RULES OF EVIDENCE
in
CRIMINAL CASES
in
SOUTH AFRICA

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PREFACE

This thesis consists of the printed text of the chapters on the law of evidence in Volume IV of South African Criminal Law and Procedure (formerly Gardiner and Lansdown), now in the press. For this purpose the pages have been re-numbered, the cross-references amended, and special indexes prepared. The printed text generally states the law as at 31st December, 1969, and relevant cases reported in the South African Law Reports, January - July 1970, are annotated in typescript.

The organisation of the material in the text has been influenced to some extent by that of Cross on Evidence, 3rd ed. (1967), L. H. Hoffmann, South African Law of Evidence, 2nd ed. (1970), Wigmore on Evidence, 3rd ed. (1940), and Gardiner and Lansdown on South African Criminal Law and Procedure, II, 6th ed. (1957).

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CHAPTER [illegible]

NATURE AND SOURCES OF THE LAW OF EVIDENCE

I. THE NATURE OF LEGAL EVIDENCE

Evidence in a legal sense refers to those means, other than argument, which can be put before a court of law to persuade it as to the existence or non-existence of facts (*facta probanda*) which are the subject of judicial investigation. It includes oral testimony from witnesses, and documents and objects produced to the court.

Many, perhaps most, of the rules of evidence are exclusionary rules. Much of what would be regarded as probative in everyday life and common-sense reasoning is kept out of the process of judicial proof. The reasons for the rules of exclusion are largely historical, flowing in great measure from the procedural division of function between judge and jury. Some rules of exclusion are based on policy, where it is recognized that evidence of great persuasiveness carries with it at the same time the danger of prejudicing the tribunal irrevocably against the accused. The fairness of the trial and the need to guard against even the possibility of prejudice take precedence over logical cogency. . . .[1] In for reasons of policy also that, even where evidence is legally admissible, the judicial officer is vested with an overriding discretion to exclude it where its prejudicial potentialities outweigh its probative force.[2] This judicial discretion can be exercised whether the evidence is technically admissible by common law or by statute. In the words of *Cuckwick J.A.* in *R.* v. *Hepworth*[3]:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides.

[1] R. v. *Noorbhai*, 1945 A.D. 58. On the judicial discretion in England, see (1958) 26 Camb. L.J. 291, and Selvey v. D.P.P. [1968] 2 W.L.R. 1494 (H.L.).
[2] 1928 A.D. 265 at 277.

> A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'

The power of the court presiding over a civil trial is not correspondingly great, since the public interest is less directly involved.[3] The concept of a criminal trial as displayed in judgments such as *R.* v. *Hepworth* has a correlative effect upon the function of the prosecutor whose role is not to be conceived of in partisan terms. He is required to act as a responsible and independent legal officer, whose duty is not simply to obtain a conviction, but to place before the court all the relevant facts in his possession whether they make in favour of a conviction or against it.[4]

Apart from the matter of judicial discretion, the rules of evidence are generally the same in criminal as in civil cases.[5] The differences are accounted for largely by the fact that in criminal trials there are no detailed pleadings narrowly defining the issues,[6] and by the incidence of the onus of proof, which rests normally upon the prosecution, to be discharged beyond a reasonable doubt. There are in addition certain particular rules applying only in criminal cases, for example, the terms upon which a confession by the accused[7] is received, or the competency and compellability as a witness of the accused's spouse.

Another difference between civil and criminal evidence is that whereas in a civil trial the rules of evidence can be waived or varied by consent, in criminal cases generally speaking the defence cannot consent to the admission of otherwise inadmissible evidence, or waive its right to object to it.[8] As to the position where the defence inadvertently or by design itself tenders or elicits inadmissible evidence, see below, pp. 600 and 608.[9]

The manner in which the reception of evidence is determined is discussed, [illegible], p. 600, and will also be referred to as relevant when particular rules of evidence are dealt with. Broadly, it may be stated that in terms of section 109(3) of the Criminal Code matters of law are for the judge alone, and this includes rulings upon the admissibility of evidence,[9] the amount of evidence,[10] the order of evidence[11] and the burden of proof.[12] Matters of cogency as to the weight or credibility of evidence are for the trier of fact, which since the abolition of jury trials[13] means the judge sitting with assessors, or the judicial officer if he is sitting alone. Where the issue of the competency of a witness depends on matters of fact, e.g. his sanity or level of comprehension, it is adjudicated before the full court as questions of the weight and the admissibility of his evidence cannot conveniently be separated.[14]

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[3] See, e.g., *Gosschalk* v. *Rossouw N.O.*, 1966 (2) S.A. 476 (C).
[4] *R.* v. *Holliday*, 1924 A.D. 250 esp. at 255.
[5] *R.* v. *Foreman* (1), 1952 (1) S.A. 423 (S.R.).
[6] As to the importance of pleadings in defining the range of relevant evidence, see *Shill* v. *Milner*, 1937 A.D. 101 at 105.
[7] *Havemann* v. *Butelezi*, 1957 (2) S.A. 86 (N).
[8] *R.* v. *Perkins*, 1920 A.D. 307 esp. at 311. It is, of course, desirable for the defence to object to the evidence at the trial if it intends to take advantage of the defect on appeal (*S.* v. *Mosala*, 1968 (3) S.A. 523 (T)).
[9] *R.* v. *Dunga*, 1934 A.D. 223; *R.* v. *Solomons*, 1959 (2) S.A. 352 (A.D.).
[10] *R.* v. *Slabbert and Prinsloo*, 1945 A.D. 137; *R.* v. *Matthews*, 1947 (4) S.A. 508 (A.D.).
[11] *Dickinson* v. *Fisher's Executors*, 1914 A.D. 424.
[12] *Pillay* v. *Krishna*, 1946 A.D. 946.
[13] By the Abolition of Juries Act, No. 34 of 1969.
[14] *R.* v. *Reynolds* [1950] 1 K.B. 606 (C.C.A.); *R.* v. *Manjanja*, 1963 (4) S.A. 708 (F.C.).

It will be appreciated from the above that there is a clear distinction between the admissibility of evidence and its sufficiency. If what is adduced can in law properly be put before the court, it is admissible. It is only once it has been or could be admitted that its persuasiveness, alone or in conjunction with other evidence, in satisfying the court as to the *facta probanda* has to be considered.

The classification of some different types of evidence, and a discussion of each type, has been set out in the chapter on 'The Manner of Adducing Evidence', below, p. 000, where the distinction between primary and secondary evidence of documents is also set out. See also, as to the Best Evidence rule, p. 000, and as to the nature of circumstantial as opposed to direct evidence, below, p. 204-5. Purely on the matter of terminology, it may be said very broadly that the distinction which is drawn between direct or original evidence and hearsay evidence refers, in the former case, to the testimony of a witness as to what he perceived with his own senses, and in the latter case, to the testimony of a witness who merely reports what another stated himself to have perceived. See below, p. 000. 'Parol evidence' is a term of art which is used, where the meaning of a document is in issue, to refer to other evidence (oral or written) of that meaning, outside of the document itself.

II. SOURCES OF THE SOUTH AFRICAN LAW OF EVIDENCE IN CRIMINAL CASES

The South African law of evidence is not based upon Roman-Dutch principles. Although occasionally the courts have made passing reference to those principles,[15] the English law of evidence was early introduced into South Africa, ~~as discussed in chapter 1, above,~~ by Ordinance 72 of 1830 (C).

The present law is regulated by the Criminal Procedure Act, 1955,[16] as amended. This Act contains evidential rules on a number of topics, and for the residue of rules not expressly set out provides in section 292 (as amended by the Criminal Procedure Amendment Act, 1963[17]):

> 'The law as to the admissibility of evidence and as to the competency, examination and cross-examination of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided by this Act or any other law.'

In addition, the effect of section 292 is expressly and apparently superfluously extended to specific cases by sections 232 (professional privilege), 233 (State privilege), 234 (privilege against self-incrimination), 241 (hearsay), 242 (dying declarations), 247 (character of the complainant in a sexual charge), 252 and 260 (manner and sufficiency of proof of appointment to public office), and 286 (impeachment and support of a witness's credibility).

What then was the law in force on 30th May, 1961? As held by the Appellate Division in *Ex parte Minister van Justisie: in re S. v. Wagner*,[18] it was the

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[15] e.g. *Van Niekerk v. Fagan* (1897) 14 S.C. 50; *R. v. Leuner*, 1958 (2) S.A. 582 (S.W.A.).
[16] Act No. 56 of 1955.
[17] Act No. 92 of 1963, sec. 29. This amendment has, if not initiated, at least reinforced a fundamental change in the approach of the courts to the whole question of what our law of evidence is, so that earlier decisions on the subject, even those of the Appellate Division, are in the newer cases not even mentioned just to be overruled, and will accordingly be referred to here only in footnotes, for historical interest.
[18] 1965 (4) S.A. 507 (A.D.) at 513F–G. See, also, *S. v. Langa*, 1963 (4) S.A. 941 (N); *S. v. Bonner*, 1964 (4) S.A. 58 (O), and *Ex parte Van der Spuy N.O.*, 1965 (4) S.A. 336 (T).

previous unamended section 292, which applied to residual matters not expressly dealt with the law 'in force in criminal proceedings in the Supreme Court of Judicature in England', and Steyn C.J. in *Van der Linde* v. *Calitz*[19] added that this was to be read in the light of the provisions whereby, until 1950,[20] the Privy Council was the ultimate court of appeal for South Africa. The result[21] is that pre-1950 opinions of the Privy Council and Appellate Division decisions are binding on the South African courts, although the Appellate Division is free to depart from either if satisfied it was clearly wrong.[22] Post-1950 Privy Council decisions are persuasive only, since it is not part of the Supreme Court of Judicature in England. Decisions of the House of Lords and lower tribunals in the English hierarchy of courts prior to 1961 are binding on South African courts *in so far as they have been understood and applied in South Africa*[23]—and this must mean first, that South African rules of practice, not English practice, are to be followed;[24] and secondly, that Appellate Division and other South African decisions as to what the English law is should be followed in preference to later English decisions which may contradict them.[25] Post-1961 decisions of the English courts, like post-1950 Privy Council opinions, are persuasive only.[26]

Even where English case law is authoritative, the same has never applied to the development of English law by statutes, which are not incorporated by reference.[27] Further, when there is a substantive provision on evidence in a South African statute, even where this is identical in wording to an English statute, the English cases remain persuasive only.[28] The effect of the incorporation by reference of the body of English law into South African law means, of course, that it is not treated in the same way as is foreign law where it is a question of fact, when it requires proof by an expert in the foreign law.[29]

The complicated rules of precedent applicable to evidentiary matters have the result of giving especial significance to the distinction between those rules which are adjective law and part of the law of evidence, and those which are substantive law. A provision such as section 292 is to be given a restrictive interpretation, said Stratford C.J. in *Tregea* v. *Godart*.[30] Thus, the incidence of the onus of proof, or the existence of a presumption,[31] have been held to be matters of substantive law, although the *effect* of the onus of proof or of a presumption is evidentiary.[32] Similarly, while we adopt the English evidentiary rule that a

[19] 1967 (2) S.A. 239 (A.D.) at 250. The learned Chief Justice was there concerned with the almost identical problem given rise to by sec. 42 of the Civil Proceedings Evidence Act, No. 25 of 1965. *Van der Linde* v. *Calitz* is critically discussed in (1967) 84 *S.A.L.J.* 245.

[20] *Privy Council Appeals Act*, No. 16 of 1950.

[21] See further Prof. Ellison Kahn in (1967) 84 *S.A.L.J.* 308 at 328–30, and H. R. Hahlo and Ellison Kahn, *The South African Legal System and its Background* (1968), pp. 258 ff.

[22] *Collett* v. *Priest*, 1931 A.D. 290; *John Bell & Co., Ltd.* v. *Esselen*, 1954 (1) S.A. 147 (A.D.).

[23] *Ex parte Minister van Justisie: In re S.* v. *Wagner*, 1965 (4) S.A. 507 (A.D.). (Contrast, as to the earlier law, *Surmon* v. *Surmon*, 1926 A.D. 47, and *R.* v. *Van Schalkwyk*, 1938 A.D. 543.)

[24] *S.* v. *Lwane*, 1966 (2) S.A. 433 (A.D.) esp. at 439; *Lwane's case* is critically discussed in (1966) 29 *T.H.R.-H.K.* 267.

[25] See *Oberholzer* v. *Edeling*, 1932 O.P.D. 120; *R.* v. *Krauner*, 1937 (?) S.A. 475 (A.D.) at 484–5. (Cf. *R.* v. *De Leeuw*, 1927 O.P.D. 276; *R.* v. *Kasa*, 1936 O.P.D. 200.)

[26] *Papenfus* v. *Transvaal Board, Peri-Urban Areas*, 1969 (2) S.A. 66 (T) at 69.

[27] *R.* v. *Bonthuys*, 1922 T.P.D. 446.

[28] *R.* v. *Hendrickz*, 1933 T.P.D. 451. See in particular the interpretation given to sec. 226 of the Criminal Code, discussed below, p. 800. 144 ff.

[29] *G & P* v. *Commissioner of Taxes*, 1960 (4) S.A. 163 (S.R.) at 165.

[30] 1939 A.D. 16 at 32.

[31] *Tregea* v. *Godart*, 1939 A.D. 16 at 42–3.

[32] *Tregea* v. *Godart*, 1939 A.D. 16 esp. at 43, per Watermeyer J.A.

vicarious admission is received against a party if he was in privity of obligation or of title with its maker, it is the substantive South African law which determines whether such privity exists in law.[33]

III. EVIDENCE OBTAINED BY COMPULSION OR OTHER ILLEGAL MEANS

Statements elicited from the accused which amount to admissions or confessions are inadmissible if he has been induced to speak, whether by violence or moral pressure.[34] Admissions or confessions by conduct in the form of a pointing out of places or things are expressly made admissible by section 245 of the Criminal Code, even if obtained from the accused against his will, but admissions by conduct in other forms still require at common law to have been freely and voluntarily made, e.g. a sample of his handwriting furnished by the accused is inadmissible if coerced.[35]

Apart from the confessions rule, the general approach of our law is apparently that evidence is not inadmissible just because it was illegally obtained.[36] Documents have been admitted even if procured unlawfully, e.g. by stealth or in the absence of a valid search warrant.[37] The accused can be compelled, under sections 289, 290 and 291 of the Code, to furnish evidence against himself by means of finger-, palm- or footprints or by medical examinations, the results of which are again admissible whatever the method by which they were obtained. There is, however, some authority for saying that such forcible examinations would at common law have rendered the evidence inadmissible,[38] and it is not clear whether this has been overruled by *Ex parte Minister of Justice: in re R.* v. *Matemba*[39] or whether the point was there merely being dealt with *obiter*.

There is no doubt that the judicial discretion to exclude in the interests of justice evidence which is technically admissible applies to illegally obtained *evidence* as to all other kinds,[40] the test being whether its reception would be 'unfair' to the accused having regard to the nature of the offence charged and the circumstances in which the evidence was procured.[41] An example of unfair circumstances can be seen from S. v. Forbes[42], where evidence obtained from the accused in the course of an enquiry into his mental condition under the Mental Disorders Act, 1916, was excluded. On the other hand, eavesdropping by a 'plain clothes' policeman was held not to be unfair in R. v. Stewart[43].

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[33] *Botes* v. *Van Deventer*, 1966 (3) S.A. 182 (A.D.) at 204, per Williamson J.A.
[34] See chap. [illegible] below, pp. [illegible]ff. 119, 133.
[35] *R.* v. *Voisin* [1918] 1 K.B. 531 (C.C.A.); *R.* v. *B*, 1933 O.P.D. 139.
[36] *Ex parte Minister of Justice: in re R.* v. *Matemba*, 1941 A.D. 75. See, generally, (1968) 85 *S.A.L.J.* 246.
[37] *R.* v. *Mabuya*, 1927 C.P.D. 181; *R.* v. *Uys and Uys*, 1940 T.P.D. 405; *Andresen* v. *Minister of Justice*, 1954 (2) S.A. 473 (W). But see *King* v. *R.* [1968] 3 W.L.R. 391 (P.C.).
[38] *R.* v. *Mangold*, 1926 A.D. 440 at 443. See, also, *R.* v. *Maleleke*, 1925 T.P.D. 491; *R.* v. *Brown*, 1935 C.P.D. 286 (footprints); *R.* v. *Goorparshad* (1914) 35 N.L.R. 87 (fingerprints); *R.* v. *Gama*, 1916 E.D.L. 34 (medical examination).
[39] 1941 A.D. 75.
[40] *Kuruma* v. *R.* [1955] A.C. 197 (P.C.); *Callis* v. *Gunn* [1964] 1 Q.B. 495; *Bell* v. *Hogg*, 1967 J.C. 49; *King* v. *R.* [1968] 3 W.L.R. 391 (P.C.).
[41] *King* v. *R.* [1968] 3 W.L.R. 391 (P.C.) esp. at 397, 400.
[42] 1970 (2) S.A. 595 (C). Compare the meaning given to 'just excuse', discussed below, p. 19.
[43] [1970] 1 All E.R. 689 (C.A.).

CHAPTER 22

MATTERS PROVED WITHOUT EVIDENCE

I. FORMAL ADMISSIONS

Where facts are formally admitted by a party they cease to be in issue, and the other side is relieved of the necessity of calling evidence to establish those facts, unlike extracurial informal admissions which are tendered *in evidence* and have to be proved by the other side.[1] Section 284(1) of the Criminal Procedure Act provides that judicial admissions may be made by the defence in criminal trials, and that such an admission is 'sufficient evidence' of the facts.

At common law such admissions could not be made in criminal trials,[2] and as section 284(1) speaks only of admissions by the defence it could have been argued that the procedure is not to be extended to the prosecution.[3] The courts have, however, held that the provision allows equally for admissions to be made by the State.[4]

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[1] See *R. v. P.*, 1958 (3) S.A. 474 (G.W.) at 479; *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 776–7.
[2] See R. Cross, *Evidence*, 3rd ed. (1967), p. 137. The common law was altered in England by the Criminal Justice Act, 1967, c. 80, sect. 10.
[3] Which conclusion has been arrived at in the application of sec. 243(1) of the Act. See p. 000 *infra*.
[4] *R. v. Padbergy*, 1948 (2) S.A. 181 (C) at 184; *S. v. Davidson*, 1964 (1) S.A. 192 (T) at 194; *R. v. Hartley*, 1966 (4) S.A. 219 (R.A.D.) at 221.

By the phrase 'sufficient evidence' is meant both that the facts admitted are taken to be proved to the requisite standard of proof,[3] and further, that evidence *to contradict* or rebut those facts is inadmissible;[4] care should therefore be taken to formulate precisely the facts intended to be admitted; the loose practice of simply admitting the evidence given at the preparatory examination is particularly to be discouraged as there should be no doubt about to which facts the *admission was related.*[5] *On the other hand, if the evidence in contradiction is* admissible as relevant to other issues in the case, the court may relieve the admitting party of the usual consequences of conclusiveness,[6] for it would be ...tiently inequitable for a judgment to be founded upon facts which appear, *from the rest of the evidence, to have been erroneously admitted.*

In civil cases a 'formal admission made in the pleadings or at the trial cannot be withdrawn without the leave of the court, which will only grant leave if furnished with sworn evidence[7] explaining the circumstances in which the admission can be made,[8] and *if satisfied that it was made in error*[11] *and without* mala fides.[12] Although section 284(1) makes no express provision for the withdrawal of admissions in criminal trials, the overriding discretion vested in a criminal court may be exercised to achieve this result.[13]

It is only facts 'relevant to the issue' which can be *admitted under the section*, which 'is not intended', said Fannin J. in *S. v. Kuzwayo*,[14] 'to be used by the defence as a means of getting on record something which the State does not propose to make part of its case'. There must, it seems, be some issue between prosecution and defence in regard to the subject-matter of the proposed admission, though an acceptance of the admission may be taken to indicate the existence of such issue.[15]

Statements made by the accused in an unsworn statement from the dock, or in an explanation when giving his plea under section 169(5) of the Code, may amount to judicial admissions, provided it is clear that he intended to absolve the State from the burden of leading evidence on any matter.[16] Where he is

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[3] *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 777; *S. v. Kuzwayo*, 1966 (3) S.A. 75 (N) at 56; *S. v. Mbatha*, 1965 (4) S.A. 476 (N) at 478; *S. v. Thoma*, 1969 (1) S.A. 385 (A.D.) at 387. The better view is that the terms of the admission must be recorded: *S. v. Volker*, 1967 (1) P.H., H. 83 (N); *S. v. D*, 1967 (2) S.A. 537 (D).

[4] *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 776–7; *Gordon v. Tarnow*, 1947 (3) S.A. 525 (A.D.) at 531–2.

[5] *S. v. Serobe*, 1968 (4) S.A. 420 (A.D.) at 426; *S. v. Thoma*, 1969 (1) S.A. 385 (A.D.) at 388. See, too, *Annual Survey of South African Law*, 1965, pp. 505–6.

[6] *Jessop v. Williams, Hunt and Cyman, Ltd.*, 1939 (4) S.A. 583 (G) at 595; *Rance v. Union Mercantile Co., Ltd.*, 1922 A.D. 312 at 315.

[7] *Slimm v. Cowzys*, 1927 T.P.D. 438; *Jennings v. Parry*, 1955 (1) S.A. 290 (T). In the Cape the court may be satisfied with an explanation from counsel: *Waterpoort (Pty.) Ltd. v. De Kock*, 1960 (4) S.A. 734 (E).

[8] *Rhijne v. Rhijne*, 1912 T.P.D. 718.

[11] *Northern Mounted Rifles v. O'Callaghan*, 1909 T.S. 174; *Gordon v. Tarnow*, 1947 (3) S.A. 525 (A.D.); *First Motors (Pty.) Ltd. v. Eyssen Motors (Pty.) Ltd.*, 1960 (3) S.A. 401 (D).

[12] *Moolman v. Estate Moolman*, 1927 C.P.D. 27; *Zungu v. Parvathie N.O.*, 1962 (3) S.A. 872 (D).

[13] *S. v. Monkoe*, 1966 (1) P.H., H. 15 (T); *S. v. Mayhew*, 1967 (2) P.H., H. 314 (N).

[14] 1966 (3) S.A. 55 (N) at 57.

[15] Ibid. A change from a plea of 'not guilty' to one of 'guilty' during the trial has *the effect* of an admission by the accused of all outstanding issues between him and the State: *S. v. Petersen*, 1969 (3) P.H., H. 296 (N).

[16] *R. v. Butshule*, 1950 (4) S.A. 108 (E); *S. v. Gowes*, 1968 (4) S.A. 354 (C.W.); *cf. Standard Bank of South Africa, Ltd. v. Minister of Bantu Education*, 1956 (1) S.A. 229 (N) at 242–3.

undefended it should be explained to him that he is under no obligation to assist the prosecution in making its case.[17]

On the question whether formal admissions are competent where the accused has pleaded guilty, see below under 'Corroboration', p. [illegible].

II. JUDICIAL NOTICE

A. *Facts Judicially Noticed*

A trier of fact, whether judicial officer or assessor, may not in general rely on his own knowledge as to the truth or otherwise of the facts in issue before him. For him to do so would be in effect for him to adjudicate as between his own information and that presented by the witnesses testifying. If, therefore, he finds himself in this position he must immediately discharge himself from acting in a judicial capacity and is under a further duty, as a judge or magistrate, to offer himself as a witness in the case.[18]

There are, however, certain categories of information of which a trier of fact may take cognizance without their being established by evidence. The judiciary is not be contained 'in an ivory tower without windows'.[19] In order to understand, correlate and evaluate the issues of fact in any proceedings, a trier of fact must of necessity employ his background knowledge and experience.[20] To lead evidence to establish such background matter afresh in every case would clog the workings of the courts. The doctrine of judicial notice is usually said to be grounded in the expediency of avoiding unnecessarily prolonged trials,[21] and the problem of its proper application is the definition of where the hearing of evidence may fairly be regarded as superfluous.

Broadly, the facts which may be judicially noticed must be 'so notorious as not to be the subject of dispute among reasonable men, or . . . be capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy'.[22] Notorious facts were said in *R. v. African Canning Co. (S.W.A.) Ltd.*[23] to include 'elemental experience in human nature, commercial affairs and everyday life'. Whether a fact is of such a nature is a question of law for the decision of the presiding judge.[24] Evidence is inadmissible to controvert

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[17] *S. v. D*, 1967 (2) S.A. 537 (D); *S. v. Loape*, 1969 (3) S.A. 40 (N).

[18] See *Rowe v. Assistant Magistrate, Pretoria*, 1925 T.P.D. 361; *S. v. Enos*, 1964 (3) S.A. 13 (N) esp. at 17–18.

[19] In the words of Holmes J.A. in *S. v. Bernardus*, 1965 (3) S.A. 287 (A.D.) at 305. Cf. Lord Simonds in *Commonwealth Shipping Representative v. P. & O. Branch Service* [1923] A.C. 191 (H.L.) at 211: '. . . to require that a judge should affect a cloistered aloofness from facts that every other man in court is fully aware of and should insist on having proof on oath of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile.' See, too, Lord Simonds in *Preston-Jones v. Preston-Jones* [1951] A.C. 391 (H.L.) at 401: '. . . it is to me repugnant that a court of justice should be so little in accord with the common notions of mankind that it should require evidence to displace fantastic suggestions.'

[20] The same considerations applied to jurors as to judges (*R. v. Rosser* [1836] 7 C. & P. 648, 173 E.R. 284) save that the judge could have given instructions to cure deficiencies in the knowledge of any juror (e.g. *R. v. A*, 1952 (3) S.A. 212 (A.D.)).

[21] e.g. see *R. v. Majola*, 1943 E.D.L. 229 at 261. But see Edmund M. Morgan (1944) 57 *Harvard L.R.* 269 fr- persuasive argument that it springs rather from the traditional division of functions be- -en judge and jury.

[22] In the words of Morgan, loc. cit, at 286.

[23] 1954 (1) S.A. 197 (S.W.A.) at 199, per Claassen J.

[24] *R. v. Bejlanie*, 1929 O.P.D. 195, where Philpson's comment that 'judges may notice what they cannot be compelled to notice' was approved (at 202).

facts properly noticed; they have more than merely prima facie validity, being irrefutable.[79] This does not of course disregard the fact that whether something is indisputable may itself be a matter of dispute,[80] and further that indisputability is not immutable but may vary from time to time and from place to place. Both dangers are adequately guarded against by the judicial officer openly stating his own impressions so that if necessary the parties may correct an erroneous one.[81]

Beyond the requirement that the trier of fact recognize that his personal store of information is not necessarily co-extensive with matters of everyday notoriety to reasonable men, general principles cannot be isolated, and examples may be multiplied without giving much illumination. On the one side of the line, clearly a court may take cognizance of facts such as that gelignite is a dangerous explosive;[82] that public companies are generally incorporated to carry on business and make a profit;[83] that there is a network of national roads in South Africa which are public roads.[84] Clearly on the other side are cases where it has been held that the court may not notice without evidence the chemical composition of milkshakes[85] or beer,[86] the rules of roulette,[87] the habits of farm fowls,[88] or the manner of estimating the age of animals[89] and their local market value.[90] A knowledge of the workings of machines is not assumed to be common to all reasonably intelligent members of the community,[91] except in broad outline or where the machine is in common use by laymen.[92] Matters of science, such as the incidence and range of abnormalities in the period of human gestation,[93] or the genetics of skin pigmentation,[94] cannot be judicially noticed, except where they have permeated into the background knowledge of non-specialists. Thus, in *R. v. Morela*,[95] Tindall J.A. held that judicial notice could be taken of the fact that no two fingerprints are exactly alike.

It will be noticed that the doctrine of judicial notice is far more freely applied to generalities rather than to matters of detail, and this is so also where the issue is the operation of a statute or document and the meaning its framers intended.

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[79] *McQuaker v. Goddard* [1940] 1 K.B. 687 (C.A.) at 700–1; *R. v. Nano* (1884) 4 E.D.C. 226; Morgan, op. cit.

[80] If there is any doubt, judicial notice should not be taken: *R. v. Williams*, 1949 (4) S.A. 53 (G). The court may have to be equipped to notice facts, by hearing 'evidence' as to whether they are indisputable, e.g., *McQuaker v. Goddard* [1940] 1 K.B. 687 (C.A.); *Mbeelo v. S.*, 1959 (2) P.H., H. (S.) 74 (T).

[81] This was stated to be the 'fair' procedure, in *R. v. Tiger*, 1944 A.D. 339 at 344.

[82] *Venn v. Port Elizabeth Divisional Council*, 1933 E.D.L. 75.

[83] *R. v. African Canning Co. (S.W.A.) Ltd.*, 1954 (1) S.A. 197 (S.W.A.) at 199. But not the activities of any particular company, however large: *R. v. Feinberg*, 1944 E.D.L. 224.

[84] *R. v. Bikitsha*, 1960 (4) S.A. 161 (E).

[85] *R. v. Tiger*, 1944 A.D. 339.

[86] *R. v. Nano* (1884) 4 E.D.C. 228.

[87] *Johnson v. S.* (1925) 46 N.L.R. 206.

[88] *S. v. Soko*, 1963 (2) S.A. 248 (T); *S. v. Dlamini*, 1965 (1) S.A. 859 (N).

[89] *R. v. Mazooba*, 1938 E.D.L. 336; *R. v. Simabuka*, 1939 E.D.L. 71.

[90] *Ilyas v. Fiji*, 1914 E.D.L. 502; *R. v. Pretorius*, 1934 T.P.D. 76. Cf. *R. v. Rozier* (1836) 7 C. & P. 668, 173 E.R. 284.

[91] *Kroonstad Westelike Boere Ko-operatiewe Vereeniging, Bpk. v. Rudzisky N.O.*, 1937 W.L.D. 20; *R. v. Abramowitz*, 1945 E.D.L. 134.

[92] *Leame v. Bray* (1803) 3 East 593, 102 E.R. 724; *Rudzitzky's case*, above; *R. v. Hickey*, 1963 (3) S.A. 96 (S.R.). See, also, chap. 19, p. [illegible] below.

[93] *Williams v. Williams*, 1925 T.P.D. 536; *Preston-Jones v. Preston-Jones* [1951] A.C. 391; *R. v. Sengoadoo*, 1961 (3) S.A. 79 (N); *Mitchell v. Mitchell*, 1963 (2) S.A. 505 (D); *Mapipa v. Ndangane*, 1964 (2) P.H., R. 14 (D.A.C.).

[94] *R. v. Abel*, 1948 (1) S.A. 654 (A.D.) at 658.

[95] 1947 (3) S.A. 147 (N).

An example of the former is the courts' readiness to rely on their own experience of people's behaviour and reactions, while refusing to notice the attributes or behaviour of any one individual.[43] Again, in *Commonwealth Shipping Representative v. P. & O. Branch Service*[44] the House of Lords asserted its knowledge of a state of war but not of the date and significance of each manoeuvre or operation forming part of that war. An example of the latter type is *Ex parte Jewish Colonial Trust, Ltd.: in re Estate Nathan*,[45] which was concerned with a testator's predictions, in 1924, regarding the cost of subsidized immigration to Palestine over the following fifty years.

Apart from these two categories, judicial knowledge is not easily assumed. The judges have not agreed with the text-writers that the scope of judicial *knowledge* should be extended rather than restricted. As De Beer J. commented in *R. v. Fanaroff*,[46]

> 'when one notes in Phipson, Wigmore and Scoble what astounding results have been achieved by the restricted application of the doctrine, one dreads to contemplate the effects of an extended application'.

The most 'astounding results' have indeed been attempted by trial courts, whose convictions have frequently been set aside because of magisterial assumptions in the sphere of what has been called 'racial mythology',[49] e.g. that Africans see better at night than do whites,[47] that Africans are capable of making definite identifications from spoor-marks,[48] or that Indians are secretive and non-committal. Another racial attribute which has been judicially noticed – this time by the Appellate Division itself, in 1911[50] – is that the majority of the white inhabitants of South Africa were racially prejudiced and considered non-whites as their inferiors.

Propriety often depends on the particular form in which a fact is noticed. In *R. v. A*[51] a direction to the jury, in a trial for indecent assault, that African women often give in when seized, was held not to have been improper. Had the direction been in terms, 'They *always* give in when seized', the result would presumably have been different.[52]

1. Local Notoriety

A fact may be judicially noticed even if not generally notorious, if it is well *known to all persons in a particular community* or district. That members of an

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[43] *Bowyer v. Masonda* (1928) 49 N.L.R. 62; *Powys v. R.*, 1945 N.P.D. 177; *R. v. Mabala*, 1947 (2) S.A. 335 (E); *R. v. De Bruyn*, 1957 (4) S.A. 408 (C) at 414. But cf. *Natal Law Society v. Button* (1882) 3 N.L.R. 67.

[44] [1923] A.C. 191 (H.L.).

[45] 1967 (4) S.A. 397 (N). Cf. *Monarch Steamship Co., Ltd. v. Karlshamns Olje-Fabriker A/B* [1949] A.C. 196 (H.L.) at 234, where Lord du Parcq took judicial notice of the fact that reasonable grounds existed in Britain in 1939 for anticipating a general war.

[46] 1940 O.P.D. 270 at 276. Disagreement with this dictum may, however, have been intended by the remarks of Watermeyer C.J. in *R. v. Tager*, 1944 A.D. 339 at 345.

[49] See L. H. Hoffmann, *South African Law of Evidence*, 2nd ed. (1970), p. 292.

[47] *R. v. Tusini*, 1953 (4) S.A. 406 (A.D.).

[48] *R. v. Sittimela*, 1962 (4) S.A. 60 (S.R.).

[50] *Anderson v. Sumner* (1916) 37 N.L.R. 517.

[51] In *Moller v. Keimoes School Committee*, 1911 A.D. 635 at 643.

[52] 1952 (3) S.A. 212 (A.D.). The Appellate Division was influenced in upholding this by the tenor of the whole summing-up, which was that whether or not the complainant had in fact submitted when seized was irrelevant to the issue of the accused's guilt.

[53] *S. v. M*, 1965 (4) S.A. 577 (N).

appellate court sitting somewhere else find themselves ignorant of these local matters is immaterial, but notoriety within the locality is not interpreted more broadly than any other kind. Thus a judicial officer may take cognizance of the general character of the district in which he sits[53] but not of its detailed topographical features[54] or matters as specific as the condition of its stock fences.[55] It has been held that he may notice only its principal features and main roads.[56] Relative distances[57] and the relation of this locality to others[58] would in most circumstances be beyond the scope of judicial knowledge.[59] The judicial features of the district, e.g. that it is an urban area,[60] or its boundaries,[61] may be noticed only where these are mentioned by name[62] in statutes or proclamations, and it has been held unnecessary to have evidence that the name could not apply to more than one place.[63]

2. Facts notoriously ascertainable

Where a fact is not itself notorious, but it may easily be ascertained by consulting sources of indisputable accuracy, it remains within the sphere of judicial notice. Thus the court may refer to calendars and authoritative almanacs to establish on what day of the week a particular date fell, or the times of sunrise and sunset.[64] In *General Life Assurance Company* v. *Moyle*[65] Innes C.J. remarked that judicial notice could be taken of standard maps and State documents such as treaties recognizing the geographical and political features of southern Africa. The reference to 'standard maps' was said in a later judgment[66] to mean maps and surveys issued under governmental or similar authority. Doubt has, however, been expressed as to whether a court may take judicial notice of all places shown on a map.[67] Probably the ordinary test should apply—whether the application of the map's symbols to concrete facts of geography would be self-evident to reasonably intelligent persons in the community. If it would not, expert evidence is necessary.

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[53] *Peart* v. *Bolckow, Vaughan & Co., Ltd.* [1925] 1 K.B. 399 (C.A.); *R.* v. *Harold*, 1929 T.P.D. 160.

[54] *Deybel's* case (1821) 4 B. & Ald. 243, 106 E.R. 926; *R.* v. *Levin*, 1932 C.P.D. 23; *Bull* v. *R.*, 1946 N.P.D. 643; *R.* v. *Katzenburg*, 1947 (1) S.A. 423 (T); *R.* v. *Kristesanty*, 1947 (4) S.A. 788 (N); *R.* v. *Ngombe*, 1964 (3) S.A. 816 (S.R.. A.D.).

[55] *S.* v. *Makula*, 1965 (2) P.H., H. 193 (O).

[56] *R.* v. *Cooper*, 1920 E.D.L. 374 at 375; *R.* v. *De Necker*, 1921 C.P.D. 567; *R.* v. *Ross*, 1927 E.D.L. 378; *R.* v. *Adkins*, 1955 (4) S.A. 242 (G.W.). But see *Brune* v. *Thompson* (1842) 2 Q.B. 789, 114 E.R. 306.

[57] R. v. *Majalo*, 1943 E.D.L. 259.

[58] *Deybel's* case (1821) 4 B. & Ald. 243, 106 E.R. 926; *R.* v. *Fanaraff*, 1940 O.P.D. 270; *R.* v. *Mbili*, 1951 (1) S.A. 110 (N); *R.* v. *Kruger*, 1951 (4) S.A. 37 (N).

[59] But see *Birrell* v. *Dryer* (1884) 9 App. Cas. 345 (H.L.).

[60] *R.* v. *Inhabitants of the Isle of Ely* (1850) 15 Q.B. 827, 117 E.R. 671; *R.* v. *Mbili*, 1951 (1) S.A. 110 (N).

[61] *R.* v. *Luwani*, 1945 E.D.L. 147; *R.* v. *Pretoria Timber Co. (Pty.) Ltd.*, 1949 (4) S.A. 368 (T); *R.* v. *Mola*, 1953 (2) S.A. 129 (E).

[62] If not so named evidence will have to be heard to establish the location of the boundaries. See *Deybel's* case (1821) 4 B. & Ald. 243, 106 E.R. 926; *R.* v. *St. Mourice* (1851) 16 Q.B. 908, 117 E.R. 1130; *R.* v. *Sher*, 1925 E.D.L. 70; *R.* v. *Tweedie*, 1930 E.D.L. 113; *R.* v. *Luwani*, 1945 E.D.L. 147.

[63] *R.* v. *De Necker*, 1921 C.P.D. 567; *R.* v. *Tweedie*, 1930 E.D.L. 113. But see *Thorne* v. *Jackson* (1846) 3 C.B. 661, 136 E.R. 264.

[64] e.g. *R.* v. *Dube*, 1915 A.D. 557 at 562.

[65] 1919 A.D. 1 at 10.

[66] *R.* v. *Pretoria Timber Co. (Pty.) Ltd.*, 1950 (3) S.A. 163 (A.D.) at 172. See, too, C. Norman-Scoble, *The Law of Evidence*, 3rd ed. (1952), pp. 859–60; *S.* v. *Tsago*, 1970 (2) S.A. 256 (T).

[67] *R.* v. *Pretoria Timber Co. (Pty.) Ltd.*, 1949 (4) S.A. 368 (T) at 371–2. It is not clear whether similar doubts were echoed in the Appellate Division: see 1950 (3) S.A. 163 (A.D.).

3. Public matters and affairs of State

Judicial notice is taken of public and political facts. Some of these would be known to a judicial officer as to any member of the community. Thus in *Harris* v. *Minister of Interior*[68] the Court noticed factual details of the constitutional history of the country, and in *Publications Control Board* v. *William Heinemann, Ltd*[69] the majority of the Appellate Division took judicial notice of the prevailing standards of public morality.

Other public matters might not be thus notorious: whether war has been declared,[70] a foreign government recognized,[71] or the territorial limits of the country defined.[72] If a court feels it lacks the information necessary to take judicial cognizance of these facts, this may be obtained from the appropriate officers of the Executive. Such information, when given

> 'is not in the nature of evidence: it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognisance'.

In other words, it comes from an indisputably accurate source of knowledge. As the basis is said to be the desirability of conformity of conduct between the Executive and the Judiciary, evidence is inadmissible to contradict the official conclusions. An analogous principle is exemplified by *Van Deventer* v. *Hancke and Monson*,[73] where Innes C.J. refused to hear evidence that the purported British annexation of the Vryheid district had been premature because at the time there had been no effective occupation of the area or subjugation of its people.

Judicial notice was taken, in *Johnson and Irvin* v. *Mayston N.O.*[74] of the signature of the Governor of Natal. (In addition, section 253 of the Criminal Procedure Act now provides that the signature and seals of public officers are admissible as prima facie proof of attestation, on their mere production.) Dove-Wilson J. went on to emphasize,[75] as the English courts have done,[76] that though judicial notice is taken of public facts, whether they have been ascertained by official assistance or not the significance and cogency of facts so noticed is for the court alone.

B. JUDICIAL NOTICE OF MATTERS OF LAW

1. South African Law

Judicial officers must be taken to know the laws of the country. Accordingly, the provisions[77] and date of commencement[78] of public statutes of the Republic

[68] 1952 (2) S.A. 457 (A.D.). On matters of ancient history the Court could have referred to historical works: see *Commonwealth Shipping Representative* v. *P. & O. Branch Service* [1923] A.C. 191 (H.L.) at 197.

[69] 1965 (4) S.A. 137 (A.D.).

[70] *Commonwealth Shipping Representative* v. *P. & O. Branch Service* [1923] A.C. 191 (H.L.); *R.* v. *Bottrill* [1947] K.B. 41 (C.A.).

[71] *Taylor* v. *Barclay* (1828) 2 Sim. 213, 57 E.R. 769; *Duff Development Co., Ltd.* v. *Govt. of Kelantan* [1924] A.C. 797 (H.L.); *Carl-Zeiss-Stiftung* v. *Rayner & Keeler, Ltd. (No. 2)* [1966] 2 All E.R. 536 (H.L.).

[72] *Duff Development Co., Ltd.* v. *Govt. of Kelantan* [1924] A.C. 797 (H.L.) at 826–7.

[73] 1907 T.S. 401 at 409–10. The learned Chief Justice based his conclusion on the court's absence of jurisdiction to inquire into acts of State (see at 410–11).

[74] (1909) 30 N.L.R. 396.

[75] At 398.

[76] See *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd. (No. 2)* [1966] 2 All E.R. 536 (H.L.).

[77] *Ndhlovu* v. *Hofmeyr N.O.*, 1937 A.D. 229 at 237; *R.* v. *Inhabitants of Anderson* (1846) 9 Q.B. 963, 115 E.R. 1428.

[78] *R.* v. *Wanzer* (1893) 8 E.D.C. 23; *Brown and Bezuidenhout* v. *R.*, 1909 T.S. 1014; *R.* v. *Hill*, 1910 C.P.D. 198.

Parliament may be judicially noticed, though it is usual as a matter of courtesy for a copy of the enactment to be furnished to the court for it to refresh its knowledge of these matters.[79] Similarly, the common law however obscure may be noticed,[80] though again reference may have to be made to previous decisions, old authorities and modern textbooks to ascertain the state of the law.

Judicial knowledge is not presumed to cover private Acts of Parliament,[81] or enactments passed by other than original legislative powers unless the taking of judicial notice is authorized by Act of Parliament.[82] Provincial council ordinances, not being delegated legislation,[83] may be noticed in the province to which they apply, but the ordinances and pre-Union legislation of other provinces must be proved by handing in a copy of the *Provincial Gazette*.[84] Proclamations which have the force of original legislation may be noticed,[85] but not those which rank as delegated legislation. These latter, like government notices, regulations and municipal by-laws, fall under the aegis of section 251 of the Criminal Procedure Act,[86] which reads:

> '(1) Judicial notice shall be taken of any law or government notice, or of any other matter which has been published in the *Gazette* or in the official *Gazette* of any province.
>
> (2) A copy of the *Gazette*, or of the official *Gazette* of any province, or a copy of such law, notice or other matter purporting to be printed under the superintendence or authority of the Government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be.'

The provision is unfortunately worded, as if subsection (2) is taken literally, subsection (1) is rendered almost nugatory, and its interpretation has led to *great* differences of judicial opinion. Where the *Gazette* has in fact been produced at the trial, courts have differed as to whether it (or a certified copy) must be handed in to form part of the record[87] or whether simply the fact that it was *inspected* by the court need be recorded.[88] There are several cases where, although no *Gazette* was produced at the trial, the courts have confirmed convictions because the *Gazette* was made available on appeal,[89] but the practice was criticized by Young J. in the Southern Rhodesian case of *R. v. Mukotsani*:[90]

> 'The rule of law requires compliance with formalities and proof (where such is required) of the existence of a law cannot be described as an unimportant formality. . . .'

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[79] See *Attorney-General* v. *Schaeman*, 1959 (1) P.H., H. 94 (E).

[80] *In re Chenworth* [1902] 2 Ch. 488; *Seaville* v. *Coley* (1891) 9 S.C. 39.

[81] *Barr's S.A.R. & H.*, 1917 T.P.D. 284; but the effect of sec. 292 of the Criminal Code may be *to incorporate the effect of* sec. 9 of the Interpretation Act, 1889 (52 & 53 Vict., c. 63) by which all statutes are deemed to be public ones, unless otherwise expressly provided, for the purpose of taking judicial notice.

[82] *Fielden* v. *Christie and Buchanan* (1853) 2 Searle 15 at 18–19. Examples of such express authorization are sec. 27 of the Powers and Privileges of Parliament Act, No. 91 of 1963, and sec. 253 of the Criminal Procedure Act, No. 56 of 1955.

[83] *R. v. Lowry*, 1914 T.P.D. 626.

[84] *Ismail* v. *Strathley*, 1911 T.P.D. 428. Strictly speaking these are foreign laws which should be proved by expert evidence, but the courts do not insist on this technicality (*Cape Govt.* v. *Belmont Diamond Co., Ltd.*, 1908 T.S. 681).

[85] *R. v. Potgieter*, 1916 C.P.D. 211; *R. v. Foster*, 1922 E.D.L. 166.

[86] Previously sec. 280 of the Criminal Procedure and Evidence Act, No. 31 of 1917.

[87] *R. v. Gitlin, 1914 C.P.D. 76* at 80.

[88] *Railway Maintenance Department* v. *Hughes* (1883) 3 E.D.C. *295; R. v. Isroff*, 1927 E.D.L. 181.

[89] *R. v. Adams* (1900) 17 S.C. 544; *R. v. Bill*, 1910 C.P.D. 298; *R. v. Reads*, 1912 C.P.D. 606; *R. v. Strange*, 1922 C.P.D. 469; *R. v. Bates*, 1922 E.D.L. 453; *Mashaire* v. *S.*, 1969 (1) P.H., H. 143 (T). A similar course was approved in *Asma* v. *Comptroller of Customs [1954] 1* W.L.R. 1405 (P.C.) at 1409.

[90] 1961 (2) S.A. 198 (S.R.) at 204.

Finally, the cases are divided on whether section 25I(1) is to be construed as dispensing entirely with the production of the *Gazette*,[31] or whether sub-section (2) is rather to be emphasized and the handing in of the *Gazette* insisted upon.[32]

Until the legislature clarifies the matter the last-mentioned procedure should be followed *ex abundante cautela*. The growing spate of subordinate legislation has not been accompanied by improvements in its accessibility. The danger of convictions being founded on repealed or amended regulations increases accordingly, and any slight inconvenience caused by adopting the suggested course is by comparison trivial.

2. Custom

Tribal customs with which a judicial officer is acquainted in his capacity as an expert in those customs need not be proved in proceedings where he is sitting as an expert, *as in a* Bantu commissioner's court or in the Bantu High Court, for in these proceedings the customs are simply part of the applicable law.[33] The custom noticed must be clearly and precisely formulated, in particular where criminal or punishable conduct is sought to be established by it.[34] The custom remains in the sphere of *judicial notice* even though Appellate Division judges or other non-expert judicial officers may require instruction to equip them to take such notice.[35] Where, on the other hand, the custom is part not of the applicable law but of the relevant facts, as it would be in the Supreme Court or magistrate's court, the ordinary principles of notoriety must be satisfied.[36] Thus Innes C.J. was prepared in *R.* v. *Dhlamini*[37] to infer from the fact that the accused had three wives that he must have had assets; but details of a particular tribe's lobola procedures would have to be proved.[38]

Local customary law need not be proved by evidence,[39] but evidence must be led to establish trade customs[40] unless they have been recognized in previous judicial decisions.[41] Evidence is advisable to prove that a custom has changed.[42]

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[31] *R.* v. *Adams* (1900) 17 *S.C.* 564 at 565; *Tomson's Truck and Car Co., Ltd.* v. *Odendaal*, 1956 (1) S.A. 794 (O); *Attorney-General* v. *Sebomun*, 1959 (1) P.H., H. 94 (T); *S.* v. *Mbanxa*, 1963 (2) S.A. 340 (N); *Matebese* v. *S.*, 1969 (2) P.H., H. 143 (T). This is also the view put forward by Hathorn J. in *R.* v. *Makolwai*, 1961 (2) S.A. 198 (S.R.). On this view, *salus*: (2) deals merely with what may be regarded as authoritative sources to which the court may refer to refresh its knowledge.

[32] *R.* v. *Gotsie*, 1911 C.P.D. 76 at 80; *R.* v. *Paysiter*, 1916 C.P.D. 211; *R.* v. *Tooral*, 1931 C.P.D. 344; *Serote* v. *Koppies Bantu Community School Board*, 1958 (3) S.A. 265 (O). An early dictum put forward by the Eastern District courts, that the *Gazette* need only be handed in if the government notice or proclamation was liable to repeal or alteration (see *R.* v. *Ngalwana* (1886) *13 E.D.C.* 32, *Ngcata* v. *R.*, 1909 E.D.C. 235, and *R.* v. *Chipa*, 1916 E.D.L. 19), finds no support in later cases, rightly it is submitted, since the issue of the *Gazette* containing the original promulgation would not reveal whether or not a notice in a later issue had varied or annulled it.

[33] *Mzantsi, Dingiswayo*, 1927 A.D. 255; *Ngcobo* v. *Ngcobo*, 1929 A.D. 233; *R.* v. *Dunuzweni*, 1961 (2) S.A. 751 (A.D.); *S.* v. *Sibiya*, 1966 (3) S.A. 148 (E).

[34] *S.* v. *Ngidi*, 1969 (1) S.A. 411 (N). *Ngidi* is discussed in (1969) 86 *S.A.L.J.* 286.

[35] *Mzantsi* v. *Dingiswayo*, 1927 A.D. 255.

[36] *Rowe* v. *Assistant Magistrate, Pretoria*, 1925 T.P.D. 361; *Masil* v. *Motswakhumo*, 1954 (3) S.A. 919 (A.D.) at 930–1. The same principle was applied to an *African* language in *R.* v. *Galeni*, 1943 B.D.L. 291.

[37] 1905 T.S. 331. See, too, the judgment of Holmes I.A. in *S.* v. *Bernardus*, 1965 (2) S.A. 287 (A.D.) at 306.

[38] *Rowe* v. *Assistant Magistrate, Pretoria*, 1925 T.P.D. 361.

[39] *In re Chesworth* [1905] 2 Ch. 488. [40] *Masil* v. *Hotiskey* [1898] 1 Q.B. 125.

[41] *Seville* v. *Colley* (1891) 9 S.C. 39; *Ex parte Powell*, 1 Ch. D. 506. In *Ngcobo* v. *Ngcobo*, 1929 A.D. 233 at 236, Wessels J.A. expressed the opinion that trade customs should be proved *anew* in every case.

[42] Zeltzer-Europe Co., Ltd. v. Bolton Tractors, Ltd., [1968] 2 W.L.R. 523.

3. Foreign Law

Judicial notice cannot be taken of the law of foreign countries.[3] Foreign law must be proved in the same way as any other fact forming part of a body of technical or specialized knowledge—by an expert witness. Textbooks setting out the foreign law[4] or copies of foreign statutes[5] are not evidence in themselves[6] but, like any other expert, the witness may refer to them in support and explanation of his opinion.[7]

The competence of the witness as an expert must be shown: he must prove to be *peritus virtute officii*. The best qualification would be experience as a judge,[8] magistrate[9] or practitioner[10] in the foreign system, but an academic degree was accepted as sufficient in *Holscher* v. *Voorsiechtskas voor Zuid Afrika*.[11] Formal qualifications are not essential provided the requisite degree of knowledge can be shown. A certificate from the German consul-general as to the validity of a marriage celebrated in Germany was held inadmissible in *Levy* v. *Levy*[12] as there was no evidence that he had had any opportunity or need to acquire a knowledge of this branch of the law, his consular functions being largely commercial; but in *Ajami* v. *Comptroller of Customs*[13] evidence on what was legal tender in West Africa was received from a bank manager with twenty-four years' experience there, the Privy Council declaring it needed to be satisfied merely (*a*) that the witness conducted a business which made it in his interest to take cognizance of what notes were legal tender in West Africa, and (*b*) that he had in fact taken such cognizance.

Our courts used to relax the usual requirements of proof where the foreign law in issue was English law, on the ground that they were as well qualified as any expert to determine what that law was.[14] This practice was disapproved by the Appellate Division in *Schlesinger* v. *C.I.R.*,[15] and possibly the case with which Van Wyk J.A. in that case could find a tacit agreement to dispense with formal proof will not be repeated in a criminal case. The same insistence on proof applies to the laws of Botswana,[16] Lesotho, Swaziland, and Rhodesia,[17] regardless of how close the ties are between those legal systems and our own.

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[3] *In re Jacobs* (1885) 3 *H.C.G.* 294; *Ex parte Neubayer*, 1947 (3) S.A. 736 (O); *Anderson* v. *The Master*, 1949 (4) S.A. 660 (E). Canon law is a foreign system of law: *The Sussex Peerage case* (1844) 11 Cl. & Fin. (H.L.) 8 E.R. 1034.

[4] *Ismail* v. *Registrar of Asiatics*, 1911 T.P.D. 1180; *Schneider* v. *Jaffe*, 1916 C.P.D. 696 at 698.

[5] *The Treasury* v. *Hanf*, 1919 A.D. 50 at 55.

[6] An exceptional case was *Ex parte Widdington's Estate*, 1940 C.P.D. 121, where owing to the state of war the necessary evidence from an expert in Swiss law was unobtainable, and a sworn translation of the Swiss code was received.

[7] *The Sussex Peerage* case (1844) 11 *Cl. & Fin.* 85 (H.L.) at 115, 8 E.R. 1034 at 1046.

[8] e.g. *The Sussex Peerage* case (1844) 11 Cl. & Fin. 85 (H.L.) at 154, 8 E.R. 1034 at 1053.

[9] e.g. *Soomar* v. *Estate Mzamba*, 1937 N.P.D. 312.

[10] *The Treasury* v. *Hanf*, 1919 A.D. 50 at 55.

[11] 1908 T.S. 562 at 568-9. See, also, *Sharif* v. *Azad* [1966] 3 All E.R. 785 (C.A.).

[12] (1934) 51 T.L.R. 164. The contrary decision in this respect in *Ex parte Fodias*, 1935 W.L.D. 14, seems clearly wrong.

[13] [1954] 1 W.L.R. 1405 (P.C.). See top. at 1409.

[14] e.g. *S.A. Breweries, Ltd.* v. *Marini* (1903) 26 N.L.R. 362 at 364. Cf. *Sharif* v. *Azad* [1966] 3 All E.R. 785 (C.A.) 788, where it was held that an English court should be very chary of itself construing a Pakistani statute and coming to a different conclusion on its meaning as that arrived at by the expert witness on the law of Pakistan.

[15] 1964 (3) S.A. 189 (A.D.) at 196, per Van Wyk J.A. This aspect of the decision is critically discussed by Professor Ellison Kahn in (1965) 82 *S.A.L.J.* 133.

[16] *Motsi* v. *R.*, 1966 (2) P.H. H. 204 (O).

[17] The position is complicated by the fact that the Cape Provincial Division and the Appellate Division were successively the court of appeal for Southern Rhodesia. It was held in *Michelli* v.

In civil cases the onus of proving the foreign law lies on the party who claims that it is applicable and that it differs from domestic law,[18] and in the absence of evidence the foreign law is presumed to be the same as South African.[19] While there is no direct authority on the point, it seems most unlikely that the same rules would be applied in a criminal case. From the obiter discussion in *McIntyre* v. *R.*[20] it seems that only Mason J. would have applied the civil rules of onus. Innes C.J. and Bristowe J. would apparently have regarded it as the prosecution's duty to adduce evidence of the foreign law as one of the facts in issue, and the same assumption was made in *Molai* v. *R.*[21] The reasoning of Mason J. in *McIntyre in any event* applies as much to the evidential onus as to the legal burden of proof, and there is no reason to vary the ordinary and desirable principle that the prosecution should always bear the onus of proof. Where the presumption is operative, it applies to statute as well as to common law.[22]

Macmaldrum, 1923 C.P.D. 401, that in consequence judicial notice would be taken of Southern Rhodesian law in all cases, not only where the appellate function was being exercised. The status as a precedent of this decision today is doubtful.

[18] *Schapiro* v. *Schapiro*, 1904 T.S. 673.

[19] *Rogals* v. *General Imports (Pty.) Ltd.*, 1948 (1) S.A. 1216 (C) (where *Schnaider* v. *Jaffe*, 1916 C.P.D. 695, was disapproved); *Estate Himovich* v. *Estate Himovich*, 1951 (2) S.A. 156 (C).

[20] 1904 T.S. 834. On similar facts today, sec. 270(3) of the Criminal Procedure Act would simplify the matter.

[21] 1960 (2) P.H., H. 204 (O).

[22] Bank of Lisbon v. Optichem Kunsmis (Edms.) Bpk., 1970 (1) S.A. 447 (W).

CHAPTER 18

WITNESSES: THEIR ATTENDANCE AND COMPETENCE

I. INTRODUCTION

A witness is competent to testify if his evidence may properly be put before the court. He is compellable *if, being competent,* he can be compelled to give evidence even against his own will.[1]

The Criminal Procedure Act contains various provisions dealing with both competence and compellability, and in addition section 292 states that the law as to competency of witnesses shall, where not expressly provided for, be determined according to the law of England.[2] Accordingly the statutory provisions are not exclusive but are supplemented by the common law.[3]

At common law, there were many disqualifications from competence, of which the most important were those based on crime and on interest. Nearly all

[1] A ruling of compellability does not, however, deprive him of the right to claim privilege in respect of particular questions. See below, p. 000. [illegible]
[2] See above, p. 000.
[3] *Ex parte Minister of Justice: in re R. v. Domingo,* 1951 (1) S.A. 36 (A.D.).

these have been abolished by statute. As Van den Heever J.A. commented in *Ex parte Minister of Justice: in re R. v. Dominga*:[4]

> "[t]he history of the law of procedure and evidence in this regard shows a progressive contraction of classes of witness who were once incompetent on the ground of presumed bias or unworthiness, leaving the question of probative value of such evidence to juries or judicial officers."

This section 223 declares generally that unless specially excluded all persons are both competent and compellable as witnesses. The old rules of *infamia* disqualifying criminals no longer apply, so that evidence may be received even from persons under sentence of death.[5] The principal interest disqualification, that which excluded accused persons and their spouses from testifying, has also been substantially withdrawn, though some limitations remain.[6]

Questions of competence and compellability, like any other question of the admissibility of evidence, are matters of law and are therefore for the decision of the judicial officer alone, at a trial within a trial where, if necessary, evidence and argument may be heard.[7] Unlike other rulings on receivability of evidence, these 'trials within the trial' need not take place in the absence of the assessors, even though they do not participate in the decision.[8] Whether the witness is competent will be decided by the judge, but whether or how far his evidence will be believed is a matter for the full court as trier of fact. Any evidence led at the competence inquiry, e.g. relating to the proposed witness's mental powers, may be crucial to the weight of his evidence should he be ruled competent.[9] Lest he be held incompetent, however, the inquiry should as far as possible be kept off the main issues in the case;[10] if these cannot be avoided on the side issue of competence, the assessors must be excluded.[11] A decision as to a witness's competence, at least where his sanity or maturity is disputed, is of an interlocutory nature. If his competency is brought into doubt by virtue of his own behaviour while testifying the court should then initiate an inquiry into his capacity[12] or, if it has already been investigated, should review its earlier ruling.[13]

Commonly in criminal trials a request is made to the court to order any witnesses present to withdraw until they are called to the stand.[14] A witness who has remained in court to hear the other witnesses, whether or not an order of this kind has been given, is not thereby disqualified from testifying. *Ex examine* a competent witness, though he may be liable to penalties for contempt of court

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[4] 1951 (1) S.A. 36 (A.D.) at 48. See, also, Charles T. McCormick, *Handbook of the Law of Evidence* (1954), pp. 169–70.
[5] *R. v. Ombalido* (1904) 25 N.L.R. 264; *R. v. Tom*, 1914 T.P.D. 317; *R. v. Dlalilomba*, 1925 E.D.L. 179.
[6] See below, pp. 209 and 210.
[7] *R. v. Mpopa* (1909) 30 N.L.R. 464; *R.* v. *Critchfield*, 1926 O.P.D. 151. In view of the provisions of sec. 223 of the Criminal Procedure Act, 1955, the burden of proving incompetence is on the party so alleging.
[8] *R. v. Dunne* (1929) 21 Crim. App. Rep. 176 (C.C.A.); *R.* v. *Reynolds* [1920] 1 K.B. 606 (C.C.A.); *R. v. Manfonjo*, 1963 (4) S.A. 708 (F.C.). But see (1930) 46 *L.Q.R.* 157 and (1930) 66 *L.Q.R.* 157.
[9] See *R. v. Reynolds*, above, at 610.
[10] *R. v. Montagu*, 1956 (3) S.A. 418 (A.D.). *R. v. Solomons*, 1959 (2) S.A. 352 (A.D.) at 364–5.
[11] *R. v. Kgalali*, 1943 A.D. 255; *R. v. Solomons*, 1959 (2) S.A. 352 (A.D.) at 365; *R. v. John*, 1929 W.L.D. 50.
[12] *S. v. Thurston*, 1968 (3) S.A. 284 (A.D.) at 290.
[13] *R. v. Malozani*, 1952 (1) S.A. 639 (A.D.); *R.* v. *Critchfield*, 1926 O.P.D. 151.
[14] Sec. 156(3) of the Criminal Procedure Act; *S. v. Modetsane*, 1962 (2) S.A. 182 (E).

and the weight of his evidence may be much diminished.[15] The ext
its value is affected depends on the circumstances in each case, the
the witness vis-à-vis the party calling him, and so forth.

II. COMPELLABILITY

With the exceptions discussed below, *all* competent witnesses are
to attend court, be sworn, and be examined.[17]

A witness's attendance at court is enforced by means of a subp
at the instance of either the prosecution or the defence.[17] If it appe
to have the evidence of a witness who is not called by the parties t
itself call the witness.[18] The Appellate Division has held that it w
for the police to take statements from defence witnesses whose ab
relevant evidence is only known to them by virtue of the subpoen
Witnesses who have been subpoenaed must remain in attenda
proceedings are *terminated,*[20] and provision is made for the pay
expenses.[21] Failure to obey a subpoena is an offence.[22]

The court may compel *any person* present in court whether in
subpoena or not, to be sworn and give evidence.[23] 'Recalcitrance
excuse' is punishable by *twelve months' imprisonment,* which ma
if the refusal is persisted in.[24] Section 212 thus creates a substa
although it may be summarily tried, and *accordingly* the witness
the assistance of counsel[25] and if he is found guilty will be treated
convict.[26]

It is not entirely clear what type of excuse will be regarded as j
fore exonerating for the purposes of section 212. *It need not be a*
said Steyn C.J. in *S.* v. *Weinberg,*[27] but then suggested obiter an o
test: the witness must 'find himself in circumstances . . . in wh
humanly intolerable to have to testify'. Nothing in the policy of
appears from the wording would seem to require such a straitin
of justice, *which would exclude* excuses accepted by the courts
legislation.[28] The contest between an individual's right to the pr

[15] *R.* v. *Keller and Parker,* 1915 A.D. 98 at 99.
[16] *R.* v. *Jele,* 1960 (3) S.A. 172 (S.R.).
[17] Sec. 206; *Sagaye* v. *R.,* 1932 N.P.D. 236.
[18] Sec. 210, on which see ~~above, p. 000,~~ and generally *R.* v. *Hepworth*
R. v. *Majosi,* 1956 (1) S.A. 167 (N).
[19] *R.* v. *Manda,* 1951 (3) S.A. 158 (A.D.); cf. the ruling of the General C
quoted by H. J. May, *South African Cases and Statutes on Evidence,* 4th ed.
[20] Sec. 209. If the trial is subsequently reopened, witnesses have to be re-s
attendance is desired: *R.* v. *Belinsky,* 1925 A.D. 393. But the original subp
adjourned date: *S.* v. *Mkize,* 1963 (3) S.A. 218 (N).
[21] Sec. 218. [22] Sec. 211. See oppo
[23] Sec. 212. A refusal to give evidence is constituted not only by silence
improper answers to questions: *S.* v. *Schumacher* (1896) 3 O.R. Rep. 11
E.D.L. 12.
[24] Sec. 212(2). [25] *R.* v. *Keyser* 1951 (1) S.
[26] *Hitchcock* v. *Germishuis,* 1967 (4) S.A. 279 (W); Proc. No. R.692, G
30th June, 1967 (*Reg. Gaz.* No. 804).
[27] 1966 (4) S.A. 661 (A.D.) at 665. A less rigorous approach, or identically
was adopted by the Southern Rhodesian Appellate Division, in *R.* v. *Park*
(S.R., A.D.). *See Annual Survey of South African Law,* 196 . pp. 400-
pp. 391-3. See opposite
[28] See, e.g., *R* v. *Williams,* 1907 E.D.C. 38; *R.* v. *Nkenjana,* 1921 E
1927 E.D.L. 69. The phrase 'reasonable excuse', which is still used in s

Ad n. 22: But the court has power to set aside a subpoena if totally satisfied that the witness is unable to give any relevant evidence (Sherv. Sadowitz, 1970 (1) S.A. 193 (C).

Ad N. 27 : In S. v. Hertzog, 1970 (2) S.A. 587 (T),at 595 ff., it was held that all the circumstances of the case may be looked at to see whether a just excuse exists, including the ease or difficulty with which the witness could give the evidence (surely a test of convenience rather than of justice), the 'bona fides' of the witness, and whether or not he has had legal advice.

and the weight of his evidence may be much diminished.[13] The extent to which its value is affected depends on the circumstances in each case, the position of the witness *vis-à-vis* the party calling him, and so forth.

II. COMPELLABILITY

With the exceptions discussed below, all competent witnesses are compellable to attend court, be sworn, and be examined.[14]

A witness's attendance at court is enforced by means of a subpoena, issued at the instance of either the prosecution or the defence.[15] If it appears necessary to have the evidence of a witness who is not called by the parties the court may itself call the witness.[16] The Appellate Division has held that it is undesirable for the police to take statements from defence witnesses whose ability to furnish relevant evidence is only known to them by virtue of the subpoena procedure.[17] Witnesses who have been subpoenaed must remain in attendance until the proceedings are terminated,[20] and provision is made for the payment of their expenses.[21] Failure to obey a subpoena is an offence.[22]

The court may compel any person present in court, whether in response to a subpoena or not, to be sworn and give evidence.[23] Recalcitrance without 'just excuse' is punishable by twelve months' imprisonment, which may be renewed if the refusal is persisted in.[24] Section 212 thus creates a substantive offence, although it may be summarily tried, and accordingly the witness is entitled to the assistance of counsel[25] and if he is found guilty will be treated like any other convict.[26]

It is not entirely clear what type of excuse will be regarded as 'just' and therefore exonerating for the purposes of section 212. It need not be a lawful excuse, said Steyn C.J. in *S.* v. *Weinberg*;[27] but then suggested obiter an equally rigorous test: the witness must 'find himself in circumstances . . . in which it would be humanly intolerable to have to testify'. Nothing in the policy of the section as it appears from the wording would seem to require such a straining of the quality of justice, which would exclude excuses accepted by the courts under previous legislation.[28] The contest between an individual's right to the privacy of his own

set aside a subpoena as is unable to give its, 1970 (1) S.A. 137

) S.A. 587 (T), at ircumstances of the r a just excuse exists, th which the witness as: of convenience fides' of the witness, advice.

[13] *R.* v. *Keller and Parker*, 1915 A.D. 98 at 99.
[14] *R.* v. *Jele*, 1960 (3) S.A. 172 (S.R.).
[15] Sec. 206; *Sagaye* v. *R.*, 1932 N.P.D. 236.
[16] Sec. 210, on which see ~~above, p. 238, and~~ generally *R.* v. *Hepworth*, 1928 A.D. 265; *R.* v. *Majosi*, 1956 (1) S.A. 167 (N).
[17] *R.* v. *Manda*, 1951 (3) S.A. 158 (A.D.); cf. the ruling of the General Council of the Bar, quoted by H. J. May, *South African Cases and Statutes on Evidence*, 4th ed. (1962), p. 378.
[20] Sec. 209. If the trial is subsequently reopened, witnesses have to be re-subpoenaed if their attendance is desired: *R.* v. *Bellinsky*, 1925 A.D. 363. But the original subpoena applies to an adjourned date: *S.* v. *Mkize*, 1963 (3) S.A. 218 (N).
[21] Sec. 218. [22] Sec. 211. See opposite.
[23] Sec. 212. A refusal to give evidence is constituted not only by silence but by evasive or improper answers to questions: *S.* v. *Schumacher (1896) 3 Off. Rep. 11*; *R.* v. *Naul*, 1930 E.D.L. 12.
[24] Sec. 212(2). [25] *R.* v. *Keyser*, 1951 (3) S.A. 512 (A.D.).
[26] *Hitchcock* v. *Germishuis*, 1967 (4) S.A. 279 (W); Proc. No. R.992, *G.G.E.* No. 1782 of 30th June, 1967 (*Reg. Gaz.* No. 804).
[27] 1966 (4) S.A. 661 (A.D.) at 665. A less rigorous approach, on identically worded legislation, was adopted by the Southern Rhodesian Appellate Division, in *R.* v. *Parker*, 1966 (2) S.A. 56 (S.R., A.D.). See *Annual Survey of South African Law*, 1966, pp. 400–1, and ibid., 1967, pp. 391–3. See opposite.
[28] See, e.g., *R.* v. *Williams*, 1907 E.D.C. 38; *R.* v. *Nkelenjana*, 1921 E.D.L. 234; *R.* v. *Pall*, 1927 E.D.L. 69. The phrase 'reasonable excuse', which is still used in sec. 211 in regard to

principles and the public interest in the administration of justice would seem to be unequal enough without adding to the scale further weighting against the individual.[30]

The aforegoing provisions apply not only to witnesses at the trial but also to a preliminary inquiry where persons may be subpoenaed to appear before a magistrate for examination by the public prosecutor regarding the commission of an alleged offence.[30]

Again, all the same provisions apply to the production of documents which may be compelled by means of a subpoena *duces tecum*. Production of official documents in the control of a public servant requires the permission of the attorney-general if the original is desired.[31] The Act does not require the documents to be specified in any particular way, but if the subpoena is imprecise the witness will not be penalized for non-production.[32] If a person, subpoenaed or not, has the documents in court he can be compelled to produce them.[33] Possession and control of the documents are sufficient to subject a witness to a subpoena *duces tecum*: his ownership of them need not be shown.[34] Possible access to them falling short of control is insufficient.[35]

III. COMPETENCE OF PERSONS SUFFERING FROM MENTAL IMPAIRMENT

Section 225 of the Criminal Procedure Act reads:

> 'No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.'

Whether a witness is sane, sober, or comprehending enough to testify is a matter for the trial court to determine, either by hearing evidence or on the basis of the witness's conduct in the box. A finding of competence is interlocutory and may be altered if the course of the evidence casts further doubt on the point.[36] A mental defect not of the kind contemplated by the section—such as impairment of memory due to old age—does not disqualify the witness but may result in his testimony being of no value.[37]

Incompetence where it exists is not absolute, for it lasts only so long as does the defect. Thus a lunatic may testify during lucid intervals, and a drunk when

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disobedience of a subpoena, does not seem to contemplate a laxer standard than is required for a 'just excuse'. Certainly it would be difficult to justify differentiating in this way between the offences created respectively by sec. 211 and sec. 212.

[30] See the judgment of Macdonald J.A. in *R.* v. *Parker*, 1966 (2) S.A. 56 (S.R., A.D.).

[31] Sec. 83; *S.* v. *Saterdien*, 1963 (2) S.A. 425 (C). This section is fully discussed in *R.* v. *Heard*, 1937 C.P.D. 401, and *Waddell* v. *Eyles N.O.*, 1939 T.P.D. 198.

[32] Sec. 262. The ordinary rules relating to the evidentiary use of documents will still have to be observed: *R.* v. *Wepener*, 1950 (1) P.H., H. 73 (G.W.).

[33] *Cave* v. *Johannes N.O.*, 1949 (1) S.A. 72 (T).

[34] Sec. 212; *R.* v. *Smale*, 1948 (3) S.A. 1210 (N); *R.* v. *Mkwayi*, 1956 (3) S.A. 406 (E).

[35] *Cave* v. *Johannes N.O.*, 1949 (1) S.A. 72 (T) at 81.

[36] *R.* v. *Mkwayi*, 1956 (3) S.A. 406 (E).

[37] *S.* v. *Thurston*, 1968 (3) S.A. 284 (A.D.) at 290; *Maartens* v *S.*, 1969 (1) P.H., H. 70 (T).

[38] *Gouws N.O.* v. *Montesse Township and Investment Corporation (Pty.) Ltd.*, 1964 (3) S.A. 609 (T). The decision is consistent with the point mentioned in *S.* v. *Thurston*, above, at 289-90, that it is not all defects of mind but only those depriving the witness of the proper use of reason which the legislature contemplated as a disqualification.

he is sober.[38] Further, an insane person may testify on matters unaffected by his defect, as where he suffers from particular and limited delusions.[39]

The evidence of such a witness may be received even where his sanity or mental ability is the very point in issue.[40] Thus on charges of unlawful connection with a female idiot or imbecile,[41] the female complainant has been permitted to testify, for were the terms 'idiot' and 'imbecile' to be given identical interpretations in the Mental Disorders Act and the Criminal Procedure Act so that the complainant would be automatically disqualified if any offence has taken place, it would often be impossible ever to establish the commission of the crime.[42]

A deaf-mute is not incompetent to testify provided a satisfactory means of communicating questions and interpreting his answers is available, and he is proved otherwise to be of requisite understanding.[43]

IV. COMPETENCE OF YOUNG CHILDREN

There is no minimum age in our law below which a child is declared incompetent to testify.[44] The maturity and understanding of the particular child must be considered by the presiding judicial officer,[45] who must determine whether it has sufficient intelligence to testify and a proper appreciation of the duty of speaking the truth.[46] On this test the evidence of a 7-year-old[47] and even of a 6-year-old[48] have been received, though the Court in *R.* v. *Umhlahlo*[49] was understandably reluctant to admit testimony from a 3- or 4-year-old. Whether or not the child understands the nature of an oath is not a criterion[50] and, accordingly, the course taken in some English cases of postponing a trial while the necessary religious instruction is given, has no place in our practice.[51]

A rule of thumb suggested in the East African and Rhodesian courts is that children under 14 may be regarded as of tender age.[52] In *R.* v. *Makhanganya*[53]

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[38] *R.* v. *Creinhold*, 1926 O.P.D. 151. The competency is tested at the date of trial not according to when the events took place.

[39] *R.* v. *Hill* (1851) 2 Den. 254, 169 E.R. 495; *R.* v. *Davis*, 1925 A.D. 30 at 32.

[40] *Pheasant* v. *Warne*, 1922 A.D. 481 esp. at 489; *Hunter* v. *Edney* (1881) 10 P. 93.

[41] Under sec. 15 of the Immorality Act, No. 23 of 1957, previously sec. 4 of the Girls and Mentally Defective Women's Protection Act, No. 3 of 1916.

[42] *R.* v. *K*, 1951 (4) S.A. 49 (O). Contra, *R.* v. *Burger*, 1938 C.P.D. 37, a decision reached without proper investigation because of a concession from counsel (as pointed out by Jansen A.J.A. in *S.* v. *Thurston*, 1968 (3) S.A. 284 (A.D.) at 289).

[43] *R.* v. *Zeeland* (1890) 7 *Cape L.J.* 235; *R.* v. *Malima*, 1906 E.D.C. 164; *R.* v. *Ranikola*, 1954 (3) S.A. 255 (O). The witness was held incompetent in *R.* v. *Imrie* (1917) 12 Cr. App. Rep. 282, since no means of cross-examining her was apparent.

[44] *R.* v. *Philipps* (1880) 1 Buch. App. Cas. 28; *R.* v. *Umhlahlo* (1904) 25 N.L.R. 264.

[45] He may not merely accept assurances of competency from counsel tendering the witness: *R.* v. *Mapoyana* (1899) 20 N.L.R. 139; *R.* v. *Surgenor* [1940] 2 All E.R. 249 (C.C.A.). A request from the magistrate to the prosecutor to dispense with the evidence of an 8-year-old boy, who was deeply distressed and frightened, was held not to be a ruling on the child's competency, in *R.* v. *Ndawo*, 1961 (1) S.A. 16 (N).

[46] *Ex parte Minister of Justice: in re R.* v. *Demingo*, 1951 (1) S.A. 36 (A.D.) at 43, per Centlivres C.J. For a fuller exposition of these two criteria, see *R.* v. *Erasmus*, 1941 O.P.D. 270 at 272–3.

[47] *R.* v. *Philipps* (1880) 1 Buch. App. Cas. 28.

[48] *De Beer* v. *R.*, 1933 N.P.D. 30.

[49] (1904) 25 N.L.R. 264 at 269.

[50] Sec. 222 of the Criminal Procedure Act; *R.* v. *Erasmus*, 1941 O.P.D. 270 at 272.

[51] *R.* v. *Umhlahlo* (1904) 25 N.L.R. 264 at 269.

[52] See the judgment of Forbes F.J. in *R.* v. *Makhanganya*, 1963 R. & N. 699 at 702. And cf. *S.* v. *Artman*, 1968 (3) S.A. 339 (A.D.); *S.* v. *Kanfer*, 1969 (4) S.A. 250 (C).

[53] 1963 R. & N. 699.

Forbes F.J. outlined the procedure to be adopted by the trial court when faced with a young witness as

> '(*a*) to inquire as to the age of the child, and if necessary to assess its age; (*b*) to investigate, by questioning the child, whether the child understands the nature of an oath; and (*c*), if the answer to (*b*) is negative, to investigate whether the child understands the difference between truth and falsehood, and the need to speak the truth. The record should show these inquiries . . . and the conclusion reached by the judge. Unless the *voir dire* is carried out as I have indicated, a trial court cannot be satisfied that a child is fit to be sworn, or even to give evidence unsworn; *and unless the voir dire is recorded an appellate court* cannot be satisfied that the trial court has appreciated and carried out its duty.'

The age of the child is of course relevant in evaluating the weight to be accorded to its evidence, being inversely proportionate to the stringency of the cautionary rule discussed below.[54]

V. COMPETENCE OF JUDICIAL OFFICERS, COUNSEL, PROSECUTOR, ATTORNEYS

Although counsel and attorneys are competent to testify in cases in which they are acting,[55] the courts have repeatedly pointed out that it is undesirable for them to *do so*,[56] *particularly* if the testimony is on facts rather than on matters of expert knowledge such as foreign law.[57] Judicial officers find it distasteful to have to make findings of credibility which may reflect adversely on a member of the legal profession.[58] More *important, however, is* the possibility of the professional independence of the practitioner involved being jeopardized. As regards the prosecutor in particular, his personal involvement will make it difficult if not impossible for him to 'prosecute an accused *person with that* detachment and moderation which is in accord with the high traditions of *prosecution* at the public instance in this country'.[59]

For the prosecutor to give evidence against the accused is not per se an irregularity,[60] but care must be taken that his evidence is not presented to the court in the form of an *unsworn statement* from the bar.[61]

The competency of a judge or magistrate to testify in a case over which he is presiding is not even of academic significance. As Centlivres C.J. put it in *Ex parte Minister of Justice: in re R.* v. *Demingo*,[62]

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[54] p. 000.

[55] The history of the law in this respect is illustrated in (1909) 26 *S.A.L.J.* 386.

[56] *Mitchell* v. *Bruckner* (1896) 17 N.L.R. 95; *Landers* v. *Vogel* (1906) 27 N.L.R. 590; *R.* v. *Secretary of State for India* [1941] 2 K.B. 169.

[57] *Hendricks* v. *Davidoff*, 1955 (2) S.A. 369 (C).

[58] *Mitchell* v. *Bruckner* (1896) 17 N.L.R. 95 esp. at 97.

[59] Per Van den Heever J. in *R.* v. *Nakedie*, 1942 O.P.D. 162 at 163. The same considerations apply with hardly less force to other practitioners. See *Elgin Engineering Co.* (*Pty.*) *Ltd.* v. *Hillview Motor Transport*, *1961* (*4*) *S.A. 450* (D) at 454.

[60] *R.* v. *Becker*, 1929 A.D. 167, where the prosecutor at the preparatory examination gave evidence at the trial but did not conduct the prosecution at the trial, which took place before a different magistrate. Cases where reception of the prosecutor's testimony was held to be irregular are *R.* v. *Maliobe* (1898) *19 N.L.R. 56; R.* v. *Dunga*, 1939 C.P.D. 7; *R.* v. *Nakedie*, 1942 O.P.D. 162; *R.* v. *Kirsten*, 1950 (3) S.A. 659 (C).

[61] *R.* v. *Dunga*, 1939 C.P.D. 7; *R.* v. *Kirsten*, 1950 (3) S.A. 659 (C). *Hickman* v. *Berens* [1895] *2 Ch. 638 at 640–1* (a civil case where counsel testified standing in their robes at the bar and unsworn, a procedure followed, though an oath was administered, *in Wilding* v. *Sanderson* (1897) 76 L.T. 346) is clearly an undesirable precedent for a criminal court in this respect, as well as being in conflict with sec. 220 of the Criminal Procedure Act, 1955.

[62] *1951* (*1*) *S.A. 36* (*A.D.*) *at* 43.

> '[t]oday it is almost impossible to imagine a judge or magistrate leaving the bench, going into the witness-box to give evidence for or against a prisoner, returning to the bench [and] at the conclusion of the evidence or argument solemnly commenting upon the demeanour of himself in the witness-box or without any comment accepting the evidence given by himself. If such a thing were to happen there is little doubt that, apart from the question of whether in law the judge or magistrate is a competent or incompetent witness, the courts would regard the matter as a gross irregularity.'

It may be mentioned that what the learned Chief Justice thought was unimaginable has occurred, in *R.* v. *Sonyangwe*,[63] with of course precisely the result expected.

VI. THE ACCUSED AS A WITNESS

At common law the accused was incompetent to give evidence at all, though he was permitted to relate unsworn his version of the facts.[64] The 1898 Act removed his incompetence to testify for the defence, but left his common-law position otherwise unaffected. The provisions of the Criminal Procedure Act followed suit, and reference to English authority is thus persuasive only since the field is covered by South African legislation.[65]

A. Unsworn Statement

When the accused was made competent to enter the box and give evidence on oath, his common-law right to make an unsworn statement from the dock was expressly preserved,[66] and may be exercised whether or not he is represented by counsel or attorney[67] and irrespective of whether witnesses are called by the defence to testify on oath.[68]

The accused is thus presented by section 227 of the Code with a threefold choice. He may enter the box and give sworn evidence, or he may remain out of the box and unsworn; if he chooses the latter he has still the choice of either remaining silent or of making an unsworn statement from the dock.[69] As a matter of practice the difference between these courses and their different effects[70] must be explained to him by the court,[71] but unless he is undefended and ignorant[72] of his position failure to give the explanation is not per se an irregularity.[73] The need for the explanation is not dispensed with by a plea of guilty.[74] The making of the explanation as well as the choice made by the accused should appear on the record.[75]

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[63] 1908 E.D.C. 394. Kotzé J.P. properly held the entire proceedings to have been invalidated.
[64] See R. N. Gooderson, 'The Evidence of Co-prisoners' (1952) 11 *Camb. L.J.* 209; *R.* v. *Bushula*, 1950 (4) S.A. 108 (E) at 113, 118.
[65] *R.* v. *Cele*, 1959 (1) S.A. 245 (A.D.) at 252, per Steyn J.A.
[66] Sec. 227(3) of the Criminal Procedure Act.
[67] The line of cases to the contrary which followed *R.* v. *De Wet*, 1933 T.P.D. 68, in this respect, was overruled in *R.* v. *Cele*, 1959 (1) S.A. 245 (A.D.) at 251; *R.* v. *Siphambo*, 1963 (1) S.A. 174 (N).
[68] *R.* v. *Cele*, above, at 256, per Ogilvie Thompson J.A.
[69] *S.* v. *Vezi*, 1963 (1) S.A. 9 (N).
[70] Authorities are collected in (1963) 26 *T.H.R.-H.R.* 120.
[71] *S.* v. *Alexander* (1), 1965 (2) S.A. 769 (A.D.) at 816–17.
[72] *R.* v. *Ngubuka*, 1950 (2) S.A. 363 (T); *R.* v. *Mahaloa*, 1953 (1) S.A. 454 (T). Cf. *R.* v. *Cooper*, 1926 A.D. 54.
[73] *R.* v. *Naki*, 1947 (2) S.A. 161 (C).
[74] *R.* v. *Gumede*, 1948 (2) S.A. 12 (N); *S.* v. *Vezi*, 1963 (1) S.A. 9 (N).
[75] *R.* v. *Ngubuka*, 1950 (2) S.A. 363 (T); *R.* v. *Bushula*, 1950 (4) S.A. 108 (E) at 119; *R.* v. *Mahaloa*, 1953 (1) S.A. 454 (T).

If the accused chooses to make an unsworn statement, he is of course not subject to cross-examination either by the prosecution or by the court,[76] though the court may ask him questions for the purposes of elucidating his meaning,[77] and may in appropriate circumstances even draw his attention to matters in need of explanation.[78] A failure strictly to observe the dividing line between this form of questioning and cross-examination will render the proceedings *irregular*.[79]

The time for the statement to be made is after the close of prosecution's case but before the defence case is closed,[80] and certainly before the prosecutor addresses the court.[81]

In *R.* v. *Cele*[82] the Appellate Division held that the accused's unsworn statement is not mere argument but, as distinct from the addresses (which usually may be made by defence counsel) under sections 157(4), 169(5) and 183(1), it is 'technically to be regarded as evidence'.[83] The court is therefore obliged to weigh the statement with the other evidential material presented, but its weight, if any, depends entirely upon the circumstances. It is not merely the absence of the oath and the lack of opportunity for testing the accused by cross-examination which results in his statement being of less value than sworn testimony: it is also the fact that he chose deliberately, when he had the alternative, to avoid the oath and cross-examination. Thus it may have even less weight than an extra-judicial statement, and will rarely prevail where contradicted by evidence on oath.[84] It is unlikely that the statement could suffice to discharge a legal onus of proof resting on the accused, but in other cases may conceivably be sufficient answer to the prosecution's prima facie case.[85]

There is little South African authority to date as to how far, *if at all*, the unsworn statement can be taken into account in favour of or against a co-accused, though if it is 'technically evidence' it may, possibly, be admissible for this purpose. In *R.* v. *Sedi*[86] Smit A.J. held that the unsworn statement could not be evidence against a co-accused, and although the reasoning on which the decision was based has been overruled by *R.* v. *Cele*,[87] a contrary decision would certainly be most unfairly prejudicial to the co-accused who would have no opportunity to cross-examine. In addition, the effect of the cautionary rules relating to accomplice evidence[88] would give the statement so little weight that it could hardly be of any assistance to the State case.[89] Neither of these objections

[76] *R.* v. *Makanyaka*, 1948 (3) S.A. 1225 (O); *S.* v. *Vezi*, 1963 (1) S.A. 9 (N).
[77] *R.* v. *Nyamasoka*, 1948 (4) S.A. 427 (S.R.).
[78] *R.* v. *Memba*, 1967 (1) P.H., H. 7 (R); but *S.* v. *Tengeni*, 1967 (1) P.H., H. 193 (O), may be inconsistent with this decision.
[79] *R.* v. *Makanyaka*, 1948 (3) S.A. 1225 (O); *R.* v. *Nyamasoka*, 1948 (4) S.A. 427 (S.R.).
[80] *R.* v. *Wooldridge*, 1957 (1) S.A. 5 (S.R.) at 7.
[81] *R.* v. *Cele*, 1959 (1) S.A. 245 (A.D.) at 251; at 256 Ogilvie Thompson J.A. added that the statement may be made before or after the witnesses for the defence have testified.
[82] 1959 (1) S.A. 245 (A.D.).
[83] *Per Ogilvie Thompson J.A. at 256.* It must of course be made to the full court: *R.* v. *Nzimba*, 1955 (1) S.A. 40 (O).
[84] Per Steyn J.A. at 252–3.
[85] *R.* v. *Buduma*, 1958 (1) P.H., H. 116 (S.R.). See, too, *R.* v. *Bushula*, 1950 (4) S.A. 108 (E) at 119, and *S.* v. *Kumalo*, 1961 (2) P.H., H. 220 (N).
[86] 1950 (3) S.A. 693 (O) at 695.
[87] 1959 (1) S.A. 245 (A.D.).
[88] See below, pp. 60–80. 190 ff.
[89] Apparently an unsworn statement has been held in England not to be evidence against a co-prisoner, in *R.* v. *Kennedy and Browne*, quoted by R. N. Gooderson in (1952) 11 *Camb. L.J.* 228, n. 98.

apply if the statement is received as evidence in favour of a co-accused, but the Supreme Court of New South Wales[88] has held that an unsworn statement is received only as evidence for the prisoner making it.

It has been suggested that the threefold choice open to the accused is a confusing one, and that a more comprehensible procedure would be the abolition of the unsworn statement, leaving a straightforward choice between evidence on oath and silence.[91] The advantages of this simplification are not clearcut, however, in a society where the vast majority of accused persons are illiterate and undefended. Certainly the abolition of the right to make an unsworn statement should under no circumstances precede the establishment of an effective system of legal aid.[92]

B. Testimony on Oath

1. Accused giving evidence for the defence

Section 227(1) enacts that every accused person is a competent witness for the defence at every stage of the proceedings, on his own application.[93] His decisions to testify at the preparatory examination, at the trial, at a 'trial within a trial' where the admissibility of evidence is being tested, are entirely separate ones independent of each other, and none compel him to a particular course on the others. Thus, he may testify at the preparatory examination and not at the trial,[94] or on the issue of the voluntariness of a confession but not on the general issue,[95] or only after conviction in mitigation of sentence but not otherwise.[96] *If he wishes to testify* he has a right to be heard, and it is a gross irregularity for him to be refused the opportunity of doing so.[97] Where he exercises his right to testify at all, he must enter the witness-box and cannot give sworn evidence from the dock.[98]

The accused as a witness is in the same position as an ordinary witness, except that he cannot in cross-examination claim the privilege against self-incrimination in respect of the offence for which he is being tried.[99] Instead, he is given another shield protecting him against cross-examination revealing his bad character and previous convictions.[1] *His credit may* be attacked by putting

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[88] In *R.* v. *Kelly* (1946) 46 S.R. (N.S.W.) 344. See Z. Cowen and P. B. Carter, *Essays on the Law of Evidence* (1956), p. 217.

[91] See, e.g., *L. H. Hoffmann, South African Law of Evidence*, 2nd ed. (1970), p. 268. The possibility of confusion was adverted to by Ogilvie Thompson J.A. in *R.* v. *Cele, 1959 (1) S.A.* 245 (A.D.) at 256.

[92] Cf. Cowen and Carter, above, p. 218.

[93] He cannot therefore be called by the court to establish omissions in the State case, which is equivalent to calling him as a witness for the prosecution. See *R.* v. *Jambo*, 1947 (4) S.A. 228 (C) at 230; *R.* v. *Narun*, 1954 (1) S.A. 309 (S.R.).

[94] *R.* v. *Moepane*, 1958 (3) S.A. 649 (O).

[95] *R.* v. *Dunga*, 1934 A.D. 223.

[96] *R.* v. *Wheeler* [1917] 1 K.B. 283 (C.C.A.). *Contra*, apparently, is *S.* v. *Meer*, 1969 (3) S.A. 588 (T).

[97] *R.* v. *Mahlalentonyeni* (1888) 9 *N.L.R. 60*; *S.* v. *Barnes*, 1965 (2) P.H., H. 150 (N). The effect of a decision not to testify is discussed below, p. 128.

[98] Sec. 227(2). There is no equivalent provision in Rhodesia, where the court may in its discretion permit the accused to testify from the dock (*R.* v. *Flniasi*, 1963 (2) P.H., H. 152 (S.R.); *R.* v. *Herbert*, 1965 (2) S.A. 385 (S.R., A.D.)).

[99] Proviso to sec. 234. On a *separation of* trials, one prisoner may claim the privilege although he is compellable to testify for the defence of his erstwhile co-accused (*S.* v. *Zondi*, 1968 (1) P.H., H. 44 (N)).

[1] Sec. 228, on which see below, pp. 148–49.

his previous *inconsistent* statements to him,[2] and his evidence may be used to provide corroboration of, or otherwise to strengthen, the State case against him.[3]

The competence and *compellability* of co-prisoners accused jointly of the same offence is governed by the same rules as where there is only one accused.[4] Each co-accused is competent to testify in his own defence and also for the defence of any of the others, but he can only be called to do so on his own application, and is not compellable at the instance of a co-accused[5] even on preliminary issues of the admissibility of evidence.[6] The danger of his consenting to enter the witness-box is of course that he thereby lays himself open to cross-examination by the prosecution not only on the role of the co-accused calling him but on his own complicity as well.[7]

Where A and B are jointly indicted, A's decision to give evidence on his own behalf can hardly avoid affecting B. Whatever A says regarding B's actions is evidence for or against B, whether contained in his evidence in chief[8] or elicited in cross-examination by the prosecution, though the rules relating to accomplice evidence will apply. (It is clear that once A becomes a witness the State may cross-examine him on all relevant matters not only those relating to his own guilt.[9]) In *R.* v. *Zawels*[10] this was qualified by a reference to what is now section 246 of the Code[11] which provides that a confession is not admissible against anyone other than the person making it. Curlewis C.J. said that if

> 'one of the accused makes an admission of his guilt amounting to a confession, though such admission may not be admissible as evidence under section [246] against any other of the accused but only as against himself, the rest of his evidence stands and is admissible like that of any other witness so far as it incriminates any of the *other accused* . . .'.

If the learned Chief Justice was merely explaining that in A's admission of his *own* guilt under cross-examination he was not identified with B for this to operate also as an admission of B's guilt, then the statement is unexceptionable. If, however, it means that A's evidence incriminating B is admissible against B *only where A does not* at the same time incriminate himself, the statement is both illogical and obiter (since on the facts A's admission does not seem to have referred to B's guilt but only to his own).[12]

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[2] Unless these amount to inadmissible confessions (*R.* v. *Gxilibegu*, 1959 (4) S.A. 266 (E)). And see *R.* v. *Pillay*, 1944 N.P.D. 314.

[3] *R.* v. *O*, 1964 (4) S.A. 245 (S.R.).

[4] Sec. 227(1).

[5] *R.* v. *Sas*, 1918 C.P.D. 346; *R.* v. *Makenyaka*, 1948 (3) S.A. 1225 (O).

[6] *S.* v. *Chamane*, 1962 (2) S.A. 428 (A.D.). If a co-accused pleads guilty he is compellable for the defence: *R.* v. *Boal* [1965] 1 Q.B. 402 (C.A.) at 415. But cf. *S.* v. *Meer*, 1969 (3) S.A. 588 (T), which is inconsistent with *Sherman* (1736) 95 E.R. 196 and *R.* v. *Ditch* (1969) 53 Cr. App. Rep. 627.

[7] *R.* v. *Rowland* [1910] 1 K.B. 458 (C.A.).

[8] *R.* v. *Gilmore* (1899) 16 S.C. 448; *R.* v. *Faithfull and Gray*, 1907 T.S. 1077; *R.* v. *Rorke*, 1915 A.D. 145 at 163-4; *R.* v. *Ahmed*, 1940 A.D. 333. Presumably the same applies if A, B and C are co-accused, and A in giving evidence for B, incriminates C. See Gooderson, below, at 213, 227. It is submitted that the view taken in *S.* v. *Groesbeek*, 1969 (4) S.A. 383 (O), that an exception is to be made where the two accused are husband and wife, finds no support in the authorities.

[9] *R.* v. *Paul* [1920] 2 K.B. 183 (C.A.), quoted with approval by Curlewis C.J. in *R.* v. *Zawels*, 1937 A.D. 342 at 348. On the position in England, see R. N. Gooderson in (1952) 11 *Camb. L.J.* 209 at 217 ff.

[10] 1937 A.D. 342 at 348–9.

[11] Sec. 275 of the Criminal Procedure and *Evidence Act*, No. 31 of 1917.

[12] Subsequent cases, however, seem to interpret the judgment according to the latter view: *R.* v. *Pietersen*, 1947 (1) S.A. 56 (G.W.). See, also, *R.* v. *Fatshawa*, 1930 T.P.D. 526.

Where A's evidence does incriminate B, B may cross-examine him as of right.[79] In *S. v. Langa*[80] the question arose whether B had the same right of cross-examination if A's evidence did not incriminate him. Is B entitled to an opportunity to elicit evidence in his favour by cross-examining A? Harcourt J. in a persuasive judgment gave an affirmative answer, but Milne J.P. would have allowed only questioning not cross-examination.[81]

Another aspect of joint trials to be considered is the position where A has made a previous extrajudicial statement regarding B. Does the fact of a joint trial alter the ordinary rule that a witness's previous statements inconsistent with his present testimony can be put to him as impeaching his credit?[82] If A's previous statement incriminated B and was made to the police it may be inadmissible by virtue of the privilege of informers.[83] If not covered by that privilege, even though it is theoretically admissible only to destroy A's credit[84] it is submitted that for B's protection the statement should be totally excluded in the exercise of the court's discretion. In any event the fact that it is to be proved is a ground on which a separation of trials may be ordered.[85] If A's evidence incriminates B, no undesirable prejudice is caused if B is permitted to cross-examine him to show that he made a previous statement favourable to B,[86] though the consequent impeachment of A as a witness adversely affects his defence. If A's evidence has not incriminated B, it may be queried whether the adoption of Milne J.P.'s view on B's right to question only would include the possibility of establishing a previous statement favourable to B, as this is a procedure usually associated with the cross-examination favoured by Harcourt J.

2. Accused as a witness for the prosecution

The common-law incompetence of an accused person to testify for the prosecution at any stage of the proceedings continues for as long as he retains the status of an accused person.[87] The incompetence applies also to the preparatory examination, which today is no longer a mere investigation, but is focused on particular accused individuals.[88] The accused cannot be compelled to convict himself out of his own mouth, and the court's power to call witnesses may not be employed to call the accused for the purpose of strengthening the State case[89] even if he testified on his own application at an earlier stage of the proceedings.[90]

[79] *R. v. Beukhaus*, 1917 T.P.D. 35; *R. v. Bagas*, 1952 (1) S.A. 437 (A.D.). On where this occurs after B has closed his case, see *R. v. Sinclaire*, 1958 (3) S.A. 302 (W).
[80] 1963 (4) S.A. 941 (N).
[81] The judgment of Harcourt J. finds support in (1965) *Crim. L.R.* 419, and in R. Cross, *Evidence*, 3rd ed. (1967), p. 212. See, also, *S. v. Monese*, 1969 (1) P.H., H. 118 (N).
[82] Certainly the ordinary rule with some necessary modifications, applies where there is only one accused: *R. v. Glatberge*, 1959 (4) S.A. 266 (E).
[83] *R. v. Pillay*, 1944 N.P.D. 314.
[84] This principle appears to have been disregarded in this context by the Court of Appeal in *R. v. Rice* [1963] 1 Q.B. 857, [1963] 1 All E.R. 832 (C.C.A.).
[85] *R. v. Nathanyine*, 1946 A.D. 1101 at 1104–5; *R. v. Bagas*, 1952 (1) S.A. 437 (A.D.) at 442–3.
[86] But cf. *R. v. Seidl*, 1950 (3) S.A. 693 (O) at 694, and *R. v. Lieberlo*, 1958 (2) S.A. 481 (A.D.) at 489.
[87] There may be statutory exceptions to this principle, e.g. sec. 6 of Act No. 11 of 1896 (N) which makes accused persons competent witnesses for the prosecution on charges of faction fighting. For a suggestion that the common-law rule be abolished, see V. G. Hiemstra, 'Abolition of the Right Not to be Questioned' (1963) 80 *S.A.L.J.* 186.
[88] *R. v. Kimwelo*, 1952 (4) S.A. 432 (N).
[89] *R. v. Jumbe*, 1947 (4) S.A. 228 (C) at 230; *R. v. Narain*, 1954 (1) S.A. 509 (S.R.).
[90] *R. v. Meapane*, 1938 (3) S.A. 649 (O).

The common-law incompetence also prevents a prisoner testifying for the prosecution against a person charged jointly with him unless he first loses his own status as a co-accused,[25] though the processes by which he suffers this mutation are essentially 'technicalities'.[26] Where he thus becomes competent the rules of corroboration relating to accomplice evidence must be observed.[27]

A person indicted on a joint trial ceases to be an accused person for the purposes of giving evidence for the prosecution in the following ways:[28]

(a) By a separation of trials. Where persons are charged with the same offence but are indicted separately they are not co-accused and each may be called by the prosecution at the other's trial.[29] The same applies where they are indicted jointly and thereafter a separation of trials is ordered.[30] It is however highly undesirable for either to be called after he has been convicted but before he has been sentenced, as he then has an inducement to lean to the prosecution and prevaricate in the hope of obtaining a more lenient sentence. He remains competent but his evidence in these circumstances is almost valueless.[31] The fact that the State wishes to call one accused against the other is not a sufficient ground on which a separation of trials may be ordered.[32]

(b) By a plea of guilty. Where A and B are jointly indicted, if both plead not guilty, A cannot be convicted and sentenced until the case against B is concluded too, for the case is not to be tried in instalments. A remains a co-accused and incompetent.[33] If A pleads guilty and B pleads not guilty, the correct procedure as a matter of practice is that the trials should then be separated.[34] But a failure to separate the trials will not invalidate the calling of A to testify against B, even if A could not be convicted on his plea of guilty alone under section 258(1)(*b*) of the Code, as there is no longer any issue between him and the prosecution in relation to verdict.[35] There is still an issue between them as to sentence, unless he is sentenced, as is desirable,[36] before being called; if he is unsentenced may evidence he gives on his own behalf in mitigation of sentence may be admissible against B but, as against B, will be of almost no weight.[37]

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[25] See *R. v. Willem*, 1908 T.S. 537 at 538; *R. v. Roberts*, 1932 C.P.D. 87.

[26] *Ex parte Minister of Justice: In re R. v. Demingo*, 1951 (1) S.A. 36 (A.D.) at 48-9, per Van den Heever J.A.

[27] See below, pp. 966–98. Ed.

[28] See R. N. Gooderson, 'The Evidence of Co-Prisoners' (1952) 11 *Camb. L.J.* 209; H. C. Nicholas in (1956) 73 *S.A.L.J.* 104.

[29] *Pitzer v. R.* (1868) 14 L.T. 567.

[30] *R. v. Van Rhyn*, 1922 T.P.D. 52; *Ex parte Minister of Justice: in re R. v. Demingo*, 1951 (1) S.A. 36 (A.D.) at 39.

[31] *Demingo's* case, above.

[32] *R. v. Gabriele*, 1918 T.P.D. 45, per Greenberg J.

[33] *R. v. Willem*, 1908 T.S. 537 at 538; *R. v. Rasnek*, 1917 C.P.D. 255; *R. v. Fijfer*, 1918 C.P.D. 501; *R. v. Mostazan*, 1937 O.P.D. 105.

[34] *R. v. Lotoli*, 1927 E.D.L. 42; *R. v. Zoutle*, 1959 (3) S.A. 319 (A.D.) at 325.

[35] *R. v. Zoutle*, 1959 (3) S.A. 319 (A.D.) at 325.

[36] A failure to sentence him does not mean that he can claim an indemnity from prosecution under sec. 254. See *Ex parte Minister of Justice: In re R. v. Demingo*, 1951 (1) S.A. 36 (A.D.) at 39–40.

[37] In *R. v. Zoutle*, 1959 (3) S.A. 319 (A.D.) at 325, Holmes J.A. cited with apparent approval *R. v. Fotshowa*, 1930 T.P.D. 526 (where it was held that A's evidence in mitigation is not admissible against B), but went on to point out that the reason for the practice of separating the trials is to avoid prejudicing B by A's evidence. *Fotshowa*'s case in this respect is irreconcilable with *R. v. Rorke*, 1913 A.D. 145 (also quoted in *Zoutle* at 326) where A's evidence in his own defence, where he pleads not guilty, was held admissible against B. The fact that A pleads guilty would not seem to be a sufficient ground for holding the evidence inadmissible against B, who presumably can only claim a right to cross-examine A on his evidence in mitigation if it

(*c*) *By a nolle prosequi.* If the prosecutor enters a *nolle prosequi* against one accused, as is often done in consideration of his agreeing to give State evidence, he thereupon ceases to be a co-prisoner and may competently be called for the prosecution.[38]

(*d*) *By an acquittal.* If one co-accused is acquitted there is no longer any issue between him and the prosecution either as to verdict or sentence, and the same applies under section 8 of the Code, which provides that a withdrawal of the charge after plea entitles the accused to a verdict of acquittal. In both these cases the acquitted prisoner thereupon becomes competent to testify for the prosecution.[39]

VII. COMPELLABILITY OF ACCOMPLICE

The compellability of persons criminally associated with the accused in the commission of the offence charged is governed by section 254 of the Criminal Procedure Act,[40] which applies to both the preparatory examination and the trial.

This provision, recently amended several times, used to govern only persons believed to be accomplices,[41] but its net has now been widened to include any person who in the prosecutor's opinion[42] is an accomplice[43] and any person who in the prosecutor's opinion 'will be required to answer questions the reply to which would tend to incriminate him in respect of an offence mentioned by the prosecutor'.[44] These persons are not merely compellable but are in addition deprived of the privilege against self-incrimination, in the case of accomplices in so far as questions relating to the crime charged are concerned, and in the case of other persons, in respect of questions relating to the offence 'mentioned by the prosecutor'. They are not apparently deprived of the privilege for questions relating not to these but to other offences;[45] nor should they remain unprotected if their answers incriminate them both in the offence charged or mentioned and also in another crime.[46]

Provided the witness fully answers all such questions to the satisfaction of the court, he is entitled to an indemnity from prosecution in respect of the offence

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can be taken into account against him (B) (cf. *Lemmert* v. *S.*, 1969 (2) P.H., H. 210 (N.C.)); but the factors affecting the weight of A's evidence as against B (as pointed out in *Ex parte Minister of Justice: In re R.* v. *Demingo*, 1951 (1) S.A. 36 (A.D.)) remain. Finally, to exclude it would surely be illogical since *Demingo*, where a convicted but unsentenced accomplice was held competent *for the State*. If *Fatshona's* case is still good law, however, it may be queried whether A's evidence in mitigation of his own sentence could be admissible in B's favour.

[38] *R.* v. *Von Kleist*, 1923 T.P.D. 52; *R.* v. *Bool*, 1932 C.P.D. 398. ~~See further on the effect of a nolle prosequi, under Criminal Procedure, above, p. 000.~~

[39] *R.* v. *Janus* (1893) 5 E.D.C. 328; *R.* v. *Magqonsholo*, 1948 (2) S.A. 222 (E).

[40] Sec. 254 does not apply where such persons are also accused: *R.* v. *Roberts*, 1932 C.P.D. 87.

[41] See *R.* v. *Hubbard*, 1921 T.P.D. 433; *R.* v. *Ndabeni*, 1959 (2) S.A. 630 (E).

[42] If the prosecutor merely states that the State has information that the witness is an accomplice, the requirements of the section are satisfied: *S.* v. *Govender*, 1967 (2) S.A. 121 (N).

[43] This is the effect of the amendment by sec. 29 of the General Law Amendment Act, No. 80 of 1964.

[44] Added by sec. 8 of the General Law Amendment Act, No. 62 of 1966.

[45] The wording of the section criticized in this respect in *R.* v. *Nxumalo*, 1939 A.D. 1 at 4, has been tightened up. See *R.* v. *Ndabeni*, 1959 (2) S.A. 630 (E).

[46] Sec. 255 of the Code only excludes evidence of the answer relating to the *particular offence*. But see below, under 'Privilege', p. ~~000~~ 156.

charged or mentioned.[42] He answers 'fully' if his answers are frank and honest,[43] to the satisfaction of the judge alone, wherein the assessors are not concerned.[44] If he has done so, the provisions of section 254 are peremptory. The witness is entitled as of right to have an indemnity entered on the record,[45] and even if it has not been recorded he can raise it as a bar to prosecution,[46] unless he has *forfeited* the indemnity under section 254(3) by failing to give evidence at all stages of the proceedings where he is called. Where the indemnity is not earned, he remains liable to prosecution but his evidence cannot then be used against him.[47]

The prosecutor must inform the court that the witness's status is governed by section 254,[48] and if the witness has already been convicted of the offence the court should be told of this also, and that he pleaded guilty if such was the case, as these facts are relevant to the weight of his evidence.[49] Further, it is the practice for the court to inform the witness of the provisions of section 254, so that he is aware he may lose the protection promised by unsatisfactory testimony.[50] But failure to warn the witness is not an irregularity of which the accused in the case can complain, as it does not form part of the issues between the defence and the prosecution;[51] and by the same token the defence has no right to lead any evidence or to advance any argument to show that the witness is or is not entitled to his indemnity.[52] As far as a subsequent prosecution of the witness is concerned, a failure to warn could not operate as a bar to the charge. At most, on a somewhat strained analogy with *S. v. Lwane*,[53] the admissibility at his trial of his earlier unwarned evidence might be affected.

It should not be forgotten that where an accomplice testifies under section 254, his evidence will require corroboration in accordance with the mandatory and cautionary rules,[54] whereas in the case of the other type of witness contemplated by section 254, only caution, if he has a motive to misrepresent,[55] need be exercised. An accomplice who is awaiting trial,[56] or who has been convicted of the offence but not yet sentenced,[57] remains competent to testify for the State. But for him to do so in either case has been held by the Appellate Division to be undesirable. As a matter of practice he should be sentenced before being called, to remove any hope that his own punishment may be lessened by inventing or exaggerating the guilt of the accused. If his trial and sentence have not yet been

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[42] Sec. 254(2).

[43] *R. v. Nxumalo*, 1939 A.D. 1, per Watermeyer J.A. The learned Judge of Appeal used language which may be read as requiring that his evidence should in addition be accepted as correct, which would be unnecessarily stringent since he may be honestly mistaken or forgetful. The Appellate Division left open, in *Mchillion* v. *R.*, 1958 (2) P.H., H. 133 (A.D.), whether the frankness and honesty can only be judged at the end of the trial, so as to make an earlier granting of the indemnity incompetent.

[44] *Mchillion* v. *R.*, 1958 (2) P.H., H. 133 (A.D.); *R.* v. *D*, 1951 (4) S.A. 450 (A.D.) at 458-B.

[45] *R.* v. *Dongwana*, 1959 (2) S.A. 227 (A.D.); *R.* v. *Miners*, 1931 E.D.L. 96.

[46] *R.* v. *Sithambeli*, 1925 E.D.L. 177.

[47] *R.* v. *Ndabeni*, 1959 (2) S.A. 630 (E) at 637.

[48] *R.* v. *Mpalana*, 1944 E.D.L. 5; *Ex parte Minister of Justice: in re R.* v. *Domingo*, 1951 (1) S.A. 36 (A.D.).

[49] *R.* v. *Dongwana*, 1959 (2) S.A. 227 (A.D.) at 230; *R.* v. *Ndabeni*, 1959 (2) S.A. 630 (E) at 637.

[50] *R.* v. *Dongwana*, 1959 (2) S.A. 227 (A.D.); Schreiner J.A. mentioned at 230 that the absence of a warning could just conceivably impair the weight of the evidence, in appropriate circumstances.

[51] *Mchillion* v. *R.*, 1958 (2) P.H., H. 33. (A.D.).

[52] 1966 (2) S.A. 433 (A.D.).

[53] See below, p. 000.

[54] See below, p. 000.

[55] *R.* v. *Pervelet*, 1912 C.P.D. 928.

[56] *Ex parte Minister of Justice: in re R.* v. *Domingo*, 1951 (1) S.A. 36 (A.D.).

concluded, the possibility of some such inducement operating accordingly diminishes the weight of his evidence and increases the need for corroboration.[42]

VIII. COMPETENCE AND COMPELLABILITY OF ACCUSED'S SPOUSE

At common law the accused's spouse was incompetent to testify either for or against him or her, being disqualified both on the ground of interest and from being identified with him as a party to the cause,[43] though the rule did not apply where the offence charged was one against the spouse's person, liberty or health.[44] The general incompetence was removed in England at the same time as that of the accused.[45] In South Africa the matter is now comprehensively regulated by statute.[46]

For the purposes of determining competence, a spouse is restrictively defined as a person married to the accused by a ceremony which the law recognizes as valid for all purposes.[47] Potentially polygamous marriages are denied such *recognition* even where there is in fact only one wife,[48] and so are purely religious rites not celebrated in due form by a marriage officer.[49] Transkeian marriages by tribal custom were recognized by law for some purposes and the spouse of such a union was therefore accorded full recognition by the courts for the purposes of determining competency,[50] but section 22(3) of the Criminal Procedure Act has now declared these unions to be excluded from recognition for this purpose in the Transkei as in the rest of the country.

Section 227(1) of the Act renders the spouse of an accused a competent witness for the defence but only on the accused's application.[51] She cannot, moreover, be compelled to testify against her own will.[52]

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[42] See esp. the judgment of Cantliwres C.J. in *Domingo*'s case, above, at 42.

[43] See *O'Connor* v. *Marjoribanks* (1842) 4 Man. & G. 435 at 443, 134 E.R. 179 at 182. It is of interest to note that in Roman law, for analogous reasons, the slaves of a litigant or of his near relatives, *and his freedmen*, were incompetent to testify against him (W. W. Buckland, *A Textbook of Roman Law*, 3rd ed. (1963), pp. 66, 681).

[44] *D.P.P.* v. *Blady* [1912] 2 K.B. 89; *R.* v. *Blanchard* [1952] 1 All E.R. 114. There has been held to be no exception of competence in the case of treason (1 Brownl. & Golds. 47, 123 E.R. 656) but the matter is not free from doubt (see E. Cross, *Evidence*, 3rd ed. (1967), p. 142).

[45] See above, p. 000, 9.5.

[46] *In R.* v. *Hendriks*, 1910 W.L.D. 33, Smith J. held that as there was such statutory provision any reference to common law under the residuary section (now sec. 292 of the Criminal Procedure Act) was excluded. See, too, *Ex parte Minister of Justice: in re R.* v. *Deminga*, 1951 (1) S.A. 36 (A.D.); *R.* v. *Mpenze*, 1946 E.D.L. 28.

[47] The excessive rigidity of this definition of marriage in a multi-cultural society such as South Africa may be compared with the position in Kenya and Tanganyika, which have removed the distinction between monogamous and other marriages as far as testimonial competence is concerned. See H. F. Morris, *Evidence in East Africa* (1968), pp. 187–9. The learned author adds (at 190): 'Any distinction between polygamous and monogamous marriages which relegates the former to a status of something less than marriage proper, whatever its reason and justification in the law of England, is unrealistic, to say the least, in an African society.'

[48] *R.* v. *Umhlakaza* (1885) 5 *E.D.C.* 86; *Ndamo* v. *R.*, 1907 T.S. 407; *R.* v. *Mbobo*, 1910 T.P.D. 445.

[49] *R.* v. *Meolilah* (1913) 34 N.L.R. 208.

[50] *R.* v. *Gebeshe* (1904) 18 E.D.C. 67; *R.* v. *Matosha*, 1924 E.D.L. 199.

[51] *R.* v. *Smith* (1900) 9 H.C.G. 269. This applies also where the court would wish to call her as a witness: *R.* v. *Jambo*, 1947 (4) S.A. 228 (C). Notwithstanding *S.* v. *Greasbeek*, 1969 (4) S.A. 381 (G), it is submitted that if the spouse happens to be the co-accused, her evidence in her own defence is admissible against the accused though not given on his application.

[52] *Lord* v. *R.* [1912] A.C. 305 (H.L.). A contrary decision was reached in *R.* v. *John*, 1966 (2) S.A. 62 (R).

The general incompetence of the accused's spouse to testify for the prosecution remains unchanged, and applies even where in a joint trial she is called to testify not against her husband but only against his co-accused, for there is only one case and the accused spouse is a party to it.[74] At common law this general incompetence continues even after the termination of the marriage by death or divorce, if the events to which the spouse is to testify took place during the coverture.[75] Whether annulment has the same effect depends on whether the defect in the marriage made it void or merely voidable.[76] If the latter, then until it was avoided it was a marriage and the erstwhile spouse remains incompetent. On the other hand, if the marriage was void *ab initio* the parties to it were never married for the purposes of the spouse's competency as for all other purposes.[77]

The Criminal Procedure Act provides for certain exceptional cases where an accused's spouse may be called to testify for the prosecution. Even in these cases, of course, the spouse witness remains entitled to invoke the privileges of declining to answer particular questions conferred by sections 229 and 230.[78] Further, if the accused is charged with several counts, the spouse may properly be called by the prosecution to testify against him on some of these only, even if she is not competent in respect of all, though the defence may cross-examine her on all of them.[79]

Section 226(1) of the Act makes the spouse both competent and compellable where the accused is charged with offences against the person of either of them or of their children, with any offence under Chapter III of the Children's Act,[80] bigamy, incest, abduction,[81] certain offences under the Immorality Act,[82] and perjury or statutory perjury arising out of any of the aforegoing. Offences against the person of the wife comprise only those in the nature of an assault, not those which might otherwise offend or invade her rights.[83] It may have to be considered whether, in the case of statutory offences, the offence is created primarily in the public interest or principally for the protection of the spouse, for only the latter rank as offences against her person.[84] The actual facts of the offence alleged by the prosecution are not a relevant consideration, so that a charge of living on the proceeds of prostitution has been held not to be an offence against the person of the wife even if the earnings are hers and even if she has been forced by the

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[74] R. v. *Boap* (1883) 3 E.D.C. 227; *R.* v. *Mapatassa*, 1912 T.P.D. 91; *Dhlamini* v. *R.*, 1943 N.P.D. 312.

[75] *O'Connor* v. *Marjoribanks* (1842) 4 Man. & G. 435, 134 E.R. 179.

[76] The voidness or voidability of the marriage is of course tested by South African not by English law: cf. *Botes* v. *Van Deventer*, 1966 (2) S.A. 182 (A.D.) at 204.

[77] *R.* v. *Kahn*, 1928 C.P.D. 328; *R.* v. *Algar* [1954] 1 Q.B. 279 (C.C.A.). In the light of the criticisms in (1959) *Crim. L.R.* 687, the correctness of these cases seems open to severe doubt.

[78] See below, p. 000.163.

[79] *S.* v. *Batpi*, 1964 (4) S.A. 427 (E).

[80] Act No. 33 of 1960.

[81] The evidence excluded in *R.* v. *Kahn*, 1928 C.P.D. 328, would no doubt be admissible today at least on the alternative charge, and as abduction is an offence against the person should have been received there by virtue of the common law.

[82] Act No. 23 of 1957.

[83] *S.* v. *Dhlamini*, 1966 (4) S.A. 149 (N); *R.* v. *Lord Mayor of London* (1886) 16 Q.B.D. 772; *R.* v. *Blanchard* [1952] 1 All E.R. 114. In *R.* v. *Yeo* [1951] 1 All E.R. 864 a threat to murder the spouse was held not to be an offence against her person; but this was not followed in *R.* v. *Verolla* [1963] 1 Q.B. 285, an attempt to administer poison to the spouse and arguably much stronger on the facts.

[84] *R.* v. *Hunda*, 1956 (3) S.A. 695 (S.R.).

accused husband into prostitution.[85] The competence of the spouse is not to depend on whether or not her evidence is believed.[86]

The accused's spouse is made competent though not compellable where the charge is of an offence against her separate property or under section 16 of the Immorality Act.[87] No test of what is her 'separate property' is provided. A strict interpretation on the ordinary meaning of the words would apply it only to property excluded from any community of property between the accused and his spouse, but it seems generally agreed that a more generous construction is justified.[88] In *R.* v. *Young*,[89] the phrase was held to cover all rights of the wife including rights like possession falling short of ownership, and it has further been suggested[90] that the rights in property protected under the Matrimonial Affairs Act[91] should be similarly included.

Where the spouse is a competent but non-compellable witness, it is desirable for her to be informed of her position by the court so that she may decide intelligently whether or not she will testify.[92]

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[85] *R.* v. *Bonthuys*, 1922 T.P.D. 446; *D.P.P.* v. *Blady* [1912] 2 K.B. 89.

[86] Per Mason J. in *Bonthuys*, above, at 449. But there is force in the remarks of Lush J., dissenting, in *Blady*'s case, at 93: 'Until it is known what the evidence is it is impossible to say whether this particular offence does or does not involve such an injury to the person, liberty or health of the wife. It may do so, and that is enough, and if it does it is a wrong which may never be proved unless the wife can give evidence. In my opinion the proper course would have been to admit the evidence of the wife in this case, even though when admitted it might establish an offence against the State rather than the wife.'

[87] Act No. 23 of 1957.

[88] As Charles T. McCormick points out (*Handbook of the Law of Evidence* (1954), p. 154), the disqualification of the spouse to testify for the prosecution is 'an archaic survival of a mystical religious dogma [that husband and wife are one], and of a way of thinking about the marital relation, which are today outmoded'.

[89] 1936 T.P.D. 263.

[90] By A. P. O'Dowd, *Law of Evidence in South Africa* (1963), p. 145.

[91] Act No. 37 of 1953.

[92] *Naidoo* v. *R.* (1901) 22 N.L.R. 420; *R.* v. *Qongwana*, 1959 (2) S.A. 227 (A.D.) at 230.

CHAPTER 4

THE MANNER OF ADDUCING EVIDENCE

A. INTRODUCTION

It is a basic principle of the administration of criminal justice that an accused person should be confronted with the witnesses against him and afforded the opportunity of challenging their evidence. This principle is embodied in section 156(1) of the *Criminal Procedure Act*, which states that, subject to express exceptions, evidence at a criminal trial shall be given viva voce in open court and in the presence of the accused. Departures from this principle are few and should be limited in scope by narrow statutory construction.

~~The exceptional cases of a trial in the absence of the accused or in camera are discussed in the chapters on Procedure, above, where the general principle is also discussed.[1]~~ The oral testimony of witnesses is dispensed with, usually subject to safeguards and in the discretion of the court, to allow evidence to be taken on commission, or proof to be afforded by way of affidavits or certificates, as discussed below.[2] Even in these cases, however, the court retains its overriding power to ensure a fair trial, and may require oral evidence to be tendered instead.[3]

An accused person is entitled to be made aware of what evidence of his guilt is brought before the court. The judicial officer must therefore apply his mind to the question whether the accused understands the language in which the witnesses testify and must have an interpreter provided if necessary, even if the accused is represented.[4] In pursuance of the same general principle, the court may act only on the evidence properly presented to it at the trial. The judicial officer may not act on his own private knowledge of the facts, and indeed if he has any must at the least disclose the fact to the parties: his recusal may be necessary.[5] It is not irregular for the presiding judge to use such general knowledge and experience as all men would have,[6] but the dividing line between permissible and impermissible knowledge, though it cannot be defined with absolute clarity, must be observed.

The problem was considered by the Appellate Division in *R.* v. *Makeip*,[7] where, in order to test the identification of the accused as the criminal, the judge had privately inspected, measured and compared certain exhibits (a plaster cast of spoor found at the scene of the crime, and the accused's boot). This was found not to have been an irregularity, as the judge had in any event been under a duty to inspect the exhibits and his experiments to compare them had been of

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~~[1] pp. 000 and 000 respectively.~~
[2] p. [redacted] ff. See, also, in regard to tendering evidence which was given at the preparatory examination, p. [redacted] below.
[3] Sec. 210 of the Criminal Procedure Act.
[4] *Mackessack* v. *Assistant Magistrate, Empangeni*, 1963 (1) S.A. 892 (N).
[5] *S.* v. *Esso*, 1964 (3) S.A. 13 (N). Cf. *Thubela* v. *Pretorius N.O.*, 1961 (3) S.A. 506 (T).
[6] See above under Judicial Notice, pp. ~~000ff.~~ [illegible] ff.
[7] 1948 (1) S.A. 947 (A.D.).

a simple and obvious nature requiring no special skills. But Centlivres J.A. nevertheless commented:[8]

> 'I think it is desirable to lay down as a matter of practice that when a trial court pursues a line of investigation not pursued by either party, it should, before reaching a conclusion on the merits of the case, inform the parties of the line of investigation which it proposes to pursue and make the investigation in the presence of the parties. Such a practice will avoid any suspicion on the part of the unsuccessful party that his case has not been fairly tried because conducted in his absence.'

For the court to obtain information privately about the facts of the case, whether from persons who are witnesses or from others, is a gross irregularity.[9] If some evidence is heard at a trial and further accused persons are then joined, the evidence must be given again if it is to be admissible against them. Merely to have it read over is insufficient.[10]

Where an inspection *in loco* is held, if the court wishes to rely on the impression he there forms he must inform the parties of his conclusion so that they may if they wish call evidence to challenge it.[11] The judicial officer should not privately inspect the scene since it may influence him to draw adverse inferences,[12] but his fortuitous acquaintance with the locality is not necessarily an irregularity.[13]

Apart from the exceptional cases already mentioned, where certificates, affidavits or the depositions of absent witnesses are expressly permitted, witnesses must attend in person, give oral testimony and be available for cross-examination by the opposing party.[14] A written report cannot be handed in instead, as this would offend against the hearsay rule.[15] Nor may a witness himself merely hand in a report or document embodying his evidence.[16] Where he has such a document it may in appropriate cases be handed in as a convenient record of his oral testimony,[17] but oral testimony there must be, even if only to the effect that the witness confirms the contents of the document.[18]

It follows from the last point that the general requirement of viva voce evidence is not so rigorous as to exclude supplementing it by other means. In *R. v. R.*[19] a charge of *crimen injuria*, the female complainants were permitted to write down instead of speaking the words alleged to have been uttered by the accused, and the writing was then shown to the Court and to the defence.[20]

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[8] At 952–3.

[9] *Rowe* v. *Assistant Magistrate, Pretoria*, 1925 T.P.D. 361 at 366; *R.* v. *Lewis*, 1950 (1) S.A. 623 (E); *R.* v. *Maharaj*, 1960 (4) S.A. 256 (N); *S.* v. *Webb*, 1965 (1) P.H., L. 1 (T).

[10] *R.* v. *Charlie* (1885) 3 H.C.G. 492; *R.* v. *Singh*, 1918 C.P.D. 541; *R.* v. *Ramasala*, 1931 O.P.D. 25.

[11] *Forsdick* v. *Additional Magistrate, Durban*, 1938 N.P.D. 437; *R.* v. *Trotsky*, 1947 (1) S.A. 612 (S.W.A.); *Kruger* v. *Ludick*, 1947 (3) S.A. 23 (A.D.); *R.* v. *Smith*, 1949 (4) S.A. 782 (O). *R.* v. *Scoble*, 1958 (3) S.A. 667 (N). See, too, the odd case of *R.* v. *Du Plessis*, 1950 (1) S.A. 297 (O).

[12] *R.* v. *Mouton*, 1934 T.P.D. 101. English law differs; see *Salsbury* v. *Woodland* [1969] 3 W.L.R. 29 (C.A.).

[13] *Akoon* v. *R.* (1926) 47 N.L.R. 306; *Thubela* v. *Pretorius N.O.*, 1961 (4) S.A. 506 (T).

[14] *R.* v. *Bruwer*, 1951 (1) S.A. 253 (T).

[15] The rule against hearsay is discussed at pp. 883 ff., below. See, also, *S.* v. *Sensla*, 1962 (4) S.A. 706 (O); *S.* v. *Yibe*, 1964 (3) S.A. 502 (E); *S.* v. *Mvulisa*, 1965 (4) S.A. 113 (O); *S.* v. *Ngwenya*, 1966 (1) S.A. 668 (N).

[16] *R.* v. *Kannemeyer*, 1958 (3) S.A. 56 (C).

[17] *R.* v. *Smit*, 1946 A.D. 862 at 867; *R.* v. *Elijah*, 1963 (3) S.A. 86 (S.R.) esp. at 89.

[18] *R.* v. *Manda*, 1951 (3) S.A. 158 (A.D.); *R.* v. *Mbongwe*, 1954 (3) S.A. 1016 (T); *R.* v. *Birch-Moncrieff*, 1960 (4) S.A. 425 (T).

[19] 1953 (4) S.A. 364 (N). See, too, *R.* v. *Jenkinson*, 1926 E.D.L. 281.

[20] It is entirely different if the evidence has been written in advance before the witness is actually testifying, a practice which would facilitate the concoction of evidence (*R.* v. *Phalane*, 1926 T.P.D. 320).

Nor does the general principle exclude witnesses who are dumb and who testify by gestures and sign language.[31]

Ex parte statements from the bar may not take the place of evidence, being made neither on oath nor subject to cross-examination, and this applies also to evidence given before the trial (e.g. at the hearing of an application for bail) or after verdict in mitigation or aggravation of sentence.[32]

B. COMMISSION, INTERROGATORIES, CERTIFICATES AND AFFIDAVITS

1. Evidence on Commission

Where a witness's attendance in person to give evidence in any criminal proceedings would cause unreasonable delay, expense or inconvenience, application may be made to a superior court to dispense with the witness's attendance and to issue a commission to take his evidence.[33] The proceedings for which his evidence is desired may be adjourned until it has been obtained.[34]

This provision is permissive and confers a discretion on the court hearing the application.[35] Notice of the application must be given to the other parties to the proceedings.[36] The applicant must set out not only the facts to which the witness is desired to testify,[37] but also facts to satisfy the court as to the undue delay, inconvenience, or expense.[38] If these circumstances are not established, the court cannot act, even if both sides consent to the commission,[39] or even if the applicant undertakes to produce the witness in person at a later stage.[40] The procedure should be sparingly invoked, varying as it does the ordinary rules in criminal cases that a witness be examined personally before the court so that he may be cross-examined and his demeanour observed, and that an accused person be confronted with the witnesses against him. A commission should only be granted where no injustice can possibly be done to the other side.[41] Thus it should not be issued where the evidence of the proposed witness is a vital component of the case[42] or where the credibility and hence the demeanour of the witness is important.[43] On the other hand, a commission will normally be granted to take evidence of a purely formal nature, which is unlikely to require probing by cross-examination,[44] or which is merely introductory of and supported by documents that will form part of the deposition.[45]

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[31] R. v. Rautkulo, 1954 (3) S.A. 255 (O).
[32] *R. v. Nilsmare*, 1951 (2) S.A. 183 (C); *Standard Bank of S.A., Ltd.* v. *Minister of Bantu Education*, 1964 (3) S.A. 229 (N) at 242-3; *S.* v. *Van Rensburg*, 1968 (3) S.A. 622 (T) (on which see D. T. Zeffertt (1969) 86 *S.A.L.J.* 16, 283); *S.* v. *Smith*, 1969 (4) S.A. 175 (N). On the distinction between evidence and argument, see *Masilela* v. *S.*, 1968 (2) P.H., H. 265 (A.D.).
[33] Sec. 215(1) of the Criminal Procedure Act.
[34] Sec. 228.
[35] *R. v. Levy*, 1929 A.D. 312 at 331, 332.
[36] Sec. 225(1).
[37] *R. v. Patterson*, 1905 T.S. 93.
[38] *Attorney-General of South West Africa* v. *Kaulchowsky*, 1922 S.W.A. 23.
[39] *S. v. Tapsie* (1888) 6 *Cape L.J.* 110.
[40] *Attorney-General of South West Africa* v. *Kaulchowsky*, 1922 S.W.A. 23 at 24.
[41] *R. v. Levy*, 1929 A.D. 312 at 331; *R. v. Pincop*, 1913 T.P.D. 1140; *R. v. Gibson*, 1916 T.P.D. 137; *Attorney-General* v. *Morrison*, 1933 N.P.D. 741. The principle is otherwise in civil cases, as to which see *Robinson* v. *Randfontein Estates Gold Mining Co., Ltd.*, 1918 T.P.D. 420. As to the local availability of the evidence, see *Jokl* v. *Alexander*, 1947 (3) S.A. 542 (W); *Blad* v. *Bazwell Brothers Circus (Pty.) Ltd.*, 1952 (2) S.A. 198 (N).
[42] *R. v. Pincop*, 1912 T.P.D. 1140; *R. v. Levy*, 1929 A.D. 312 at 331.
[43] *R. v. Levy*, 1929 A.D. 312 at 331; *Attorney-General* v. *Morrison*, 1933 N.P.D. 741.
[44] *R. v. Gibson*, 1916 T.P.D. 137; *Attorney-General* v. *Morrison*, 1933 N.P.D. 741 at 746; *Attorney-General* v. *Roberts*, 1944 N.P.D. 3.
[45] *Ex parte Attorney-General: in re R. v. Riedl*, 1931 O.P.D. 44.

Where the commission is granted on the application of the prosecution, in the discretion of the court the State may be ordered to bear the accused's costs of representation at the examination.[38] The accused's entitlement to this assistance is not automatic: he must put forward his lack of means to show he would otherwise be prejudiced in his defence.[39]

If the court grants the application and the witness is within the Republic, a commission is issued to a magistrate, who takes down the evidence in the same way as in a preparatory examination.[40] If the commission is to be executed outside the Republic, the rules governing commissions *de bene esse* apply.[41] After having been executed, the commission must be returned, with the witness's deposition, to the court issuing it. It is then open to the inspection of both parties and it may be read in evidence and subjected to objections as to admissibility.[42] It is only then that the deposition becomes part of the evidence on record in the proceedings.[43] It should not be supplied to the court before the trial, but heard for the first time with the other evidence.[44]

Where a foreign court requires evidence to be taken from a witness in the Republic, a similar procedure is provided for by the Foreign Courts Evidence Act, 1962.[45]

2. Interrogatories

Any party to criminal proceedings in which a commission is issued may transmit interrogatories relevant to the issue to the person directed to take the evidence, who must examine the witness on the interrogatories.[46] The witness may also be orally examined by or on behalf of any party to the proceedings in the same way as if he were testifying in court.[46]

Interrogatories may also be submitted by the court under section 239 of the Code, which provides for the admissibility in certain cases of affidavit evidence.[47] The court to which such an affidavit is produced may in its discretion require oral evidence from the deponent or may cause written interrogatories to be submitted to him. The interrogatories and any reply purporting to be from the deponent are admissible as evidence in the proceedings, subject of course to the exclusionary rules.[47]

3. Certificates

Where a statute provides for certificates to be admissible in evidence, the provisions of that statute must be strictly observed, whether as to the form, content or signatory to the certificate.[48] The purpose of such provisions is to reduce the inconvenience and expense which would be occasioned were the personal attendance in court of officials invariably insisted on. It is therefore unnecessary to have evidence authenticating the seals or signatures on a

[38] Sec. 235(1).
[39] *Attorney-General* v. *Govey*, 1928 C.P.D. 262. The accused's lack of means was accepted in *R.* v. *Swaggie*, 1914 T.P.D. 128, and *R.* v. *Tiny Tim*, 1914 T.P.D. 503.
[40] Sec. 236(2).
[41] Sec. 235(2). See *R.* v. *Tiny Tim*, 1914 T.P.D. 505; *Attorney-General of South West Africa* v. *Katzakowsky*, 1922 S.W.A. 23 at 26.
[42] *R.* v. *Sachaldi* (2), 1956 (2) S.A. 717 (W).
[43] *"S.S. Hilkreag"* v. *Beckett* (1902) 23 S.C. 450.
[44] Act No. 80 of 1962.
[45] Sec. 236(3).
[46] *Wood* v. *Van Rensburg*, 1921 C.P.D. 36.
[47] *R.* v. *Smit*, 1912 C.P.D. 618; *R.* v. *Nel*, 1913 E.D.L. 320.
[47] Sec. 237.
[48] Sec. 236(1).
[48] See below, p. 000.

certificate unless these are challenged,[49] and certificates may be put in from the bar.[50]

As a rule certificates are received only in proof of formal matters which are unlikely to be challenged,[51] but provision is occasionally made for calling the maker of the certificate to give oral evidence and be cross-examined on it. It is almost always provided that the certificate is prima facie evidence of its contents, so that its truth may be relied upon unless challenged. Where its accuracy is disputed, the evidence in contradiction must be such as to [illegible] that it would be unsafe to rely upon the certificate. If the evidence does not create such a conviction in the mind of the court, the statutory prima facie weight remains undisturbed.[52] What evidence will [illegible] to challenge a certificate successfully is a question of the circumstances in [illegible] case, but factors relating to the source of the maker's knowledge will usually be relevant.[53]

4. Affidavits

The admissibility of affidavits in lieu of oral testimony is increasingly permitted under statutory exceptions to the general principle that evidence be given viva voce and subject to cross-examination.

Apart from special statutes, section 239 of the Criminal Procedure Act allows evidence to be tendered by way of affidavit to establish that something has or has not transpired in a public office, court of law or bank; that information was or was not furnished to an official; that a [illegible] registration has or has not taken place; a large range of topics of a scientific or technical nature, covering the physical, biological and forensic fields of knowledge; and to establish the accuracy of railway consignment notes. In every case it must be read in open court so as to be brought to the knowledge of the other side.[54]

The affidavit must comply strictly with the provisions of the section, and must confine itself narrowly to the matters regarding which it is permitted.[55] It should contain as full details and explanations as oral evidence on the same points would provide.[56] The court is given the power under section 239(6) to require the deponent to attend and testify in person, or to submit interrogatories to him, and should exercise these powers whenever the affidavit requires elucidation or expansion.[57]

As to the attesting of affidavits, reference should be made to the Justices of the Peace and Commissioners of Oaths Act, 1963,[58] and the government notices issued thereunder.

[49] Sec. 253. See below, under Documentary Evidence, p. 000. [illegible] and S. v. Ismail, 1970 (2) SA. [illegible].
[50] *R. v. Chipper*. 1914 C.P.D. 991.
[51] e.g. sec. 28 of the General Law Amendment Act, No. 32 of 1952 (times of sunrise and sunset); sec. 154(6) of the Insolvency Act, No. 24 of 1936 (date of sequestration or rehabilitation); secs. 249 and 303bis of the Criminal Procedure Act (previous convictions of accused).
[52] *R. v. Chisali*, 1960 (1) S.A. 435 (A.D.) at 442.
[53] Per Steyn J.A. in *R. v. Chitsh*, 1960 (1) S.A. 435 (A.D.), commenting upon *R. v. Gill*, 1950 (4) S.A. 199 (C) at 201-2.
[54] *R. v. Schabir* (1883) 2 S.C. 267.
[55] *R. v. Pella*, 1956 (1) P.H., H. 39 (C); *R. v. Van Coller*, 1953 (4) S.A. 116 (T); *S. v. Hancock*, 1969 (3) S.A. 602 (N). Cf. *S. v. Nkosi*, 1968 (2) P.H., H. 181 (N). See also below, under hearsay evidence in documents of companies and associations, p. 000. 101
[56] *Kirkpatrick v. R.*, 1958 (1) P.H., G. 158 (C); *S. v. Yamba*, 1964 (1) S.A. 642 (N); *S. v. Ndhlovu*, 1965 (3) S.A. 390 (N).
[57] *R. v. Maude*, 1951 (3) S.A. 158 (A.D.).
[58] Act No. 16 of 1963, replacing the Justices of the Peace and Oaths Act, No. 16 of 1914. See, also, *R. v. Bulah*, 1955 (3) S.A. 276 (A.D.), and the authorities collected in *Royal Hotel, Durban v. Liquor Licensing Board*, 1966 (2) S.A. 661 (N).

C. REAL EVIDENCE

Objects produced to the court as exhibits have been called real evidence. As a rule such exhibits are of little evidential value unless accompanied by testimony.[59] For example, the witness producing the exhibit will testify that it was found at the scene of the crime, or bears the accused's fingerprints, or, if he is the complainant, that it is the object which was stolen from him. Evidence concerning objects may be received without the objects having to be produced as exhibits. Thus in *R. v. Smit*,[60] where the accused was charged with stealing a motor-car, there was evidence from a fingerprint expert that he had found the accused's fingerprints on the window of the car and on an empty brandy bottle left in it. Neither the bottle nor a photograph of the prints was produced, but the expert's evidence was nevertheless admitted. While it would certainly have made it easier for the court to follow and appreciate the evidence had it been able to inspect these objects, the failure to produce them was held to affect only to the cogency of the testimony.

The principle of *R. v. Smit* may apply to documents if they are tendered as things, as, for example, where theft of a document is in issue. If, however, the issue turns on the contents of the document, secondary evidence concerning its terms is inadmissible and the original document itself must be produced.[61] By the same token, if a thing is in the nature of a document, because words inscribed upon it are in issue, then primary evidence—the thing itself with its inscription—must be per ju ved.[62]

The appearance of a person who is in court is real evidence of his race for the purposes of the various statutes under which racial classification is necessary.[63] A child's appearance may be evidence of his age for the purposes of a judicial estimate under section 383 of the *Criminal Procedure Act, 1955*.[64] A physical resemblance between persons is some evidence of relationship where descent or legitimacy is in issue, though it is of trifling weight.[65] The observable bodily features of the accused or complainant—e.g. the scars or marks he bears, his strength, height, and so forth, are part of the evidence before the court.[66] In addition to what the court can itself observe, provision is made for fingerprints, palm-prints, and footprints to be taken, and for physical and psychiatric investigation of the accused to be undertaken if necessary without the accused's consent being required.[67] The prints and the results of such investigations of

[59] If exhibits have not only been put in evidence but also their functioning demonstrated, this fact is likewise part of the evidence and must be recorded: *Olivier v. R.*, 1945 O.P.D. 10.

[60] 1952 (3) S.A. 447 (A.D.). See, also, *Bhagwan v. Rex N.O.*, 1947 (3) S.A. 560 (T).

[61] See below, under Documentary Evidence, p. 400, *ii*, 2.

[62] *R. v. Smit*, 1952 (3) S.A. 447 (A.D.) at 455.

[63] *R. v. Fakir*, 1938 A.D. 237; *R. v. Abel*, 1947 (2) S.A. 778 (C); *R. v. Vilbro*, 1957 (3) S.A. 523 (T); *R. v. Wyngaard*, 1956 (2) S.A. 372 (C). The judicial officer should record his conclusion as to appearance, and inform the defence of it (*R. v. D.*, 1954 (2) S.A. 462 (T)). Unless the statute requires the court to decide a person's race on his appearance, evidence of his racial appearance may be given without him being produced to the judicial officer (*Drury v. R.*, 1906 T.S. 640). That a woman's children appeared to be half-castes was regarded as evidence of miscegenation in *R. v. Muller*, 1934 T.P.D. 9.

[64] *R. v. Koplan*, 1942 O.P.D. 232.

[65] *Kema v. Estate Kema* (1902) 17 E.D.C. 39; *R. v. Bentlie*, 1932 G.W.L. 40; *R. v. Ismi*, 1949 (1) S.A. 298 (G.W.); *Mountford v. Mukakomiki*, 1960 (2) S.A. 56 (R.A.D.).

[66] *Ex parte Minister of Justice: in re R. v. Masemola*, 1941 A.D. 73 at 82; *R. v. Khan*, 1967 (2) S.A. 324 (N); and cf. *R. v. Venniker*, 1939 T.P.D. 101.

[67] Secs. 289, 290, 291 of the Criminal Procedure Act.

course have to be proved by the person who took them.[68]

A person's clothing may also be evidence, which is why the accused should not be produced in the dock wearing prison clothes or manacles, as this has been held to be equivalent to leading evidence of his bad character or previous convictions.[69]

Photographs of relevant scenes or objects may be handed in provided there is evidence from the photographer identifying their subject-matter, and he may of course be examined as to whether they have been retouched in any way.[70] A photograph or accident plan of the scene of the crime containing a reconstruction of events, if admissible at all,[71] should not be shown to witnesses, as it would suggest to them the evidence required from them.[72] Where a film or photograph is taken by purely mechanical means, without human agency, it is admissible even though evidence as to its making cannot be given as it would be by a cameraman.[73]

Tape recordings of speeches or conversations are admitted as real evidence, and must be accompanied by testimony identifying the voices and the occasion; in addition, the person who made the recording must prove that it has not been tampered with.[74] It is desirable that there should be evidence as to the circumstances and manner in which the tape was made, as these factors affect the weight and quality of the tape as evidence.[75] A transcript of the tape, and translations if it records speech in a foreign language, may also be received if their accuracy is established.[76]

Although the purpose of an inspection *in loco* held by the court[77] is usually said to be to enable the presiding officer to appreciate more readily the testimony of the witnesses,[78] it has also been recognized that the court does thereby acquire information at least analogous to real evidence and of a particularly vivid and cogent kind.[79] Unlike in England, however, the courts in South Africa do not admit information so acquired to outweigh all other evidence so as to found a judgment on it alone.[80] More dubious, both on principle and on authority, are

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[68] Official records of fingerprints are admissible on their mere production, and extracts from them may even be proved by telegram, under sec. 204 of the Criminal Procedure Act.

[69] *In re Trotter M.O.* (1891) 6 H.C.G. 94; *S. v. Stevens*, 1961 (3) S.A. 518 (C).

[70] *R. v. Maqand Alli* [1966] 1 Q.B. 686, [1965] 2 All E.R. 464 (C.A.). The photographer's evidence would obviously not be required if the photographs are relevant as objects, e.g. they were found in the accused's possession or at the scene of the crime. The admissibility of X-ray plates is discussed in (1969) 40 *Mississippi L.R.* 241 at 251.

[71] A filmed reconstruction was excluded in *R. v. Quinn and Bloom* [1962] 2 Q.B. 245, [1961] 3 All E.R. 80, since the danger of inaccuracy was overwhelming. As to a police accident plan, see *Mahabirsw v. Rondalia Assurance Corp. of S.A., Ltd.*, 1969 (2) S.A. 254.

[72] *R. v. Mbokeke*, 1921 W.L.D. 59; *R. v. Pretorius*, 1930 N.P.D. 352.

[73] *'Sapporo Maru' v. 'Statue of Liberty'* [1968] 1 W.L.R. 739.

[74] *R. v. Keck*, 1955 (3) S.A. 26 (T); *R. v. Behrman*, 1957 (1) S.A. 433 (T); *S. v. Peake*, 1962 (4) S.A. 288 (C).

[75] *R. v. Peake*, 1962 (4) S.A. 288 (C).

[76] *R. v. Behrman*, 1957 (1) S.A. 433 (T); *R. v. Maqand Alli* [1966] 1 Q.B. 686, [1965] 2 All E.R. 464 (C.A.); *Nel v. S.*, 1968 (1) P.H., H. 49 (A.D.).

[77] As to which see generally [illegible] (1940) 57 *S.A.L.J.* 243.

[78] *R. v. Seopeng*, 1949 (4) S.A. 978 (N); *R. v. Holland*, 1950 (3) S.A. 37 (C).

[79] *Goldrank v. Magpie and Weeds, Ltd.*, 1927 T.P.D. 723; *R. v. Van der Merwe*, 1950 (4) S.A. 17 (O) (and see H. C. Nicholas (1951) 68 *S.A.L.J.* 8); *East London Municipality v. Van Zyl*, 1959 (3) S.A. 514 (E).

[80] *R. v. Streeksamp*, 1947 (1) S.A. 711 (E.W.A.); *Kruger v. Ludick*, 1947 (3) S.A. 23 (A.D.). Contra, apparently, is *Olivier v. R.*, 1945 O.P.D. 10. As to the position in England, see *Buckinghamw v. Daily News, Ltd.* [1956] 2 Q.B. 534, [1956] 2 All E.R. 904 (C.A.), and *Yeneshwar v. R.* [1957] A.C. 476, [1957] 2 All E.R. 685 (P.C.).

the South African decisions which hold that what is said and done by witnesses at the inspection *in loco* is not evidence at all.[85] In this respect the English law seems preferable.[86]

D. EVIDENCE OF READINGS MADE BY MECHANICAL, ELECTRIC OR ELECTRONIC INSTRUMENTS

There is no presumption of fact that measuring instruments are usually reliable.[87] Van den Heever J. explained why not in *R.* v. *X*,[88] where, without more, evidence of a speedometer reading was tendered:

> 'I have seen thermometers registering blatant falsehoods. I have seen aneroids and clocks not functioning at all, or faultily. To my mind the creation of an individual instrument at any particular time, when itself *directly* in issue, do not carry conviction. . . . Most legislators have taken elaborate precautions in regard to standards of weight and measure to protect the citizen's pocket. I do not think it was intended to jeopardise his liberty by such slapdash methods as these.'

While, therefore, the courts will receive evidence of readings taken by instruments, without any principle analogous to the rule against hearsay being invoked,[89] a foundation for its reception should first be laid. If the reading was given by an instrument with which the average citizen is familiar, such as a stopwatch, there must be evidence that its accuracy was tested.[90] If it is a less familiar instrument of a technical or specialist nature, there must be clear evidence, including expert evidence, to establish that the instrument is of a kind capable of giving an accurate measurement, and it must then be proved that the particular model from which the reading in the case was taken was at the time operating reliably and accurately.[91]

E. DOCUMENTARY EVIDENCE

1. Primary and Secondary Evidence: the Best Evidence Rule

The terms 'primary' and 'secondary' are sometimes applied to oral as well as documentary evidence, being used to indicate respectively whether best evidence of a matter is being given or a relatively inferior substitute. In respect of oral evidence the distinction is more accurately made by the terms 'original evidence' and 'hearsay', leaving the terms 'primary' and 'secondary' applicable exclusively to the field of documentary evidence.[92] Where a document which is relevant is itself produced to the court, it is said to be primary evidence of its

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[85] *R.* v. *Van der Merwe*, 1950 (4) S.A. 17 (O) at 20. *Kruger* v. *Ludick*, 1947 (3) S.A. 23 (A.D.) at 31, could be read as implicitly supporting *Van der Merwe*. But in *R.* v. *Kumalo*, 1950 A.D. 193, it was held that a confession made by the accused to the judge in open court was evidence in itself which could be taken into account. What is stated by witnesses at the inspection *in loco* before the judicial officer and in the presence of the accused would seem to be indistinguishable, at least if they have been sworn. See, also, H. C. Nicholas (1951) 68 *S.A.L.J.* 8, commenting on *Van der Merwe*'s case.

[86] See *Karuppan* v. *R.* [1956] A.C. 257, [1956] 1 All E.R. 415 (P.C.); *Tameshwar* v. *R.* [1957] A.C. 476, [1957] 2 All E.R. 685 (P.C.).

[87] *R.* v. *Mensah*, 1959 (1) S.A. 771 (C) at 773.

[88] 1958 O.P.D. 155 at 158, 159.

[89] Any such argument was firmly rejected in *'Sapore Mare'* v. *'Status of Liberty'* [1968] 1 W.L.R. 729.

[90] *Downing* v. *R.* (1922) 43 N.L.R. 139; *R.* v. *Veale*, 1924 *T.P.D.* 447.

[91] *S.* v. *Corrin*, 1961 (4) S.A. 393 (O); *S.* v. *Margolin*, 1964 (4) S.A. 579 (T); *S.* v. *Lucas*, 1968 (2) S.A. 393 (G); *R.* v. *Harley*, 1960 (2) S.A. 193 (R.A.D.). There is an article on 'The Gatometer' by J. D. van der Vyver in (1965) *28 T.H.R.-H.R.* 15.

[92] See *Vulcan Rubber Works (Pty.) Ltd.* v. *S.A.R. & H.*, 1958 (3) S.A. 286 (A.D.) at 296.

own contents; where some derivative, inferior or substitute proof of its contents is offered, the evidence is said to be secondary.

Where the contents of a document are in issue, proof of those contents must be afforded by the production of the document itself, to the exclusion of secondary evidence. This insistence on primary evidence, while historically *antedating* the formulation of the "best evidence" rule, is today cited as the only remaining survival of that rule. Where it applies, no evidence of the document's contents other than the document itself is admissible. Thus, evidence as to who was shown in the Deeds Registry as registered owner of property was held inadmissible in *R. v. Halem*,[97] as the title deeds themselves should have been produced, and in *R. v. Pelunsky*[98] the Appellate Division refused to admit the counterfoils of lottery tickets as proof of the contents of the tickets. The case of two counterfoil copies tendered in *Pelunsky* should be distinguished from cases where an instrument is at its making actually executed in duplicate, which brings into existence more than one original.[99] A shorthand writer's notes subsequently transcribed are not the original writings but merely stages in the production of the original, so that it is the transcript which is primary evidence.[100]

The principle *is of application only* where the document is in itself the best evidence, so that it does not by its very nature suggest the existence of better evidence. The mere fact that a relevant document exists does in itself mean it is primary evidence of *its contents, e.g. minutes* of a meeting are secondary ev...nce of the fact that it was held, whereas oral evidence from a person who attended would be primary evidence.[101] By the same token, no document need be produced if the issue is whether a *particular relationship* or status existed, even if the relationship or status has been defined in a written instrument, since it is said that the terms of the writing are not in issue. Thus, the issue of whether payments were made as royalties or as remuneration *for services* was held, in *Firestone S.A. (Pty.) Ltd. v. Genticuso A.G.*,[102] not to require production of the agreement defining the relationship between the giver and the recipient.

> "[W]here there is no question of the terms of a document, where all that is sought to be established is the fact of some relationship between the parties [to it], the rule of best and secondary evidence does not come into operation at all; the fact of the relationship may be proved by parol evidence, although the terms which govern it may have been reduced to writing. Such evidence may be convincing in varying degree, and it may not be as convincing as the production of the document itself, but it is not incompetent because it is parole, and it is not secondary evidence in the sense of the rule."[103]

Where the contents of the document are what is in issue, production of the primary evidence normally required may be excused in certain circumstances and

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[97] 1949 (3) S.A. 274 (T). The Court pointed out that a certified extract from the Deeds Registry could also have been received, under sec. 261 of the Criminal Code. But see *R. v. Meyer*, 1946 T.P.D. 472.

[98] 1916 A.D. 360.

[99] Lyner v. *International Trade Developer, Inc.* (1922) 43 N.L.R. 301; *Kiddie v. Attorney*, 1924 C.P.D. 229.

[100] *R. v. Moll*, 1960 (2) S.A. 458 (N) at 463–4.

[101] *S. v. Maele*, 1966 (4) S.A. 401 (N) at 405. See, too, *Ex parte Commissioner of Child Welfare: In re Schmidt*, 1956 (4) S.A. 787 (T) at 791. Minutes of meetings are made admissible, to prove the meeting, by sec. 65(2) of the Companies Act, No. 46 of 1926, and by sec. 263(a) of the Criminal Procedure Act.

[102] 1968 (1) S.A. 611 (A.D.) at 626–5.

[103] Per Innes-Wilson J.P. in *R. v. Murenzy* (1918) 39 N.L.R. 29 at 31. See, also, *R. v. Kerrie* (1917) 38 N.L.R. 259; *Suleman v. R.* (1923) 44 N.L.R. 223 (*contra Motlabe v. Mohet*, 1921 T.P.D. 343); *Union Government v. Labbe*, 1927 T.P.D. 455; *R. v. Hendricks*, 1934 A.D. 338.

secondary evidence received. These exceptional situations are four:

(*a*) Where production of the original document is impossible, either legally or physically. Secondary evidence is therefore admissible where, for example, it would be an offence to remove the document from its present location,[95] where it is so affixed as to be irremovable,[97] or where it has been lost and cannot be found after proper search.[98] A document is not considered to be lost where there is still a hope, albeit only a sanguine one, of its recovery.[99] The loss and the adequacy of the search must be established before the secondary evidence is put in.[1]

(*b*) Where the document is outside the jurisdiction of the court and either all reasonable efforts to procure it have been made and have failed, or it can be demonstrated that any such efforts are doomed to failure.[2]

(*c*) Where the other party has admitted the contents of the document or has consented to the introduction of secondary evidence.[3] The ordinary rules of judicial admissions in criminal cases will apply. A mere failure to contest the admissibility of the secondary evidence is not to be construed as a consent,[4] nor is an admission of the accuracy of the secondary evidence.[5]

(*d*) Where the document is in the possession of the other party who has failed or refused after notice to produce it.[6]

In any of the foregoing cases where primary evidence is dispensed with, any type of secondary evidence may be tendered—copies, oral evidence, etc. At common law there are no degrees of secondary evidence.[7] However, where by a statute secondary evidence of a particular type is rendered admissible in a situation where at common law the original would be required, other forms of secondary evidence remain excluded. For example, although the Motor Carrier Transportation Act, 1930, relaxes the common-law insistence on the original document by authorizing the production in evidence of a certified copy of a licence issued under the Act, oral evidence of the contents of the licence cannot be received.[8]

[95] *R. v. Zenge*, 1953 (4) S.A. 660 (N), applying sec. 7(1)(*f*) of the Motor Carrier Transportation Act, No. 39 of 1930, as amended

[97] *Watts v. R.* (1919) 40 N.L.R. 108.

[98] *Re Thawley*, 1902 T.S. 190.

[99] *Ex parte Roche*, 1947 (1) S.A. 678 (D). Milne J.P. considered (at 683) that a document was lost "although its existence is presumed, the precise place of its existence cannot be ascertained or by anyone who can reasonably be expected to have known it, and it cannot be found after reasonable search".

[1] *R. v. ... and & Co. (Pty.) Ltd.*, 1947 (3) S.A. 32 (A.D.).

[2] *R. v. Vaughan & Co., Ltd.*, 1919 T.P.D. 77. Where the military authorities refused to give up to the ordinary courts the records of a charge under martial law, the record was proved by secondary evidence, in *R. v. Van der Merwe* (1902) 19 S.C. 437, as the courts had no jurisdiction to compel production from the military.

[3] Dilcock v. *R.*, 1946 N.P.D. 449; *R. v. Pierce*, 1956 (1) S.A. 183 (T); *R. v. Nhlanhla*, 1960 (3) S.A. 568 (T).

[4] *R. v. Renew*, 1915 T.P.D. 239; *R. v. Sinuley*, 1954 (3) S.A. 641 (C).

[5] *R. v. Pelunsky*, 1914 A.D. 360 at 362. See, too, *Dalpleich v. Israel*, 1909 T.H. 229; *Long v. Long*, 1946 W.L.D. 353.

[6] *R. v. Rudzwill* (1902) 19 S.C. 195; *Pitt v. R.*, 1912 E.D.L. 41; *R. v. Green*, 1911 C.P.D. 823; *Mbilika v. Pietermaritzburg Corporation* (1915) 36 N.L.R. 346; *R. v. Sc thall*, 1921 T.P.D. 403.

[7] *Doe d. Gilbert v. Ross* (1840) 7 M. & W. 102, 151 E.R. 676; *R. v. Frass*, 1923 C.P.D. 310. But see *Mahona v. Brakpan Municipality*, 1956 (1) S.A. 182 (T), and *S. v. Bachelard*, 1969 (2) S.A. 116 (N), as to the degree of precision the secondary evidence is required to possess.

[8] *Mahona v. Brakpan Municipality*, 1956 (1) S.A. 179 (T); *S. v. Nagtewaal*, 1968 (1) P.H. H.96 (B). Copies and extracts of public documents are made generally admissible under sec. 285 of the Criminal Code.

2. Proof of Documents

The manner in which a document may be put in evidence is governed by rules quite distinct from those governing the evidentiary use which may be made of the document. We are concerned here only with the former. The effect of a document once it is properly before the court—for example, whether it is evidence of its contents or whether it may be put to a witness to attack his credibility or used by him to refresh his memory—is a separate question.

Documents may be of two kinds, distinguished according to the manner by which they become evidence. The one category consists of those documents which need not be authenticated by a witness producing them and testifying to their execution, i.e. they are documents which 'prove themselves' and become evidence on their mere production. The other category covers documents which require authenticating evidence for their reception.

The documents which prove themselves are almost exclusively public or official.[9] At common law public documents coming from the proper official custody are admissible in evidence on their mere production,[10] and in addition statutes requiring the keeping of records or registers or the issue of licences or certificates generally provide that the documents prepared thereunder prove themselves.[11] Proof of the genuineness of official signatures and seals is not a prerequisite of admissibility unless it is challenged.[12] Production of the original of official documents from a State official requires the consent of the attorney-general;[13] copies can be obtained and are admissible,[14] but are not self-identifying. However, if they are authenticated by way of an official certificate the latter apparently proves itself.[15]

The foregoing does not apply to foreign official acts, for the public documents of a foreign country always require authentication.[16]

The only private documents which prove themselves are those that are authenticated by their age, partly because (it is said) it is unlikely that anyone would forge a document which would only be of assistance many years later, and partly because of the difficulty or impossibility after the lapse of a long period of obtaining a witness who could give authenticating evidence. Accordingly, the ancient documents rule provides that documents more than twenty years old,[17] coming from the proper custody and which are not on their face suspicious, become evidence without proof of their due execution.[18] A foundation for their reception must of course be laid by evidence as to the age[19]

[9] Reference should also be made to the rules of State-privilege, below, p. 600, and judicial notice, above, p. 200.

[10] *Adamthwaite* v. *Synge*; (1816) 4 Camp. 371, 171 E.R. 118; 1 Stark. 183, 171 E.R. 440.

[11] e.g. sec. 377 of the Criminal Code; sec. 16 of the Price Control Act, No. 25 of 1964; sec. 2 of the Maintenance Amendment Act, No. 19 of 1967.

[12] Sec. 253 of the Criminal Procedure Act; *Doe d. Williams* v. *Lloyd* (1840) 1 M. & G. 671, 133 E.R. 501; *Johnson & Jervis* v. *Magistrate N.O.* (1909) 30 N.L.R. 396.

[13] Sec. 262 of the Criminal Procedure Act.

[14] Secs. 261, 263.

[15] Secs. 261, 263.

[16] *Greef* v. *Verreaux* (1929) 1 M. 151; *Benjamin* v. *Benjamin* (1881) 1 E.D.C. 273 at 278; *Bass* v. *Rathouse*, 1908 T.S. 58; *R.* v. *Sherrin*, 1913 T.P.D. 474 at 476; *Bloemfontein Board of Executors* v. *Richtsey*, 1930 O.P.D. 3; sec. 280.

[17] The previous period of thirty years was altered by sec. 5 of the Evidence Act, No. 14 of 1962, as read with sec. 44 and the Schedule to the Civil Proceedings Evidence Act, No. 25 of 1965.

[18] *Smith* v. *Strydom*, 1953 (2) S.A. 799 (T); *Nolan* v. *Powell*, 1953 (2) S.A. 202 (S.R.) at 209–10.

[19] The age is reckoned from the time of its execution not from the time when it takes legal effect (*Doe d. Oldham* v. *Wolley* (1828) 8 B. & C. 22, 108 E.R. 951).

of the documents and as to the custody whence they come. The latter must be a source in which one would reasonably expect to have found the documents had they been authentic, but it need not be the only or even the most proper custody.[20]

There is no restriction on the type of document which can be tendered as ancient—wills, contracts, letters, accounts, etc. Ancient copies of documents may also come in in this way provided production of the original is excused under the best evidence rule.[21]

Where the document is not self-identifying, because it is neither public nor ancient, it can only be put in evidence by a witness who can testify as to its authenticity, e.g. the person who executed it, or one who saw its execution or who can identify its maker from the handwriting or other features.[22] If the witness *denies knowledge of the document it cannot be put in through him.*

If witnesses to the execution of the document were required by law as a condition of its validity, then the document can only be proved by calling one of the attesting witnesses. If any attesting witness was available at common law no other evidence of the document's execution was admissible, not even that of its maker.[23] Since 1962,[24] however, the common-law rule applies only to testamentary documents. In all other cases the document may now be proved as though no attesting witness was alive, which means by proof of the signature of the attesting witness.[25]

While the attesting witness must testify, his evidence need not, to render the document admissible, favour its authenticity, nor is it conclusive or even necessarily sufficient proof of due execution.[27] There is conflicting authority on whether the need to call him persists even where the party against whom the document is tendered has admitted its execution.[28]

Once a document has been properly received in evidence neither party has any right to alter it, nor has the court power to authorize an alteration.[29] Conversely, if the document is (albeit improperly) altered, the court cannot *order it to be restored* to its original state, though the fact of alteration can of course be proved in evidence.[30]

There is no requirement that documents be stamped before being tendered in a criminal court.[31]

3. Proof of Handwriting

Evidence to identify a person's handwriting may be given by any person who is familiar with it.[32] The evidence of a handwriting expert is not a necessity.

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[20] *Lord Bishop of Meath* v. *Marquess of Winchester* (1836) 3 Bric. (N.C.) 183, 132 E.R. 380.
[21] *See Wigmore on Evidence*, 3rd ed. (1940), VII, § 2143; Charles T. McCormick, *Handbook of the Law of Evidence* (1954), pp. 402-3.
[22] *Polimeny Bros., Ltd.* v. *Policastro*, 1935 A.D. 89.
[23] *R.* v. *Badir*, 1921 C.P.D. 544; *In re S.S. Wintoa*, 1938 P.D. 257 at 251-2.
[24] *Wigmus* v. *Garth* (1853) 8 Ex. 804, 155 E.R. 1378. The rule is criticized by Wigmore, VII, § 1299.
[25] Sec. 4 of the Evidence Act, No. 14 of 1962, as read with sec. 44 and the Schedule to the Civil Proceedings Evidence Act, No. 25 of 1965.
[26] *Nelson* v. *Whittal* (1817) 1 B. & Ald. 19, 106 E.R. 8.
[27] *Re Vera-Wardale* [1949] P. 395. See also Wigmore, § 1302.
[28] Compare *Gall* v. *Downie* (1930) 4 East 53, 102 E.R. 750, and *Plumer* v. *Briscoe* (1847) 11 Q.B. 46, 116 E.R. 392; *Wigmus* v. *Garth* (1853) 8 Ex. 804, 155 E.R. 1378.
[29] *Mackay Bros.* v. *Bradford* (1908) 29 N.L.R. 563.
[30] *Bates* v. *Grobbelaar*, 1924 O.P.D. 90.
[31] See, 283 of the Criminal Procedure Act.
[32] *Dietzman* v. *Curlewis* (1834) 1 Meeu. 42; *R.* v. *Malan*, 1925 T.P.D. 806; *R.* v. *Stevenson*, 1934 E.D.L. 43

Section 248 of the *Criminal Procedure Act*, 1955, allows the authorship of a disputed piece of writing to be proved by comparing it with other writing already proved, to the satisfaction of the presiding officer,[30] to be genuine. The genuine writing used for the comparison need not be otherwise relevant to the issue.[31] It seems from *R.* v. *De Klerk*[32] that the comparison need not be made by an expert in handwriting. Any witness whose opinion would assist the court may be asked about it. Or the court may itself make the comparison, unassisted by any witness,[33] though it is of course dangerous for it to do so.[34] Indeed, so unreliable are opinions as to handwriting, even those of an expert, that the courts have expressed the greatest reluctance to convict on that alone.[35] There is, however, no rule that in principle a conviction cannot be founded solely upon the evidence of a handwriting expert, in the unlikely event of the court being convinced by it beyond a reasonable doubt.[36]

F. ORAL EVIDENCE

1. Oath, Affirmation or Admonition

No witness may testify or be examined without being upon oath,[37] and the admission of unsworn oral evidence is an irregularity.[38]

Not everyone appearing before a court is a witness for this purpose. A person subpoenaed *duces tecum* to produce documents need not be sworn unless he is required to prove those documents, i.e. not if they prove themselves or are to be proved by another witness.[39] In *R.* v. *Boodhen*,[40] where the usher of the Court had repeated in louder tones what was said by certain witnesses who were testifying very softly, he was held not to have acted as a witness. On the other hand, an interpreter is a species of expert witness, and interpreted evidence is unsworn unless both he and the witness whose testimony he interprets are upon oath.[41]

The oath must be administered to the witness in the form which most clearly conveys to him its meaning and which he considers binding upon his conscience.[42] By the usual form established in South African procedure the witness swears that he will tell the truth, *the whole truth and nothing* but the truth, at the same time holding up the fingers of the right hand or kissing the Bible, and in either case invoking the name and aid of the deity.[43] This is normally administered in question and answer form as a kind of stipulation, but the witness is upon oath even if he merely nods or mumbles a response.[44]

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[30] *R.* v. *Foreman* (2), 1952 (1) S.A. 426 (S.R.).
[31] *Birch* v. *Ridgway* (1858) 1 F. & F. 270, 175 E.R. 722. [32] 1930 A.D. 308.
[33] See, e.g., *R.* v. *Lindecke*, 1958 (2) S.A. 481 (A.D.) at 490D. Cf. *R.* v. *O'Sullivan* (1965) 53 Cr. App. Rep. 275.
[34] *R.* v. *Harwitz*, 1940 W.L.D. 149; *R.* v. *Kruger*, 1941 O.P.D. 33.
[35] *R.* v. *Fourie*, 1947 (2) S.A. 972 (G); *R.* v. *Chitson*, 1966 (3) S.A. 428 (R.A.D.).
[36] *Amanza* v. *Cleary*, 1946 A.D. 142.
[37] Sec. 220(1) of the Criminal Procedure Act, 1955. As to who swears in the witness, see sec. 122 of the *Magistrates' Courts Act*, No. 32 of 1944.
[38] *R.* v. *Kgaladi*, 1943 A.D. 235 at 239; *R.* v. *Kleeton*, 1950 (3) S.A. 699 (C).
[39] *Perry* v. *Gibson* (1854) 1 Ad. & E. 48, 110 E.R. 1125; *Waterhouse* v. *Shields*, 1924 C.P.D. 155.
[40] (1886) 7 N.L.R. 200. [41] *S.* v. *Naidoo*, 1962 (2) S.A. 625 (A.D.).
[42] Sec. 220(2) of the Criminal Procedure Act, 1955. See, too, *Crutchlow* v. *Barker* (1744) Willes 338, 125 E.R. 1310, and *R.* v. *Jones* (1883) 3 E.D.C. 215.
[43] A more solemn procedure is advocated in (1966) 27 *T.H.R.-H.R.* 216.
[44] *R.* v. *Matsolotsane*, 1947 (3) S.A. 717 (O); *S.* v. *Ilko* 1963 (4) S.A. 897 (A.D.).

If the usual form of oath would not be binding upon the witness's conscience, the presiding officer must ascertain by inquiry from the witness what alternative form should be adopted. In *Elandshoek Trading Co., Ltd.* v. *Mia*,[48] Hiemstra J., faced with a Muslim witness, in addition made the necessary inquiries also from a priest of the Islamic faith, to ensure that the outward form of the oath was according to the tenets of the witness's religion.

At common law persons who would not have considered themselves bound by some form of oath were held incompetent to testify even though they recognized the obligation to tell the truth.[49] Section 221 of the Criminal Procedure Act, 1955, gives persons who object to taking the oath the privilege, of making an affirmation instead,[50] in a prescribed form. A witness who has affirmed is to be equated for all purposes with a witness who has sworn, so that, for example, his evidence may be the subject of a charge of perjury.[51]

Where the court finds[52] that a witness does not understand or recognize the obligation arising from an oath or affirmation he may be admonished to speak the truth.[53] It is not the practice in South Africa to take the witness aside for instruction upon the oath.[54] Lord De Villiers C.J.[55] was of the view that a witness's ignorance of the nature of an oath could be regarded as *diminishing* the weight of his evidence, but unless that knowledge is in some way relevant to his understanding of the issues there does not seem to be any logic behind this reasoning, since the obligation to speak the truth must have been understood for the witness to be competent at all.[56]

Whether a witness has taken the oath, affirmed or been admonished should be noted upon the record.[57]

II. Examination and Refutation of Witnesses

In the normal course of events (which may to some extent be varied in the discretion of the court) the examination of a witness called by the parties proceeds in various stages.[58] He first gives evidence in chief, or 'direct' evidence, led by the party who called him. Thereafter the opposing party cross-examines him to undermine the effect of the evidence in chief. Cross-examination may be reserved until a later stage in the proceedings, with the permission of the court.[59] The party calling the witness may be able to rehabilitate the witness's evidence and counter the results of the cross-examination by re-examination. In addition, the witness may be examined by the judicial officer.[60]

(a) Evidence in Chief

By his witnesses' evidence in chief a party lays before the court all the evidence he has supporting his case, subject to the rules of admissibility. Neither party is

[48] 1963 (3) S.A. 162 (W).
[49] *Maden* v. *Catanach* (1861) 7 H. & N. 360, 158 E.R. 512
[50] *Van Boom* v. *R.*, 1934 N.P.D. 388. See, too, *Kleynhans* v. *Van den Berg*, 1958 (2) S.A. 503 (T).
[51] Sec. 221(1) and (3).
[52] The presiding officer must investigate this point itself and not merely accept counsel's word: *R.* v. *Surgenor* [1940] 2 All E.R. 249; *R.* v. *Makhanganya*, 1963 R. & N. 699.
[53] Sec. 222 of the Criminal Procedure Act, 1955; the form of the admonition is laid down.
[54] *R.* v. *Umhlahlo* (1904) 25 N.L.R. 264 at 269.
[55] In *R.* v. *Jizwa* (1894) 11 S.C. 387 at 392–3.
[56] See above, ch. ~~II~~ 3
[57] *R.* v. *Lamla* (1882) 2 E.D.C. 385; *Paanah* v. *R.* (1915) 36 N.L.R. 479; *R.* v. *Matakane*, 1947 (3) S.A. 717 (O) at 726–7.
[58] ~~As to the examination of witnesses called by the court, see above, p. 000.~~
[59] *Gumede* v. *Dalnex N.O.*, 1952 (2) S.A. 315 (T).
[60] See below, p. ~~000~~. 67

obliged to convince the court in advance as to the relevancy of a particular witness's testimony.[61]

A witness may be led through his evidence by question and answer or be permitted simply to narrate his story uninterrupted. There are no fixed rules as to the extent to which one or other method is adopted.[62] If questions are asked they cannot be in the form of leading questions. Whether a question is leading or not depends not so much upon the form or phraseology but upon the circumstances of the case. It is a leading question if it is suggestive of the desired answer[63] or invites a reply founded upon controverted or unproven facts.[64]

The reason for the prohibition on leading questions is that the witness is supposed to be in sympathy with the party calling him, so that he would be inclined to co-operate by readily adopting the suggested answer, and this would invite the presentation of a prearranged version of the facts. Where this reasoning does not apply leading questions are permitted, i.e. where the witness is not disposed to fall in with the questioner's suggestions because he is hostile,[65] or where there is little motive to accept false suggestions, as in regard to introductory matter such as the witness's name, address and occupation.[66] The court has a discretion to permit leading questions in cases where there is no other way of eliciting the evidence, e.g. to direct the witness's attention to the topic on which facts are required of him,[67] or to get a direct contradiction of what another witness has said.[68]

1. Impeaching own Witness

Examination in chief must be confined to matters relevant to the issues in the case. A party who calls a witness is considered to put him forward as a person worthy of belief. Evidence that the witness is honest may be excluded unless his character has first been attacked by the opponent.[69] For the same reason, if the party finds his witness is turning out to be unfavourable (where, for example, he does not give the evidence expected from him, or where his version is broken down in cross-examination), he cannot impeach the witness's credit still further by cross-examining him as to credit[70] or by leading evidence to discredit him.[71] Faced with an unfavourable witness, there are only three possible courses of remedial action open to the calling party:[72]

(i) Evidence in contradiction. A party has a right to call as much evidence as he can to establish his case. This right is not affected by one of his witnesses having given unfavourable evidence.[73] Further or additional evidence on facts

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[61] *S. v. Wilkes*, 1962 (4) S.A. 382 (T); *R. v. Olivi* [1965] 3 All E.R. 116 (C.C.A.).

[62] See generally *Phipson on Evidence*, 10th ed., (1963), paras. 1517 ff.; A. P. O'Dowd, *The Law of Evidence in South Africa* (1963), pp. 154 ff.

[63] *Ex parte Bottomley* [1909] 2 K.B. 14. Particularly clear examples may be found in *R. v. Wilson* (1913) 9 Cr. App. 124] and in *Moor v. Moor* [1954] 2 All E.R. 458 (C.A.).

[64] *Wigmore on Evidence*, 3rd. ed. (1940), III, §§ 767 ff.

[65] See below, p. 488, ff. [66] *Wigmore on Evidence*, III, § 775.

[67] *Nicholls v. Dowding* (1815) 1 Stark. 81, 171 E.R. 408.

[68] *Courtens v. Touzé* (1807) 1 Camp. 42, 170 E.R. 907.

[69] *Durham v. Beaumont* (1808) 1 Camp. 207; *contra*, *Kola v. R.*, 1934 N.P.D. 287.

[70] *R. v. Wellers*, 1918 T.P.D. 234; *Ex parte Tanyanika*, 1961 (2) P.H., H. 260 (S.R.); *Huddlestons Motors (Pty.) Ltd. v. Cronjé*, 1967 (2) P.H., F. 65 (A.D.).

[71] Sec. 3 of the Criminal Law Procedure Act, 1865 (28 & 29 Vict., c. 18), as read with sec. 286 of the Criminal Procedure Act, 1955; *Mouthaszamy v. Murugan* (1919) 40 N.L.R. 402.

[72] See generally, A. Fraser Williamson (1940) 43 *S.A.L.J.* 360; I. W. Horn (1961) *Rhod. L.J.* 80.

[73] *Hampton & Company v. Else* (1884) 2 H.C.G. 439; *Mouthaszamy v. Murugan* (1919) 40 N.L.R. 402.

relevant to the issues may still be led as of right even if its effect is indirectly to discredit the unfavourable witness.

(ii) Previous inconsistent statement. The proviso to section 286 of the Criminal Procedure Act, 1955, introduces a departure from the English law[74] by providing that a party

> who has called a witness who has given evidence in any [criminal] proceedings (whether that witness is or is not, in the opinion of the judge or judicial officer presiding at such proceedings, adverse to the party calling him) may, after the said party or the said judge or judicial officer has asked the witness whether he has or has not previously made a statement with which his evidence in the said proceedings is inconsistent, and after sufficient particulars of the alleged previous statement to designate the occasion when it was made, have been mentioned to the witness, prove that he previously made a statement with which his said evidence is inconsistent.

If a party is aware that his witness has made a previous inconsistent statement it is his duty to prove it.[75] In *R. v. Loafer*[76] it was said that if the witness has made several previous statements, some consistent and some inconsistent with his testimony, it is fairer to put in all of them, but the better view is that if the previous statement is not demonstrably inconsistent with the evidence it cannot be used at all.[77] On the other hand, if the previous statements are in distinct parts, such as separate letters, each of which is consistent with the witness's evidence though their combined effect is to contradict it, they are still admissible.[78]

The witness must be given an opportunity to explain said comment upon the contradiction,[79] and may be asked whether the truth is contained in his previous statement or in his present testimony,[80] but he cannot be cross-examined upon the previous statement unless he has first been declared hostile[81] by the court. Nor, of course, can the statement be regarded as evidence of its contents. It is admissible solely to impeach the witness's credit.[82]

If the witness does not admit making the statement evidence to prove it in the ordinary way is necessary, e.g. if it was recorded in a document the accuracy of the transcription must be shown, and so forth.[83]

Parties who anticipate the defection of a witness often take the precaution of recording a statement from him. The courts have frequently expressed disapproval of the practice whereby a prospective witness is asked or, worse,

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[74] In England (as in South Africa until this provision was first passed in 1935) a previous inconsistent statement can only be proved if the witness has first been declared "hostile" by the court. For a summary of the earlier law, see *R. v. Isaacs*, 1947 (2) S.A. 1135 (S.R.).

[75] *R. v. Weller*, 1918 T.P.D. 234; *R. v. Hlaopane* (1922) 43 N.L.R. 398; *R. v. Fraser* (1956) 40 Cr. App. Rep. 160 (C.A.); and cf. *R. v. Dyon*, 1954 (1) S.A. 324 (A.D.) at 337. As to the prosecutor's duty of disclosure, see also (1968) 119 *New L.J.* 913.

[76] 1952 (2) S.A. 798 (C) at 805, per Herbstein J.

[77] *Mankaba v. R.*, 1950 (2) P.H., H. 144 (T). On the general inadmissibility of previous consistent statements, see below, p. 698.

[78] *Jackson v. Thomazen* (1861) 1 B. & S. 745, 121 E.R. 891.

[79] In *R. v. Fine*, 1918 E.D.L. 2, proof of a previous inconsistent statement was rejected as the witness alleged to have made it had not been asked about it while in the box.

[80] *R. v. Michael George*, 1945 (2) P.H., H. 256 (T); *R. v. Golder* [1960] 1 W.L.R. 1169 (C.C.A.).

[81] *R. v. Wellers*, 1918 T.P.D. 234 at 238; *Steenkamp v. Sirtes*, 1923 T.P.D. 208; *R. v. Loafer*, 1952 (2) S.A. 798 (C) at 804–5.

[82] *R. v. Deale*, 1928 T.P.D. 259; *Odendaal v. Hoskison*, 1935 C.P.D. 82. *R. v. Golder* [1960] 1 W.L.R. 1169 (C.C.A.). In appropriate circumstances the court may feel able to rely on the witness's evidence despite proof of an earlier inconsistent statement: e.g. *Laurens v. Laurens* (1915) 36 N.L.R. 428; *Muller v. Nel*, 1942 C.P.D. 327.

[83] *R. v. Sagwabala*, 1930 A.D. 437 at 445; *R. v. Nyede*, 1951 (3) S.A. 151 (T); *Israelsohn v. Power N.O.*, 1953 (2) S.A. 499 (W).

compelled to swear to such a statement so that the threat of a perjury charge is held over the witness's head.[84] A witness giving evidence in court should not be 'intimidated, induced, instructed or threatened',[85] but free of outside interference should feel at liberty to depart from what he has earlier said if he comes to the conclusion that he was wrong.[86] Compulsion or intimidation in this regard may so vitiate a witness's reliability that no credence at all can be attached to what he says to support a conviction.[87] For a witness to be arrested on a charge of perjury while the trial is still in progress is also obviously undesirable because of the effect it may have upon the remaining witnesses.[88]

(iii) Hostile witnesses. Where a witness, by his conduct in the box, shows himself to be adverse, the party calling him may ask the court to declare the witness to be 'hostile' and to permit the examination in chief to be conducted as a cross-examination. Whether the witness is declared hostile or not is solely in the discretion of the presiding officer at the trial, and an appeal court or reviewing judge will be very reluctant to disagree other than in very exceptional circumstances.[89]

If the permission of the court is obtained, the calling party may then cross-examine his own witness as to the issues.[90] A party cannot reverse the procedure by first cross-examining his witness and then on the basis of the answers asking the court to declare him hostile.[91]

A witness is hostile if he shows an unfair bias against the party calling him in that he does not wish to tell the truth at that party's instance.[92] It is largely a question of his demeanour in the box, e.g. if he is reluctant, evasive and contradictory.[93] The fact that the witness gives evidence unfavourable or unexpected by the party calling him,[94] his relationship with the opposing party,[95] or that he has made previous statements inconsistent with his present testimony,[96] are all relevant indications which the court may take into account, but none of these is conclusive.

There is conflicting authority at common law as to whether a necessary witness, i.e. a witness whom a party is compelled to call, such as one who attested a will, can be cross-examined by the calling party without leave of the

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[84] *Laurens* v. *Laurens* (1915) 36 N.L.R. 428; *Hersman* v. *Angaillev*, 1936 C.P.D. 386; *Beshoff* v. *Manack*, 1937 N.P.D. 192; *R.* v. *Pietersen*, 1944 C.P.D. 340.

[85] In the words of Schreiner J. in *R.* v. *Salaman*, 1936 W.L.D., reported in (1949) 66 *S.A.L.J.* 133 at 134.

[86] *R.* v. *Lemmert*, 1961 (1) P.H., H. 133 (G.W.).

[87] e.g. *R.* v. *Majoro*, 1915 E.D.L. 258. See, also, *Maswana* v. *R.*, 1909 E.D.C. 352.

[88] *Harris* v. *R.* (1927) 48 N.L.R. 330 at 346; *R.* v. *Ngwatirenga*, 1969 (3) S.A. 537 (R.A.D.).

[89] *Stein* v. *R.*, 1908 T.S. 816; *Steenkamp* v. *Street*, 1923 T.P.D. 208; *R.* v. *Saqwashula*, 1930 A.D. 437.

[90] A. Faure Williamson in (1926) 43 *S.A.L.J.* 260 at 268 quotes authority that a hostile witness cannot be cross-examined as to credit. But, on principle, cross-examining the witness on a previous inconsistent statement is nothing else, and is certainly permissible.

[91] *R.* v. *Joonalaway*, 1947 (2) S.A. 1135 (S.R.).

[92] *R.* v. *Chapman* (1838) 8 C. & P. 558. See (1923) 40 *S.A.L.J.* 159.

[93] *Potgieter* v. *Cape Dairy and General Auctioneers* (1), 1942 W.L.D. 130; *R.* v. *Loofer*, 1952 (3) S.A. 798 (C).

[94] *Farmer* v. *McMillan*, 1905 T.H. 134; *Moothoosamy* v. *Murugan* (1919) 40 N.L.R. 402.

[95] *Meyer's Trustee* v. *Malan*, 1911 T.P.D. 559; *R.* v. *Saqwashula*, 1930 A.D. 437.

[96] J. W. Horn in (1961) *Rhod. L.J.* 80 at 81 points out that decisions such as *R.* v. *Saqwashula*, 1930 A.D. 437, antedate the legislation allowing a previous inconsistent statement to be proved only if the witness was hostile; but in English law the courts regularly receive proof of the witness's previous contradictory statement as showing he has a hostile mind (see (1954) 28 *Aust. L.J.* 70; *R.* v. *James* (1954) *Crim. L.R.* 55; *R.* v. *Fraser* (1956) 40 Cr. App. Rep. 160).

court and even if not hostile,[47] but the question appears never to have been considered in South Africa

2. *Witness refreshing memory*

A witness may refresh his memory during his evidence by referring to notes or memoranda. Usually the memoranda are documents—a policeman's notebook,[48] hospital records,[49] or a family Bible[50]—but the same principles apply where they are in other forms.[51] If the witness wishes to refresh his memory from memoranda while testifying in chief the memoranda must first be proved to comply with certain conditions, but these are not applicable if the witness is asked to look at documents by the opponent during his cross-examination.[52]

For a party's own witness to refresh his memory, the document must have been made by the witness at a time when he had a clear recollection of the facts,[53] or, if made by someone else, must have been read by the witness and accepted by him as correct while he had such recollection.[54] Thus in *Anderson* v. *Whalley*[55] a ship's captain was permitted to refresh his memory regarding a navigational accident from the ship's log, although the log had been kept by the mate, since the captain had read and approved it about a week after the accident when the events were fresh in his mind. Of course if the witness never had personal knowledge of the facts recorded, i.e. where he has had no memory of the facts which could be refreshed, he cannot refer to memoranda prepared by others or by himself in dependence on the knowledge of others.[56] Whether the witness had a clear recollection of the facts at the time the memorandum was made or read is a question of fact in every case. There is no fixed time limit and exact contemporaneity of the notes with the facts recorded is not required.[57] It has been held that the memoranda should have been prepared *ante litem motam*,[58] but this does not apply to expert witnesses or those in a similar position, so that a physician may refer to his report even though it was made expressly for the purposes of litigation.[59]

If the witness at the time of testifying still retains some independent recollection of the facts, he may refresh his memory from copies or extracts of the memoranda;[60] but the original memorandum is required if he has no independent recollection and can tell the court only what is in the notes, e.g. where he says in effect "I do not remember the facts but it must have been so because that is what

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[47] See (1926) 43 *S.A.L.J.* 260 at 265 n. 25, and at 267.
[48] *Lamont* v. *L.*, 1906 T.S. 154.
[49] *R.* v. *Sherrin*, 1913 T.P.D. 424.
[50] *R.* v. *Mills* [1962] 3 All E.R. 298 (C.C.A.), where the witness was allowed to refresh his memory from a tape recording he had made. See also Edmund M. Morgan in (1927) 40 *Harvard L.R.* 712 at 725 ff.
[51] *R.* v. *Yuvachin*, 1947 (4) S.A. 267 (T) at 271.
[52] *R.* v. *Isaacs*, 1916 T.P.D. 390; *S.* v. *Heller* (1), 1964 (1) S.A. 520 (W.) at 523–4.
[53] *Topham* v. *McGregor* (1854) 1 *Car. & K.* 320, 174 E.R. 829; *R.* v. *Bryant* (1946) 31 Cr. App. Rep. 146.
[54] (1852) 3 *Car. & K.* 54, 175 E.R. 468.
[55] *R.* v. *Nkhoma*, 1950 (4) S.A. 574 (N); *R.* v. *Van Rooi*, 1958 (3) S.A. 70 (G.W.); *R.* v. *Mavuma*, 1961 (3) S.A. 522 (S.R.) at 367.
[56] *Burton* v. *Plummer* (1834) 2 Ad. & E. 341, 111 E.R. 132; *R.* v. *Isaacs*, 1916 T.P.D. 390; *R.* v. *Rose*, 1937 A.D. 467; *S.* v. *Heller* (1), 1964 (1) S.A. 520 (W).
[57] *The Dysart Peerage* (1881) 6 App. Cas. 489 (H.L.) at 497.
[58] *S.* v. *Heller* (1), 1964 (1) S.A. 520 (W).
[59] *Beer* v. *Jones* (1846) 5 C.B. 886, 136 E.R. 1032; *Full* v. *Colonial Govt.* (1890) 11 N.L.R. 11; *R.* v. *Elphik*, 1963 (3) S.A. 86 (S.R.).

I wrote down'.[12] If the original cannot be produced a copy may be used provided it is proved to be accurate.[13]

If a witness wishes to refresh his memory from notes they must be produced. They need not be admissible in themselves,[14] but if disclosure is not desired because a privilege is being claimed in respect of them the witness cannot refer to them.[15] It is essential that the documents be available for the court and the opponent to inspect those portions to which the witness has referred, so that he may be cross-examined on them.[16] The court may in its discretion refuse the opponent access to the other portions of the memoranda.[17] If access to those other portions is permitted they become part of the opponent's evidence, as the parts referred to and adopted by the witness in chief are part of the calling party's case[18] (even if they form the subject of cross-examination).[19]

Apart from this, the memoranda are not evidence of the truth of their contents.[20] They are relevant only to the credibility of the witness and cannot be used as independent pieces of evidence to corroborate him.[21] The notes may be handed in, if no objection is taken to this course, as constituting a convenient record of his evidence.[22]

All the foregoing is concerned only with the position where the witness *refreshes* his memory while in the witness-box. It is not irregular for him to read any memoranda at all to refresh his memory extracurially before he gives evidence,[23] and at least where the witness retains some independent recollection of the events, the opponent cannot demand production of the memoranda in court.[24]

3. Previous Consistent Statements

A statutory departure from the common law permits a party to impeach his own witness by proving that the witness has previously made a statement inconsistent with his present testimony.[25] The converse does not apply. A party may not attempt to enhance or rehabilitate the credit of his witness by showing that the witness told the same story on a previous occasion.[26] For example, in

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[12] *Maugham* v. *Hubbard* (1828) 8 B. & C. 14, 108 E.R. 948; *Cape Coast Exploration, Ltd.* v. *Scholtz*, 1933 A.D. 36; *R.* v. *Bryant* (1946) 31 Cr. App. Rep. 146.

[13] *Alcock* v. *Royal Exchange Assurance Company* (1849) 13 Q.B. 292, 116 E.R. 1275.

[14] *Du Plessis* v. *Triggaardt*, 1918 E.D.L. 175.

[15] *Macduff & Company* v. *J.C.I. Co., Ltd.*, 1923 T.P.D. 318.

[16] *Michael* v. *Additional Magistrate, Johannesburg*, 1926 T.P.D. 331; *R.* v. *Grieve*, 1947 (2) S.A. 264 (T); *R.* v. *Bass* [1953] 1 Q.B. 680 (C.C.A.).

[17] *Michael* v. *Additional Magistrate, Johannesburg*, 1926 T.P.D. 331; *R.* v. *Scoble*, 1958 (3) S.A. 667 (N). As to recall of a witness for the purpose of inspecting his notes, see *Quanan* v. *R.*, 1944 G.W.L. 10 at 18.

[18] *Estate Parry* v. *Murray*, 1961 (3) S.A. 487 (T); *Senat* v. *Senat* [1965] P. 172, [1965] 2 All E.R. 505.

[19] *Gregory* v. *Tavernor* (1833) 6 C. & P. 280, 172 E.R. 1241.

[20] *Lousson* v. *R.*, 1906 T.S. 154; *Botha* v. *Van Rooyen* (1909) 30 N.L.R. 277. The rule is criticized in *Estate Parry* v. *Murray*, 1961 (3) S.A. 487 (T); see, also, Edmund M. Morgan (1937) 40 *Harvard L.R.* 712.

[21] *R.* v. *Rose*, 1937 A.D. 467.

[22] *R.* v. *Smit*, 1946 A.D. 862; *R.* v. *Elliah*, 1963 (3) S.A. 86 (S.R.) esp. at 89. See also above, under Viva Voce Evidence.

[23] *R.* v. *Varachia*, 1947 (4) S.A. 267 (T) at 271–2.

[24] *Ex parte Minister van Justisie: In re S.* v. *Wagner*, 1965 (4) S.A. 508 (A.D.), critically discussed in (1966) 83 *S.A.L.J.* 136, (1966) 83 *S.A.L.J.* 531, and (1967) 84 *S.A.L.J.* 233.

[25] The proviso to sec. 206 of the Criminal Procedure Act, 1955. See above, p. 000.

[26] The history of the rule is briefly traced by De Villiers C.J. in *R.* v. *Manyona*, 1931 A.D. 386 at 389. The principle was apparently overlooked by Tindall A.C.J. (obiter) in *R.* v. *Lee*, 1949 (1) S.A. 1134 (A.D.) at 1142–3, and disregarded in *Isaacs* v. *S.*, 1969 (1) P.H., H. 93 (A.D.).

R. v. *Chizah*,[27] the allegation against the accused was that, being an African, he had been unlawfully in an urban area. His defence was that he was Coloured, and sought to prove this by producing his marriage certificate where he was so described. The certificate was held inadmissible for this purpose since it reflected only the information he himself had given. On the same principle, the fact that a witness gave identical evidence in other proceedings cannot be proved.[28]

Various explanations have been put forward to account for the rule of exclusion, of which the most convincing are based on considerations of relevancy. A previous consistent statement of the witness has insufficient probative value, partly because falsehoods may be repeated as often as the truth,[29] and partly because the witness is assumed to be telling the truth on his oath unless reasons to the contrary appear, so that there is no need to establish his truthfulness in advance.

The general rule of exclusion is subject to five well-recognized exceptions.[30] Even where the previous consistent statement is admissible under one of these categories, however, it is never evidence of the truth of its contents so as to afford independent evidence corroborative of the witness's story in the box, but is relevant to the weight of his evidence alone.

Previous consistent statements are admissible in the following cases:

3.1. *To rebut an adverse inference which it would otherwise be permissible to draw*

This exception applies only to previous consistent statements of the accused himself. The absence of an explanation from the accused, the giving of a false explanation, or undue delay in advancing an explanation, are all factors which the court may properly take into account in evaluating whether or not the prosecution has made out a prima facie case of the accused's guilt, where he was found at the scene of the crime or in possession of incriminating articles.[31] Similarly, where he raises the defence of alibi only at a time when it is too late for the police to investigate its truth, the cogency of that defence may well be reduced.[32] In fairness to the accused, therefore, evidence that he immediately tendered the explanation he now relies on is admissible in chief to counter in advance the possibility of an adverse inference being drawn[33] (though such

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[27] 1959 (3) S.A. 292 (C). As to books kept by a witness, see *R.* v. *Rose*, 1937 A.D. 467, and *Estate Parry* v. *Murray*, 1961 (3) S.A. 487 (T) at 491. Other clear cases applying the rule are *R.* v. *Jood*, 1949 (1) S.A. 293 (G.W.), and *R.* v. *Inyanga*, 1962 (2) P.H., H. 136 (S.R.).

[28] *Van Wyhe* v. *R.* (1925) 46 N.L.R. 273; *Mati* v. *R.*, 1960 (1) P.H., H. 14 (A.D.).

[29] This was the reason advanced in *R.* v. *Rose*, 1937 A.D. 467 at 473. But see *Isaacs* v. *S.*, 1969 (1) P.H., H. 93 (A.D.).

[30] The framework of the ensuing discussion is based on R. Cross, *Evidence*, 3rd ed. (1967), pp. 193 ff., and R. N. Goodetson, 'Previous Consistent Statements' (1968) 26 *Cambridge L.J.* 64. *Isaacs* v. *S.*, 1969 (1) P.H., H. 93 (A.D.), can be read as creating a sixth exception, where the reasons for the exclusionary rule do not apply; but the cogency of the statement was probably exceptionally great. A similar situation is discussed in (1968) 5 *Victoria Univ. of Wellington L.R.* 82.

[31] *R.* v. *Kumalo*, 1930 A.D. 193 at 214; *R.* v. *Ngwenya*, 1955 (2) S.A. 182 (T).

[32] *R.* v. *Mashelele*, 1944 A.D. 570 at 585.

[33] *R.* v. *Lutoli*, 1927 E.D.L. 43; *R.* v. *Kumalo*, 1930 A.D. 193 at 214; *R.* v. *De Vries*, 1930 C.P.D. 78; *R.* v. *Roos*, 1936 T.P.D. 259; *R.* v. *Cohen*, 1942 T.P.D. 266; *R.* v. *Tshabalala*, 1942 T.P.D. 27; *Khan* v. *S.*, 1967 (1) P.H., H. 173 (N); *Malindi* v. *S.*, 1968 (1) P.H., H. 2 (O). In his dissenting judgment in *R.* v. *Dube*, 1915 A.D. 557 at 571–2, Mansdorp J.A. appeared to contemplate that statements were admitted under this heading as part of the *res gestae*, but though this view has much to commend it, for the sake of clarity a division has been made.

evidence is not necessarily sufficient to prevent the prosecution discharging its burden of proof).[34]

This exception is not extended to allow evidence to be given of every previous occasion when the accused mentioned his present defence. If his silence would support no adverse inference, the ordinary rule that the accused's extracurial statements are admissible against him but not in his favour applies,[35] though he is of course entitled to have his whole statement, including the favourable portions, put in if the prosecution wishes to use the unfavourable portions.[36]

3.2. *Previous identification*

To avoid as far as possible mistakes flowing from the notorious unreliability of evidence of identity, various evidentiary devices have been developed. For instance, such evidence is to be approached with caution, and where possible corroboration will be sought.[37] In addition, various safeguards to establish the reliability of identification parades have been enumerated.[38] It is therefore clear that the normal assumption that a witness is to be trusted on his oath until *impeached is not made* where he gives identifying evidence, and accordingly evidence establishing his consistency is admissible. The witness may himself testify in chief that he made the identification he has made in court also on a former occasion closer in time to the events in issue. In addition, the previous identification may be proved *aliunde* by those who observed it.[39]

It has not been settled whether the evidence of the bystanders is admissible even where the *identifying witness does not himself during his testimony* mention the previous occasion,[40] but the better view seems to be that the evidence *aliunde* remains admissible, since the credibility of a witness who testifies to identity is always in issue.[41] Of course evidence of identification on another occasion can only be given where the identifier gives evidence of identity in court, since it is relevant only to the credit of that evidence.

3.3. *Rebutting afterthought*

If a witness is impeached in cross-examination so that the assumption of his trustworthiness is put in question, the party calling him may rehabilitate his credit by showing that he told the same story before he had the motive or opportunity to fabricate.[42] This may be done when the witness himself is re-examined, and in addition other witnesses should be called to testify in chief as to his previous recounting.[43] For example, if it is put to a witness in cross-

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[34] *R.* v. *Storey* (1968) *Crim. L.R.* 387 (C.A.). See, too, the judgment of Schreiner J. in *R.* v. *Cohen*, 1942 T.P.D. 266 at 277, 278; (1946) 63 *S.A.L.J.* 92.

[35] *R.* v. *Jaspan*, 1940 A.D. 9; *R.* v. *Roberts* [1942] 1 All E.R. 187 (C.C.A.); *R.* v. *Sedl*, 1950 (3) S.A. 693 (O); *S.* v. *Forbes*, 1962 (3) *S.A. 963 (C). See, also, Fox* v. *General Medical Council* [1960] 3 All E.R. 225 (P.C.).

[36] *R.* v. *Valachia*, 1945 A.D. 826.

[37] See under Corroboration, below, p. 200.

[38] See below, p. 208.

[39] *R.* v. *Christie* [1914] A.C. 545 (H.L.); *Rassool* v. *R.*, 1932 N.P.D. 112. Giving a description to the police is not a previous act of identification which can be proved (*R.* v. *Mack*, 1969 (4) S.A. 53 (R)).

[40] See *Rassool* v. *R.*, 1932 N.P.D. 112; *R.* v. *Vclekaze*, *1947 (1) S.A. 162* (W).

[41] See also R. N. Gooderson, 'Previous Consistent Statements' (1968) 26 *Cambridge L.J.* 64 at 81 ff.

[42] *Pincus* v. *Solomon* (1), 1942 W.L.D. 237; *R.* v. *Kizi*, 1959 (4) S.A. 532 (A.D.).

[43] *R.* v. *M*, 1959 (1) S.A. 434 (A.D.) at 438.

examination that his failure at the preparatory examination to mention certain details contained in his present evidence in chief is to be attributed to their having been recently fabricated, evidence could be heard that the witness mentioned the same details immediately after the events in question.[44]

Not every cross-examination attacking the witness's reliability may be countered by proving his previous consistent statement. It is admissible only when the cross-examination tends in the opinion of the court[45] to suggest that the witness's testimony has been recently fabricated or embellished for some or other reason.[46] Merely to suggest that the witness's memory of the events is unreliable,[47] or to ask why he did not mention certain facts before,[48] would not suffice.

The previous consistent statement is not independent corroboration of the witness's evidence but is relevant merely to his credit.

3.4. Res gestae

Where the previous consistent statement formed part of the *res gestae*, it may be proved.[49] *Res gestae* is of course a flexible concept, and much depends upon the discretion of the court.[50] An example is *Erasmus* v. *Siffman*,[51] an action upon a contract of sale, where a witness testified that he had acted as the buyer's agent in the transaction. Evidence that he had told the seller so at the time the contract was entered into was received as part of the *res gestae*, though statements to the same effect he had made to other persons at the time were excluded.

3.5. Complaints

This exception is a survival of an old procedural requirement of early English law[52] (which had in fact an exact Roman-Dutch equivalent[53]) whereby a woman who was raped had to have raised the *hue and cry before she could prosecute* an appeal against her assailant. It may be justified today by the fact that charges of a sexual nature are difficult to refute though easy to make, and the complainant's credit is always of importance.[54]

In its modern form, this exception to the rule against previous consistent statements states that where the complainant testifies to an offence such as rape, indecent assault, or kindred offences, evidence is admissible of the fact that she (or he[55]) voluntarily made a complaint, at the first reasonable opportunity thereafter, and of the terms of that complaint.[56] The complaint is admitted to prove the consistency of her conduct at the time with her present *testimony*,[57] so

[44] *R.* v. *Benjamin* (1913) 8 Cr. App. Rep. 146 (C.C.A.); *R.* v. *Vlok*, 1951 (1) S.A. 26 (C).
[45] *Fox* v. *General Medical Council* [1960] 3 All E.R. 225 (P.C.) at 230, 231.
[46] *R.* v. *M*, 1959 (1) S.A. 434 (A.D.) at 438; *R.* v. *Abrey*, 1959 (2) S.A. 76 (E).
[47] *S.* v. *Sitwayi*, 1961 (4) S.A. 538 (E).
[48] *R.* v. *Erasmus*, 1958 (2) S.A. 685 (O).
[49] *Milne* v. *Leisler* (1862) H. & N. 786, 158 E.R. 686; *Fisher* v. *Fisher*, 1911 W.L.D. 71. The evidence excluded in *Lucey & Co., Ltd.* v. *Desai & Company*, 1927 T.P.D. 842, could probably have been received under this heading.
[50] For an argument that the transaction may be regarded as beginning or ending at different times for different participants, see R. N. Gooderson in (1968) 26 *Cambridge L.J.* 64 at 72–3.
[51] 1909 T.S. 1026. See, too, *Spittle* v. *Spittle* [1965] 3 All E.R. 451.
[52] *R.* v. *Osborne* [1905] 1 K.B. 551 at 560; *Guttenberg* v. *R.*, 1905 T.S. 207 at 211.
[53] *R.* v. *Kautumundu*, 1936 (2) P.H., F. 154 (S.W.A.).
[54] *As to Corroboration in Sexual Cases*, see below, p. 466, 468.
[55] The rule applies equally to male complainants: *R.* v. *Camelleri* (1922) 2 K.B. 122; *R.* v. *Burgess*, 1927 T.P.D. 14; *R.* v. *Komsane*, 1928 E.D.L. 423.
[56] *R.* v. *Lillyman* [1896] 2 Q.B. 167; *R.* v. *Jenkinson* (1904) 21 S.C. 233.
[57] *R.* v. *Lillyman* [1896] 2 Q.B. 167.

if the complainant does not give evidence the question of her self-consistency does not arise and the complaint is inadmissible.[58] It is often said that the complaint is proved to negative consent,[59] but it remains admissible even where consent is neither legally nor factually in issue.[60] Though relevant to self-consistency, however, it is not to be regarded as corroborative of the complainant's evidence.[61]

A complaint may only be proved where circumstances analogous to rape or indecent assault are alleged.[62] In essence the offence must have contained the two elements, indecency and violence. The sexual element alone, as in charges of *crimen injuria*[63] or miscegenation,[64] would not suffice, nor would violence alone.[65] The offence actually charged is not the decisive factor. For example, incest may be committed with or without accompanying violence, but if the complainant testifies that violence was used the complaint may be proved.[66] Similarly it would be admissible if the accused is charged simply with assault but it appears from the evidence that the assault was of an indecent character.[67]

Whether the complaint was made at the first reasonable opportunity is a question which depends upon the facts of each case. Where young children are involved, who do not realize the nature of the acts perpetrated upon them until circumstances arise making a complaint natural, even a fairly lengthy interval between the offence and the complaint would not be regarded as unreasonable.[68] Much shorter delays might be unreasonable in the case of adults or children of understanding.[69] An important factor in considering the circumstances is the accessibility of a person in whom the particular complainant would naturally confide. It is not necessary that the complaint be made to the first person to whom the complainant speaks after the alleged offence.[70] If the complainant speaks first to someone to whom full details would not be expected to be given, and subsequently makes a more complete narration to a person with whom she is on more intimate terms, the terms of both complaints may be proved.[71]

The complaint can logically only be relevant to the complainant's credit if it represented his or her 'unassisted and unvarnished story'.[72] It must not have been elicited by leading questions which suggested the terms of the complaint,[73] nor by threats or intimidation without which no complaint might have been

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[58] *R.* v. *Molete*, 1907 T.H. 235; *R.* v. *Kgaladi*, 1943 A.D. 255; *S.* v. *R*, 1965 (2) S.A. 463 (W).
[59] See the discussion in R. Cross, *Evidence*, 3rd ed. (1967), p. 199.
[60] e.g. *R.* v. *Gannon*, 1906 T.S. 114; *R.* v. *T*, 1937 T.P.D. 389.
[61] *R.* v. *Bell*, 1929 C.P.D. 416; *De Beer* v. *R.*, 1933 N.P.D. 30.
[62] Convictions were set aside where complaints were wrongly proved on charges of theft (in *R.* v. *Stuzin*, 1933 O.P.D. 112) and extortion (*R.* v. *Lazarus*, 1922 C.P.D. 293). The complaint was proved in *R.* v. *R*, 1961 (1) S.A. 28 (N), where the accused was faced with a charge of abduction as well as one of rape.
[63] *Guttenberg* v. *R.*, 1905 T.S. 207; *Weskesmeyer* v. *R.* (1911) 32 N.L.R. 197; *R.* v. *Erickson*, 1917 C.P.D. 392.
[64] *R.* v. *Storm*, 1935 E.D.L. 14; *R.* v. *Gloose*, 1936 (2) P.H., F. 155 (S.W.A.).
[65] *R.* v. *Mfralo*, 1914 E.D.L. 12. Violence need not be shown where the victim is a child, e.g., *R.* v. *T*, 1937 T.P.D. 389; *R.* v. *S*, 1948 (4) S.A. 419 (G.W.).
[66] *R.* v. *Bezuidenhout*, 1946 C.P.D. 190; *R.* v. *Z*, 1959 (2) P.H., H. 226 (S.R.).
[67] *R.* v. *Dray*, 1925 A.D. 553.
[68] *R.* v. *Gannon*, 1906 T.S. 114; *R.* v. *P*, 1967 (2) S.A. 497 (R).
[69] *R.* v. *Meyer*, 1925 T.P.D. 390; *H* v. *R.*, 1937 N.P.D. 1; *R.* v. *M*, 1959 (1) S.A. 352 (A.D.).
[70] *R.* v. *Cummings* [1948] 1 All E.R. 551 (C.C.A.); *R.* v. *S*, 1949 (4) S.A. 419 (G.W.).
[71] *R.* v. *Lee* [1911] 7 Cr. App. Rep. 31; *R.* v. *Koutumundu*, 1936 (2) P.H., F. 154 (S.W.A.); *R.* v. *T*, 1937 T.P.D. 389.
[72] Per Viscount Reading C.J. in *R.* v. *Norcott* [1917] 1 K.B. 347 (C.C.A.) at 350.
[73] *Potgieter* v. *R.*, 1958 (2) P.H., H. 332 (O).

made.[74] The mere fact that it was made in answer to a question[75] or after some persuasion[76] would not automatically exclude it, provided it remains in terms the complainant's own spontaneous story.

The possibility that the complaint may be untrue does not render it inadmissible in law if the other criteria are satisfied: it is merely of less value in supporting the complainant's credit.[77] The court may therefore choose to exercise its discretion to exclude it. Where the complainant is a very young child even an immediate complaint may be insufficient to persuade the court to place any reliance on its evidence, unless substantial corroboration is also present.[78]

Complaints made about the accused's previous misconduct, whether made by the present complainant or by others, should not be mentioned in evidence, being excluded on the ground of irrelevance as well as by the prohibition of evidence of the accused's bad character.[79]

(*b*) CROSS-EXAMINATION

1. Generally

'The objects sought to be achieved by cross-examination', in the formulation of Hemochsberg A.J. (as he then was) in *Carroll* v. *Carroll*,[80] 'are to impeach the accuracy, credibility and general value of the evidence in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party.'

Witnesses called by one party may be cross-examined as of right by the other party, and the court has no discretion to prevent the exercise of that right,[81] even to protect the witness. In *R.* v. *Ndawo*[82] where the witness, an 8-year-old boy, was so frightened by the proceedings that the magistrate intervened to curtail his distress, the prohibiting of cross-examination was still held to be an irregularity. Protection of the witness by disallowing cross-examination which might incriminate him would be equally misconceived: the proper course for the presiding officer is to inform the witness of his right to refuse to answer.[83] Where the witness is withdrawn before he gives any evidence he is not subject to cross-examination,[84] but if he is not withdrawn he can be cross-examined even if he gives no evidence in chief at all.[85] It is not necessary that the evidence in

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[74] *S.* v. *T.* 1963 (1) S.A. 484 (A.D.).
[75] *R.* v. *Osborne* [1905] 1 K.B. 551.
[76] *R.* v. *Norcott* [1917] 1 K.B. 347 (C.C.A.).
[77] *R.* v. *Sitangwe*, 1960 (2) P.H., H. 271 (D); *S.* v. *V*, *1961 (4) S.A. 201 (O).*
[78] *R.* v. *Sidaropoulos*, 1910 C.P.D. 15 at 19.
[79] *R.* v. *S.*, 1950 (3) S.A. 712 (O); *R.* v. *S.*, 1954 (3) S.A. 525 (A.D.). As to character evidence, see below, p. 606. Complaints of similar offences are inadmissible even if tendered after verdict in aggravation of sentence (*S.* v. *De Vos*, 1967 (2) P.H., H. 222 (G.W.)).
[80] 1947 (4) S.A. 37 (D) at 40. See, also, *Phipson on Evidence*, 10th ed. (1963), § 1541.
[81] *Distillers Korporasie (S.A.) Bpk.* v. *Katze*, 1956 (1) S.A. 357 (A.D.); *S.* v. *Makaula*, 1961 (4) S.A. 600 (E). As to the court's power to control the exercise of that right, see below.
[82] 1961 (1) S.A. 16 (N).
[83] *R.* v. *Ntshangela*, 1961 (4) S.A. 592 (A.D.). See the chapter on Privilege, below, p. 606. 155
[84] *Creevy* v. *Carr* (1835) 7 C. & P. 64, 173 E.R. 29. But it is grossly improper for a party to withdraw his witness for the purpose of preventing cross-examination (*In re Quartz Hill & Company* (1882) 21 Ch. D. 642 (C.A.)), and closing his case is ineffective to secure this object (*R.* v. *Mahomed*, 1942 T.P.D. 45).
[85] *Phillips* v. *Eamer* (1795) 1 Esp. 355, 170 E.R. 383. There is authority that if he gives no evidence in chief he cannot be cross-examined as to credit, only as to the issues (*Bracegirdle* v. *Bailey* (1859) 1 F. & F. 536, 175 E.R. 842), but this seems illogical since his credit remains relevant to the value of his answers in cross-examination. See *Distillers Korporasie (S.A.) Bpk.* v. *Katze*, 1956 (1) S.A. 357 (A.D.).

chief he gives should be adverse to the cross-examining side[85]—he may have given only formal evidence such as to prove a document[87]—nor is the cross-examination confined to matters he testified to in chief.[88]

As there is a right of cross-examination, consequences flow from the failure to exercise this right. To prevent a party taking his opponent by surprise, he must disclose so much of his own case to each of the opponent's witnesses as concerns that witness, for explanation or comment.[89] In a civil case, failure to cross-examine may be regarded as an admission of the subject-matter of the abstentions.[90] In criminal proceedings the rule is far from inflexible,[91] and is of especially scant application where the accused is unrepresented.[92] If it is not necessary to cross-examine to put the opponent's case, because it has already been disclosed, e.g. in cross-examining other witnesses, no adverse inference will be drawn;[93] similarly, if no useful purpose would be served by cross-examination, because the evidence amounts to no more than a direct denial or contradiction of the opponent's case.[94] If, on the other hand, a failure to cross-examine may mislead the opponent into acting on the assumption that certain material elements of his case are not being seriously disputed, the court may attach great weight to the fact that there was no challenge on those aspects by cross-examination.[95] It is all a question of the circumstances of the case, since the main effect of a failure to cross-examine a witness is upon the cogency of that witness's evidence.[96] If it has inherently little cogency, because it is obviously farfetched or apparently fanciful, challenge may well be superfluous.[97] Where the case turns largely on the relative credibility of the witnesses for the prosecution and those for the defence, especially where the former are accomplices, traps, or otherwise to be regarded with particular circumspection, the other side's failure to cross-examine is unlikely to be condoned.[98] (All the aforegoing applies in appropriate cases as much to examination by the court as by the opponent.[99])

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[86] As to whether this is so where one accused wishes to cross-examine his co-accused, see above, p. 600; J. G. Carvell in (1965) *Crim. L.R.* 419; *R. Cross, Evidence*, 3rd ed. (1967), p. 212.

[87] *Morgan* v. *Brydges* (1818) 2 Stark. 313, 171 E.R. 657; *R.* v. *Brooke* (1819) 2 Stark. 473, 171 E.R. 709.

[88] *Morgan* v. *Brydges* (1818) 2 Stark. 313, 171 E.R. 657; *Distillers Korporasie (S.A.) Bpk.* v. *Kotze*, 1956 (1) S.A. 357 (A.D.) at 362.

[89] *R.* v. *Motehen*, 1949 (2) S.A. 547 (A.D.) at 550; *Paola* v. *Hughes (Pty.) Ltd.*, 1956 (2) S.A. 587 (N).

[90] *Small* v. *Smith*, 1954 (3) S.A. 434 (S.W.A.); *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Co. (South) Ltd.*, 1955 (2) S.A. 1 (W) at 9; *Paola* v. *Hughes (Pty.) Ltd.*, 1956 (2) S.A. 587 (N). Even in a civil case, however, a duty to cross-examine does not necessarily override the other party's duty to lead some evidence in support of his case (*R.* v. *Weinberg*, 1939 A.D. 71 at 80; *Ward* v. *Steenberg*, 1951 (1) S.A. 395 (T)).

[91] See, generally, *R.* v. *M*, 1946 A.D. 1023; *Mbele* v. *S.*, 1961 (2) P.H., H. 162 (A.D.).

[92] *Khumalo* v. *S.*, 1966 (1) P.H., H. 220 (N). And see *R.* v. *Jawke*, 1957 (2) S.A. 187 (E) at 190.

[93] *R.* v. *Marquard*, 1946 C.P.D. 474.

[94] *Roux* v. *R.*, 1956 (2) P.H., H. 259 (A.D.).

[95] Failure to cross-examine led to the inference of acceptance of the witness's testimony in chief in the circumstances of *R.* v. *Motehen*, 1949 (2) S.A. 547 (A.D.) at 550, and *R.* v. *Mgatywa*, 1958 (1) S.A. 99 (E) (and see *R.* v. *Hart* (1932) 23 Cr.-App. Rep. 202), but was held not to justify such inferences in *R.* v. *Jawke*, 1957 (2) S.A. 187 (E); *Du Plessis* v. *R.*, 1957 (1) P.H., H. 86 (O); *Van der Walt* v. *R.*, 1958 (2) P.H., H. 162 (A.D.). *S.* v. *Naicker*, 1966 (1) S.A. 524 (N) esp. at 603C, is open to criticism in this respect.

[96] *R.* v. *Jawke*, 1957 (2) S.A. 187 (E) at 190.

[97] *Small* v. *Smith*, 1954 (3) S.A. 434 (S.W.A.) at 438.

[98] *R.* v. *Ogatwa*, 1957 (2) S.A. 191 (E); *R.* v. *Witbooi*, 1960 (1) P.H., H. 100 (E).

[99] *R.* v. *Ngema*, 1960 (2) S.A. 263 (T); *Xaswa* v. *S.*, 1964 (2) P.H., H. 155 (C); *Shoko* v. *S.*, 1966 (1) P.H., H. 3 (E). See below, p. 606. 67

The court may also properly draw a cross-examiner's attention to matters on which cross-examination is in its view desirable,[1] and may cure much by exercising its power of recalling a witness under section 210 of the Criminal Procedure Act.[2] As to the measures a cross-examiner can take to prevent an adverse inference being drawn from his failure to cross-examine, see the Appellate Division case of *Mbele* v. *S.*[3]

The range of permissible cross-examination is in many respects broader than that of examination in chief. It need not be restricted to the issues in the case, but may be directed also to collateral matters relevant solely to the witness's credit.[4] Further, as the witness is assumed to be out of sympathy with the cross-examiner and to lean in favour of the party calling him, leading questions may be asked in cross-examination.[5] In *R.* v. *Ismail*[6] Davis J. exercised his discretion to prevent leading questions while the defence was cross-examining the complainant, a young girl whom the accused was alleged to have abducted and who was clearly in love with him and resentful of the prosecution. The learned Judge pointed out that in these circumstances her answers to leading questions by the defence would have been of no weight. Even if the court does not intervene where a witness is manifestly favourable to the cross-examining party, factors of weight and cogency would counsel the avoidance of leading questions lest his evidence be suspect because it is in substance untested.[7] 'Misleading questions' which trap a witness into making false or unproven assumptions of fact are always improper.[8]

The somewhat greater range of cross-examination does not derogate from the governing effect of the exclusionary rules, which apply with hardly less rigour here than to examination in chief.[9] Thus in *R.* v. *Perkins*[10] the inadmissibility of a confession was held to prevail even though it had been first referred to by the defence in cross-examining a State witness. (This has since been somewhat modified by section 244(2) of the Criminal Procedure Act, which provides that if the defence refers in cross-examination to a favourable portion of an inadmissible confession the whole can then be proved.[11]) The judgment in *Perkins's* case was founded upon the opinion of the Privy Council in *R.* v. *Bertrand*[12] that

> 'the object of a trial is the administration of justice in a course as free from doubt, or chance of miscarriage, as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a prisoner's consent, even

[1] *R.* v. *Solomons*, 1959 (2) S.A. 352 (A.D.) at 363.
[2] *Mbele* v. *S.*, 1961 (2) P.H., H. 162 (A.D.).
[3] 1961 (2) P.H., H. 162 (A.D.).
[4] '[T]he credit of a witness is always relevant to whatever issue is being tried . . .', in the words of Krause J. in *R.* v. *Barnett*, 1926 T.P.D. 464 at 469.
[5] *R.* v. *Milne and Erleigh* (7), 1951 (1) S.A. 791 (A.D.) at 818; *S.* v. *Ngcwabe*, 1966 (2) P.H., H. 445 (E).
[6] 1943 C.P.D. 418.
[7] *Huddlestone Motors (Pty.) Ltd.* v. *Crousaz*, 1967 (1) P.H., F. 65 (A.D.).
[8] *Phipson on Evidence*, 10th ed. (1963), § 1552.
[9] *R.* v. *Sluzin*, 1938 O.P.D. 112; *R.* v. *Treacy* [1944] 2 All E.R. 229 (C.C.A.); *R.* v. *A*, 1959 (3) S.A. 498 (F.C.).
[10] 1929 A.D. 307. *Perkins* was applied to a case of a vicarious admission inadmissible against the accused in *R.* v. *Black*, 1923 A.D. 381. See, also, *R.* v. *Motibele*, 1944 T.P.D. 40 at 41.
[11] Of course, if a confession would be admissible, the mere fact that it has not been proved by the prosecution in chief would not prevent it being put to the accused in cross-examination (*Lee* v. *S.*, 1962 (1) P.H., H. 70 (T)). But hearsay statements by other persons which could not be and are not in evidence cannot be put to the accused in cross-examination (*R.* v. *A*, 1959 (3) S.A. 498 (F.C.); cf. *Carroll* v. *Carroll*, 1947 (4) S.A. 37 (D) at 42).
[12] L.R. 1 P.C. App. 252.

> where he is advised by counsel, and substantially, not of course literally, affirms the wisdom of the common understanding in the profession, that a prisoner can consent to nothing.'

Thus, reasoned Innes C.J.,[13] the accused could not by waiver or consent render admissible a statement which the legislature had expressly and unconditionally declared to be inadmissible.

The subsequent application of this principle has not followed an entirely untroubled course. In *R.* v. *Meyer*[14] the accused was charged with unlawful carnal intercourse with a girl below the age of 16. Clearly the prosecution could not have led evidence, to prove the accused's immoral habits, of his previous seduction of the complainant's sister. However, the defence was based on an attempt to prove a conspiracy by the whole of the complainant's family against him, and thus it was the defence which directed its cross-examination to eliciting the fact of the earlier misconduct. A simple application of the *Perkins* ruling to this situation would clearly have been unworkable, as the Court held, since the defence could not be allowed to engineer the reception of evidence upon which to ground a complaint of irregularity. As subsequently clarified by the Appellate Division in *R.* v. *Bosch*,[15] the position is now that an exclusionary rule of evidence (whether statutory or common-law) which would prevent the prosecution or the court from eliciting certain evidence cannot be applied to prevent the accused doing so if it is in the interests of his defence. The evidence is not inadmissible, therefore, if elicited by a purposive question by the defence, whether or not the answer was expected or desired by the questioner. It remains inadmissible, on the other hand, if it is not properly part of the answer to the question.

It seems, from *R.* v. *Mitchell*,[16] that just because otherwise inadmissible evidence is elicited by the defence does not give the prosecution a licence to lead further evidence of the same kind; and it seems also that a witness who does give inadmissible evidence may still be cross-examined on it to destroy, if possible, *its effect*.

Apart from the question of admissibility, a fair degree of latitude is permitted to a cross-examiner.[17] The general principles are set out in the case of *Dongwe* v. *Assistant Magistrate, Durban*.[17] It is to be assumed that when he embarks on an unexpected line of investigation that this is not merely a hopeful 'fishing expedition' but has some latent relevance which will soon appear. The court should not therefore interrupt or require counsel to explain in advance the *purpose of each question*, as to do so may deprive the cross-examination of its crucial weapon of surprise. A curtailment of cross-examination in general or of a line of inquiry in particular would be grossly irregular.[18] On the other hand, a judicial officer has a duty as well as a discretion to control the conduct of proceedings before him. In the interests of the administration of justice he may prevent vague and irrelevant questioning or direct that questions be clarified by rephrasing;[19] he may curtail lengthy questioning as to collateral matters or

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[13] *R.* v. *Perkins*, 1920 A.D. 307 at 311.
[14] 1925 T.P.D. 390.
[15] 1949 (1) S.A. 548 (A.D.) esp. at 553–4.
[16] 1929 T.P.D. 727 at 731.
[17] 1951 N.P.D., reported in H. J. May, *South African Cases and Statutes on Evidence*, 4th ed. (1962), p. 288.
[18] *Chester* v. *Oldman*, 1914 T.P.D. 67; *Berkowitz* v. *Pretoria Municipality*, 1925 T.P.D. 113; *Dierdie* v. *R.*, 1960 (1) P.H., H. 128 (A.D.).
[19] *R.* v. *Sacks*, 1931 T.P.D. 188.

prevent over-repetitious examination where this is not serving to test the witness's consistency of recollection;[20] and he must intervene to protect a witness from abusive, insulting or harassing cross-examination, for the dignity of the court is inconsistent with gross discourtesy to witnesses.[21] A cross-examiner should not recklessly impute misconduct to a witness, and even if instructed to do so retains his professional responsibility for weighing whether it is a necessary course.[22] As pointed out by Viscount Sankey L.C.,[23]

> '[I]t is right to make due allowance for irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted without restraint and without the courtesy and consideration which a witness is entitled to expect in a court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the court are taking part in the great task of doing justice between man and man.'

The civil liability of a cross-examiner who oversteps the limits of defensible cross-examination should also be remembered,[24] and, in the case of defence counsel, the consequences of making imputations upon the prosecution witnesses.[25] As to questioning by the court itself, see below.[26]

A witness is not always obliged to answer a question even if it is properly the subject of cross-examination, for he may be able to claim privilege.[27] Where it is the accused who is under cross-examination *the mere asking of certain questions* may be improper by virtue of section 228 of the Criminal Procedure Act.[28]

2. Cross-examination as to credit

A *witness may* be cross-examined on matters entirely collateral to the issues for the purpose of testing his credit. Questions which are relevant neither to the issues nor to the credibility of the witness may not be put,[29] but it is in the discretion of the court whether any aspect of the witness's past conduct, associations or circumstances should be excluded as irrelevant to his veracity. The presiding officer as trier of fact is the best person to decide what questions will affect the credibility of the witness in his mind,[30] and he may even indicate to the cross-examiner that further questions are superfluous because the witness has been sufficiently exposed or discredited.[31] In *Gillingham* v. *Gillingham*[32] the question whether a witness had committed adultery was disallowed as having no bearing upon the likelihood of his telling the truth on oath, but later courts

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[20] *Bagley* v. *Cole*, 1915 C.P.D. 776; *R.* v. *De Bruyn*, 1957 (4) S.A. 408 (C); *R.* v. *Amod*, 1958 (2) S.A. 438 (N); *R.* v. *Nomtwana*, 1961 (4) S.A. 174 (E); *S.* v. *Green*, 1962 (3) S.A. 886 (A.D.).

[21] *R.* v. *O'Neill* (1950) 34 Cr. App. Rep. 108; *S.* v. *Boot*, 1964 (1) S.A. 224 (E); *De Vos* v. *S.*, 1964 (2) P.H., O. 20 (G.W.).

[22] Rules laid down by the Inns of Court as to the duty of a barrister who is to cross-examine as to credit may be found in (1918) 25 *S.A.L.J.* 295. See, also, H. J. May, *South African Cases and Statutes on Evidence*, 4th ed. (1962), pp. 286 ff.; (1969) 15 *McGill L.* [illegible] 360.

[23] *Mechanical & General Inventions Co., Ltd.* v. *Austin* [1935] A.C. 346 at 360.

[24] See *Gleckman* v. *Schneider*, 1936 A.D. 151. [illegible]

[25] Sec. 228 of the Criminal Procedure Act, discussed at pp. 000-00, below.

[26] p. 000 [illegible] [27] See chap. 21, below.

[28] See below, pp. 000 ff.

[29] *Spencely* v. *De Willott* (1806) 7 East 108, 103 E.R. 42.

[30] Per Gardiner *J.* in *Bagley* v. *Cole*, 1915 C.P.D. 776 at 782.

[31] *Dlendle* v. *R.*, 1960 (1) P.H., H. 128 (A.D.). Naturally if the court does so it is entirely improper for it thereafter to accept any part of the witness's evidence.

[32] 1904 T.S. 126.

have disagreed,[33] and indeed witnesses—particularly complainants in charges involving indecency—are commonly asked about their sexual encounters and misconduct.[34] On the other hand, the cross-examiner in *R.* v. *Sacks*[35] was not permitted to ask a witness 'whether he was in trouble in Port Nolloth for I.D.B.', on the ground that the question was a vague and fishing one: it could have meant no more than that there had been a complaint against the witness or that he had been arrested, and thus interpreted would have been irrelevant to credit.

A witness may be cross-examined as to whether his testimony in other trials had been disbelieved or rejected by the court, though it is said that a trier of fact should not be unduly influenced by another court's view of the witness's credibility.[36]

If a matter relative to the witness's credit is put to him and he denies it, must the cross-examiner accept the denial or can he bring evidence to contradict that denial? For example, if a prosecution witness is asked whether he has a grudge against the accused, and he says he does not, may the defence call evidence to show that he does in fact bear the accused malice? In general the principle is that a witness's reply in cross-examination upon the collateral matter of his credit is conclusive, and the cross-examining party is not permitted to adduce evidence in contradiction of that reply,[37] since otherwise trials would be unduly prolonged. Thus in *Grant* v. *S.A. National Trust and Assurance Co., Ltd.*,[38] though a witness could be asked if he had not offered to give favourable evidence in return for a consideration, upon his denial evidence to establish that he had made the offer could not be heard. (If he had been asked whether he had received a bribe, a different result would probably have been reached. See below.) Where the accused is charged with rape or indecent assault, the complainant may be asked about the chastity of her general behaviour, and about specific instances of misconduct whether with the accused or with others.[39] If she denies the particular instances put to her, evidence in contradiction may be led to show that she has had previous voluntary intercourse with the accused, this being clearly relevant as to whether she is likely to have consented on the occasion charged. But her denial of previous intercourse with other men cannot be contradicted, being purely collateral,[40] (unless perhaps to prove her physical condition, 41a.

If the cross-examination is relevant to the issue, evidence in rebuttal is no less admissible, just because the questions are *in addition* relevant to collateral matters of credit. An illustration is provided by *R.* v. *Solomons*,[41] where the

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[33] *Clifford* v. *Clifford* [1961] 3 All E.R. 231.

[34] e.g. *R.* v. *Samuels*, 1930 C.P.D. 67; *Spence* v. *R.*, 1946 N.P.D. 696; *Modibe* v. *S.*, 1967 (2) P.H., H. 337 (G.W.).

[35] 1931 T.P.D. 188. See, also, *Hamangile* v. *R.*, 1911 E.D.L. 371; *R.* v. *O'Neill* (1950) 34 Cr. App. Rep. 108.

[36] *Seaman* v. *Netherclift* (1876) 2 Com. Pl. Div. 53 (C.A.); *Heystek* v. *Alge*, 1925 T.P.D. 1; *R.* v. *Barnett*, 1926 T.P.D. 464; *Dollie* v. *R.*, 1960 (1) P.H., H. 27 (C).

[37] *S.* v. *Sinkankana*, 1963 (2) S.A. 531 (A.D.). See, also, *R.* v. *Zakeyu*, 1957 (3) S.A. 198 (F.C.)

[38] 1948 (3) S.A. 39 (W). Cf. *Attorney-General* v. *Hitchcock* (1847) 1 Ex. 91, 154 E.R. 38, and *Moriarty* v. *London, Chatham & Dover Railway Company* (1870) L.R. 5 Q.B. 314.

[39] *R.* v. *Samuels*, 1930 C.P.D. 67; *Modibe* v. *S.*, 1967 (2) P.H., H. 337 (G.W.).

[40] *R.* v. *Riley* (1887) 18 Q.B.D. 481; *R.* v. *Yousry* (1914) 11 Cr. App. Rep. 13; *R.* v. *Samuels*, 1930 C.P.D. 67; *Spence* v. *R.*, 1946 N.P.D. 696. In *R.* v. *Bashir* [1969] 1 W.L.R. 1303, evidence was received, in contradiction of her denial, that she was reputed to be a prostitute, and that she had offered herself to a man for money (a previous inconsistent statement).

[41] 1959 (2) S.A. 352 (A.D.). 41a R. v. M., 1970 (1) S.A. 329 (R.A.D.).

accused was charged with murder by stabbing. Under cross-examination by the prosecutor, the accused denied that he had had a knife on him on the relevant evening, and the prosecution was permitted to contradict this denial by leading evidence that he had made other use of a knife on the same evening. The possession of the knife was clearly relevant to establish the charge, and would normally have to be proved by the prosecution in chief even had the accused not denied it. The fact that the truthfulness of the accused's evidence was put in doubt was subsidiary.

Whether a question refers to a matter in issue or to a collateral matter is a question of law,[42] and there is no clearcut test as to whether it relates to the issues or to credit or to both. It is a question of degree depending upon the facts of each particular case. That the subject-matter of the question could have been proved in chief is one criterion of relevance to the issues, but not the only criterion.[43] For example, in *Wilkins* v. *S.*,[44] evidence was received to contradict a prosecution witness's claim that he had been an eyewitness to the events in issue, although the defence could clearly not have led evidence of his absence had it not been for his answers in cross-examination.

There are two types of case only[45] where evidence to contradict a witness's answers in cross-examination as to credit is permissible.

(*a*) By statute,[46] a witness may be cross-examined as to whether he has a criminal record, and if he denies that he has been convicted of any offence the conviction may be proved in the manner provided by section 248 of the Criminal Procedure Act. It is not, apparently, necessary that the conviction have been of an offence involving dishonesty.[47] A witness's previous conviction for assault[48] or for selling beer without a licence[49] has been proved under the statute.

(*b*) Evidence is admissible to establish the witness's general status as unreliable.[50] This may take two distinct forms. (i) Where the witness has some disability or tendency which makes him untrustworthy, it may be proved to discredit him in contradiction of his answers under cross-examination. A moral disability would be established by showing bias in favour of or against one of the parties—that the witness is the accused's paramour, sister or daughter,[51] or that he bears a grudge against[52] or has been bribed by[53] the accused or the prosecution. A physical disability could be shown by evidence that a purported eyewitness has defective vision or, as in *Toohey* v. *Metropolitan Police Commissioner*,[54] that the witness suffered from hysterical and delusional personality

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[42] *R* v. *Solomons*, 1959 (2) S.A. 352 (A.D.) at 363.
[43] *S.* v. *Sinkankana*, 1963 (2) S.A. 531 (A.D.) at 539. [44] 1962 (2) P.H., H. 205 (T).
[45] Proof of a previous inconsistent statement is really a third case, but for the sake of clarity is dealt with separately, below.
[46] Sec. 6 of the (English) Criminal Procedure Act, 1865 (28 & 29 Vict., c. 18), as read with sec. 286 of the Criminal Procedure Act, No. 56 of 1955.
[47] *Clifford* v. *Clifford* [1961] 3 All E.R. 231 at 232.
[48] *Williams* v. *Shaw* (1884) 4 E.D.C. 105 at 111.
[49] *R.* v. *Baker* [1895] 1 Q.B. 797.
[50] *Attorney-General* v. *Hitchcock* (1847) 1 Ex. 91 at 103, 154 E.R. 38 at 43, per Alderson B.
[51] *Thomas* v. *David* (1836) 7 C. & P. 350, 173 E.R. 156; *Cronkshaw* v. *Galloway* (1887) 5 S.C. 202.
[52] *Hamangile* v. *R.*, 1911 E.D.L. 371; *R.* v. *Ismail*, 1943 C.P.D. 418.
[53] *Attorney-General* v. *Hitchcock* (1847) 1 Ex. 91 at 104, 154 E.R. 38 at 44–5.
[54] [1965] A.C. 595, [1965] 1 All E.R. 506 (H.L.); (1965) 23 *Cambridge L.J.* 176. The evidence as to hysterical personality in *Toohey's* case could perhaps have been received as relevant not only to the complainant's credit but also to the truth of the defence story, but this is not the basis upon which the House of Lords chose to found its admissibility.

disorders. (ii) Evidence of a witness's general bad reputation is admissible to impugn his credit, though it may not include specific instances when his bad character was displayed.[45] In *R. v. Richardson*[46] the Court of Appeal, in setting out the procedure for so impeaching a witness, held that the impugning witness may also give his own personal opinion of the witness's untrustworthiness but again cannot speak of the particular incidents upon which his poor opinion of the witness is based. The discrediting witness may himself be impugned by showing his general unreliability, but the process of recrimination must stop there.[47]

3. Previous Inconsistent Statement

Cross-examination as to credit may be directed to showing that the witness has not consistently told the same story as he narrated in his evidence in chief. The procedure for discrediting the witness by cross-examining him as to a previous statement inconsistent with his present testimony is laid down in an English statute, the Criminal Procedure Act, 1865,[48] which is made applicable in South Africa by section 286 of the Criminal Code. The effect is that a witness may always be asked in cross-examination if he has ever made a previous contradictory statement. If he does not admit having done so, he may be reminded of the occasion and circumstances.[49] If he thereupon admits having made the statement he must be given the opportunity of explaining or excusing the contradiction which may thereby be deprived of much of its impeaching force.[50] But if the witness persists in his denial of having made any inconsistent statement, the only remedy for the cross-examining party would be to contradict the denial by proving the statement. Whether or not this can be done depends upon another application of the principle stated above regarding the contradiction of answers given in cross-examination, although the question of a previous inconsistent statement itself relates only to credit. The test of whether the witness's previous inconsistent statement can be proved to rebut his denial of having made it, is whether or not it relates to the issues in the case and not merely to collateral matters.[51] If it can be proved, the statement must be fully and properly proved, e.g. by calling witnesses who heard it.[52]

If the previous inconsistent statement is in documentary form, the document need not be shown to the witness before the cross-examiner asks whether he has ever told a different story. It may thereafter be shown to him and he may then be asked if he still adheres to his evidence, without its being put in evidence,[53] but if he is cross-examined upon its contents it should be made available to the court and the opponent.[54] The witness must be given an opportunity of explain-

[45] *R. v. Ader-orda*, 1937 C.P.D. 331. See, also, *R. v. Samuels*, 1930 C.P.D. 67; *R. v. Bashir* [1969] 1 W.L.R. 1303.
[46] [1968] 3 W.L.R. 15 (C.A.) at 19. But cf. *R. v. Rowton* (1865) L. & C. 520, 169 E.R. 1497.
[47] *Tookey v. Metropolitan Police Commissioners* [1965] A.C. 575 (H.L.) at 605-6, [1965] 1 All E.R. 506.
[48] 28 & 29 Vict. c. 18 (1865). See *R. v. McLaren* (1901) 18 S.C. 470.
[49] *R. v. Jagwig*, 1962 (3) S.A. 704 (C).
[50] *Soper v. Watney*, 1934 C.P.D. 203; *R. v. Michael Georgiou*, 1945 (2) P.H., H. 254 (N); *Cooke v. R.*, 1961 (1) P.H., H. 103 (C).
[51] *Attorney-General v. Hitchcock* (1847) 1 Ex. 91, 154 E.R. 38; *Saltzman v. Holmes*, 1914 A.D. 471; *R. v. Lombacher*, 1926 A.D. 276; *Kuutiya v. Nel*, 1966 (3) S.A. 309 (A.D.).
[52] *Soper v. Watney*, 1934 C.P.D. 203; *R. v. Kupelo*, 1957 (4) S.A. 309 (A.D.).
[53] *R. v. Riley* (1866) 4 F. & F. 966, 176 E.R. 868; *R. v. Steyn*, 1954 (1) S.A. 324 (A.D.).
[54] *Rayner v. R.* (1912) 33 N.L.R. 28; *R. v. Tivoli*, 1924 T.P.D. 545; *R. v. Wright* (1866) F. & F. 967, 167 E.R. 869.

ing the contradictions if he can.[65] If he denies making the statement, the document again can only be proved if it refers to the issues in the case and not to merely collateral matters,[66] and where it can be proved this must be done in the proper manner by which documentary evidence is adduced.[67] It would not, for example, be sufficient for the document to be merely read over from the bar.[68]

Wherever the previous inconsistent statement is proved, it can be used only to impeach the witness's credibility. It is never evidence of the facts asserted in the statement and the court cannot found a judgment upon its contents.[69] On the other hand, the court may nevertheless consider it safe to rely upon the witness's *sworn testimony*, despite proof of the inconsistent statement.[70] But that statement itself is evidence only of the witness's unreliability. It follows that unless the maker of the statement gives evidence, the documents or statements are irrelevant and cannot be used for the purposes of cross-examination.[71]

The court may *at any time during the proceedings* require the document to be produced to it for inspection and may make such use of it for the purposes of the trial as it thinks fit,[72] subject to general principles.[73]

A cross-examiner should not, in cross-examining a witness as to credit, employ previous statements which *are inadmissible in evidence*[74] *or incapable of* production.[75] Thus a witness may not be cross-examined on or contradicted by statements in respect of which privilege is claimed.[76] This is of particular importance in the case of statements taken by the police from prosecution witnesses. The defence cannot compel the prosecutor *to make these statements* available to it for cross-examination, as a claim of privilege was upheld by the Appellate Division in *R.* v. *Steyn*.[77] However, Greenberg J.A. in that case stressed that a prosecutor has an invariable duty as an officer of the court to

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[65] *Potgieter* v. *Minty and Sons*, 1929 T.P.D. 745; *Botha N.O.* v. *Timbridge N.O.*, 1933 E.D.L. 95; *S.* v. *Jeggels*, 1962 (3) S.A. 704 (C).

[66] See n. 3 above. 61 above.

[67] See above, under Documentary Evidence, p. 400. 4 2

[68] *R.* v. *Tladi*, *1924 T.P.D. 545*. *See, also, Goold* v. *Bladwell*, 1919 T.P.D. 53; *S.* v. *Van Tonder*, 1967 (2) P.H., H. 352 (G.W.). If the previous statement is contained in the record of the preparatory examination or other proceedings, the opposing party whether prosecution or defence, may admit the accuracy of the record in this respect (*R.* v. *Kupeka*, 1957 (1) S.A. 399 (A.D.) as read with *S.* v. *Thomo*, 1969 (1) S.A. 385 (A.D.)), but if there is no such admission *the accuracy of the record* must be proved (*Potgieter* v. *Minty & Sons*, 1929 T.P.D. 745; *Botha N.O.* v. *Timbridge N.O.*, 1933 E.D.L. 95).

[69] *Hoskisson* v. *R.*, 1906 T.S. 502; *R.* v. *Beukman*, 1950 (4) S.A. 261 (O); *R.* v. *Golder* [1960] 3 All E.R. 457 (C.A.). Cf. *R.* v. *Weinberg*, 1939 A.D. 71 at 80.

[70] *Laurens* v. *Laurens* (1915) 36 N.L.R. 428; *R.* v. *W*, 1960 (3) S.A. 247 (E); *Gatehe* v. *R.*, 1961 (3) P.H., H. 103 (O); *Twetison* v. *R.*, 1964 (2) P.H., H. 144 (S.R.). On the factors to be considered by the court in weighing how far proof of a previous inconsistent statement impairs a witness's credibility, see *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Co. (South) Ltd.*, 1955 (2) S.A. 1 (W) at 8.

[71] *R.* v. *Winshaw*, 1929 C.P.D. 494; *Weintraub* v. *Oxford Brick Works (Pty.) Ltd.*, 1948 (1) S.A. 1090 (T); *R.* v. *Beukman*, 1950 (4) S.A. 261 (O).

[72] Sec. 5 of the Criminal Procedure Act, *1865*.

[73] *R.* v. *Birch* (1924) 18 Cr. App. Rep. 26.

[74] *R.* v. *Yousry* (1914) 11 Cr. App. Rep. 13; *Bloom and Bailey's Trustee* v. *Fourie*, 1922 T.P.D. 248; *Emmanuilly* v. *R.*, 1941 N.P.D. 333. But see, too, *National Bank of S.A., Ltd.* v. *Royal Exchange Assurance Co., Ltd.*, 1917 W.L.D. 100.

[75] *R.* v. *Anderson* (*1929*) *12 Cr. App. Rep. 178*.

[76] Privilege may be held to have been waived where the statement is partly disclosed *for* purposes of cross-examinations: *Burnell* v. *British Transport Commission* [1956] 1 Q.B. 187, [1955] 3 All E.R. 822 (C.A.); *Ex parte Minister van Justisie: In re S.* v. *Wagner*, 1965 (4) S.A. 587 (A.D.) at 514.

[77] *R.* v. *Steyn*, *1954 (1) S.A. 324 (A.D.)*. See, too, *Leask* v. *Attorney-General* (1916) 37 N.L.R. 445; *Hull* v. *Minister of Justice*, 1932 T.P.D. 139.

inform it where a State witness has made previous statements materially inconsistent with his testimony, and, in the absence of special and cogent reasons to the contrary, to make those statements available to the defence for cross-examination.[78] In practice the discharge of this duty no doubt depends largely upon frank and vigilant co-operation between the investigating police officers and prosecuting counsel.[79]

(c) RE-EXAMINATION

After the completion of the opponent's cross-examination, the witness may be re-examined by the party who called him. Re-examination must be confined to answering and rebutting the cross-examination and no new matter may be introduced[80] except by leave of the court,[81] whereupon a further cross-examination upon the new material must be allowed.[82]

Generally all the rules applicable to examination in chief apply also to re-examination, so that, for example, leading questions may not be put.

(d) EXAMINATION BY THE COURT

As part of his controlling function to ensure that the truth is elicited and justice done, the presiding judicial officer may examine the witnesses called by the parties by questions testing, elucidating or supplementing[83] the evidence elicited by the parties and, if desirable, by investigating aspects of the case to which the parties' examination did not advert.[84] It is desirable that questions by the court should be put after both parties have finished with the witness or, if more convenient, when the questioning on any particular topic has been completed and before a new topic is introduced. Interruptions by the court should be minimized in order not to break the line of thought of cross-examiner and witness.[85]

There is no absolute restriction on the court's power to ask leading questions,[86] provided its so doing does not amount either to taking over the conduct of the prosecution[87] or of the defence,[88] or to so influencing a witness's answers that no picture of the witness's own version of the facts is obtained.[89] In particular it is irregular for the court to adopt a badgering or harassing attitude towards the accused or the defence witnesses, as there is then not even the appearance of a fair trial.[90] These principles apply equally to trials of a political nature, as Van der Riet J. pointed out in *S.* v. *Makaula*,[91] for witnesses should invariably

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[78] At 337. See, too, *R.* v. *Fraser* (1956) 40 Cr. App. Rep. 160; *R.* v. *White*, 1962 (4) S.A. 153 (F.C.) at 156; *R.* v. *Tapera*, 1964 (3) S.A. 771 (S.R., A.D.). There is an article on "The Prosecutor as Minister of Justice" in (1969) 15 *McGill L.J.* 124.

[79] R. H. Christie (1964) *Rhod. L.J.* 113. See, also (1968) 118 *New L.J.* 913.

[80] *The Queen's Case* (1820) 2 Brod. & Bing. 284 at 297, 129 E.R. 976 at 981 (H.L.).

[81] *R.* v. *Levy* (1966) 50 Cr. App. Rep. 198.

[82] *Phipson on Evidence*, 10th ed. (1963), § 1562.

[83] *R.* v. *Benjamin*, 1914 T.P.D. 27; *R.* v. *Baartman*, 1960 (3) S.A. 535 (A.D.).

[84] *R.* v. *De Klerk*, 1930 A.D. 308.

[85] *Yuill* v. *Yuill* [1945] 1 All E.R. 183 (C.A.), approved in *Sequeira* v. *Sequeira*, 1945 A.D. 1077 at 1084, and in *R.* v. *Roopsingh*, 1956 (4) S.A. 509 (A.D.) at 515.

[86] *R.* v. *A*, 1952 (3) S.A. 212 (A.D.).

[87] *R.* v. *Laubscher*, 1926 A.D. 270; *R.* v. *Cain* (1936) 25 Cr. App. Rep. 204.

[88] *S.* v. *Tengeni*, 1967 (1) P.H., H. 193 (O).

[89] *R.* v. *Ngcobo*, 1925 A.D. 561; *Beattie* v. *S.*, 1967 (2) P.H., H. 318 (O).

[90] *R.* v. *Baartman*, 1960 (3) S.A. 535 (A.D.) at 541.

[91] 1964 (2) S.A. 575 (E). See, also *R.* v. *Naran*, 1954 (1) S.A. 509 (S.R.), where Tredgold C.J. said (at 511): 'It is notable that in those countries in which the enforcement of the law is

be treated in such a manner as to enlist the sympathy of the witness and of the public with law and order.

Undue judicial participation is in itself undesirable as depriving the court of the opportunity to reach an objective appraisal of the evidence put before him:[91]

> 'A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the cross-examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked that the demeanour of a witness is apt to be very different when he is being cross-examined by the judge as to when he is being questioned by counsel.'[92]

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tempered with restraint the co-operation of the public in its enforcement is correspondingly great.'

[91] *S. v. Adriantos*, 1965 (3) S.A. 436 (A.D.); *S. v. Sigwakla*, 1967 (4) S.A. 566 (A.D.).

[92] Per Lord Greene M.R. in *Yuill* v. *Yuill* [1945] 1 All E.R. 183 (C.A.) at 189. See n. 85, above.

CHAPTER 205

RELEVANCE AND ADMISSIBILITY

I. RELEVANCE

When rejecting evidence, *judges frequently* describe it as 'legally irrelevant' using the term in a technical sense.[1] More modern usage, however, draws a clear terminological *distinction* between relevance and admissibility. The latter presupposes the presence of the former, but is narrower in scope:

> 'When we have said (1) *that*, without any exception, nothing which is not, or is not supposed to be logically relevant is admissible; and (2) that, subject to many exceptions and qualifications, whatever is logically relevant is admissible; it is obvious that, in reality, there are tests of admissibility *other than logical relevancy*.'[2]

Evidence is only admissible, then, when it is relevant; and irrelevant evidence is always inadmissible.[3] Relevant evidence, *however, is not necessarily* admissible, for it may be excluded by one or other of the exclusionary rules which comprise the bulk of the law of evidence.[4]

Evidence may be relevant in three ways. It may be relevant (*a*) to the issues in the case, as defined *by the indictment* and the plea thereto read in the light of the applicable law;[5] (*b*) to the credibility of witnesses;[6] or to the admissibility of other evidence, *such as proof* offered on whether a confession by the accused was freely and voluntarily made as required by section 244(1) of the Criminal *Procedure Act, 1956*. If evidence is offered for the truth of the fact asserted,

[1] The history of the terminology is traced by *I. L. Montrose* in (1954) 7 *L.Q.R.* 527.
[2] Thayer, *Preliminary Treatise on Evidence* (1898), p. 265.
[3] Sec. 240 of the Criminal Procedure Act, No. 56 of 1955.
[4] *R.* v. *Trupedo*, 1920 A.D. 58 at 62; *R.* v. *Katz*, 1946 A.D. 71 at 78.
[5] See, e.g., *R.* v. *Gerson*, 1918 T.P.D. 450; *R.* v. *Lukelo*, 1929 T.P.D. 370; *Mokhachane* v. *Hendricks*, 1935 E.D.L. 28; *S.* v. *Christodolou*, 1967 (3) S.A. 269 (N).
[6] *Zulu* v. *R.*, 1934 N.P.D. 286.

i.e. direct evidence, its relevance is obvious. Disputed questions of relevance, therefore, arise only in respect of circumstantial evidence.[7]

The Appellate Division has adopted[8] Stephen's definhion of relevance as present where

> 'any two facts . . . are so related to each other that according to the common course of *events one*, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other'.

In *R.* v. *Mpanza*,[9] Innes C.J. said a fact is relevant 'when inferences can properly be drawn from it as to the existence of a fact in issue'. Neither definition is exhaustive, *the former* leaving unstated what is 'the common course of events', and the latter a criterion of the propriety of drawing inferences. The courts are wont to repeat that relevance is a matter not of law but of logic and common sense.[10] This overlooks the fact that decisions on relevance are treated as precedents *in subsequent cases, but is conveniently flexible*,[11] for there are situations on which experience and judgment would lead to individual differences of opinion on whether any inferences can be drawn from facts, e.g. whether an attempt at suicide by a person accused of a serious crime is or is not probative of his consciousness of guilt.[12] *If the probabilities are equally balanced the* evidence will not advance the inquiry and is therefore irrelevant and inadmissible.[13] Facts supporting highly speculative inferences, such as identification by police tracking dogs, are similarly inadmissible as entering on 'a region of conjecture and uncertainty'.[14] *This does not of course mean that the* evidence of the fact tendered must conclusively indicate the inference to be drawn from it. There is a clear distinction between relevance and sufficiency. As stated in the definitions of relevance quoted, the inference need only be a permissible or reasonable one.[15]

Thus evidence of the accused's motive to commit the crime charged,[16] or threats by him to commit it,[17] are relevant to the inquiry as to whether he did commit it. Evidence of his mental condition is always admissible—at the instance of the prosecution as well as of the defence—as relevant to whether or not he can be fixed with criminal responsibility.[18] Evidence of his possession of property is admissible to show his guilt of a crime which must or may result in possession, *such as illicit liquor selling*,[19] counterfeiting, theft, receiving[20] or bribery.[21] That he and his family have been living above his lawful means is

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[7] Charles T. McCormick, *Handbook of the Law of Evidence* (1954), p. 316.
[8] By Watermeyer C.J. in *R.* v. *Katz*, 1946 A.D. 71 at 78. [9] 1915 A.D. 348 at 352–3.
[10] *R.* v. *Matthews*, 1960 (1) S.A. 752 (A.D.) at 758; *Erasmus* v. *R.*, 1945 O.P.D. 50 at 75.
[11] See, e.g., Harcourt J. in *S.* v. *Gakool*, 1965 (3) S.A. 461 (N) at 477–8, *distinguishing* *R.* v. *D*, 1958 (4) S.A. 364 (A.D.). (*Gakool* was confirmed by the Appellate Division in 1966 (1) S.A. 436 (A.D.).)
[12] See McCormick, above, pp. 318–19. Cf. *R.* v. *Simon*, 1929 T.P.D. 328; *R* v. *C*, 1949 (2) S.A. 438 (S.R.).
[13] See Selke J. in *R.* v. *Hlope*, 1947 (2) S.A. 453 (N) at 458.
[14] Per Innes C.J. in *R.* v. *Trupedo*, 1920 A.D. 58 at 63. Purely instinctive behaviour of animals is admissible, and inferences of their familiarity with persons or places may be drawn therefrom: *R.* v. *Trupedo*, at 62; *Poswa* v. *Christie*, 1934 N.P.D. 178; *R.* v. *King*, 1943 E.D.L. 191.
[15] See Innes C.J. in *R.* v. *Kumalo and Nkosi*, 1918 A.D. 500 at 504.
[16] *R.* v. *Kumalo and Nkosi*, above; *R.* v. *Khan*, 1954 (2) S.A. 340 (A.D.).
[17] *R.* v. *Mpanza*, 1915 A.D. 348; *R.* v. *Khan*, above.
[18] *R.* v. *Holliday*, 1924 A.D. 250; *R.* v. *Maphumalo* (1), 1960 (1) S.A. 808 (D).
[19] *R.* v. *Christians*, 1925 T.P.D. 868. [20] *R.* v. *Tshabalala*, 1942 T.P.D. 27.
[21] *R.* v. *Ingham*, 1958 (2) S.A. 37 (C). Where the possession of the articles was in no way linked to the crime, evidence of possession was excluded, in *R.* v. *W*, 1947 (2) S.A. 708 (A.D.), and *R.* v. *Sekute*, 1953 (4) S.A. 120 (O).

relevant to the inference that he had an unlawful source of income, as where he is charged with illegally transporting passengers for reward[22] or illicit selling of some kind.[23] Where a state of affairs is alleged to exist, evidence that it existed before and after the date alleged is receivable to found the inference of prospective or retroactive continuity.[24] On the other hand, evidence of a subsequent state of affairs is not admissible if the situation in issue is not of a continuing nature as no inference could helpfully be drawn from it.[25] Facts constituting *part* of the *res gesta*—those intimately related in time, place or circumstance to the issues, or which lead up to or explain the issues—are relevant and admissible to give the court as complete as possible a picture of the events; but although their mere proximity to the facts in issue will usually suffice for their admission, they can be excluded if they are demonstrated to be unconnected with the issues.[26]

Evidence which is prima facie relevant may yet be rejected under the exclusionary factors. These, 'in order of their importance', are listed by McCormick[27] as follows:

> 'First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility and sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side-issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter-proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.'

More than one of these categories may of course apply in any particular case. The second and third were invoked in *Delew* v. *Town Council of Springs*,[28] an action for payment of an electricity account where evidence of the amount of statements of account submitted in previous years was excluded. All four have been advanced as the reason why the bad character of the accused person—both his reputation and his other disreputable or criminal acts—are irrelevant in law, in the sense that it may not found an inference as to his guilt on a particular occasion.[29] The exclusion here is based on policy rather than logical relevance, as is shown by the fact that the character or reputation of persons other than the accused may be proved if relevant, and the character (in the sense of repute) of the complainant has been held to be relevant on charges of *crimen injuria*,[30] rape[31] or similar offences, or where paternity is in issue.[32] The complainant's previous voluntary intercourse with the accused is also relevant to the issue of consent, but not her acts of connection with other men, which would involve the

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[22] *R.* v. *Nitshi*, 1956 (3) S.A. 641 (E).
[23] *Nhlapo* v. *R.*, 1958 (2) P.H., H. 229 (C)
[24] *Valkin* v. *Daggafontein Mines, Ltd.*, 1960 (2) S.A. 507 (W); *Feldt* v. *Bailey*, 1961 (4) S.A. 545 (W); *R.* v. *Nkomo*, 1965 (1) S.A. 225 (S.R., A.D.); *S.A. Associated Newspapers, Ltd.* v. *Yutar*, 1967 (3) S.A. 445 (A.D.).
[25] *Bishop* v. *Inspector of Nuisances, Durban* (1914) 35 N.L.R. 1. Cf. *Wilkinson* v. *Clark* [1916] 2 K.B. 636.
[26] See *Carroll* v. *Carroll*, 1947 (4) S.A. 37 (D); *R.* v. *De Beer*, 1949 (3) S.A. 740 (A.D.); Julius Stone in (1939) 55 *L.Q.R.* 66.
[27] *Handbook of the Law of Evidence* (1954), pp. 319-20.
[28] 1945 T.P.D. 128.
[29] See below, pp. 660 ff.
[30] *R.* v. *Van Tonder*, 1932 T.P.D. 90. Cf. *Sudani* v. *R.* (1923) 44 N.L.R. 38.
[31] Sec. 247 of the Criminal Procedure Act, 1956; *R.* v. *Stevens* (1889) 16 S.C. 280; *R.* v. *Adamstein*, 1937 C.P.D. 331; *S.* v. *Regino*, 1958 (1) P.H., H. 152 (A.D.) (where the evidence was, however, rejected on procedural grounds); *R.* v. *Samuels*, 1930 C.P.D. 67.
[32] *R.* v. *Franks*, 1930 A.D. 430.

court in a lengthy investigation of collateral issues.[33] (As to the character of witnesses, see generally above, p. 69 ~~below, p. 000~~.) Evidence of a course of dealing or systematic bad conduct on the part of persons other than the accused is not excluded. Thus the practice of a government departm[illegible] was held relevant to establish the scope of the authority conferred by it in a letter of appointment in *Randles Bros. & Hudson, Ltd.* v. *Estate Horner*,[34] and in *S.* v. *Letsoko*,[35] evidence of a police system of interrogation technique including assaults was admitted to establish that the same technique had been used on the accused by that investigational team, for the purpose of showing that a confession had been elicited from him by force.

The exclusion of evide[illegible] of the accused's misconduct on occasions other than those charged, does not of course extend to cases where the offence charged requires proof of more than one act, such as charges of unlawful dealing or unlawful practice. Whether proof of repetitious acts is required is a question of interpretation of the statute creating the offence. A single purchase of unwrought gold has been held to constitute a dealing,[36] but for illegal trading[36] or living on the earnings of prostitution[37] more than one act may have to be proved. More than one act of witch-finding was required to prove the accused was 'by habit and repute' a witchdoctor,[38] but a person may unlawfully 'practise' as a doctor by putting up a nameplate and advertising himself as such even though only one act of treating a patient is proved.[39]

The rule against hearsay[40] and evidence which is privileged from disclosure on some ground,[41] discussed elsewhere, are the other main exclusionary rules, apart from those already mentioned, limiting the pervasive effect of the relevance principle.

II. CHARACTER OF THE ACCUSED

1. Good and Bad Character

The question of the inadmissibility of evidence of similar facts on the grounds of their irrelevance, or insufficient relevance, to the facts in issue, is discussed above. Under this heading the admissibility of evidence which is logically relevant to the issue is now to be dealt with.

The character of the accused—the law-abiding or law-breaking disposition he has manifested during his past life—is not without relevance to his guilt on the particular charge for which he is standing trial. Deductions from a man's character are commonly relied on in everyday life, and its relevance is recognized in the law of evidence by permitting the accused to call evidence as to his good character to persuade the court of the improbability of his guilt[42] as well as of

[33] 1936 N.P.D. 193. Cf. *Lamprecht* v. *Varkevisser*, 1932 C.P.D. 388. The contrary conclusion reached in *R.* v. *Ndhlovu*, 1950 (4) S.A. 574 (N), cannot be supported, appearing as it does to be based on a confusion of the *res inter alios acta* maxim.

[34] 1964 (4) S.A. 768 (A.D.). See, too, *R.* v. *Musekiwa*, 1965 (3) S.A. 529 (S.R., A.D.); *Gouveia* v. *Rossouw*, 1966 (2) S.A. 476 (C).

[35] *R.* v. *Peekhan and Lalloo*, 1906 T.S. 798. But cf. *R.* v. *Hurwitz*, 1944 E.D.L. 23.

[36] *R.* v. *Abrahams*, 1927 T.P.D. 240; *R.* v. *Mphahlele*, 1942 T.P.D. 112.

[37] *Lindenstein* v. *R.*, 1908 T.S. 430.

[38] *R.* v. *Tiki*, 1919 E.D.L. 19.

[39] *R.* v. *Mutshikwana*, 1915 C.P.D. 89. See, too, *R.* v. *Strydom*, 1946 E.D.L. 342; *R.* v. *Van Wyk*, 1950 (3) S.A. 712 (O).

[40] See below, pp. ~~000 ff.~~ 80 ff.

[41] See below, chap. 21, pp. ~~000~~ 485 ff.

[42] *R.* v. *Gimingham*, 1946 E.D.L. 156.

the creditworthiness of his testimony.[43] Good character may be established not only by evidence of his reputation for uprightness, but also apparently by proving *particular virtuous* acts.[44] If such evidence is tendered, however, the accused's character is put in issue. If he testifies, he may be held to have forfeited his shield against cross-examination as to character under section 228(*a*) of the Criminal Procedure Act,[45] and further, though the prosecution will not necessarily become entitled to lead evidence in rebuttal and attack his character in every circumstance where he loses such shield,[46] if his character has been put in issue by the defence the prosecution may adduce evidence of his bad character either in cross-examination of his witnesses[47] or by leading evidence from its own witnesses. In the latter case the prosecution witnesses may apparently speak only as to the accused's general reputation and may not narrate specific incidents or their own personal opinion of him.[48]

When the defence *has given evidence* of the accused's good character in any respect its witnesses may be cross-examined upon the whole of it, even on those aspects unrelated to the charge.

> '[T]here is no such thing known to our procedure as putting half your character in issue, and leaving out the other half.'[49]

Apart *from these cases* of cross-examining on or rebutting defence evidence of the accused's good character, the prosecution witnesses may not in general give evidence of the accused's bad or suspicious character (except in so far as this is elicited as part of proper *answers to defence* cross-examination[50]) to support an inference that he is the kind of man who would commit the offence. The prohibition applies to State evidence of his bad reputation,[51] but in its most frequent application is formulated as excluding evidence *of the misconduct of* the accused on any occasion other than that charged, where the relevance of the *evidence is* solely to indicate the accused's propensity or disposition to criminality in general or to particular forms of criminal or otherwise reprehensible behaviour. The reason for this exclusionary rule is not its irrelevance, since the fact that a person *has on previous* or subsequent occasions transgressed moral or legal boundaries would certainly indicate that he is the kind of person on whom these standards have little restraining effect. The basis of the rule is rather the undue prejudice to the prisoner *the reception of* such evidence may cause, by clouding the issue of his guilt on the limited charge with the wickedness of his ways in general. However many crimes he may have committed the series must stop at some point; but if crimes *a*, *b*, *c*, and *d could be proved* against him when he is charged with crime *e*, the trier of fact may tend to forget

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[43] *R.* v. *Belliss* [1966] 1 All E.R. 552 (C.C.A.), [1966] 1 W.L.R. *234 (C.C.A.).*
[44] See L. H. Hoffmann, *South African Law of Evidence*, 2nd ed. (1970), p. 32.
[45] See below, pp. ~~000–00~~ 149–55
[46] *R.* v. *Paluszak*, *1938 T.P.D. 427*; *R.* v. *Butterwasser* [1948] K.B. 4 (C.C.A.), [1947] 2 All E.R. 415 (C.C.A.).
[47] *R.* v. *Roberts*, 1916 T.P.D. 495; *R.* v. *Hodgkiss* (1836) 7 Car. & P. 298, 173 E.R. 132.
[48] *R.* v. *Rowton* (1865) Le. & Ca. 518, 169 E.R. 1497.
[49] Per Humphreys J. in *R.* v. *Winfield [1939] 4 All E.R. 164* (C.C.A.). See, too, *Stirland* v. *D.P.P.* [1944] A.C. 315 (H.L.), [1944] 2 All E.R. 13 (H.L.).
[50] *R.* v. *Brewis*, 1945 A.D. 261 esp. at 274; *R.* v. *Meyer*, 1925 T.P.D. 390.
[51] *Thus in R.* v. *Simon*, 1925 T.P.D. 297, where the accused were charged with indecently assaulting two young girls they had met casually at a railway *station*, evidence by a policeman that he saw the accused loafing about the station every night was held to have a sinister connotation reflecting upon their respectability and was therefore held inadmissible. See, too, *Diamond* v. *R.*, *1933 N.P.D. 380*; *R.* v. *Wapad*, 1933 G.W.L. 56.

that it is as possible that he terminated his criminal career after crime *d* as that *it included* also crime *e*.[52] The accused is to be protected from reasoning as to his guilt on one occasion via his criminal propensity as shown on other occasions, for he is not on trial for the whole of his past life. Nor is any relaxation of the *exclusionary* rule to be permitted merely because the charge may be difficult to drive home without propensity evidence,[53] or, as was at one stage thought to be the case, where he is accused of an unnatural offence.[54]

It is therefore to ensure the fairness of the trial that evidence which supports only reasoning from propensity is excluded. Evidence of repeated misconduct does not, however, necessarily support reasoning from propensity. Thus, the charge *may involve* proof of a series of acts, for example, unlawful peddling,[55] and repetitious conduct would therefore constitute the facts in issue as to which evidence could not be excluded.[56] Another type of case where propensity is not shown by *the similar fact evidence* is exemplified by *R.* v. *Lee*,[57] where the accused woman was charged with murder by arsenic poisoning. Evidence that she and the deceased had been associated in perpetrating a number of thefts, and had *substantially increased the size* of his estate which she was to inherit, was admitted as highly relevant to the establishment of the accused's motive to commit the crime, Tindall A.C.J. stressing[58] that 'it is clear that no reasonable tribunal could . . . *for a moment regard* the accused as more likely to commit murder because she was capable of committing theft. No prejudice to the accused could therefore arise.'

Further, evidence of the accused's *previous misconduct may* have multiple relevance. It may be capable of supporting an inference from propensity, but also have relevance to some other proper aspect of the case. The leading case of this kind is *Makin* v. *Attorney-General for New South Wales*,[59] which arose out of a charge of infanticide against a husband and wife. The body of the baby whose death formed the subject of the charge had been found together with the remains of three others, and the disputed evidence *showed that the remains* of a total of nine other babies had been found buried in the gardens of two houses previously occupied by the accused, and that the deceased and several other children had been adopted by the accused upon payment *of a sum inadequate* for their support for more than a limited period. In ruling that the evidence was admissible, Lord Herschell L.C. said:[60]

> 'It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence *for which* he is being tried. On the other hand, the mere fact that the evidence tends to shew the commission of other crimes does not make it inadmissible, if it be relevant to an issue before the jury, and it may be so relevant *if it appears upon the question* whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.'

The exclusionary rule *therefore relates* only to the use of similar fact evidence as an index of the accused's propensity or disposition, but not to its use for other

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[52] *See* Z. Cowen and P. B. Carter, *Essays on the Law of Evidence* (1954), pp. 142–3.
[53] *R.* v. *L.*, 1951 (4) S.A. 614 (A.D.), *per* Centlivres C.J. at 622.
[54] *R.* v. *L.*, above.
[55] *R.* v. *Dekeda*, 1950 (3) S.A. 583 (C).
[56] 1949 (3) S.A. 1134 (A.D.).
[57] [1894] A.C. 56 (P.C.).
[58] See above, under Relevance.
[59] At 1145.
[60] *At* 65.

purposes. If it is relevant for any other reason, it is not excluded.[61]

Lord Herschell's statement of the rule was analysed by the Appellate Division in *R.* v. *Zawels*.[62] Stratford J.A. pointed out that it was not contemplated in that passage that there should be two rules, one allowing the evidence on the ground of relevancy and the other allowing it on the ground of necessity to rebut a *defence*. The only test, said the learned Judge of Appeal, was one of relevance, and the allusion to possible defences was merely to illustrate relevance.[63] But the mere theory that a plea of not guilty puts everything in issue cannot be applied to determine relevance, for 'the prosecution cannot credit the accused *with fancy* defences in order to rebut them at the outset with some damning piece of prejudice'.[64] The evidence is usually said to be required to relate to some real issue in the trial,[65] and if as a result of an admission by the defence some aspect of the charge is no longer contested, evidence of the other misconduct might be excluded. For example, in *R.* v. *Solomons*,[66] on a charge of murder by stabbing, the trial court had refused to allow the State to lead evidence that the accused had stabbed two other persons earlier the same evening. During subsequent cross-examination of the accused, he denied any knowledge of the crime, or that *he had had a knife in* his possession on that evening, and the court had then 'rightly and properly', in the view of the Appellate Division, instructed prosecuting counsel to investigate the prior assaults. Had the accused not denied possession of a knife the earlier ruling excluding the evidence as not relating to a matter *really in issue would have stood*. A man may therefore paradoxically render evidence inadmissible by contesting only one issue, whereas if he makes no admission and contests two the evidence would have to be admitted.[67] But if the evidence is relevant to establish the State case as well as relevant to the defence abandoned by the *admission, the paradox is avoided*, as the defence admission saves the accused nothing. Thus in *R.* v. *Zawels*,[68] on a charge of fraud, evidence of similar false misrepresentations made to other persons was admitted as relevant to prove the *mens rea* of the accused, which was of course an issue to be established by the prosecution. *The fact that the evidence* supporting the State case might incidentally also rebut a defence of mistake or accident could not render it retroactively inadmissible just because the accused happened not to raise these defences.

The prosecution could not be said to be 'crediting the accused *with fancy* defences' if the act alleged may be capable of an innocent explanation and

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[61] *Lucid examples of* exclusion as relevant only to propensity are *Noor Mohamed* v. *R.* [1949] A.C. 182 (P.C.); *R.* v. *S.* 1954 (3) S.A. 522 (A.D.); *R.* v. *Vilagazi*, 1929 T.P.D. 295; *Alper* v. *R.*, 1931 N.P.D. 429; *R.* v. *Spilkin*, 1944 E.D.L. 55.

[62] 1937 A.D. 342.

[63] At 346.

[64] *See, too,* Lord Simon in *Harris* v. *D.P.P.* [1952] A.C. 694 (H.L.) at 705, [1952] 1 All E.R. 1044 (H.L.) at 1046; Z. Cowen and P. B. Carter, *Essays on the Law of Evidence (1956)*, p. 317.

[65] Per Lord Sumner in *Thompson* v. *R.* [1918] A.C. 221 (H.L.) at 232. See, too, *Harris* v. *D.P.P.*, above, at 704. For an application of this dictum, see *R.* v. *Sakute*, 1953 (4) S.A. 120 (O); *R.* v. *Flack* [1969] 1 W.L.R. 937 (C.A.).

[66] *Cowen and Carter*, above, suggest at p. 157 that Lord Herschell's phrase, in *Makin*, about rebutting defences open to the accused means, in effect, defences *tactically open to the accused.*

[67] 1959 (2) S.A. 352 (A.D.). Another example of the principle is *Diamond* v. *R.*, 1933 N.P.D. 380.

[68] *Thompson* v. *R.* [1918] A.C. 221 (H.L.) at 232.

[69] 1937 A.D. 342. *See, too, Perkins* v. *Jeffery* [1915] 3 K.B. 702; *R.* v. *Armstrong* [1922] 2 K.B. 555.

similar fact evidence is tendered to prove its guilty complexion,[70] or where statements suggesting the line of defence were made by the accused on his arrest or at the preparatory examination,[71] for the prosecution cannot be obliged to withhold its evidence until the defence has actually been revealed and thereby risk the discharge of the accused at the close of the State case or at the completion of the preparatory examination.[72]

In *R.* v. *Noorbhai*[73] Davis A.J.A. warned that nothing more should be contained in the State evidence than is absolutely necessary for the purpose for which it is admissible, so that matters extraneous to the issue to which it is *relevant* should be excluded. That this dictum is not to be applied to limit the range of *relevant* similar fact evidence is clear from *R.* v. *Matthews*,[74] where Schreiner J.A. said:

> '[T]he Crown case is essentially that there was concerted action by persons who, as a group, the Msomi gang, had a motive to seize the deceased [a member of a rival gang, the Spoilers] and, if circumstances so indicated, to kill him. It was contended [for the defence] that, gang rivalry being established by proof of inter-gang fighting, the issue of motive was then exhausted and evidence could not properly be led of gang violence not directed against the other gang. I do not agree with this contention. Wherever it is relevant to prove motive, in order to prove that an act was done, it must be relevant to show the full strength of the motive since, *while the commission of the crime* by the accused might be explainable by the presence of any measure of a particular motive, it might be more readily explained, and therefore more probable, if the motive were present in a more powerful form. . . . [I]t is clearly relevant to consider the scope of the gang operations and the extent to which it might render probable the resort to extreme violence in the furtherance of gang interests.'

In pursuance of the general principle, evidence relevant to the accused's criminal propensity has been admitted, *inter alia*, where it was also substantially relevant to establish his guilty knowledge[75] or intent,[76] a systematic course of criminal conduct,[77] acts of preparation or attempts;[78] it has been found relevant to the *res gestae*,[79] to establish the identity of the criminal[80] or the commission of the *actus reus*,[81] to corroborate witnesses on other counts in the indictment,[82] or to prove the guilty association between co-criminals.[83] Detailed discussion of these or other examples would not, it is felt, be warranted,[84] since decisions finding

[70] e.g. *R.* v. *Rorke*, 1915 A.D. 145; *R.* v. *Pharenque*, 1927 A.D. 57; *R.* v. *Ismail*, 1952 (1) S.A. 204 (A.D.).
[71] *R.* v. *Hall* [1952] 1 All E.R. 66 (C.C.A.) at 68–9.
[72] *Harris* v. *D.P.P.* [1952] A.C. 694 (H.L.) at 705.
[73] 1945 A.D. 58 at 77.
[74] 1960 (1) S.A. 752 (A.D.) esp. at 758, 759.
[75] e.g. *R.* v. *Keller and Parker*, 1915 A.D. 98.
[76] e.g. *R.* v. *Pharenque*, 1927 A.D. 57.
[77] e.g. *R.* v. *Katz*, 1946 A.D. 71; *R.* v. *Gouws*, 1935 E.D.L. 385; *S.* v. *Letsoko*, 1964 (4) S.A. 768 (A.D.).
[78] e.g. *R.* v. *Troskie*, 1920 A.D. 466.
[79] e.g. *R.* v. *Perkins*, 1920 A.D. 307; *R.* v. *De Beer*, 1949 (3) S.A. 740 (A.D.); *R.* v. *Bowden*, 1930 T.P.D. 512.
[80] e.g. *Thompson* v. *R.* [1918] A.C. 221 (H.L.); *R.* v. *Davis*, 1925 A.D. 30; *R.* v. *W*, 1947 (2) S.A. 708 (A.D.); *R.* v. *M*, 1963 (3) S.A. 182 (T). The evidence admitted in *Thompson* was actually relevant to corroborate an act of identification, as pointed out by Montrose (1954) 70 *L.Q.R.* 527.
[81] e.g. *S.* v. *Green*, 1962 (3) S.A. 886 (A.D.) esp. at 895; *S.* v. *Gokool*, 1965 (3) S.A. 461 (N) esp. at 477 (decision confirmed in 1966 (1) S.A. 436 (A.D.)).
[82] e.g. *R.* v. *Viljoen*, 1947 (2) S.A. 56 (A.D.); *S.* v. *Green*, above, at 893; *R.* v. *Tatana*, 1934 E.D.L. 22; *R.* v. *Maiete*, 1944 W.L.D. 193; *S.* v. *Gokool*, above, at 480.
[83] e.g. *R.* v. *Sebeso*, 1945 A.D. 196; *R.* v. *Roets*, 1954 (3) S.A. 512 (A.D.); *R.* v. *Mall*, 1960 (2) S.A. 340 (N); *Tesner* v. *S.*, 1951 (2) P.H., H. 256 (A.D.). See, also, *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Co. (South) Ltd.* (1), 1955 (2) S.A. 1 (W) at 15 (approved in *R.* v. *Matthews*, 1960 (1) S.A. 752 (A.D.) at 759).
[84] For an exhaustive analysis of this kind, see L. H. Hoffmann, *South African Law of Evidence*, 2nd ed. (1970), pp. 41–55.

relevance in the facts of one case cannot invariably be treated as precedents for holding comparable evidence to be relevant in another: relevance being a *matter not* of law but of logic and common sense.[85] On principle, however, there cannot be said to be any distinction in relevance between the misconduct of the accused before the commission of the charged, and those subsequent to it; in a *suitable case*, either could be relevant.[86] Nor does relevance depend on proximity in time between the other acts and that charged,[87] this being a matter affecting merely the weight and not the admissibility of the evidence. On the other hand *relevance to the* offence charged does depend both on the degree of similarity between the previous acts and those charged,[88] and on the strength of the evidence implicating the accused in the other misconduct, for

> 'evidence of other occurrences *which merely tend to deepen suspicion does not go to* prove guilt'.[89]

In this respect weight and admissibility cannot be clearly demarcated,[90] for even if the evidence is not believed it may be the odd coincidence of repeated and similar allegations being made against one individual which gives those allegations their relevance, though coincidence alone is not equivalent to credibility.[91]

The principles of relevance then, are not rigid ones, depending as they do on matters of degree varying in every case. In addition, the flexibility of the rules of admissibility in this branch of the law is further increased by the court's discretion to exclude technically admissible evidence if its reception would unfairly prejudice the accused, a discretion flowing from the overriding power of a criminal court to control in all aspects the fairness of the trial, but which is of particular importance where evidence of other misconduct is tendered.[92] Clearly *the degree of prejudice* caused by such evidence is conditioned less by the strength of its non-propensity relevance or by the degree to which the accused is identified as the perpetrator of the other acts, than by the unpleasantness or viciousness *of the conduct* alleged against him.[93] Where, therefore, the evidence tendered could influence the trier of fact because of its relevance to propensity in addition to its relevance to the issues in the case, the court in exercising its discretion must weigh *the strength of the* potential prejudice against the probative value of the evidence, and receive it only if the desirability of admitting it because of its importance clearly outweighs the dangers unavoidably occasioned by its reception. It has been pointed[93] *out that the* application of this test means, put crudely, that strong similar fact evidence will be accepted and weak similar

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[85] *R.* v. *Matthews*, 1960 (1) S.A. 752 (A.D.) *at 758*; *R.* v. *Erasmus*, 1945 Q.P.D. 50 at 75.
[86] *S.* v. *Green*, 1962 (3) S.A. 886 (A.D.) at 894. See, also, (1934) 50 *L.Q.R.* 386 (reprinted in (1937) 54 *S.A.L.J.* 201).
[87] *R.* v. *Pharenque*, 1927 A.D. 57 esp. at 61–2. [88] *R.* v. *Pharenque*, above, at 60–1.
[89] *Harris* v. *D.P.P.* [1952] A.C. 694 (H.L.) at 708; *and see S.* v. *Khan*, 1967 (4) S.A. 673 (N) esp. at 677. Evidence of a previous *acquittal* was excluded in *R.* v. *Umhlalo and Nokuza* (1904) 25 N.L.R. 264.
[90] See *Cowen and Carter*, op. cit., pp. 145–6.
[91] *R.* v. *Sims* [1946] K.B. 531 (C.A.); *R.* v. *Mulcrie*, 1944 W.L.D. 193 at 199; *Cowen and Carter*, op. cit., at 153. The unlikelihood of coincidence is not a sufficient ground of relevance in every case where the defence is one of innocent association, as may be seen from *R.* v. *Horwood* [1969] 3 W.L.R. 964 (C.A.), [1969] 3 All E.R. 1156.
[92] *R.* v. *Noorbhai*, 1945 A.D. 58; *Harris* v. *D.P.P.* [1952] A.C. 694 (H.L.) at 707; *R.* v. *Roets*, 1924 (3) S.A. 512 (A.D.) at 521.
[93] *R.* v. *Oddy*, 20 L.J.M.C. 189, quoted in (1930) 47 *S.A.L.J.* 417 at 418.
[93] By *Cowen and Carter*, op. cit., p. 145.

fact evidence rejected. A somewhat different criterion was applied by Fagan J.A. in *R.* v. *Khan*:[95] there was no reason, he said, why the trial judge should have exercised his discretion to exclude the evidence since its connection with the issue of the accused's guilt was 'very direct'. This test seems a less satisfactory one than that already set out, which was enunciated in *R.* v. *Noorbhai*, as it fails to take account of the prejudicial effect of displaying the accused's dirty linen regardless of the peg of relevance on which it is hung.[96]

2. Previous Convictions of the Accused

Section 300 of the Criminal Procedure Act excludes evidence before verdict that the accused has a criminal record,[97] since the disclosure of that record inevitably prejudices him in the eyes of the jury or other trier of fact.[98] Even inadvertent disclosure of the accused's previous convictions will amount to an *irregularity*. For instance, in *R.* v. *Meyer*,[99] a witness on being asked where he had first met the accused, replied, 'In prison'. Although this answer was unexpected and unsolicited, Rumpff J. discharged the jury. Where the previous convictions were disclosed at the preparatory examination and thus included in its record, it was held in *R.* v. *Mgwenya*[1] that they should if possible be expunged from the copy handed to the trial judge (but the same does not necessarily apply to the record before an appeal court).[2]

The accused's bad record, however, cannot always be successfully concealed, as where he is charged with trivial offences in a superior court[3] or where the fact of a previous conviction is an integral part of the charge.[4] In addition, the scope of section 300 is subject to the common-law principle relating to character evidence discussed immediately above, and accordingly if similar fact evidence is substantially relevant to anything other than the accused's propensity, its admissibility does not depend on whether or not the accused has been convicted *as a result* of his previous conduct but only on relevance as already defined in this connection.[5] Thus a conviction was upheld in *Mpanza* v. *R.*[6] where, in the course of proving certain admissions made by the prisoner, the State witnesses disclosed the fact that these had been made while they and the accused were

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[95] 1954 (2) S.A. 340 (A.D.) at 342.

[96] See, generally, Julius Stone in (1932) 46 *Harvard L.R.* 983.

[97] As to the manner of proof of previous convictions after verdict, for the purposes of sentence, see ~~above under Procedure, p. 000~~. Secs. 303 (2), 304.

[98] Bristowe J. said in *R.* v. *Dominic*, 1913 T.P.D. 582 at 584: 'One knows, from one's own experience in trying criminal cases, the effect which is produced on the mind of a judge when he learns that there is a record of previous convictions against the accused. A magistrate, I think, would be more than human if a matter of that kind did not affect his mind.' In the light of this, the comment by Davis A.J.A. in *R.* v. *Saffy and Bennett*, 1944 A.D. 391 at 442, that prejudicial evidence will more easily be found to have affected the minds of the jury than of a judge, seems unrealistic.

[99] 1953 (4) S.A. 26 (W). See, too, *R.* v. *Titles* (1907) 24 S.C. 437; *R.* v. *Ngqezu*, 1921 E.D.L. 109; *R.* v. *Chondi*, 1933 O.P.D. 267; *R.* v. *Mocke*, 1949 (4) S.A. 95 (T). On the effect of the accused appearing in court in prison clothing, see *In re Truter N.O.* (1890) 6 H.C.G. 94; *Fennessy* v. *R.*, 1907 T.S. 74.

[1] 1931 A.D. 3 at 7.

[2] *R.* v. *Mogate*, 1952 (4) S.A. 1 (T) at 4, where Dowling J. disagreed with the expunction favoured in *R.* v. *Kumalo*, 1952 (3) S.A. 223 (T).

[3] *R.* v. *Mgwenya*, 1931 A.D. 3 at 7; *R.* v. *Burton*, 1946 A.D. 773 at 781–2.

[4] *Croll* v. *Clerk of the Peace, Durban* (1887) 8 N.L.R. 71; *R.* v. *Mogate*, 1952 (4) S.A. 1 (T); *R.* v. *Malika*, 1958 (3) S.A. 663 (T).

[5] *R.* v. *Pharenque*, 1927 A.D. 57 at 59.

[6] (1915) 36 N.L.R. 197. See, too, *Fennessy* v. *R.*, 1907 T.S. 74; *R.* v. *Malika*, 1958 (3) S.A. 663 (T).

inmates of the same prison. Similarly, evidence of the accused's previous convictions will be received to rebut defence evidence of his youthful inexperience tendered for the purpose of establishing extenuating circumstances.[7]

Such evidence is also admissible for the defence to establish the plea of *autrefois convict*, an alibi (the accused's presence in gaol at the time of the alleged commission of the offence), or for any other relevant purpose.[8]

There are two statutory exceptions to the relevance principle; sections 276 and 277 of the Criminal Procedure Act, 1956, which, by way of facilitating proof that the accused is a fence, provide that on charges of knowingly receiving stolen property, evidence is admissible to show that the accused was found in possession of other property stolen within the previous twelve months, and that he has been convicted within the previous five years of any offence involving fraud or dishonesty. Three days' written notice must be given to the defence of the prosecution's intention to lead such evidence.

The common law in respects other than relevance is not altered by these provisions: previous convictions not falling within the statutory limits continue to be admissible if relevant; and although in terms sections 276 and 277 provide simply that on the giving of the statutory notice proof of the accused's previous convictions becomes receivable, the common-law discretion of the court to disallow the evidence in the interests of the fairness of the trial is not excluded.[9]

3. Previous Acquittals

In *Maxwell* v. *Director of Public Prosecutions*,[10] Viscount Sankey *L.C.* remarked that an acquittal is in general not evidence of bad character, but simply a misfortune. Normally, therefore, the fact of an acquittal of or unproved suspicion against the accused is irrelevant and inadmissible,[11] though if relevant it will not be excluded, e.g. in *R.* v. *Waldman*[12] the accused was charged with receiving property stolen by X; a previous acquittal on an identical charge was admitted as relevant to show the accused's knowledge that X was a thief.

III. THE RULE AGAINST HEARSAY

1. What is hearsay

Evidence is hearsay when it consists in a witness's reporting to the court, or putting in a document containing, assertions by another where the assertions are relevant only because of the facts asserted. The rule excluding hearsay, historically 'the result of marking off the functions of witnesses from those of jurors',[13] was developed in order to ensure that manifestly untrustworthy evidence should not be laid before the jury. Hearsay evidence, although of course frequently relied on in everyday life, is said to be untrustworthy because the assertion reported was not made on oath, and the declarant cannot be

[7] *R.* v. *Owen*, 1957 (1) S.A. 458 (A.D.) at 462. [8] *S.* v. *Malinga*, 1962 (3) S.A. 174 (D).
[9] *R.* v. *List* [1965] 3 All E.R. 710; *R.* v. *Herron* [1966] 3 W.L.R. 374 (C.C.A.), [1966] 2 All E.R. 26 (C.C.A.).
[10] [1935] A.C. 309 (H.L.) at 319.
[11] [1944] A.C. 315 (H.L.), [1944] 2 All E.R. 13 (H.L.). *R.* v. *Umhlalo and Nokusa* (1904) 25 N.L.R. 264.
[12] 24 Cr. App. Rep. 204, quoted in (1954) 70 *L.Q.R.* at 553.
[13] R. W. Baker, *The Hearsay Rule* (1950), p. 15. The history of the exclusionary rule is summarized by Baker, pp. 7–12, where there is also a discussion of the view of Professor E. M. Morgan that the rule arose as a function of the adversary system rather than as a concomitant of the rise of the jury. See, too, *Phipson on Evidence*, 10th ed. (1963), pp. 277–80.

subjected to cross-examination whereby his sincerity or honesty, or his powers of observation or of recollection can be investigated.[14] However, in its modern application, out-of-court assertions may be excluded even where these supposed guarantees are present. Sworn affidavits by persons who are not or cannot be called as witnesses are excluded as hearsay,[15] as are statements made by persons giving evidence on oath in previous proceedings where they were or could have been cross-examined.[16] Further, the rule has been invoked to exclude evidence where the persons whose utterances were reported were in fact present and testifying.[17] It accordingly seems clear that the hearsay rule is closely linked with the basic principle of our procedure that evidence be given orally in open court.

Thus date stamps in a passport have been held to be hearsay if tendered to prove the dates on which the holder of the passport left or entered a country,[18] and invoices and delivery notes are mere hearsay evidence of the contents of a parcel or the fact that it was dispatched.[19] A person's own evidence of his age or parentage is hearsay, as is a birth certificate[20] though the latter has been made admissible in evidence by statute, as discussed below, p. 000.107

Where the assertion was made by the declarant through an interpreter, the person to whom it was interpreted cannot give evidence of what was said unless either he had sufficient knowledge of the language used to follow what passed between the declarant and the interpreter, or the interpreter testifies also. The principle was explained by Davis A.J.A. in *R.* v. *Mutche*[21] as follows:

> 'It seems to me to be clear that it is sufficient if B, the interpreter, deposes to the fact that he has interpreted correctly all that was said to him by A, and if C, the person to whom he interpreted, then deposes to what B, the interpreter, said at the time. For here we have no hearsay. . . . The interpreter deposes to a fact within his own knowledge, namely that he interpreted correctly. The person to whom he interpreted also deposes to a fact within his own knowledge, namely, what the interpreter told him. The sum of the evidence of B and C, each speaking to his own knowledge, proves what was said by A.'

The learned Acting Judge of Appeal was here dealing with the case of a confession, but the same problem arises whenever an interpreter has been used,[22] even if only to prove, in cases of perjury, that an oath was administered.[23]

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[14] See E. M. Morgan, 'Hearsay Dangers and the Application of the Hearsay Concept' (1948) 62 *Harv. L.R.* 177 at 185–8, for an analysis of the supposed effectiveness of the oath and of cross-examination in ensuring the reliability of evidence.

[15] *Still* v. *Norton* (1841) 3 Menz. 390; *Bulai* v. *R.* (1900) 21 N.L.R. 20; *Liebenguth* v. *Joffe*, 1904 T.S. 234; *Van Reenen* v. *Union Govt.*, 1931 C.P.D. 34.

[16] *R.* v. *Jaspan*, 1940 A.D. 9 at 16.

[17] *R.* v. *Makhelyane*, 1946 O.P.D. 140. Though the previous consistent or inconsistent statements of a witness can be put to him in certain circumstances, they are not evidence of the facts asserted but are admissible only to affect credibility. See above, pp. 000–00, and (1963) 61 *Michigan L.R.* 1306. If the witnesses in *Makhelyane* had been parties to the action their statements might have been received as admissions, which constitute an exception to the hearsay rule. See below, pp. 000–00. 116 ff. 153, 65

[18] *Naik* v. *Hassim*, 1952 (1) S.A. 362 (S.R.). Cf. *R.* v. *Plumer* (1814) Russ. & Ry. 264, 168 E.R. 794, and *Ex parte Neubauer*, 1947 (3) S.A. 736 (O).

[19] *R.* v. *Budd and Shortte* (1897) 14 S.C. 436; *R.* v. *Cohen*, 1942 T.P.D. 266; *R.* v. *Els*, 1949 (3) S.A. 849 (W); *S.* v. *Nel*, 1967 (2) P.H., H. 349 (G.W.); *Patel* v. *Comptroller of Customs* [1966] A.C. 356 (P.C.). See, however, sec. 239(1) and (5) of the Criminal Procedure Act.

[20] *R.* v. *Kaplan*, 1942 O.P.D. 232.

[21] 1946 A.D. 874 at 878. For an argument that the rule against hearsay does nevertheless apply to such situations, see Prof. R. Cross in (1969) 7 *Melbourne L.R.* 1.

[22] See *R.* v. *Maharaj* (1910) 31 N.L.R. 183; *R.* v. *Tshlabato*, 1924 O.P.D. 97; *Sitole* v. *R.* (1927) 48 N.L.R. 83; *R.* v. *Makubesi*, 1952 (2) S.A. 75 (T).

[23] *R.* v. *Mtuntum*, 1946 E.D.L. 327; *R.* v. *Maduna*, 1946 E.D.L. 334; *R.* v. *Matakane*, 1947 (3) S.A. 717 (O).

The admissibility of statistical evidence and of police records to prove the prevalence of certain types of crime has been considered in a number of cases. It was admitted without comment as relevant to a fact in issue by the Appellate Division in *Sutter* v. *Brown*,[24] and in the Rhodesian case of *R.* v. *Nyoka*[25] (where it was necessary to establish the existence of a state of 'public disorder'), but it is undoubtedly hearsay and has therefore been excluded in several cases,[26] except where it is tendered after conviction for the purposes of sentence, under section 186(2) of the Criminal Procedure Act, 1956, where, subject to cross-examination, the rules of evidence need not be strictly applied.[27]

The application of the exclusionary rule may on occasion prevent certain matters from being proved at all, for original non-hearsay evidence may be not only more expensive or inconvenient to obtain: it may simply be unobtainable. In large organizations, for example, the number or turnover of the personnel may make it impossible to trace the person who has first-hand knowledge of the facts. For this reason, suggestions were made in the provincial divisions that, where no better evidence is available, hearsay evidence of matters recorded in the ordinary course of official or business practice could be given. Under this heading they received trade union records reflecting the size of the membership,[28] a mining company's records of the numbers on its staff,[29] and railway records showing the weight of a particular load.[30] This trend was, however, firmly checked by the Appellate Division in *Vulcan Rubber Works (Pty.) Ltd. v. S.A.R. & H.*,[31] where, after distinguishing the rule against hearsay from the best evidence rule, Schreiner J.A. said:[32]

> 'No doubt the difference between evidence and hearsay can be said to be an illustration of a broad rule favouring the use of the best evidence, but the better way of stating the position is that hearsay, unless it is brought within one of the recognised exceptions, is not evidence, that is, legal evidence, at all. . . . There is no doubt that the exceptions to the rule against hearsay have come into existence mainly because there was felt to be a strong need for such exceptions if justice was to be done. But that is a different thing from recognising a principle that the rule against hearsay may be relaxed or is subject to a general qualification if the court thinks the case is one of necessity.'

A similar conclusion was reached by the majority of the Court in *Myers* v. *D.P.P.*,[33] where the House of Lords was concerned with the identification of motor-cars alleged to have been stolen. The identifying evidence was given by an employee of the manufacturers, who stated that the practice was for the vehicles' chassis and engine numbers to be noted on cards by the assembling workmen, and the information on the cards then to be recorded on microfilms of which he was in charge. His evidence was reluctantly excluded by the Law Lords: original evidence by the unidentifiable workmen that they had actually seen on

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[24] *1926 A.D. 155 at 169–70.*
[25] 1965 Rhod. L.R. 214 (R.A.D.).
[26] *R.* v. *Stephen*, 1962 (3) S.A. 727 (S.R.); *R.* v. *Phineas*, 1966 (1) S.A. 538 (S.R.); *R.* v. *Mhowu, 1966 (2) S.A. 182 (R).*
[27] *R.* v. *Boesigo*, 1956 (1) S.A. 234 (A.D.); *S.* v. *Gqabi, 1964 (1) S.A. 261 (T); R.* v. *Kupe*, 1967 (3) S.A. 443 (R). See, too, *R.* v. *Morosi*, 1950 (2) S.A. 351 (S.R.) at 352; S. v. Kakoti, 1970 (3) S.A. 504(D).
[28] *Garment Workers' Union v. De Vries and others*, 1949 (1) S.A. 1110 (W) at 1128.
[29] *R.* v. *Ferguson*, 1949 (3) S.A. 69 (N).
[30] *Gibson* v. *Arnold & Co, (Pty.) Ltd.*, 1951 (2) S.A. 139 (T). *Contra*, *R.* v. *Els*, 1949 (3) S.A. 849 (W).
[31] 1958 (3) S.A. 285 (A.D.).
[32] At 296. See, too, Curlewis J.A. in *Taylor* v. *Budd*, 1932 A.D. 326 at 334.
[33] [1965] A.C. 1001 (H.L.), [1964] 2 All E.R. 881 (H.L.). See however the persuasive dissents of Lords Pearce and Donovan.

the cars the numbers entered in the records should have been produced. In such a situation clearly the danger of deliberate misrepresentations being embodied in the records was minimal, and the possibility of error no larger in the hearsay evidence than it would have been in the original. *Myers's* case has therefore been overruled in England by statute,[34] and no doubt it was the manifest inconvenience and *absurdity of* exclusion which led the Appellate Division *to refuse to recognize* as hearsay the almost identical evidence received in *S.* v. *Naran*.[35] Even where what is technically hearsay is daily acted on by hundreds in their daily transactions, as produce brokers throughout the country act on lists of the market prices in the major centres, the courts must exclude the evidence.[36]

The mere fact that an assertion is reported in evidence does not necessarily bring the rule against hearsay into play, for an assertion may be tendered for non-hearsay use, that is, where the making of the assertion is relevant for some reason other than the truth of the matters asserted.[37] Where the fact that a statement was made at all or in particular terms is in issue or relevant to an issue—for example, to prove that the speaker was alive at the time, or that a fraudulent misrepresentation or inquiries were made, a contract entered into, or perjured evidence given—the reporting witness is giving original evidence of what he perceived with his own senses.[38] Statements spoken or contained in letters by one spouse to another,[39] or even to a third person,[40] are admissible to show the terms of affection or otherwise on which they lived; and the fact that a statement was made may be used to prove the hearer's knowledge of the information communicated[41] or that as a result of threats he was in fear[42] or was provoked.[43]

Implied Assertions as Hearsay

As formulated by Cross,[44] implied assertions may be of two kinds, 'statements which were not intended by their maker to be assertive of the fact they are *tendered to prove*, and non-verbal conduct not intended to be assertive of the fact it is tendered to prove'.

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[34] Criminal Evidence Act, 1965 (c. 20), which is similar in outline to the Evidence Act, 1938 (1 & 2 Geo. V, c. 28) on which secs. 34 ff. of our Civil Proceedings Evidence Act, No. 25 of 1965, are modelled. The full text of the Act appears in (1966) 83 *S.A.L.J.* 514.

[35] 1963 (1) S.A. 652 (A.D.). See H. Luntz in (1964) 81 *S.A.L.J.* 429. The evidence received in *R.* v. *Mahomed*, 1940 A.D. 474, and *S.* v. *Becker*, 1968 (1) S.A. 18 (C), is, by the same token, really indistinguishable in principle from that excluded in *Vulcan Rubber Works (Pty.) Ltd.* v. *S.A.R. & H.*, 1956 (3) S.A. 265 (A.D.).

[36] See *Bland and Son* v. *Pointe and De Villiers*, 1945 E.D.L. 26. In *Robinson* v. *Randfontein Estates Gold Mining Co., Ltd.*, 1924 A.D. 151, stock exchange price lists were accepted as evidence of the price of shares, on the basis of a limited exception to the hearsay rule, but newspaper lists of share values, however carefully prepared, would apparently not fall within this exception (see at 157). See now, too, sec. 25*bis* of the Stock Exchanges Control Act, No. 7 of 1947, as inserted by sec. 3 of the General Law Further Amendment Act, No. 93 of 1963.

[37] See E. Seligman in (1912–13) 26 *Harv. L.R.* 146 esp. at 153.

[38] *R.* v. *Mills* 1939 A.D. 106 esp. at 119; *Hitchins* v. *Chapman*, 1932 N.P.D. 255; *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Companies (South) Ltd.*, 1953 (3) S.A. 343 (W) at 346-8; *R.* v. *Ahmed*, 1958 (3) S.A. 313 (T); *The Douglas* (1882) P.D. 151 (C.A.).

[39] *Trelawney* v. *Coleman* (1817) 1 B. & Ald. 90, 106 E.R. 33.

[40] *Willis* v. *Bernard* (1832) Bing. 376, 131 E.R. 439; *R.* v. *Lee*, 1949 (1) S.A. 1134 (A.D.) at 1148; and see, generally, E. M. Morgan in (1948) 62 *Harv. L.R.* 177 at 202.

[41] *R.* v. *Willis* [1960] 1 All E.R. 331 (C.C.A.); *Tickle* v. *Tickle* [1968] 1 W.L.R. 937.

[42] *Subramaniam* v. *Public Prosecutor* [1956] 1 W.L.R. 965 (P.C.); *R.* v. *Lazarus*, 1922 C.P.D. 293.

[43] *Fraser* v. *Berkeley* (1836) 7 Car. & P. 625, 173 E.R. 272.

[44] R. Cross, *Evidence*, 3rd ed. (1967), p. 383.

An example of the first kind is *S.* v. *Van Niekerk*,[45] where a magistrate was charged with stealing a gun from a prisoner. Letters written by the prisoner (who had since died) to his brother, reminding him to get the gun back from the magistrate, were excluded as hearsay. Watermeyer J. pointed out that had it been stated directly in the letters that the prisoner had not given the gun to the magistrate, they would clearly have been hearsay; it would make no difference to their admissibility that the same statement was made by way of implication.

The same reasoning would appear to account for the decision of the House of Lords in *Teper* v. *R.*,[46] but in *Stobart* v. *Dryden*[47] Parke B. held that the signature of an attesting witness to a bond was not an assertion of the bond's due execution. It could be contended that to sign describing oneself *as witness* to a deed is a shorthand form of asserting, 'I witnessed the execution of this document',[48] and no more abbreviated than a drowning man's shout of 'Sharks!' or, at sea, a lookout's call of 'Land!', but Baker[49] argues in support of the decision that the signature should be treated rather as presumptive evidence of due execution than as an exception to the rule against hearsay.

Where conduct is intended to be assertive there would seem to be no doubt that it falls under the exclusionary rule. A communication by signs or gestures is indistinguishable in principle from a spoken or written communication, and to report it was held by the Appellate Division to be hearsay in *Sutter* v. *Brown*.[50] More recently, however, in *S.* v. *Qolo*,[51] while excluding as hearsay a statement by the deceased in a murder charge identifying the accused as his assailant, Williamson J.A. held admissible evidence that the deceased had then slapped the accused's face. It may be that the distinction between this case and *Sutter* v. *Brown* lies in the fact that the slap was not intended to be assertive, but Williamson J.A. expressly found[52] that the inadmissible statement was repeated by the act which was therefore of the same weight. As the two decisions therefore cannot stand together, the correctness of *Qolo's* case in principle is doubtful.

Recognition of the hearsay nature of conduct not intended to be assertive is no less dubious. *In Wright* v. *Doe d. Tatham*[53] letters written to a testator whose sanity was in issue were rejected as constituting hearsay assertions of the writers' opinion that the addressee was sane, an assertion implied by the treat-

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[45] 1964 (1) S.A. 729 (C), discussed by L. H. Hoffman in (1964) 81 *S.A.L.J.* 151. Another example of an indirect assertion, though the Court failed to recognize it as such, is *R.* v. *Alexander*, 1913 T.P.D. 561, but the utterance would appear to fall into the category of vicarious admissions and was therefore correctly received in evidence. *See, also, R.* v. *Chapman* [1969] 2 W.L.R. 1004 (C.A.).

[46] [1952] A.C. 480, [1952] 2 All E.R. 447. While *Cross*, above, p. 384, suggests this as a possible reason for the exclusion of the evidence he points out that alternatively it might have been regarded as irrelevant.

[47] (1836) 1 M. & W. 615, 150 E.R. 581.

[48] It is not suggested that the signature of a document in any other capacity is necessarily an assertion. *See, e.g., Taylor* v. *Budd*, 1932 A.D. 326 at 332.

[49] R. W. Baker, *The Hearsay Rule* (1950), pp. 161–2. This view is by no means unanimous: see *Wigmore on Evidence*, III, § 1508, and E. M. Morgan, 'The Relation between Hearsay and Preserved Memory' (1926–7) 40 *Harv. L.R.* 712 at 714, n. 1.

[50] 1926 A.D. 155 at 170. See, too, *Chandrasekera* v. *R.* [1937] A.C. 220 (H.L.), [1936] 3 All E.R. 865 (where the evidence was, however, admitted under the 'dying declarations' exception to the hearsay rule).

[51] 1965 (1) S.A. 174 (A.D.). The statement could not be received as a dying declaration because it was not shown that the declarant was aware of his impending death.

[52] At 184. Cf. *R.* v. *Christie* [1914] A.C. 545 (H.L.) esp. at 553.

[53] (1837) 7 Ad. & E. 311, 112 E.R. 488. Evidence of a person's silence, tendered to show that he had no objection, seems to have been regarded, obiter, as hearsay evidence of his opinion in R. v. Chapman [1969] 2 W.L.R. 1004 (C.A.).

ment of him as capable.[54] On the other hand, in *Lloyd* v. *Powell Duffryn Steam Coal Co., Ltd.*[55] statements by a man, since deceased, of his belief that he had fathered a child were admitted to prove the issues of paternity and of his intention to support the child. The statements of belief were relevant only because the facts on which the belief was founded could be inferred from them, and it was those facts and not the belief which were of importance. The use made of the evidence was therefore indistinguishable from the use to be made of the evidence rejected in *Wright* v. *Doe d. Tatham*.[56]

A comparable situation arose in the South African case of *Levin* v. *Barclays Bank D.C.O.*,[57] where, in order to prove that two persons not parties to the action were partners, evidence by a bank manager of their joint operation of a partnership banking account was received. Potgieter J.A. rejected the argument that this conduct was hearsay in the following terms:[58]

> 'Although some of this evidence may amount to conduct of the alleged partners, it was *not conduct* which is, and is not relied upon as conduct equivalent to an assertion or an admission that they were trading in partnership; but is relied upon as independent facts from which the court is asked to draw the inference that they were trading in partnership.'

If a conversation between A and B had been overheard in the course of which A had offered to enter into a partnership agreement with B and B had agreed, clearly the reporting of this would not have been hearsay evidence of the agreement. But if B had thereafter told his wife that he and A had entered into such an agreement, for the wife to so testify would surely have been mere hearsay, and no different in principle from the evidence received in *Levin*.[59] The opening and operation of a partnership banking account would be admissible to prove that certain performance of the agreement had been embarked upon, but, properly viewed, not to prove the historical event of the agreement having been concluded at all. As Hiemstra J. put it in *Estate Parry* v. *Murray*,[60] in dealing with the admissibility of book entries:

> 'When the point at issue is: Was there such an agreement, then the books are not admissible to prove that there was. When the point at issue is: If there was such an agreement, did Parry carry out his part of the bargain, and Parry says, "I did so by means of book entries", then the books are admissible to show that he made the entries. They are then on a parallel with, for instance, a cheque put in *to prove that payment* was made.'

As the authorities now stand, however, it cannot be stated with any confidence whether the rule against hearsay does not apply to conduct not intended to be

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[54] *Phipson on Evidence*, 10th ed. (1963), p. 222, explains the decision as an application of the opinion rule (see below, p. 000); but as E. M. Morgan has shown ((1948) 62 *Harv. L.R.* 177 at 209) it seems clear from the examples given in the judgment – not all of which involved opinion – that the Court would have considered the hearsay objection alone to be insurmountable. See too Baker, above, pp. 4–6.

[55] [1914] A.C. 733 (H.L.).

[56] See Morgan, above, n. 54, at pp. 209–11, and *Ruto Flour Mills (Pty.) Ltd.* v. *Adelson* (3), 1958 (4) S.A. 311 (T) at 312–13.

[57] 1968 (2) S.A. 45 (A.D.).

[58] At 47.

[59] See Pollock C.B. in *Milne and Seville* v. *Leisler* (1862) 7 H. & N. 786 at 795, 158 E.R. 686 at 689.

[60] 1961 (3) S.A. 487 (T) at 494–5. The evidence in *Levin* certainly falls within the definition of hearsay given by E. M. Morgan in 'Hearsay and Non-Hearsay' (1954–5) 48 *Harv. L.R.* 1138 at 1158: 'Hearsay is defined so as to include evidence of all conduct of a person, verbal or non-verbal when . . . not intended to operate as an assertion and offered either to prove both his belief and the external event or condition which caused him to have that belief or to prove that such conduct truly reflected his belief.'

assertive, or whether it does so apply and is received in certain cases, such as to show relationship,[61] under an exception to the rule

2. Res Gesta and the Rule against Hearsay

Res gesta as referring to a super-category of admissibility is a much abused phrase. Lord Tomlin in *Homes* v. *Newman*[62] accused it of being 'a phrase adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied', and writers have designated it in terms of far less judicial moderation.[63] The phrase is commonly employed to cover facts in issue as well as those closely related by factors of time, place and circumstance to facts in issue, and is therefore descriptive of an inclusionary rather than an exclusionary principle.[64]

Many schemes of subdivision of the law of *res gesta*, of varying complexity, have been suggested.[65] It is not proposed to suggest another here. The term has been used to refer to evidence of conduc. or of statements when these are themselves facts in issue, to circumstantial evidence, and to matters relevant only to the credibility of witnesses, such as complaints in sexual cases. In so far as it refers to statements, it undoubtedly leads to confusion since it is applied not only to those which are hearsay but are admitted as exceptions to the hearsay rule, but also to those which are received as original evidence and those which are received as showing only that a witness has or has not contradicted himself. The categories of *res gesta* statements to be treated of under this general heading are those which do not readily fall under any other heading, and the treatment which follows is not intended to give comprehensive coverage of the different *res gesta* concepts but rather to illustrate their interaction with and where necessary their independence of the rule against hearsay. The headings adopted are not necessarily mutually exclusive and in many instances the decisions mentioned could be dealt with under more than one heading.

2.1. *Statements in issue or relevant to an issue*

Statements as facts in issue are dealt with above in the discussion of what is a hearsay use of a statement.[66] The admissibility of statements which are circumstantial evidence, not put to hearsay use, is illustrated by *R. v. Hamman*.[67] The accused, a farmer, was charged with failing to destroy locust swarms, and evidence of his neighbours' complaints about this failure were received not for the hearsay purpose of proving that failure, but as introducing and explanatory of the inspector's frequent visits to the accused's farm.

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[61] See below, pp. 000–00, 87–8

[62] [1931] 2 Ch. 112 at 120.

[63] For a choice collection of abuse, see L. T. C. Harms, '*Res Gestae* in die Suid-Afrikaanse Reg' (1965) 28 T.H.R.-H.R. 257 at 258–9.

[64] Julius Stone, '*Res Gestae Reagitata*' (1939) 55 *L.Q.R.* 66 at 80; R. N. Gooderson, '*Res Gesta* in Criminal Cases' (1959) *Cambridge L.J.* 199 esp. at 203, n. 18.

[65] e.g. Stone, above; G. D. Nokes, '*Res Gestae* as Hearsay' (1954) 70 *L.Q.R.* 370 at 371–2; Gooderson, above, and in (1957) *Cambridge L.J.* 55 esp. at 66; Harms, above; L. H. Hoffmann, *South African Law of Evidence*, 2nd ed. (1970), pp. 101 ff. For the scheme of what follows, I have relied in particular on the classification adopted by Cross, *Evidence*, 3rd ed. (1967), chap. 19, and by Hoffmann.

[66] See above.

[67] 1935 O.P.D. 51. Harms, above, regards *R. v. Alexander*, 1913 T.P.D. 561, as an example of this type of case (see at 260–1), but it is, arguably, to be treated as a vicarious admission by implied assertion.

(Further examples of statements used as circumstantial evidence will be found in Wigmore,[68] who stresses that in such cases the hearsay rule is not concerned.)

2.2. Statements as conduct evidencing treatment

Where the manner in which a person is treated by others is relevant in any case—usually, to establish that person's relationship to those others, though this is not the only type of case[69]—evidence is admissible of their conduct towards him, including their statements in so far as these are conduct. Statements of this kind are not admitted under any exception to the hearsay rule, but as verbal conduct constituting circumstantial evidence from which inferences as to the matters in issue may be drawn.[70] Whether, therefore, the declarant is alive or dead at the time of the trial, present or unavailable as a witness, is irrelevant to the admissibility of the statement.[71]

Thus, for example, to establish the paternity of a child, the fact that his mother's husband treated him distantly or more unkindly than her other children is relevant to rebut the presumption of *pater est quem nuptiae demonstrant*, and statements made by the husband which are conduct, such as manifestations of dislike or indifference, may be proved.[72] Similarly, the relevant conduct may consist in instructions given by the mother's paramour as to the child's upbringing,[73] his naming the child as his son and heir in his will[74] or his promise to marry the mother.[75]

On the same principle, evidence that a woman was introduced by a man as his wife to the priest of his church or to the midwife attending her confinement,[76] that he registered her children as legitimate,[77] or that she habitually ordered goods for his account describing herself as his wife,[78] has been received in proof of the marriage.[79]

The evidence of conduct and statements in this type of case was said to be received as part of the *res gesta* in *The Dysart Peerage* case,[80] where what was in issue was whether an irregular marriage had taken place in Scotland. The words and behaviour of the alleged husband both before and after the date of the alleged ceremony were proved as casting light on the probabilities of the ceremony having taken place; but his purely narrative statements on the point, uttered subsequent to his marriage *in facie ecclesiae* to another woman, were excluded as not being part of the *res gesta* of the first ceremony. The reasoning seems to be that narrative statements are not conduct from which relevant

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[68] *Wigmore on Evidence*, VI, §§ 1788–9.
[69] e.g. evidence of the way X is treated by his family or his physician could be relevant to the issue of his sanity—see *Wright* v. *Doe d. Tatham* (1837) 7 Ad. & E. 311 at 388, 112 E.R. 488 at 516.
[70] *The Aylesford Peerage* case (1886) 11 App. Cas. 1 (H.L.) at 10.
[71] See Lord Blackburn in *The Dysart Peerage* (1881) 6 App. Cas. 489 (H.L.) at 502.
[72] Per Lord Bramwell in *The Aylesford Peerage* [1886] 11 App. Cas. 1 at 12.
[73] *The Aylesford Peerage*, above.
[74] *Morris* v. *Davies* (1837) 5 C. & F. 163, 7 E.R. 365; *Fitzgerald* v. *Green*, 1911 E.D.L. 432 esp. at 464, 465; *Bernaby* v. *Baillie* (1889) 2 Ch.D. 282. See, too, *Wilkinson* v. *Estate Steyn*, 1947 (2) S.A. 740 (C).
[75] *Lloyd* v. *Powell Duffryn Steam Coal Co., Ltd.* [1914] A.C. 733 (H.L.) esp. at 739. Cf. *Gin* v. *S.*, 1967 (1) P.H., H. 135 (A.D.).
[76] *Fitzgerald* v. *Green*, *1911 E.D.L. 425 at 453, 454.*
[77] *The Dysart Peerage* (1881) 6 App. Cas. 489 (H.L.) at 522.
[78] *Fitzgerald* v. *Green*, 1911 E.D.L. 425 at 459.
[79] See, too, sec. 270(3) of the Criminal Procedure Act, 1955.
[80] (1881) 6 App. Cas. 489 (H.L.) at 502.

inferences may be drawn, but simply assertions which depend for their relevance on the truth of the matters stated. As such, they are mere hearsay and inadmissible unless they can be brought under one of the exceptions to the rule against hearsay, e.g. as pedigree declarations.[81] Subsequent narrative statements were admitted by the House of Lords in *The Aylesford Peerage* case,[82] but no reasons are given for the ruling and it is submitted that on principle the decision on this point in *The Dysart Peerage* case is to be preferred.

2.3. *Verbal parts of relevant acts*

Where the fact that a statement was made is in itself in issue or relevant, evidence of its making is not hearsay, and is receivable without anything further being shown just as evidence of any other fact in issue is received.[83] But where what is in issue or relevant is not the making of a statement but an act, both verbal and behavioural components of that conduct may be proved, the reporting of those verbal components or statements is not hearsay. In this *second type of case*, the statement is admitted because it is part of an act of which evidence is admissible, and if the act would be irrelevant were it not for the contents of the statement accompanying it, neither the act (being irrelevant) nor the statement (being mere hearsay) may be proved. In *Wright* v. *Doe d. Tatham*,[85] the facts of which are given above,[86] just because the letter-writers' statements were made in the course of the act of writing letters did not render them admissible, Coltman J. pointing out[87] that he knew of no case 'where the act done is, in its own nature, irrelevant to the issue, and where the declaration per se is inadmissible, in which it has been held that the union of the two has rendered them admissible'. Thus in *Naidoo* v. *Ismail*,[88] interpleader proceedings where the ownership of goods was in issue, whether the claimant had bought the goods of which the attachment debtor was custodian was itself a relevant question, and a statement by the person who had sold it to him was therefore received; but in *Hyde* v. *Palmer*,[89] the fact of a sale having taken place at all was held to be irrelevant, and the seller's comments while entering into it had to be excluded.

Statements cannot be regarded as verbal parts of conduct unless the words are spoken by the person whose conduct is the subject of investigation[90] and the words accompanied the conduct. Strict contemporaneity of words and acts is therefore required[91] though if the conduct is of a continuing nature a statement

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[81] The husband's declarations in *The Dysart Peerage* case were held, at 502 f., not to satisfy the requirements of this exception, on which see below, pp. 000–00. 102–4.

[82] (1886) 11 App. Cas. 1 (H.L.) at 6–7.

[83] See above, p. 000. Verbal conduct evidencing treatment, discussed immediately above, is of this kind.

[84] *Wigmore on Evidence*, 3rd ed. (1940), VI, §§ 1766 ff.; Julius Stone, '*Res Gesta Rengistata*' (1939) 55 *L.Q.R.* 66 at 74.

[85] (1837) 7 Ad. & E. 311, 112 E.R. 488.

[86] p. 000, 74.

[87] (1837) 7 Ad. & E. 311 at 361, 112 E.R. 488 at 507.

[88] 1935 N.P.D. 227.

[89] (1863) 3 B. & S. 657, 122 E.R. 246. See, also, *R.* v. *Bliss* (1837) 7 Ad. & E. 550, 112 E.R. 577. If similar fact evidence is admissible in a particular case (see above) declarations accompanying a previous similar act are presumably admissible on this principle. See R. N. Gooderson, '*Res Gesta* in Criminal Cases' (1956) *Cambridge L.J.* 199 at 214–15, and cases cited.

[90] *Bewsson* v. *Cartwright* (1864) 5 B. & S. 1, 122 E.R. 733.

[91] *Sidmouth* v. *Sidmouth* (1840) 2 Beav. 447, 48 E.R. 1254. In *Ex parte Currie and May N.N.O.*, 1966 (2) S.A. 184 (R), where the issue was whether a will had been destroyed *animo revocandi*, the deceased's statements on the journey to and from the attorney's office where she actually destroyed the will, were held to be sufficiently contemporaneous.

made at any time during its continuance satisfies this requirement.[82] It follows also from the fact that the declaration is only admitted because it is part of the act, that if the act is complete in itself the declaration is not part of it. The act is incomplete if it is legally equivocal in nature, and the declaration is received in so far as, but only in so far as, it completes or explains the character of the act. Thus in *Basson* v. *Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control*,[83] statements made by a client on handing moneys to his attorney were received to explain the nature of the handing over, in itself ambiguous, for money can change hands as a loan, or a donation, or to be held by the recipient in trust for another, or to be kept for himself in settlement of a debt; though statements made by either party thereafter, such as the attorney's book entries reflecting his disposal of the money, would, the Co rt indicated, have been rejected as purely narrative and not required to complete the act. On the other hand, in *R.* v. *Plumer*,[84] a postal official was charged with the theft of a bill of exchange from a letter in the post. A statement on the envelope, 'Two shillings paid' (being the postage payable for a letter and enclosure) was rejected as evidence that the letter had contained the enclosure alleged, presumably on the ground that the act of posting, though relevant, was in no way ambiguous so as to need explanation by the accompanying declaration

2.4. Statements of physical or mental condition

A person's subjective feelings of the state of his mind or the state of his body, which are essentially internal, are susceptible of knowledge by others only by the indications he himself gives of them by words or by conduct. Where the indications are verbal, it is controversial among the writers on the law of evidence whether the reporting of the verbal indications is hearsay or original evidence,[85] though the better view appears to be that it is not hearsay. Although the exact categorization is hazy, however, its admissibility is undoubted (whether as an exception to the rule against hearsay or as non-hearsay) by a line of cases tracing their origin to the fragmentarily reported 1693 decision of *Thompson* v. *Trevanion*.[86]

Where anyone's mental or bodily condition is in issue or relevant to an issue, his contemporaneous statements respecting those topics are admissible in proof of that condition. The leading case is *Aveson* v. *Kinnaird*[87] an action on a life insurance policy, where the state of health of the life assured—the plaintiff's wife—at the date of taking out the policy was in issue. A friend of the wife's gave evidence that when visiting the latter she had found her in bed at an unusual hour, and she was permitted to relate the reasons—her illness—the wife had then assigned in explanation. An example of the reception of statements showing mental condition is *R.* v. *Maloi*,[88] where the accused was charged with the

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[82] See *Lenssen* v. *R.*, 1906 T S. 154; *Bennison* v. *Cartwright* (1864) 5 B. & S. 1 esp. at 18, 122 E.R. 733 esp. at 739–40.

[83] 1957 (3) S.A. 490 (C). The accused's attempted suicide after arrest was held to be relevant and ambiguous in *R.* v. *C*, 1949 (2) S.A. 438 (S.R.), so as to let in evidence of his declarations in the suicide note explaining his reasons for the attempt.

[84] (1814) Russ. & Ry. 264, 168 E.R. 794.

[85] The conflicting views are summarized by R. W. Baker, *The Hearsay Rule* (1950), pp. 127 ff.

[86] (1693) Skinner 402, 90 E.R. 1057.

[87] (1805) 6 East 188, 102 E.R. 1258. See, too, *R.* v. *Johnson* (1847) 2 Car. & K. 354, 175 E.R. 146.

[88] 1939 W.L.D. 280. See, also, *Giddy, Giddy & White* v. *Malcomess' Estate*, 1937 E.D.L. 269.

murder of a woman. He had stated to a policeman that he had fought with two persons the same evening because of his suspicions that one was cohabiting with his (the accused's) wife, and that the other was harbouring her. The policeman's evidence of this statement was admitted by Murray J.:[99]

> '[A]ny evidence which throws light upon [the intention of the accused] is prima facie relevant and admissible. . . . If the deceased was a stranger to him it is a relevant question whether he stabbed her mistaking her for his reputed wife, and if so, what motive he had for injuring his wife and what was the extent of the injury he contemplated inflicting upon her, having regard, *inter alia*, to any excusable lack of control resulting from lawful provocation.'

Statements expressly or impliedly assertive of state of mind have similarly been received to show the declarant's ignorance,[1] knowledge[2] or belief[3] of facts, his malice[4] or state of confusion[5] and the presence or absence of a fraudulent intent.[6]

It must be stressed that for statements to be received under this heading, the state of body or mind must itself be the fact in issue or relevant to an issue,[7] and may be used only to establish that state: for example, declarations of belief are admissible only to show the belief but not the truth of the facts believed in;[8] and in so far as the declaration is narrative it is similarly excluded. Thus in *Amys* v. *Barton*[9] a doctor's evidence that his patient had stated his pain to have been caused by a wasp sting was excluded, and in *R.* v. *Lazarus*,[10] a charge of extortion, evidence that the complainant said he was in fear was received, but not his report of what had passed at the conversation between himself and the accused.

The requirement that the statement must relate to contemporaneous feelings only is apparently a flexible one. In *Aveson* v. *Kinnaird*[11] declarations referring to the duration of the illness were received, and in *In re Fletcher*[12] and *R.* v. *Maloi*[13] subsequent declarations showing state of mind were admitted, although Warrington L.J. in the former case agreed that contemporaneous ones might have had greater weight. In cases like *Fletcher* and *Maloi*, the declaration is, according to Professor Cross,[14] tendered as evidence of a person's feelings at a particular date, as circumstantial evidence from which the court may draw the inference that the feelings had existed at a date in the past or continued to exist to a date in the future.[15] Where no such inference can reliably be drawn because

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[99] At 282.

[1] *Curtis' Estate* v. *Gronningsaeter*, 1942 C.P.D. 531 at 539–40.

[2] *Naik* v. *Pillay's Trustee*, 1923 A.D. 471; *Estate De Wet* v. *De Wet*, 1924 C.P.D. 341; *Jacobs* v. *Auto Protection Insurance Co., Ltd.*, 1964 (3) S.A. 379 (W) at 381.

[3] *R.* v. *Kukubula*, 1958 (3) S.A. 698 (S.R.).

[4] *R.* v. *Aquadro*, 1934 O.P.D. 36; *Kemp* v. *Bryant*, 1938 E.D.L. 416.

[5] *Cash Wholesalers, Ltd.* v. *Hogan*, 1933 N.P.D. 117 at 123; *Shapiro* v. *S.A. Savings and Credit Bank*, 1949 (4) S.A. 985 (W) at 993. The exclusion of similar evidence in *Policansky Bros., Ltd.* v. *L. & H. Policansky*, 1935 A.D. 89 at 90, cannot be supported.

[6] *Ruto Flour Mills (Pty.) Ltd.* v. *Adelson* (3), 1958 (4) S.A. 311 (T).

[7] Subject to what is said below.

[8] The exceptions to this principle including the cases relating to the execution of wills or to paternity, are discussed at pp. 000–00 and pp. 000–00 respectively.

[9] [1912] 1 K.B. 40.

[10] 1922 C.P.D. 293 at 297, 298.

[11] (1805) 6 East 188, 102 E.R. 1258.

[12] [1917] 1 Ch. 339 at 343, 347.

[13] 1939 W.L.D. 280 at 282.

[14] *Evidence*, 3rd ed. (1967), pp. 470–1. See also the illuminating analysis by E. Seligman in 'An Exception to the Hearsay Rule' (1912–13) 26 *Harv. L.R.* 146.

[15] This is in accord with the view of Laurence J. in *Aveson* v. *Kinnaird*, but is not easily reconcilable with the grounds of admission relied on by the other members of the Court.

intervening circumstances have created too great a danger of fraud, a subsequent statement will be excluded.[16]

However the contemporaneity requirement is interpreted, of course, it does not exclude testimony by a *witness* of what his past feelings or intentions were, though such evidence is of little weight.[17]

2.5. *Declarations of intention to prove intention carried into effect*

A related problem to that just discussed, and one to which no clear answer can be given, concerns the admissibility of evidence of a person's statements of his intention to do an act, tendered to prove not his intention, but the fact that he did the act. In the American case of *Mutual Life Insurance Company* v. *Hillmon*,[18] a man's letters from Kansas - his sister and his sweetheart telling them that he intended leaving for Colorado with a Mr. Hillmon were received as tending to prove that he and Hillmon had in fact left together. In England the admissibility of a declaration of intention for such a purpose is unsettled,[19] but in South Africa statements of intention have in several cases been employed to support an inference that the intention was carried out. For example, a husband's statements that he was going to give his wife a motor-car were admitted in *Pieterse's Executors* v. *Pieterse*,[20] to prove that he had in fact given it to her.[21] In *Gleneagles Farm Dairy* v. *Schoombee*[22] Hoexter J. held that such evidence, although inadmissible in criminal cases, could be received in civil cases for the purposes of corroboration only. The point was expressly left open by Van den Heever J.A. on appeal,[23] but neither branch of Hoexter J.'s proposition can find unquestioning support on the authorities. Clayden J. would have excluded the evidence entirely in the civil case of *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Companies (South) Ltd.*[24] As to criminal cases, while the judgment of Stratford C.J. in *R.* v. *Blom*[25] appears to be in line with English cases such as *R.* v. *Wainwright*[26] in holding that evidence of the deceased's statement that she was going to meet the accused could not properly be used to prove she

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R. N. Gooderson, '*Res Gesta* in Criminal Cases' (1956) *Cambridge L.J.* 199 at 211–12 is of the view that references to past symptoms or causes are admissible only in rebuttal or in criminal cases where the transaction is a continuous one, as, e.g., in poisoning cases, or those dealing with the starvation of a child.

[16] See *Langham* v. *Milne*, 1961 (1) S.A. 811 (N) at 815.

[17] *Ellon* v. *Ellon*, 1965 (1) S.A. 703 (A.D.) at 709; *Kelly* v. *Battershell* [1949] 2 All E.R. 830 (C.A.) at 843.

[18] (1892) 145 U.S. 285. It is argued by E. Seligman in 'An Exception to the Hearsay Rule' (1912–13) 26 *Harv. L.R.* 146 that the *Hillmon* case logically means the abolition of the entire hearsay rule, but see J. A. Maguire, 'The *Hillmon* Case—Thirty Three Years After' (1925) 38 *Harv. L.R.* 709. The United States court has not been prepared to extend the *Hillmon* doctrine in the directions Seligman pointed out as implicit: see *Shepard* v. *U.S.*, 290 U.S. 96 (1933).

[19] See R. Cross on *Evidence*, 3rd ed. (1967), pp. 472–4. In *R.* v. *Barney* (1932), quoted by Gooderson in (1956) *Cambridge L.J.* at 207, the Court admitted a statement by X as to Y's suicidal intention as tending to prove that Y had attempted to carry out that intention. See also Gooderson in (1957) *Cambridge L.J.* at 63 ff.

[20] 1931 E.D.L. 214.

[21] See, also, *Harris* v. *Coulson*, 1926 O.P.D. 91; *Seyman* v. *Popes (Pty.) Ltd.*, 1938 C.P.D. 572 at 576. In *R.* v. *Boardman*, 1959 (4) S.A. 457 (T), Marais J. went even further in relying on the terms of the instructions given to a trap participating in illicit diamond buying to prove that the instructions had been obeyed. Cf. *Ex parte Ford and Langham: in re Estate Boediker*, 1953 (4) S.A. 338 (N) at 346.

[22] 1947 (4) S.A. 66 (E).

[23] 1953 (3) S.A. 343 (W) at 348.

[24] (1875) 13 Cox C.C. 171.

[25] 1949 (1) S.A. 830 (A.D.) at 841.

[26] 1939 A.D. 188 at 200.

did so, a compromise position is that taken by Fischer *J.P.* in *R.* v. *Apter*[27] in admitting, on the same basis as an admission, evidence of the accused's statement of intention to prove the act intended; the English authorities were distinguished on the ground that they had all concerned statements made by persons other than the accused.

It should be noticed that although evidence is frequently received of the fact that the accused previously threatened to commit the act of which he is then charged, this is done as being relevant to the issue of the identity of the criminal, the commission of the act by someone being required to be proved *aliunde*.[28]

There is one clear case where statements of intention are admissible as circumstantial evidence of probability to prove the act done. Ante-testamentary declarations by a deceased testator of his intentions regarding the disposal of his estate are received to prove the contents of his will,[29] and also apparently its due execution.[30] In view of the confusion of authority outlined above, however, it is not clear whether this is to be regarded as an example of the general principle of admissibility, or (as seems more likely) as an exception to the general rule of exclusion.

Post-testamentary declarations by a testator are discussed below, p. [illegible]

2.6. *Spontaneous declarations*

This class of statements stems, like the category of assertions concerning physical condition, from *Thompson* v. *Trevanion*[31] but, unlike that category, has been held clearly to constitute an exception to the rule against hearsay.[32] The following passage by Wigmore,[33] which has twice been approved by the Appellate Division,[34] gives the ground upon which this exception has been recognized:

> 'This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.'

A clear illustration of the principle is afforded by *R.* v. *Taylor*,[35] a charge of culpable homicide arising out of the death of the accused's wife. To prove that it was the accused who had assaulted her, testimony from the neighbours was received that on the day in question they had heard sounds of a scuffle, thuds

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[27] 1941 O.P.D. 161.
[28] See *R.* v. *Mpanza*, 1915 A.D. 348 at 353; *R.* v. *Mabaso*, 1952 (3) S.A. 521 (A.D.) at 523.
[29] *Sugden* v. *Lord St. Leonards* [1876] L.R. 1, P.D. 154 (C.A.) at 227, 242; *De Lange* v. *Rudman*, 1928 E.D.L. 439; *R.* v. *Basson*, 1965 (1) S.A. 697 (C) at 699–700 (though at 698 such evidence was said to be of little weight). See, also, *Ex parte Slade*, 1922 T.P.D. 220, where the testator's declarations of his intention not to revoke his will were received as evidence that he had not revoked it.
[30] *De Lange* v. *Rudman*, 1928 E.D.L. 439 at 441. See, also, the discussion of the maxim *omnia praesumuntur rite esse acta*, below, p. [illegible].
[31] (1693) Skinner 402, 90 E.R. 1057.
[32] *S.* v. *Qolo*, 1965 (1) S.A. 174 (A.D.) at 180; *S.* v. *Tuge*, 1966 (4) S.A. 565 (A.D.) at 573.
[33] *Wigmore on Evidence*, 3rd ed. (1940), VI, § 1747.
[34] In *Qolo's* case, above, at 180, and *Tuge's* case, above, at 573.
[35] 1961 (3) S.A. 616 (N). Cf. *S.* v. *Apolis*, 1965 (4) S.A. 178 (C).

and the deceased's voice crying out, 'John, please don't hit me any more, you will kill me!'

In *S.* v. *Tuge*[36] Williamson J.A. listed the four requirements he conceived a statement would have to satisfy to be admissible as a dying declaration.

First, the declarant must be shown to be unavailable as a witness. In *Tuge's* case itself the declarant in fact could not be found, but it is submitted that on Wigmore's reasoning, if the declarations are accepted because they are the best evidence, indeed better, because fresher, than the declarant's testimony on the stand, they should not be rejected even if the declarant is available. It is accordingly to be hoped that the requirement of unavailability mentioned by Williamson J.A. is not to be regarded as settled beyond the possibility of reconsideration.

The second requirement is that there must have been an occurrence startling enough to produce a stress of nervous excitement in the declarant, whether he was a participator or a bystander.[37] The typical cases have concerned explosions,[38] collisions,[39] or assaults,[40] but it is not necessary that any physical shock has been present: in *Tuge's* case the startling event was a robbery.[41]

Third, the declaration must have been made while the stress was still so operative upon the declarant that his reflective powers may be assumed to have been in abeyance. How strict a degree of contemporaneity was to be insisted on before this requirement could be regarded as satisfied was until recently controversial. Our law in this regard has now been settled by *S.* v. *Tuge*,[42] which gave approval to Wigmore's view[43] that the proper course of inquiry is not a judicial weighing up of minutes or hours to determine whether objectively considered a story can be devised or contrived in four[45] or five[46] or fifteen[47] minutes. Rather, the inquiry must be directed to a determination by the trial court whether, as a question of fact, the particular declaration tendered was in truth made spontaneously at a time of stress—an approach already adopted in *R.* v. *Le Roux*,[48] *R.* v. *Nicholls*,[49] and *Van Zyl* v. *S.A.N.T.A.M., Bpk.*[50] There is no reason why the

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[36] 1966 (4) S.A. 565 (A.D.) at 573. See (1967) 84 *S.A.L.J.* 15.

[37] As with any statement admitted as an exception to the hearsay rule, the declarant and not the reporting witness is in fact the person on whose credit the court must rely. See *S.* v. *Qolo*, 1965 (1) S.A. 174 (A.D.) at 181; *Wigmore on Evidence*, 3rd ed. (1940), VI, § 1751. Provided he speaks from personal knowledge, there would seem to be no reason why an onlooker's declaration should not be received: *The 'Schwalbe'* (1859) Swab. 461, 166 E.R. 1244; *Agassiz* v. *London Tramway Co., Ltd.* (1872) 27 L.T. 492. See, too, *Milne and Seville* v. *Leisler* (1862) 7 H. & N. 786 at 795, 158 E.R. 686 at 689.

[38] *R.* v. *De Leeuw*, 1927 O.P.D. 277; *Hitchins* v. *Umfolosi Co-operative Sugar Planters' Association* (1929) 50 N.L.R. 117.

[39] e.g. *Wishart* v. *Mason*, 1931 N.P.D. 530; *Vermaak* v. *Parity Insurance Co., Ltd. (in liquidation)*, 1966 (2) S.A. 312 (W).

[40] *Kawala* v. *R.* (1929) 50 N.L.R. 39.

[41] The learned Judge of Appeal was apparently unaware of the inconsistency between this fact and his approval of the passage from Wigmore quoted above.

[42] The controversy corresponded to the distinction between those cases based on *R.* v. *Bedingfield* (1879) 14 Cox C.C. 341, and those based on *R.* v. *Foster* (1834) 6 Car. & P. 325, 172 E.R. 1261.

[43] 1966 (4) S.A. 565 (A.D.). See, however, (1967) 84 *S.A.L.J.* 15, where doubts are expressed as to whether the declaration admitted could in fact be regarded as a spontaneous response to the occurrence.

[44] *Wigmore on Evidence*, 3rd ed. (1940), VI, § 1750.

[45] *R.* v. *De Leeuw*, 1927 O.P.D. 277 at 279.

[46] *Pincus* v. *Solomon* (1), 1942 W.L.D. 237.

[47] *Kawala* v. *R.* (1929) 50 N.L.R. 39.

[48] (1897) 14 S.C. 424 at 431.

[49] 1931 N.P.D. 557 at 560.

[50] 1948 (2) S.A. 815 at 817.

spontaneous declarations should not have been made immediately before as well as immediately after the startling event.[51]

The nature or contents of the declaration may afford a guide as to its spontaneity. An offer by one driver involved in a collision to pay the other, though made immediately, was held to be too deliberate an action to qualify, in *Mabizela* v. *Yorkshire Insurance Co., Ltd.*,[52] but the deceased's wish that the murderer would enter Paradise, her husband being charged with her murder, was held in *R.* v. *Le Roux*[53] to negative any idea of her having maliciously devised a story against him. It was made clear in *Tuge's* case[54] that a declaration in appropriate circumstances may be regarded as spontaneous even though it was made in answer to a question and even though it is written and not oral.

The fourth requirement for admissibility as a spontaneous declaration, as formulated in *Tuge*, is that the statement must not be a reconstruction of a past event, but must relate to the circumstances of the startling occurrence preceding it. The distinction drawn by Lord Normand in *Teper* v. *R.*[55] between declarations relating to the commission or circumstances of the act in question, which would be admissible, and declarations relating to the identity of the actor, which would be inadmissible, has no validity in principle[56] and was not adopted in *S.* v. *Tuge*, where the declaration received was a note of the registration number of the robbers' getaway car—which was clearly relevant only to identification.

Purely narrative matter contained in the declaration will be excluded, as in *Joubert N.O.* v. *S.A.R. & H.*,[57] which arose out of a collision between a trolley and a train. A declaration by the trolley driver immediately thereafter as to his authority to drive his trolley on that line was rejected as not referring to the incidents of the actual collision. If the abeyance of the declarant's reflective faculties is considered to provide sufficient guarantee of the trustworthiness of the declaration, there seems to be no reason in logic why its narrative portions should be regarded as less reliable than its descriptive ones, but the distinction is sanctioned by authority, and Wigmore[58] *points out that 'it is possible to argue* that such utterances imply to some extent a process of reflection or deliberate reasoning'.

3. Exceptions to the Hearsay Rule: Declarations by Deceased Persons

These six exceptions to the rule against hearsay are variously justified but, as applied in England, all require as a prerequisite to admissibility the death of the

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[51] See A. P. O'Dowd, *Law of Evidence in South Africa* (1963), p. 82; L. T. C. Harms in (1965) 28 *T.H.R.-H.R.* 266.

[52] 1961 (3) S.A. 820 (N).

[53] *(1897) 14 S.C. 424 at 431.*

[54] 1966 (4) S.A. 565 (A.D.) at 573–4, overruling *Kelly* v. *S.A.R. & H.*, 1928 T.P.D. 671, where reliance was placed on *Justin* v. *Arnold & Sons* (1915) 84 L.J.K.B. 2214.

[55] [1952] A.C. 480 at 488, discussing *R.* v. *Gibson* (1887) 18 Q.B.D. 537. In *Gibson*, the accused was alleged to have wounded the complainant by throwing a stone at him. Evidence that a woman was heard to say 'The person who threw the stone went in there' (pointing to the house where the accused was found) was excluded as pure hearsay. This was followed, on very similar facts, in *R.* v. *John*, 1929 W.L.D. 50.

[56] See G. D. Nokes, '*Res Gestae* as Hearsay' (1954) 70 *L.Q.R.* 370 at 384, n. 71, who takes the view that there is no conclusive authority against admissibility of hearsay assertions of identity.

[57] 1930 T.P.D. 164.

[58] See *Wigmore on Evidence*, 3rd ed. (1940), § 1750.

declarant.[59] This has not been uniformly insisted on in the South African cases,[60] apparently influenced in this regard by *Naik* v. *Pillay's Trustee*,[61] where unavailability of the declarant even from causes other than death was said to suffice. However, most of these cases antedate the decision in *Vulcan Rubber Works (Pty.) Ltd.* v. *S.A.R. & H.*[62] and must therefore be regarded as having been overruled.

Many of the conditions of admissibility are illogical and antiquated. In civil cases the scope of admissibility as regards documentary hearsay has been considerably extended by the Civil Proceedings Evidence Act.[63] Unfortunately the old rules have not been similarly relaxed in criminal trials in this country. The recent English Criminal Evidence Act[64] may provide a useful legislative precedent, being similar in conception to the civil act. Perhaps most desirable of all would be legislation on the lines of those in force in Massachusetts and Rhode Island[65] where all declarations of deceased persons based on their personal knowledge are received, and the circumstances under which they were made affect merely the weight of the evidence.

It may be mentioned that all these exceptions to the rule against hearsay are governed by section 252 of the Criminal Procedure Act and therefore governed largely by English law.[66] The dying declarations exception is in addition dealt with specifically by section 242, to the same effect.

It should be borne in mind throughout that the deceased whose words are being reported is the real witness, and it must be shown that had he been alive he would have been competent to testify.[67]

3.1. *Declarations in the course of duty*

Written or oral declarations made by deceased persons in the ordinary course of duty contemporaneously with the act or transaction of which they were under a duty to speak, may be received in evidence. This exception to the rule against hearsay is usually dated from *Price* v. *The Earl of Torrington*,[68] where, in order to prove the quantity of beer the plaintiff had supplied to the defendant, evidence was received of an entry made in the plaintiff's shopbook by a deceased drayman recording, as was the practice in the plaintiff's brewery, the deliveries he had made that day. The reason for this exception is said to be the unlikelihood of someone misrepresenting facts where the person to whom the duty is owed could easily discover inaccuracies or falsifications.[69]

The declarant must have had personal knowledge of the facts asserted and must be speaking of his own acts and not those of others. The latter condition

[59] *Wright d. Tatham* v. *Doe* (1837) 7 Ad. & E. 313 at 384-5, 112 E.R. 488 at 515; *Sturla* v. *Freccia* (1880) 5 App. Cas. 623 (H.L.).

[60] e.g. *R.* v. *Ferguson*, 1949 (3) S.A. 69 (N) (declarations in the course of duty); *Fuchs and Downing* v. *Port Elizabeth Municipality*, 1944 E.D.L. 254 (declarations as to public and general rights).

[61] 1923 A.D. 471 at 477, per De Villiers J.A.: 'As the rule springs *ex necessitatae rei* the principle applies equally to cases where the best evidence is not available, such as the [declarant's] grave illness in the present instance.'

[62] 1958 (3) S.A. 285 (A.D.) at 296, quoted above, p. 000.

[63] Act No. 25 of 1965, sec. 34.

[64] 1965, c. 20, quoted in full in (1966) 83 *S.A.L.J.* 514 at 516.

[65] See C. T. McCormick, *Handbook of the Law of Evidence* (1954), p. 630.

[66] See above, chap. 16.

[67] *R.* v. *Drummond* (1794) 1 Leach 337, 168 E.R. 271; *R.* v. *Wingfield*, 1958 (3) S.A. 46 (S.R.).

[68] (1703) 1 Salk. 285, 91 E.R. 252.

[69] *Poole* v. *Dicas* (1835) 1 Bing. (N.C.) 649 at 653, 131 E.R. 1267 at 1269.

was not satisfied in *The Henry Coxon*,[70] an action which arose out of a collision between two ships; entries in the logbook of one of the ships, by its deceased first mate, describing the incident, were excluded because the description of both ships' manoeuvres was inextricably intermingled, so that the parts relating to what his own ship was doing could not be separately tendered. The facts that the declarant had been under a duty to record the acts of the other ship as well, and had seen those acts personally, could not make the entries admissible. Lack of personal knowledge was the fault in *Van Vreden* v. *Bourhill*[71] where a merchant's ledgers were tendered in evidence, and Gregorowski J. commented:

> *'I cannot see how an ordinary ledger can be proof of anything, because the bookkeeper probably knows nothing of the transaction; he would probably get the details from a rough day-book.'*

The existence of the declarant's duty to record or assert the facts must be proved *aliunde* before evidence of the declaration can be received, as must the fact that it was made contemporaneously with those facts.[72] The duty must have been owed to another, such as to the declarant's employer,[73] and not a mere practice of convenience adopted by the declarant for his own purposes in dealing with his employer or with others.[74] Thus records made by a physician of the results of his examination of a patient were excluded in *Simon* v. *Simon*,[75] and a stockbroker's records of his purchase of shares for a customer in *Massey* v. *Allen*.[76] On the other hand, in *Doe d. Pattershall* v. *Turford*,[77] where a firm of solicitors had given instructions to their clerks that the time and date of service of notices should be recorded, on the one occasion when a partner served notices his record of that fact was received. '[W]e must assume', Lord Tenterden C.J. remarked,[78] 'that when a principal served the notice, he would do what he required his clerk to do.' In other words, since the principal was performing a duty owed by his clerks to him, he was under the same duty as they were to record that performance.

The declaration is required to have been made contemporaneously with the occurrence of the facts recorded, but this requirement is not strictly applied, and declarations in the evening reporting the morning's transactions would be admissible. In *The Henry Coxon*[79] a gap of two days was held too great, but in *Welani* v. *Winter and Company*[80] Lansdown J.P. appeared satisfied to admit the declaration despite the lapse of a similar period of time. A case where contemporaneity was clearly lacking is *Polini* v. *Gray*,[81] where the record of an applica-

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[70] [1878] 3 P. 156.

[71] 1913 T.P.D. 67 at 71–2. See, also, *Vianini Ferro-Concrete Pipes (Pty.) Ltd.* v. *Union Government*, 1941 T.P.D. 252; *Brain* v. *Preece* (1843) 11 M. & W. 773, 152 E.R. 1016; *Nolan* v. *Barnard*, 1908 T.S. 142 at 146–7; *White* v. *Taylor* [1967] 3 W.L.R. 1246.

[72] *Polini* v. *Gray* (1879) 3 Ch.D. 411; *Rensburg* v. *Bayman* (1882) 1 S.C. 386; *Mercer* v. *Denne* [1905] 2 Ch. 538 (C.A.). In *Welani* v. *Winter and Company*, 1940 E.D.L. 159 at 166, Lansdown J.P. deduced the contemporaneity of the declarations from the nature of the declarations themselves and of the books in which they were made, but this course does not seem to be in accordance with principle.

[73] e.g. *Poole* v. *Dicas* (1835) 1 Bing. (N.C.) 649, 131 E.R. 1267.

[74] *Smith* v. *Blakey* (1867) L.R. 2 Q.B. 326 at 332.

[75] [1936] P. 17.

[76] (1879) 13 Ch.D. 558.

[77] (1832) 3 B. & Ad. 890, 110 E.R. 327.

[78] (1832) 3 B. & Ad. 890 at 895, 110 E.R. 327 at 329. See, also, the discussion of this case in *R.* v. *Inhabitants of Worth* (1843) 4 Q.B.D. 132 at 138–9, 114 E.R. 847 at 849, 850.

[79] [1878] 3 P. 156 at 158.

[80] 1940 E.D.L. 159 at 165.

[81] (1879) 3 Ch.D. 411 (C.A.). In addition, no duty to record the date of birth was found to exist.

tion for a government appointment tendered to prove the applicant's date of birth was rejected, *inter alia*, because the birth had obviously occurred many years earlier.

Unlike declarations against interest, declarations in the course of duty are rendered inadmissible if the declarant is shown to have had a motive to misrepresent the facts asserted.[82] Another point of difference from declarations against interest is that declarations in the course of duty are admissible only to establish those facts of which the declarant had a duty to speak. Collateral facts asserted, however closely connected with the duty, cannot be proved by the declaration. In *Chambers* v. *Bernasconi*,[83] where a deputy-sheriff was under a duty to inform the sheriff of the fact and date of any arrest, it was held that his return could not be used to establish the place where an arrest had taken place. The extent of this principle can be seen from *Stapylton* v. *Clough*.[84] Once it had been shown that the declarant was under a duty to keep a written record, which was received, his oral declaration made at the same time and contradicting the writing had to be excluded. Had his duty been one more general in scope, as in *Nolan* v. *Bernard*,[85] where a farm manager was charged with keeping a complete record of all daily events of the farm, the declaration might have been received.

3.2. *Declarations against interest*

Evidence may be given of declarations made by a deceased person if, to his knowledge, the declarations were against his pecuniary or proprietary interest at the time he made them, and provided he had personal knowledge of the facts asserted. The theory of this exception is that a statement asserting a fact against interest is unlikely to be either deliberately false or heedlessly incorrect.[86] Declarations against penal or social interest cannot, however, be received under this exception to the hearsay rule,[87] whatever the gravity of their possible consequences. An admission by the deceased declarant that he committed fraud is received because it amounts to an acknowledgment of liability to repay the amount fraudulently obtained, even though the criminal consequences would almost invariably be uppermost in his mind.[88]

Provided the declaration is against pecuniary or proprietary interest, the extent of the interest is apparently immaterial, though if it is trifling it does not necessarily provide any motivation to tell the truth.[89] Apparently it suffices that the declaration is prima facie against interest;[90] it is not necessary to go to the

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[82] *Poole* v. *Dicas* (1835) 1 Bing. N.C. 649 at 652, 131 E.R. 1267 at 1269; *The Henry Coxon* [1878] 3 P. 156.

[83] (1834) 1 C.M. & R. 347, 149 E.R. 1114. See, also, *Jantjies* v. *Hume Pipe Co., Ltd.*, 1950 (3) S.A. 679 (C).

[84] (1853) 2 El. & Bl. 933, 118 E.R. 1016.

[85] 1908 T.S. 142. Cf. *Mellor* v. *Walmesley* [1905] 2 Ch. 164 (C.A.), where, receiving a surveyor's report in evidence, Vaughan Williams L.J. pointed out (at 168): 'Here the duty of the surveyor was to report, not only the ultimate result of his survey, but also to record everything without which he could not arrive at that ultimate conclusion.'

[86] *Williams N.O.* v. *Eagle Star Insurance Company*, 1961 (2) S.A. 631 (C) at 633.

[87] This inexplicable and unjustifiable restriction dates from the *Sussex Peerage Case* (1844) 11 Cl. & F. 85, 8 E.R. 1034.

[88] *Flange Engineering Co. (Pty.) Ltd.* v. *Elands Steel Mills (Pty.) Ltd.*, 1963 (2) S.A. 303 (W) at 307.

[89] See Bernard S. Jefferson, 'Declarations Against Interest' (1944) 58 *Harvard L.R.* 1 at 19, n. 42.

[90] This test, enunciated in Taylor v. *Witham* (1876) 3 Ch.D. 605, was approved by the Court of Appeal in *Coward* v. *Motor Insurers Bureau* [1962] 1 All E.R. 531 (C.A.) at 536.

extent of showing that it could never be self-serving.[91] Nor is it required that the declarant would have had any interest in the action in which his declaration is tendered,[92] this being the distinguishing feature between declarations against interest and admissions.

The underlying concept of purely mercenary psychology requires that the declarant must have had personal knowledge of the facts asserted,[93] failing which the supposed guarantee of truthfulness is lacking. Similarly, the theory requires that the declarant must have been aware that the declaration is against his interest,[94] though this requirement has not always been insisted on.

A declaration is against pecuniary interest if it admits a liability of the declarant or repels a claim he would otherwise have had against another, e.g. entries in the books of a deceased creditor that a debt has been discharged,[95] a statement abandoning a claim for damages,[96] or an acknowledgment that moneys received are being held for the declarant's employer[97] or partner.[98] A declaration is against proprietary interest where, for example, the declarant would inherit on another's intestacy and his declaration upholds the validity of a will whereunder he does not take,[99] or where the declaration predicates a lesser title in property than the declarant appears to have, such as a statement that he holds as tenant or bailee rather than as owner.[1] (This is subject to the limitation that a tenant's assertions cannot be received to derogate from his landlord's title.[2]) In some of these cases it will be seen that the question of the declarant's consciousness that he is speaking against interest is a highly theoretical one, presuming, for example, his knowledge that possession is prima facie evidence of ownership; and if the fact that he is a tenant is implied from his assertion that he has paid his rent, this requirement becomes even more remote since he himself would no doubt regard his statement as highly self-serving. Logic would therefore require at least that if there is evidence showing that he was not in fact aware that the statement was against his interest, it should be excluded. Unlike with some of the other exceptions to the hearsay rule even the proved existence of a motive to falsify goes only to the weight of the declaration and does not affect its admissibility.[3]

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[91] This was said to be the test in *Smith* v. *Blakey* (1867) L.R. 2 Q.B. 326 and was preferred to that of *Taylor* v. *Witham* in *Ward* v. *H. S. Pitt & Company* [1913] 2 K.B. 130 (C.A.) at 137, but Baker, *The Hearsay Rule* (1950), pp. 71–2, points out that the prima facie test accords with the bulk of older authority.

[92] The decision to the contrary in *R.* v. *Kaiser*, 1927 W.L.D. 278 at 281, is clearly incorrect. See C. W. H. Schmidt in (1955) 18 *T.H.R.-H.R.* 1 at 4.

[93] *Sturla* v. *Freccia* (1880) 5 App. Cas. 623 (H.L.) at 632–3; *Ward* v. *H. S. Pitt & Company* [1913] 2 K.B. 130 (C.A.) at 137; *In re Jenion* [1952] Ch. 454 (where the deceased's assertion of paternity was held not to satisfy this requirement).

[94] *Tucker* v. *Oldbury Urban District Council* [1912] 2 K.B. 317.

[95] *Higham* v. *Ridgway* (1808) 10 East 109, 103 E.R. 717.

[96] *Blandy-Jenkins* v. *Earl of Dunraven* [1899] 2 Ch.D. 121 (C.A.); *Williams N.O.* v. *Eagle Star Insurance Company*, 1961 (2) S.A. 631 (C).

[97] *Doe d. Kinglake* v. *Beviss* (1849) 7 C.B. 456, 137 E.R. 181.

[98] *Retief* v. *Estate Du Plessis*, 1928 C.P.D. 387.

[99] *In re Adams* [1922] P. 240.

[1] e.g. *R.* v. *Exeter* (1869) L.R. 4 Q.B. 341. If the declarant has no apparent title his statements to this effect cannot be against his interest: *Re Gardner's Will Trusts* [1936] 3 All E.R. 938. Cf., on pecuniary interest, *In re Jenion* [1952] Ch. 454 (C.A.) at 465.

[2] *Papendick* v. *Bridgwater* (1855) 5 El. & Bl. 166, 119 E.R. 443.

[3] *Taylor* v. *Witham* (1876) 3 Ch.D. 605. It is of course manifest that the declarant's motive to misrepresent or his belief that the declaration is self-serving destroys the supposed guarantee of reliability. See (1944) 58 *Harvard L.R.* 1 at 53.

The fact that the declaration was made in contemplation of death, so that it was really made against the interest of the declarant's estate, does not render it inadmissible,[4] since the restriction to pecuniary or proprietary interests in any event limits this hearsay exception to patrimonial rather than personal interests.

The interest impugned by the declaration need not be a legally enforceable one: an acknowledgment of a friendly non-contractual arrangement to share travelling expenses between workmates with a lift scheme has been held to be a declaration against interest.[5] A declaration that is neutral, equally self-serving and disserving, is inadmissible;[6] but a declaration which is against interest is received even if it is necessary for the explanation to refer to other favourable assertions.[7] The interest must, however, be one existing at the time the declaration is made. In *Smith* v. *Blakey*[8] an agent's letter to his principal acknowledging the receipt of three huge overdrafts was excluded, since the possibility of this making him responsible in the event of their loss was held to be too remote a contingency.[9] In *Lloyd* v. *Powell Duffryn Steam Coal Co., Ltd.*,[10] a man's admission that he was responsible for a woman's pregnancy was rejected as importing only a future liability for maintenance of the child, though his interest might have been regarded as a presently existing one if the woman had been married and her husband had had a claim for damages for the adultery.[11]

A declaration against interest is admissible to prove not only the fact which is against interest but also collateral facts contained in the declaration, even where these are highly self-serving. In *Stuart* v. *Grant*[12] a deceased purchaser of land had noted the price he was to pay on a copy of the diagram distributed at the auction sale where he bought, and this was held to render admissible his further statement on the plan indicating the situation of a proposed market. A tenant's statement that he is such is admissible to prove further facts asserted, such as the identity of the landlord,[13] and a confession by the declarant that he participated with X in perpetrating a fraud is received in so far as it proves X's complicity as well.[14] In *Higham* v. *Ridgway*[15] an entry in the books of a midwife reflecting payment of charges for attending the delivery were received to establish the child's date of birth.

It appears from the latter case that the entire entry need not have been made

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[4] *Williams N.O.* v. *Eagle Star Insurance Company*, 1961 (2) S.A. 631 (C); *Flange Engineering Co. (Pty.) Ltd.* v. *Elands Steel Mills (Pty.) Ltd.*, 1963 (2) S.A. 303 (W). The decision to the contrary in *Freedman and Levin* v. *Penny*, 1911 W.L.D. 228, cannot be supported.

[5] *Coward* v. *Motor Insurers Bureau* [1962] 1 All E.R. 531 (C.A.), discussed by G. D. Nokes in (1962) 25 *Mod. L.R.* 458.

[6] In *R.* v. *Inhabitants of Worth* (1843) 4 Q.B. 132, 114 E.R. 847, an employer's acknowledgment of the existence of a service contract was excluded, as although it predicated his liability to pay the salary, it entitled him to claim the services. An example concerning proprietary interests is *Crease* v. *Barrett* (1835) 1 C.M. & R. 919 at 931, 149 E.R. 1353 at 1358.

[7] *See Doe d. Kinglake* v. *Beviss* (1849) 7 C.B. 456 at 509 and 512, 137 E.R. 181 at 203 and 204, where it is stressed that the favourable assertions are only admissible in this case in so far as necessary to interpret those against interest.

[8] (1867) L.R. 2 Q.B. 326.

[9] The distinction between this case and the cases where an agent has acknowledged receiving money for his principal is obscure. Either the money cases are an established exception, or *Smith* v. *Blakey* turned solely on its own facts.

[10] [1914] A.C. 733 (H.L.). See, too, *In re Jenion* [1952] Ch. 454 (C.A.) at 465, 476–7.

[11] *B* v. *Attorney-General* [1965] 1 All E.R. 62.

[12] (1903) 24 N.L.R. 416.

[13] *Peacable d. Uncle* v. *Watson* (1811) 4 Taunt. 16, 128 E.R. 232.

[14] *Flange Engineering Co. (Pty.) Ltd.* v. *Elands Steel Mills (Pty.) Ltd.*, 1963 (2) S.A. 303 (W).

[15] (1808) 10 East 109, 103 E.R. 717. See, too, *Taylor* v. *Witham* (1876) 3 Ch.D. 605.

at the same time, for the midwife entered the debit for attending delivery some five months before receiving and recording payment, and it was the later entry which rendered the whole admissible.

3.3. *Dying declarations*

The doctrine governing admissibility under this exception to the hearsay rule has been described as 'the most mystical in its theory and the most arbitrary in its limitations'.[16] It may be formulated as permitting the reception, in criminal cases where the accused is charged with criminal responsibility for a death, of declarations made by the deceased victim as to the circumstances of his death, provided these were made at a time when the declarant's death was impending and when he had a settled hopeless expectation of death. The requirements for admissibility are as strictly applied where the dying declaration is tendered by the defence as where it is tendered by the prosecution.[17]

As the declarant is in effect the real witness, it must be shown that he would have been testimonially competent had he been alive.[18] The declaration tendered must be a complete one, not in the sense of being a full description of the causes or symptoms of the fatal injury or disease, but as representing all he wished to say. If incomplete, as in *Waugh* v. *The King*,[19] where while speaking the declarant fell into a coma from which he never recovered, the partial statement must be excluded *in toto*. It is not necessary for the *ipsissima verba* of the declarant to be given, as long as the court is satisfied that the meaning of the deceased is being accurately conveyed.[20]

The use of such declaration is confined, typically, to charges of murder or culpable homicide[21]—a restriction which, though manifestly illogical, is well established.[22] It is not enough that the death of the declarant in fact resulted from the alleged act of the accused, if the charge is not based on the death. Thus in *R.* v. *Hutchinson*[23] on a charge of administering an abortefacient, the fact that the patient had died in consequence of the drug did not render her dying declaration admissible. The requirement that the death charged be the death of the declarant is equally illogical, as can be seen from the American case of *Westberry* v. *State*,[24] where a husband and wife were shot by an intruder at the same time. The accused was charged with the murder of the husband only, and accordingly the dying declaration of the wife had to be excluded.[25]

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[16] Charles T. McCormick, *Handbook of the Law of Evidence* (1954), p. 555.
[17] *R.* v. *Morton* (1862) 3 F. & F. 492, 176 E.R. 221; *R.* v. *Kaiser*, 1927 W.L.D. 278.
[18] *R.* v. *Drummond* (1784) 1 Leach 337, 168 E.R. 271.
[19] [1950] A.C. 203 (P.C.).
[20] *R.* v. *Balol*, 1949 (1) S.A. 491 (T); *S.* v. *Cele*, 1965 (1) S.A. 82 (A.D.) at 98. Cf. *Chandrasekera* v. *R.* [1937] A.C. 220 (H.L.), [1936] 3 All E.R. 865.
[21] Although the recognition of this exception is usually dated from *Wright d. Clymer* v. *Littler* (1761) 3 Burr. 1244, 97 E.R. 812, it has been established at least since *Stobart* v. *Dryden* (1836) 1 M. & W. 615 at 625, 150 E.R. 581 at 585, that dying declarations are inadmissible in civil cases. See, also, *Korsten* v. *Cuyler* (1829) 1 Menz. 430.
[22] *R.* v. *Mead* (1824) 2 B. & C. 606, 107 E.R. 509 (perjury); *R.* v. *Lloyd* (1830) 4 Car. & P. 233, 172 E.R. 624 (robbery with violence).
[23] (1824) 2 B. & C. 608 (note), 107 E.R. 509.
[24] 175 Ga. 115, 165 S.E. 905 (1932), quoted by *Wigmore on Evidence*, 3rd. ed. (1940), V, § 1433, n. 1, and by McCormick, above, p. 558.
[25] The limitation was apparently disregarded in *R.* v. *Baker* (1837) 2 M. & Rob. 53, 174 E.R. 211. The accused was charged with the murder of A, by feeding him with a poisoned cake. The cook D also partook of the cake, and her dying declaration, that she had put nothing bad in it and that the accused had been in the room while she prepared it, was received as forming part of the whole transaction. The case is perhaps to be regarded as an example of the overriding inclusionary role the *res gesta* doctrine can play.

To be admissible, a dying declaration need not have been spontaneous. It may have been elicited by questions, even leading questions, though these should if possible be recorded along with the answers[26] (and will in any event affect the weight to be attached to the declaration). This follows from the underlying rationale of admissibility which is found in the deceased's conscious and deliberate awareness of the implications of his situation. The declarant's mind, said Baron Eyre in *R.* v. *Drummond*,[27]

> 'impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The declarations therefore of a person dying under such circumstances, are considered as equivalent to the evidence of the living witness upon the oath.'

The declarant's awareness of the retributions at hand in the after life is therefore a prerequisite. In *R.* v. *Pike*[28] the dying declarations of a 4-year-old child were rejected as he could not have any such awareness, but those of a 10-year-old were received in *R.* v. *Perkins*[29] upon proof that he believed he would go to hell if he told a lie and to heaven if he were truthful. Oddly enough, the question of whether the declarant's scheme of beliefs include the conception of sanctions in an after-life has never been considered in South Africa,[30] but the Australian courts have excluded the dying declaration of a native of Papua and New Guinea on the ground of his belief that the next life will be a comfortable one irrespective of death-bed veracity or falsehood.[31]

That the declarant was *in extremis*[32] is more readily proved than his awareness of that fact—his 'settled hopeless expectation of death'.[33] His expectation of impending death may be indicated directly by the words he used or by the fact that he was so told by his attendants;[34] or it may be proved circumstantially by his demeanour[35] or his conduct such as the fact that he gave instructions as to his funeral[36] or took leave of his family.[37] Or it may be shown that the nature of his injuries or illness was such that he must inevitably have had the required realization.[38] Even the words used are not conclusive for the deceased's settled

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[26] *R.* v. *Abdul*, 1905 T.S. 119; *R.* v. *Bottomley* (1903) 38 L.J.N. 311. See, too, *R.* v. *Buloi*, 1949 (1) S.A. 491 (T).

[27] (1784) 1 Leach 337 at 338, 168 E.R. 271 at 272. See, also, *R.* v. *Woodcock*, 1 Leach C.C. 500, quoted in *R.* v. *Bouwer*, 1964 (4) S.A. 58 (O) at 59.

[28] (1829) 3 Car. & P. 598, 172 E.R. 562.

[29] (1840) 9 Car. & P. 395, 173 E.R. 884.

[30] Anthropology has amply documented the fact that in most African tribes, there is no conception of an after-life corresponding to that of Christianity, but that this conception is expressed in the form of ancestor worship which is far from analogous (see M. Fortes, 'Some Reflections on Ancestor Worship in Africa', *African Systems of Thought* (1965), ed. M. Fortes & G. Dieterlen, pp. 128 ff.; and that ancestor worship does not necessarily play any part in the upholding of morality (see, e.g., J. D. & E. J. Krige, 'The Lovedu of the Transvaal', *African Worlds* (1954), ed. Daryll Forde, esp. at pp. 79–80.

[31] *R.* v. *Mudobi* (1963) 6 F.L.R. 1, quoted by R. Cross, *Evidence*, 3rd ed. (1967), p. 419. But there is American authority that the awfulness of imminent death is sufficient sanction, irrespective of actual beliefs (E. M. Morgan, *Some Problems of Proof under the Anglo-American System of Litigation* (1956), p. 181).

[32] On which see *R.* v. *Abdul*, 1905 T.S. 119 at 122–3; *R.* v. *Nzobi*, 1932 W.L.D. 98; *S.* v. *Bouwer*, 1964 (4) S.A. 58 (O); *The Sussex Peerage* (1844) 9 Cl. & F. 85 at 108, 8 E.R. 1034 at 1043.

[33] *R.* v. *Perry* [1909] 2 K.B. 697 (C.A.).

[34] e.g. *R.* v. *Rolston*, 1907 T.S. 681; *R.* v. *Perkins* (1840) 9 Car. & P. 395, 173 E.R. 884.

[35] *R.* v. *Le Roux* (1879) 14 S.C. 424 at 430; *R.* v. *De Leeuw*, 1927 O.P.D. 276.

[36] *R.* v. *Spilsbury* (1835) 7 Car. & P. 187 at 190, 173 E.R. 82 at 84.

[37] *R.* v. *Nyoobo*, 1925 A.D. 561 at 564.

[38] e.g. *R.* v. *Lin Shun Hai*, 1910 W.L.D. 57; *R.* v. *Hine*, 1910 C.P.D. 371; *R.* v. *Masence*, 1910 E.D.L. 383 at 384; *R.* v. *Bouwer*, 1964 (4) S.A. 58 (O) at 60.

expectation of death has been held not to be sufficiently established where he said 'I have no hope of recovery, I think I shall die',[39] or 'I feel so weak that I do not think I will succeed in getting well'.[40] Further, the courts have recognized that in certain African languages expressions such as 'I am dead' or 'I have been killed' do not have their literal meaning but are used idiomatically to indicate a feeling of faintness, unconsciousness or serious injury.[41]

If there is any doubt as to the extent of the deceased declarant's knowledge of his condition, the declaration will be excluded—for example, if he gives some indication that he retains some hope of recovery, however faint.[42] But if after the declaration is made his hopes revive or his expectation of death recedes, it is not thereby rendered inadmissible, provided death in fact ensues, no matter how long after.[43] If in the required state of mind he reaffirms a previous declaration made before he was in hopeless expectation of death, it must be clear that he remembered to adhere *in articulo mortis* to all the details of the previous declaration, which should therefore be read over to him when he reaffirms it.[44]

3.4. *Declarations as to pedigree*

Where genealogical or pedigree matters are in issue, and not merely relevant to the issue,[45] hearsay declarations by deceased members of the family as to the relationship in issue, made *ante litem motam*, are admissible as an exception to the hearsay rule.

These declarations are received as reflecting the family tradition as to its history, so that it need not be shown that the declarant had personal knowledge of the facts asserted;[46] but only members of the family are presumed to be sufficiently acquainted with the family tradition to be qualified to speak to it, and declarations made by friends or servants whatever their degree of intimacy with the family cannot be received under this exception.[47] The testimonial qualification of the deceased declarant—which must be proved *aliunde* the declaration itself,[48] requires the declarant to have been legitimately related by

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[39] *R.* v. *Martha* (1894) 15 N.L.R. 326.

[40] *R.* v. *Nzabi*, 1932 W.L.D. 98.

[41] Evidence to establish this fact was led in *R.* v. *Ngcobo*, 19.. .D. 561 at 563, and judicial notice taken of it in *R.* v. *Masence*, 1910 E.D.L. 383 at 384.

[42] *R.* v. *Bouwer*, 1964 (4) S.A. 58 (O) at 60.

[43] *R.* v. *Hine*, 1910 C.P.D. 371; *R.* v. *Bernadotti* (1869) 11 Cox C.C. 316.

[44] See *R.* v. *Rolston*, 1907 T.S. 681; cf. *R.* v. *Abdul*, 1905 T.S. 119.

[45] There is no logic in this distinction, but it is well established. Thus in *R.* v. *Inhabitants of Erith* (1807) 8 East 539, 103 E.R. 450, a hearsay declaration as to the place of a pauper's birth was excluded, since the case was concerned not with his parentage but only with which locality was, by virtue of being his birthplace, responsible for him as a pauper. For the same reason, where the defence of minority was raised in an action on a contract, so that the defendant's date of birth though not his descent was involved, a pedigree declaration was excluded, in *Haines* v. *Guthrie* (1884) L.R. 13 Q.B. 818 (C.A.). It is doubtful whether *Ex parte Lottering*, 1936 T.P.D. 29, an application to have a birth registered and a birth certificate issued, is correctly to be classed with these; the Court excluded an entry in a family Bible on the ground that neither succession, descent or legitimacy were in issue. While it is true that the vast majority of the English cases on the point are succession cases involving questions of legitimacy, if the registration of a birth involved not only the date of birth but equally the parentage the pedigree declaration should not, therefore, have been excluded.

[46] *Doe d. Banning* v. *Griffin* (1812) 15 East 293, 104 E.R. 855; *Monkton* v. *Attorney-General* (1831) 2 Russ. & M. 146 at 165, 39 E.R. 350 at 357.

[47] *Johnson* v. *Lawson* (1824) 2 Bing. 86, 130 E.R. 237; *The Lovat Peerage* (1885) 10 App. Cas. 763 (H.L.) at 767–8.

[48] *Doe d. Jenkins* v. *Davies* (1847) 10 Q.B. 315 at 324, 116 E.R. 122 at 125; *Plant* v. *Taylor* (1861) 7 H. & N. 211 at 237, 158 E.R. 453 at 463.

blood,[49] or have been the spouse of a person so related,[50] to either the family or the person alleged to be related to the family. Relationship to both need not be shown, because if this could be established *aliunde* the declaration itself would be superfluous.[51] This principle was apparently overlooked in *R. v. Ndabazonke*,[52] an incest charge where the State alleged the complainant to be the daughter of the accused's illegitimate child. A declaration of the complainant's deceased grandmother, whose illicit intercourse with the accused had resulted in the birth of the complainant's mother, was excluded on the ground that she was not legitimately connected with the accused, but the judgment cannot be supported as she was clearly legitimately connected with the complainant, on the principle *'n moeder maak't geen bastaard*.[53] The deceased declarant as a member of his own family may have spoken as to his own parentage, legitimacy, etc., as in *Doe d. Jenkins v. Davies*,[54] where Lord Denman C.J. commented[55] that

> 'neither the admissibility nor the effect of the evidence is altered by the accident that the fact which is for the judge as a condition precedent is the same fact which is for the jury in the issue'.

The identity of the declarant need not be shown if the declaration has been accepted by the family generally as representing its tradition, such as entries in family Bibles[56] or a pedigree displayed by the family in its reception room.[57] It is only if such general family acceptance is lacking that the identity of the maker must be established.[58]

Pedigree declarations are received on the theory that events affecting the family or its members would naturally be the subject of discussion within the family: in particular, the time or place of births, marriages and deaths and the identity of the participants in these occasions, but also matters of an individual's personal history such as the fact that he ran away from home,[59] committed a murder,[60] or took up a particular occupation or residence.[61] Declarations on

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[49] *Vowles v. Young* (1806) 13 Ves. Jun. 140, 33 E.R. 247.

[50] *Vowles v. Young* (1806) 13 Ves. Jun. 140, 33 E.R. 247; *The Shrewsbury Peerage* (1858) 8 H.L.C. 1 at 23, 11 E.R. 1 at 10–11.

[51] *Monkton v. Attorney-General* (1831) 2 Russ. & M. 146, 39 E.R. 350.

[52] 1915 E.D.L. 133.

[53] As laid down in *Boins v. Von Deventer*, 1966 (3) S.A. 182 (A.D.) at 204–6, it is clear that our courts must apply South African and not English substantive law in determining who is a relative legitimately connected by blood, and the cases based on the English doctrine that an illegitimate child is *filius nullius* are therefore not to be followed. It should be noted, however, that even in England declarations by a deceased father that his children are illegitimate have been admitted: e.g. *Shedden v. Patrick* (1860) 2 Sw. & Tr. 170, 164 E.R. 958; *Murray v. Milner* (1879) L.R. 12 Ch.D. 845; *In re Turner* (1885) L.R. 29 Ch.D. 985. As to statements by the putative father, see *B v. Attorney-General* [1965] 1 All E.R. 62. For South African cases on the point, see *Fitzgerald v. Green*, 1911 E.D.L. 432 at 464, 465, and *Wilkinson v. Estate Steyn*, 1947 (2) S.A. 740 (C).

[54] (1847) 10 Q.B. 315, 116 E.R. 122. See, also, *Shedden v. Patrick* (1860) 2 Sw. & Tr. 170, 164 E.R. 958; *In re Turner* (1885) L.R. 29 Ch. 985.

[55] (1847) 10 Q.B. 315 at 324, 116 E.R. 122 at 125.

[56] *The Berkeley Peerage* (1811) 4 Camp. 402, 171 E.R. 128; *Hood v. Beauchamp* (1836) 8 Sim. 26, 59 E.R. 11; *Hubbard v. Lees* (1866) 1 L.R. 1 Exch. 255.

[57] *The Perth Peerage* (1848) 2 H.L.C. 865 at 876, 9 E.R. 1322 at 1327. See, too, *Sturla v. Freccia* (1880) 5 App. Cas. 623 (H.L.) at 641.

[58] *Monkton v. Attorney-General* (1831) 2 Russ. & M. 146 at 163, 39 E.R. 350 at 356–7; *The Fitzwalter Peerage* (1843) 10 Cl. & F. 193, 8 E.R. 716; *The Shrewsbury Peerage* (1858) 8 H.L.C. 1, 11 E.R. 1.

[59] *Attorney-General v. Köhler* (1861) 9 H.L.C. 654, 11 E.R. 885.

[60] *The Lovat Peerage* (1885) 10 App. Cas. 763 (H.L.).

[61] *Doe d. Banning v. Griffin* (1812) 15 East 293, 104 E.R. 855; *Rishton v. Nesbitt* (1844) 2 M. & Rob. 554, 174 E.R. 378; *Shields v. Boucher* (1846) 1 De G. & Sm. 40, 63 E.R. 962.

such matters are received, in the oft-quoted words of Lord Eldon L.C. in *Whitelocke* v. *Baker*,[62] as

> 'the natural effusions of a party, who must know the truth; and who speaks upon the occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth'.

If, therefore, the declarations were made at a time when a controversy (though not necessarily actual litigation[63]) as to the very point[64] had arisen, that is, *post litem motam*, they will be excluded. There is no *lis* disqualifying the declaration even if it was made for the purpose of avoiding a controversy which it was foreseen might arise in the future, but which had not yet caused dispute,[65] though this circumstance may impair the weight to be given to the declaration.[66]

3.5. *Declarations as to public or general rights*

This exception to the hearsay rule allows evidence to be given of declarations made *ante litem motam* by deceased persons of competent knowledge, to establish matters of public or general interest. 'Interest' here is used not in the sense of gratifying curiosity or desire for information, but refers to matters 'in which a class of the community [has] a pecuniary interest, or some interest by which their legal rights and liabilities are affected'.[67]

Private or individual rights cannot be established in this fashion, even though a number of individuals may have similar rights. The presence of a cluster of private rights does not make the issue one of general interest—it is not a mere matter of degree or quantity, but of the nature of the right.[68] Thus the question whether, in a particular district, it was the sheriff or the local authority which was charged with carrying out a death sentence was held to be a matter of purely private rights in *R.* v. *Antrobus*,[69] though in *Rogers* v. *Wood*,[70] in contrast, the establishment of jurisdiction as between the city of Chester and the county of Chester was treated as a matter of general rights. On the other hand, though the issue may be a private one, it may coincide with questions of public right. For example, in *Thomas* v. *Jenkins*[71] evidence of reputation as declared by deceased persons was received once it had been shown that the boundaries of a farm coincided with the boundaries of the hamlet in which it fell, and the same would presumably apply if the private rights derived from one were dependent upon the existence of public rights.[72]

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[62] (1807) 13 Ves. Jun. 510 at 514, 33 E.R. 385 at 386.

[63] *The Berkeley Peerage* (1811) 4 Camp. 402, 171 E.R. 128; *The Lovat Peerage* (1885) 10 App. Cas. 763 (H.L.) at 780, 797.

[64] A declaration made when a *lis* on a collateral point has arisen is admissible: *Gee* v. *Ward* (1857) 7 El. & Bl. 509, 119 E.R. 1335; *The Shrewsbury Peerage* (1858) 8 H.L.C. 1 at 22–3, 11 E.R. 1 at 10.

[65] *Goodright d. Stevens* v. *Moss* (1777) 2 Coup., 591, 98 E.R. 1257. See, too, *Plant* v. *Taylor* (1861) 7 H. & N. 211, 158 E.R. 453.

[66] *Monkton* v. *Attorney-General* (1831) 2 Russ. & M. 146 at 164, 39 E.R. 350 at 357.

[67] Per Lord Campbell C.J. in *R.* v. *Inhabitants of Bedfordshire* (1855) 4 El. & Bl. 535 at 541–2, 119 E.R. 196 at 198. It is doubtful whether the issue in *Fuchs & Downing* v. *Port Elizabeth Municipality*, 1944 E.D.L. 254, complied with this test (though Clane J. appeared to rely on this exception to the hearsay rule), but it seems in any event that the evidence was not put to a hearsay use.

[68] *Dunraven* v. *Llewellyn* (1850) 15 Q.B. 791 at 812, 117 E.R. 637 at 665.

[69] (1835) 2 Ad. & E. 788, 111 E.R. 304. Another example is *Withnell* v. *Gartham* (1795) 1 Esp. 322, 170 E.R. 371.

[70] (1831) B. & Ad. 245, 109 E.R. 1134.

[71] (1837) 6 Ad. & E. 525, 112 E.R. 201.

[72] See *Stoney* v. *Eastbourne R.D.C.* [1927] 1 Ch.D. 367 (C.A.) at 394, 406.

Naturally, evidence under this heading is equally admissible whether it asserts reputation as to the existence of a public right, or as to the non-existence of the right.[73]

The reason advanced for the admissibility of such declarations is that matters of reputation necessarily predicate the concurrence of many and, being matters of general concern, are likely to be discussed by and therefore known to those affected, so that contradiction could be expected from others with conflicting interests.[74] It follows that only the declarations of persons with personal knowledge of the reputation prevailing in the community are admissible.[75] In the case of public rights, such as whether a particular road on private land is a public highway,[76] *any member of the public would be competent,*[77] although unless the declarant had had some connection with the rights or their user his assertion would be of little weight. In the case of rights of a more restricted kind, which are confined to members of a particular community,[78] only members of that community are considered competent.[79] The fact that the declarant was personally interested in the rights does not disqualify his declarations.[80] If, however, the declarations were made *post litem motam*, the possibility of misrepresentation is thought to become too immediate and the declarations will be excluded.[81]

The competency of the declarants, although a prerequisite for the admissibility of their statements, need not be shown directly. In *Newcastle* v. *The Hundred of Broxtowe*[82] it was implied from the nature of the position held by them. The decision of Gane J. in *Fuchs and Downing* v. *Port Elizabeth Municipality*,[83] admitting the evidence without proof of even the identity of the declarant, seems, however, to be an unwarranted extension.

The requirements as to competent knowledge of the declarant do not mean that the declaration is admissible in so far as it refers to facts within his personal knowledge.[84] In so far as anything other than reputation is asserted, the declaration is *pro tanto* inadmissible. Hearsay evidence of particular facts is therefore excluded even though inferences as to rights may be drawn from those facts. The physical features of land, e.g. the location or condition of houses or streets, the existence of a road or acts of user[85] have been held to be particular facts. The

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[73] *Drinkwater* v. *Porter* (1835) 7 Car. & P. 181, 173 E.R. 80.

[74] *R.* v. *Inhabitants of Bedfordshire* (1855) 4 El. & Bl. 535 at 542, 119 E.R. 196 at 198; *Wright d. Tatham* v. *Doe* (1837) 7 Ad. & E. 313 at 360–1, 112 E.R. 488 at 507.

[75] e.g. *Transkeian Territories General Council* v. *Magaibisa*, 1928 E.D.L. 256.

[76] *Rogers* v. *Wood* (1831) 2 B. & Ad. 245, 109 E.R. 1134. Insistence on this requirement was held to be unnecessary in *Du Toit* v. *Lydenburg Municipality*, 1909 T.S. 521 at 528, but the case cannot be regarded as authoritative since the requirement that the declarant be dead also seems to have been disregarded.

[77] *Crease* v. *Barrett* (1835) 1 C.M. & R. 919 at 928, 149 E.R. 1353 at 1357; *Mercer* v. *Denne* [1905] 2 Ch. 538 (C.A.) at 559.

[78] e.g. *R.* v. *Buhlanga*, 1923 E.D.L. 251; *Du Toit* v. *Lydenburg Municipality*, 1909 T.S. 527.

[79] *Crease* v. *Barrett* (1835) 1 C.M. & R. 919 at 929–30, 149 E.R. 1353 at 1357.

[80] *Mosely* v. *Davies* (1822) 11 Price 162, 147 E.R. 434.

[81] The test of *lis mota* in this context is the same as that applying to pedigree declarations (*Mosely* v. *Davies* (1822) 11 Price 162 at 178, 147 E.R. 434 at 440), and is discussed above, p. 000.

[82] (1832) 4 B. & Ad. 273, 110 E.R. 458.

[83] 1944 E.D.L. 254 at 260. But see n. 67, above.

[84] *R.* v. *Bliss* (1837) 7 Ad. & E. 550, 112 E.R. 577; *Brocklebank* v. *Thompson* [1903] 2 Ch. 344. This requirement was apparently overlooked in *Opperman* v. *Owens*, 1924 E.D.L. 94 at 99.

[85] *R.* v. *Berger* [1894] 1 Q.B. 823; *Attorney-General* v. *Horner* [1913] 2 Ch. 140 (C.A.); *Fowke* v. *Berington* [1914] 2 Ch. 308.

evidence must relate only to the legal quality or attributes of such facts or acts, to their character as being the subject or the exercise of public rights. A particularly striking example is *Mercer* v. *Denne*[86] where it was necessary to establish that from time immemorial the inhabitants of a district had had a customary right to dry their fishing-nets on a bank between the sea and a castle. Depositions taken during the seventeenth century, from which it appeared that the bank had at that period been covered by the tides, were held to be inadmissible as relating only to particular facts, for they did not go directly to establish or disprove the custom but merely to negative it by way of inference.

No confirmation of a declaration as to public or general rights by proof of user is necessary for the admissibility of the declaration.[87] Evidence of user would of course strengthen the reputation evidence—which has been said to be of little weight[88]—but may not be shown by the declaration itself, as this would amount to the assertion of particular facts.

3.6. *Post-testamentary declarations by testators as to their wills*

In *Sugden* v. *Lord St. Leonards*[89] the Court of Appeal created a new exception to the rule against hearsay, on the grounds that the declarant had peculiar means of knowledge and is usually without motive to lie.[90] This exception permits the reception of evidence of a testator's post-testamentary declarations as to the contents of his will, in proof of its contents. Though *Sugden's* case was doubted obiter in the House of Lords,[91] it has continued to be followed in the Court of Appeal,[92] but its principle has not been extended in England to admit a testator's declarations where the issue is not the contents of a lost will, but whether the testator in fact made a will at all or in particular terms.[93]

In South Africa, no case so far appears to have turned on proof of the contents of a lost will by the testator's assertions, but the execution of wills has been in issue in several cases. In *Brink* v. *Brink*[94] such declarations by the testator were admitted to prove due execution, but in *Dukada* v. *Dukada's Estate*[95] a statement by the deceased that she had not made a will was said to be inadmissible as hearsay. *Dukada's* case cannot be reconciled with *Kunz* v. *Swart*,[96] where the Appellate Division admitted without question a large volume of evidence as to the deceased's assertions in order to determine whether or not he had executed the will which was alleged to be a forgery. Accordingly, *Dukada* was not followed by the Rhodesian Court in *R.* v. *Foreman* (1),[97] where the testator's

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[86] [1905] 2 Ch. 538 (C.A.).

[87] *Crease* v. *Barrett* (1835) 1 C.M. & R. 919 at 930, 149 E.R. 1353 at 1357; *Duroven* v. *Llevellyn* (1859) 15 Q.B. 391 at 409, 117 E.R. 657 at 664.

[88] See preceding note.

[89] (1876) L.R. 1 P.D. 154 (C.A.).

[90] Cf. the refusal of the House of Lords to create another exception in *Myers* v. *D.P.P.* [1965] A.C. 1001 (H.L.), [1964] 1 All E.R. 881.

[91] *Woodward* v. *Goulstone* (1886) 11 App. Cas. 469 (H.L.).

[92] See *In re Estate of Macgillivray* [1946] 2 All E.R. 301 (C.A.).

[93] e.g. *In re the goods of Ripley* (1858) 1 Sw. & Tr. 68, 163 E.R. 632; *Atkinson* v. *Morris* [1897] P. 40 (C.A.).

[94] 1927 C.P.D. 212. Cf. *Re Phibbs* [1917] P. 93; *Re Webb* [1964] 1 All E.R. 91.

[95] 1937 E.D.L. 372.

[96] 1924 A.D. 618 esp. at 627 ff.

[97] 1952 (1) S.A. 423 (S.R.). *In re the Goods of Nosworthy* (1865) 4 Sw. & Tr. 45, 164 E.R. 1431, is distinguishable, for there the reception of evidence of the testatrix's declarations to identify which of two documents was her will was relevant to the issue of her testamentary intention, and no inference from the assertion of her intention to the facts on which the state of mind was based had to be made. Cf. *Ex parte Ford and Langham*, 1953 (4) S.A. 338 (N).

declarations were received in order to establish which of two instruments he had in fact executed as a will. In turn, *Foreman's* case was apparently overlooked in *Ex parte Currie and May NN.O.*,[96] where Lewis J. indicated obiter that he would not have admitted hearsay declarations by the testatrix as to whether she had destroyed her will.

Both *Kunz* v. *Swart* and *R.* v. *Foreman* may be distinguishable from the Cape case of *R.* v. *Basson*,[97] though Ogilvie Thompson J. there approved *Foreman* and purported to follow it. *Basson's* case was concerned with whether the testatrix had executed a particular will or whether it had been forged by the accused; the testatrix's statements after the date of the disputed will, referring to an earlier will proved to be genuine, were received as evidencing her lack of intention to revoke the earlier will, and this decision may therefore be regarded as an illustration of the admissibility of declarations of mental condition received to prove past state of mind.[1] But it is not clear whether the Court considered her state of mind to be independently relevant, and if not, and that state—her belief that she had not revoked—was employed merely as supporting an inference as to the facts on which that belief was based, then *Basson's* case is indistinguishable in principle from those where this exception to the hearsay rule is properly brought into play.

4. Public Documents

At common law, public documents are evidence of the truth of their contents provided they were made in pursuance of a public duty by a public official after inquiry into the matters stated. It need not be shown that the maker of the document is dead or otherwise unavailable, the evidence being received on grounds of convenience rather than necessity.[2] Nor is its admissibility affected by the possibility that the official had an interest in the matters recorded—a consideration which affects only the weight to be given to the evidence.[3]

The subjective operation of the duty on the mind of the maker of the document is said to afford the circumstantial guarantee of its trustworthiness. It follows that foreign documents are equally admissible, provided the existence in the foreign country of a public duty to make the document is shown, and it is proved that the document is in the form required by the law of that country and is properly authenticated.[4]

Public documents are those made under common-law or statutory authority, express or implied,[5] original or delegated.[6] Thus a magistrate's reasons for judgment[7] and official births and marriage registers[8] have been held to be public documents, but South African baptismal registers do not qualify, however

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[96] 1966 (2) S.A. 184 (S.R.).
[97] 1965 (1) S.A. 697 (C) at 701.
[1] See above, pp. 000–00. 90–1
[2] *Wigmore on Evidence*, 3rd ed. (1940), V, § 1631
[3] *The Irish Society* v. *Bishop of Derry* (1846) 12 Cl. and Fin. 641 at 668-9, 8 E.R. 1561 at 1573.
[4] *Lyell* v. *Kennedy* (1889) 14 App. Cas. 437 (H.L.) at 448–9; *Ex parte Duncan*, 1912 C.P.D. 338; *R.* v. *Sherrin*, 1913 T.P.D. 474; *Pedregal* v. *Pedregal*, 1958 (1) S.A. 436 (S.R.).
[5] *R.* v. *De Villiers*, 1944 A.D. 493 at 500; *Hassim* v. *Naik*, 1952 (3) S.A. 331 (A.D.) at 340; *Mercer* v. *Denne* [1905] 2 Ch. 538 (C.A.) at 564.
[6] *Sturla* v. *Freccia* (1880) 5 App. Cas. 623 (H.L.) at 648.
[7] *R.* v. *Makolomine*, 1920 E.D.L. 371.
[8] These are in addition now governed by statute: sec. 42(3) of the Births, Marriages and Deaths Registration Act, No. 81 of 1963, and see below, p. 000. 109

reliably maintained,[9] since in this country there is no legal duty to make them.[10] Even if made under authority of law, however, a document is not a public document for the purposes of this exception to the hearsay rule, unless it is compiled for the purpose of affording members of the public a right of access to it.[11] Because of this requirement, a police occurrence book tendered to prove the fact of an arrest and the nature of the report made by the arresting officer was rejected in *Lenders* v. *R.*,[12] and in *Northern Mounted Rifles* v. *O'Callaghan*[13] a regimental musketry register was excluded as having been kept purely for the domestic regulation of the corps. For the same reason a passport,[14] and post office records of the delivery of telegrams,[15] have been held not to be public documents. It follows that confidential official documents could never be admitted under this heading, irrespective of any claim of State privilege.[16] Official documents made for a temporary purpose and not intended to be incorporated in a permanent public register are likewise excluded.[17] Finally, public documents must be produced from proper custody, i.e. from the custody of the official properly having control of them.[18] Court records must be put in by the clerk of a magistrate's court or the registrar of a superior court, as the case may be,[19] not, for example, by a court interpreter.[20] On this principle, ancient maps in the possession of public libraries were held not be be public documents in *Attorney-General* v. *Horner* (*No.* 2).[21]

The officer who made the documents must be shown to have had a public duty both to inquire into the matters stated and to record them. If his duty was merely to record information given to him with no obligation to satisfy himself personally as to the facts, the document is inadmissible. For this reason, it was held in *R.* v. *De Villiers*[22] that a motor-car registration certificate could not be received to prove the engine and chassis numbers of the vehicle in question, since the licensing officials were under no duty to ascertain that they were correctly informed when registering the number. The extent of the duty of inquiry required is unclear. In *De Villiers's*[23] case the Appellate Division purported to follow *Doe d. France* v. *Andrews*,[24] but in that case the maker of the document

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[9] *Doe d. France* v. *Andrews* (1850) 15 Q.B. 756 at 759, 117 E.R. 644 at 645.

[10] *Zwedala* v. *Mtyobile*, 1911 E.D.L. 412. A foreign baptismal register may well be admissible if the law of that country requires them: *Lyell* v. *Kennedy* (1889) 14 App. Cas. 437 (H.L.).

[11] *Sturla* v. *Freccia* (1880) 5 App. Cas. 623 (H.L.) at 643–4; *Beningfield* v. *Durban Corporation* (1897) 18 N.L.R. 31; *Ioannou* v. *Demetriou* [1952] A.C. 84 (P.C.) at 93. This requirement was apparently overlooked in *R.* v. *Fakiri*, 1938 A.D. 237, but the records there received were no doubt admissible as declarations made in the course of duty (see above, p. 000).

[12] 1943 G.W.L. 34.

[13] 1909 T.S. 174. See, too, *R.* v. *Hoffman*, 1941 O.P.D. 65; *Ex parte Rainnie*, 1943 N.P.D. 160.

[14] *Hassim* v. *Naik*, 1952 (3) S.A. 331 (A.D.).

[15] *Heyne* v. *Fischel and Company* (1913) 30 T.L.R. 190, (1914) 31 *S.A.L.J.* 299. Cf. *R.* v. *Wepener*, 1950 (1) P.H., H. 73 (G.W.) (railway records); *Gebe* v. *S.*, 1968 (1) P.H., H. 18 (C) (municipal township records).

[16] *Sturla* v. *Freccia* (1880) 5 App. Cas. (H.L.); *Lilley* v. *Petitt* [1946] K.B. 401, [1964] 1 All E.R. 593.

[17] *Sturla* v. *Freccia* (1880) 5 App. Cas. 623 (H.L.) at 649; *Heyne* v. *Fischel and Company* (1913) T.L.R. 190.

[18] *Breed* v. *Breed*, 1946 E.D.L. 27. Delegation is permitted by sec. 263(2) of the Criminal Procedure Act, 1955.

[19] *Fan* v. *Fan*, 1931 E.D.L. 283.

[20] *Ngea* v. *R.*, 1911 E.D.L. 162.

[21] [1913] Ch. 140 (C.A.) at 155–6.

[22] 1944 A.D. 493. A car registration certificate may, however, be evidence of the date of registration of ownership, if the statute requires it to be dated: *R.* v. *Lambat*, 1961 (1) S.A. 734 (S.R.). See, too, *Nolan* v. *Povall*, 1953 (2) S.A. 202 (S.R.).

[23] 1944 A.D. 493 at 501.

[24] (1850) 15 Q.B. 756, 117 E.R. 644.

had no personal knowledge of the matters recorded. Absence of such personal knowledge was held to be a fatal bar to admissibility in *Doe d. Warren* v. *Bray*.[25] On the other hand, it appears from *In re Stollery*[26] that in England it is sufficient if the officer may satisfy himself by making inquiries from others, and the likelihood of his error, presumably based on the probabilities as to how far in the circumstances the inquiries are likely to have been pursued, may mean that *different* parts of the document may differ in weight. On the face of it, *De Villiers* is more in accord with *Bray* than with *Andrews* and *Stollery*, but the Appellate Division decision may have turned on the peculiar consideration that the licensing officers in fact never did make inquiry, and in the absence of such showing the Court might well have been prepared to assume, with *Andrews* and *Stollery*, that reasonably sufficient investigations had been undertaken.

In any event, the document is only admissible to evidence those matters which there was a duty to ascertain and record. In so far as it contains particulars not covered by the duty, it must be rejected.[27]

It is not apparently a requirement that the maker of the document have been a public official, as long as he was carrying out a public duty imposed by law.[28]

Where an original document satisfies the requirements of the public documents exception to the hearsay rule, sections 261 and 263(1) of the Criminal Procedure Act, 1955, render certified copies or extracts admissible, and section 262 provides that the original of an official document may only be produced in court upon the order of the attorney-general. The provision for such copies or extracts sets the permissible minimum, so that oral evidence of the original register's contents is inadmissible.[29]

5. Statutory Exceptions to the Hearsay Rule

Many statutes provide that documents prepared in connection with their administration shall be admissible as prima facie proof of their contents. In some of these cases the documents might in any event be admissible at common law as public documents,[30] e.g. birth, marriage and death certificates received under section 42(3) of the Births, Marriages and Death Registration Act, 1963.[31] In other cases the general provisions of the Criminal Procedure Act, 1955, would probably cover the circumstances specially provided for under particular Acts, so that, for example, section 11(5) of the Maintenance Act, 1963,[32] adds little to the field already included under section 249 of the Criminal Procedure Act. A simple and comprehensive code regulating the whole field of Criminal

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[25] (1828) 8 B. & C. 813, 108 E.R. 1245.

[26] [1926] Ch. 284 (C.A.).

[27] *Evans* v. *Taylor* (1838) 7 Ad. & E. 617, 112 E.R. 602; *In re Stollery* [1926] Ch. 284 (C.A.) at 328; *Ioannou* v. *Demetriou* [1952] A.C. 84 (P.C.) at 95.

[28] *Richardson* v. *Mellish* (1824) 2 Bing. 229, 130 E.R. 294. Cf. *Merrick* v. *Wakley* (1838) 8 Ad. & E. 171, 112 E.R. 803; *Huntley* v. *Donovan* (1850) 15 Q.B. 96, 117 E.R. 394. In *Sturla* v. *Freccia* (1880) 5 App. Cas. 623 (H.L.) at 643, Lord Blackburn seemed to regard it as essential that the document have been made by a public officer, but as Wigmore points out (*Wigmore on Evidence*, 3rd ed. (1940), § 1633(a)), this need mean no more than that a private individual may have a specific and limited public duty to discharge although he has otherwise no official status, e.g. the duty imposed on medical practitioners to give death certificates, by secs. 24 and 34 of the Births, Marriages and Deaths Registration Act, No. 81 of 1963.

[29] *R.* v. *Halem*, 1949 (3) S.A. 274 (T). See, also, *S.* v. *Naicker*, 1966 (1) S.A. 594 (W); *S.* v. Nkalele, 1970(2)S.A. 361 (T).

[30] See above.

[31] Act No. 81 of 1963.

[32] Act No. 23 of 1963, as amended by sec. 2 of the Maintenance Amendment Act, No. 19 of 1967.

documents would bring desirable uniformity, and would obviate the necessity for frequent repetition of the statutory formula that the contents of a document may be tendered as prima facie proof.

The effect of this formula was discussed by the Appellate Division in *R.* v. *Chizah*,[33] where Steyn C.J. held, overruling *R.* v. *Gill*,[34] that the particulars stated in the document do not become valueless as soon as challenged. Rather, the *judicial officer must rely on the document unless he is convinced to the contrary*, and whether he is so convinced depends on the nature of the evidence refuting or throwing doubt on the document. Relevant factors, though not the only ones, would be whether the maker of the document had personal knowledge of the matters recorded or whether he acted on inquiry, and from whom he inquired. If the reliability of the document is left in doubt, the prima facie proof created by statute remains undisturbed. An example of a case where the court was *persuaded not to rely upon the document* is *Lengene* v. *R.*,[35] where a marriage certificate was tendered in proof of the husband's place of birth. The certificate was contradicted in this respect by the evidence of his parents, which as original evidence was obviously stronger than the double hearsay of the certificate, a mere record of the husband's having recounted to the registering officer what he himself had been told as to his place of birth.

5.1. Bankers' books

The admissibility as evidence of the matters recorded in the books of a bank, where the bank is not a party to the proceedings,[36] is provided for by section 264 of the Criminal Procedure Act. Such books need be identified only by an affidavit by an officer of the bank. Section 265(1) allows copies or extracts of the entries in the books to be received, again verified only by affidavit. Ten days' notice must be given to his opponent by the party intending to put in such copies or extracts, to enable the opponent to inspect the originals (if necessary, *obtaining* a court order compelling a reluctant bank on three days' notice to make the originals available for this purpose[37]). The court may, however, on application of a party refuse to receive the copies[38] and direct the production of the originals.[39]

The provisions, constituting an inroad upon the ordinary principles of the law of evidence, are narrowly construed. The statutory conditions of admissibility must be strictly observed. There must be evidence that the *verifying affidavit* was made by an officer of the bank,[40] who must state that he personally examined the books,[41] and that the ten days' notice required by section 265(1) was in fact given.[42] The absence of such introductory evidence not only bars the admissibility of the bank documents, but should the document have been received without it, will result in the conviction being set aside on appeal.[43]

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[33] 1960 (1) S.A. 435 (A.D.) at 442–3.
[34] 1950 (4) S.A. 199 (C) at 201–2.
[35] 1960 (2) P.H., H. 222 (T).
[36] Sec. 267 of the Criminal Procedure Act, 1955.
[37] Sec. 265(2).
[38] Sec. 265(3).
[39] Sec. 266.
[40] *Grubb* v. *Mouton N.O.*, 1958 (1) S.A. 463 (T) at 465–6; *S.* v. *Smit*, 1966 (1) S.A. 638 (O).
[41] *Van der Westhuizen N.O.* v. *Kleynhans*, 1969 (3) S.A. 174 (O).
[42] *R.* v. *Pieterse*, 1950 (4) S.A. 21 (O); *R.* v. *Bhoola*, 1960 (4) S.A. 895 (T).
[43] *Grubb* v. *Mouton N.O.*, 1958 (1) S.A. 463 (T); *R.* v. *Bhoola*, 1960 (4) S.A. 895 (T).

5.2. *Documents of companies, organizations and associations*

Various provisions of the Companies Act[44] render documents directed to be prepared by that Act prima facie evidence of their contents—the register of members,[45] the minutes of company meetings,[46] and so forth.[47] In applying these provisions it is merely a question of the wording of each whether the document is evidence against all persons or only against a limited class of persons.[48]

The strict construction which the courts have given to the bankers' books provisions of the Criminal Procedure Act has unfortunately not been equally insisted on as regards the most far-reaching of the statutory exceptions to the hearsay rule, those contained in sections 263*bis* and 263*ter* of the Criminal Procedure Act, section 12(4) of the Suppression of Communism Act,[49] and section 2(3) of the Terrorism Act.[50] The scope of all these sections is markedly similar, and, broadly, they provide that documents purporting to be made or issued by an organization or association (or copies or extracts thereof) are admissible as evidence of the truth of their contents. From an evidentiary view the provisions may be classified into three types:

(*a*) Where a basis for the reception of the document must first be laid by introductory evidence, e.g. that the document was found in certain premises or in the custody of certain persons,[51] or is certified by the Secretary for Foreign Affairs as being of foreign origin.[52] In these cases, unless the statutory preconditions are first established, the document remains mere inadmissible hearsay.[53]

(*b*) Where the document is only admissible as proof of its contents if certain types of allegation are made in the charge,[54] e.g. where the accused is charged with being an office bearer or active supporter of a particular organization. Whether such allegations are made is a question of interpretation of the indictment, but in *S. v. Naidoo*[55] Harcourt J., dealing with the meaning of the phrase 'active supporter', refused to interpret such provisions narrowly, and in manifest contrast to the cases on the bankers' books provisions, rejected the submission that being in derogation of the common law, the statute should be restrictively interpreted.[56]

(*c*) Where the document is admissible on its mere production, provided it purports to emanate from a particular organization.[57] All that is necessary here is that the document be exhibited to the court for its inspection, to determine whether or not it does, on its face, identify itself as admissible. An example is *S. v. Matsiepe*,[58] where the fact that a document was headed 'Constitution of

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[44] Act No. 46 of 1926.
[45] Sec. 11.
[46] Sec. 66(2).
[47] Further examples are secs. 97, 152 and 188.
[48] *R. v. Raisun and Pather*, 1947 (2) S.A. 881 (W).
[49] Act No. 44 of 1950.
[50] Act No. 83 of 1967.
[51] Sec. 12(4)(*a*) and (*b*) of Act No. 44 of 1950; sec. 263*bis* of the Code; sec. 2(3)(*a*) and (*b*) of Act No. 83 of 1967.
[52] Sec. 263*ter* of Act No. 56 of 1955.
[53] *Hlaluka v. S.*, 1964 (1) P.H., K. 4 (N); *S. v. Naidoo*, 1966 (4) S.A. 519 (N) at 522.
[54] Sec. 2(3) of the Terrorism Act.
[55] 1966 (4) S.A. 519 (N).
[56] The learned Judge appears, with respect, to have taken the same approach as that discussed, in a different context, in (1967) 84 *S.A.L.J.* 262.
[57] Sec. 12(4)(*c*) of Act No. 44 of 1950; sec. 263*bis*(1)(*c*) and (*d*) of the Code; sec. 2(3)(*c*) of Act No. 83 of 1967.
[58] 1962 (4) S.A. 708 (A.D.) at 712. See, also, the judgment of the lower court, reported in 1962 (1) P.H., H. 40 (T).

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[42] Act No. 46 of 1926.
[43] Sec. 66(2).
[45] Sec. 33.
[47] Further examples are secs. 97, 152 and 188.
[48] *R.* v. *Rolson and Father*, 1947 (2) S.A. 881 (W).
[49] Act No. 44 of 1950.
[50] Act No. 83 of 1967.
[51] Sec. 12(4)(*a*) and (*b*) of Act No. 44 of 1950; sec. 263*bis* of the Code; sec. 2(3)(*a*) and (*b*) of Act No. 83 of 1967.
[52] Sec. 263*ter* of Act No. 56 of 1955.
[53] *Hlaluka* v. *S.*, 1964 (1) P.H., K. 4 (N); *S.* v. *Naidoo*, 1966 (4) S.A. 519 (N) at 522.
[54] Sec. 2(3) of the Terrorism Act.
[55] 1966 (4) S.A. 519 (N).
[56] The learned Judge appears, with respect, to have taken the same approach as that discussed, in a different context, in (1967) 84 *S.A.L.J.* 262.
[57] Sec. 12(4)(*c*) of Act No. 44 of 1950; sec. 263*bis*(1)(*c*) and (*d*) of the Code; sec. 2(3)(*c*) of Act No. 83 of 1967.
[58] 1962 (4) S.A. 708 (*A.D.*) at 712. See, also, the judgment of the lower court, reported in 1962 (1) P.H., H. 40 (T).

the A.N.C.' was held by the Appellate Division to be proof without more of the aims of the organization concerned.

Some of the provisions here discussed make a document evidence against the accused where it bears a name 'corresponding' to that of the accused.[66] These provisions should, it is submitted, be regarded as an example of category (*a*) above, where a condition precedent for admissibility must be satisfied, but to date the courts have inexplicably regarded them as falling into the third category so that *the document is admissible on its mere production*. A '*corresponding*' name has been held not to require identity but mere similarity, though 'corresponding' does not seem to suggest a loose approximation and in the Afrikaans version 'ooreenstem' is even less equivocal. Nevertheless, in *S.* v. *Sethlodi*,[69] 'Sehlodi' was held to correspond to the accused's name, and in *S.* v. *Mothopeng*,[70] 'Mothoping'.

It should be noted that documents admitted under these sections may not be used in proof of anything more than the purpose authorized. For example, under section 263*bis*(1)(*c*) of the Code, where a document appears to reflect the proceedings of a meeting, it may be used to prove *the holding of and the proceedings* at the alleged meeting, but not that the events reported to that meeting took place.[71]

Evidence in Prior Proceedings

The record of evidence given at earlier proceedings may be used, like any other previous statement proved to have been made by a witness, for the purposes of examining him to credibility.[72] Moreover, that record cannot as a general rule be tendered to prove the facts then deposed to, and it is hearsay evidence if tendered for this purpose. This applies even if the earlier statement was on oath, and irrespective of the nature of the prior proceedings—trials before domestic[74] or foreign[75] courts, inquests,[76] preparatory examinations,[77] insolvency inquiries[78] or meetings of creditors.[79] Accordingly, unless the record of evidence falls within one of the exceptions to the hearsay rule, it is inadmissible, and neither the reading out of the record[70] nor the consent of the defence[71] cures the defect.

If the person who was a witness at the former proceedings is a party to the present proceedings, his previous testimony is admissible against him as an

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[66] Sec. 263*bis*(*a*) and (*b*) of the Code; sec. 2(3)(*c*) of Act No. 83 of 1967.
[69] 1962 (1) P.H., H. 35 (T). [71] 1965 (4) S.A. 484 (T).
[70] *S.* v. *Alexander* (2), 1965 (2) S.A. 818 (C) at 823.
[71] See above, pp. ~~000 and 000~~. 50 and 69.
[74] e.g. *Gus* v. *Willcock*, 1916 E.D.L. 371. But see below.
[75] *Rhodesian Corporation, Ltd.* v. *Globe and Phoenix Gold Mining Co., Ltd.*, 1934 A.D. 293.
[76] *African Guarantee & Indemnity Co., Ltd.* v. *Moni*, 1916 A.D. 524; *R.* v. *Sego'*, 1949 (3) S.A. 61 (C). See, too, *In re S.S. Winton*, 1938 C.P.D. 247.
[77] *R.* v. *Bamberger* (1871) 1 Rose. 8, 1 S.C. 153; *S.* v. *Nzuza*, 1963 (3) S.A. 631 (A.D.). It was held in *S.* v. *Serabe*, 1968 (4) S.A. 420 (A.D.) at 426, that if the evidence given at the preparatory examination is to be the subject of a formal admission, it is the facts themselves and not the record embodying the evidence of those facts which should be admitted. This decision has now been overruled by sec. 6(*a*) of the General Law Amendment Act, No. 101 of 1969. If the accused pleads guilty the preparatory examination record can be referred to for the purposes of sentence, on its mere production (*S.* v. *Jabavu*, 1969 (2) S.A. 466 (A.D.)).
[78] *Yorkshire Insurance Co., Ltd.* v. *Standard Bank of South Africa, Ltd.*, 1928 W.L.D. 223.
[79] *R.* v. *De Klerk*, 1915 E.D.L. 42; *R.* v. *Mia*, 1933 T.P.D. 24.
[70] *R.* v. *Kwenja*, 1942 O.P.D. 273.
[71] *R.* v. *Steenkamp* (1881) 1 E.D.C. 266; *R.* v. *Xoki* (1891) 12 N.L.R. 348; *R.* v. *Kwenja*, 1942 O.P.D. 273. Cf. *R.* v. *Mothibi*, 1960 (2) P.H., H. 350 (O).

admission, as an exception to the hearsay rule.[72] The evidence of other witnesses at that proceeding must, to be admissible, be shown to fall into the category of vicarious admissions.[73]

Where the previous evidence was given at an inquiry under the Insolvency Act, 1936,[74] or the Companies Act, 1926,[75] it is expressly provided in these statutes that the evidence so given will be admissible against the witness who gave it.[76] He need not be given notice that it is to be so used.[77] It was necessary to legislate particularly for these cases, since at common law to be used as an admission the statement would have to be shown to have been freely and voluntarily made, which might not have been satisfied where it was made under statutory compulsion and with no right to claim the privilege against self-incrimination.[78] For this reason the inquiry provisions are strictly construed, and any irregularity in the conduct of the meeting will vitiate the admissibility of the evidence taken.[79] It should be noted that although the voluntariness aspect of the depositions is provided for, the depositions are in all other respects subject to the ordinary rules of evidence such as the principle of relevance,[80] opinion evidence,[81] and of vicarious admissions. The evidence given by the insolvent would therefore be admissible not only against him but also against those in privity with him who are bound by his acts, such as a creditor who is alleged to have received an undue preference from the insolvent.[82] Where the evidence at the inquiry was given by officers of a company, since it has been held that they do not in so doing make admissions binding on the company, their evidence cannot be received in an action against the company.[83]

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[72] *R.* v. *Carson*, 1926 A.D. 419.

[73] *Naik* v. *Pillay's Trustee*, 1923 A.D. 471 at 476; *Marais's Estate* v. *Vermooten*, 1922 E.D.L. 266; *R.* v. *Raisun and Father*, 1947 (2) S.A. 881 (W) at 884–5; *R.* v. *Diakanu*, 1948 (3) S.A. 1202 (E). On vicarious admissions, see below, p. 000. [illegible]

[74] Act No. 24 of 1936, sec. 65.

[75] Act No. 46 of 1926, secs. 155(3), 156(6), 180*ter*(4).

[76] See, generally, on these provisions, *R.* v. *Jaspan*, 1940 A.D. 9; *Yorkshire Insurance Co., Ltd.* v. *Standard Bank of South Africa, Ltd.*, 1928 W.L.D. 223; *R.* v. *Raisun and Father*, 1947 (2) S.A. 881 (W); *R.* v. *Klisser and Rosenberg*, 1949 (3) S.A. 807 (W); *R.* v. *Mell*, 1960 (2) S.A. 458 (N); *Simmons N.O.* v. *Gilbert Hamer & Co., Ltd.*, 1962 (2) S.A. 487 (D). The evidence is admissible even if the deponent was not asked the statutory question whether he has made full disclosure: *R.* v. *Fetselson*, 1928 T.P.D. 240.

[77] *R.* v. *Jaspan*, 1940 A.D. 9 at 17. See now, however, *R.* v. *Motloa*, 1956 (4) S.A. 824 (A.D.) at 833–4; *Liquidators Platini Café (Pty.) Ltd.* v. *Versomapoulos*, 1942 W.L.D. 169.

[78] *R.* v. *Carson*, 1926 A.D. 419; *Sulenan* v. *R.* (1923) 44 N.L.R. 223; *Langham N.O.* v. *Milne*, 1961 (1) S.A. 811 (N). It has since been settled that statutory compulsion would not prevent an admission being voluntary; *R.* v. *Motloa*, 1956 (4) S.A. 824 (A.D.); the position regarding confessions is still unclear. See below, p. 000. [illegible]

[79] *R.* v. *Herholdt*, 1957 (3) S.A. 236 (A.D.) at 251. See, e.g., *R.* v. *Palken*, 1933 T.P.D. 1; *R.* v. *Mia*, 1933 T.P.D. 24. Cf. *R.* v. *Mahluli*, 1922 A.D. 472.

[80] *R.* v. *Klisser and Rosenberg*, 1949 (3) S.A. 807 (W).

[81] *R.* v. *Mackenzie* (1927) 48 N.L.R. 382; *R.* v. *Mia*, 1933 T.P.D. 24 at 32.

[82] *Naik* v. *Pillay's Trustee*, 1923 A.D. 471; *Estate Van der Merwe* v. *Hoffman*, 1925 C.P.D. 295; *Wakeford* v. *Wakeford's Estate*, 1932 E.D.L. 246. The attempts in *Estate Becker* v. *Eaton Robins, Ltd.*, 1924 C.P.D. 42, and *Estate De Wet* v. *De Wet*, 1924 C.P.D. 341, to restrict the scope of the decision in *Naik* v. *Pillay's Trustee* to contemporaneous statements of the insolvent and exclude subsequent ones seem unjustified. The possibility of a motive to misrepresent at the time of the subsequent statement should affect the weight but not the admissibility of the statement. See, *contra*, however, *Langham N.O.* v. *Milne N.O.*, 1961 (1) S.A. 811 (N) at 815. The question was left open by Centlivres C.J. in *Estate Lala* v. *Mahomed*, 1944 A.D. 324 at 330.

[83] *Rhodesian Corporation, Ltd.* v. *Globe & Phoenix Gold Mining Co., Ltd.*, 1934 A.D. 293; *Yorkshire Insurance Co., Ltd.* v. *Standard Bank of South Africa, Ltd.*, 1928 W.L.D. 223; *In re S.S. Winton*, 1938 C.P.D. 247; *Simmons N.O.* v. *Gilbert Hamer & Co., Ltd.*, 1962 (2) S.A. 487 (D) at 494.

To the aforegoing principles there are several exceptions. The remittal of a case to the same magistrate, who presided at a preparatory examination, is one situation where the record at the preparatory examination may constitute evidence at the trial.[84] There is a common-law exception which allows the evidence given at previous proceedings to be received provided it is established, in the formulation given in *Lensvelt and Co., Ltd. v. John Swift, Ltd.*,[85] (*a*) the proceedings are between the same parties or their privies, (*b*) the issues involved are the same or substantially the same in both proceedings, (c) the party against whom the depositions are tendered had a full opportunity of cross-examining the deponent while the deposition was being taken, and (*d*) the deponent is dead, insane, kept out of the way by the opposite party, or too ill to travel. An accomplice of the accused can apparently not be regarded as being in privity with him,[86] but in any event the evidence at the accomplice's trial would not normally have been subject to cross-examination by the criminal unless he was a co-accused at that trial.

These four common-law requirements are restated in section 243(2) of the Criminal Procedure Act, whereunder, on corresponding conditions, the evidence given at a former criminal trial is admissible at a later trial against the same accused on the same charge.[87]

The admissibility of depositions taken at the preparatory examination is provided for by section 243(1) and (3). Both subsections require sworn evidence that the deposition tendered is an accurate transcript of the evidence,[88] and that the accused personally or through his representative had a full opportunity of cross-examining the witness.[89] In addition, of course, the deposition must satisfy the ordinary rules of evidence as to relevancy, opinion evidence, and so forth.[90] Where these conditions are satisfied, and the deponent is proved to be

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[84] *Sec. 189 of the* Criminal Procedure Act. ~~See supra: Procedure, above, p. 000.~~

[85] 1920 W.L.D. 112 at 113.

[86] *R.* v. *Sondhloon* (1884) 4 E.D.C. 270; *Van Wyhe* v. *R.* (1925) 46 N.L.R. 273; *R.* v. *Fortune*, 1941 C.P.D. 287; *R.* v. *Kwenja*, 1942 O.P.D. 273; *R.* v. *Benade*, 1946 G.W.L. 9; *R.* v. *Ntuli*, 1957 (4) S.A. 42 (N).

[87] For the common-law position, see *R.* v. *Odendall* (1875) 5 Buch. 172.

[88] *R.* v. *Phillipps* (1881) 1 Buch. App. Cas. 28; *R.* v. *Morgendal*, 1939 C.P.D. 453. Cf. *R.* v. *Mall*, 1960 (2) S.A. 458 (N).

[89] *In Lensvelt & Co., Ltd. v. John Swift, Ltd.*, 1920 W.L.D. 112, the opposite party was held to have had such an opportunity where he could have made a special application to do so though this would admittedly have been unusual. It is arguable that a stricter test should be applied in criminal cases, but the courts have so far shown no inclination to do so. In *R.* v. *McDonald*, 1927 A.D. 110, Jones C.J. held that although the accused had been unsuccessful, because of short notice of the preparatory examination, in obtaining a representative, he had still had sufficient opportunity to cross-examine. Where the accused's failure to cross-examine was due to the fact that his representative did not appear at the preparatory examination after informing the presiding magistrate that he reserved his cross-examination, the representative's knowledge that he could have appeared and cross-examined was held to be sufficient opportunity, in *R.* v. *Matyeni*, 1958 (2) S.A. 573 (E). See, too, *R.* v. *Taljaard*, 1930 W.L.D. 194.
It is possible that decisions such as *McDonald* and *Matyeni* can no longer be followed at their face value, in view of more recent judgments concerned with the right to counsel. See, e.g., *S.* v. *Heyman*, 1966 (4) S.A. 598 (A.D.), and *S.* v. *Wessels*, 1966 (4) S.A. 89 (C), discussed by D. J. R. Dugard in (1967) 84 *S.A.L.J.* 1. In the view of Charles T. McCormick, *Handbook of the Law of Evidence* (1954), pp. 482–3, '[i]t hardly seems practicable to apply the same rigorous standard to this collateral question of admissibility, as would be applied in determining whether the original trial without counsel was a denial of due process'. McCormick would, however, insist that the accused have been afforded adequate opportunity to secure counsel.

[90] *R.* v. *Mackenzie* (1927) 48 N.L.R. 382; *R.* v. *Wald*, 1932 C.P.D. 14; *R.* v. *Klisser and Rosenberg*, 1949 (3) S.A. 807 (W).

dead,[91] incapable of testifying,[92] too ill to attend[93] or kept away from the trial by the accused, under subsection (1) the court has no discretion in regard to the admissibility of the deposition, which must be received. If the witness cannot be found after diligent search or cannot be compelled to attend the trial[94] subsection (3) gives the court a discretion, even though the conditions mentioned are fulfilled, to reject or accept the deposition. Apart from the pre-conditions, there is no overlap between subsection (1) and subsection (3).[95]

Under subsection (1) of section 243, as the Appellate Division has warned,[96] the admission of depositions even of vital witnesses may prejudice the accused and the court has no discretion to prevent this. It has, therefore, a duty to mitigate the possibility of prejudice by warning the triers of fact as to the weight of the deposition of the absent witness, and they should be helped to realize the danger of convicting merely on the record. The danger increases in direct proportion to the significance in the case of the witness's evidence and its credibility, and the warning should be particularly stressed in those situations, such as those involving the evidence of accomplices or of the complainant in a sexual charge, where a cautionary rule of corroboration applies.[97]

Where the court is given a discretion under section 243(3), in respect of the reception of the deposition, an appeal court cannot interfere with its exercise.[98] The factors which should influence the judicial exercise of that discretion were summarized by De Waal J. in *R.* v. *Stoltz*[99] in a passage frequently approved in subsequent judgments:[1]

> 'This discretion I know should be exercised guardedly. The court should look at the nature of the evidence sought to be put in. If, for instance, it conflicts with other evidence in the case, if from cross-examination the evidence as recorded would seem to leave a doubt, and generally where from the nature of the evidence much would depend on the credibility of the witness, so that a jury should have an opportunity of judging for themselves thereon from the appearance and demeanour of a witness, the court should be very slow in admitting the evidence under the section.'

A further factor which weighed with the Court in *Stoltz's* case (which was a charge of theft) in admitting the deposition was the fact that its contents—to the effect that the complainant's shop had been broken into and robbed—could hardly be denied and at the same time did not in itself implicate the accused.

The fact that without the deposition the State case must fail is not a relevant factor in the exercise of the court's discretion.[2] It seems that if the deponent was in fact cross-examined at the preparatory examination this may be taken into

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[91] *Matanda* v. *R.*, 1923 A.D. 435.
[92] *R.* v. *McDonald*, 1927 A.D. 110 at 117; *R.* v. *Goliath*, 1946 E.D.L. 310.
[93] *R.* v. *Mkwanazi*, 1935 T.P.D. 129; *R.* v. *Stoffels*, 1948 (2) S.A. 809 (C).
[94] *R.* v. *Andrews*, 1920 A.D. 290; *R.* v. *Stoltz*, 1925 W.L.D. 38.
[95] *S.* v. *Ngubane*, 1961 (4) S.A. 377 (N).
[96] *R.* v. *Rautenbach*, 1949 (1) S.A. 135 (A.D.) at 142.
[97] *R.* v. *Rautenbach*, 1949 (1) S.A. 135 (A.D.) at 144. See, also, *S.* v. *Jabavu*, 1969 (2) S.A. 466 (A.D.).
[98] *R.* v. *Andrews*, 1920 A.D. 290 at 293. It is submitted that the view expressed by Fischer J. in *R.* v. *Konza*, 1934 O.P.D. 16, that it is also in the entire discretion of the presiding officer as to whether or not it has been sufficiently shown that the deponent cannot be found, cannot be supported on the wording of the section.
[99] 1925 W.L.D. 38.
[1] e.g. *R.* v. *Rasool*, 1927 T.P.D. 73; *R.* v. *Malan*, 1948 (2) S.A. 327 (T); *R.* v. *Stoffels*, 1948 (2) S.A. 809 (C); *R.* v. *Diadla* (1), 1961 (3) S.A. 919 (D).
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account,[3] as may the extent to which inadmissible matter is contained in the deposition.[4]

Section 243 is clearly conceived in the interests of the prosecution, to permit it to put in at that trial the deposition of a State witness at the preparatory examination. Whether the wording would permit the prosecution to put in the deposition of a defence witness has been doubted,[5] unless of course it is the deposition of the accused which is received as an admission.[6] In *S.* v. *Andrews*,[7] the defence was permitted at the trial to put in a deposition from a State witness, a course apparently already permitted, though the report is unclear on the point, by the Appellate Division in *Masia* v. *S.*[8] The defence was held entitled to invoke the section to put in the deposition of a defence witness in *R.* v. *Mazibuko*.[9] The desirability of giving the defence the same facilities as the prosecution is clear from the point of view of policy,[10] but whether the strict wording of the section is susceptible of such an application seems doubtful, and the possibility of this being permitted under the common-law exception as set out in *Lensvelt's* case above is a likelier one.[11]

7. *Admissions*

Unlike formal admissions made at the trial, which constitute, where competent, a waiver of proof by one or other party,[12] informal admissions made out of court, which cover statements and conduct by a party inconsistent with his allegations, are tendered by the opponent[13] as evidence against that party. Like other such evidence an admission is not conclusive proof; it does not shift the legal burden of proof to the party against whom it is tendered,[14] and in itself may not be believed by the court.[15]

Statements by a party which are admissions are received as an exception to the hearsay rule, the rationale being that no one would be likely to speak against himself unless the statement was true (a formulation apparently influenced by the declarations against interest exception to the rule against hearsay). Certainly he cannot object to evidence of his own statements on the ground of unreliability as not having been made on oath or subject to cross-examination. The guarantee of reliability is not present where the statements are self-serving, and the accused cannot therefore lead evidence of his previous statements which are favourable

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[3] In *R.* v. *Zafirion*, 1943 N.P.D. 135 at 137.
[4] *R.* v. *Erasmus*, 1918 C.P.D. 257; *R.* v. *Taljaard*, 1930 W.L.D. 194.
[5] *R* v. *Wald*, 1932 C.P.D. 14.
[6] *R.* v. *Ngutshane*, 1952 (4) S.A. 608 (N). Cf. *Limbada* v. *R.*, 1958 (1) P.H., H. 156 (A.D.); *S.* v. *Nzuza*, 1963 (3) S.A. 631 (A.D.); and *S.* v. *Kuwayo*, 1964 (3) S.A. 55 (N).
[7] 1964 (4) S.A. 805 (C). This was not permitted, however, in *R.* v. *Cele*, 1960 (1) S.A. 292 (C).
[8] 1962 (1) P.H., H. 95 (A.D.). *Andrews* was followed in preference to *Cele* in *R.* v. *Lahson*, *1968 (4) S.A. 108 (R).*
[9] 1961 (3) S.A. 113 (N). See, *contra*, the erratic judgment in *S.* v. *Kali*, *1964 (1) S.A. 237 (O).* *Mazibuko's* case accords with the interpretation given to similar statutes in American courts. See Charles T. McCormick, *Handbook of the Law of Evidence* (1954), p. 483.
[10] See (1960) 77 *S.A.L.J.* 293; V. G. Hiemstra, *Suid-Afrikaanse Strafproses* (1967), pp. 303–4.
[11] The problem is discussed in more detail in (1965) 82 *S.A.L.J.* 137, and by Hiemstra, above, pp. 303–4.
[12] See *R.* v. *Fouche*, 1958 (3) S.A. 767 (T) at 776, and above, chap. 17.
[13] Of course a party may *himself prove* his own admission, as, e.g., in *R.* v. *Persotam*, 1937 A.D. 53.
[14] *R.* v. *Van Rooyen*, 1953 (3) S.A. 293 (A.D.).
[15] *R.* v. *Higgins* (1829) 3 Car. & P. 603, 172 E.R. 565; *Monkoe* v. *S.*, 1966 (1) P.H., H. 15 (T).

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[9] 1961 (3) S.A. 113 (N). See, *contra*, the erratic judgment in *S.* v. *Kali, 1964 (1)* S.A. 237 (O). *Mazibuko's* case accords with the interpretation given to similar statutes in American courts. See Charles T. McCormick, *Handbook of the Law of Evidence* (1954), p. 483.
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[15] *R.* v. *Higgins* (1829) 3 Car. & P. 603, 172 E.R. 565; *Moukoe* v. *S.*, 1966 (1) P.H., H. 15 (T).

to his cause.[16] If, however, the statement contains both self-serving and adverse matter, the prosecution may not extract and prove only the latter. The accused is entitled to insist that the whole statement be proved, and the trier of fact must take into consideration both the incriminatory and the exculpatory portions. The statement need not in consequence necessarily be accepted or rejected as a whole, for it is competent to find the incriminatory portions more convincing.[17]

Again because there must be the guarantee of trustworthiness, an equivocal statement or one which is not unambiguously unfavourable is not admissible as an admission, though this does not mean that a statement intended as exculpatory cannot rank as unfavourable if the context so characterizes it.[18] What is required is that it be an unequivocal acknowledgment of a guilty fact.[19] For the same reasons of trustworthiness an admission must be narrowly construed.[20]

It is not necessary that the accused have intended to communicate his adverse statement to anyone else. What he is overheard saying to himself,[21] or his entries in his private diary,[22] are no less admissions.

A further result of the party's being disabled from objecting to the unreliability of his own admissions as proof of the facts it asserts, is that many of the exclusionary rules which might otherwise apply are overridden where an admission is tendered. Thus an admission is not excluded because it is obviously based on hearsay, so that a man may be taken to have admitted his own age[23] or that of others.[24] The rule against evidence of the accused's bad character or previous convictions would not exclude proof of his admission of such facts;[25] and an admission of the accuracy of a copy would avoid the rule requiring primary proof of documents.[26] Where the accused has no means of knowledge of the facts his admission is still received, though it is of very little weight.[27] But the accused's admissions on a charge of bigamy, as to the validity of a marriage contracted under foreign law, have on occasion been rejected,[28] as only an expert could form an opinion, and in *Van Lutteveld* v. *Engels*[29] an admission of

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[16] *R.* v. *Sedi*, 1950 (3) S.A. 693 (O); *Narotam* v. *Medhav*, 1965 (4) S.A. 85 (W). An exception to the rule is dealt with under Previous Consistent Statements, above, p. 000. Ed.

[17] *R.* v. *Higgins* (1829) 3 Car. & P. 603, 172 E.R. 565; *R.* v. *Valachia*, 1945 A.D. 826; *R.* v. *Klisser and Rosenberg*, 1949 (3) S.A. 807 (W); *R.* v. *Vather*, 1961 (1) P.H., H. 1 (A.D.).

[18] *R.* v. *Burton*, 1946 A.D. 773 at 779; *R.* v. *Van Rensburg*, 1948 (2) S.A. 276 (E); *S.* v. *Mtembo*, 1962 (1) P.H., H. 108 (N).

[19] *R.* v. *Perloff*, 1941 G.W.L. 39. A striking example is *R.* v. *Bene* (1), 1961 (2) P.H., H. 252 (S.R.), where in answer to a police inquiry as to whether one M was implicated in the crime, the accused immediately replied, 'No, he was not there'—a damning admission of his own presence and knowledge.

[20] *R.* v. *Rose*, 1917 T.P.D. 617; *Engel* v. *Race Classification Appeal Board*, 1967 (2) S.A. 298 (C).

[21] *R.* v. *Simons* (1834) 6 Car. & P. 540, 172 E.R. 1355; *Isaacs* v. *S.*, 1969 (1) P.H., H. 93 (A.D.).

[22] *Towert* v. *Towert*, 1956 (1) S.A. 429 (W).

[23] *R.* v. *Turner* [1910] 1 K.B. 346 (C.A.). [24] *R.* v. *Francis et Cie*, 1933 T.P.D. 233.

[25] *Legge* v. *R.*, 1910 T.P.D. 450; *Turner* v. *Underwood* [1948] 2 K.B. 284.

[26] *Slatterie* v. *Pooley* (1840) 6 M. & W. 665, 151 E.R. 579; *S.* v. *Shepard*, 1966 (4) S.A. 530 (W).

[27] *Comptroller of Customs* v. *Western Electric Co., Ltd.* [1966] A.C. 367 (P.C.) at 371.

[28] *R.* v. *Naguth* [1917] 1 K.B. 359 (C.A.). Such admissions were received without question in *McIntyre* v. *R.*, 1904 T.S. 804; *McNeil* v. *McNeil*, 1945 N.P.D. 287. See, also, *S.* v. *Meola*, 1969 (3) S.A. 745 (N) at 748.

[29] 1959 (2) S.A. 699 (A.D.). But *contra*, *Gin* v. *S.*, 1967 (1) P.H., H. 135 (A.D.). As to admissions overriding the rule against opinion evidence, Edmund M. Morgan in (1946) 59 *Harvard L.R.* 556 points out that to reject these is inconsistent with the long line of undisputed authorities admitting evidence of a party's conduct tending to show that he has no confidence in the strength of his case.

paternity was rejected as it was not a matter on which the man could have had any personal certainty.

7.1. Proving the admissibility of an admission

Admissions made by the accused are only admissible in a criminal trial if shown to have been voluntarily made, and not induced by the prospect of advantage or disadvantage held out by a person in authority.

The onus of proving that these conditions were satisfied rests upon the prosecution,[30] which must discharge the onus by proof beyond a reasonable doubt. The circumstances are to be adjudicated upon at a 'trial within a trial' before the judge sitting alone, in the absence of the assessors.[31] The defence is entitled to lead evidence in rebuttal on this issue.[32] The amount of evidence necessary for the State to discharge its burden of proof varies with the circumstances of each case. The voluntariness of a statement intended by the accused to be exculpatory may be taken to have been proved where it is not challenged by the defence and the circumstances of its making in themselves suggest no other inference,[33] but where the statement is prima facie incriminatory direct proof positive that it was voluntary and uninduced may be necessary.[34] Should the statement be admitted initially the judge retains his discretion to exclude it subsequently if circumstances later emerging cast doubt on its admissibility.[35]

The issue of whether or not the admission was made at all, is, like that of its truth, one for the full court as trier of fact.[36] The truth or falsity of the admission is therefore not normally a relevant inquiry at the trial within the trial, unless it is inextricably linked with the issue of voluntariness, e.g. because the accused alleges that not he but his interrogators were the source of the statement.[37]

The fact that the accused is not believed in his denial of having made the statement at all does not of course relieve the State of its burden of proving that the admission was free and voluntary,[38] though a false denial is a dangerous argument for the accused as it may tell heavily against his credibility. Where, however, the accused alleges he was induced to make the admission, the rejection of his version would not normally oblige the court to speculate as to the possible existence of other inducements not raised by him.[39]

The making of the admissions in the terms or to the effect alleged by the prosecution must be established by the prosecution just as with any other evidence tendered by it. It is of far more weight if the *ipsissima verba* of the accused can be proved, but even admissions obtained in question-and-answer form are admissible.[40]

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[30] *R.* v. *Barlin*, 1926 A.D. 459.

[31] *R.* v *Dunga*, 1934 A.D. 223. The judge may not admit the evidence provisionally subject to first hearing all the other evidence in the case on the main issue, nor may he leave the question of its admissibility, if the State prima facie satisfies him, to the final determination of the full court.

[32] *R.* v. *Lewis*, 1944 C.P.D. 298.

[33] *R.* v. *Burton*, 1946 A.D. 773; *R.* v. *Dhlamini*, 1949 (3) S.A. 976 (N).

[34] *R.* v. *Melozani*, 1952 (3) S.A. 639 (A.D.) at 643–4.

[35] *R.* v. *Melozani*, 1952 (3) S.A. 639 (A.D.); *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.).

[36] *S.* v. *Mkwanazi* 1966 (1) S.A. 736 (A.D.)

[37] *S.* v. *Lebone*, 1965 (2) S.A. 837 (A.D.). [38] *Moloki* v. *R.*, 1957 (2) P.H., H. 203 (T).

[39] *R.* v. *Sambo*, 1965 (1) S.A. 640 (S.R., A.D.); *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.) at 746.

[40] *R.* v. *Kleinbooi*, 1917 T.P.D. 86; *S.* v. *Cele*, 1965 (1) S.A. 82 (A.D.) at 97; *R.* v. *Jairos*, 1966 (2) S.A. 350 (R.A.D.); *Attorney-General* v. *Schaube-Kuffner*, 1969 (1) P.H., H. 54 (R.A.D.).

7.2. *Freely and voluntarily made wi*

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[41] Authorities are collected in (1968)
[42] *R.* v. *Warwickshall* (1783) 1 Leach see *R.* v. *Leimer*, 1958 (2) S.A. 582 (S.
[43] *R.* v. *Magoetle*, 1959 (2) S.A. 322
[44] *S.* v. *Radebe*, 1968 (4) S.A. 410 (A
[45] *Deokinan* v. *R.* [1968] 2 All E.R.
[46] *R.* v. *Barlin*, 1926 A.D. esp. at 4
169 E.R. 608; *R.* v. *Dhlamini*, 1949 (3)
S. v. *Mtemba*, 1962 (1) P.H., H. 108
[47] *R.* v. *Thompson* [1893] 2 Q.B. 12
[48] *R.* v. *Kleinbooy* (1886) 5 E.D.C.
E.D.L. 6; *R.* v. *Mhopeleghe*, 1960 (4)
[49] *R.* v. *Smith* [1959] 2 All E.R. 193,
[50] *Commissioners of Customs and*
84 *S.A.L.J.* 212.
[51] *R.* v. *Blaauw*, 1917 C.P.D. 391;
[52] *Mawana* v. *R.*, 1909 E.D.C. 325
1961 (2) P.H., H. 252 (S.R.); *R.* v.
1964 (2) S.A. 495 (A.D.) (promise of

Ad n. 47 : The inducement may emanate from a person in authority even though it is the accused who first mentions it and the person in authority only acquiesces in it (R. v. Zaveckas [1970] 1 All E.R. 413 (C.A.)).

7.2. Freely and voluntarily made without undue influence

There is no agreement among the authorities as to whether the conditions of admissibility for admissions are dictated by the danger of false confessions being procured or by the need to remove any possible inducements for police misconduct in relation to the investigation of crime;[41] but the common law has been clear from early on that an admission 'forced from the mind by the flattery of hope or by the torture of fear comes in so questionable shape'[42] that it should not be admitted in evidence.

Whether the admission was freely and voluntarily made is a question of fact to be answered subjectively from the point of view of the accused in each case.[43] The fact that an improper inducement was offered which objectively might have induced the accused to state what was not true is a relevant but not conclusive indication of its subjective result upon his freedom of volition.[44]

An inducement to make an admission is improper if it emanated from a person in authority who held out some advantage or disadvantage which would result if an admission was forthcoming.[45] Who is a person in authority for this purpose is likewise tested subjectively: it must be someone whom the accused believed, rightly or wrongly, able to bring about or influence the threatened disadvantage or promised advantage. Such could be a police officer, a headman, the accused's employer, and so forth, and the extent to which, if at all, they are involved in the offence, e.g. as complainant or as investigating officer, is again relevant only to the extent to which the accused might be expected to have regarded them as persons in authority.[46] An inducement may be held to have emanated from a person in authority even if it was not communicated to the accused directly by such person, but through an intermediary.[47]

An admission elicited by violence or ill treatment of the accused is *a priori* inadmissible.[48] Threats of some disadvantage which will accrue to the accused if he remains silent,[49] whether or not the disadvantage relates to the course of the proceedings against him,[50] are obviously improper, and a mere invitation to speak or an exhortation to tell the truth may also in the circumstances carry the implication of a threat or promise of benefit.[51] An admission obtained by trickery is not apparently inadmissible.[52] Examples of improper promises of benefits, which have led to the exclusion of a consequent admission, are a promise by the police that they would take the accused to his wife to break the

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[41] Authorities are collected in (1968) 85 *S.A.L.J.* 246 at 252.

[42] *R.* v. *Warwickshall* (1783) 1 Leach 263. The Roman-Dutch law was to the same effect—see *R.* v. *Leuner*, 1958 (2) S.A. 582 (S.W.A.).

[43] *R.* v. *Magoetle*, 1959 (2) S.A. 322 (A.D.).

[44] *S.* v. *Radebe*, 1968 (4) S.A. 410 (A.D.). See, also, *R.* v. *Van Blerck*, 1919 C.P.D. 68.

[45] *Deokinan* v. *R.* [1968] 2 All E.R. 346 (P.C.).

[46] *R.* v. *Barlin*, 1926 A.D. esp. at 465. Other examples are *R.* v. *Moore* (1852) 2 Den. 522, 169 E.R. 608; *R.* v. *Dhlamini*, 1949 (3) S.A. 976 (N); *R.* v. *Mbaleghe*, 1960 (4) S.A. 55 (F.C.); *S.* v. *Mtemba*, 1962 (1) P.H., H. 108 (N).

[47] *R.* v. *Thompson* [1893] 2 Q.B. 12. See opposite.

[48] *R.* v. *Kleinbooy* (1886) 5 E.D.C. 328; *R.* v. *Kaiola*, 1909 T.S. 1019 ... *Jumel*, 1915 E.D.L. 6; *R.* v. *Mbopeleghe*, 1960 (4) S.A. 55 (C).

[49] *R.* v. *Smith* [1959] 2 All E.R. 193, [1959] 2 Q.B. 35; *R.* v. *Nhleko*, 1960 (4) S.A. 712 (A.D.).

[50] *Commissioners of Customs and Excise* v. *Harz* [1967] 1 All E.R. 177 (H.L.), (1967) 84 *S.A.L.J.* 212.

[51] *R.* v. *Blaauw*, 1917 C.P.D. 391; *R.* v. *Magoetle*, 1959 (2) S.A. 322 (A.D.).

[52] *Maswana* v. *R.*, 1909 E.D.C. 325 (promise to use accused as State witness); *R.* v. *Bene* (1), 1961 (2) P.H., H. 252 (S.R.); *R.* v. *Ananias*, 1963 (3) S.A. 486 (S.R.) at 489; *S.* v. *Kearney*, 1964 (2) S.A. 495 (A.D.) (promise of secrecy).

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news of his arrest to her personally,[53] a promise of a reward for returning the stolen property,[54] or an undertaking by the accused's employer to keep his job open for him.[55] The fact that the admission was made under a statutory compulsion to speak is not construed as preventing it from having been freely and voluntarily made.[56] In several early cases it was held that it was not voluntary if made on oath,[57] unless, apparently, if the oath was sworn voluntarily.[58]

The accused's intoxication at the time of the admission does not in itself prevent him from acting freely and voluntarily as long as he was not too drunk to know and appreciate what he was saying.[59] The degree of intoxication will also affect the weight to be given to the admission.[60]

The effect of police questioning or interrogation of the accused has frequently been discussed by the courts. The mere fact that an admission was elicited by questioning, subtle or otherwise, does not in itself mean it was improperly induced.[61] Indeed, questions can hardly be avoided by policemen investigating a crime, and it is very often to the advantage of a suspect that he be given the opportunity to clear away if he can the suspicion of his guilty implication.[62] But the admission will be rejected where the effect of the questioning was to trick or bully the accused into making admissions whether by the use of questions designed to put words into his mouth, or by bringing pressure to bear which corrodes his free volition, even if this falls short of 'third-degree' methods.[63] The effect of the interrogation remains, of course, a question of fact, but proof of a prolonged interrogation may make it harder for the prosecution to prove beyond doubt that the admission was free and voluntary.

Proof that the police behaviour fell within the defined limits of propriety is not conclusive as to the admissibility of an admission so elicited. As Innes C.J. said in *R.* v. *Barlin*,[64] legal principle is not sacrificed to administrative reform, and the rejection of improperly obtained evidence is not one of the methods used to discourage misconduct.[65] However, in 1931, at the request of the Minister of Justice, a conference of judges drew up the Judges' Rules as a code of conduct to guide the police in their dealings with suspects and accused persons. These rules, which have been officially issued as administrative directions to the police, are not designed to restrain the police from investigating the commission of offences or from narrowing down their investigations to one or other suspect; but they stress that the police duties do not include the function of eliciting evidence from a suspect which may then be used against him, by conducting an informal trial whereat the accused's guilt can be established without the safe-

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[53] *S.* v. *W.* 1963 (3) S.A. 516 (A.D.).
[54] *R.* v. *Wilson* [1967] 2 Q.B. 406 (C.A.), [1967] 1 All E.R. 797.
[55] *R.* v. *Michael*, 1962 (3) S.A. 355 (S.R.).
[56] *R.* v. *Molloa*, 1956 (4) S.A. 524 (A.D.); *R.* v. *Herholdt*, 1957 (3) S.A. 236 (A.D.).
[57] *R.* v. *Mkwena*, 1939 T.P.D. 152; *R.* v. *Cwele*, 1939 E.D.L. 257. *Contra*, *R.* v. *Oberay*, 1946 E.D.L. 238.
[58] *R.* v. *Van As*, 1941 A.D. 361.
[59] *R.* v. *Molloa*, 1956 (4) S.A. 824 (A.D.).
[60] *R.* v. *Scott*, 1959 (2) S.A. 786 (C); *Nkumalo* v. *R.*, 1960 (1) P.H., H. 234 (T).
[61] *Pera* v. *R.*, 1906 T.S. 704; *R.* v. *Barlin*, 1926 A.D. 459; *R.* v. *Smith* [1961] 3 All E.R. 972 (C.A.); *S.* v. *Cele*, 1965 (1) S.A. 82 (A.D.).
[62] *R.* v. *Van Rensberg*, 1948 (2) S.A. 276 (E); *R.* v. *Magoetie*, 1959 (2) S.A. 322 (A.D.).
[63] *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.). See, also, *R.* v. *Ananias*, 1963 (3) S.A. 486 (S.R.); *R.* v. *Richards*, 1963 (3) S.A. 471 (F.C.).
[64] 1926 A.D. 556.
[65] As to illegally obtained evidence generally, see above, p. 000. 5

guards of full judicial process being observed.[86] The basis of the approach is that suspects and accused persons may be given an opportunity to clear themselves or explain away apparently incriminating facts, but that they should always be cautioned as to their right to remain silent and warned that what they say may be used against them. The full text of the Judges' Rules reads:

'(1) Questions may be put by policemen to persons whom they do not suspect of being concerned in the commission of the crime under investigation, without any caution being first administered.

(2) Questions may be put to a person whom the police have decided to arrest or who is under suspicion where it is possible that the person by his answers may afford information which may tend to establish his innocence, as, for instance, where he has been found in possession of property suspected to have been stolen, or of an instrument suspected to have been used in the commission of the crime, or where he was seen in the vicinity about the time when the crime was committed. In such a case caution should first be administered. Questions, the sole purpose of which is that the answers may afford evidence against the person suspected, should not be put.

(3) The caution to be administered in terms of rule 2 should be to the following effect:

"I am a police officer. I am making inquiries (into so and so) and I want to know anything you can tell me about it. It is a serious matter and I must warn you to be careful what you say."

Where there is any special matter as to which an explanation is desired, the officer should add words such as: "You have been found in possession of . . . and unless you can explain this I may have to arrest you."

(4) Questions should not be put to a person in custody with the exception of questions put in terms of rule (7).

(5) Where a person in custody wishes to volunteer a statement, he should be allowed to make it, but he should first be cautioned.

(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence, merely by reason of no caution having been given prior to the commencement of his statement, but in such a case he should be cautioned as soon as possible.

(7) A prisoner making a voluntary statement must not be cross-examined, but questions may be put to him solely for the purpose of removing elementary or obvious ambiguities in voluntary statements. For instance, if he has mentioned an hour without saying whether it was morning or evening or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

(8) The caution to be administered to a person in custody should be to the following effect:

(*a*) *Where he is formally charged:*

"Do you wish to say anything in answer to the charge? You are not obliged to do so, but whatever you say will be taken down in writing and may be used in evidence."

(*b*) *Where a prisoner volunteers a statement otherwise than on a formal charge:*

"Before you say anything (or, if he has already commenced his statement, 'anything further'), I must tell you that you are not obliged to do so, but whatever you say will be taken down in writing and may be given in evidence."

(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and in the language in which it was made. It should be read over to the person making it, and he should be given full opportunity for making any corrections therein that he may wish to and he should then be invited to sign it.

(10) When two or more persons are charged with the same offence, and a voluntary statement is made by any one of them, the police, if they consider it desirable, may

[86] See, generally, *R.* v. *Barlin*, 1926 A.D. 459 at 466, and the judgment of Macdonald A.J.A. in *R.* v. *Hackwell*, 1965 (2) S.A. 388 (S.R., A.D.). The Judges' Rules were said to be more honoured in the breach than in the observance, in *S.* v. *Sithole*, 1968 (2) P.H., H. 387 (N).

furnish each of the other persons with a copy of such statement, but nothing should be said or done by the police to invite a reply. The police should not read such statement to a person furnished, unless such person is unable to read it and desires that it be read over to him. If a person so furnished desires to make a voluntary statement in reply the usual caution should be administered.'

Being purely domestic directives to the police force, the Judges' Rules do not have the force of law, and a failure to comply with them will not automatically lead to the rejection of an admission, nor will compliance necessarily lead to the reception of the admission.[67] The extent to which the Rules were observed by the police may be a potent factor in persuading the court to admit or reject an admission, but the issue remains one of fact. Was the accused acting freely and voluntarily? The presence or absence of a caution may assist in establishing this, but other circumstances may well negate or override its effect.[68] The Judges' Rules do not apply to investigating officers of other government departments, but the presence or absence of a caution could still be a relevant factor.[69]

The same principle applies where admissions have been elicited by two or more accused persons being brought into confrontation. Compliance or non-compliance with Rule 10 of the Judges' Rules is relevant but not conclusive on the question whether the confrontation was an improper inducement preventing the admissions from being held to have been freely and voluntarily made.[70]

7.3. *Statements in the presence of a party*

Where an accusatory statement was made by anyone in the presence and hearing of the accused, the form of his reaction may be such as to give rise to an inference that he agreed to what was said: his behaviour in the face of an accusation may amount to an adoption of the statement as his own admission. An example is *Jacobs* v. *Henning*,[71] a civil action based on an alleged seduction. Evidence was received that when the plaintiff's father asked the defendant if he was responsible for her pregnancy, the defendant started, hung his head, and remained silent. 'I cannot believe', said Tindall J.,[72] 'that an innocent man, hearing for the first time a false charge of that character, would remain silent.'

The mere fact that an accusation was made is not in itself admissible,[73] unless it amounts to nothing more than an act of identification.[74] Standing alone, it is pure hearsay. Only where the form of the accused's reaction is equivalent to an admission[75] is the accusation received, as introducing and explaining the response. In order, therefore, for an admission to be shown, three things must be established (in addition to proof that the admission was freely and voluntarily made in accordance with the general principle of admissions[76]): (*a*) that the

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[67] *R.* v. *Holtzhausen*, 1947 (1) S.A. 567 (A.D.); *R.* v. *Kuzwayo*, 1949 (3) S.A. 761 (A.D.).
[68] e.g. *R.* v. *Malope*, 1940 W.L.D. 175; *R.* v. *Lewis*, 1947 (4) S.A. 73 (O).
[69] *R.* v. *Overell* [1969] 1 Q.B. 17 (C.A.), [1968] 1 All E.R. 933.
[70] *R.* v. *Mtilongo*, 1949 (2) S.A. 552 (A.D.). See, too, *R.* v. *Mills and Lemon* [1947] K.B. 297 (C.A.), [1946] 2 All E.R. 776; *R.* v. *Bene* (1), 1961 (2) P.H., H. 252 (S.R.).
[71] 1927 T.P.D. 325.
[72] At 329.
[73] *R.* v. *Norton* [1910] 2 K.B. 496 (C.A.) at 499; *R.* v. *Jackelson*, 1917 A.D. 556 at 558; *R.* v. *Hughes*, 1916 C.P.D. 737; *R.* v. *Abrey*, 1959 (2) S.A. 76 (E) at 81.
[74] *Rassool* v. *R.*, 1932 N.L.R. 113. See above, under previous consistent statements, p. 000.
[75] The reception of such evidence at the instance of the defence, in *R.* v. *Lutoli*, 1927 E.D.L. 42, seems contrary to the principle that admissions are received against but not in favour of the accused, unless it could have been received under an exception to the rule against self-serving statements. See above, p. 000.
[76] *Ibrahim* v. *R.* [1914] A.C. 599 (P.C.).

accusation was made in the accused's presence and hearing.[77] The accusation itself is not evidence of this fact.[78] Unless he was aware of it, his conduct could not be a response to it. There appears to be no authority on the point, but no doubt it must also have been made in a language he understood; (*b*) that in the circumstances some explanation or denial could have been expected of an innocent man and that the accused was afforded an opportunity to provide such an explanation or denial.[79] If at the preparatory examination the accused does not at once deny the evidence against him, naturally no adverse inference can be drawn since the decorum of the proceedings would preclude the opportunity to do so.[80] Further, if the accused is cautioned in terms of the Judges' Rules that he is not obliged to say anything, and he does not then deny the accusation, again this is not a situation in which an explanation or denial would be expected;[81] (*c*) that the accused's reaction is indicative of guilt as not being such a denial or explanation as could be expected of a man convinced of his innocence. The reaction may be express words of agreement,[82] conduct,[83] or in appropriate circumstances, silence.[84] A denial of the accusation which is not believed may also be treated as an admission.[85]

In *R. v. Norton*,[86] the Court of Appeal held that these three requirements must be established to the satisfaction of the judge, sitting alone, who may entirely prevent the evidence from going to the trier of fact if not satisfied on the point. A different procedure, however, was prescribed by the House of Lords in *R. v. Christie*[87] and has been approved in South Africa:[88] the question whether the accused's reaction was such as to amount to an admission is to be determined by the trier of fact, and the function of the judge at the trial within a trial is simply to determine whether there is sufficient evidence on which it could reasonably be found that an admission was made. If the trier of fact then concludes that there was no admission, it must disregard the evidence entirely. The latter procedure is said to increase the risk of unfair prejudice to the accused, since the mere fact that an accusation was made may cause prejudice to him in

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[77] *R. v. Melozani*, 1952 (3) S.A. 639 (A.D.) at 643–4; *R. v. Jogi*, 1916 C.P.D. 45; *R. v. Abrey*, 1959 (2) S.A. 76 (E) at 81. In *R. v. Botha*, 1917 T.P.D. 380, the Court inferred a denial from the fact that no mention was made in the evidence of the accused's response, but this decision cannot have survived *Melozani*.

[78] *R. v. Melozani*, 1952 (3) S.A. 639 (A.D.).

[79] *Bessela v. Stern* (1877) 2 C.P.D. 265 (C.A.) at 272.

[80] *R. v. A*, 1959 (3) S.A. 498 (F.C.) at 502.

[81] *R. v. Mashelele*, 1944 A.D. 571 at 583; *R. v. Patel*, 1946 A.D. at 907–8; *R. v. Hoare* [1966] 2 All E.R. 846 (C.A.). In *Van Lill v. S.*, 1969 (2) P.H., H. 219 (T), it was held to be an irregularity for the court to permit the accused to be cross-examined on his silence after the caution.

[82] *Fisher v. Malherbe and Rigg*, 1912 W.L.D. 15 at 19; *Veale v. Williams*, 1929 E.D.L. 301; *R. v. H*, 1948 (4) S.A. 154 (T). The words used should be narrowly construed—they must amount unequivocally to assent (*R. v. Bell*, 1929 C.P.D. 478).

[83] *R. v. Norton* [1910] 2 K.B. 496 (C.C.A.) at 499; *Towert v. Towert*, 1956 (1) S.A. 429 (W) at 431.

[84] *Narasimman v. R.* (1914) 35 N.L.R. 458; *R. v. Botha*, 1917 T.P.D. 380 at 383, 385; *Jacobs v. Henning*, 1927 T.P.D. 325 at 329.

[85] *R. v. Christie* [1914] A.C. 545 (H.L.); *R. v. Hendricks*, 1913 C.P.D. 11. But cf. *Warrington v. Warrington and Lucey*, 1916 W.L.D. 24.

[86] [1910] 2 K.B. 496 (C.A.) at 499–500.

[87] [1914] A.C. 545 (H.L.) at 554, 565.

[88] See *R. v. Manjonjo*, 1963 (4) S.A. 708 (F.C.), cited with approval in *S. v. Mkwanazi*, 1966 (1) S.A. 736 (A.D.) at 743. It is not yet clear whether in application to this category of evidence, the English cases relied on in *Manjonjo* have not been deprived of much of their authority by *Chan Wei Keung v. R.* [1967] 2 A.C. 160 (P.C.), and *R. v. Burgess* [1968] 2 W.L.R. 1209 (C.A.).

the eyes of the assessors, in spite of an instruction to disregard the evidence. Accordingly, there is much scope for exercise of the judicial discretion to exclude the evidence where it would have little evidential value in proportion to its detrimental effect.[80]

Where a person in the presence of another makes a statement incriminating that other as well as or instead of himself, on the principles of this form of admission the other's reaction may make it his admission or confession as well. For this reason, the courts have frowned on the police practice of deliberately engineering a confrontation between several accused or suspected persons with the object of eliciting either a confession from each or a statement from one which may then be used against the others as having been made in their presence.[90] Such a confrontation is in breach of Rule 10 of the Judges' Rules,[91] and as with the other Rules, contravention may result, though it will not automatically result, in the rejection of the resulting evidence. Even where admitted, indeed, admissions so obtained have been held to have little if any probative value.[92]

1.4. Admissions by conduct

Generally, any previous behaviour of a party which is inconsistent with the stand taken by him at the trial may be taken into account as evidence against him. Many examples of conduct loosely regarded as an admission would more properly be classified as circumstantial evidence than as implied assertions falling under the admissions exception to the rule against hearsay, in particular where the conduct is not intended to be assertive. The indiscriminate use of the term 'admissions by conduct' to cover both types of conduct has resulted in a lack of consistency in the decisions as to whether there must always be proof, as with verbal admissions, that the conduct was free and voluntary. Usually, however, the nature of the conduct itself postulates prima facie that the accused was not induced so to act.

Thus in *R.* v. *Barlin*[93] Innes C.J., in treating a false explanation given by the accused as an admission, laid down that it should not have been admitted unless first proved to have been voluntary in the sense that it was not induced by any promise or threat; but in most of the cases where the accused's false explanation has been taken into account against him this point does not seem to have been adverted to at all.[94] On the other hand, where a schoolboy charged with *crimen injuria* in writing obscenities on a blackboard was made to write out the offending words, in the presence of the police and the headmaster, for the purposes of furnishing a comparison between those words as written and his handwriting, the sample so obtained was excluded as having been obtained by compulsion.[95]

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[90] See *R.* v. *Christie* [1914] A.C. 545 (H.L.) at 555 560, 565.
[91] *R.* v. *Mills and Lemon* [1947] K.B. 297 (C.A.), [1946] 2 All E.R. 776; *R.* v. *Mthlongo*, 1949 (2) S.A. 552 (A.D.) at 557; *R.* v. *Nyati*, 1961 (1) P.H., H. 88 (N). Cf. *R.* v. *Matambo*, 1962 (2) P.H., H. 253 (S.R.) where the confrontation was found to have been fortuitous and therefore not improper.
[92] See above, p. 988. [illegible]
[93] Per Van der Heever J.A. in *R.* v. *Kuzwayo*, 1949 (3) S.A. 761 (A.D.) at 769.
[94] 1926 A.D. 459 esp. at 462, 463. A similar view was taken in *R.* v. *Crispen*, 1967 (3) S.A. 450 (R.A.D.).
[95] e.g. *R.* v. *Simon*, 1929 T.P.D. 328; *R.* v. *Bennett* (1), 1940 G.W.L. 1; *R.* v. *Tshabalala*, 1942 T.P.D. 27.
[96] *R.* v. *B*, 1933 O.P.D. 139.

A similar approach was taken in England by the Court of Appeal, in *R.* v. *Voisin*.[96]

Other examples of conduct by the accused which have been characterized as admission by conduct are his attempted flight when apprehended,[97] his efforts to bribe proposed witnesses either to give false evidence or to refrain from testifying against him,[98] his actions in covering up the traces of the crime, or inducements offered to persuade the complainant not to pursue the charge.[99] On the analogy of flight, the accused's attempted suicide after arrest was received under this heading in *R.* v. *C.*[1] Payments made to maintain a child were construed by the Appellate Division as an admission of paternity in *Gin* v. *S.*[2] Even the possession of letters—whether proved to have been answered or not—may in appropriate circumstances support an adverse inference. For example, a husband's careful collection and retention of love letters referring to his adultery with the letter-writer was regarded as evidence of his adultery in the divorce case of *Thompson* v. *Thompson*.[3] A party's own books of account are of course evidence against him.[4]

A party's failure to answer letters he is proved to have received may also amount to an admission of their contents, if in the circumstances a repudiation would ordinarily be expected from one who disagreed. To what inference the circumstances are appropriate is a question which will vary with the facts of every case,[5] and the courts may well be less ready to draw such adverse inferences in a criminal case than in a civil trial. The adverse circumstances are, naturally, greatly strengthened where there is positive conduct rather than mere quiescence upon receipt of a letter, e.g. payment of a sum requested in the letter may be treated as an admission not only of the amount but also of the *causa* as stated in the request.[6]

7.5. *Vicarious admissions*

Admissions are generally receivable only against the party who made them. Thus, for example, where the accused is charged with knowingly having received stolen property, the fact that the property was stolen cannot be proved by tendering an admission by the accomplice to the theft.[7] The principle applies no less at a joint trial: a confession by one accused is not evidence against any of the other co-accused[8] for any purpose whatsoever, not even to provide corrobo-

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[96] [1918] 1 K.B. 531 (C.C.A.).
[97] *R.* v. *Govulana*, 1919 E.D.L. 194; *Skeef* v. *R.*, 1958 (2) P.H., H. 347 (O).
[98] *Moriarty* v. *The London, Chatham and Dover Railway Company* (1870) L.R. 5 Q.B. 314.
[99] *Van der Westhuizen* v. *R.*, 1908 E.D.C. 468; *Ward* v. *Steenberg*, 1951 (1) S.A. 395 (T).
[1] 1949 (2) S.A. 438 (S.R.). See also above, under Relevance, p. 000.
[2] 1967 (1) P.H., H. 13* (A.D.).
[3] 1917 E.D.L. 179. Cf. *R.* v. *Whittaker* [1914] 3 K.B. 1283 (C.C.A.); *Saunders* v. *Saunders* [1965] P. 499 at 510.
[4] *Naik* v. *Pillay's Trustee*, 1923 A.D. 471.
[5] Failure to reply to a letter advising that another was claiming to act as the addressee's agent was regarded as an admission of the authority in *Randles & Oldacre* v. *Wilson* (1887) 8 N.L.R. 148, and *Faure, Neethling & Company* v. *Beyers* (1895) 12 S.C. 438. As to failure to contest the other party's version of negotiations, see *Stuttaford & Co., Ltd.* v. *Parker*, 1921 C.P.D. 381; *Benefit Cycle Works* v. *Atmore*, 1927 T.P.D. 525; *Seedat* v. *Tucker's Shoe Store*, 1952 (3) S.A. 513 (T). Failure to reply to a letter from the mother of a child alleging the addressee was the father was held to be an admission in the circumstances of *Gin* v. *S.*, 1967 (1) P.H., H. 135 (A.D.), but not in the circumstances of *Matyila* v. *Nkosi*, 1926 E.D.L. 78.
[6] *S.* v. *Shepard*, 1966 (4) S.A. 530 (W); *Gin* v. *S.*, 1967 (1) P.H., H. 135 (A.D.).
[7] *R.* v. *Hewertson* (3), 1937 C.P.D. 103.
[8] *R.* v. *Baartman*, 1960 (3) S.A. 535 (A.D.); *R.* v. *Kefasi*, 1966 (1) S.A. 364 (S.R., A.D.). Nor, of course, can the extracurial admission be evidence *in favour* of a co-accused: *R.* v. *Jaspan*, 1940 A.D. 9.

ration or strengthen the credibility of other evidence implicating the co-accused.[9] One result of the rule is that mutual contradictions in admissions made by each co-accused can be ignored, as each need only be considered in violation as evidence against its maker.[10] As, however, there is a real possibility of prejudice resulting from such a situation, there should wherever it arises be a separation of trials.[11]

There are three general categories to be distinguished as exceptions to the rule that the admissions of a party are evidence against him only:[12]

(*a*) Where there has been a pre-appointment of or a referal to the maker of the statement by the party against whom it is tendered. *Van Rooyen* v. *Humphrey*[13] provides a clear example of a referral. The parties to the action having been concerned to determine the cause of a fire which had spread from the defendant's land to the plaintiff's, the defendant, being unable to speak to the matter of his own personal knowledge, put forward two of his employees as persons to whom the plaintiff should refer for first-hand information. As he had himself nominated them to speak, their statements were received against him.

The same applies where the maker of the statement was appointed in advance to speak on the party's behalf, whether or not as part of other duties he performs for the party. In this category have been held to be an accountant who is appointed by the party to keep his books[14] or make his returns to the revenue officials,[14] a stationmaster with the power and duty of reporting losses of property from the railway company's custody,[15] and a scout or look-out deputed, during the commission of a crime, to give warnings if detection seemed imminent.[16] On the other hand, a barman[17] or housekeeper[18] have been found not to have such authority to speak on behalf of their employers, nor normally has an officer of a company authority to speak for the company.[19] In all such cases there must be proof of the pre-appointment before the admission can be received, and the admission itself is not evidence of such pre-appointment.[20]

The existence of the authority to speak is a question of fact in each case. It must have existed at the time the admission was made, not necessarily at the time of the events to which the admission refers,[21] nor at the time of the trial in which it is tendered.[22]

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[9] *R.* v. *Matsitwane*, 1942 A.D. 213.

[10] *R.* v. *Qwabe*, 1939 A.D. 255 at 263; *R.* v. *Ndhlangisa*, 1946 A.D. 1101; *R.* v. *Urayanyi*, 1949 (4) S.A. 217 (S.R.).

[11] This threefold class of exceptions is *Wigmore's* (IV, § 1069), approved in *Bates* v. *Van Deventer*, 1966 (3) S.A. 182 (A.D.) at 198, per Williamson J.A. See (1966) 83 *S.A.L.J.* 416.

[12] 1953 (3) S.A. 392 (A.D.).

[13] *R.* v. *Shamasewitz*, 1915 T.P.D. 439; *R.* v. *Govey*, 1929 C.P.D. 58; *R.* v. *Wingfield*, 1958 (3) S.A. 44 (S.R.).

[14] *R.* v. *Milne and Erleigh* (1), 1950 ( ) S.A. 591 (W).

[15] *Kirkstall Brewery Company* v. *Furness Railway Company* (1874) L.R. 9 Q.B. 468.

[16] *R.* v. *Alexander*, 1913 T.P.D. 561. A difficulty of regarding the warning in this case as a vicarious admission is that it would seem to conflict with the principle that what an agent says to his principal is not an admission, only what he says to a third party.

[17] *R.* v. *Black*, 1923 A.D. 388. Cf. *R.* v. *Pillai*, 1953 (2) S.A. 373 (N).

[18] *Sunnyhock Private Residential Hotel* v. *Shields*, 1953 (1) S.A. 495 (T).

[19] *R.* v. *Hewertson* (3), 1937 C.P.D. 103; *R.* v. *Gwey*, 1929 C.P.D. 58; *Simmons N.O.* v. *Gilbert Hamer & Co., Ltd.*, 1963 (1) S.A. 897 (N) esp. at 919. Witnesses called at the party's instance in previous proceedings were not his agents to speak even if they were also in his employ at the time (*Rhodesian Corporation, Ltd.* v. *Globe & Phoenix Gold Mining Co., Ltd.*, 1934 A.D. 293). But see sec. 381 of the Criminal Procedure Act.

[20] *Erasmus* v. *Siffman*, 1909 T.S. 1026; *King* v. *Lane & Co., Ltd.* (1912) 33 N.L.R. 325; *Estate Bilden* v. *Sarif*, 1933 C.P.D. 275 at 287; *R.* v. *Koro*, 1950 (3) S.A. 797 (O).

[21] *Wood* v. *Dersley* (1882) 2 E.D.C. 200.

[22] *R.* v. *Levy*, 1929 A.D. 312.

(*b*) Where the party has subsequently adopted as his own the statement made by another, it is treated as though it were his own statement, as it were by ratification.[23]

(*c*) Where, in civil cases there is privity or identity of interest between the maker of the statement and the party against whom it is tendered. Such privity may take the form of either privity of obligation or privity of title. Whether there is such a privity is a matter of substantive law, not of the law of evidence, and it is therefore South African and not English law which determines this.[24]

Partners who are fully liable for each other's delictual or contractual acts within the scope of the partnership, would be affected by each other's admissions concerning these matters;[25] and a master's vicarious liability for the wrongful acts by which his servant renders himself also personally liable, means that the latter's admissions are receivable against the former.[26] Privity of title would cover such as exists between a past and present owner of land, as to its boundaries,[27] between spouses married in community of property in relation to the joint estate,[28] between the deceased and the executor of the deceased's estate[29] and between an insolvent and his trustee[30] in relation to estate transactions. On the other hand, the insolvent and his wife would not necessarily be in privity of interest,[31] and nor is a mother in privity with her child so as to make her admission of adultery evidence against it on the issue of its legitimacy.[32] A creditor and his debtor may in execution proceedings be in privity of title regarding property attached in the debtor's possession,[33] and, similarly, an insolvent and his creditor, as against the trustee.[34]

7.6. *Co-criminals: common purpose*

Where several persons have associated for an unlawful common purpose, the statements made by any of them in pursuance of the common purpose are admissible against each of the others whether some only or all of the co-criminals are being tried. This is not strictly speaking a form of *vicarious admission*,[35] since the rule permits proof of such statements only in so far as they are executive, i.e. statements as acts performed in pursuance of the common purpose.[36] Statements made subsequently as pure narrative, not amounting to acts,[37] or statements (whether acts or not) made for an individual not common purpose,[38]

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[23] *R.* v. *Raisun and Pather*, 1947 (2) S.A. 881 (W); *R.* v. *Milne and Erleigh* (5), 1950 (4) S.A. 604 (W).
[24] *Botes* v. *Van Deventer*, 1966 (3) S.A. 182 (A.D.) at 204.
[25] *R.* v. *Levy*, 1929 A.D. 312; *Taylor* v. *Budd*, 1932 A.D. 326.
[26] *Botes* v. *Van Deventer*, 1966 (3) S.A. 182 (A.D.). Cf. sec. 321.
[27] *Holgreen* v. *Theron*, 1927 E.D.L. 417.
[28] *Oelofse* v. *Grundling*, 1952 (1) S.A. 338 (C); *Netherlands Bank of S.A., Ltd.* v. *Le Roux N.O.*, 1965 (1) S.A. 681 (T).
[29] *Meyer* v. *Intestate Estate Rudolph* (1919) 40 N.L.R. 92.
[30] *Nalk* v. *Pillay's Trustee*, 1923 A.D. 471. Naturally in the insolvent's admissions after sequestration he is not in privity with his trustee (*Gotze* v. *Estate Van der Westhuizen*, 1935 A.D. 300).
[31] *Dobrin* v. *Trustees Estate Dobrin*, 1932 W.L.D. 195.
[32] *Mitchell* v. *Mitchell*, 1963 (2) S.A. 505 (D).
[33] *Gleneagles Farm Dairy* v. *Schoombee*, 1947 (4) S.A. 66 (E). The decision in *Cullinan* v. *Union Government*. 1922 C.P.D. 33, that a surety and a principal debtor are not in privity of obligation to the creditor, seems unsupportable.
[34] *Marais's Estate* v. *Vermooten*, 1922 E.D.L. 265.
[35] *R.* v. *Miller*, 1939 A.D. 105 at 115. [36] *R.* v. *Miller*, 1939 A.D. 106.
[37] *R.* v. *Rose*, 1937 A.D. 467; *S.* v. *Bondi*. 1961 (4) S.A. 671 (A.D.).
[38] *R.* v. *Blake and Tye* (1844) 6 Q.B. 126, 115 E.R. 49; *R.* v. *Heyne* (1), 1958 (1) S.A. 607 (W).

cannot be received under this heading and are admissible only against their maker, unless they can be brought under one or other heading of vicarious admissions proper, as discussed above. An example of an 'executive' statement is furnished by *R.* v. *Mayet*,[39] where the accused was charged with the murder of her husband. The prosecution case was that she had deputed one J to hire two assassins who would actually perform the killing. J's statements in attempting to engage two men to assume the task not only constituted his part in effecting the whole criminal transaction but were received against the accused both to define the scope of the common purpose and to identify the persons thus criminally associated.[40] In *Mawaz Khan* v. *R.*[41] the statements received were the joint fabrication of a protective tissue of lies, indicative of the common guilt.

The statements of one criminal are only received against another if they were acting in concert,[42] but this does not mean that there must first be full proof of their criminal association, otherwise the reasoning becomes circular.[43] What is required is that at the conclusion of the State case the existence of the conspiracy and the identity of the conspirators should have been finally proved. How this is achieved is for the decision of the trial court, which must keep control of the order in which evidence is presented to it, and determine whether a foundation for receiving the statements has been laid by sufficient prima facie evidence of the conspiracy.[44] The court may even accept simply the firm assurance of the prosecutor, as an officer of the court, that satisfactory proof of the association will indeed be tendered in due course;[45] but in view of the potential prejudice to the accused that will normally prevail the court should as a rule first be satisfied that there is a real possibility of the other facts necessary ultimately being proved.[46] If sufficient proof of the association is, in the end, not forthcoming, the statements cannot be taken into account against anyone other than their maker.[47]

8. Confessions

8.1. *What is a confession*

Confessions are a species of admissions but require separate treatment because they are regulated by statute. Section 244(1) of the Criminal Procedure Act provides that a 'confession of the commission of any offence' shall be admissible when tendered in evidence against its maker, subject to certain conditions as to the circumstances of its making and recording being shown to have been fulfilled. Before these conditions of admissibility are discussed, it is necessary to examine the meaning of 'confession' as used in the Act, since no statutory definition of the term is provided. It will be seen that here as with other aspects of subsection 244(1), a narrow construction is applied by the

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[39] 1957 (1) S.A. 492 (A.D.).
[40] See, also, *R.* v. *Whittaker* [1914] 3 K.B. 1283 (C.C.A.); *R.* v. *Leibbrandt*, 1944 A.D. 253 esp. at 276; *S.* v. *Bondi*, 1962 (4) S.A. 671 (A.D.) at 677.
[41] [1967] A.C. 454, [1967] 1 All E.R. 80 (P.C.).
[42] Of course, evidence which would always be admissible against an accused is not rendered inadmissible, even if not falling under this heading, just because it is given by a *socius* (*R.* v. *Ingham*, 1958 (2) S.A. 37 (C)).
[43] *R.* v. *Cilliers*, 1937 A.D. 273 at 285; *R.* v. *Miller*, 1939 A.D. 106 at 118–19.
[44] *R.* v. *Cilliers*, 1937 A.D. 278; *S.* v. *Bondi*, 1962 (4) S.A. 671 (A.D.).
[45] *R.* v. *Levy*, 1929 A.D. 312 esp. at 326–7.
[46] *R.* v. *Victor*, 1965 (1) S.A. 249 (S.R., A.D.).
[47] *R.* v. *Levy*, 1929 A.D. 312 at 327; *R.* v. *Cilliers*, 1937 A.D. 278 at 285.

courts, so as to restrict as little as possible the applicability of the common-law rules governing admissions.[48]

In *R.* v. *Becker*, De Villiers A.C.J. considered the use of the term 'confession' wherever it appears in the Act, and concluded that what the legislature intended to denote was

> 'an unequivocal acknowledgment [by the accused] of his guilt, the equivalent of a plea of guilty before a court of law'.

Several statements by the accused on different occasions which laboriously pieced together may lead to the inference of his guilt, do not amount to a confession within the meaning of section 244, unless they are so linked together by circumstances that they in effect constitute one continuous statement.[49]

A plea of guilty to the charge, even if later withdrawn or entered as a plea of not guilty, is of course a judicial confession of which the court may take cognizance.[50]

It follows from the definition given in *Becker's* case that to be a confession there must be an admission of every component element of the accused's guilt. As Wessels J. put it in *R.* v. *Van Veren*,[52] the accused must have said in effect, 'I am the man who committed the crime'. This is not a test which is easily satisfied. An example where it was is *R.* v. *Hoffman*,[53] where the accused was charged with failing to obey a government notice directing him to hand in his fire-arms. His statement that his rifles were expensive and he was afraid he would not be paid their full value was held to be a confession since it impliedly admitted both the failure to act and the necessary *animus*.[54] If, however, the accused's statement is at all capable of a rational explanation other than his guilt, it is not a confession. For instance, in *R.* v. *Lepulo*,[55] a charge of theft of a sheep where the accused admitted the taking, De Beer J. pointed out that it was still open to him to set up the defence that he did not intend to terminate the owner's rights, or that he thought the complainant would not object to his sheep being taken. Thus an admission of the main or of an essential fact, however prejudicial and even if conclusive of guilt in the light of other circumstances, is not a confession.[56] nor is an admission of the *actus reus* unless coupled with an admission of *mens rea*[57] if this is an element of the offence.[58]

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[48] *R.* v. *Van Veren*, 1918 T.P.D. 218 at 221, approved in *R.* v. *Becker*, 1929 A.D. 167 at 171. The provision was an innovation introduced by sec. 273 of the Criminal Procedure and Evidence Act, No. 31 of 1917.

[49] 1929 A.D. 167 at 171

[50] *R.* v. *Lepulo*, 1946 O.P.D. 203 at 208. Cf. *R.* v. *Williams*, 1931 E.D.L. 205; *R.* v. *Burgess*, 1947 (1) S.A. 560 (D).

[51] *R.* v. *Kumalo*, 1930 A.D. 193 at 202, 207.

[52] 1918 T.P.D. 218 at 221, approved in *R.* v. *Becker*, 1929 A.D. 167 at 171.

[53] 1941 O.P.D. 65.

[54] See, also, *R.* v. *H*, 1948 (4) S.A. 154 (T) (charge of miscegenation, woman's statement to the police, 'You have caught us red-handed', held to be a confession); *R.* v. *Batelezi*, 1960 (1) P.H., H. 101 (N) (charge of unlawfully cultivating dagga, accused was held to have confessed by saying the field and the dagga were his and he had cultivated it because he needed the money); *S.* v. *Apolis*, 1965 (4) S.A. 178 (C) (murder, accused's statement, 'Ek kon dit nie meer met haar uithou nie, daarom het ek haar doodgemaak', held to be a confession).

[55] 1946 O.P.D. 203. See, also, *R.* v. *Viljoen*, 1941 A.D. 366: *R.* v. *Anschutz*, 1946 C.P.D. 4; *R.* v. *King*, 1952 (4) S.A. 621 (T) esp. at 623.

[56] *R.* v. *Blato*, 1945 A.D. 469; *R.* v. *Xulu*, 1956 (2) S.A. 288 (A.D.) at 294; *R.* v. *Kanti*, 1932 E.D.L. 209.

[57] *R.* v. *Hanger*, 1928 A.D. 459 at 463; *R.* v. *Deacon*, 1930 T.P.D. 233; *R.* v. *Gule*, 1935 T.P.D. 401; *R.* v. *Zola*, 1944 E.D.L. 137; *R.* v. *Levin*, 1946 E.D.L. 233.

[58] *R.* v. *Langa*, 1936 C.P.D. 158; *R.* v. *Xulu*, 1956 (2) S.A. 288 (A.D.). Cf. *R.* v. *De Vries*, 1930 C.P.D. 78, which seems to be of doubtful correctness.

This is sometimes phrased as requiring an admission not only of the conduct charged but also of the unlawfulness of that conduct. An extreme example is provided by *S.* v. *Motara*.[59] The accused, a non-White, was charged with unlawfully occupying premises in a place which had been proclaimed as a White *group area*. His statement, 'I live here', was held to fall short of a confession although there was other evidence of his race and of the proclamation of the area, since he had not actually stated, 'I live here illegally'.

A common problem in cases where the charge consists in or has as an element the unlawful possession of articles or substances, is the classification of the accused's admission of ownership. There have been provincial division decisions *both ways*,[60] but in *R.* v. *Kumalo*[61] and *R.* v. *Xulu*[62] the Appellate Division appears to have held that on such charges a mere admission of ownership is not per se a confession. The problem in the form in which it has arisen in the Appellate Division cannot, however, be considered apart from the broader one of the interpretation of a statement which is not directly or explicitly a confession. In how far can the circumstances in which the statement was made lend confessing significance to the words used? As mentioned already, the fact that in the light of other facts known at the time or subsequently proved, the statement is conclusive of guilt, will not make it a confession.[63] But some circumstances have been held to affect the interpretation: the circumstances in which the accused is found, as in *R.* v. *H*,[64] a miscegenation charge where the couple were found by the police *in flagrante delicto*, and the woman's statement, 'Oh, you have caught us red-handed', had clearly to be related to that fact to be meaningful; the circumstances in which the property which is the subject of the charge is discovered, since if it would appear that someone other than the accused is responsible for it, the accused's claim of ownership may be an assumption of liability;[65] the charge as put to or understood by the accused may have to be referred to, to ascertain whether his statement is a reply;[66] and finally, the words used in themselves, so that a mere admission coupled with an offer or request to pay an admission of guilt[67] may be converted by that addition into a confession. An example of the last kind is *R.* v. *Burgess*,[68] a murder charge where evidence was tendered that the accused had telephoned the police station and asked them to send a policeman as 'I have shot somebody'. The admission of the shooting alone would not have been a confession as no defence—e.g. accident, provocation etc.—was thereby negatived, as they

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[59] 1963 (2) S.A. 579 (T). See, also, *R.* v. *Williams*, 1931 E.D.L. 205 at 207; *R.* v. *Blato*, 1945 A.D. 469; *R.* v. *Xulu*, 1956 (2) S.A. 288 (A.D.). The conclusion in *S.* v. *Gcaba*, 1956 (4) S.A. 325 (N), appears to be out of line with these authorities.

[60] Such an admission was held to be a confession in *R.* v. *Eleanor*, 1928 E.D.L. 466; *R.* v. *Malata*, 1928 C.P.D. 75; *S.* v. *Gumede*, 1963 (2) S.A. 349 (N); and held not to be a confession in *R.* v. *Manuel*, 1934 C.P.D. 98; *Butelezi* v. *R.*, 1941–2 N.P.D. 13; *R.* v. *Molesane*, 1945 T.P.D. 250; *R.* v. *Mashabane*, 1950 (4) S.A. 193 (C); *Letthlabeka* v. *S.*, 1965 (1) P.H., H. 71 (O).

[61] 1949 (1) S.A. 620 (A.D.).

[62] 1956 (2) S.A. 288 (A.D.).

[63] *R.* v. *Ikelheimer*, 1948 (1) S.A. 1081 (T), which held to the contrary, was held in *S.* v. *Motara*, 1963 (2) S.A. 579 (T) at 585, to have been impliedly overruled by *Kumalo* and *Xulu*, above. See, also, *S.* v. *Gumede*, 1963 (2) S.A. 349 (N).

[64] 1948 (4) S.A. 354 (T). Another example is *R.* v. *Pakkies*, 1956 (2) S.A. 145 (E).

[65] The extent to which the accused's claim of responsibility must go, can be seen from *R.* v. *Kumalo*, 1949 (1) S.A. 620 (A.D.).

[66] *R.* v. *Swart*, 1937 T.P.D. 168; *R.* v. *Mashabane*, 1950 (4) S.A. 193 (C).

[67] *R.* v. *Sitole*, 1946 (1) P.H., H. 59 (T); *R.* v. *Dlinga*, 1951 (2) S.A. 185 (C).

[68] 1947 (1) S.A. 560 (D).

perhaps might have been had he said 'I have murdered somebody'. But when the words were coupled with the fact of the voluntary telephoning and the identity of the recipient of the call, the accused must have meant in effect to give himself up into custody, and in the light of the circumstances his statement amounted to a confession.

Burgess's case is not authority for regarding a confessing intention to be required to constitute a statement a confession. 'The test is not whether the accused intends to admit that he is guilty, but whether he intends to admit facts which make him guilty, whether he realizes it or not.'[69] If all the essential elements of the offence are admitted, the presence of an exculpatory intention will not prevent the statement from being a confession.[70] On the other hand, a statement falling short of admitting all the elements and which is purely exculpatory in intention is not a confession however prejudicial its effect. As Innes C.J. put it in *R.* v. *Barlin*,[71] no outside factor can convert an assertion of innocence into a confession of guilt. An explanation found to be false,[72] or found to be contradictory of another explanation given[73] is therefore not a confession; the same, of course, applies to statements completely denying the commission of the offence.[74] Most exculpatory statements naturally are either a denial of an essential element of guilt or postulate a defence,[75] and for this reason alone would fail to qualify as confessions (though the assertion of mitigating factors would not prevent the statement from being a confession[76]). For example, in *R.* v. *Hanger*[77] the accused was charged with theft from his employer, Lennon, Ltd. On being arrested the accused stated, 'I do not look upon that as theft. I took the things to supply [R] who had to pay me, and when I received the money from [R] I would pay Lennons.' In holding that this did not amount to a confession, De Villiers J.A. reasoned that it was exculpatory as clearly repudiating the intention to steal.

A related question is presented by the situation where the accused's statement is exculpatory of the offence charged but is incriminatory in some other respect. It is clear that, on any charge, a statement by the accused to the effect that he was a *socius criminis* to that offence—again usually made with exculpatory intent—is a confession and the conditions of admissibility in section 244(1) must therefore be satisfied.[78] It also seems clear that where the statement is an unequivocal admission equivalent to a plea of guilty to a lesser offence of which the accused could competently be convicted on the indictment (e.g. a confession to assault where the charge is one of murder), it ranks as a confession and

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[69] Per Greenberg J. in *R.* v. *Kant*, 1933 W.L.D. 128 at 129–30. See, also, *R.* v. *King*, 1952 (4) S.A. 621 (T) at 623, and *R.* v. *Pakkies*, 1956 (2) S.A. 145 (E).

[70] *R.* v. *Kanti*, 1932 E.D.L. 209; *R.* v. *Kant*, 1933 W.L.D. 128; *R.* v. *Pakkies*, 1956 (2) S.A. 145 (E).

[71] 1926 A.D. 459 at 462. See, also, *R.* v. *Hanger*, 1928 A.D. 459 at 463; *R.* v. *Burton*, 1946 A.D. 773 at 779–80.

[72] e.g. *R.* v. *Msheshwe*, 1920 E.D.L. 198; *R.* v. *Barlin*, 1926 A.D. 456; *R.* v. *Magena*, 1947 (2) S.A. 589 (T).

[73] e.g. *R.* v. *Vosloo*, 1941 E.D.L. 58; *R.* v. *Nel*, 1960 (4) S.A. 892 (O).

[74] *R.* v. *Balfour*, 1918 C.P.D. 386; *R.* v. *Davis*, 1921 C.P.D. 562.

[75] e.g. *Xumalo* v. *R.*, 1958 (2) P.H., H. 323 (A.D.).

[76] See *R.* v. *Butelezi*, 1960 (1) P.H., H. 101 (N).

[77] 1928 A.D. 459.

[78] *R.* v. *Perkins*, 1920 A.D. 307; *R.* v. *Mahomed*, 1921 C.P.D. 189; *R.* v. *Hladi*, 1958 (2) P.H., H. 271 (O); *Nxele* v. *S.*, 1966 (2) P.H., H. 280 (N).

section 244(1) must again be complied with.[79] However, where the offence confessed to is not a competent verdict on the charge, the statement is apparently not a confession.[80] These situations must be distinguished from the case where the accused's making or failing to make a statement is in itself an element of the offence, where the offence is committed, for example, by the accused failing to furnish information or failing to give a satisfactory explanation. Here the terms of the information or explanation are always admissible without section 244(1) having to be satisfied,[81] even if they would amount to a confession to another offence, and irrespective of whether the accused is actually charged with failing to give the information or explanation[82] or whether this is merely a competent alternative verdict on the charged offence to which he confessed.[83]

Where the accused's extrajudicial statement fails to satisfy the criterion of a confession section 244(1) is inapplicable, but the statement is not necessarily admissible automatically. It must still be considered whether or not it is an admission and, if so, must satisfy the applicable rules of admissibility[84] discussed above. If the statement, though inculpatory, is admitted under some other heading, e.g. as a statutory explanation, naturally the conditions of admissibility of confessions do not apply.[85]

The special statutory provision made for confessions does not appear to contemplate the possibility of confessions purely by silence[86] or conduct[87] however incriminating, and evidence of such silence or conduct would therefore fall to be dealt with by the common law relating to admissions. Nor is there any possibility of a vicarious confession[88] (as to vicarious admissions, see above, p. 000), since section 246 provides that no confession made by any person shall be admissible as evidence against any other person.[89] This means also that a confession by one accused person is not evidence against a co-accused;[90] and to avoid the possibility of prejudice, if one accused has made a confession which implicates a co-accused this is grounds for ordering a separation of trials.[91]

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[79] *R.* v. *Kant*, 1933 W.L.D. 128 at 130; *R.* v. *Ahmed*, 1940 A.D. 333 at 343; *R.* v. *Goliath*, 1941 C.P.D. 3; *S.* v. *Ori*, 1963 (2) P.H., H. 165 (D); *S.* v. *Gcaba*, 1965 (4) S.A. 325 (N); *S.* v. *F.* 1967 (4) S.A. 619 (W). *Contra*, *R.* v. *Coetzee*, 1928 W.L.D. 297.

[80] *R.* v. *Vosloo*, 1941 E.D.L. 58. Cf. *R.* v. *Sombana*, 1939 E.D.L. 71.

[81] Naturally, the statement is only admissible where it would ordinarily be so on the charge. Thus, if the charge is failing to account for possession of articles reasonably suspected of being stolen, the accused's possession must first be shown before the terms of his account are received: *R.* v. *Hladi*, 1958 (2) P.H., H. 271 (O); *R.* v. *Schmitt*, 1960 (1) S.A. 666 (O) at 670.

[82] *R.* v. *Petoli*, 1932 N.P.D. 186; *R.* v. *Simelane*, 1941 N.P.D. 313; *R.* v. *Malakeng*, 1956 (4) S.A. 232 (T).

[83] *R.* v. *Sombana*, 1939 E.D.L. 71; *R.* v *Schmitt*, 1960 (1) S.A. 666 (O).

[84] *R.* v. *Barlin*, 1926 A.D. 459 at 463; *R.* v. *Sambando*, 1943 A.D. 608 at 612; *R.* v. *Burton*, 1946 A.D. 773 at 779-80; *S.* v. *Cele*, 1965 (1) S.A. 82 (A.D.) at 97.

[85] *R.* v. *De Vries*, 1930 C.P.D. 78; *R.* v. *Petoli*, 1932 N.P.D. 186; *R.* v. *Solani*, 1940 O.P.D. 222; *R.* v. *Schmitz*, 1960 (1) S.A. 666 (O).

[86] *R.* v. *Barlin*, 1926 A.D. 459 at 462; *R.* v. *Kanti*, 1932 E.D.L. 209. But cf. *R.* v. *Murano*, 1931 O.P.D. 145.

[87] *Ex parte Minister of Justice: In re R.* v. *Matemba*, 1941 A.D. 75 at 82.

[88] *R.* v. *Roomaney*, 1931 G.W.L. 139; *R.* v. *Vallabh*, 1942 G.W.L. 93.

[89] See *R.* v. *Zawels*, 1937 A.D. 342 at 346 ff.; and under Vicarious Admissions above, p. 000.125

[90] *R.* v. *Baartman*, 1960 (3) S.A. 535 (A.D.), where the accused's conviction, which depended upon his association before and after the crime with one H, was set aside, as there was no proof of H's connection with the crime apart from H's confession.

[91] *In re R.* v. *Mallalieu*, 1932 N.P.D. 80; *R.* v. *Ndhlangisa*, 1946 A.D. 1101.

8.2. *Proving the admissibility of a confession*

The first proviso to section 244(1) of the Code prescribes that, in order to be admissible, a confession by the accused must be shown to have been freely and voluntarily made by him while he was in his sound and sober senses, and without having been unduly influenced thereto. The second proviso lays down the inadmissibility of confessions made to a peace officer other than a magistrate or justice, and the third requires a confession made at a preparatory examination to have been preceded by a caution.[92]

The prosecution must prove compliance in all respects with these provisos, beyond a reasonable doubt. Compliance will not be assumed; there must be proof positive of each condition of admissibility.[93] The issue is tested independently of the issue of guilt at the time the confession is proposed to be proved, at a trial within the trial where evidence and, if necessary, argument from both sides may be heard.[94] Where there are several accused persons, all of whom have allegedly made confessions, the trials within the trial may, if convenient, be consolidated.[95] Like all rulings on the admissibility of evidence, the decision as to whether a confession qualifies for admission is one for the judicial officer alone, and the trial within the trial therefore takes place in the absence of the assessors.[96] If the court is left in doubt as to the voluntariness of the confession it must be rejected as the State has failed to discharge the onus resting upon it. A decision admitting the confession, however, is only interlocutory, and the presiding judge may review his decision at a later stage in the proceedings, again acting without the assessor's participation.[97]

Where the accused denies the making of any confession at all, or that he made one in the terms alleged by the prosecution, this issue is one for the triers of fact and not for the trial within the trial, provided the issue of the making of the confession can be separated from the issue of its voluntariness. The contents of the confession may be referred to to determine its source.[98] Where the issues are closely linked some of the evidence given on the voluntariness issue may have to be repeated before the full court,[99] but as far as possible it should be left to the defence to raise these matters. The prosecution should not force the defence to convince the full court of the truth of a story already rejected by the judge sitting alone.[1]

It is still open to the court to find, as a matter of law, that the confession was not freely and voluntarily made, though the accused has not contended he was induced to make it but has been disbelieved as to his denial of having made it.[2]

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[92] *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.); *R.* v. *Mtabela*, 1958 (1) S.A. 264 (A.D.).
[93] *R.* v. *Selepi*, 1919 T.P.D. 105; *R.* v. *Bhyat*, 1930 T.P.D. 176.
[94] *R.* v. *Dunga*, 1934 A.D. 223; *R.* v. *W*, 1963 (3) S.A. 516 (A.D.).
[95] *S.* v. *Letsoko*, 1964 (4) S.A. 768 (A.D.).
[96] *S.* v. *Mtabela*, 1958 (1) S.A. 264 (A.D.); *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.).
[97] *R.* v. *Melozaki*, 1952 (3) S.A. 639 (A.D.); *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.).
[98] *S* v. *Lebone*, 1965 (2) S.A. 837 (A.D.); *S.* v. *Mofokeng*, 1968 (4) S.A. 852 (W) at 854. See, also, *Attorney-General* v. *Schaube-Kuffler*, 1969 (1) P.H., H. 54 (R.A.D.).
[99] *R.* v. *Manjonjo*, 1963 (4) S.A. 708 (F.C.); *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.) esp. at 743. For an example of a link between the credibility of the State witnesses and the voluntariness of the confession, because of police interrogation methods, see *Isaacs* v. *S.*, 1969 (1) P.H., H. 93 (A.D.).
[1] *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.) at 743. And see *S.* v. *Lebone*, 1965 (2) S.A. 837 (A.D.).
[2] The point was left open in *S.* v. *Mahlala*, 1967 (2) S.A. 401 (W), but it would seem to be settled by the incidence of the onus of proof.

On the other hand, where he is disbelieved as to the presence, nature or effect of the inducement he says he was offered, since he himself would normally be the best judge of what influenced him, the court need not speculate as to other factors which may have been operative.[3] The unsatisfactory nature of the *accused's evidence does not in itself, however, discharge the prosecution's* burden of proof.[4]

Where a confession is inadmissible as not complying with the requirements of section 244(1), there is no discretion in the court to receive it, nor can the defence consent to its reception, the provisions of the Act being here peremptory.[5] It is improper for the prosecution witnesses to hint at it so as to bring it indirectly to the knowledge of the court,[6] nor may the prosecutor attempt to prove part only of the statement as an admission.[7] On the other hand, if the confession is admissible the accused may be cross-examined on it even though the prosecution has not proved it in chief.[8]

Where the defence takes the initiative in referring to the inadmissible confession by proving a favourable portion of it, the whole statement thereupon, in terms of section 244(2), becomes admissible. It is for the court to determine in each case whether the statement so adduced by the defence both (*a*) is favourable to the accused,[9] and (*b*) in fact is connected with the confession, for if the favourable statement is found to be separate and unconnected, section 244(2) is not brought into operation.[10]

8.3. *Conditions of admissibility of confessions*

8.3.1. *Sound and sober senses*

This phrase is not to be interpreted disjunctively, but as a single concept, as can be seen from the Afrikaans version of section 244(1), which speaks of proof that the confession was made while the accused was 'by sy volle verstand'.[11] There must be *affirmative proof that this condition* of admissibility was present, but it need not be shown that the accused was in a state of quiet serenity free of physical or mental discomfort. In *R.* v. *Blyth*[12] the accused was held to have been in her 'sound and sober senses' even though when she wrote the letter containing her confession she was in a great temper; and in *S.* v. *Mahlala*[13] the pain and exhaustion of the accused, who was suffering from a bullet wound in the arm, were found not to have prevented him from being in his sound senses. The test is simply whether the accused was at the time in the full possession of his understanding so as to realize what he was doing.[14] Some degree of intoxication due to

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[3] *S.* v. *Lebone*, 1965 (2) S.A. 837 (A.D.) at 844; *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.) at 746. See, too, *R.* v. *Sambo*, 1965 (1) S.A. 640 (S.R., A.D.) at 641 *in fine*.

[4] *S.* v. *Mafokeng*, *1968 (4)* S.A. 852 (W).

[5] *R.* v. *Perkins*, 1920 A.D. 307.

[6] *R.* v. *Swart*, 1937 T.P.D. 168.

[7] *R.* v. *Nel*, *1960* (4) S.A. *892 (O)*.

[8] *Lee* v. *S.*, 1962 (1) P.H., H. 70 (T).

[9] Sec. 244(2).

[10] *R.* v. *Mzimsha*, 1942 W.L.D. 82. And see *R.* v. *Valachia*, 1945 A.D. 826; *R.* v. *Sedi*, 1950 (3) S.A. 693 (O).

[11] *R.* v. *Mtabela*, 1958 (1) S.A. 264 (A.D.).

[11a] *R.* v. *Zonde* (1927) 48 N.L.R. 131; *R.* v. *Salepi*, 1919 T.P.D. 110; *R.* v. *Zide*, 1931 E.D.L. 276.

[12] 1940 A.D. 355.

[13] 1967 (2) S.A. 401 (W) esp. at 406. See, also, *R.* v. *Selebano*, 1957 (1) S.A. 384 (O), where Botha J. pointed out that the accused's state of exhaustion might be relevant to his susceptibility to any undue influence being brought to bear upon him.

[14] *R.* v. *Blyth*, 1940 A.D. 355 at 361, per Tindall J.A.

alcohol or drugs does not necessarily mean the test is unsatisfied, as long as he was not too drunk to appreciate what he was saying.[15] The degree of intoxication is, in addition, relevant to the weight as well as to the admissibility of the confession.[16]

The *fact* that the accused *is* not always in his sound senses, e.g. where he suffers from hallucinatory spells, as in *R.* v. *Mtabela*,[17] does not affect the admissibility of a confession made by him at a time when he was not so afflicted.

8.3.2. *Free and voluntary, without being unduly influenced*

It does not follow that because a confession is proved to have been freely and voluntarily made, it was also made without undue influence. There must be express and affirmative evidence of both elements[18] although, as they are usually closely related in fact, they are here dealt with together for the sake of convenience. Lack of compliance with the Judges' Rules[19] does not automatically disqualify the confession,[20] and conversely, that a caution was given to the accused in terms of the Judges' Rules will not always mean the confession will be admitted.[21] The issue of what operated to induce the accused to confess remains a factual one; observance or non-observance of the Judges' Rules is a relevant factor in an inquiry into the circumstances but is not decisive.[22]

As formulated by the Appellate Division, a confession is 'voluntary' within the meaning of section 244(1) if the confessor's will 'was not swayed by external impulses improperly brought to bear upon it which are calculated to negative the apparent freedom of volition'.[23] There is 'undue influence' if the confessor was 'placed in such a situation that a confession, regardless of its truth or falsity, has become the more desirable of two alternatives between which he was obliged to choose, and . . . the risk may be put thus, "Was the inducement such that there was any fair risk of a false confession?" '.[24] What is contemplated by these formulations seems to require, first, an inquiry as to whether objectively considered the inducement was undue or improper in law, and second, whether considered subjectively from the point of view of the accused the inducement did in fact operate upon his freedom of volition.[25] These tests do not apply to inducements not emanating from a source external to the accused himself. He may have mistakenly believed that he was obliged to confess, as in *S.* v. *Lwane*,[26] but this does not prevent his confession being free and voluntary as long as no one induced that belief in him. The same applies if he entertains the hope that by confessing he will gain some advantage, provided the hope arose in him spontaneously,[27] or as a result of advice not amounting to pressure.[28]

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[15] *R.* v. *Ramsamy*, 1954 (2) S.A. 491 (A.D.); *S.* v. *Masia*, 1962 (2) S.A. 541 (A.D.). See, also, *R.* v. *Lincoln*, 1950 (1) P.H., H. 68 (A.D.).

[16] *Nkumalo* v. *R.*, 1960 (1) P.H., H. 234 (T).

[17] 1958 (1) S.A. 264 (A.D.).

[18] *R.* v. *Zwane*, 1950 (3) S.A. 717 (O); *S.* v. *Lebone*, 1965 (2) S.A. 837 (A.D.).

[19] See above, p. 000. [illegible].

[20] *R.* v. *Kuzwayo*, 1949 (3) S.A. 761 (A.D.).

[21] *R.* v. *Nhleko*, 1960 (4) S.A. 712 (A.D.) at 720.

[22] *R.* v. *Holtzhausen*, 1947 (1) S.A. 567 (A.D.); *S.* v. *Majola*, 1966 (1) P.H., H. 128 (D).

[23] Per Van den Heever J.A. in *R.* v. *Kuzwayo*, 1949 (3) S.A. 761 (A.D.) at 767.

[24] Per Holmes J.A., adopting *Wigmore*, in *S.* v. *Kearney*, 1964 (2) S.A. 495 (A.D.) at 498.

[25] This formulation would seem to meet the objections to the tests quoted which were perceived by Jansen J. in *R.* v. *Mamabolo*, 1960 (2) P.H., H. 370 (T). And see *S.* v. *Radebe*, 1968 (4) S.A. 410 (A.D.) at 418–19.

[26] 1966 (2) S.A. 433 (A.D.) at 437. See, too, *R.* v. *Stadlander*, 1949 (3) S.A. 951 (T).

[27] *R.* v. *Khan*, 1954 (2) S.A. 23 (N); *S.* v. *Beartman*, 1960 (3) S.A. 535 (A.D.); *S.* v. *Madiki*, 1961 (4) S.A. 101 (E).

[28] *R.* v. *Mulke*, 1932 W.L.D. 16.

Where there was an inducement, it is improper or undue if it could have induced the accused to confess falsely. Whether he did indeed confess falsely, or whether the confession happens to be true, is not relevant[29] (although it may be relevant to the separate question of whether or not the accused confessed at all[30]). An exhortation to the accused to tell the truth, or to tell everything he knows, cannot, therefore be an improper inducement, unless the circumstances of the exhortation give rise to the further implication. "It will be better for you to say you did this even if you did not."[31] A confession encouraged by a promise of secrecy, or by some other trick or fraud (even if reprehensible) is not inadmissible unless the trick was such as to create a fair risk of a false confession.[32]

An inducement may be undue even if it did not emanate from a peace officer,[33] nor, probably, from a person in authority,[34] and even if it was of a mild or minor nature,[35] although both considerations are relevant to the inquiry of whether or not the accused was actually persuaded by the inducement.[36] It is not necessary that the inducement related to the charge.[37]

Actual physical violence perpetrated on the accused to force him to confess obviously prevents the confession being free and voluntary,[38] and threats of violence are hardly less objectionable.[39] Express threats or warnings of a disadvantage flowing from the failure to confess are naturally undue.[40] Even short of ill-treatment, so are circumstances calculated to put the accused into a state of fear,[41] or constituting an implied threat.[42] A promise of some benefit or advantage,[43] or circumstances giving the accused to understand that such might be forthcoming if he confesses,[44] are no less likely to negative the accused's freedom of volition than some variety of unpleasant treatment.

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[29] *R.* v. *D*, 1961 (2) S.A. 341 (N); *R.* v. *Dzaniba*, 1961 (1) P.H., H. 68 (D).

[30] *S.* v. *Lebone*, 1965 (2) S.A. 837 (A.D.).

[31] Per Brink J. in *R.* v. *Afrika* 1949 (3) S.A. 627 (O) at 634. See, also, *R.* v. *Kleinbooi*, 1917 T.P.D. 86; *R.* v. *Forman*, 1928 W.L.D. 286; *R.* v. *Lee*, 1931 W.L.D. 134.

[32] *S.* v. *Kearney*, 1964 (2) S.A. 495 (A.D.) at 500; *Radebe* v. *S.*, 1968 (2) P.H., H. 349 (A.D.). Apart from the trickery the confession must be shown to have been otherwise freely and voluntarily made.

[33] *R.* v. *Holtzhausen*, 1947 (1) S.A. 567 (A.D.); *S.* v. *Majozi*, 1964 (1) S.A. 68 (N) at 73–4.

[34] This is a requirement of the common law but is not necessarily imported into sec. 244(1) (see *R.* v. *Gumede*, 1942 A.D. 398 at 412–13; *R.* v. *Ramsamy*, 1954 (2) S.A. 491 (A.D.) at 497). The point was left open in *R.* v. *Khan*, 1954 (2) S.A. 23 (N), and in *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.) at 326. *S.* v. *Madiki*, 1961 (4) S.A. 101 (E), could be read in support of either view.

[35] *R.* v. *Sibanda*, 1964 (4) S.A. 252 (S.R.) at 254; *S.* v. *Lebone*, 1965 (2) S.A. (A.D.) at 843.

[36] e.g. *R.* v. *Masinyana*, 1958 (1) S.A. 616 (A.D.).

[37] *R.* v. *Lee*, 1931 W.L.D. 134; *R.* v. *Nchabeleng*, 1941 A.D. 502; *R.* v. *Michael*, 1962 (3) S.A. 355 (S.R.). Decisions to the contrary (e.g. *R.* v. *Mkwena*, 1939 T.P.D. 152; *Perkins* v. *S.*, 1966 (2) P.H., H. 265 (C); and see (1967) 84 *S.A.L.J.* 21) were based on the common law as it was then thought to be. See (1967) 84 *S.A.L.J.* 212.

[38] *R.* v. *Bostander* (1889) 5 H.C.G. 496; *R.* v. *Rool*, 1946 G.W.L. 83; *R.* v. *Nhleko*, 1960 (4) S.A. 712 (A.D.). For a case where a 'truth drug' had been administered to the accused, see *R.* v. *Lincoln*, 1950 (1) P.H., H. 68 (A.D.).

[39] *R.* v. *Nhleko*, 1960 (4) S.A. 712 (A.D.) at 719.

[40] *R.* v. *Moos*, 1918 E.D.L. 65; *R.* v. *Gwija*, 1960 (2) P.H., H. 327 (C).

[41] *R.* v. *Jonas*, 1928 T.P.D. 520; *S.* v. *Ismail* (1), 1964 (1) P.H., H. 62 (N). See, also, Professors A. S. Mathews and R. C. Albino in (1966) 83 *S.A.L.J.* 16 at 33 ff.

[42] *R.* v. *Msutu*, 1941 E.D.L. 7; *R.* v. *Sher*, 1932 W.L.D. 7.

[43] *R.* v. *Mulke*, 1932 W.L.D. 16 (promise directors would treat offence more lightly); *R.* v. *Masinyana*, *Nchabeleng*, 1941 A.D. 502 (promise to release accused's wives from prison); *R.* v. *Michael*, 1962 (3) S.A. 1958 (1) S.A. 616 (A.D.) (promise of more lenient treatment); *R.* v. *Mqubane*, 1966 (1) P.H., H. 186 (C) 355 (S.R.) (promise to reinstate accused in job); *S.* v. *Mqubane*, 1966 (1) P.H., H. 186 (C) (promise accused would be released before Christmas). See, too, *S.* v. *W*, 1963 (3) S.A. 516 (A.D.).

[44] *R.* v. *Chowa*, 1922 T.P.D. 415; *R.* v. *Beattie*, 1927 W.L.D. 156; *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.).

To confront the accused with his co-accused, or with their confessions, may be an improper inducement if the accused is thereby tricked or bullied into making a confession, though such a confrontation is not necessarily improper in itself.[45] Prolonged interrogation of the accused may be an undue influence even if it does not amount to 'third-degree'.[46] Interrogation, unlike confrontation, is per se improper, and has been frequently disapproved of by the courts,[47] but disapproval of police or administrative methods does not supersede the ordinary test of whether the accused's will was indeed overborne.[48]

There are conflicting authorities as to whether a statement made under statutory compulsion is inadmissible as a confession because it cannot be said to have been freely and voluntarily made,[49] but the better view would seem to be against admissibility.

Once an external pressure has been established which could have prevented the free exercise of the accused's will as to whether or not to confess, it must further be investigated whether that pressure indeed had the inducing effect. The causal link between the exerting influence and the resulting confession is sufficiently shown if the accused, even though he might have confessed anyway, was induced to confess more fully than he would otherwise have done,[50] or to confess upon oath where he would otherwise have made an unsworn statement.[51] The effect of the inducement can, of course, be negatived by showing that it was contradicted or withdrawn,[52] or that sufficient time elapsed between it and the confession for any effect it might have had to be dissipated by the interval.[53]

8.3.3. *Confessions to a peace officer*

In terms of the second proviso to section 244(1), confessions made to a peace officer, other than a magistrate or justice of the peace, are inadmissible unless confirmed and reduced to writing in the presence of a magistrate or justice. A confession made to a magistrate or justice does not fall within the purview of the proviso and is simply admissible[54] (provided of course that the first proviso is satisfied); and the same applies where the confession is made to a peace officer who is at the same time a magistrate or justice,[55] even where the peace officer of

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[45] *R.* v. *Kuzwayo*, 1949 (3) S.A. 761 (A.D.); *R.* v. *Sibanda*, 1964 (4) S.A. 252 (S.R.).

[46] *R.* v. *Nchabeleng*, 1941 A.D. 502 at 505; *R.* v. *Holtzhausen*, 1947 (1) S.A. 567 (A.D.); *S.* v. *Letsoko*, 1964 (4) S.A. 768 (A.D.); *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.).

[47] e.g. *R.* v. *Kleinbooi*, 1917 T.P.D. 86; *R.* v. *Worthmann*, 1940 N.P.D. 540. In *R.* v. *Eward*, 1907 (1) P.H., H. 42 (R), one hour's interrogation was said to raise a prima facie case that the confession had been coerced.

[48] *R.* v. *Dhlamini*, 1952 (2) S.A. 693 (T); *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.). See, too, *R.* v. *Ananias*, 1963 (3) S.A. 486 (S.R.). As to illegally obtained evidence in general, see above, p. 000.

[49] e.g. *White* v. *R.*, 1944 N.P.D. 189; *R.* v. *Dhlamini*, 1952 (2) S.A. 693 (T) (inadmissible); *S.* v. *Hlekani*, 1964 (4) S.A. 429 (E) (criticized in *Annual Survey of South African Law*, 1964, pp. 408–9) (admissible). The point was left open by the Appellate Division in *R.* v. *Molloa*, 1956 (4) S.A. 824 (A.D.), and *S.* v. *Alexander* (1), 1965 (2) S.A. 796 (A.D.). See, too, *R.* v. *Carson*, 1926 A.D. 419.

[50] *R.* v. *Kleinbooi*, 1917 T.P.D. 86; *R.* v. *Jonas*, 1928 T.P.D. 520 at 524; *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.) at 327.

[51] *R.* v. *Mkwena*, 1939 T.P.D. 152; *R.* v. *Circle*, 1939 E.D.L. 257. *Aliter*, apparently, if the oath was taken voluntarily: *R.* v. *Van As*, 1941 A.D. 361; (1911) 28 *S.A.L.J.* 352.

[52] e.g. *S.* v. *Mkwanazi*, 1966 (1) S.A. 736 (A.D.) at 746; cf. *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.).

[53] e.g. *R.* v. *Mulke*, 1932 W.L.D. 16; *R.* v. *Sungayi*, 1964 (3) S.A. 761 (S.R., A.D.); *Sparks* v. *R.* [1964] A.C. 964 (P.C.) at 988–9.

[54] *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.).

[55] *Ex parte Minister of Justice*, 1920 A.D. 304.

such rank is himself the investigating officer[56] or, it seems, the complainant.[57]

Section 1(xiii) of the Code consists in a lengthy enumeration of who is a 'peace officer'. The enumeration is an exhaustive definition, and persons not specifically covered by one of the categories mentioned are not treated as peace officers by analogy.[58] The onus of proving that someone is a peace officer for the purposes of the Act falls on the party so alleging,[59] although it is the prosecution which must prove beyond a reasonable doubt that the confession was not *made to* a peace officer.[60] The following have been held not to fall within the definition as restrictively applied: a person holding an *ad hoc* appointment to discharge police functions in reference only to a particular case;[61] a mine compound manager or police boy, or other persons appointed by private bodies to the functions of disciplining persons or controlling property;[62] a subheadman,[63] induna or chief's deputy;[64] and inspectors under the Wheat Industry Control Board.[65] The definition of 'peace officer' has been held to cover the warder of a convict station,[66] the superintendent of a municipal location,[67] and a pass officer for a rural area.[68] In *R.* v. *Deitch*[69] the Appellate Division assumed, without deciding, that a traffic officer was a peace officer.

A confession to a peace officer remains inadmissible even when in writing,[70] as, for example, when contained in a letter addressed to him[71] or a document which to the accused's knowledge is ordinarily intended for his eyes.[72] The writing need not have been made in the presence of the peace officer.[73]

Whether or not a confession was *made to* a peace officer is a question of fact.[74] That it was ostensibly addressed to a third person also in the company of the accused and the peace officer is not conclusive, if the court finds it was in truth directed to the peace officer.[75] On the other hand, the fact that the accused made a confession in the presence of the peace officer does not necessarily lead to the inference that it was addressed to him.[76] A peace officer should not attempt to

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[56] *R.* v. *Selebano*, 1957 (1) S.A. 384 (O).
[57] *R.* v. *Muzani*, 1962 (1) P.H., H. 31 (S.R.).
[58] *R.* v. *Debele*, 1956 (4) S.A. 570 (A.D.).
[59] *R.* v. *Debele*, 1956 (4) S.A. 570 (A.D.) at 577; *R.* v. *Tshetaundzi*, 1960 (4) S.A. 569 (A.D.). Presumably where it is the accused who so contends, the burden may be discharged upon a preponderance of probabilities (cf. *Ex parte Minister of Justice: In re R.* v. *Bolon*, 1948 A.D. 345).
[60] *R.* v. *Du Toit*, 1947 (1) S.A. 184 (O); *S.* v *Lotter*, 1964 (1) S.A. 229 (O). See, also, *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.) at 323A.
[61] *R.* v. *Tshetaundzi*, 1960 (4) S.A. 569 (A.D.). See, too, *R.* v. *Magapa*, 1954 (1) P.H., H. 117 (A.D.).
[62] *R.* v. *Manakale*, 1932 W.L.D. 180; *Dhlamini* v. *R.*, 1945 N.P.D. 50; *R.* v. *Adams*, 1946 C.P.D. 288; *R.* v. *Debele*, 1956 (4) S.A. 570 (A.D.).
[63] *R.* v. *Zireni*, 1918 E.D.L. 250.
[64] *R.* v. *Msomi*, 1957 (1) S.A. 206 (A.D.). As to the 'special appointment' of an acting chief, see *R.* v. *Yolelo*, 1918 E.D.L. 136; *R.* v. *Mzobe* (1930) 15 P.H., H. 33 (N), and *R.* v. *Manakele*, 1932 W.L.D. 180.
[65] *R.* v. *Dhlamini*, 1952 (2) S.A. 693 (T).
[66] *R.* v. *Mhlongo*, 1918 G.W.L. 5.
[67] *R.* v. *Montso*, 1934 O.P.D. 31.
[68] *R.* v. *Hamuhadimba*, 1959 (3) S.A. 711 (S.W.A.).
[69] 1939 A.D. 178 at 186.
[70] *R.* v. *Pienaar*, 1918 T.P.D. 288; *S.* v. *Ranthlanko*, 1965 (3) S.A. 814 (O).
[71] *S.* v. *Lotter*, 1964 (1) S.A. 229 (O). Cf. *R.* v. *Blyth*, 1940 A.D. 355, where, as the letter was addressed to a peace officer who was also a justice, it was admitted.
[72] *R.* v. *Burgess*, 1947 (1) S.A. 560 (D).
[73] *S.* v. *Lotter*, 1964 (1) S.A. 229 (O).
[74] *R.* v. *Kgadiete*, 1922 T.P.D. 121; *R.* v. *Tshetaundzi*, 1960 (4) S.A. 569 (A.D.).
[75] *R.* v. *Kgadiete*, 1922 T.P.D. 121; *R.* v. *Du Preez*, 1935 E.D.L. 10; *R.* v. *Du Toit*, 1947 (1) S.A. 184 (O).
[76] *R.* v. *Young*, 1949 (3) S.A. 1169 (E); *R.* v. *De Souza*, 1955 (1) S.A. 32 (T).

evade the provisions of the Act by taking the accused to confess to some other person, e.g. to the complainant.[77] A third party who heard the confession being made to the peace officer cannot testify to it any more than could the peace officer himself.[78]

A confession to a peace officer becomes admissible if confirmed and reduced to writing[79] before a magistrate or justice. Where this is done, it must of course be proved that the confession was freely and voluntarily made and that the first proviso to section 244(1) is otherwise satisfied, as discussed above; it need not be shown that the original confession to the peace officer also complied with the first proviso.[80]

The purpose of the second proviso, as De Wet C.J. pointed out in *R.* v. *Gumede*,[81] is the protection of accused persons, but doubts have frequently been expressed as to whether this purpose is not defeated in practice by the letter of the law rather than its spirit being observed. The intention was that where an accused person manifests a confessing state of mind, he should be brought before an impartial and independent official who would inquire into the possible existence of antecedent inducements which led up to the formation of that state of mind. What has tended to happen instead is that the confirmation of the accused's confession before a magistrate has had the effect of dropping a veil between the treatment of the accused by his custodians and his resulting confession,[82] which 'gives an aura of respectability and admissibility to a statement which might be suspect in regard to its being motivated by previous events'.[83] As a result of such doubts, departmental instructions have been issued for the guidance of magistrates as to the inquiries they should make of accused persons who come before them to confess. These instructions, like the Judges' Rules, do not have the force of law,[84] though the magistrate's failure to observe them is relevant to whether or not the confession made to him was free and voluntary.[85] Nor have they allayed all suspicion, since the wording of the questions they contain have been judicially criticized as over-formal and the manner of their administration has in many cases been disturbingly perfunctory;[86] but the Appellate Division has indicated that the prosecution should specifically lead evidence of the magistrate's inquiries having been meticulously made.[87] Confusion remains, however, since in the same breath it is said that the magistrate, while not permitting himself to become a mere amanuensis, is not

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[77] *R.* v. *De Waal*, 1958 (2) S.A. 109 (G.W.).
[78] *R.* v. *Xgadiete*, 1922 T.P.D. 121.
[79] It is not sufficient if the confession is only partially reduced to writing: *R.* v. *Balfour*, 1918 C.P.D. 386. As to how far the accused may be questioned while he is making the confession, see *R.* v. *Afrika*, 1949 (3) S.A. 627 (O), where Brink J. said that the magistrate should confine himself to such matters as clearing up ambiguities, and must avoid leading questions. The whole of the statement the accused wishes to make must be taken down, unedited, by the magistrate (*R.* v. *Ndoyana*, 1958 (2) S.A. 562 (E)), and preferably in the *ipsissima verba* of the accused (*R.* v. *Hewitt*, 1938 C.P.D. 484; *S.* v. *Cele*, 1965 (1) S.A. 82 (A.D.) at 97; R. v. Tsoane, 1970 (1) S.A. 186 (A.D.)).
[80] *R.* v. *Jacobs*, 1954 (2) S.A. 320 (A.D.) at 322; *S.* v. *Radebe*, 1968 (4) S.A. 410 (A.D.) at 416 f.
[81] 1942 A.D. 398 at 400.
[82] See *R.* v. *Gumede*, 1942 A.D. 398, especially the judgment of Feetham J.A. at 433.
[83] Per Harcourt J. in *S.* v. *Majozi*, 1964 (1) S.A. 68 (N) at 71.
[84] *R.* v. *Mtabela*, 1958 (1) S.A. 264 (A.D.); *R.* v. *Van Jaarsveld*, 1958 (1) P.H., H. 25 (O).
[85] *S.* v. *Radebe*, 1968 (4) S.A. 410 (A.D.) at 419.
[86] *R.* v. *Zwane*, 1950 (3) S.A. 717 (O); *R.* v. *Ndoyana*, 1958 (2) S.A. 562 (E); *R.* v. *Ngobese*, 1961 (4) S.A. 98 (D).
[87] *R.* v. *Mtabela*, 1958 (1) S.A. 264 (A.D.) at 268.

obliged to investigate the treatment of the accused by the police[88] unless the accused can persuade him he has cause for complaint, in which case it would be his duty to advise the accused to refrain from making any statement.[89]

The rulings that this second proviso is sufficiently complied with even where the justice before whom the confession is confirmed is himself the investigating policeman *or is a member of the same police unit*[90] or where the confirmation takes place in the presence of the police[91] would also seem to contradict the object of the section. Although further safeguards have been suggested by the courts, notably by Colman J. in *S.* v. *Mofokeng*[92] where he recommended that the magistrate should be empowered to have the accused removed if necessary from access by those of his custodians against whom he is in need of protection, it is submitted that what is really required is a drastic amendment of the statute.

The second proviso of section 244(1) not only seems lamentably to have failed to protect accused persons against undue pressures to confess. It has at the same time been just as strongly criticized because its requirement of a technical procedure often leads to the exclusion of evidence which is clearly highly relevant and possibly highly reliable.[93] The solution to the criticisms from both sides would be either the complete abolition of the requirement and a return to the common-law (or first proviso) position where the inquiry is purely whether the confession to whomever made, was freely and voluntarily forthcoming without having been induced by any undue influence, or alternatively a tightening up of the provision, so that, as in India, no confession made to a police officer is admissible at all, or only, as in Roman-Dutch law and today in Tanganyika and Zanzibar, if made in the immediate presence of a magistrate.[94]

8.3.4. *Confessions at a preparatory examination*

Where a confession is made by the accused at a preparatory examination, it is, in terms of the third proviso to section 244(1), inadmissible unless he was first *cautioned by the presiding magistrate* that he is not obliged to say anything in answer to the charge against him but that what he does say may be used in evidence against him. The caution need only have been given before a statement made at the invitation of the magistrate under section 66(1); it is not necessary for the admissibility of other confessory statements made by the accused spontaneously at the preparatory examination.[95]

Even where the magistrate has given the required caution, it is still possible

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[88] *R.* v. *Mtabela*, 1958 (1) S.A. 264 (A.D.) at 268, approving *R.* v. *Hector*, 1954 (2) S.A. 138 (C).

[89] *S.* v. *Cele*, 1966 (1) P.H., H. 97 (D).

[90] *S.* v. *Mahlala*, 1967 (2) S.A. 401 (W); *S.* v. *Mofokeng*, 1968 (4) S.A. 852 (W). A preferable decision is *R.* v. *Williams*, 1927 C.P.D. 221, where Gardner J.P. held that the magistrate or *justice is here performing a judicial* function and if his impartiality cannot be apparent he should excuse himself. See, too, (1952) 42 *S.A.L.J.* 43.

[91] *S.* v. *Radebe*, 1968 (4) S.A. 410 (A.D.) at 415.

[92] 1968 (4) S.A. 852 (W). See, also, *R.* v. *Ndoyana*, 1958 (2) S.A. 562 (E).

[93] These criticisms are voiced in *R.* v. *Van Veren*, 1918 T.P.D. 218; *R.* v. *Surmon*, 1927 E.D.L. 224; *R.* v. *Du Preez*, 1935 E.D.L. 10; *S.* v. *Lotter*, 1964 (1) S.A. 229 (O); and in (1952) 69 *S.A.L.J.* 426.

[94] See (1914) 31 *S.A.L.J.* 416, where Van der Linden is quoted; H. F. Morris, *Evidence in East Africa* (1968), pp. 71 ff.; 'Developments in the Law of Confessions' (1966) 79 *Harvard L.R.* 935 at 1106 ff.

[95] *R.* v. *Ngubane*, 1934 A.D. 215; *R.* v. *Mpako*, 1942 E.D.L. 153; *R.* v. *Mtembu*, 1949 (3) S.A. 137 (O); *R.* v. *Schoeman*, 1959 (2) P.H., H. 314 (E). See, too, *R.* v. *Makwambere*, 1962 (4) S.A. 66 (F.C.); *R.* v. *William*, 1968 (1) S.A. 421 (R).

that the confession can be found not to have been made without undue influence, freely and voluntarily, as required by the first proviso.[96]

9. Facts discovered from Accused's Statements or Pointings-out

Evidence may be given both of facts discovered as a result of information given by the accused, and of the fact that the information was imparted by him or the place or thing pointed out by him.[97] It need not be shown that before he did so the information or the connection of the place with the crime was not known.[98] In terms of section 245 of the Criminal Code, the admissibility of such evidence is unimpaired even if the information or indications were given as part of an inadmissible admission or confession by the accused, and whatever the means, even apparently in spite of violence or cruelty, by which he was induced to act.[99] The courts retain, of course, their common-law discretion to exclude evidence which is technically admissible,[1] but the South African cases have thus far furnished no indication of what grounds would induce the courts so to act. The Privy Council in *King* v. *R.*[2] considered that the position of the accused, the gravity and type of offence, and the kind of investigation appropriately undertaken by the police, as relevant factors to be evaluated when the exercise of the discretion to exclude is contemplated.

Where evidence of the pointing out is received under section 245, no portion of the inadmissible statement accompanying it can be proved.[3] The purpose of permitting evidence that it was the accused who did the pointing out is, of course, to link him with the crime by proving his knowledge, but whether the inference of knowledge can be drawn from his pointing out alone depends upon the circumstances of the case. It may indeed support no inference at all, but in itself be completely neutral and irrelevant. For example, in *S.* v. *Mtombeni*[4] while evidence could be given that the accused pointed out a bed and a hole in a building, it took the case no further if his concurrent statements to the effect 'That is the bed upon which I stood', 'That is the hole I climbed through' were, as they had to be, excluded.

Even if the inference of knowledge can be drawn it is not conclusive of the accused's guilt.[5] It must still be clear beyond a reasonable doubt that his knowledge could not reasonably have come to him in any way other than by his own complicity in the crime.[6]

Although the methods of extraction of the pointing out do not affect its admissibility, they may have other relevance. For example, in *S.* v. *Cele*[7] the issue of whether the police had assaulted the accused was held to be relevant to

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[96] *R.* v. *Pavo*, 1910 E.D.C. 388; *S.* v. *Maharaj*, 1969 (1) P.H., H. 123 (D).
[97] Sec. 245 of the Criminal Procedure Act.
[98] *R.* v. *Tebetha*, 1959 (2) S.A. 337 (A.D.) at 346; *Miya* v. *S.*, 1962 (1) P.H., H. 80 (N).
[99] *R.* v. *Sambando*, 1943 A.D. 609 (overruling *R.* v. *Camane*, 1925 A.D. 570); *S.* v. *Ismail*(1), 1965 (1) S.A. 446 (N). But see *R.* v. *Nhleko*, 1960 (4) S.A. 712 (A.D.).
[1] *Kuruma* v. *R.* [1955] A.C. 197 (P.C.) at 204; *Callis* v. *Gunn* [1964] 1 Q.B. 495 at 500–1; *R.* v. *Mayo*, 1967 (4) S.A. 613 (R); *King* v. *R.* [1968] 3 W.L.R. 391 (P.C.). See, generally, (1968) 85 *S.A.L.J.* 246.
[2] [1968] 3 W.L.R. 391 (P.C.) at 400.
[3] *R.* v. *Nhleko*, 1960 (4) S.A. 712 (A.D.) at 721.
[4] 1965 (2) P.H., H. 112 (O). See, too, *R.* v. *Afrika*, 1949 (3) S.A. 627 (O).
[5] *Davidson* v. *R.*, 1960 (1) P.H., H. 109 (A.D.).
[6] See *S.* v. *Gweyu*, 1961 (4) S.A. 536 (N); *S.* v. *Ziane*, 1963 (4) S.A. 326 (T); *S.* v. *Ismail* (2), 1965 (1) S.A. 452 (N).
[7] 1965 (1) S.A. 82 (A.D.) at 90–2. Cf. *S.* v. *Lebone*, 1965 (2) S.A. 837 (A.D.).

the credibility of his story that violence had been used on him and that he had not pointed out anything.

IV. OPINION AND BELIEF

1. General Opinion and Repute

Evidence of what is the public opinion as to particular facts, is admissible to prove the existence or non-existence of those facts only in the following cases:

(*a*) to establish the character or reputation of individuals, discussed above under Character of the Accused, p. [illegible], and under Cross-examination as to Credit, p. [illegible];

(*b*) to prove or disprove the existence of a public right, as an exception to the rule against Hearsay. See above, p. [illegible];

(*c*) reputation as part of a family tradition to establish matters of pedigree, also as an exception to the rule against Hearsay. See p. [illegible], above. In addition, a special and limited statutory provision allows proof of reputed relationship to be given in charges of incest. See section 271(1) of the Criminal Procedure Act;

(*d*) where neither direct evidence nor documentary evidence is available to establish a marriage between a man and a woman, evidence of their cohabitation and of their having been generally regarded as a married couple is admitted in civil cases, and may be sufficient to prove their marriage.[8] There do not appear to have been any criminal cases in South Africa concerning evidence of cohabitation and repute, other than *McIntyre* v. *R.*[9] where strong doubts as to its applicability in criminal law were expressed. Even if it does apply, however, quite clearly it is not even prima facie proof of marriage if either one of the parties went through a marriage ceremony with another, whether before[10] or after[11] commencing the cohabitation with the reputed spouse; or if the association between the reputed spouses could not have been a civil union but, for example, merely a potentially polygamous union.[12]

2. Opinion Evidence

In general a witness's testimony may not include statements of belief upon the matters in dispute. To make findings of fact and to draw inferences from those facts in coming to a conclusion is the task of the tribunal itself, and it would be superfluous and time-wasting for it to hear a witness's views on such matters as the guilt or innocence of the accused[13] or the sentence he deserves.[14] A witness's opinion as to the law applicable to the case is also irrelevant.[15] (Foreign law is regarded as a question of fact. As to proof of foreign law, see above, p. [illegible].)

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[8] *Warren* v. *Warren*, 1909 T.H. 304; *Fitzgerald* v. *Green*, 1911 E.D.L. 432; *Ochberg* v. *Ochberg's Estate*, 1941 C.P.D. 15 at 33.

[9] 1904 T.S. 804.

[10] *Ismail* v. *Registrar of Asiatics*, 1911 T.P.D. 1180; *Ex parte L.*, 1947 (3) S.A. 50 (C).

[11] *McIntyre* v. *R.*, 1904 T.S. 804 at 818; *S.* v. *Haasbroek*, 1969 (2) S.A. 624 (A.D.) at 630–1.

[12] *Ex parte Soobiah: In re Estate Pillay*, 1948 (1) S.A. 873 (N).

[13] *R.* v. *Jakhalr* (1883) 3 E.D.C. 224; *R.* v. *Van Tonder*, 1929 T.P.D. 365; *R.* v. *David*, 1962 (3) S.A. 305 (S.R.).

[14] *R.* v. *Bloem* (1884) 2 H.C.G. 432.

[15] *R.* v. *Nocanda*, 1944 E.D.L. 250; *Ngewabe* v. *S.*, 1966 (2) P.H., H. 445 (E); *S.* v. *Pedro*, 1969 (1) S.A. 600 (C).

Although a witness's function is to speak to facts, there is of course no determinable line between statements of fact and statements of opinion.[16] The rule against opinion evidence has its main effect on the form of examination, since the more a question is designed to elicit the most detailed and specific answer the witness can give, the less likely is that answer to infringe the rule.[17] While it is often said that a witness may not express his opinions on the very question the court has to decide,[18] this would seem to mean in effect no more than that the witness's opinion is in the circumstances of the case irrelevant.[19] The formulation is a misleading one, since it often seems that a question objected to can, by simply a change in its wording, yet on rephrasing be directed towards eliciting the very same thing from the witness.[20]

The rule against opinion evidence does not apply where the witness's opinion could tell the court more than it could itself deduce unassisted. This situation can arise with either a lay witness or an expert witness.

2.1. *Lay opinion*

It is frequently impossible or unhelpful to distinguish between a statement of fact and an inference drawn from observation. For example, for a witness to state his own act of recognition in identifying a person may be of more meaningful assistance to the tribunal than a lengthy and detailed catalogue of each feature he observed, even could the witness's memory yield such a list. In the same way he may identify objects or substances,[21] state that a person was distressed, afraid, angry, etc., or that a car was driven very fast.[22]

What is necessary here is that the witness's opinion must be shown to be based on his own observations, and that these observations are more conventionally and comprehensibly communicated to the court in opinion form. Thus where the accused is charged with having been in unlawful possession of a drug or intoxicant, the statement in evidence of a State witness identifying the substance is admissible and the results of a chemical analysis of the substance need not invariably be proved.[23] It should be proved that the witness could recognize the substance by virtue of his past experience of it,[24] how he did so, by its taste or smell, for example,[25] since a bald statement identifying the substance would not of course be more than prima facie proof, and the court might require further evidence before being persuaded.[26] However, the facts on which the observation was based need not be stated in advance as a prerequisite of admissibility but can be left to be elicited in cross-examination.[27] The same

[16] e.g. *R.* v. *Ndhlovu*, 1954 (4) S.A. 482 (N).
[17] Charles T. McCormick, *Handbook of the Law of Evidence* (1954), pp. 22 ff.
[18] *North Cheshire & Manchester Brewery Co., Ltd.* v. *Manchester Brewery Co., Ltd.* [1899] A.C. 83 (H.L.) at 85; *S.* v. *Gouws*, 1967 (4) S.A. 527 (E).
[19] *Ruto Flour Mills, Ltd.* v. *Adelson* (1), 1958 (4) S.A. 235 (T) at 237; *S.* v. *Insight Publications (Pty.) Ltd.*, 1965 (2) S.A. 775 (C).
[20] e.g. *Rich* v. *Pierpont* (1862) 3 F. & F. 35, 176 E.R. 16; *Ismail* v. *R.*, 1932 N.L.R. 609; *S.* v. *Gouws*, 1967 (4) S.A. 527 (E); *D.P.P.* v. *A. & B.C. Chewing Gum, Ltd.* [1967] 3 W.L.R. 493.
[21] *S.* v. *Kunene*, 1963 (1) S.A. 62 (T).
[22] *R.* v. *Van der Westhuizen*, 1929 C.P.D. 484; *R.* v. *Frankel*, 1940 T.P.D. 159.
[23] *R.* v. *Cele*, 1943 A.D. 123; *S.* v. *Haasbroek*, 1969 (2) S.A. 624 (A.D.).
[24] *R.* v. *Potolo*, 1940 O.P.D. 280; *R.* v. *Khotatso*, 1946 O.P.D. 269; *R.* v. *Radebe*, 1960 (4) S.A. 131 (T).
[25] *R.* v. *Ntholeng*, 1952 (3) S.A. 396 (O); *S.* v. *Bareeling*, 1969 (4) S.A. 208 (N).
[26] *R.* v. *Modesa*, 1948 (1) S.A. 1157 (T); *S.* v. *Ngwanya*, 1962 (3) S.A. 690 (T).
[27] *R.* v. *Vilbro*, 1957 (3) S.A. 223 (A.D.). The prosecution may find it safer to lead this evidence in advance as a precaution against inadequate cross-examination, to ensure that its

principles have been applied to allow a lay witness to state his opinion that a particular person was intoxicated[28] or belongs to a particular racial group.[29]

2.2. *Expert opinion*

An expert witness is one who possesses some special skill, knowledge or experience in a relevant field by which he is better equipped than the court to draw inferences as to the existence and significance of any facts. There can be no fixed list of technical and scientific matters where expert evidence will always be admissible, since each court will have to decide whether in the circumstances of the particular case assistance is needed from a witness with greater skills than it possesses itself.[30] The application of this test is a matter of degree and will vary in the discretion of different judicial officers. This is illustrated by the case of *Publications Control Board* v. *William Heinemann, Ltd.*,[31] where the majority of the Appellate Division considered themselves fully able to determine without assistance whether a publication would have a tendency to corrupt and deprave its readers,[32] while the dissenting minority of the judges of appeal felt the need for guidance as to how and why the publication might or might not do so.[33]

If the court decides that expert assistance will be useful to it, the witness tendered as an expert must be proved to be appropriately skilled. The burden of proof is on the party tendering the witness and, like all preliminary matters of fact and competency, is for the decision of the judge alone.[34] Section 239 of the Criminal Procedure Act, 1955, provides for expert evidence to be given by affidavit, in which case it is necessary for the expert, in addition to stating his qualifications, also to depose that he is in the service of one of the particular institutions named.[35] Where the expert attends personally, on the other hand, there need only be evidence as to the extent of his training and experience. (As to proving the competence of an expert in foreign law, see above, p. ***.) His special knowledge must not have been acquired expressly for the purpose of his testimony at the trial.[36] A formal course of study is not always a necessary qualification, unless appropriate, so that, for example, an experienced stock farmer may give expert evidence as to the value of cattle.[37] Conversely, however,

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onus of proof is discharged. See Charles T. McCormick, *Handbook of The Law of Evidence* (1954), pp. 29–30.

[28] *R.* v. *Bronson*, 1949 (2) S.A. 819 (T); *R.* v. *Seaward*, 1950 (2) S.A. 704 (N); *S.* v. *Mhetoa*, 1968 (2) S.A. 773 (O); *R.* v. *Wood*, 1969 (4) S.A. 188 (R.A.D.); *S.* v. [illegible], 1970 (1) S.A. 225 (A).

[29] *R.* v. *Vilbro*, 1957 (3) S.A. 223 (A.D.); *S.* v. *Wyngaard*, 1966 (2) S.A. 372 (C).

[30] As to the evidence of an accountant in interpreting books, compare *R.* v. *Berholdt*, 1956 (2) S.A. 714 (W), and *Ruto Flour Mills, Ltd.* v. *Adelson* (1), 1958 (4) S.A. 235 (T). As to the extent of injuries in assault cases, compare *R.* v. *Van Schalkwyk*, 1948 (2) S.A. 1000 (O), and *R.* v. *Nqanjelwa*, 1960 (2) S.A. 178 (S.R.). See, too, *R.* v. *Bates*, 1927 E.D.L. 453; *R.* v. *Boesigo*, 1956 (1) S.A. 234 (A.D.) at 237; *S.* v. *Insight Publications (Pty.) Ltd.*, 1965 (2) S.A. 775 (C); *D.P.P.* v. *A. & B.C. Chewing Gum, Ltd.* [1967] 3 W.L.R. esp. at 497.

[31] 1965 (4) S.A. 137 (A.D.).

[32] At 147 f., per Steyn C.J.

[33] Per Rumpff J.A. at 157, and Williamson J.A. at 165. And see Prof. Ellison Kahn in *Annual Survey of South African Law*, 1965, p. 44.

[34] See above under Competency, chap. 18, and Charles T. McCormick, *Handbook of the Law of Evidence* (1954), pp. 149–50.

[35] Further on this section, see above, p. 800.3 *q*

[36] *Rowe* v. *Assistant Magistrate, Pretoria*, 1925 T.P.D. 361; *Van Heerden* v. *S.A. Pulp and Paper Industries, Ltd.*, 1954 (2) P.H., J. 14 (W). Distinguish *R.* v. *Maysud Ali* [1965] W.L.R. 229 (C.C.A.).

[37] *Van Graan* v. *Naude*, 1966 (1) P.H., J. 17 (O); *Bandcrete City View Investments (Pty.) Ltd.*, 1969 (1) S.A. 134 (N); *S.* v. *Sabotker*, 1976 (1) S.A. 216 (T).

purely theoretical knowledge of a field of knowledge, without experience in it, would not normally suffice,[38] though the witness need not be shown to use the skill professionally.[39] In *S. v. Limekaya*[40] the unusual course was adopted of proving an experiment which demonstrated the witness's remarkable skill in identifying footprints.

The witness may only give evidence as an expert in fields in which his competence is established, so that a physician cannot be asked about the shape and type of bullets which caused a wound unless he is also an expert in ballistics,[41] and land surveyors are not regarded as experts in interpreting the relative position of ships from photographs taken at sea.[42] On the other hand, as the data contained within a field may be of enormous scope and variety, it is recognized that no single individual could from personal observation have tested the principles upon which he relies every day as working truths. He is not required to possess proved statistical skills before relying upon [illegible]s and data which are part of the current and accepted knowledge within his [illegible]d, as long as he has the training and experience to ascertain and evaluate the proper sources of information.[43]

He may in the course of his testimony refer to learned books and articles, and incorporate portions into his testimony. Such books and journals do not become evidence in themselves except in so far as they have been put to and assented to by the expert witness. It is improper and irregular for the court to rely upon other portions of the publications or upon other publications,[44] nor may these be referred to by counsel in argument.[45] The opponent or the court may put to the witness for comment portions of the publications, or other publications, which appear to contradict the witness's opinion, but unless he (or another expert witness) adopts those portions they may not be used to discredit or to bolster up his testimony.

The expert's opinion may be based upon facts which he himself has observed or upon facts observed and testified to by others.[46] If he did not himself observe the facts, they must be put to him as assumptions in the form of hypothetical questions. Facts should not be put to the witness in this way which are not going to be proved during the case, or which have clearly been disproved. There is some danger in hypothetical questions in that they may elicit a slanted opinion, because of the partisan selection of data. It may also be unclear to the tribunal precisely which facts the witness is being asked to assume as correct, a precision necessary because, of course, if the evidence of the facts is ultimately disbelieved the opinion founded upon them must also be rejected.[47]

Where the expert has himself made the observations upon which his opinion

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[38] *Rowe* v. *Assistant Magistrate, Pretoria*, 1925 T.P.D. 361; *Von Heerden* v. *S.A. Pulp and Paper Industries, Ltd.*, 1945 (2) P.H., J. 14 (W).
[39] *R.* v. *Silverlock* [1894] 2 Q.B. 766.
[40] 1969 (1) S.A. 540 (E).
[41] *Barrie* v. *R.*, 1959 (1) P.H., H. 22 (O).
[42] *United States Shipping Board* v. *The 'St. Albans'* [1931] A.C. 632 (P.C.).
[43] *S.* v. *Kimimbi*, 1963 (3) S.A. 250 (C); *R.* v. *Samers* [1963] 3 All E.R. 808 (C.C.A.).
[44] *R.* v. *Mofokeng*, 1928 A.D. 132; *Nepgen N.O.* v. *Van Dyk N.O.*, 1940 E.D.L. 123; *R.* v. *Barson*, 1946 C.P.D. 479.
[45] *Darby* v. *Ouseley* (1856) 1 H. & N. 1 at 12, 156 E.R. 1093 at 1098.
[46] *M'Naghten's* case (1843) 10 Cl. & Fin. 200, 8 E.R. 718 (H.L.); *R.* v. *Mason* (1911) 7 Cr. App. Rep. 67; *R.* v. *Van der Westhuizen*, 1929 C.P.D. 484 at 486.
[47] See, generally, *Wigmore on Evidence*, 3rd ed. (1940), II, §§ 678 ff.; Charles T. McCormick, *Handbook of the Law of Evidence* (1954), pp. 30 ff. Also S. v. Ndley, 1970 (2) S.A. 223 (N), at 225-6.

is based—indeed, his special skill may lie precisely in his trained ability to make observations—the opinion of the expert is evidence in itself.[48] This does not mean that the court is entitled to substitute the witness's opinion for its own without independent investigation. The expert must give the reasons for his opinion, and must explain these as fully as possible, so that the court can make up its own mind. The extent to which it may be guided by the expert's opinion depends partly upon the expert's degree of skill,[49] partly upon the extent to which his evidence is tested in cross-examination or corroborated by other evidence;[50] but the most important factor is the precision and certainty of which the particular branch of knowledge is capable. Some fields, such as that of fingerprint identification, have long been recognized as capable of yielding results upon which the court may safely rely. In these cases, although the court should attempt to see for itself the alleged similarities or differences upon which the fingerprint expert's conclusion is based, even if it is not able to do so his evidence may still be accepted. The judge here really decides whether he can safely accept the expert's opinion,[51] and in such cases it is desirable for him, if he rejects it, to indicate clearly in his judgment his reasons for so doing.[52]

In other less developed or less recognized fields of knowledge, such as handwriting evidence or identification of toolmarks, the court is less likely to be guided by the expert evidence unless it can itself perceive the similarities or differences upon which he founds his opinion, or there is corroboration *aliunde* of his opinion. Even where these fields of knowledge are concerned, however, there is no fixed principle that a court cannot rely upon expert knowledge alone.[53] It is purely a question of the weight of the evidence. The law recognizes, too, that fields of knowledge change and grow, and that techniques may be improved or validated. The invention of the microscope has, for instance, advanced the skill of the handwriting expert;[54] and footprint evidence, once regarded with caution if not suspicion,[55] has now begun to reach almost the same level of instant acceptability as fingerprint evidence.[56]

Expert evidence has frequently been said to be of little weight. The adversary method of obtaining an expert witness is the principal cause of this judicial scepticism,[57] but it is also partly attributable to the fact that courts may deal in standards which do not accord with scientific criteria to which an expert is accustomed,[58] and to the lawyer's expectation of an absolute certainty which may be alien to a scientific training.[59] It is discernible, however, that the courts of law are not entirely immune from the growing prestige of science in modern

[48] *R.* v. *Smit*, 1952 (3) S.A. 447 (A.D.).
[49] *Saheb* v. *R.*, 1960 (1) P.H., H. 119 (N).
[50] See, e.g., *R.* v. *Stevenson*, 1934 E.D.L. 43; *R.* v. *Molahloe*, 1940 O.P.D. 235.
[51] *R.* v. *Morela*, 1947 (3) S.A. 147 (A.D.); *S.* v. *Nala*, 1965 (4) S.A. 360 (A.D.).
[52] *Estate Marks* v. *Pretoria City Council*, 1969 (3) S.A. 227 (A.D.) esp. at 253.
[53] *Amama* v. *Chetty*, 1946 A.D. 142; *R.* v. *Nyamayaro*, 1967 (4) S.A. 263 (R.A.D.).
[54] Per Greenberg J.A. in *Amama* v. *Chetty*, 1946 A.D. 142 at 156. And see *Naicker* v. *S.*, 1969 (2) P.H., H. 182 (N).
[55] e.g. *R.* v. *Mfanto*, [illegible] E.D.L. 280; *R.* v. *Deball*, 1951 (1) S.A. 421 (T).
[56] *S.* v. *Linekayo*, 1969 (1) S.A. 540 (E).
[57] *The Tracy Peerage* (1843) 10 Cl. & F. 154 at 191, 8 E.R. 700 (H.L.) at 715; *Thorn* v. *Worthing Skating Rink Company* (1876) L.R. 6 Ch. D. 415.
[58] e.g. *R.* v. *Zulch*, 1937 T.P.D. 400 at 402.
[59] An extreme example is *R.* v. *Viljoen*, 1946 (2) P.H., H. 268 (C), where Sutton J.P. stated that the evidence of an experienced policeman as to whether the accused was drunk was more valuable than that of physicians 'who often have doubts and difficulties and will not express a definite opinion'.

society.[80] Particular difficulty is still caused by a clash between the experts called on each side, where the task of the court is to give its lay verdict as to which expert is to be believed, and if humanly possible it must try to avoid making its decision merely according to the preponderance in number, qualifications or length of experience of the experts involved.[81] If it can make no decision, being unpersuaded by the experts of either side, the onus of proof governs: the party bearing the onus of proof has failed to discharge it and must lose on that issue.[82]

V. JUDGMENTS AS EVIDENCE

A decision on fact given by another court in other proceedings cannot be used to establish the same fact in later proceedings.[83] The rule applies whether the earlier decision was given in a civil or in a criminal trial.[84] In *R. v. Lechudi*[85] a civil order of ejectment granted against the accused at the instance of the owner of the property was held inadmissible to prove that the accused was a trespasser, and in *R. v. Lee*,[86] where the accused was charged with receiving stolen property, the fact that the property had been stolen could not, it was held, be established by proving that the accused's accomplice had been convicted of the theft.

The inadmissibility of judgments as evidence is said to be founded both on the opinion rule and the rule against hearsay, and even apart from these considerations the maxim *omnia praesumuntur rite esse acta*, which has been urged against the rule, would not be applied to dispense with full proof of an essential element of the case.[87] The one exception to the rule permits proof of a witness's previous convictions or that he was disbelieved by another court, as an attack on his credibility, as to which see above, p. 698. The mode of proof is provided for by section 249 of the Criminal Procedure Act, 1955.

As to proof before verdict of the previous convictions of the accused, see above under Character Evidence, p. 339, and under Procedure, p. 434. On the effect of a plea of *autrefois acquit* or *convict*, or *le pardon*, see above, chapter 32.

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[80] See, e.g., Lord Parker C.J. in *D.P.P. v. A. & B.C. Chewing Gum, Ltd.* [1967] 3 W.L.R. 493 at 497.

[81] *The Drug Club v. Lysol Ltd.*, 1924 T.P.D. 614 at 631.

[82] *Keeton v. R.*, 1906 E.D.C. 56; *Ocean Accident and Guarantee Corporation, Ltd. v. Keeley*, 1963 (4) S.A. 147 (A.D.).

[83] See, generally, 'Judgments as Evidence' (1968) 85 *S.A.L.J.* 74.

[84] A court-martial finding was also held inadmissible in *Benson v. R.*, 1910 T.P.D. 1218.

[85] 1945 A.D. 796 at 800. See, also, *Maharaj v. R.* (1912) N.L.R. 32.

[86] 1952 (2) S.A. 67 (T). See, also, *R. v. De Stadler* (1904) 21 S.C. 258; *R. v. Leach*, 1939 E.D.L. 28; *R. v. Xaki*, 1950 (2) S.A. 332 (E).

[87] See above, under Presumptions, p. 660, 680.

CHAPTER 6

PRIVILEGE

Where a witness is given a privilege by law, *his usual obligation to answer* all questions put to him in the witness-box is partially suspended, and he is entitled to refuse a reply to certain questions relating to matters covered by the privilege. This does not mean that the information cannot be placed before the court. Other witnesses may speak of it subject to the ordinary rules of relevance, and the privilege merely allows the privileged witness to refuse with impunity.

In addition to witnesses' privileges, however, there are certain types of information which are themselves privileged, independent of any relation to a particular witness's testimony. Where this is so, the information may *not be put before the court* at all, by anyone, and even if neither of the parties takes objection to the evidence, the court should intervene *mero motu* to exclude it.

In addition to the rules of privilege dealt with in this chapter, particular statutes cast a cloak of secrecy over particular kinds of facts. Examples are contained *in section 17 of the* Population Registration Act, No. 30 of 1950, section 19 of the Railways and Harbours Service Act, No. 22 of 1960, and section 11 *of* the Group Areas Act, *No. 36 of 1966*. In each such case it is a matter of interpretation as to whether the information is in itself privileged from disclosure, *or* whether it is only certain persons who as witnesses are not permitted to divulge it. No general rules other than those of statutory construction will afford a guide. A recent example is S. v. Forbes[1] 148 where evidence obtained from the accused in the course of an inquiry into his sanity under the Mental Disorders Act, No. 38 of 1916, was excluded. The reasoning was based on the general undesirability of disclosure, the purpose underlying the statute and the possible inhibition of candour rather than on the wording expressed in the Act.

[1] 1970 (2) S.A. 594 (C).

I. PRIVILEGE OF WITNESS

1. Privilege of accused as witness

When an accused person was by section 1 of the English Criminal Evidence Act, 1898,[1] given testimonial competence, his position in the witness-box had in some way to be differentiated from that of an ordinary witness, who may be *freely* cross-examined as to bad character or previous convictions for the purpose of impeaching his credit.[2] If the accused could be subjected to the same treatment, and his disreputable antecedents elicited albeit under the guise of attacking his veracity, the theoretical distinction between his guilt and his credit would disappear under the cloud of prejudice towards him in the eyes of the jury. The protection which therefore had to be extended to the accused as witness by section 1(*f*) of the *1898 Act* was in the form of a limitation on the scope of cross-examination of the accused, a provision re-enacted as section 228 of the Criminal Procedure Act, 1956,[3] which reads as follows:

> 'An accused called as a witness upon his own application shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed, or has been convicted of, or has been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless—
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> (*a*) he has personally or by his counsel, attorney or law agent, asked questions of any witness with a view to establishing, or has himself given evidence of, his own good character, or the nature or conduct of the defence is such to involve imputation of the character of the prosecutor or the witnesses for the prosecution; or
>
> (*b*) he has given evidence against any other person charged with the same offence; or
>
> (*c*) the proceedings against him are such as are described in section two hundred and seventy-six or two hundred and seventy-seven, and the notice required by those sections has been given to him; or
>
> (*d*) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged.'

The section imposes a blanket prohibition on questions tending to reveal the accused's bad history which is lifted in certain exceptional circumstances. In England, subsection (*d*), which is more narrowly expressed than the substantive prohibition, is interpreted literally, so that the permission is not as absolute as the prohibition it supersedes.[4] The construction adopted in South Africa, however, is not only more realistic, but also avoids many of the difficulties of application to which the literal construction has given rise.

The Appellate Division has held[5] that the substantive prohibition in section 228 must be read in the light of the common law, which in any event excludes evidence of other offences or previous misconduct by the accused unless relevant to the charge presently under investigation.[6] In other words, the accused's shield against cross-examination simply operates to prevent the putting of questions relevant only to his criminal disposition or propen[illegible]ust as evidence of such

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[1] 61 & 62 Vict., c. 36.
[2] See above, p. 000. 62.
[3] Previously sec. 295 of the Criminal Procedure and Evidence Act, No. 31 of 1917.
[4] *Maxwell* v. *D.P.P.* [1935] A.C. 309 (H.L.) at 319 (and see generally Professor Julius Stone in (1935) 51 *L.Q.R.* 443). This reading was reaffirmed in *R.* v. *Jones* [1962] 2 W.L.R. 575 (H.L.), [1962] A.C. 635. It has also been held in England that 'character' in the provision means reputation as well as disposition (*Selvey* v. *D.P.P.* [1968] 2 All E.R. 497 (H.L.)).
[5] *R.* v. *Rorke*, 1915 A.D. 145 at 159–60, 161; *R.* v. *Lipschitz*, 1921 A.D. 282 at 288.
[6] The so-called 'rule in *Makin* v. *Attorney-General for New South Wales*' [1894] A.C. 57. See above, p. 000, 73–80.

disposition cannot be included as part of the State case against him.[7] Where, however, his previous misconduct is relevant to show his guilt or to attack his credit, so that at common law evidence may be led of it, he may properly be questioned thereon.[8] Subsection (*d*), so far from cutting down the scope of examination addressed to him, is in fact mere surplusage.[9] Thus in *R.* v. *Lipschitz*,[10] where the accused denied the correctness of a police witness's identification of him, he was cross-examined on whether he had been searched two years previously by that police officer, Solomon J.A. pointing out that 'the question was put not for the purpose of influencing the jury by bringing to their notice that the accused had been in trouble before, but for the purpose of testing his veracity, when he denied any knowledge of [the detective]'.[11] On charges of fraud, cross-examination will be allowed as to the accused's previous false statements, as relevant to showing his dishonest intention.[12] And in *S.* v. *Mokoena*,[13] the accused was cross-examined as to whether or not he had made an admission, notwithstanding that other offences were also thereby exposed. The prohibition may therefore be said to exclude cross-examination of the accused as to character solely where this is relevant to propensity alone. An acquittal on an earlier charge, or an unproved suspicion against the accused, is irrelevant to the issue of his present guilt.[14]

It is explicitly recognized that the mere putting of the questions may prejudice the accused and the court should thereupon instruct the accused of his right to refuse an answer.[15] If the question is permitted, not only is the accused not obliged to respond, but if he does respond without objection his answers remain inadmissible.[16] Whether the questions objected to fall under the purview of the prohibition in section 228 is tested objectively. 'Tending to show' does not mean 'intended by the prosecution to show'. The test is, 'what was the true effect of the cross-examination, what would be conveyed to a reasonable body of jurymen?'[17] In judging of this effect, regard may be had to the whole tenor of the examination and context of the questions.[18]

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[7] Thus in *R.* v. *Knothe*, 1916 T.P.D. 472, questions showing the accused had been found in a brothel were disallowed. See above under Character Evidence, p. 000.73–80.

[8] *R.* v. *Lipschitz*, 1921 A.D. 282 at 290.

[9] *R.* v. *Rorke*, 1915 A.D. 145 at 161.

[10] 1921 A.D. 282.

[11] At 290. Had the accused not put the identification in issue by his denial, the cross-examination would have been impermissible as his veracity on the point would not have been raised.

[12] *R.* v. *Pharenque*, 1927 A.D. 57 at 61. See, too, *R.* v. *Hair*, 1927 A.D. 391.

[13] 1967 (1) S.A. 440 (A.D.)

[14] *Maxwell* v. *D.P.P.* [1935] A.C. 309; *R.* v. *Cokar* [1960] 2 All E.R. 175 (C.C.A.); *Stirland* v. *D.P.P.* [1944] A.C. 315 (H.L.). Cf. *Harris* v. *D.P.P.* [1952] A.C. 694 (H.L.). These matters may, however, be relevant to his credit if he has raised the matter as part of putting forward his good character (*R.* v. *Lipschitz*, 1921 A.D. 282 at 290; the point made by Viscount Simon in *Stirland* at 323, 326–7, was disapproved in *R.* v. *Jones* [1962] 2 W.L.R. 575 (H.L.) at 588, 593).

[15] *R.* v. *Ramakok*, 1919 T.P.D. 305.

[16] *R.* v. *Mkabile*, 1935 T.P.D. 107 at 109.

[17] The formulation given by Tindall J.A. in *R.* v. *Du Preez*, 1943 A.D. 562 at 574.

[18] *R.* v. *Mkabile*, 1935 T.P.D. 107 at 109–10; *R.* v. *Ellis* [1910] 2 K.B. 746 at 757. In England, because of the construction the House of Lords has placed on the section as excluding otherwise relevant examination, it was necessary for 'tending to show' to be given the meaning of 'tending to reveal' (*R.* v. *Jones* [1962] 2 W.L.R. 575 (H.L.) at 588, 592, 614), so that if the accused's bad character has already been touched on by the defence *as being relevant* to his innocence, he may be cross-examined further on what has been revealed. In his dissenting speech in *Jones*, Lord Devlin disapproved (at 635) of the 'vague rule which enables the prosecution to ask what it likes so long as it does not make out the accused's character to be substantially worse than he has himself suggested'. See, too, Lord Denning M.R. at 595; and L. H. Hoffmann, *South*

The accused's shield against cross-examination not relevant to the issues is forfeited in the circumstances specified in provisos (*a*), (*b*) and (*c*) of section 228.[18] Of these, proviso (*c*) is merely an example of similar fact evidence which has expressly been enacted to be relevant to the issue of guilt by sections 276 and 277 of the Criminal Code. The scope of cross-examination is not restricted by subsection (*c*) to the matters on which those sections permit evidence to be led, but since section 228 is to be applied subject to the ordinary rules of relevancy, it may be argued that it was not intended to broaden the range of permissible questioning to include matters on which no evidence could be given in chief.

Provisos (*a*) and (*b*) differ from proviso (*c*) in that they contemplate the suspension of the prohibition as a consequence of the conduct of the defence, though not necessarily as a purely procedural penalty. Three situations are covered.

(*a*) *Where the accused has put his good character in issue.* Normally evidence of the accused's bad character is inadmissible at the instance of the State.[20] It is however always open to the accused to try to show his good character, to persuade the court either that his evidence should be believed or that he is unlikely to have committed the offence with which he is charged. Where he has done so, the prosecution may correct the misleading impressions he attempts to create by its own witnesses giving evidence in rebuttal, through cross-examination of the defence witnesses, and, under the first part of section 228(*a*), by cross-examination of the accused himself. On the wording of the provision, whether the accused has put forward claims of his good character depends on the intention with which the evidence is laid before the court.[21] Where a witness volunteers an unsolicited tribute to the accused's character, it has not been put in issue by the defence so as to lay the accused open to cross-examination on it.[22]

In *Stirland* v. *D.P.P.*,[23] Viscount Simon took the view that the accused's character is indivisible. If he says he is of good character in any respect, he can be cross-examined on the whole of his past record. A different view seems to have been expressed by Mason J. in *R.* v. *Lipsitch*,[24] holding apparently that the test of relevance applies to cross-examination under this heading as in the applicability of the substantive part of the section. The better view seems to be that where the accused lays claim to good character in any respect he may be cross-examined on all aspects of his character: both on those aspects related to the present charge as these are relevant to his guilt, and on the extraneous aspects as these are relevant to the credibility of his testimonial assertion of bis virtue.

It is no disproof of good character that the accused was acquitted on a previous charge, or suspected but not tried, and he cannot be cross-examined on these incidents unless he has himself raised the incidents,[25] in which case the permissible cross-examination would be directed to attacking his credit only.

African Law of Evidence (1963), pp. 166–7. That revelation to the court is not the test in our law is underlined by *R.* v. *Makatshana*, 1939 E.D.L. 199.

[18] Even where it has been so forfeited, it is only otherwise impermissible *cross-examination* which is then allowed; the prosecution does not become entitled to *lead* evidence of the accused's bad moral character to strengthen the State case: *R.* v. *Paluszak*, 1938 T.P.D. 427 at 429–30.

[20] See ~~below, p. 000~~ above, p. 73-80.

[21] See Bristowe J. in *R.* v. *Lipsitch*, 1913 T.P.D. 652 at 657; *R.* v. *Beecham* [1921] 3 K.B. 464. Reference to the accused's good character in his counsel's opening address does not amount to giving evidence of character: *R.* v. *Ellis* [1910] 2 K.B. 746 at 762.

[22] [1944] A.C. 315 (H.L.) at 326–7.

[23] *R.* v. *Redd* [1922] All E.R. 435.

[24] 1913 T.P.D. 652 at 654–5. The point was not mentioned in the judgment of the Court on appeal (1921 A.D. 282).

[25] *Stirland* v. *D.P.P.* [1944] A.C. 315 (H.L.) at 326–7.

The accused does not put his character in issue where he himself refers to his bad record. An example is *R.* v. *Thompson*,[26] where he revealed his earlier trouble with the police, in connection with which his fine had not been paid, in order to explain the fact that he had run away when an officer had attempted to arrest him. On the other hand, if he refers to only one previous conviction when in fact he has several, he is in fact giving evidence of good character, and may be asked about all.[27]

(*b*) *Imputations on the character of the complainant*[28] *or prosecution witness.* Both in this case, and under proviso (*b*), section 228 apparently allows cross-examination of a kind that would not be permitted at common law, i.e. on *specific* misconduct (rather than bad reputation) to attack credibility even where this is not relevant to the issue of guilt and where good character is not in issue.[29] Where the defence has made imputations on the character of the complainant or the prosecution witnesses, the accused may be cross-examined on his own character, to demonstrate to the jury the unreliability of the source of those imputations.[30]

In England this branch of proviso (*a*) is also interpreted literally, so that the accused forfeits his shield by any imputation, even if necessarily made in the course of establishing his defence, but always subject to the court's discretion to exclude unfairly prejudicial cross-examination.[31] In South Africa the position is not entirely clear.[32] The general judicial consensus, however, seems to be that the accused does not forfeit his shield where the two conflicting versions are such that the defence version can only be accepted on the hypothesis that the State witnesses are lying—in the words of Greenberg J. in *R.* v. *Hendrickz*,[33] 'where the facts sought to be proved [by the defence] are an essential portion of the proof that the conduct of the accused is not criminal'. Thus on a charge of assault, evidence of the complainant's undue familiarity with the accused's wife, though a slur on the former's character, was obviously inextricable from the issue of provocation and thus did not lay the accused open to character cross-examination.[34] In *R.* v. *Du Preez*[35] a defence insistence that uncut diamonds had been 'planted' by the police witnesses was held not to bring proviso (*a*) into operation, even

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[26] [1966] 1 All E.R. 505 (C.C.A.).

[27] *R.* v. *Thompson*, above, at 507, citing *R.* v. *Watson* (1952) 36 Cr. App. Rep. 72 at 78.

[28] The statute uses the English term 'prosecutor', the equivalent in our procedure being the complainant. See *R.* v. *Klisser and Rosenberg*, 1949 (3) S.A. 807 (W) at 824.

[29] *R.* v. *Lipschitz*, 1921 A.D. 282 at 290; and see Lord Devlin in *R.* v. *Jones* [1962] 2 W.L.R. 575 (H.L.) at 622; *Selvey* v. *D.P.P.* [1968] 2 All E.R. 497 (H.L.) at 502–3, 511.

[30] This is so even where the imputations were made on the character of a prosecution witness whose evidence does not implicate the accused: *S.* v. *Heyne* (2), 1958 (1) S.A. 612 (W) at 614.

[31] The court's discretion will not always be exercised in favour of the accused, as fairness to the prosecution is a factor to be taken into account: *R.* v. *Selvey* [1968] 2 All E.R. 497 (H.L.) at 508 ff., 513. For a survey of the preceding case law, see Florence O'Donoghue, 'Imputations on the Character of Prosecution Witnesses' (1966) 29 *Mod. L.R.* 492.

[32] Hoffmann (op. cit.), pp. 169–70, discerns two different tests which have been applied, one by the Appellate Division and the other by the lower courts. It is submitted that the two approaches are perfectly reconcilable, and that the views of the lower courts are not inconsistent with those expressed in *R.* v. *Lipschitz*, 1921 A.D. 282, and *R.* v. *Du Preez*, 1943 A.D. 562. See *S.* v. *V*, 1962 (3) S.A. 365 (E), where O'Hagan J. pointed out that only Feetham J.A., dissenting in *Du Preez's* case, would have overruled *R.* v. *Hendrickz*, 1933 T.P.D. 451, and equated *Hendrickz with the approach of* Tindall J.A. in *Du Preez*. Cf. A. P. O'Dowd, *The Law of Evidence in South Africa* (1963), p. 33.

[33] 1933 T.P.D. 451 at 458.

[34] *Spence* v. *R.*, 1946 N.P.D. 696 at 700. See, too, *R.* v. *Persmans*, 1934 T.P.D. 253, and *S.* v. *V*, 1962 (3) S.A. 365 (E). Cf. *O'Hara* v. *H.M. Advocate* [1948] S.C. 90 (J).

[35] 1943 A.D. 562.

though this contained a necessary implication of an allegation of perjury or conspiracy to commit perjury.[36] It follows that an indignant denial of the State evidence, even by alleging it is all lies, is to be treated merely as 'pleading not guilty with emphasis'.[37]

In *R.* v. *Du Preez*, Tindall J.[38] distinguished the facts of that case from those in *R.* v. *Dunkley*,[39] where a Crown witness had been asked about her bias against the accused because he had been instrumental in her brother's conviction, and *R.* v. *Jones*,[40] where it was alleged that the police had fabricated a confession by the accused. In both cases the learned Judge of Appeal would have permitted the accused to be cross-examined as to character (as the respective courts in fact had done). It seems to be a fair inference from this that the well-established categories of relevance should be applied to section 228(*a*). Entirely extraneous abuse would in any event be excluded as irrelevant. To be allowed at all, the defence evidence must, therefore, be relevant either to the issues in the case (i.e. to the accused's guilt or innocence), or to the weight of the State evidence, or to the admissibility of that evidence. *Dunkley's* case is an example of the *second category*,[41] *and Jones's* case of the *third*. On this analysis, therefore, it is only imputations falling into the first category of relevance which do not bring proviso (*a*) into operation. But where the attack on the prosecution witnesses is relevant solely to their credit, or to the admissibility of the evidence they produce, then the defence is making imputations on their characters within the meaning of the section, and the way is clear[42] for the unrestricted cross-examination of the accused.

Imputations on the character of persons not testifying for the State, such as the deceased in a murder charge, do not bring proviso (*a*) into operation.[43]

If the same counsel is representing several of the accused persons in the same trial, he should intimate to the court, the prosecutor and the attacked witness on behalf of which accused the imputation is being launched, so that the other accused will remain protected by their section 228 shield.[44]

(*c*) *Giving evidence against a co-accused.* Where the accused gives evidence against a co-accused, to deprive the latter of the right to cross-examine as to character would be to fetter his ordinary right to defend himself by discrediting those persons who have testified against him.[45] In this case it is immaterial

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[36] See, too, *R.* v. *David*, 1962 (3) S.A. 305 (S.R.).

[37] Per Lord Goddard C.J. in *R.* v. *Clark* [1955] 2 Q.B. 907 (C.C.A.) at 478. See, also, *R.* v. *Almond*, 1905 T.S. 14; *Ngidi* v. *R.*, 1932 N.P.D. 22 at 24; *R.* v. *Hendrickz*, 1933 T.P.D. 451 at 455. Cf., however, *R.* v. *Rappolt* (1911) 18 Cr App. Rep. 156.

[38] With whom Centlivres J.A. concurred (at 583). The judgment of Watermeyer J.A. is, it is submitted, not inconsistent with the analysis which follows above.

[39] [1927] 1 K.B. 323, [1926] All E.R. 187.

[40] (1923) 39 T.L.R. 457, 17 Cr. App. Rep. 117 (C.C.A.).

[41] Cf. *Vahed* v. *R.*, 1945 N.P.D. 237 at 240–1.

[42] Subject to the court's overriding discretion to exclude prejudicial evidence. See above, p. 000.].

[43] *R.* v. *Biggin* [1920] 1 K.B. 713 (C.A.). The imputations in this case were in any event relevant to establishing the defence.

[44] *R.* v. *Heyne* (2), 1958 (1) S.A. 612 (W).

[45] Proviso (*b*) would not allow cross-examination of an accused person where not he but his witnesses have given evidence against the co-accused. In this case it is the credit of those witnesses which may call for attack. One co-accused may *always* cross-examine another on the issues just as he may cross-examine any witness who has been called and sworn (*R.* v. *Zavels*, 1937 A.D. 342 at 350; *S.* v. *Langa*, 1963 (4) S.A. 941 (N); *R.* v. *Barkham*, 1917 T.P.D. 35; and see (1902) 19 *S.A.L.J.* 310); the prohibition in sec. 228 intervenes only to prevent cross-examination of any accused as to credibility, unless proviso (*b*) applies.

whether the attack be made as an essential part of the defence of the attacking accused or as incidental thereto.[46] Nor is the intention in making the attack of moment, whether it is born of 'pained reluctance or malevolent eagerness'.[47] An accused thus attacked must have equal means of discrediting the attacker, whether prosecution witness or defence witness, but such character cross-examination in the latter case has no bearing on the guilt or innocence of the co-accused since the general exclusion of propensity evidence continues.[48]

Evidence 'against' a co-accused was said in *Murdoch* v. *Taylor*[49] to mean 'evidence which supports the prosecution case in a material respect or which undermines the defence of the co-accused'—for example, if one accused destroys the alibi put forward by his co-accused.[50] Where this occurs, the wording of proviso (*b*) draws no distinction between cross-examination of the accused at the instance of the prosecution, and cross-examination at the instance of the co-accused. In the former case, the House of Lords in *Murdoch* v. *Taylor* considered that the court retains a discretion to refuse it in the interests of maintaining the fairness of the trial.[51] This would be consistent with equity and logic, as from this point of view the liability to cross-examination is still incurred as a procedural penalty. But in that case no discretion was allowed to exclude the co-accused from cross-examining—he may do so as of right. The same conclusion is also implied by Van den Heever J.A.'s express rejection, in *R.* v. *Bagas*,[52] of this situation as involving a procedural penalty. Such a result is not, however, without its dangers.

A compromise view[53] would allow cross-examination of one accused as of right only where his evidence 'against' his co-accused falls into the second branch of Lord Donovan's definition, in other words where he has in some way undermined his co-accused's defence (as was in fact the position in *Murdoch* v. *Taylor*). Where he has not done so, has not obstructed his co-accused's avenue of escape, but has only supplemented or strengthened the prosecution case against his co-accused, to deny the court a discretion to refuse cross-examination would be to defeat the underlying purpose of section 228. That underlying purpose is surely to protect both accused as far as possible, rather than to expose one to the possibility of prejudice where the other's opportunity to establish his defence remains unblocked.

Where the accused gives evidence against his accomplice who has for some reason not been charged,[54] or against a co-accused who is not charged with the

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[46] *R.* v. *Bagas*, 1952 (1) S.A. 437 (A.D.). But in accordance with the general rules of relevance, the attack would have to be relevant either to the issue of guilt or of veracity.

[47] Per Lord Morris of Borth-y-Gest in *Murdoch* v. *Taylor* [1965] 1 All E.R. 406 (H.L.) at 409.

[48] *R.* v. *Bagas*, 1952 (1) S.A. 437 (A.D.) at 441.

[49] [1965] 1 All E.R. 406 (H.L.) at 416, per Lord Donovan. At 409, Lord Morris of Borth-y-Gest defined it as 'positive evidence [ignoring anything casual or trivial] given by the witness which would rationally have to be included in any survey or summary of the evidence in a case which would rationally have to be included in any survey or summary of the evidence in a case which, if accepted, would warrant a conviction of the "other person charged with the same offence" '. There does not seem to be any difference in effect between this and the test enunciated by Lord Donovan.

[50] *R.* v. *Myataza*, 1932 E.D.L. 108.

[51] See also *R.* v. *Thompson* [1966] 1 All E.R. 505 (C.C.A.) at 508.

[52] 1952 (1) S.A. 437 (A.D.) at 440–1.

[53] This was prompted by the note on *Murdoch* v. *Taylor* in [1965] 1 *New Zealand Universities L.R.* 547.

[54] *R.* v. *Manana*, 1926 O.P.D. 1.

same offence,[55] the terms of the proviso are not met and character cross-examination remains inadmissible.

Judicial Discretion under section 228. Even where the accused has in some way brought into operation one of the exceptions to the prohibition contained in section 228, the court retains its general discretion in criminal trials to exclude technically admissible cross-examination where its reception would prejudice the accused unduly in relation to its usefulness[56] (subject to what has been said above in relation to proviso (*b*)).

This judicial discretion has as its corollary the duty resting on counsel for the prosecution to intimate to the judge in advance his intention of cross-examining the accused as to character, to enable a ruling on the point to be given in the absence of the jury.[57] Where the examination is allowed, prosecuting counsel should exercise the utmost restraint and avoid any detrimental references in so far as is compatible with the fair presentation of his case.[58] Where the character cross-examination is to be conducted at the instance of a co-accused, counsel for the defence should subject himself to the same restraint as counsel for the prosecution; and an intention to attack the character of a co-accused, in cross-examination or otherwise, should where possible be communicated to the latter's counsel in advance to enable him to consider whether any objection will be taken.[59]

The accused and his witnesses should not be trapped or misled by the opposing cross-examiner into statements which will result in the shield being lost,[60] and defence counsel should be warned when the conduct of the defence veers towards incurring a forfeiture of the shield.[61]

2. Privilege against self-incrimination

A witness is not obliged to answer any questions if he would have been excused from answering in the Supreme Court of Judicature in England[62] because his answer might tend to expose him to 'any *pains, penalty, punishment* or forfeiture, or to a criminal charge, or to degrade his character'.[63]

Historically, this protection evolved in response to a revulsion against Star Chamber methods,[64] but the rationale advanced for its retention today far transcends its origins. In the words of Warren C.J. in the United States Supreme Court,[65]

> 'the privilege against self-incrimination – the essential mainstay of our adversary system – is founded on a complex of values . . . [all pointing] to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. To maintain a "fair State-individual balance",

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[55] *R.* v. *Roberts* [1936] 1 All E.R. 23; R. v. Moriarty [1969] Crim. L.R. 659.
[56] *R.* v. *Klisser and Rosenberg*, 1949 (3) S.A. 807 (W), esp. at 825. The exercise of the discretion is discussed by Livesey in (1968) *26 Cambridge L.J. 293*.
[57] *R.* v. *Du Preez*, 1943 A.D. 562 at 580; *R.* v. *Weston-super-Mare Justices* [1968] 3 All E.R. 225.
[58] *R.* v. *Du Preez*, above, at 580; *R.* v. *Marchie*, 1934 T.P.D. 59; *R.* v. *Persutam*, 1934 T.P.D. 253; *R.* v. *Pillay*, 1944 N.P.D. 316 at 318; and see also *Jones* v. *D.P.P.* [1962] 2 W.L.R. 575 (H.L.) at 616.
[59] *R.* v. *Miller* [1952] 2 All E.R. 667 at 669.
[60] *R.* v. *Baldwin* [1925] All E.R. 402. [61] *R.* v. *Cook* [1959] 2 Q.B. 340 (C.C.A.) at 349.
[62] The substitution of this phrase by 'on the *thirtieth day of May, 1961*', by sec. 20 of the Act, No. 92 of 1963, has in substance left the law unchanged. See above, p. 000. 3
[63] Sec. 234 of the Criminal Procedure Act, No. 56 of 1955.
[64] See 8 Wigmore, *Evidence*, § 2250 (McNaughten rev., 1961).
[65] In *Miranda* v. *Arizona*, 384 U.S. 436 (1965) at 460.

> to relieve the government " to shoulder the entire load" . . . to respect the inviolability the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours, rather than by the cruel, simple expedient of compelling it from his own mouth."[66]

It has also been suggested that the existence of the privilege is necessary to encourage persons to come forward and testify freely,[67] but it is no doubt because of the constitutional importance of the privilege that statutory encroachments on it are to be narrowly construed.[68] However, in South Africa today, the scope of these inroads has deprived the privilege of much of its significance.

The right to withhold an incriminatory answer is not available to an accused person who has chosen to give evidence on his own behalf, in so far as concerns his inculpating himself of the offence charged.[69] (As far as concerns other offences he has committed, see discussion of section 228 of the Code above.[70]) Nor, in terms of section 254 of the Code,[71] can the privilege be claimed by persons whom the prosecutor believes[72] to be accomplices, or by persons whom he believes may incriminate themselves of an offence he specifies; answers thus compelled, if duly given to the satisfaction of the court, entitle the witness to an indemnity against himself being prosecuted for that offence, and are inadmissible against him at any subsequent trial for that offence.[73] If he is charged with any other offence perhaps arising out of the same facts, it is not clear whether his criminatory evidence remains inadmissible against him, but since the legislature apparently felt it necessary to provide expressly to permit its use for the purpose of a charge of perjury,[74] the maxim *expressio unius est exclusio alterius* would presumably apply to prevent its being wielded against him for any other purpose. The protection once extended to him should not be circumvented by the device of a different but factually related charge.

The pains and penalties which will entitle a witness to invoke the privilege do not include civil liabilities;[75] and the protection against questions 'tending to degrade his character' has apparently very little meaning today, as it is accepted that a witness may be broadly cross-examined as to character for the purpose of attacking his credit.[76] There are a few situations where forfeitures still exist[77] and in respect of these, though they are rare, the privilege is claimable.

The existence of the privilege does not entitle a witness to refuse to take the oath on the ground that any evidence he might possibly give may expose him to

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[66] Cf. *S.* v. *Cameron*, *1962 (3) S.A. 437 (T)* at 441.

[67] See, e.g., Professor R. Cross, *Evidence*, 2nd ed. (1967), p. 229.

[68] *R.* v. *Naran*, 1954 (1) S.A. 509 (S.R.) at 511; *R.* v. *Herholdt* (1), 1956 (2) S.A. 714 (W); *S.* v. *Govender*, 1967 (2) S.A. 121 (N). Cf. *R.* v. *Camane*, 1925 A.D. 570 at 575.

[69] As laid down in the proviso to sec. 234.

[70] *pp. 000–000.* [illegible].

[71] As amended by sec. 29 of the General Law Amendment Act, No. *80 of 1964*, and sec. 8 of the General Law Amendment Act, No. 62 of 1966. See *Annual Survey of South African Law*, 1966, pp. 387–8.

[72] A statement by the prosecutor to the effect that the State has information that a witness is an accomplice was held to satisfy this phrasing, since the prosecutor is the representative of the State in the trial, in *S.* v. *Govender*, 1967 (2) S.A. *121 (N)*.

[73] Sec. 255. Secs. 254 and 255 are discussed under 'Compellability', above, p. 000. [illegible].

[74] The proviso to sec. 255.

[75] Sec. 231. Case

[76] See above, pp. 000. But see Gregorowski J. in *R.* v. *Kuyper*, 1915 T.P.D. 308 at 316.

[77] Examples are secs. 19 and 20 of the *South African* Citizenship Act, No. 44 of 1949; sec. 360(3) of the *Criminal* sec. 13 of the Suppression of Communism Act, No. 44 of 1950; Procedure Act, No. 56 of 1955; secs. 36 and 41 of the Group Areas Act, No. 36 of 1966.

criminal penalties.[78] He must submit to being sworn, and claim it only when the particular questions are asked.[79]

In *S.* v. *Lwane*[80] the Appellate Division held[81] that the presiding judicial officer has a duty as a matter of practice to warn a witness, whenever he seems about to incriminate *himself, that he is entitled to decline to answer.*[82] The prosecutor is under a corresponding duty to warn the court when the answer to a proposed question may have this result. A failure to warn the witness will not necessarily render the criminatory evidence inadmissible against him subsequently, but may well do so if he in fact did not know that he could have claimed privilege.[83]

Where a witness claims the privilege on oath, the court is not bound to accept his view of the likelihood of incrimination. He must disclose the grounds of his apprehension so that *the judge or magistrate may determine for himself that the* witness's danger is not an imaginary or unsubstantial one.[84] A *nolle prosequi* offered by the attorney-general has been held to render the fear of prosecution unreal,[85] but a mere promise not to prosecute, which is supported only by the goodwill of the prosecutor, is insufficient.[86] A witness's fear that he would be deprived of his liquor licence was held to be unsubstantial in the light of the evidence sought from him, in *Ramsay* v. *Attorney-General for the Transvaal*;[87] and the likelihood of restrictions *being imposed on the witness in terms of the* Suppression of Communism Act, 1950,[88] did not enable him to claim the privilege successfully in *S.* v. *Carneson*,[89] again on the ground of the relatively trivial information asked for. However, Ludorf J.'s view, in the latter case, that the witness could not claim the privilege because the evidence had already shown him to be guilty of an offence, cannot be supported in view of the Appellate Division's pronouncement in *R.* v. *Ntshangela*[90] that as the witness alone can know the nature and extent to which he may be *incriminated, the choice* whether he is prepared to jeopardize himself further should be left to him.[91]

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[78] *R.* v. *Kuyper*, 1915 T.P.D. 308 at 316; *R.* v. *Hubbard*, 1921 T.P.D. 433 at 438; *R.* v. *Heard*, 1937 C.P.D. 401 at 406, 410–11.

[79] *R.* v. *Kuyper*, above, at 314; *Hartley* v. *Newman*, 1937 C.P.D. 142 at 144; *R* v. *Heard*, above, at 406, 410–11; *Waddell* v. *Eyles N.O.*, 1939 T.P.D. 198. It cannot be claimed in argument: *S.* v. *Pogrund*, 1961 (3) S.A. 868 (T) at 871.

[80] 1966 (2) S.A. 433 (A.D.) at 439–44; and see *R.* v. *Ramakok*, 1919 T.P.D. 305.

[81] Overruling *R.* v. *Kweyi*, 1957 (3) S.A. 663 (E).

[82] There is no such duty on a court in England today, since the knowledge of this right has permeated throughout the population. In South Africa this has not yet occurred, as both judgments in *Lwane's* case emphasize, and the protection thus afforded to any ignorant witness is very necessary. But see Professor C. H. Schmidt in (1966) *T.H.R.-H.R.* 267.

[83] Cf. *Miranda* v. *Arizona*, 384 U.S. 436 (1965) at 468–9, where Warren C.J. said: 'Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence or prior contact with authorities, can never be more than speculation. A warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation *is indispensable* to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time. The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. . . . It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.'

[84] *Hardy* v. *R.* (1905) 26 N.L.R. 28 at 32, 34; *R.* v. *Kuyper*, 1915 T.P.D. 308 at 314; *Miller* v. *Magenvis*, 1924 C.P.D. 295 at 296.

[85] *R.* v. *Hubbard*, 1921 T.P.D. 433 at 439.

[86] *Rademeyer* v. *Attorney-General*, 1955 (1) S.A. 444 (T).

[87] 1937 W.L.D. 70 at 75.

[88] Act No. 44 of 1950.

[89] 1962 (3) S.A. 437 (T) at 442.

[90] 1961 (4) S.A. 592 (A.D.) at 598.

[91] Unless, possibly, his bona fides are in doubt: see *Cross on Evidence*, op. cit., p. 231.

3. Professional privilege

The attorney–client privilege, the oldest of the privileges recognized by the law of evidence, has as its object the encouragement of members of the public to consult freely and candidly with their legal advisers, without fear that what is said in the course of consultation can be used against them.[92] The privilege, therefore, is that of the client not of the lawyer. In its present form, the privilege is enacted by section 232 of the Criminal Procedure Act, which refers, for the privilege attaching to legal advisers, to the law as administered in England.

Inevitably, it seems, some degree of disclosure is unavoidable if the witness is to convince the court of the justice of his refusal, particularly where the question or answer is not directly incriminatory but may constitute a necessary link for establishing the chain of his criminal responsibility. It must be conceded that the proper administration of justice could hardly allow a witness's invocation of the privilege to be final in itself without some investigation of its basis.

Broadly stated, all confidential communications, oral or documentary, passing between the client and his legal adviser acting in a professional capacity (and including their respective agents and intermediaries[93]) are privileged from disclosure.

It is in every case a question of fact whether the occasion and context was indeed a professional and confidential one. For example, the client does not normally give his address to his attorney in confidence, though circumstances are conceivable where he might have done so,[94] but the mere fact that the attorney would not have been in possession of the information had the professional relationship not existed is in no way conclusive. The fact that the attorney has been instructed to act for the client is not confidential;[95] nor are the client's instructions to negotiate a settlement,[96] or the contents of an order of court communicated by the attorney to the client.[97]

In ascertaining whether the legal adviser at the time the communication was made was acting in a professional capacity, such factors as whether he received a fee, the place where the consultation was held, and the surrounding circumstances generally may be looked at.[98] Communications to an attorney who is acting in another capacity would not be privileged, e.g. where he is acting as a rent-collector, insurance agent, deputy-sheriff, or confidential friend.[99]

Once it has been established that the occasion was indeed a confidential and a professional one, all communications passing between the lawyer and the client are privileged from disclosure. It is not necessary that the consultations

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[92] *Moffat* v. *South African Breweries, Ltd.*, 1912 W.L.D. 104 at 106.*Schlosberg* v. *Attorney-General of the Transvaal*, 1936 W.L.D. 59 at 64. In *Helman, Maasdorp and Barker* v. *S.I.R.*, 1961 (4) S.A. 160 (W) it was held that the privilege is not overridden by particular statutory provisions requiring information to be disclosed, unless so expressed.

[93] *S.* v. *Moseli*, 1969 (1) S.A. 650 (O).

[94] e.g. *Nathan* v. *Anderson N.O.*, 1939 W.L.D. 13 at 18, 23. As to the client's giving his name in confidence, see *Ditz* v. *Attorney-General*, 1936 N.P.D. 345.

[95] *Resisto Dairy (Pty.) Ltd.* v. *Auto Protection Insurance Co., Ltd.*, 1962 (2) S.A. 408 (C) at 411–12; *Bursill* v. *Tanner* (1885) 16 Q.B.D. 1.

[96] *Legate* v. *Natal Land and Colonization Co., Ltd.* (1906) 27 N.L.R. 410 at 411; *Giavagnoli* v. *Di Meo*, 1960 (3) S.A. 393 (D) at 399.

[97] *Harry* v. *Devan*, 1930 E.D.L. 265.

[98] See *R.* v. *Fouche*, 1953 (1) S.A. 440 (W), and, generally, *Greenough* v. *Gaskell* (1833) 1 M. & K. 98.

[99] *Fouche's* case, above; *Brill* v. *Mutual Life Insurance Company of New York* (1905) 22 S.C. 421.

were in connection with litigation: any matter on which legal advice is sought will raise the privilege, both as to facts and as to statements or documents,[1] and not only for the client's revelations but also for the attorney's or counsel's opinion which is in consequence forthcoming.[2] The communications need not have been strictly relevant to the matter on which legal advice was sought, as long as they are 'fairly referable' to the professional relationship.[3] Nor need they have had no additional purpose or contained no collateral matter, as long as the main purpose related to the obtaining or furnishing of legal advice.[4] A statement made so as initially to attract the privilege continues to do so even after the attorney's employment has been terminated,[5] and whether or not that employment related to the particular matter now being adjudicated.[6] The privilege extends apparently only to the contents of the communication, not to the fact that it was made; but the fact that particular matters were *not* imparted to the legal adviser should be regarded as privileged.[7]

Where the communication is not one passing directly between attorney and client but is obtained by or from a third party, the privilege has a narrower scope. It covers only statements obtained for submission to the legal adviser in anticipation of litigation,[8] whether on the attorney's initiative or on the client's.[9] Thus ordinary routine reports from an agent to his principal are not privileged, even if they are subsequently used for instructing a solicitor,[10] unless the legal adviser is himself the agent, as in *Claremont Union College* v. *Cape Town City Council*,[11] where he was an official of the defendant municipality. Nor does the privilege apply to information regarding a collision given by an insured driver to his statutory third-party insurers, if this is done simply in pursuance of his contract with them.[12]

If the communication was obtained for the purpose of taking legal advice, the privilege is unaffected even though it is not thereafter in fact used for that

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[1] *Marks* v. *Lugg N.O.*, 1933 W.L.D. 135; *Savides* v. *Varsamopoulos*, 1942 W.L.D. 49; *Middeldorf* v. *Zipper N.O.*, 1947 (1) S.A. 545 (S.R.); *S.* v. *Green*, 1962 (3) S.A. 899 (D); *S.* v. *Kearney*, 1964 (2) S.A. 495 (A.D.) at 499.

[2] *Estate Rumsey* v. *Union Govt.* (*Minister of Railways and Harbours*), 1912 C.P.D. 1012 at 1017.

[3] Per Buckmaster C.J. in *Minter* v. *Priest* [1930] A.C. 558 (H.L.) at 568; *R.* v. *Fouche*, 1953 (1) S.A. 440 (W) at 448. See, too, *Savides* v. *Varsamopoulos*, 1942 W.L.D. 49.

[4] *Kerwin* v. *Jones*, 1957 (3) S.A. 181 (S.R.). Cf. *Longthorn* v. *British Transport Commission* [1959] 2 E.R. 32 at 37.

[5] *Ex parte Luyt*, 1927 C.P.D. 278; *Witz* v. *Additional Assistant Magistrate*, 1931 W.L.D. 180 at 184; *R.* v. *Chisvo*, 1958 (3) S.A. 353 (R.A.D.).

[6] *Estate Bliden* v. *Sarif*, 1933 C.P.D. 271.

[7] *Waterhouse* v. *Shields*, 1924 C.P.D. 155; *S.* v. *Green*, 1962 (3) S.A. 899 (D); *Vengtas* v. *Nydao*, 1963 (3) S.A. 225 (D). *Contra*, *Marks* v. *Lugg N.O.*, 1933 W.L.D. 135. See esp. *S.* v. *Mosell*, 1969 (1) S.A. 650 (O).

[8] *Adams* v. *Moffatt* (1906) 23 S.C. 343 at 346; *Messina Bros., Coles and Searle* v. *Kirsten N.O.*, 1912 C.P.D. 127 at 137; *Rainsford* v. *African Banking Corp., Ltd.*, 1912 C.P.D. 729 at 738–9.

[9] *Wheeler* v. *Le Marchant* (1881) 17 Ch.D. 675 (C.A.) at 681.

[10] *Daniel* v. *Central S.A. Railways*, 1904 T.H. 224; *Legate* v. *Natal Land and Colonization Co., Ltd.* (1906) 27 N.L.R. 410 at 412; *Brill* v. *Mutual Life Insurance Company of New York* (1905) 22 S.C. 421; *Estate Rumsey* v. *Union Govt.* (*Minister of Railways and Harbours*, 1912 C.P.D. 1012 at 1016; *Leo* v. *Barclays Bank*, 1931 T.P.D. 153; *United Tobacco Companies* (*South*) *Ltd.* v. *International Tobacco Company of S.A., Ltd.*, 1953 (1) S.A. 66 (T) at 70.

[11] 1933 C.P.D. 419. Cf. *O'Rourke* v. *Darbishire* [1920] A.C. 581 (H.L.), where the privilege was upheld for communications passing between co-trustees where one of them was also acting as solicitor for the others.

[12] e.g. *Howe* v. *Mabuya*, 1961 (2) S.A. 635 (D).

purpose.[13] It is also clear that the information which is regarded as having been called into being for this purpose covers preparatory notes or statements from which is drawn the final document actually to be used by the legal adviser, since to deny the privilege to the preparatory material would be to defeat indirectly the privilege of the final document.[14] For the same reason, no adverse inference is to be drawn from the invocation of the privilege, since if a party were thus penalized the purpose of the privilege is similarly frustrated.[15]

Difficulty has centred mainly on the requirement that where outsiders are involved the communication must have been made 'in anticipation of litigation'. Litigation must, it seems, be actually pending, threatened or contemplated as *likely or reasonable, not merely as possible,*[16] and *is contemplated when a dispute* is clearly foreseen even though not in the precise form in which it subsequently arises.[17] And this contemplation or anticipation can only be in the mind of the likely litigant, so that, for instance, while the state of mind of the manager or of a director of an insurance company would be relevant, that of the insurance assessor would not.[18] The likelihood of litigation is judged objectively and not from the viewpoint of a 'very nervous or suspicious man', but as Clayden J. has pointed out,[19] 'a litigant should not lose the privilege because he is astute to see the likelihood of litigation'.

The time when the communication is made is the relevant time: that the client's contemplation of litigation altered subsequently because he hoped to effect a settlement, is immaterial.[20]

In all cases the privilege is the privilege of the client himself, not of the attorney.[21] The latter may not withhold the information if the client wishes it disclosed, and if the client chooses not to waive the privilege he can refuse disclosure by himself, his agents or his legal adviser. (Naturally, no privilege can be set up as against persons who have a joint interest with the client in the subject-

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[13] *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Companies (South) Ltd.* (3), 1953 (4) S.A. 251 (W) at 255; *Resisto Dairy (Pty.) Ltd.* v. *Auto Protection Insurance Co., Ltd.*, 1962 (2) S.A. 408 (C) at 409–10.

[14] *S.* v. *Alexander*, 1965 (2) S.A. 796 (A.D.) at 812; *Fenner* v. *London and South Eastern Railway Co.* (4) (1872) L.R. 7 Q.B. 767; *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Companies (South) Ltd.* (3), 1953 (4) S.A. 251 (W) at 256. Cf. *Heiman, Maasdorp and Barker* v. *S.I.R.*, 1968 (4) S.A. 160 (W) at 164.

[15] *International Tobacco Co. (S.A.) Ltd.* v. *United Tobacco Companies (South) Ltd.*, 1955 (2) S.A. 1 (W) at 10.

[16] *Birmingham and Midland Motor Omnibus Co., Ltd.* v. *London and North-western Railway Company* [1913] 3 K.B. 850 (C.A.) at 859–60; *General Accident, Fire & Life Assurance Corp., Ltd.* v. *Goldberg*, 1912 T.P.D. 494 at 501, 504; *Saven* v. *A.A. Mutual Insurance Co., Ltd.*, 1952 (1) S.A. 110 (C); *Potter* v. *South British Insurance Co., Ltd.*, 1963 (3) S.A. 5 (W).

[17] E.g. *Dickie* v. *Colonial Govt.* (1909) 26 S.C. 347. Documents prepared in connection with foreign legal proceedings, before the domestic proceedings were contemplated, were held to be privileged in *Re Duncan* [1968] 2 All E.R. 395.

[18] *Goldberg's* case, above, at 507; *Caldwell* v. *Western Assurance Co., Ltd.*, 1916 W.L.D. 111 at 115.

[19] In *United Tobacco Companies (South) Ltd.* v. *International Tobacco Co. of S.A., Ltd.*, 1953 (1) S.A. 66 (T) at 72.

[20] *Moffat* v. *South African Breweries, Ltd.*, 1912 W.L.D. 104 at 107; *Leo* v. *Barclays Bank*, 1931 T.P.D. 153 at 161–7.

[21] *In re The Cameron's Coalbrook & Railway Company* (1857) 53 Eng. Rep. 535 at 536; *General Accident, Fire & Life Assurance Corp., Ltd.* v. *Goldberg*, 1912 T.P.D. 494 at 506; *Savides* v. *Varsamopoulos* 1936 W.L.D. 59 at 61; *Schlosberg* v. *Attorney-General of the Transvaal*, 1936 W.L.D. 49; *R.* v. *Davies*, 1956 (2) S.A. 52 (A.D.) at 58. If the client does not wish to claim the privilege the court itself has no power to exclude the evidence: *S.* v. *Van Vreden*, 1969 (2) S.A. 361 (W).

matter of the communication, as would co-conspirators or partners.[22]) Where, however, the information was obtained from an outsider who is not the agent of the client, the scope of the privilege is narrower; while the communication remains privileged in the hands of the attorney, his client or the latter's agents, the third party himself cannot be prevented from disclosing it[23] (though the third party cannot invoke the privilege if the attorney's client does not[24]). Similarly, if the information has come into the hands of the opponent, even if by improper means, it is admissible.[25]

Because, too, the privilege is the client's, information or documents which would not have been privileged in his hands do not become immune from disclosure simply by being handed to an attorney. Thus in *R.* v. *Davies*,[26] as the *business records* kept by the client were not privileged, when they came into the attorney's custody he was simply an agent to possess and could claim no greater privilege than his principal. For this reason, too, it follows that where no attorney is acting, statements and documents are protected in a litigant's hands to the same extent as if he had employed an attorney, so that, e.g., witnesses' statements in the hands of the police or prosecutor need not be disclosed.[27]

The privilege does not operate to relieve a witness claiming it from taking the stand at all. He must submit to being sworn and then claim the privilege if and when particular questions infringing it are asked of him.[28]

Despite the public policy in favour of frankness in the legal professional relationship, the existence of the privilege is undoubtedly an obstacle to the free investigation of the truth.[29] In order, therefore, to prevent its abuse, the proviso to section 232 states that there is no privilege where *the legal advice was sought* before the criminal conduct was embarked on, i.e. in furtherance of an illegal purpose. Where the legal adviser participates in such a purpose he has ceased to act in a professional capacity, whether or not he is aware of his client's illegitimate objects, and accordingly no privilege obtains.[30] The onus of proof is on the

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[22] *Cave* v. *Johannes N.O.*, 1949 (1) S.A. 72 (T).

[23] *International Tobacco Co. of S.A., Ltd.* v. *United Tobacco Companies (South) Ltd.*, 1953 (3) S.A. 879 (W). The decision to the contrary in *Vengtas* v. *Nydoo*, 1963 (2) S.A. 504 (D), seems clearly wrong; see *Annual Survey of South African Law*, [illegible] p. 516.

[24] *Heiberg* v. *McWilliam, Kilroe and King*, 1905 T.S. 215 at 220; *S.* v. *Kearney*, 1964 (2) S.A. 495 (A.D.) at 499.

[25] *Calcraft* v. *Guest* [1898] 1 Q.B. 759 (C.A.); *Williams* v. *Shaw* (1884) 4 E.D.C. 105 at 110–11; *Hurley and Seymour N.O.* v. *W. H. Muller & Company* (1924) 45 N.L.R. 121; *Andresen* v. *Minister of Justice*, 1954 (2) S.A. 473 (N).

[26] 1956 (3) S.A. 52 (A.D.) esp. at 58–9, 74–5. See, also, *Heiman, Maasdorp and Barker* v. *S.I.R.*, 1968 (4) S.A. 160 (W) at 164.

[27] *R.* v. *Steyn*, 1954 (1) S.A. 324 (A.D.) at 334. Note, however, that where there is a significant discrepancy between a witness's statement and his evidence in the box, it is the invariable duty of the prosecutor to bring such discrepancy to the attention of the court, and in the normal course also to the defence. See *Ex parte Minister van Justisie*; *In re S.* v. *Wagner*, 1965 (4) S.A. 507 (A.D.)

[28] *Witz* v. *Additional Assistant Magistrate*, 1931 W.L.D. 100; *Andresen* v. *Minister of Justice*, 1954 (2) S.A. 473 (N) at 478.

[29] The tendency was, as a result, to construe it strictly. Thus Best C.J. in *Broad* v. *Pitt* (1828) 173 E.R. 1142 at 1142: 'The privilege is an anomaly, and ought not to be extended.' More recently, however, the privilege has come to receive more generous treatment. See *Seabrook* v. *British Transport Commission* [1959] 2 All E.R. 15 esp. at 19–20, where Havers J., tracing this evolution, dates the change as having occurred about 1913.

[30] *R.* v. *Cox and Railton* (1884) 14 Q.B.D. 153; *Schlosberg* v. *Attorney-General of the Transvaal*, 1936 W.L.D. 59 at 64; *Ditz* v. *Attorney-General*, 1936 N.P.D. 345 at 352–3. As to consultation for the purpose of tax evasion, see *Bullivant* v. *Attorney-General for Victoria* [1910] A.C. 196, and [1965] 28 *Mod. L.R.* 18 at 25 f.

person alleging the exclusion of the privilege to give prima facie proof of the illegality. Naturally, the proviso to section 232 does not affect the privilege of a client who has sought out his lawyer for the legitimate purpose of being defended upon a criminal charge against him in respect of acts already committed.

The attorney–client privilege is the only professional privilege recognized in our law. None extends to the confidential relationship between physician and patient,[31] priest and penitent,[32] accountant and client, or between a journalist and his sources of information.[33] A banker has no privilege for his books at common law, but is given a limited privilege by section 266 of the Criminal Procedure Act, which entitles him to withhold disclosure unless production is specially ordered by the court.

4. Privilege for income tax matters

Section 4(1) of the Income Tax Act, 1962,[34] imposes a duty of secrecy on all persons employed in carrying out the provisions of that Act with regard to matters coming to their knowledge in the performance of their duties. These matters are not to be divulged except to the taxpayer concerned or his lawful representatives,[35] unless the performance of the official's duties under the Act requires disclosure or it is required by order of a competent court. The purpose of the provision is the encouragement of full disclosure to the fiscal authorities who are enabled to retain the confidence of those supplying information to them by the protecting veil of secrecy,[36] but this covers only the contents of documents not the fact that such were made.[37]

The taxpayer is entitled to compel the revenue department to produce his returns, assessments, etc., in a court of law,[38] but no other party has a right to their production. The court has a discretion to order production for the benefit of or at the instance of someone other than the taxpayer,[39] but will not easily be persuaded to do so.[40] In *Strydom* v. *Griffin Engineering Company*,[41] however, disclosure was ordered, as not only was the information required four years old, but the taxpayer concerned had since died, so that even if it had incriminated him no punitive consequences could have followed; and in *Union Government* v. *Shiu*[42] Rumpff J. exercised his discretion in favour of granting an application by the Commissioner for Inland Revenue to divulge the contents of income tax documents, where the Commissioner was the petitioning creditor in a sequestration application.[43]

Since disclosure by the revenue officials is allowed in the performance of their duties under the Act, and since for them to assist in the prosecution of persons

[31] *Parkes* v. *Parkes*, 1916 C.P.D. 702. But see S. v. Forbes, p. 148 above.
[32] *Wheeler* v *Le Marchant* (1881) 17 Ch. D. 675 (C.A.) at 681.
[33] *S.* v. *Pogrund*, 1961 (3) S.A. 868 (T); *Attorney-General* v. *Clough* [1963] 2 W.L.R. 343. See B. van D. van Niekerk in (1969) 87 *S.A.L.J.* 300.
[34] Act No. 58 of 1962. Previously sec. 4 of Act No. 31 of 1941.
[35] See *Ohlsson's Cape Breweries* v. *Muller*, 1940 C.P.D. 371.
[36] See *Union Govt.* v. *Shiu*, 1955 (1) S.A. 298 (T) at 300.
[37] *Strydom* v. *Griffin Engineering Company*, 1927 O.P.D. 47; *Margau* v. *De Kock*, 1947 (4) S.A. 318 (W).
[38] Unless, of course, such production would adversely affect the interests of the State (see below, pp. [illegible], but in *Crane* v. *Johannesburg Stock Exchange Committee*, 1949 (4) S.A. 835 (A.D.), Watermeyer C.J. doubted, at 843, whether income tax documents could ever fall into this category.
[39] *Tooch* v. *Greenaway*, 1922 C.P.D. 331.
[40] e.g. *Silver* v. *Silver*, 1937 N.P.D. 129.
[41] 1927 O.P.D. 47 at 51–2.
[42] 1955 (1) S.A. 298 (T).
[43] Possibly this situation would be covered in any event by the first proviso to sec. 4(1).

charged with contraventions of the Act are part of those duties, otherwise secret information may be furnished by such officials both to the prosecuting authorities and to the court.[44]

The privilege created by the Income Tax Act extends only to the officials employed under it, so that the taxpayer himself cannot claim to have a privilege under section 4(1), but would have to bring his refusal to produce his income tax returns, assessments, etc., under one of the other headings of privilege if he can, by invoking, for example, the protection against self-incrimination.[45]

5. Marital privilege

The only other confidential relationship which gives rise to a legally recognized privilege is the marital one, where the importance of protecting the mutual trust and confidence of the spouses overrides the inconvenience to the administration of justice.

Section 229(1) of the Criminal Procedure Act provides that a witness may refuse to disclose communications made by his or her spouse during the subsistence of the marriage. A person whose marriage has been dissolved or annulled by a competent court can claim the privilege for anything occurring during the marriage before its dissolution or annulment.[46] If, however, the marriage was dissolved by death rather than by order of court, the privilege ceases.[47]

The prototype of section 229(1), which was section 1(*d*) of the English Criminal Evidence Act, 1898,[48] was said in *Shenton* v. *Tyler*[49] to confer a privilege on the testifying spouse alone, who alone may elect to waive it and divulge the communication. In the United States, on the other hand, the privilege is said to be that of the communicating spouse, who may therefore prevent the testifying spouse from speaking to it.[50] The solution imposed by our Criminal Code is an amalgamation of these two views, since section 230 provides that a testifying spouse can claim any privilege his or her spouse could have claimed. Thus the witness may refuse to answer questions which would incriminate the spouse,[51] or would reflect on the character or previous convictions of the spouse who is the accused;[52] the witness may invoke the professional privilege for communications made by the spouse in his or her presence to the former's legal adviser,[53] and the privilege contained in section 229(1) to withhold disclosure of communications made by the witness to his or her spouse.

Where the communication between the spouses has reached an outsider, he

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[44] *R.* v. *Kassim*, 1950 (4) S.A. 522 (A.D.) at 527–8, per Greenberg J.A.

[45] *Crane* v. *Johannesburg Stock Exchange Committee*, 1949 (4) S.A. 835 (A.D.) esp. at 844; *Marais* v. *Lombard*, 1958 (4) S.A. 224 (E); *Millman, Maasdorp and Barker* v. *S.I.R.*, 1968 (4) S.A. 160 (W).

[46] Sec. 229(2) of the Criminal Procedure Act.

[47] *Shenton* v. *Tyler* [1939] 1 All E.R. 827 (C.A.) at 841, 848–9. Cf. 8 Wigmore, *Evidence*, § 2341 (McNaughten rev. 1961), from which it seems that in the United States the privilege does not terminate on either death or divorce.

[48] 61 & 62 Vict., c. 36.

[49] [1939] 1 All E.R. 827 (C.A.) at 833, per Greene M.R.

[50] See Wigmore, op. cit., § 2340.

[51] Sec. 234. Cf. *Lady Ivy's Trial* (1684) 10 St. Tr. 555 at 628.

[52] Sec. 228; *R.* v. *Bishop*, 1965 (2) P.H., H. 134 (R).

[53] The authority on the point so far has concerned cases where the spouses both consulted the adviser as client, e.g. *Harris* v. *Harris* [1931] P. 10, but presumably sec. 230 would cover the case where only one of them is the client.

may testify to it even against their wish. Thus in *R.* v. *Nelson*,[54] a letter written to a woman by her husband while he was in gaol awaiting trial, was intercepted by a prison warder before delivery to her. The contents of the letter were held to be admissible. The same would apply where a conversation between spouses is overheard by a third person.[55]

II. PRIVILEGED INFORMATION

1. Affairs of State

Evidence will be excluded where its reception would be contrary to the interests of the State, 'on grounds of public policy and from regard to public interest'.[56]

This is an absolute privilege in the sense that where it applies no witness can testify to the matters covered (except, under the proviso to section 233 of the Criminal Code, where the disclosure of the information itself constituted an offence); for example, if it is claimed to justify the withholding of documents, no secondary or circumstantial evidence of their contents may be given,[57] and even if they have been disclosed inadvertently such evidence remains inadmissible,[58] unless the reasons for secrecy have thereby fallen away.[59] Where the privilege is not claimed by the State, it lies in the discretion of the court as to whether it should be treated as having been waived.[60]

As in all cases where the question of privilege arises, counsel may argue the matter for the assistance of the court, but its invocation or waiver may have nothing to do with the parties themselves,[61] as the privilege applies with equal vigour regardless of whether or not the State is a party to the action.

Section 29 of the General Law Amendment Act, No. 101 of 1969, provides that evidence shall be excluded, on the mere production to the court of a certificate signed by a Minister of State or other person authorized to do so by the Prime Minister and stating that the signatory is of the opinion that the giving of the evidence 'will be prejudicial to the interests of the State or public security'. This provision was clearly designed to reverse the extensive overhaul to which the whole field of State privilege had immediately before been subjected by the Appellate Division in *Van der Linde* v. *Calitz*.[62] It is difficult to imagine that many cases will in the future arise where the simple expedient and total finality of the certificate will not be resorted to. However, as the provision itself

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[54] 1936 S.R. 121. A similar case is *Rumping* v. *D.P.P.* [1962] 3 All E.R. 256 (H.L.).

[55] *R.* v. *Trott* [1955] Crim. L.R. 643. See, too, (1958) 32 *Austr. L.J.* 86.

[56] Sec. 233.

[57] *Minister of Community Development* v. *Saloojee*, 1963 (4) S.A. 65 (T) at 72; *Redelinghuys* v. *Geidel* (2), 1963 (4) S.A. 912 (W).

[58] *Duncan* v. *Cammell, Laird and Company* [1942] A.C. 624 (H.L.) at 630; *Faber* v. *Barraw* (1), 1963 (1) S.A. 422 (S.R.) at 428–9; *Redelinghuys* v. *Geidel*, 1963 (2) S.A. 274 (W) at 280; *Conway* v. *Rimmer* [1968] 2 W.L.R. 998 (H.L.) at 1047–8.

[59] *R.* v. *Schalkwyk*, 1938 A.D. 543 at 553; *Van der Linde* v. *Calitz*, 1967 (2) S.A. 239 (A.D.) at 262.

[60] *Chatterton* v. *Secretary of State for India in Council* [1895] 2 Q.B. 189 (C.A.) at 195; *Hennessy* v. *Wright* (1888) 21 Q.B.D. 509 at 515, 521; *Tranter* v. *Attorney-General*, 1907 T.S. 415 at 420.

[61] *Le Roux* v. *A.R.M. of Pietersburg*, 1919 T.P.D. 119 at 121.

[62] 1967 (2) S.A. 239 (A.D.). The statutory reinstatement, in even more rigorous form, of the old *Duncan* v. *Cammell, Laird* rule, effected by Act 101 of 1969, is in striking contrast with the recent Israeli legislation which, although enacted when the country was in a virtual state of war, allows the courts to investigate privately the executive's claim of privilege even when matters of national security and foreign relations are involved. Privilege in matters of the kind

expressly preserves the pre-existing law where not inconsistent, the common-law position as set out in the cases up to the time of the Act will be discussed, as being of at least historical significance. It should be borne in mind that the exclusionary rule in this regard should as far as possible be less strictly applied in criminal cases than in civil trials.[63]

At common law public policy was held to dictate that the interests of the State would be adversely affected by the disclosure of matters relating to national security,[64] including the maintenance of good diplomatic relations;[65] matters of high policy;[66] the proper functioning of the public service;[67] and the efficient detection of crime.[68] However, the mere fact that the communications are made to high officers of the executive does not mean that they will automatically be privileged regardless of content,[69] nor is it sufficient that the communications are official ones or of administrative moment[70] even if they were made in confidence,[71] unless perhaps if made in pursuance of a duty imposed by law.[72] The protection from disclosure afforded to parliamentary proceedings, which may give rise to questions of admissibility, is extensively regulated by statute and need not be considered here.[73]

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mentioned are distinguished only procedurally from cases where ordinary 'administrative' privilege is claimed. See (1969) 85 *L.Q.R.* 17. The pre-existing common-law position in Israel is discussed in (1968) 3 *Israel L.R.* 387.

[63] *Duncan* v. *Cammell, Laird & Company* [1942] A.C. 624 (H.L.) at 633–4; *S.* v. *Naicker*, 1965 (2) S.A. 919 (N) at 935. Although section 233 of the Criminal Procedure Act incorporates the law of England by reference, little guidance in this regard is afforded by English law since it is not the practice for the Crown to claim State privilege in criminal cases. See (1959) *Crim. L.R.* 10; *Cross on Evidence*, 3rd ed. (1967), p. 256; *Conway* v. *Rimmer* [1968] 2 W.L.R. 998 (H.L.) at 1006–7.

[64] e.g. the plans of a military submarine, in wartime, as in *Duncan* v. *Cammell, Laird*, above; *Conway* v. *Rimmer*, above. See too *Anglia* v. *R.* (1918) 39 N.L.R. 147.

[65] Privilege has been granted to a high commissioner's reports to his government (*Isaacs & Sons, Ltd.* v. *Cook* [1925] 2 K.B. 391; and see *Conway* v. *Rimmer*, above, at 1033, 1042), but in *A* v. *A & B*, 1908 T.H. 188, Curlewis J. expressed doubt as to whether the same applied to a consul.

[66] e.g. Cabinet minutes. See *Nyangeni* v. *Minister of Bantu Education*, 1961 (1) S.A. 547 (E); *Faber* v. *Barrow* (1), 1963 (1) S.A. 422 (S.R.); *Chatterton* v. *Secretary of State for India in Council* [1895] 2 Q.B. 189 (C.A.); *Conway* v. *Rimmer*, above, at 1015, 1050.

[67] e.g. letters of complaint about an official addressed by a member of the public to the Minister, the disclosure of which might prevent complaints being made and therefore abuses being traced: *Redelinghuys* v. *Geidel*, 1963 (2) S.A. 274 (W), and *Barnicott* v. *Minister of Justice*, 1913 T.P.D. 691 at 697. But cf. *Van der Linde* v. *Callitz*, 1967 (2) S.A. 239 (A.D.) at 261.

[68] e.g. *S.* v. *Peake*, 1962 (4) S.A. 288 (C), where privilege was claimed for the methods by which a political speech, the subject of the charge had been recorded. See, too, *Allen* v. *Rayner* [1958] 3 All E.R. 566; *R.* v. *Abelson*, 1933 T.P.D. 227 at 232.

[69] *Frazer* v. *Sivewright* (1885) 3 S.C. 375; *Hellett* v. *S.A.R. & H.* (1927) 48 N.L.R. 65.

[70] *Van der Horst* v. *Colonial Govt.* (1903) 20 S.C. 578 at 585; *Barkly West Bridge Co., Ltd.* v. *Colonial Govt.* (1908) 25 S.C. 49; *Van der Linde* v. *Callitz*, 1967 (2) S.A. 239 (A.D.) at 260.

[71] *Crane* v. *Johannesburg Stock Exchange*, 1949 (4) S.A. 835 (A.D.) at 842; *Day* v. *Minister of Justice*, 1913 T.P.D. 853; *Rutland* v. *Engelbrecht*, 1956 (2) S.A. 578 (C) at 580.

[72] *Van der Linde's* case, above, at 260. At 261 Steyn C.J. stated that where the official had acted honestly and properly, he would probably be indemnified by the State against the consequences of disclosure, which seems to indicate that the fact that the communication was made in pursuance of an official duty will not necessarily mean it should be withheld from disclosure but that this is a factor which the court should weigh in determining whether or not to order production. In *Conway* v. *Rimmer* [1968] 2 W.L.R. 998 (H.L.), it was the unanimous view of the House of Lords that the protection of an official against the possibility of a defamation action was not one of the purposes of State privilege (see esp. at 1035–6, 1050); and that the courts had the power and duty to investigate whether the possibility of disclosure would in fact inhibit the candour of reports and correspondence.

[73] Powers and Privileges of Parliament Act, No. 19 of 1911. See *Kahn* v. *Time, Incorporated*, 1956 (2) S.A. 580 (W), and also *Upington* v. *Saul Solomon & Company* (1879) 9 Buch. 240 at 267.

In England *State interests can only be said to be affected where the central government is concerned.* In South Africa, both central and provincial affairs may be covered,[74] but, as in England, local authorities and other official organizations cannot claim privilege for their concerns.[75]

The privilege may be claimed not only on account of the particular contents of the communication, but also where, although the contents of the communication may happen to be innocuous, the communication belongs to a particular class which should be immune from disclosure.[76] In both cases the privilege must be claimed *jurat* by the political head of the department of State concerned. (In the case of provincial matters the political head is the Administrator.)[77] Only if this is not possible for any reason—which must be explained—may the claim be made by the permanent head of the department. The deponent must state that he has himself inspected the documents and is of the opinion that the disclosure of its contents would adversely affect the interests of the State. In so claiming the Minister should not weigh the need for the information in the particular trial: he is acting not in a judicial but in an administrative capacity.[78]

A blanket privilege cannot be claimed for a number or file of documents. The Minister must consider each one individually when it is asked for or tendered. If oral and not documentary evidence is concerned, objections to the subpoenaing of a witness are incompetent for the same reason.[79]

The affidavit under the common law must describe the nature of the communication and, if this is not obvious, the prejudice to the public interest which might result from disclosure, so that the court is put in a position to decide whether or not the claim for privilege is well founded. In *Duncan* v. *Cammell, Laird and Company*[80] the House of Lords held that an invocation of privilege made in proper form was conclusive and binding on the courts, which could therefore not go behind the affidavit. The same conclusion had been reached in South Africa, though frequently reluctantly,[81] until, in *Van der Linde* v. *Calitz*,[82] Steyn C.J. repudiated it at least in so far as concerned those cases where the documents are said to *belong to a class which is* privileged from disclosure.[83]

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[74] *Van der Linde's* case, above, at 260–1.

[75] *London & S.A. Exploration Co., Ltd.* v. *Beaconsfield Municipality* (1885) 3 H.C.G. 152; *Le Roux* v. *A.R.M. of Pietersburg*, 1919 T.P.D. 119; *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349 at 379–80, [1948] 1 All E.R. 85 at 97. See now sec. 3(2) of the Official Secrets Act, No. 16 of 1956, as amended by sec. 10 of the General Law Amendment Act, No. 101 of 1969.

[76] *Duncan* v. *Cammell, Laird and Company* [1942] A.C. 624 (H.L.) at 636; *Van der Linde* v. *Calitz*, 1967 (2) S.A. 639 (A.D.); see, too, the judgment of Singleton L.J. in *Ellis* v. *Home Office* [1953] 2 All E.R. 149 (C.A.). The utility of this classification was however doubted by the majority of the Law Lords in *Conway* v. *Rimmer* [1968] 2 W.L.R. 998 (H.L.) at 1031, 1033 and 1045, and little significance was attached to it by the minority (see at 1008, 1047, 1051). It is submitted that the sole test should be the public interest as balanced between the administration of the executive and the administration of justice (in the words of Lord Pearce in *Conway* v. *Rimmer*, at 1045).

[77] *Van der Linde's* case, above, at 260.

[78] *Van der Linde's* case, at 260; *Auten* v. *Rayner* [1958] 3 All E.R. 566 (C.A.) at 570, 572.

[79] *S.* v. *Natcker*, 1965 (2) S.A. 919 (N); *S.A. Defence and Aid Fund* v. *Minister of Justice*, 1967 (1) S.A. 31 (C); *Broome* v. *Broome* [1955] 1 All E.R. 201 at 207, (1955) P. 190 at 199.

[80] [1942] A.C. 624 (H.L.).

[81] e.g. *Barnicott* v. *Minister of Justice*, 1913 T.P.D. 691; *Hellett* v. *S.A.R. & H.* (1927) 48 N.L.R. 65. But see *Day* v. *Minister of Justice*, 1913 T.P.D. 853 esp. at 857, and *Rutland* v. *Engelbrecht*, 1956 (2) S.A. 578 (C).

[82] 1967 (2) S.A. 639 (A.D.). For a criticism of the reasoning by which this conclusion was reached in the face of the legislative direction that English law governs, see (1967) 84 *S.A.L.J.* 245.

[83] The question of documents privileged because of their particular contents was expressly left open in *Van der Linde's* case, at 259.

(*Duncan's* case was subsequently overruled by the House of Lords, in *Conway* v. *Rimmer*.[84]) In such cases the courts have the power to order disclosure by overruling a claim of privilege even where it does not appear to have been frivolously or vexatiously made. Further, the court has power itself to inspect the documents privately to determine whether there is any necessity for secrecy.

Steyn C.J. warned[85] that the executive was not to be lightly overridden: there might be more reasons of State than were dreamt of in judicial philosophies, and disclosure might entail payment of too great a price for the information sought. On the other hand, said the learned Chief Justice, governmental interest does not exhaust State interest: there is a public interest also in the unfettered administration of justice. But the legislature has clearly indicated, by Act No. 101 of 1969, that in its view judicial evaluation, however cautious, cannot be permitted to compete with executive control and responsibility in the protection of the public interest.

2. **Privilege protecting informers**

A particular privilege is recognized with the object of encouraging private individuals to disclose to the authorities information as to crimes committed, which they might otherwise be reluctant to volunteer for fear of reprisals from those who would be prejudiced by the disclosures.[86]

This privilege is an aspect of State privilege and as such is governed by the terms of section 233 of the Criminal Procedure Act, which states it is to be accorded in situations where an English court would recognize it.[87] The English statement of the rule excludes, in 'public prosecutions', evidence tending to reveal the identity of an informer or otherwise exposing the channels of communication of a crime.[88] Since in South African procedure public prosecutions are the almost invariable rule—unlike the English position—our courts were led initially in adopting the principle to apply what was in effect a far more stringent rule of exclusion.[89] A realistic adjustment has, however, been established by the two Appellate Division decisions where the matter has been considered.

As formulated by Stratford C.J. in *R.* v. *Van Schalkwyk*,[90] the privilege will obtain where information which may cause the initiation of a criminal prosecution[91] is given to the officers of justice[92] by someone who should be protected against those who may suffer by his having done so.

A person who has laid a charge would therefore normally be regarded as an

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[84] [1968] 2 W.L.R. 998 (H.L.). See (1968) 85 *S.A.L.J.* 309.

[85] At 259.

[86] *R.* v. *Van Schalkwyk*, 1938 A.D. 543 at 549; *Ex parte Minister of Justice: in re R.* v. *Pillay*, 1945 A.D. 653 at 668. Both judgments stress that the protection of the informer is not the purpose of the privilege, it is merely the means of ensuring the free flow of information.

[87] See above, pp. 160, 163, 165.

[88] *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494 (C.A.).

[89] Per Watermeyer C.J. in *Pillay's* case, above, at 667, discussing *Trauter* v. *Attorney-General*, 1907 T.S. 415, and the many cases which followed it.

[90] 1938 A.D. 543 at 548.

[91] Whether a criminal prosecution has in fact resulted is irrelevant. Nor is it necessary that the information has actually disclosed an offence, if it has suggested or initiated investigation by which an offence *would be discovered*: *Robinson* v. *Benson*, 1918 W.L.D. 1. Cf. *R.* v. *Chetty*, 1931 N.P.D. 534.

[92] See *Botha* v. *Richter*, 1916 O.P.D. 216; *Piper* v. *Spencer's Motor Co., Ltd.*, 1931 W.L.D. 86; *Duvenage* v. *Duvenage*, 1936 E.D.L. 147 at 170. The particular officer who received it may not be identified: *R.* v. *Watson* (1817) 32 How St. Tr. 100; *R.* v. *Hardy* (1794) 24 How St. Tr. 815.

informer,[93] except where he is the complainant in a charge involving injury to the person or property of an individual—at least where he is a State witness—for such persons are not considered to be in need of encouragement to lodge their complaints.[94] Persons from whom the police have taken statements in the course of their investigation of a crime are usually not to be treated as informers. One example of this would be a witness to a motor collision, even if he was involved in the collision and has stated in response to the routine inquiry that he desires a prosecution to ensue.[95] Similarly, persons interrogated by the police when the accused is already under arrest are not informers.[96]

Whether an informer in the strict sense requires the protection of secrecy is tested by the requirements of public policy. Watermeyer C.J. in *R.* v. *Pillay*[97] adopted a flexible measure in stating that evidence of the State's sources of information would be excluded only

> 'when public policy requires the name of the informer or his information to be kept secret, because of some confidential relationship between State and informer,[98] or because the State desires its sources of information to be kept secret for the reason that the informer's information relates to matters in respect of which he might not inform if he were not protected,[99] or for the reason that the candour and completeness of his communication may be prejudiced, if he were not protected, or for some other good reason'.

On the test of public policy, the privilege has been refused where the informer is in need of no protection since he has already been identified[1] by his own admission[2] or perhaps in earlier trials;[3] or where disclosure of the informer's identity would be in *favorem innocentiae* not only to establish the accused's defence[4] but also where the reliability of the informer is in issue.[5] In terms of the proviso to section 233, no privilege applies where the making of an otherwise protected communication constitutes an offence,[6] such as incitement, forgery, *falsitas*, perjury,[7] *crimen injuria*, or the laying of a false charge.[8] Apart from such cases, however, generally fraud will not defeat a claim of State privilege.[9]

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[93] *Olifant* v. *R.*, 1937 (2) P.H., H. 191 (T).

[94] *Pillay's* case, above, at 667–8; *Naylor* v. *Wheeler*, 1947 (2) S.A. 681 (D).

[95] *R.* v. *Van Schalkwyk*, 1938 A.D. 543 at 550; *R.* v. *Makaula*, 1949 (1) S.A. 40 (E); *Pechey* v. *Lutchman*, 1963 (4) S.A. 112 (N) at 114.

[96] *Hitge* v. *African Guarantee and Indemnity Co., Ltd.*, 1923 W.L.D. 25; *Attorney-General* v. *Van Wyk*, 1932 T.P.D. 359 at 361; *Van Lingen* v. *Mornewicke*, 1921 E.D.L. 330.

[97] 1945 A.D. 653 at 668. See also the judgment of Tindall J.A. at 673.

[98] A peace officer who witnessed a crime and who himself had power to arrest the criminals, was held not to be in such a confidential relation with the State, in *R.* v. *Makaula*, 1949 (1) S.A. 40 (E).

[99] An example of the application of this consideration is *Marais* v. *Lombard*, 1958 (4) S.A. 224 (E), where O'Hagan J. refused to relax the privilege where the crime alleged, stock theft, was both very prevalent and difficult of detection without information being fed to the authorities.

[1] *R.* v. *Van Schalkwyk*, 1938 A.D. 543.

[2] e.g. *Botha* v. *Richter*, 1916 O.P.D. 216; *Baker* v. *Christiane*, 1920 W.L.D. 14; *Hirschfield* v. *Malan*, 1943 C.P.D. 47.

[3] *Day* v. *Schwartz*, 1933 C.P.D. 583; *R.* v. *Gunkel*, 1939 E.D.L. 57 at 62; *R.* v. *Richardson* [1863] 176 Eng. Rep. 35, 3 F. & F. 693; *Conway* v. *Rimmer* [1968] 2 W.L.R. 998 (H.L.) esp. at 1016.

[4] *Rascher* v. *Minister of Justice*, 1930 T.P.D. 810; *R.* v. *Chetty*, 1931 N.P.D. 534.

[5] *R.* v. *Malgas*, 1918 E.D.L. 191; *Milton* v. *Vacuum Oil Co. of South Africa, Ltd.*, 1932 W.L.D. 26, *Sapar* v. *Watney*, 1934 C.P.D. 203; *Sebastian* v. *Gonsalves*, 1939 T.P.D. 172 at 177; *Naylor* v. *Wheeler*, 1947 (2) S.A. 681 (D).

[6] See *Duvenage* v. *Duvenage*, 1936 E.D.L. 147 at 170.

[7] *R.* v. *Mbidi*, 1925 E.D.L. 179; *R.* v. *Makaula*, 1949 (1) S.A. 40 (E).

[8] *R* v. *Chipo*, 1953 (3) S.A. 602 (S.R.). Cf. *R.* v. *Manley* [1933] 1 K.B. 529 (C.C.A.).

[9] *Auten* v. *Rayner* [1958] 1 W.L.R. 1300 (C.A.).

Where it exists, the privilege protecting informers is an absolute one. It is not a matter of judicial discretion but a rule of law,[10] so that the judicial officer has a duty to prevent any questions being put which are directed to ascertaining whether the witness or a third person was the informer, even where the police or attorney-general makes no objection.[11] A similar duty rests on the public prosecutor. The attorney-general cannot be compelled to produce or disclose the information,[12] nor can it be admitted if produced from another source.[13] It seems clear however that although the privilege cannot be waived by quiescence[14] or failure to object, it can be waived by the informer himself. Where he voluntarily identifies himself, whether in testifying as a witness or by extracurial admissions, the evidence will not be excluded:[15] *cessat ratione cessat lex ipsa*.

It may be noted that the privilege apparently extends no further than those matters from which the identity of the informer may be discovered. The actual information he has given is not automatically privileged from disclosure,[16] unless either it cannot be disclosed without its source also being revealed (as will no doubt usually be the case), or it falls under some other heading of privilege, e.g. the professional privilege covering witness's statements obtained for the purposes of litigation,[17] or some general heading of matter which should not be divulged in the public interest.[18]

3. *Judicial disclosures*

The evidence of judges and magistrates as to the performance of their judicial duties in cases heard by them is inadmissible.[19] A magistrate may, however, testify as to events occurring in the course of the trial, such as whether a statement which is the subject of a subsequent charge of perjury was made on oath,[20] or whether an assault or escape took place during the hearing. It is probable, though not entirely settled,[21] that the evidence of a superior court judge would be allowed in similar circumstances.

Before the Abolition of *Juries Act, No. 34 of 1969*, evidence as to a jury's manner of reaching its decision was held inadmissible, not only because it

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[10] *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494 (C.A.) at 498. It is argued in (1959) *Crim. L.R.* 10 that the privilege is an absolute one only in civil cases, whereas in criminal cases it is for the discretion of the judge. This seems, however, to amount to little more than a statement that the public policy test is a flexible one susceptible of individually differing judicial approaches.

[11] *Marks* v. *Beyfus*, above, at 500; *R.* v. *Van Schalkwyk*, 1938 A.D. 543 at 555. In civil cases such as actions based on defamation or malicious prosecution, the rule may be relaxed: *Baker* v. *Christiane*, 1920 W.L.D. 14; *Hilge* v. *African Guarantee and Indemnity Co., Ltd.*, 1923 W.L.D. 25; *Sebastian* v. *Gonsalves*, 1939 T.P.D. 172 at 175–6, 179–80. *Contra, Schneider* v. *Cloughly*, 1917 T.P.D. 512.

[12] *Marks* v. *Beyfus*, above at 500 (per Lord Esher M.R.); *Viljoen* v. *De Jager* (1912) 33 N.L.R. 581; *Botha* v. *Richter*, 1916 O.P.D. 216; *Leask* v. *Attorney-General, Natal* (1916) 37 N.L.R. 445.

[13] *Marincowitz* v. *Grundling*, 1916 C.P.D. 587.

[14] See *Robinson* v. *Benson*, 1918 W.L.D. 1 at 4–5.

[15] *R.* v. *Van Schalkwyk*, 1938 A.D. 543 at 554; *Harris* v. *R.* (1927) 48 N.L.R. 330 at 344–5; *Bashoff* v. *Marais*, 1933 T.P.D. 55 at 56–7.

[16] 8 Wigmore, *Evidence*, § 2374 (McNaughten rev. 1961); *R.* v. *Van Schalkwyk*, 1938 A.D. 543 at 555.

[17] e.g. *R.* v. *Steyn*, 1954 (1) S.A. 324 (A.D.).

[18] See Watermeyer C.J. in the extract from *Pillay's* case, quoted on p. 168 above.

[19] *Ex parte Wolpert*, 1917 W.L.D. 98; *R.* v. *Harmse*, 1931 T.P.D. 449.

[20] *Harmse's* case, above. De Waal J.P. stressed that the magistrate should not be asked whether the statement was a material one, unless the issue cannot be established in any other way, e.g. where the materiality turned on the relative credibility of witnesses.

[21] See R. Cross, *Evidence*, 3rd ed. (1967), p. 261.

concerns the performance of a judicial function, but also for the protection of the jurymen,[23] but the evidence of a juror was not excluded where it related to an alleged irregularity in the proceedings, such as an individual juror's inability to understand the language in which the evidence had been given,[24] or breaches of the privacy of the juryroom.[25] There appears to be no authority as to how far assessors are to be treated as jurors or as judicial officers, for these purposes.

[23] *R. v. Krasner*, 1950 (2) S.A. 475 (A.D.).
[24] *R. v. Silber*, 1940 A.D. 151.
[25] *R. v. Krasner*, 1950 (2) S.A. 475 (A.D.) at 487; *S. v. Moodie*, 1961 (4) S.A. 752 (A.D.).

CHAPTER 22

THE BURDEN OF PROOF

I. GENERAL PRINCIPLES

The phrase 'burden of proof' is used in several senses. In its most frequent and *probably most correct sense, it refers to 'the duty which* is cast on a particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be'.[1] This duty is also termed the legal burden of proof, or the risk of non-persuasion,[2] since the party who bears it must lose if he fails to persuade *the court that his allegation is the true* one. It is not discharged if he can establish only that his allegation is more likely to be true than is the opponent's allegation, since this would not provide for the situation where the court was unable to decide between the contradictory versions.[3]

Which party bears the burden of proving a particular issue is a matter of substantive law. Once determined, the incidence of the onus remains fixed and does not change from one party to another during the course of the trial. Where

[1] Per Davies A.J.A. in *Pillay* v. *Krishna*, 1946 A.D. 946 at 951.
[2] *Wigmore on Evidence*, 3rd ed. (1940), IX, §§ 2485 ff.
[3] *R.* v. *Ebrahim*, 1948 (2) S.A. 677 (A.D.), as explained in *Van Aswegen* v. *De Clerq*, 1960 (4) S.A. 577 (A.D.) at 582.

several distinct issues fall to be decided, the burden of proof on each is separately determined and may fall on different parties. When this occurs the burden of proof is said to give the impression of shifting from one party to another, but properly regarded the burdens cannot shift, though one resting on party A may not arise until another has first been discharged by party B.[4]

The general principle in criminal cases[5] is that the legal burden of proving the accused's guilt[6] rests upon the prosecution. This is often loosely expressed by saying that there is a presumption of innocence in favour of the accused: *in favorem vitae libertatis et innocentiae omnia praesumuntur.*[7] The State must prove every element of the accused's guilt beyond a reasonable doubt—the commission of the act charged,[8] its unlawfulness,[9] and the identity of the accused as the criminal[10]—regarded cumulatively.[11]

What amounts to proof beyond a reasonable doubt is incapable of precise definition,[12] and absolute certainty such as is conceivable in the exact sciences is not to be expected in matters of fact.[13] A high degree of probability in the mind of 'the ordinary reasonable man, on mature consideration',[14] which 'leaves no doubt to the reasonable, honest mind'[15]—such terminology emphasizes the essentially common-sense approach to be adopted. In *R. v. Blom*[16] Wessels-meyer A.J.A. put it another way when he said that 'before a man is convicted of a crime every supposition not in itself improbable which is consistent with his innocence ought to be negatived'. It should be stressed, however, that proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. Fanciful or unsubstantial doubts in the mind of the court may be disregarded;[17] but a doubt may be reasonable even though it is not considerable.[18]

The prosecution may have proved its case beyond a reasonable doubt even though there is yet more evidence it could have called to make its case even stronger.[19]

As the legal burden of proof remains fundamentally upon the State, it cannot shift to the defence. The accused bears no onus, in this sense, of proving his innocence. Whether he pleads a general denial or sets up a particular defence,[20] and even where he relies upon facts peculiarly within his own knowledge,[21] the

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[4] *Cock v. Lichtenstein N.O.*, 1910 A.D. 178 at 192; *R. v. Heffman*, 1941 O.P.D. 55 at 74; *Pillay v. Krishna*, 1946 A.D. 946 at 952.

[5] See, generally, J. J. P. Jafer in (1952) 21 T.H.R.-H.R 286; C. H. Schmidt in (1963) 26 *T.H.R.-H.R.* 165, 259, (1964) 27 *T.H.R.-H.R.* 36, 126.

[6] As to proof of facts in mitigation or aggravation of guilt, see below, p. [illegible].

[7] e.g. *R. v. Benjamin* (1883) 3 E.D.C. 337; *S. v. Ntuli*, 1963 (1) S.A. 394 (T).

[8] *R. v. Nhleko*, 1960 (4) S.A. 712 (A.D.) at 721; *S. v. Siswana*, 1968 (4) S.A. 231 (E).

[9] *R. v. Mabanti* (1905) 22 S.C. 632; *R. v. Nkhoma*, 1945 A.D. 369 at 386.

[10] *R. v. Blom*, 1939 A.D. 188 at 210. As to the effect of the rules of corroboration upon the burden of proof, see *R. v. Bellingham*, 1953 (2) S.A. 366 (A.D.), and *R. v. J*, 1968 (1) S.A. 88 (S.R., A.D.).

[11] *R. v. Mfembu*, 1950 (1) S.A. 670 (A.D.) at 679; *S. v. Siegard*, 1967 (4) S.A. 170 (W).

[12] As pointed out by De Villiers J.P. in *R. v. Boje*, 1952 (3) S.A. 574 (C) at 576. See, too, *Ex parte Minister of Justice: In re R. v. Baim*, 1941 A.D. 345 at 351.

[13] *Wilsbenrt v. Goldenhuis*, 1911 T.P.D. 1050; *R. v. De Fleuts*, 1942 E.D.L. 9.

[14] *Per* Rumpff J.A. in *S. v. Rama*, 1966 (2) S.A. 395 (A.D.).

[15] *Per* Claasen J. in *S. v. Britz*, 1963 (1) S.A. 394 (T) at 397.

[16] 1939 A.D. 188 at 210.

[17] *Miller v. Minister of Pensions* [1947] 2 All E.R. 372 at 373; *R. v. Bergstedt*, 1955 (4) S.A. 186 (A.D.); *S. v. Rama*, 1966 (2) S.A. 395 (A.D.).

[18] *R. v. Van der Vyver*, 1932 O.P.D. 171.

[19] *R. v. Ramona*, 1952 (1) S.A. 397 (A.D.).

[20] *R. v. Lahee*, 1941 E.D.L. 215; *R. v. Nkhoma*, 1945 A.D. 369 at 386-7; *R. v. Rijn*, 1952 (4) S.A. 514 (A.D.) at 520–1.

[21] *R. v. Cohen*, 1933 T.P.D. 128.

Another exception is in the case of murder charges, where the defence has the burden of proving, on a balance of probabilities, the existence of extenuating circumstances (S. v. Ndhlovu, 1970 (1) S.A. 430 (A.D.)).

Ad n. 28 : But the burden on the defence of establishing extenuating circumstances is a legal and not an evidential burden (S. v. Ndhlovu, 1970 (1) S.A. 430 (A.D.)).

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This brings us to a further meaning of
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argument is obviously insufficient.[27] It may
bears the legal burden of proving the accu
any defence, the accused has at the same
sufficient evidence of his defence to force
he is guilty.[28]
The nature of the evidential burden also
rests upon the prosecution, and here

[22] This includes the defence of automatism, [illegible]
purely emotional (*S.* v. *Van Zyl*, 1964 (2) S.A. [illegible]
Bezuidenho [illegible] 964 (2) S.A. 651 (A.D.). See also [illegible]
[23] *Cape Coast Exploration Co., Ltd.* v. [illegible]
[1947] 2 All E.R. 372 at 374.
[24] *Van Wyk* v. *Lewis*, 1924 A.D. 438 at [illegible]
[25] *R.* v. *Maphumalo* (2), 1960 (1) S.A. [illegible]
Ireland [1961] 3 All E.R. 523 (H.L.) [illegible]
[26] See, generally, *Pillay* v. *Krishna*, [illegible]
In *Jayasena* v. *R.* [1970] 1 All E.R. 219 (P.C.) [illegible]
burden as a 'burden of proof', since [illegible]
[27] *Pillay* v. *R.*, 1942 N.P.D. [illegible]
188 at 196.
[28] *R.* v. *Lohee*, 1941 E.D.L. 215 [illegible]
R. v. *Lobell* [1957] 1 Q.B. 547 (C.A.) [illegible]
Ireland [1961] 3 All E.R. 523 (H.L.) [illegible]
1 W.L.R. 983 (C.A.) (duress). [illegible]
[29] *Wigmore on Evidence*, 3rd ed. (1940), [illegible]

of murder charges, where the
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ing circumstances (S. v.

onus remains on the State to negative his innocence. ~~The~~ One exception to this (apart from statutory cases, discussed below, p. [redacted]) is where the defence sets up insanity. *In this case the onus of proof is, for policy reasons, upon the accused*, and the standard of proof required from him is the same as that required of a litigant in a civil case, viz. proof upon a preponderance of probabilities.[22] See opposite.

A balance of probabilities, though of a lesser degree than the standard of proof required of the prosecution, still requires a reasonable degree of probability, not merely conjectures or surmises,[23] and if the probabilities are evenly balanced the defence loses on this issue[24] (even though the court may have a reasonable doubt as to the accused's sanity), as it has failed to discharge its onus of ultimately satisfying the court that insanity is more probable than not. This exceptional situation prevailing in regard to proof of insanity by the defence has been extended to apply also where, as has now been recognized, it is the prosecution which wishes to contend that the accused is insane rather than to allow a dangerous person to be at large. The prosecution here bears the same onus as would be borne by the defence advancing the same contention, that is, proof upon a preponderance of probabilities.[25]

Apart from this special case of allegations of insanity, where the onus of proof is upon the State it must disprove any defence raised by the accused. This does not mean that the prosecution must lead evidence on all possible issues to negative in advance all possible defences. The prosecution witnesses are not required to recite in every case that the accused acted without provocation, not in self-defence, under no mistake or duress, and so forth. Rather, if the defence wishes to rely on such a defence and put the prosecution to the disproof thereof, it must raise the particular issue.

This brings us to a further meaning of the phrase 'burden of proof'—the evidential burden or the burden of adducing evidence.[26] The accused must lead some evidence which puts his contentions in issue. A mere speculation in argument is obviously insufficient.[27] It may thus be said that although the State bears the legal burden of proving the accused's guilt and therefore of negativing any defence, the accused has at the same time an evidential burden of bringing sufficient evidence of his defence to force the State to prove affirmatively that he is guilty.[28]

The nature of the evidential burden also falls to be considered in so far as it rests upon the prosecution, and here Wigmore's characterization[29] of this

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[22] This includes the defence of automatism, whether the disease of the mind is rooted in purely emotional (*S.* v. *Van Zyl*, 1964 (2) S.A. 113 (A.D.)) or in physical disorders (*S.* v. *Bezuidenhout*, 1964 (2) S.A. 651 (A.D.)). See also vol. I, chap. 8.
[23] *Cape Coast Exploration Co., Ltd.* v. *Scholtz*, 1933 A.D. 56; *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372 at 374.
[24] *Van Wyk* v. *Lewis*, 1924 A.D. 438 at 444; *Friedlander* v. *Hodes*, 1944 C.P.D. 169 at 173.
[25] *R.* v. *Maphumalo* (2), 1960 (1) S.A. 809 (D); *Bratty* v. *Attorney-General for Northern Ireland* [1961] 3 All E.R. 523 (H.L.); and see Glanville L. Williams in (1962) *Cambridge L.J.* 3.
[26] See, generally, *Pillay* v. *Krishna*, 1946 A.D. 946; and *Klaassen* v. *Benjamin*, 1941 T.P.D. 80. In *Jayasena* v. *R.* [1970] 1 All E.R. 219 (P.C.), Lord Devlin criticized any designation of this burden as a 'burden of proof', since it can be discharged by evidence that falls short of proof.
[27] *Pillay* v. *R.*, 1942 N.P.D. 252; *R.* v. *Tucker*, 1945 A.D. 790; *R.* v. *Moolman*, 1945 C.P.D. 188 at 196.
[28] *R.* v. *Lahee*, 1941 E.D.L. 215 (mistake); *R.* v. *Bayat*, 1947 (4) S.A. 128 (N) (provocation); *R.* v. *Lobell* [1957] 1 Q.B. 547 (C.A.) (self-defence); *Bratty* v. *Attorney-General for Northern Ireland* [1961] 3 All E.R. 523 (H.L.) (automatism); *R.* v. *Bone* [1968] 2 All E.R. 644, [1968] 1 W.L.R. 983 (C.A.) (duress). See opposite.
[29] *Wigmore on Evidence*, 3rd ed. (1940), IX, §§ 2487 ff.

fence of establishing
. and not an evidential
430 (A.D.)).

burden as 'the duty of passing the judge' is illuminating. In a trial before a judge and a jury, the judge still had to retain control of the trial in order to prevent a completely unreasonable decision by the jury. The division of function between the judge as the arbiter of the law and the jury as arbitrators on fact was interpreted to take account of the judge's controlling function. The judge was therefore empowered to withdraw the case from the jury if, when the prosecution closed its case, he was satisfied that there was no evidence on which reasonable men could convict the accused. Whether or not the necessary amount of evidence had been adduced by the prosecution was thus held to be a matter of law.[30] Once this hurdle of the judge's decision had been passed, the case could then go to the jury to decide on the facts whether or not the prosecution's case was to be believed. The same test was applied even when the judicial officer sat alone without a jury, and will therefore continue to be applied now that trials by jury have been abolished.[31] As trier of law, the question for the judicial officer on a defence application for the accused's discharge at the close of the State case, is whether there is any evidence of the accused's guilt of the offence charged or any other offence of which he could be convicted on the indictment. The test is whether there is evidence on which a reasonable man could properly convict.[32]

A refusal to discharge the accused does not mean that the judicial officer as a reasonable man should convict. If the defence thereupon closes its case without leading evidence, the prosecution evidence, which is all the evidence put before the court, must then be tested by more stringent dictates of the quite different *legal* burden of proof. The inquiry is now, has the prosecution proved the accused's guilt beyond a reasonable doubt?

A. Prima Facie Case

Whether or not the prosecution can resist an application for the discharge of the accused at the close of its case, as explained above, is often formulated in terms of whether or not the State has made out a prima facie case. Such terminology is not properly applied to the accused's duty of leading enough evidence to raise his defence, as the close of the defence case is also the stage when all the evidence is in, and the inquiry would be whether, in the light of the defence evidence, there is a reasonable doubt whether the State evidence is true.[33]

In making out its case the prosecution may be assisted by statutory or common-law presumptions,[34] or be relieved by law of the duty of proving certain elements of the accused's guilt.[35] If guilt is sought to be proved by circumstantial evidence, there must be no other inference which could reasonably be drawn, as the existence of any other reasonable inference means that there must be a reasonable doubt as to the accused's guilt.[36] Where certain facts are peculiarly within the knowledge of the accused less evidence of those facts need be furnished

[30] *R. v. Slabbert and Prinsloo*, 1945 A.D. 137 at 145.
[31] Sec. 157(3) of the Criminal Procedure Act, 1955, as amended by sec. 10(*b*) of the Abolition of Juries Act, No. 34 of 1969
[32] See *R. v. Mantell*, 19[illegible] (1) S.A. 771 (C), ~~and under Procedure, p. 000, above.~~
[33] *R. v. Blyo*, 1952 (4) S.A. 514 (A.D.). See, too, *Udol v. Witfontein Fruit Farms, Ltd.*, 1922 A.D. 127 at 136, and *Klaassen v. Benjamin*, 1941 T.P.D. 80.
[34] See p. ~~000, above.~~ below, 176, 178.
[35] Discussed below, p. ~~000.~~ 178
[36] *R. v. Blom*, 1939 A.D 188 at 210; *Erasmus v. R.*, 1945 O.P.D. 50; *R. v. Blyo*, 1952 (4) S.A. 514 (A.D.) at 520–1.

by the prosecution than where the facts are equally accessible to the knowledge of both sides,[37] but some evidence of those facts there must be.

B. Accused's Silence

If the prosecution has succeeded in setting up a prima facie case which calls for an answer, the accused's failure to dissipate its force by providing an answer may be a significant factor. If the incriminating or suspicious circumstances are susceptible of an innocent explanation his silence may lead to the inference that he offers no innocent explanation because there is none.[38] A satisfactory explanation may be given extracurially, or the accused may give it in evidence at the trial. If he gives several contradictory explanations, or an explanation found to be false, or gives one so late that the State has had no opportunity to investigate and rebut it, the case against him may again be strengthened.

Where the legal burden of proof is on the prosecution there is, however, no onus resting upon the accused to give either any explanation or any evidence at all. If he remains silent, he takes the risk that the prosecution's case will be believed,[39] but uncontradicted evidence is not necessarily acceptable evidence and the risk may not materialize.[40] If he does not wish to take this risk, he may offer an innocent explanation of the incriminating facts, an explanation which he need not further substantiate.[41] If there is an innocent explanation which may reasonably probably be true, or which leaves the court in doubt as to its possible truth, he has raised a reasonable doubt as to his guilt, and the onus remains upon the State to produce evidence destroying that explanation. The explanation need not be found by the court to be credible or acceptable before it can raise a doubt.[42]

The accused's silence does not in itself give rise to an adverse inference, but it may in appropriate circumstances give greater weight to the evidence against him,[43] and will do so the more, the stronger is the case against him, e.g. if is likely to be more significant where there is direct than where there is only circumstantial evidence incriminating him,[44] or where the existence of any explanation would be peculiarly within his knowledge.[45]

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[37] Whether the accused had been authorized or licensed may be so regarded (*R. v. Goldstein* (1885) 2 S.C. 164; *Howe v. Conservator of Forests* (1894) 11 S.C. 321; *R. v. Thomas*, 1928 E.D.L. 401); the behaviour of a horse, at all times in the custody of one party's servant (*Carr v. Webb*, 1930 T.P.D. 700); whether accused was employed by another or acted on his own account (*R. v. Simpson*, 1942 E.D.L. 39 at 48); whether a signature was the accused's or had been authorized by him (*R. v. Mostowe*, 1945 C.P.D. 188 at 193); what precautions had been taken to prevent the escape of sparks from an engine (*Union Government (Minister of Railways) v. Ryder*, 1913 A.D. 150).

[38] *R. v. Nyati*, 1916 A.D. 319; *R. v. Kumalo*, 1930 A.D. 193 at 209, 212-13. See, also, under Admissions by Silence, above, p. 122.

[39] *R. v. Kumalo*, 1930 A.D. 193 at 212-13; *R. v. Flee*, 1947 (2) S.A. 593 (T). In *S. v. Modisla*, 1969 (2) S.A. 637 (A.D.), Holmes J.A. said (at 642) that even though the accused's silence may be due to his fear of revealing his complicity in a lesser offence, it does not necessarily prevent the drawing of an adverse inference. But cf. *S. v. Mfol*, 1963 (3) S.A. 188 (A.D.) at 195.

[40] e.g. *R. v. Pasha*, 1926 T.P.D. 641.

[41] *R. v. Du Plessis*, 1925 T.P.D. 103.

[42] *R. v. Difford*, 1937 A.D. 380 at 398; *R. v. Cohen*, 1942 T.P.D. 266; *R. v. Watson*, 1950 (4) S.A. 178 (O) at 185.

[43] *R. v. Blom*, 1939 A.D. 188 at 202; *S. v. Mosia*, 1962 (2) S.A. 541 (A.D.) at 549, approving the judgment of Schreiner J.A. in *R. v. Israel*, 1952 (1) S.A. 304 (A.D.) at 309.

[44] *S. v. Letsoko*, 1964 (4) S.A. 768 (A.D.); *S. v. Sigwaza*, 1968 (2) S.A. 582 (A.D.).

[45] *R. v. Van der Linde*, 1933 O.P.D. 51; *R. v. Sandile*, 1952 A.D. 335; *S. v. Modisla*, 1969 (2) S.A. 637 (A.D.). Cf. *Van der Westhuizen N.O. v. Kleynhans*, 1969 (3) S.A. 174 (O).

The State case is not strengthened by the accused's silence unless there is already a case calling for an answer. His failure to explain, or his false or contradictory explanations, can at most strengthen the incriminating circumstances proved against him: it can never supply them when they are lacking,[46] or point to an adverse rather than a favourable explanation of equivocal facts.[47]

C. Failure to Call a Witness

In civil cases it has been held that not to call as a witness a person who could be expected to elucidate the facts may lead to an inference that the witness's absence is attributable to the fact that he does not support the desired version of the facts.[48] A similar inference may be drawn in criminal cases, but great caution should be exercised in doing so.[49] The witness must first be shown to be both competent[50] and available.[51] If he could equally have been called by either side his absence is open to an inference against both parties not merely against the party bearing the onus.[52] However, the failure to call a witness, even a crucial one, is a weak foundation on which to build inferences, and can never be decisive.[53]

The prosecutor has a special duty to call all witnesses who could throw light upon the issues, even if some of them would tend to support the innocence of the accused; he should at least make them available to the court and to the defence.[54] It is particularly desirable that this procedure should be observed in trapping cases and in similar circumstances where independent evidence is most needed,[55] but the prosecution's failure to discharge this duty is not in itself an irregularity.[56]

The failure of a party to produce material documents may be treated in the same way as is non-production of a witness.[57]

D. Statutory Alterations of the Incidence of the Burden

The general principle that the legal burden of proof rests on the prosecution is subject to numerous statutory exceptions by which it is placed upon the accused. Where the defence bears a statutory onus, it is, unless otherwise expressly provided, to be discharged not to the same degree of certainty as would be required of the State, but upon a balance of probabilities only.[58]

The following phrases in sections creating offences have all been construed as placing the burden of proof upon the accused, to be discharged affirmatively upon the probabilities, but not beyond a reasonable doubt: 'until the contrary is

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[46] *Erasmus v. R.*, 1945 O.P.D. 50 at 73, 74; *S. v. Matsepe*, 1962 (4) S.A. 708 (A.D.); *S. v. Swarts*, 1966 (2) S.A. 375 (C).
[47] *S. v. Mini*, 1963 (3) S.A. 188 (A.D.).
[48] *Glenapties Farm Dairy v. Schoombee*, 1949 (1) S.A. 830 (A.D.).
[49] *R. v. Beeuwdenhout*, 1954 (3) S.A. 188 (A.D.). See, too, *R. v. Jana*, 1931 T.P.D. 89.
[50] *Gouws N.O. v. Afrikaanse Tiroonlyn & Investment Corp. (Pty.) Ltd.*, 1964 (3) S.A. 609 (T).
[51] *R. v. Fibis*, 1958 (3) S.A. 161 (A.D.); *Kark v. S.A.F. Laboratories*, 1962 (3) S.A. 764 (witness held to be available where he could have been subpoenaed, not only where he is actually present in court).
[52] *Braud v. Minister of Justice*, 1959 (4) S.A. 712 (A.D.).
[53] *R. v. Bellinsky*, 1925 A.D. 568; *R. v. Makwena*, 1940 O.P.D. 129.
[54] *R. v. Viljoen*, 1916 T.P.D. 415; *R. v. Van Rooyen*, 1931 T.P.D. 355; *R. v. Sitole*, 1945 N.P.D. 198.
[55] *R. v. Hallbron*, 1922 T.P.D. 99; *R. v. Cohen* 1934 T.P.D. 198.
[56] *R. v. Bellinsky*, 1925 A.D. 368; *R. v. Makwena*, 1940 O.P.D. 129.
[57] *Administrateur Municipalité v. Strydom*, 1960 (4) S.A. 85 (E).
[58] *Ex parte Minister of Justice: in re R. v. Baloi*, 1941 A.D. 345.

proved',[59] 'if it appears to the court',[60] 'unless he had reasonable cause',[61] 'without reasonable cause',[62] 'unless he gives a satisfactory account'.[63] A statute which makes proof of fact X prima facie proof of fact Y, means that a case which calls for an answer has been made out if the State establishes fact X, and the accused cannot obtain his discharge at the close of the State case because fact Y has not been demonstrated.[64] Where a penal statute deems x to be y, the scope and object of the statute will determine whether this is intended to be conclusive,[65] or whether it merely transfers the onus to the accused of showing, upon a balance of probabilities, that y is not x.[66]

The onus of proof in statutory offences, in which the definition is accompanied by exceptions, exemptions, provisos, excuses or qualifications is provided for by section 315(2) of the Criminal Procedure Act, ~~document relevant~~[67] Sections 263*bis* and *ter* of the Code, relating to documentary evidence, are also discussed elsewhere.[68] Apart from provisions facilitating the State's task of proof in particular offences (as to which see volume II), the Code provides generally for the onus of proof where the accused's possession or lack of a particular qualification, *authority*[69] or licence[70] is an element of the offence. Proof that the accused was outside the country may be given in a 'dossier hearsay' form, under section 263*ter*. As to the onus of the proof in taxation statutes or in charges of failing to give information, see section 287.

In certain political offences created by the Suppression of Communism Act[71] and the Terrorism Act,[72] the onus has been placed upon the accused to prove his absence of guilty intent beyond a reasonable doubt.[73] These provisions seem in effect to deprive the accused of his election whether or not to enter the witness-box, since it is difficult to imagine what would discharge the onus short of his own evidence on oath as to his state of mind. It has been held, however, that an exceptionally high degree of proof is not required of the State even in cases where a serious political offence is charged,[74] and that the evidence of a single State witness may prove an allegation beyond a reasonable doubt.[75] Both these principles will no doubt apply to the same onus now resting on the accused,

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[59] *Bolon's* case, above; *S. v. Romana*, 1965 (4) S.A. 472 (C); *S. v. Mhlongo*, 1967 (4) S.A. 412 (N).

[60] *R. v. Zulch*, 1937 T.P.D. 400.

[61] *R. v. Vivier*, 1939 T.P.D. 402, approved in *Ex parte Minister of Justice: in re R. v. Bolon*, 1941 A.D. 345 at 352.

[62] *R. v. Chetyane*, 1960 (2) S.A. 588 (R.A.D.).

[63] *R. v. Zulu*, 1953 (3) S.A. 44 (N). 'Unless he satisfies the court' was held to require proof from the accused beyond a reasonable doubt (*R. v. Goldstein*, 1939 A.D. 173; *R. v. Jaffelim*, 1931 O.P.D. 90), but these cases have presumably been overruled by *Bolon*. Cf. *S. v. Bhengu*, 1966 (1) S.A. 673 (N).

[64] *R. v. Ismail*, 1952 (1) S.A. 207 (A.D.); *R. v. Chitsh*, 1960 (1) S.A. 435 (A.D.); *S. v. Alexander*, 1964 (3) S.A. 823 (C).

[65] e.g. *R. v. Juliani*, 1956 (4) S.A. 837 (C).

[66] *R. v. Hoffiee*, 1943 A.D. 345; *S. v. Mhlongo*, 1967 (4) S.A. 412 (N) (where, at 415–16, there is also a discussion of the effect of the phrase 'in the absence of evidence to the contrary', and see *R. v. Equetla*, 1951 (1) S.A. 278 (O) at 284); *Fitcher v. Secretary for the Interior*, 1968 (4) S.A. 238 at 244 f.

[67] ~~p. 000~~, fff.

[68] Sec. 288.

[69] Sec. 285.

[70] Act No. 44 of 1950, as amended by sec. 3 of the Suppression of Communism Amendment Act, No. 24 of 1967.

[71] Act No. 83 of 1967, sec. 2(2).

[72] See, generally, *Annual Survey of South African Law* 1967, p. 377 and pp. 327–30.

[73] *S. v. Sinkankanza*, 1963 (2) S.A. 531 (A.D.) at 541.

[74] *R. v. Mamuel*, 1938 C.P.D. 552.

and the fact that the defence is faced with the difficulty of proving a negative should also be a has adduced sufficient evidence to discharge it sideration which have led the courts to develop ration in regard, for example, to the evidence accomplice, do not necessarily apply where the accused.

E. Burden of Proving Facts in Aggravation or M

Facts relied upon in aggravation of sentence beyond a reasonable doubt.[76] The defence clearly in mitigation of sentence.[77] As to the degree of Colman J. held in *S. v. Shepard*[78] that a degree unfortunately the Appellate Division appears fixed rule that the defence must discharge probabilities.[79] *Shepard's* case has, however, be

II. PRESUMPTIONS

A. Presumptions of Law

A presumption is an inference of fact which from a proved or assumed fact.

Occasionally the factual or logical appropria inference is by law not subject to challenge: hat (*praesumptiones iuris et de iure*) are, more con which are only loosely (and often misleading terms. For example, to say that a man is presum or that everyone is presumed to know the law, way of saying that ordinarily the burden of proc ignorance of the law does not constitute a defe

Where the drawing of the inference of fact against whom it would operate, the presumption *iuris*). The effect of a rebuttable presumption burden of proof is not entirely settled. The con the view that a rebuttable presumption shifts party against whom it is to be drawn, so tha evidence to leave the court in doubt as to the tr There is however some authority,[80] and weight

[76] *R. v. Beetge*, 1956 (1) S.A. 234 (A.D.).
[77] *R. v. Ely*, 1963 A.D. (unreported), quoted in R. v.
S. v. Tonga, 1969 (2) S.A. 648 (C).
[78] *R. v. Pasha*, 1956 (4) S.A. 605 (A.D.) See, generally,
[79] 1967 (4) S.A. 170 (W) at 180–1.
[80] *S. v. Adampahi*, 1967 (1) S.A. 435 (A.D.) at 440; *Ad*
[81] *R. v. Chinyamu*, 1960 (2) S.A. 588 (R.A.D.).
[82] e.g. *S. v. A*, 1962 (4) S.A. 679 (T), (1963) 26 *T.H.R.*
The South African Law of Evidence, 2nd ed. (1970), pp.
[83] See above, p. 172.
[84] *Zergers v. Godart*, 1939 A.D. 1 at 22–3; *R. v. Epstein*
Pengtus, 1965 (1) S.A. 1 (A.D.) at 11.
[85] e.g. *Estate Wydeve v. Weinberg*, 1939 A.D. 95 at 9
[86] James B. Thayer (1890) *4 Harvard L.R.* 45 at 66; J
§§ 2490 ff.; *Phipson on Evidence*, 10th ed. (1963),
C. W. H. Schmidt in (1965) 28 *T.H.R.-H.R.* 259 at 269

Ad n. 80 . If it is to be refuted, it must be by evidence in rebuttal or by cross-examination, in the ordinary way (S. v. A, 1970 (3)S.A. 757 (A.D.)).

and the fact that the defence is faced with the additional and well-recognized difficulty of proving a negative should also be a factor in considering whether it has adduced sufficient evidence to discharge its burden. Conversely, the considerations which have led the courts to develop the cautionary rules of corroboration in regard, for example, to the evidence of a single witness or of an accomplice, do not necessarily apply where the burden of proof rests upon the accused.

E. Burden of Proving Facts in Aggravation or Mitigation of Sentence

Facts relied upon in aggravation of sentence must be proved by the State[74] beyond a reasonable doubt.[75] The defence clearly bears the onus of proving facts in mitigation of sentence.[76] As to the degree of proof required in the latter case, Colman J. held in *S. v. Shepard*[77] that a degree of flexibility should obtain, but unfortunately the Appellate Division appears since to have laid it down as a fixed rule that the defence must discharge its burden on a balance of probabilities.[78] *Shepard's* case has, however, been followed in Rhodesia.[79]

II. PRESUMPTIONS

A. Presumptions of Law

A presumption is an inference of fact which the law requires a court to draw from a proved or assumed fact.

Occasionally the factual or logical appropriateness of drawing the particular inference is by law not subject to challenge; but these irrebuttable presumptions (*praesumptiones iuris et de iure*) are, more correctly, rules of substantive law which are only loosely (and often misleadingly[80]) formulated in evidentiary terms. For example, to say that a man is presumed innocent until proved guilty, or that everyone is presumed to know the law, is simply another less accurate way of saying that ordinarily the burden of proof is on the prosecution,[81] or that ignorance of the law does not constitute a defence to a criminal charge.[82]

Where the drawing of the inference of fact can be prevented by the party against whom it would operate, the presumption is a rebuttable one (*praesumptio iuris*). The effect of a rebuttable presumption of law on the incidence of the burden of proof is not entirely settled. The courts on the whole seem to favour the view that a rebuttable presumption shifts the legal burden of proof to the party against whom it is to be drawn, so that, if he adduces only sufficient evidence to leave the court in doubt as to the truth, the presumption operates.[83] There is however some authority,[84] and weighty academic opinion,[85] that it is

must be by evidence in
e ordinary way (S. v. A.

[74] *R. v. Buntjie*, 1936 (1) S.A. 234 (A.D.).
[75] *R. v. Ely*, 1963 A.D. (unreported), quoted in *S. v. Shepard*, 1967 (4) S.A. 130 (W) at 180; *S. v. Tonga*, 1969 (2) S.A. 648 (C).
[76] *R. v. Petkin*, 1956 (4) S.A. 605 (A.D.). See, generally, D. T. Zeffertt in (1969) 86 *S.A.L.J.* 16.
[77] 1967 (4) S.A. 170 (W) at 180–1.
[78] *S. v. Mangathi*, 1967 (1) S.A. 435 (A.D.) at 440; *Manuel v. S.*, 1968 (1) P.H., H. 72 (A.D.). See Appendix.
[79] *R. v. Chinyare*, 1969 (2) S.A. 588 (R.A.D.).
[80] e.g. *S. v. A.* 1962 (4) S.A. 679 (T), (1963) 26 *T.H.R.-H.R.* 139. See, also, L. H. Hoffmann, *The South African Law of Evidence*, 2nd ed. (1970), pp. 369–70.
[81] See above, p. 169. [82] See vol. I, pp. 360 ff.
[83] *Tregea v. Godart*, 1939 A.D. 1 at 33–5; *R. v. Epstein*, 1951 (1) S.A. 278 (O) at 284; *Nyaba v. Vengtas*, 1965 (1) S.A. A.D.) at 21.
[84] e.g. *Estate Webber v. Wellhelitz*, 1939 A.D. 95 at 96–7.
[85] James B. Thayer (1896) 4 *Harvard L.R.* 45 at 64; *Wigmore on Evidence*, 3rd ed. (1940), IX, §§ 2490 ff.; *Phipson on Evidence*, 10th ed. (1963), § 2–17. Authorities are collected by Prof. C. W. H. Schmidt in (1963) 26 *T.H.R.-H.R.* 259 at 269 ff.

only the evidential burden or duty to adduce evidence which is shifted by a presumption. Probably the true position is that some presumptions are of the first kind and others are of the second.[88]

Conflicting rebuttable presumptions neutralize each other, leaving the issue to be decided solely on the evidence of the facts.[89]

The existence of a presumption is a matter of substantive not adjective law, so that the presumptions of English substantive law have not been imported along with the English law of evidence.[90]

B. Some Rebuttable Presumptions[91]

In general most of the presumptions operative in civil cases apply also in criminal cases, although the different standards of proof must be borne in mind.

The child of a married woman is presumed to have been fathered by her husband (*pater est quem nuptiae demonstrant*).[92] The presumption must be rebutted by proof upon a balance of probabilities[93] that the mother's husband could not have been the father. In other words, the impossibility—by virtue of his impotence or non-access—must be established by the probabilities; it is insufficient to establish only the improbability of his being the father.[94] The common-law prohibition on spouses' evidence of non-access was abolished by statute in 1935.[95] The presumption does not apply where the spouses were living apart under a notarial or judicial separation,[96] but it is operative even where the child is shown to have been conceived before the date of the marriage.[97]

As to the paternity of an illegitimate child, proof of an admission by the alleged father that he had intercourse at any time[98] with the mother (or other evidence of the fact) shifts upon him the onus of proving that he could not have been the father.[99]

There is a rebuttable presumption that the possessor of a movable is also the owner;[1] that a spinster is a virgin;[2] that the contents of a notarial document are true.[3] As to facts giving rise to a presumption of impotence, see *Hunt* v. *Hunt*.[4]

Section 260 of the Criminal Procedure Act, 1955, incorporates the English law as to the sufficiency of proof of appointment to public office.[5] The effect is that proof that a person acted in a particular capacity is prima facie evidence of the

[88] See Glanville Williams, *Criminal Law* (The General Part), s 225. [2nd ed., 1961]
[89] *S.* v. *Steyn*, 1963 (1) S.A. 797 (W) at 802; *Phipson on Evidence*, 10th ed. (1963), § 103.
[90] *Trogea* v. *Godart*, 1939 A.D. 16 at 42–3.
[91] For a more complete compilation, see the discussion in L. H. Hoffmann, *South African Law of Evidence*, 2nd ed. (1970), pp. 373 ff.
[92] As to the Roman-Dutch law on the point, see *Fitzgerald* v. *Green*, 1911 E.D.L. 432 at 461.
[93] *Van Lutterveld* v. *Engels*, 1959 (2) S.A. 699 (A.D.); *R.* v. *Isaacs*, 1954 (1) S.A. 266 (N).
[94] *Louw* v. *Louw*, 1933 C.P.D. 407; *Erasmus* v. *Erasmus*, 1940 T.P.D. 377; *R.* v. *Cross*, 1945 O.P.D. 309. No defence can therefore be founded upon the mother's intercourse with others, as the *exceptio plurium concubentium* does not apply in modern South African law (*S.* v. *Swart*, 1965 (3) S.A. 454 (A.D.), and *S.* v. *Gin*, 1967 (1) P.H., H. 135 (A.D.), have left the matter open).
[95] Sec. 101 of the General Law Amendment Act, No. 46 of 1935.
[96] *Fell* v. *Fell*, 1928 C.P.D. 293; *Venter* v. *Venter*, 1932 N.P.D. 89. An informal separation does not prevent the presumption arising: *Louw* v. *Louw*, 1933 C.P.D. 407.
[97] *Wilkinson* v. *Estate Steyn*, 1947 (2) S.A. 740 (C) at 747.
[98] Even if he admits intercourse at a date which could not have caused the pregnancy.
[99] *S.* v. *Swart*, 1965 (3) S.A. 454 (A.D.) critically discussed in (1965) 82 *S.A.L.J.* 448, and in *Annual Survey of South African Law*, 1965, pp. 66–8.
[1] *Ruskin N.O.* v. *Thiergen*, 1962 (3) S.A. 737 (A.D.).
[2] *Biggs* v. *Jennings* (1925) 46 N.L.R. 22; *Cranfield* v. *Hoocy*, 1932 C.P.D. 265.
[3] *Gade's Assignees* v. *Weijer*, 1917 A.D. 463 at 467.
[4] 1940 W.L.D. 55.
[5] See also sec. 252.

validity of his appointment to that office. Under this section the courts have inferred the valid appointment of the officer presiding at an insolvency inquiry[4] or at a headman's court,[5] of a policeman,[6] an administrative official,[7] and of the Officer administering the Government.[8] A person purporting to act as a lawfully appointed marriage officer will be presumed to have been so appointed,[9] in the absence of evidence to the contrary;[10] but to raise the presumption there must be something more than the mere fact that he officiated at a marriage *ritus*: e.g. he must have signed the marriage certificate in his capacity as a marriage officer.[11]

Section 260 represents only one aspect of the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium*, which is fundamentaly a presumption of the regularity and validity of official acts. (As to raising such a presumption by affidavit evidence, see section 239 of the Criminal Code.) Where a sequence of procedures is laid down, the court is entitled to conclude, from the presence of the later acts in the sequence, that the earlier acts were properly performed.[12] Thus, where officials or official bodies are required to follow a specified procedure in regard to such matters as the holding of meetings,[13] the giving of notice,[14] obtaining authority[15] or consent,[16] acting on request[17] or recommendation,[18] or the promulgation of statutory instruments,[19] the courts will assume, in the absence of evidence to the contrary, that the correct procedure was observed in all respects. In *Byers* v. *Chinn*[20] the Appellate Division adopted Wigmore's fourfold test for the applicability of the presumption, namely, whether (*a*) the matter is more or less in the past and incapable of easily procured evidence; (*b*) it involves a mere formality or detail of procedure in the routine of a public officer's act or of a litigation;[21] (*c*) it involves to some extent the regularity of apparently vested rights; and (*d*) the circumstances of the particular case add some element of probability.[22] It is not necessary that all four elements be present; in *Byers* v. *Chinn*[20] itself Stratford J.A. considered it safe to apply the presumption of regularity where he perceived three of these, and it was applied in *Seedat* v. *R.*[20] although only one element—that of probability—was satisfied.

[4] *R.* v. *Sullivan*, 1923 A.D. 659.
[5] *R* v. *Dumezweni*, 1963 (2) S.A. 751 (A.D.).
[6] *Naidoo* v. *R.*, 1909 T.S. 43.
[7] *Bhendlis* v. *Atto.-ney-General, Transvaal*, 1961 (3) S.A. 232 (T).
[8] *Ebrahim* v. *Essop*, 1905 T.S. 98; *Ex parte Asar*, 1932 O.P.D. 107; *Ex parte Abrahams*, 1937 E.D.L. 107.
[9] e.g. *Schlechling* v. *Schlechling* (1875) 5 Buch. 24; *Fitzgerald* v. *Green*, 1911 E.D.L. 432 at 456.
[10] *Alverson* v. *Anderson*, 1942 W.L.D. 86; *S.* v. *Dikimisi*, 1966 (4) S.A. 149 (N).
[11] *Grant* v. *R.*, 1942 N.P.D. 189; *R.* v. *Matikila*, 1951 (1) S.A. 49 (T). The reasoning does not apply if there are separate non-sequential acts: *S.* v. *Venti*, 1967 (4) S.A. 349 (T), where there was held to be no room for the application of the presumption.
[12] *Tshirhoust* v. *Union Government*, 1927 A.D. 94.
[13] *Wilhelm* v. *Barkly East Divisional Council*, 1914 E.D.L. 519; *Byers* v. *Chinn*, 1928 A.D. 322; *R.* v. *Zondo*, 1954 (1) S.A. 209 (N).
[14] *Bastille* v. *Durban Corporation* (1927) 48 N.L.R. 284; *Germiston Stadsraad* v. *Thuri*, 1959 (4) S.A. 577 (T).
[15] *Worcester Municipality* v. *Colonial Government* (1909) 26 S.C. 56.
[16] *R.* v. *Kramer*, 1920 T.P.D. 173.
[17] *R.* v. *Abdoyle*, 1957 (1) S.A. 251 (T); *Pretoria Stadsraad* v. *Administrateur, Transvaal*, 1962 (4) S.A. 467 (T).
[18] *Mcalister* v. *R.* (1924) 45 N.L.R. 259.
[19] 1928 A.D. 322 at 332.
[20] See *Cape Coast Exploration Co., Ltd.* v. *Schultz*, 1933 A.D. 56 at 76; *Kellerman* v. *Minister of the Interior*, 1943 T.P.D. 179 at 193.
[21] See *Cape Coast Exploration Co., Ltd.* v. *Schultz*, 1931 A.D. 56 at 84.
[22] 1928 A.D. 322.

[7] *R.* v. *Smith* (1887) 4 H.C.G. 431.
[11] 1942 N.P.D. 189.

It is the probability element which prevents the presumption of validity or regularity from being applied if there is evidence of irregularity in some other part of the procedure;[27] or where *ex facie* the later acts of the sequence some impropriety is suggested, for example, if regulations have to be approved by the Administrator of a province personally, but are promulgated expressly as having been approved by the Administrator in Executive Committee.[28] Where a statute permits an act to be done where a Minister or official is satisfied as to the existence of a state of facts, his doing of the act gives rise to the presumption that he was so satisfied.[29] Where, on the other hand, the act is only permitted if some external fact or circumstance objectively exists, the better view would seem to be that the existence of the pre-condition must be proved and cannot be presumed.[30] Finally, the presumption of validity is not invoked to relieve the prosecution of the onus of proving an essential element in a criminal charge. Thus in charges of perjury it is not to be presumed without proof that the allegedly false statement was made on oath,[31] nor in charges of escaping from lawful custody that the custody had been preceded by a lawful arrest.[32] And in *R. v. Mbina*,[33] a charge of continued occupation after the cancellation of a licence to occupy, the Court insisted upon proof positive of the cancellation of the licence.

Apart from establishing the formal propriety of official acts, *omnia praesumuntur rite esse acta* has been applied to establish the formal validity of a will,[34] the details of a marriage ceremony,[35] and the due administration of a deceased estate.[36] In *Cape Indian Congress* v. *Transvaal Indian Congress*[37] the Appellate Division applied it also to presume the correct procedures having been observed for the election of the committee of a private voluntary association, and it has also been applied to other non-official matters like the internal functioning of a company[38] and of a building society.[39]

A party wishing to rebut the presumption must prove affirmatively the impropriety or irregularity in the procedure. If he can do no more than produce evidence which leaves the validity or regularity in doubt, he has failed to discharge the onus resting upon him and the presumption operates.[40]

C. Presumptions of Fact

Presumptions of fact (*praesumptiones hominis*) are not really presumptions at all, but merely permissible inferences drawn from common concatenations of

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[27] *Mtilu* v. *Mayekiso*, 1919 E.D.L. 51.

[28] *Nigel Town Council* v. *Ah Yat*, 1950 (2) S.A. 182 (T); *R.* v. *Joffee*, 1950 (3) S.A. 251 (T); *S.* v. *Manelis*, 1965 (1) S.A. 748 (A.D.). But cf *R.* v. *Leven*, 1959 (1) S.A. 792 (T).

[29] *R.* v. *Naran Samy*, 1945 A.D. 618; *R.* v. *Prometheus Printers and Publishers (Pty.) Ltd.*, 1960 (4) S.A. 888 (E).

[30] *Kellerman* v. *Minister of the Interior*, 1945 T.P.D. 179. *Contra*, apparently, *R.* v. *Magana*, 1961 (2) S.A. 654 (T).

[31] *R.* v. *Mtumtum*, 1946 E.D.L. 328.

[32] *R.* v. *Henkins*, 1954 (3) S.A. 560 (C); *S.* v. *Mcunu*, 1962 (1) S.A. 375 (N).

[33] 1938 E.D.L. 18. See, also, *R.* v. *Berman*, 1915 C.P.D. 279.

[34] *Kunz* v. *Swart*, 1924 A.D. 618; *Yassen* v. *Yassen*, 1965 (1) S.A. 438 (N).

[35] *Kariem* v. *Latif*, 1910 C.P.D. 154; *Nxasana* v. *Nxasana* (1922) 43 N.L.R. 441.

[36] *Wright's Executors* v. *Keyser*, 1908 E.D.C. 68 at 77–8.

[37] 1948 (2) S.A. 595 (A.D.) esp. at 609, per Tindall A.C.J. This settles the question left open in *Knocker* v. *Standard Bank of South Africa, Ltd.*, 1933 A.D. 128 at 133, of whether *omnia praesumuntur rite esse acta* applies to private as well as public acts.

[38] *D. Frenkel, Ltd.* v. *Liquidators Susman Jacobs & Co., Ltd.*, 1923 G.W.L. 182.

[39] *In re Natal Building Society (Permanent)* (1926) 47 N.L.R. 178.

[40] *R.* v. *Sussman*, 1939 O.P.D. 68 at 74; *R.* v. *Abdoola*, 1957 (1) S.A. 251 (T); *R.* v. *Supra*, 1958 (1) S.A. 474 (T); *R.* v. *Magana*, 1961 (2) S.A. 654 (T).

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Ad n. 42 : The inference arises especially in the case of stolen money, which travels faster than goods (Stupple v. Royal Insurance Co., Ltd. [1970] 3 W.L.R. 217 (C.A.)).

[41] 1958 (2) S.A. 349 (W) at 352, approved in *Ar*
S.A. 566 (A.D.) at 574, and *Norwich Union Fire Ins*
S.A. 993 (A.D.). Cf. *Henderson* v. *Henry E. Jenkins &*
[42] *R.* v. *Nxumalo*, 1939 A.D. 580 at 587; *R.* v. *Eras*
[43] *R.* v. *Tshabalala*, 1942 T.P.D. 27.
[44] *S.* v. *Screech*, 1967 (2) S.A. 407 (E).
[45] *Levy* v. *Calf* (1857) Watermeyer 1 at 4; *Schubi* v
[46] R. v. *Fourie*, 1937 A.D. 31; *Vulcan Rubber Wor*
S.A. 285 (A.D.); *R.* v. *Maja*, 1961 (3) S.A. 188 (E).
[47] *Goldfields Confectionery and Bakery (Pty.) Ltd.*
S.A. 763 (T). Cf. *S.* v. *Williams*, 1965 (2) S.A. 567 (C)
[48] *Ex parte Fourie*, 1958 (4) S.A. 523 (O).
[49] *R.* v. *Koala*, 1950 (3) S.A. 705 (O).
[50] *S.* v. *Gooda*, 1969 (1) P.H., H. 85 (E).

circumstantial evidence. Whether the inference is to be drawn in any particular case is a matter for the reasoning and logic of the court. No rules can be laid down to cover the fluctuating facts from which an inference may be supported. 'It is in the realm of inference cases', said Holmes J. in *R. v. Sacco*,[1] 'that the profession has long been plagued by no less absurd maxims and rubber stamp presumptions, dilemmas, prima facie cases and rebuttals. . . . With due respect to those who favour these piecemeal processes of reasoning, I venture to suggest that the practical approach is to look at all the facts at the end of the case, including, if it be one of the facts, '. . . absence of any evidence from the person to whom negligence is sought to be imputed . . . and the inquiry is whether, from that totality of facts, one can draw an inference of negligence—in criminal cases to the exclusion of all other inferences.'

The learned Judge was there dealing with an argument based on *'res ipsa loquitur'*, but precisely the same reasoning applies to a large number of other inferences which have been loosely termed presumptions. Among the most common of these are the 'doctrine of recent possession' (where the accused is found in possession of recently stolen property, an appropriate circumstance[2] an inference may be drawn as to his guilt of theft, receiving[3] or housebreaking[4]); prospective or retrospective continuity (where a state of facts is shown to have existed at a particular date it may be inferred that the same state had also existed just before[5] or just after[6] that date); that a letter shown to have been posted, reached the addressee;[7] that a person advanced into middle age is no longer capable of procreation;[8] that a woman participating with her husband[9] or a minor participating with an adult[10] in a criminal activity was coerced by him into so doing. None of the aforegoing albeit repetitious and usage have endowed them with names, is a presumption of law, and none transfers any legal burden of disproving them.

[1] 1958 (3) S.A. 349 (W) at 352, approved in *Arthur v. Bezuidenhout & Mieny*, 1962 (2) S.A. 566 (A.D.) at 574, and *Norwich Union Fire Insurance Society, Ltd. v. Tait (2)* 1962 (3) S.A. 593 (A.D.). Cf. *Henderson v. Henry E. Jenkins & Sons* [1969] 3 All E.R. 756 (H.L.).
[2] *R. v. Masondo*, 1939 A.D. 380 at 387; *R. v. Evanese*, 1946 O.P.D. 50.
[3] *R. v. Tshabalala*, 1942 T.P.D. 27.
[4] *R. v. Sereseh*, 1957 (2) S.A. 407 (E).
[5] *Levy v. Cuff* (1827) Watkenwyer 1 at 4; *Sibeko v. Sofi*, 1949 (3) S.A. 337 (T).
[6] *R. v. Fourie*, 1937 A.D. 31; *Volcon Rubber Works (Pty.) Ltd. v. S.A.R. & H.*, 1953 (3) S.A. 285 (A.D.); *R. v. Mbiti*, 1961 (3) S.A. 188 (E).
[7] *Goldfields Confectionery and Bakery (Pty.) Ltd. v. Norman Adam (Pty.) Ltd.*, 1950 (2) S.A. 763 (T). Cf. *S. v. Williams*, 1945 (2) S.A. 567 (C).
[8] *Ex parte Fourie*, 1958 (4) S.A. 523 (O).
[9] *R. v. Konie*, 1950 (3) S.A. 702 (C).
[10] *R. v. Cande*, 1960 (1) P.H. H. 85 (E).

See opposite.

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.L.R. 217 (C.A.)).

CHAPTER ~~23~~ 8

THE SUFFICIENCY OF EVIDENCE

Section | *Page*

I. NUMBER OF WITNESSES

The general principle of the common law,[1] that credibility does not depend upon the number of witnesses, has been enacted into statute in South Africa. Section 256 of the Criminal Procedure Act, No. 56 of 1955, provides that except in charges of treason and perjury[2] an accused person may be convicted on the single evidence of any competent and credible witness.

This section applies not only where a solitary State witness is produced whose evidence contains the entire case against the accused, but also to every situation where a fact is to be proved by the testimony of a single witness, notwithstanding the fact that other witnesses are proffered to testify to other co-ordinate facts.[3]

[1] Roman law from the time of Constantine, and Romanist systems including the Roman-Dutch, *prescribed a numerical requirement. See the authorities cited by Wigmore on Evidence*, 3rd ed., VII (1940), § 2033, L. H. Hoffmann, *South African Law of Evidence* ~~(1963), p. 300~~ 2nd ed. (1970), p. 446.

[2] ~~The corroborative rules relating to such charges are dealt with in vol. II, pp. 000 and 000 respectively.~~

[3] Thus the section as interpreted (see below) was applied where only one witness implicated the accused in the offence although others testified to its commission by someone, in *R.* v.

Proof beyond a reasonable doubt *may* therefore be furnished by the evidence of one witness, who is competent to testify in accordance with the rules discussed above.[4] His credibility is a matter for the jury or other trier of fact,[5] who will be influenced by the witness's demeanour and personality in the light of the 'atmosphere' of the trial,[6] his conduct, the internal consistency and objective probabilities of his testimony,[7] and any interest he may have to misrepresent.[8] Where the witness has been assaulted[9] or frightened[10] by the police to induce him to testify, the court may refuse to attach any weight to his statements.

Credibility is *not* to be prejudged by the witness's race[11] or occupation[12] nor by the fact that the court has formed an impression of the witness's veracity or reliability by hearing him testify in other trials, since a man may lie in one case and not *in* another.[13] Similarly, while the court may legitimately consider that where the witness has been found to be untruthful on one point, no credence is to be attached to his evidence on other points,[14] this is not a necessary conclusion. He may, for example, have a motive to conceal facts or shield someone in certain parts of his story, which is not operative in other respects.[15]

However, apart from the usual features of credibility, a gloss has been put on section 256. In R. v. *Mokoena*[16] De Villiers J.P. said:

> 'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by section [256], but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of the offence involving dishonesty, where he has not had proper opportunities for observation, etc.'

These remarks have been repeatedly approved by the Appellate Division,[17] and

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Mokoena, 1956 (3) S.A. 81 (A.D.) at 85, and to proof of a confession alleged to have been made by the accused, in *S.* v. *Letsedi*, 1963 (2) S.A. 471 (A.D.) at 473.

[4] See ~~pp. 000~~, Chap. 3.

[5] '[R]ules of evidence in Anglo-American law are not a science of weighing proof; they are chiefly regulations governing the admissibility of proof', as Philip Jeffrey wrote in (1954) 28 *Australian L.J.* 138 at 139. Cf. (1911) 28 *S.A.L.J.* 20.

[6] See *R.* v. *Momekelo*, 1936 O.P.D. 23; *R.* v. *Dhlumayo*, 1948 (2) S.A. 677 (A.D.) at 697.

[7] *Salzmann* v. *Holmes*, 1914 A.D. 471 at 477; *R.* v. *Mbina*, 1923 E.D.L. 248 at 249; *R.* v. *Lekaota*, 1947 (4) S.A. 258 (O) at 263.

[8] *Fourie* v. *Smit* (1902) 19 S.C. 263; *R.* v. *Mbina*, 1923 E.D.L. 248 at 249; *R.* v. *Dube*, 1929 A.D. 46 at 53.

[9] *Seetharan* v. *R.*, 1957 (2) P.H., H. 199 (N).

[10] *R.* v. *George*, 1915 E.D.L. 399 at 402.

[11] *R.* v. *McLaren* (1901) 18 S.C. 470 at 472–3; *Anderson* v. *Suamber* (1916) 37 N.L.R. 517 at 520. See, too, *Fish* v. *Tau*, 1946 G.W.L. 52 at 53–4, 56, and *Patel* v. *Patel*, 1946 C.P.D. 46 at 47.

[12] *R.* v. *Madiba*, 1947 (3) S.A. 491 (N) at 494, where De Wet J. stated: 'The fact that appellant is a riksha puller and the sergeant an experienced police officer has . . . no bearing on the question of credibility.' See, too, Hoexter J. in *R.* v. *Seeber*, 1948 (3) S.A. 1036 (E) at 1039.

[13] *R.* v. *P*, 1955 (2) S.A. 561 (A.D.) at 564; *Miller* v. *Mageunis*, 1924 C.P.D. 295 at 298. The court is not expected to expunge its previous experience of the witness totally from its mind (*R.* v. *Mukuma*, 1934 T.P.D. 134; *R.* v. *L*, 1955 (1) S.A. 575 (T)) unless it has the effect of preventing the court from weighing his evidence impartially (*R.* v. *H*, 1955 (2) S.A. 288 (T); *R.* v. *Van Heerden*, 1960 (2) S.A. 405 (T)).

[14] *R.* v. *Malete*, 1944 W.L.D. 193 at 199; *R.* v. *Kotboodien*, 1930 C.P.D. 191. See, too, *Rainer* v. *R.*, 1910 T.P.D. 1327 at 1330, 1331; *R.* v. *Ahmed*, 1940 A.D. 333 at 352 f.

[15] *Isaacs* v. *Sachstein*, 1925 O.P.D. 123 at 125; *R.* v. *Meier*, 1936 E.D.L. 291 at 300–2, where Graham J.P. rejects the maxim *falsum in uno, falsum in omnibus*; *R.* v. *Morris*, 1946 O.W.L. 65 at 68.

[16] 1932 O.P.D. 79 at 80.

[17] *Nhlapo* v. *R.*, 1953 (1) P.H., H. 11 (A.D.); *R.* v. *Bellingham*, 1955 (2) S.A. 566 (A.D.) at 569; *R.* v. *Mokoena*, 1956 (3) S.A. 81 (A.D.) at 86, overruling *R.* v. *Abdoorham*, 1954 (3) S.A.

a rule of practice has thus been formulated which enjoins a court or jury to approach with caution a case thus slenderly founded. The section after all does not say that the evidence of one witness must be treated as being as persuasive as that of many—although in particular cases this may of course be so[18]—and in general the cogency of evidence is increased where the court is presented with several versions of the same facts which can then be checked one against the other.[19]

The tests enumerated by De Villiers J.P. are not of course exhaustive, nor are they to be applied mechanistically to every case as a touchstone against which a witness's truthfulness and reliability can always be accurately measured.[20] Nor, on the other hand, is the single witness required to be flawless, as long as the imperfections he displays are minor ones.[21]

Where the evidence of the single witness is corroborated in any way which would tend to indicate that the whole story was not concocted,[22] the caution enjoined may be overcome and the court's acceptance of his version facilitated.[23] But corroboration is not essential.[24] Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution, e.g. a defence failure to challenge the witness by cross-examination or to produce evidence in contradiction.[25] The rules governing the onus of proof may be decisive, so that, for instance, if the court is faced with a flat contradiction between the evidence on oath of the accused and that of the State witness and the former may reasonably be true, it may hold that the accused's guilt has not been approved beyond a reasonable doubt.[26] By the same token, from the mere fact that the State witness is unchallenged it does not necessarily follow that the cautionary rule is satisfied. As long as the onus of proof is on the State, a shortfall in the credibility of the witness may mean that the State has failed to set up even a prima facie case against the accused which calls for an answer.[27]

In certain situations, a particular likelihood of false incrimination has been recognized, arising either from the type of offence charged,[28] the type of the witness or the nature of the evidence he is to give. In these cases the court is required to be aware of the peculiar dangers inherent in each such set of circum-

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163 (N) at 165; *Thulo* v. *R.*, 1958 (1) P.H., H. 90 (A.D.); *R.* v. *T*, 1958 (2) S.A. 676 (A.D.) at 678; *R.* v. *Sinkankana*, 1963 (2) S.A. 531 (A.D.) at 541.

[18] e.g. *R.* v. *Cele*, 1943 A.D. 123.

[19] *R.* v. *Mokoena*, 1956 (3) S.A. 81 (A.D.) at 85, 86. Where two witnesses recite the identical story apparently learned by rote, not only are they to be treated as a single witness but the probabilities in favour of their version are much diminished: *R.* v. *Vlok*, 1954 (1) S.A. 203 (S.W.A.) at 206–7.

[20] *R.* v. *Bellingham*, 1955 (2) S.A. 566 (A.D.) at 569.

[21] *R.* v. *Bellingham*, above; *R.* v. *Abdoorham*, 1954 (3) S.A. 163 (N) at 165; *Barrie* v. *R.*, 1959 (1) P.H., H. 22 (O).

[22] *Dladla* v. *R.* (1), 1961 (1) P.H., H. 130 (A.D.), can be read as laying down a requirement of corroboration in a respect implicating the accused; but as pointed out by Harcourt J. in *S.* v. *Gokool*, 1965 (3) S.A. 461 (N) at 472–3, such a reading is contrary to both the wording and the intention of sec. 256.

[23] e.g. *Swarts* v. *R.*, 1954 (2) P.H., H. 107 (O); *R.* v. *Jacke*, 1957 (2) S.A. 187 (E).

[24] *S.* v. *Letsedi*, 1963 (2) S.A. 471 (A.D.) at 473; *S.* v. *Artman*, 1968 (3) S.A. 339 (A.D.).

[25] *R.* v. *Van der Poel*, 1941 T.P.D. 319 at 320–2; *R.* v. *Cele*, 1943 A.D. 123; *R.* v. *Mokoena*, 1958 (2) S.A. 212 (T) at 217–18; *S.* v. *Letsedi*, above.

[26] *R.* v. *Mehlowakulu*, 1922 T.P.D. 305–6; *R.* v. *Segoale*, 1947 (2) S.A. 641 (T).

[27] *R.* v. *Macaba*, 1939 A.D. 66 at 70; *R.* v. *Ditshego*, 1932 O.P.D. 164 at 166. See also above, p. ~~000~~ 174.

[28] ~~See vol. II, pp. 000 and 000.~~

stances. In other words, a directed caution must be exercised, with full consciousness of the special dangers to be guarded against.

A. CORROBORATION ON A PLEA OF GUILTY

Section 258(1) of Act No. 56 of 1955 provides that where the accused has pleaded guilty before a superior court, he may be convicted on that plea alone save where he is charged with murder. In an inferior court, he can only be convicted on the plea alone if the court is of the opinion that the offence is a trivial one.[32] In all other cases there must be, in addition to the plea of guilty, 'proof, other than the unconfirmed evidence of the accused, that the offence was actually committed'.

Even before section 258(1) and its predecessor,[33] it had been laid down as a matter of practice that a review court should not certify proceedings as in accordance with real and substantial justice unless satisfied, apart from the plea of guilty, that an offence had actually been committed.[34] This rule of practice rapidly hardened into a rule of law by the interpretation of the provision dealing with the corroboration of confessions[35] to cover also pleas of guilty as a form of judicial confession.[36] The 1935 amendment[37] drew a clear distinction between confessions and pleas of guilty and the old equivalence was therefore no longer made.[38]

Section 258(1) has given rise to numerous difficulties of interpretation as variants of the two basic problems it presents: what is 'evidence of the accused' which can be confirmed, and what amounts to proof *aliunde* of the commission of the offence. A third problem, the nature of the confirmation of evidence of the accused, has thus far hardly been touched on, Schreiner J.A. in *R. v. Nathanson*[39] being content to leave open 'whether it could be different from the confirmation in a material respect required to satisfy the accomplice and confession provisions of Act 56 of 1955'.[39]

The plea of guilty itself is not 'evidence of the accused'[39] but is merely the pre-existent factor which creates the necessity for evidence of the accused plus confirmation, or other proof of the commission of the offence.[39] The better view is that formal admissions by the defence at the trial are not 'evidence of the

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[2] See above, p. 000.

[32] Its predecessor, sec. 286(1) of Act No. 31 of 1917, as substituted by sec. 51 of Act No. 46 of 1935, traced its ancestry back to sec. 29 of Ordinance No. 72 of 1830 (C).

[33] See *The Queen v. Strydom* (1880) 1 S.C. 60; *R. v. Dikamini*, 1905 T.S. 418 at 419-20; *Sibal v. Smyrl* (1913) 34 N.L.R. 311.

[34] Sec. 286 of Act No. 31 of 1917, in its original and unamended form, corresponding to sec. 258(2) of Act No. 56 of 1955.

[35] *R. v. Pier* (1893) 8 H.C.G. 222; *R. v. Sherwin-Wilber*, 1916 C.P.D. 617; *Sobashe v. Bosse* (1918) 39 N.L.R. 343; *R. v. Cisha*, 1920 T.P.D. 115; *R. v. Nkosi*, 1942 E.D.L. 76.

[36] See note 50 above.

[37] *R. v. Mutimba*, 1944 A.D. 23 at 36. The old rule of practice still obtains in the superior courts. See, e.g., *R. v. E.*, 1964 (2) S.A. 539 (T) at 540.

[38] 1959 (3) S.A. 124 (A.D.).

[39] At 126. Cf., however, Tindall J.A. in *R. v. Blyth*, 1940 A.D. 355 at 363-4.

[39] S. v. *Narhanzua*, 1959 (3) S.A. 124 (A.D.), overruling *R. v. Rader*, 1957 (4) S.A. 47 (N); and *R. v. Lemon*, 1958 (2) S.A. 582 (S.W.A.). Accord: *R. v. Liebenberg*, 1958 (3) S.A. 767 (T); *R. v. Jones*, 1958 (3) *R. v. V.* 1958 (3) S.A. 474 (S.W.A.); *R. v. Fouche*, 1958 (3) S.A. 767 (T); *R. v. Fourie*, 1958 (3) P.H., H. 11 S.A. 482 (N); *R. v. Kula*, 1958 (4) S.A. 675 (C). See, further, *R. v. Fourie*, 1965 (1) P.H., H. 11 (N).

[39] The plea of guilty cannot be regarded as a confession, which if confirmed under sec. 258(2) will found a conviction: *R. v. Mutimba*, 1944 A.D. 23 at 36.

accused';[40] neither can extrajudicial admissions by the accused be so regarded, since they are tendered by the State against the accused and testified to by State witnesses,[41] although they can of course be used in proving the commission of the offence.[42]

As to whether an unsworn statement made by the accused at the trial is 'evidence of the accused',[43] it seems preferable not to so regard it.[44] Although in *R. v. Cele*[45] it was held to be evidential in nature, this should permit the statement to be taken into account in considering whether the offence has been otherwise proved.

The second question to which section 258(1) gives rise, in the absence of confirmed evidence of the accused, is the nature of the evidence proving the commission of the offence. What is required is proof 'by admissible and sufficient evidence'[46] of every element of the offence[47] except the identity of the offender, which is supplied by the plea of guilty.[48] In considering whether or not the offence has been proved, the court may clearly employ admissions made by the accused extrajudicially[49] and during the trial,[50] circumstantial evidence,[51] any relevant presumptions[52] and, where appropriate, judicial notice.[53] Formal

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[40] In *R. v. V*, 1958 (3) S.A. 474 (G.W.) at 479, Wessels J. said: 'In my view it is not correct to state that an admission of a fact made during the hearing is evidence thereof unless one disregards the distinction between *evidence* of a fact and *proof* thereof. . . . An admission of a fact in issue results in that fact being considered proved or established without receiving evidence in regard thereto.' This reasoning was approved in *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 777. *Contra*, *R. v. McWilliam*, 1958 (2) S.A. 243 (E) at 245–6; *R. v. Singh*, 1948 (3) S.A. 669 (N); *R. v. Heathcote*, 1958 (2) S.A. 391 (E).

[41] *S. v. Lombard*, 1967 (3) S.A. 541 (A.D.) at 542; *R. v. Siwi*, 1951 (3) S.A. 703 (O) at 709; *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 780; *R. v. Nel*, 1960 (2) S.A. 488 (E) at 491, 495.

[42] *R. v. Bushula*, 1950 (4) S.A. 108 (E) at 120; *R. v. Siwi*, 1951 (3) S.A. 703 (O) at 709; *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 780–1; *R. v. Nel*, 1960 (2) S.A. 488 (E) at 495; *S. v. K*, 1964 (2) S.A. 539 at 541. *Contra*, *R. v. Bedi*, 1946 O.P.D. 242; *R. v. Hilarius*, 1949 (2) S.A. 238 (E); *R. v. Van Dyk*, 1949 (3) S.A. 118 (T); *R. v. McWilliam*, 1958 (2) S.A. 243 (E), but these may be taken to have been overruled by *S. v. Nathanson*, 1959 (3) S.A. 124 (A.D.). Cf., however, *S. v. Suselo*, 1968 (1) P.H., H. 30 (O).

[43] In most of the reported cases where the accused has made such a statement, there has apparently been no confirmation of it and it has therefore been unnecessary for the court to put its mind to the question: e.g. *R. v. Jafa*, 1936 C.P.D. 485; *R. v. Rakgoale*, 1947 (4) S.A. 636 (T); *R. v. Baboollal*, 1952 (4) S.A. 731 (N) at 733.

[44] See *R. v. Van Dyk*, 1949 (3) S.A. 118 (T); the majority judgments in *R. v. Bushula*, 1950 (4) S.A. 108 (E); *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 778–9, 780–1; *R. v. Philip*, 1960 (2) S.A. 267 (N) at 270; *R. v. Nel*, 1960 (2) S.A. 488 (E) at 491, 494. *Contra*, apparently, the judgment of Hathorn J.P. in *R. v. Mazibuko*, 1947 (4) S.A. 821 (N) at 829–30. L. H. Hoffmann, *South African Law of Evidence*, 2nd ed. (1970), p. 407, argues that logically if the unsworn statement is not 'evidence of the accused' then it would need no confirmation at all. As however it has very little weight in itself (*R. v. Cele*, 1959 (1) S.A. 245 (A.D.) at 252) evidence *aliunde* would still be required to prove the commission of the offence beyond a reasonable doubt. The practical result will be the same, since confirmation will be necessary in both cases, while there is no straining of the term 'evidence' as used in sec. 258(1).

[45] 1959 (1) S.A. 245 (A.D.).

[46] *R. v. Nathanson*, 1959 (3) S.A. 124 (A.D.) at 126.

[47] *R. v. Majola*, 1954 (1) S.A. 287 (N); *R. v. Sogokomashe* 1956 (2) S.A. 142 (E).

[48] *R. v. Siwi*, 1951 (3) S.A. 703 (O) at 708; *R. v. Letnli*, 1953 (4) S.A. 241 (T); *R. v. Duma*, 1958 (3) S.A. 882 (N); *R. v. Adam*, 1960 (2) S.A. 86 (S.W.A.); *R. v. Nel*, 1960 (2) S.A. 488 (E) at 490. But there are certain types of offences where the identity of the offender and the commission of the offence are inextricable, e.g. *S. v. Makhubo*, 1968 (2) P.H., H. 238 (T); *S. v. Nyembezi*, 1969 (3) S.A. 381 (N); S. v. Godden, 1970 (3) S.A. 209 (N).

[49] See note 42, above.

[50] *R. v. Mazibuko*, 1947 (4) S.A. 821 (N); *R. v. Bushula*, 1950 (4) S.A. 108 (E); *R. v. Melamo*, 1959 (3) S.A. 600 (O) at 603; *R. v. Philip*, 1960 (2) S.A. 267 (N); S. v. Jordaan, 1970 (3) S.A. [illegible] (T).

[51] *R. v. Siwi*, 1951 (3) S.A. 703 (O).

[52] *R. v. V*, 1958 (3) S.A. 474 (G.W.); *R. v. Fouche*, 1958 (3) S.A. 767 (T) at 781.

[53] R. v. *Dhlamini*, 1905 T.S. 331; *R. v. Luvoni*, 1945 E.D.L. 147; R. v. *Siwi*, 1951 (3) S.A. 703 at 708.

admissions by the defence in lieu of evidence of the offence have been held to be incompetent by the Appellate Division,[51] despite dicta in some earlier cases that they are permissible where the purpose of section 258(1) is not thereby stultified.[52]

Where proof of the offence is tendered by way of extrajudicial confessions by the accused, which themselves require confirmation by virtue of section 258(2) of Act No. 56 of 1955, such confirmation is not dispensed with where the accused has pleaded guilty any more than where he has pleaded not guilty,[53] and the same presumably applies to the evidence of accomplices requiring confirmation by section 257.[54] The plea of guilty makes this difference, however: although the commission of the offence must still be proved beyond a reasonable doubt,[55] this burden is more easily discharged since the plea of guilty has weight in determining whether prima facie proof may be treated as conclusive demonstration.[56]

B. Corroboration of Confessions

The admissibility of a confession is usually justified on the ground that no man is likely to be untruthful in making a statement detrimental to his own interests. However, it has been felt to be necessary to provide for those exceptional occurrences where individuals, as a result perhaps of mental unbalance, confess to being guilty of crimes which they never committed.[57] In South Africa a safeguard has been provided in section 258(2) of Act No. 56 of 1955: where an accused person is proved to have confessed he may only be convicted thereon if the confession is confirmed by other evidence or, if it is unconfirmed, on proof by competent evidence that the offence was actually committed.[58] A plea of guilty has been held not to be a confession for this purpose,[59] but as the same considerations may apply, it, too requires corroboration under section 258(1).[60]

Apparently the term 'confession' has the same meaning in section 258(2) as in section 244,[61] which is discussed above, pp. [illegible]. Where the self-incriminatory statement does not amount to a confession, or as a confession is inadmissible, section 258(2) is inapplicable. What is then required is not confirmation of the

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[51] *S. v. Mokgoleli*, 1966 (4) S.A. 335 (A.D.); (1966) 83 *S.A.L.J.* 14. But this does not apply if the formal admissions were accepted when the plea was one of not guilty, even if subsequently changed to a plea of guilty (*S. v. Coetzer-Jones*, 1969 (1) P.H., H. 184 (N)); *S. v. Petersen*, 1969 (4) S.A. 201 (N)).

[52] *R. v. Ooi-Nam*, 1946 C.P.D. 498 at 501, per Fagan J.; *R. v. Buntala*, 1950 (4) S.A. 108 (E); *R. v. Ephraimsen*, 1957 (1) P.H., H. 84 (C); *R. v. Hoffmann*, 1958 (2) S.A. 291 (E).

[53] *S. v. Nathanson*, 1959 (3) S.A. 124 (A.D.) at 128-9; *S. v. K.*, 1964 (2) S.A. 539 (T).

[54] *S. v. Mbele*, 1964 (4) S.A. 401 (N). *Contra*, *R. v. Sidayi*, 1957 (2) P.H., H. 262 (E); *R. v. Koza*, 1958 (1) P.H., H. 165 (O); *S. v. Ngubane*, 1963 (4) S.A. 479 (N).

[55] *R. v. Dunn*, 1958 (3) S.A. 882 (N).

[56] *R. v. Nathanson*, 1959 (3) S.A. 124 (A.D.) at 126-7. *Cf. S. v. Ngubo*, 1965 (1) P.H., K. 49 (N).

[57] *Cf. R. v. Sikonono*, 1960 (4) S.A. 723 (A.D.) at 729; the 6th edition of *Gardiner and Lansdown*, p. 648, refers to instances in South Africa where members of a tribe, in order to save the royal blood of the tribe, have deliberately endeavoured to take upon themselves the responsibility for capital crimes committed by others: in *S. v. Bonga*, 1965 (1) S.A. 298 (N) at 301, reference is made to an American case where the accused had confessed to the murder of someone who was subsequently discovered alive, in the hope of obtaining some executive clemency where the evidence was strongly against them.

[58] See *R. v. Blyth*, 1940 A.D. 335 at 363; *R. v. Montsione*, 1932 G.W.L. 79; *R. v. Ryon*, 1933 E.D.L. 198 at 171.

[59] *R. v. Mutimba*, 1944 A.D. 23.

[60] See above, pp. [illegible].

[61] *R. v. Hunger*, 1928 A.D. 459; *R. v. Becker*, 1929 A.D. 167; *R. v. Gule*, 1935 T.P.D. 401; *R. v. Xaxa*, 1936 T.P.D. 10; *S. v. Kearney*, 1964 (2) S.A. 495 (A.D.).

statement, but proof of the accused's guilt in the ordinary way, an onus which the admissions may of course assist in discharging.[43]

If the only evidence before the court is the confession, a conviction is not competent.[44] What is required is evidence outside the confession which corroborates it in some material respect.[45] Materiality is a matter of degree as well as kind, but the confirmation is not necessarily trivial or unsubstantial just because it does not establish either the complicity of the accused in the offence or the fact that an offence was committed;[46] in other words, the confession itself may still provide the only evidence of the offence and of the identity of the offender. For example, in *R. v. Chaize*[47] the accused had confessed to murdering the deceased with arsenic taken from a tin of sheep dip. Proof of his ownership of the tin, and the fact that its contents on analysis were found to be arsenical, were held to be adequate confirmation of the confession. Similarly, in *R. v. Sefanyane*,[48] which concerned a charge of murder by strangling, medical evidence was held to be confirmation of the confession even though it was as consistent with the death having occurred by innocent means.

In Rhodesia, even where confirmation is present, the confession must still be scrutinized for reliability to ensure that the guilt of the accused has been established beyond a reasonable doubt.[49] This explicit formulation is only beginning to influence the South African rule[50] but our law seems in the result to be the same. The Appellate Division has frequently stressed that although section 258(2) prohibits a conviction based only on an unconfirmed confession, it does not follow that the presence of confirmation means the court must inevitably convict. It is for the jury or other trier of fact to ascertain the weight to be attached to the confession as confirmed,[51] and if at the close of the whole case there remains a reasonable doubt as to the guilt of the accused he will not be convicted.[52]

It appears from *R. v. Gerber and Miller*[53] that confirmation by way only of accomplice evidence may in law suffice,[54] despite the fact that such evidence also requires confirmation under section 257.[55]

The alternative to confirmation of the confession is proof *aliunde* of the commission of the offence. What is required here is proof of every element of the

[43] *R. v. Biata*, 1945 A.D. 469 at 473; *R. v. Cele*, 1925 T.P.D. 681; *R. v. Jonas*, 1936 T.P.D. 10 at 13; *R. v. Ramsamy*, 1948 (2) S.A. 89 (C) at 90.

[44] *R. v. Blyth*, 1940 A.D. 355 at 364; *R. v. Rose* (1908) 25 S.C. 259. Proof of the confession by more than one witness remains insufficient; the confirmation required is not of the fact that the confession was made but of facts which indicate that it is true; *R. v. Ryan*, 1933 E.D.L. 168 at 171-2. However, co-*para S. v. Kearney*, 1964 (2) S.A. 495 (A.D.) at 502, where the accused's repetition of his confession to someone else, and other admissions made by him were held to be confirmation.

[45] A plea of guilty is not confirmation for this purpose: *R. v. Kufazwinesi*, 1950 (4) S.A. 51 (S.R.).

[46] *R. v. Sefanyane*, 1955 (2) P.H., H. 223 (A.D.) at 426; *Khoza v. S.*, 1964 (1) P.H., H. 2 (A.D.) at 5-6.

[47] 1955 (2) P.H., U. 223 (A.D.).

[48] 1947 (2) S.A. 193 (S.R.).

[49] *R. v. Fraune*, 1956 (4) S.A. 761 (F.C.) at 764, 765; *R. v. Mudyedzo*, 1964 (4) S.A. 807 (S.R., A.D.) at 810.

[50] *Mudyedzo's* case was followed in *S. v. Van Wyngaardt*, 1965 (1) P.H., H. 64 (O).

[51] *R. v. Nicholenge*, 1941 A.D. 502 at 511.

[52] *R. v. Sikatana*, 1960 (4) S.A. 723 (A.D.) at 729; *S. v. Letsedi*, 1963 (2) S.A. 471 (A.D.); *S. v. Kearney*, 1964 (2) S.A. 495 (A.D.) at 501. See *S. v. Benge*, 1965 (1) S.A. 298 (N), as to the position where the court is considering an application for discharge of the accused at the close of the State case.

[53] 1933 A.D. 137.

[54] Cf. *R. v. Petersen*, 1910 T.P.D. 859.

[55] See below, p. 190.

offence[78] except the identity of the offender, which may apparently be established by the confession alone.[79] If the evidence *aliunde* does prove this element as well, it may be of course unnecessary for the court to consider the confession or its admissibility or even to determine whether the case falls within the purview of section 258(2) at all.[80]

Although in *R.* v. *Grosskopff*[81] Graham J. stated that the requirement of proof by 'competent evidence' means evidence on oath, this limitation was not accepted by the Appellate Division in *R.* v. *Sikosana*,[82] and the offence may be proved by circumstantial evidence,[83] documentary evidence[84] or whatever means are admissible in proof of the particular charge. Formal admission by the defence of the elements of the offence are not competent as a substitute for evidence[85] since they amount to no more than a repetition in court of the accused's extracurial statement.[86]

It should be noted that where the evidence tendered is insufficient to establish the offence, it may still be possible to use it to provide confirmation of the confession.[87]

C. Corroboration of Accomplice Evidence

Section 257 of Act No. 56 of 1955 allows a court or jury to convict any accused of any offence alleged against him on the single evidence of any accomplice, provided that the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to have been actually committed. The provision is curiously conceived, since the false evidence of an accomplice is commonly regarded as more likely to take the form of incriminating the wrong person than imagining the crime charged,[88] and the courts have therefore been influenced by English law to supplement the statutory requirements with a cautionary rule,[89] so that a prosecution founded mainly on accomplice evidence must comply with both types of corroboration requirement.

For the purposes of section 257, said the Appellate Division in *S.* v. *Kellner*,[90] a witness is an accomplice if he was criminally associated with the accused in the commission of the offence. Even if he is not capable of committing the offence himself as a principal, he is an accomplice if he aids or abets the principal offender so as to render himself liable as an accessory. An accessory after the fact was *obiter* said not to be an accomplice[91] since he is not a *socius criminis* in our law,[92] but since he does incur criminal liability for his *ex post facto*

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[78] *R.* v. *Nkulomo* (1922) 43 N.L.R. 77.
[79] *R.* v. *Motjola*, 1952 (2) S.A. 197 (T).
[80] *R.* v. *Blato*, 1945 A.D. 469.
[81] 1913 E.D.L. 293 at 295.
[82] 1960 (4) S.A. 723 (A.D.) at 729.
[83] As in *Sikosana's* case itself.
[84] *S.* v. *Kearney*, 1964 (2) S.A. 495 (A.D.).
[85] *S.* v. *Mokgeledi*, 1968 (4) S.A. 335 (A.D.); (1969) 86 *S.A.L.J.* 14.
[86] At 338.
[87] *R.* v. *Hassam*, 1925 A.D. 91; *R.* v. *Montsione*, 1932 G.W.L. 79.
[88] As pointed out in *R.* v. *Freestone*, 1913 T.P.D. 758 at 771, 772; *Tumahole Bereng* v. *The King* [1949] A.C. 253 (P.C.) at 265.
[89] On which, see below, p. 000.143.
[90] 1963 (2) S.A. 435 (A.D.) at 443, per Steyn C.J. The test laid down in a long line of earlier cases, based on *R.* v. *Maphaga* (1908) 25 S.C. 230 and *Bhula* v. *R.*, 1910 T.P.D. 70, that criminal participation falling short of rendering the participator liable to conviction for the same offence will not make him an accomplice, was expressly disapproved in *Kellner's* case at 446.
[91] At 446. See, too, *R.* v. *Didat*, 1913 A.D. 299 at 303–4.
[92] *R.* v. *Mlool*, 1925 A.D. 131.

participation, it is submitted that the definition of 'accomplice' formulated in *Kellner's* case would require no extension to cover such a witness.[93]

Where the charge is a statutory offence such as underpaying employees, or unlawfully supplying liquor or drugs, or taking bribes, which in its nature presupposes the doer of a supplementary act—the employees, the persons supplied, the donors of the bribes—what is necessary is an analysis of the provisions relating to the offence to determine whether the doer of the supplementary act was intended to be punished or to be protected. For example, section 14 of the Immorality Act, No. 23 of 1957, is intended for the protection of the under-age complainant even if she is in fact a consenting party, and she would not therefore fall within the definition of an accomplice,[94] whereas the woman partner in one of the miscegenation offences created by section 16 of the same Act would be.[95]

Whether or not a person who participates in the commission of a crime renders himself criminally liable therefor, depends of course on the exact nature of his participation and his intention in so acting.[96] If *mens rea* is not an ingredient in the offence, an assistant's ignorance of the criminal nature of the transaction will not prevent him from being an accomplice.[97]

Assuming the witness in question is an accomplice within the meaning of section 257, the statutory requirement of corroboration means that before his evidence suffices to found a conviction, *either* that evidence must be confirmed

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[93] He is certainly regarded as an accomplice for the purposes of the cautionary rule: *R.* v. *Nhleko*, 1960 (4) S.A. 712 (A.D.) at 722, per Schreiner J.A.

[94] *R.* v. *Falkenstein*, 1929 W.L.D. 227; *R.* v. *W*, 1949 (3) S.A. 772 (A.D.) at 778.

[95] *R.* v. *Hassam*, 1925 A.D. 91; *Ndhlalosa* v. *R.*, 1946 N.P.D. 549; *R.* v. *Abdulla*, 1930 T.P.D. 346. See, also, *R.* v. *A*, 1959 (3) S.A. 498 (F.C.), and *R.* v. *Troskie*, 1920 A.D. 466, where on charges of incest the consenting woman was held to be an accomplice, and cf. *R.* v. *D*, 1942 C.P.D. 103, and *Petersen* v. *R.*, 1910 T.P.D. 859, which differ as to whether the submissive victim of an indecent assault can be said to be an accomplice.

[96] *Kellner's* case at 446–7; *R.* v. *Mbina*, 1923 E.D.L. 248 at 251. As held in R. v. *Kenene*, 1946 E.D.L. 18 at 21–2, a child *doli incapax* cannot, therefore, be an accomplice as his participation will not be criminal. On traps, see on the one hand, *The Queen* v. *Pound* (1882) 2 S.C. 2; *R.* v. *Strade*, 1927 T.P.D. 281, and *S.* v. *Ganie*, 1967 (4) S.A. 203 (N), and on the other *R.* v. *Jonas*, 1908 E.D.C. 44; on employees who carried out the unlawful instructions of the accused, compare *R.* v. *Erasmus* (1), 1931 O.P.D. 51, with R. v. *Immelman*, 1933 G.W.L. 6, and *R.* v. *Pretorius*, 1934 T.P.D. 76; on usury offences, see *S.* v. *Van Heerden*, 1964 (3) S.A. 239 (T); on receiving stolen property, compare *R.* v. *Galperowitz*, 1941 A.D. 485, and *Dhanpaul* v. *R.* (1924) 45 N.L.R. 95, with *R.* v. *Mbanjwa*, 1916 A.D. 469, and *R.* v. *Nopakane*, 1920 E.D.L. 66; on underpaying employees, see *R.* v. *Maserow*, 1928 T.P.D. 336, and *Maharaj* v. R., 1935 N.P.D. 470; the woman on whom an abortion is performed is an accomplice of the abortionist—*R.* v. *Owen*, 1942 A.D. 389 at 392; on incitement to crime, compare *R.* v. *Murray*, 1924 T.P.D. 511, and *R.* v. *Bester*, 1966 (4) S.A. 432 (R.A.D.); on illicit selling, presumably the disapproval of *R.* v. *Maphaga* (1908) 25 S.C. 230, expressed in *Kellner's* case at 444, reinstates the correctness of *R.* v. *Heally* (1907) 24 S.C. 719 (and see, also, *R.* v. *Jansen*, 1937 C.P.D. 294, and *R.* v. *Mkoza*, 1952 (3) S.A. 466 (N)); donor and recipient of a bribe are accomplices —*S.* v. *Kellner*, 1963 (4) S.A. 435 (A.D.), *S.* v. *Gokool*, 1965 (3) S.A. 461 (N), 1966 (1) S.A. 436 (A.D.), *R.* v. *Otter*, 1947 (4) S.A. 371 (S.R.). There is some conflict in the case-law, since *Kellner*, as to whether, in charges relating to membership of unlawful organizations, all members of that organization are accomplices. They were assumed to be such in *S.* v. *Boot*, 1964 (1) S.A. 224 (E), and *S.* v. *Ismail* (2), 1965 (1) S.A. 452 (N); held not to be accomplices in *S.* v. *Xoswa*, 1964 (2) P.H., H. 155 (C), *S.* v. *Zitha*, 1965 (1) S.A. 166 (E), and *Schermbrucker* v. *S.*, 1965 (2) P.H., H. 190 (T). It is submitted that the correct view is that expressed by Vieyra J. in *S.* v. *Naidoo*, 1966 (1) P.H., H. 104 (W), where he held that in the absence of mutuality or communication between the persons concerned, they are not accomplices, even though all are acting criminally and liable to conviction for similar offences. Cf. *R.* v. *Freestone*, 1913 T.P.D. 758 at 769. It seems clear at any rate that such persons are undoubtedly within the purview of the cautionary rule: *S.* v. *Mbele*, 1964 (4) S.A. 401 (N); *S.* v. *Yazini*, 1964 (1) P.H., H. 9 (E); *S.* v. *Zitha*, 1965 (1) S.A. 166 (E).

[97] *R.* v. *Pretorius*, 1934 T.P.D. 76.

or the commission of the offence must be otherwise proved.[16] The provision therefore makes the same demands for *confirmation* as section 258(2) makes for evidence of a confession, and the decisions on either section are relevant to both.[17]

A conviction is therefore not competent where the only evidence before the court is that of an accomplice even if the accused has pleaded guilty.[1] If it is not the only evidence, and the State relies on proof *allunde* of the offence, every element of the offence including *mens rea* must be shown. But it is not necessary under section 257 to prove the identity of the offender,[2] nor, where the State relies on confirmation of the accomplice's testimony, need such confirmation implicate the accused.[3] The other testimony need not go so far as to establish the offence as long as it confirms the accomplice's evidence in a material respect, which does not mean corroboration as to a material ingredient of the offence *or* as to a material issue in dispute at the trial: it means evidence tending to show that the accomplice is a generally reliable and trustworthy witness.[4]

There is no restriction in the section on the type of evidence which may furnish such proof or confirmation: It may be found in a confession by the accused[5] or in the evidence of another accomplice.[6] It may be real evidence, such as, in a miscegenation charge, the half-caste appearance of a child,[7] or circumstantial evidence,[8] or documentary evidence.[9] It may come as inferences from the accused's proved conduct[10] or from admissions made by him either during the trial[11] or extrajudicially.[12] A false statement which supported an unfavourable inference, made by the accused when he knew he was under suspicion, was held to be corroborative in *R. v. Baxter*,[13] as has been his giving of two irreconcilably contradictory stories[14] or his failure to give any explanation at all in suspicious circumstances.[15] Similarly, the accused's failure to testify in answer to a prima facie case against him has also been held in appropriate circumstances to be corroborative, especially where he is unrepresented.[16] Where the accused faces

[16] *R. v. Thielke*, 1918 A.D. 373 at 377; *R. v. Meyers*, 1946 A.D. 57.
[17] *R. v. Birch*, 1940 A.D. 355; *R. v. Meyers*, 1946 A.D. 57 at 71.
[1] Sec. 258(1), as applied in *S. v. Mbele*, 1964 (4) S.A. 401 (N); *S. v. Ngobese*, 1963 (4) S.A. 479 (N) at 482-3.
[2] *R. v. Raffmann* (1906) 2 Buch. App. Cas. 342 at 345.
[3] *R. v. Lakanile*, 1919 A.D. 362; *R. v. Hanson*, 1925 A.D. 91.
[4] *R. v. Twalatenge* (1903) 20 S.C. 425; *R. v. Gaberwitz*, 1941 A.D. 485 at 492; *R. v. Quen*, 1942 A.D. 389 at 393-4 (thereby overruling *Dhanpaul v. R.* (1924) 45 N.L.R. 95 at 96-7). In *R. v. P.*, 1957 (3) S.A. 444 (A.D.) at 448, Schreiner J.A. criticised this test on the ground that a witness may lie on one point and be truthful on another corroboration on a material point would not tend to show that the whole story is true; at most it would show that the whole story was *not* concocted. See, however, *R. v. Levy*, 1943 A.D. 558 at 561.
[5] *R. v. Gruben & Möller*, 1933 A.D. 137; *Petersen v. R.*, 1910 T.P.D. 859. Sec. 258(2) is apparently also satisfied thereby.
[6] *R. v. Mokgalemi* (1904) 21 S.C. 368 at 370; *R. v. Thielke*, 1918 A.D. 373 at 379, 380.
[7] *R. v. P.* 1957 (3) S.A. 444 (A.D.) at 448-9; *R. v. D.*, 1958 (4) S.A. 364 (A.D.).
[8] *R. v. Gaberwitz*, 1941 A.D. 485 at 492; *R. v. Sivoni*, 1946 N.P.D. 158.
[9] *R. v. Sekhere*, 1915 T.P.D. 257 at 260; *S. v. Gabriel*, 1965 (3) S.A. 461 (N) at 473-4.
[10] Cf. *Van der Westhuizen v. R.*, 1933 N.P.D. 459, a miscegenation charge where the police had discovered the accused hiding under the woman's bed.
[11] *R. v. Smuts and Hoffmann* (1906) 2 Buch. App. Cas. 347; *S. v. W*, 1963 (3) S.A. 516 (A.D.) at 523; *R. v. O.* 1964 (4) S.A. 245 (S.R.).
[12] e.g. *R. v. Curtis*, 1926 C.P.D. 385.
[13] 1943 A.D. 241 at 249. Cf. *Potter v. R.*, 1945 N.P.D. 83 at 86, and *Nquntwini v. R.*, 1959 (1) P.H., H. 38 (A.D.).
[14] *R. v. Buntier*, 1943 C.P.D. 475.
[15] *R. v. Van der Poel*, 1941 T.P.D. 319. Cf. *Dhlulihle v. R.*, 1946 N.P.D. 404, and *R. v. Enos*, 1961 (2) P.H., H. 145 (D).
[16] *R. v. Mosuetse*, 1938 T.P.D. 336 at 338.

several charges, corroboration of an accomplice on a particular count may be found in the testimony given by the witnesses on the other counts, on the ordinary principles of 'similar fact' evidence, discussed above, p. ***.[17] The only factors which have been held not to be corroborative are the completely colourless ones, i.e. those which in the particular circumstances are equally consistent with the accused's innocence as with his guilt.[18] For example, evidence of the accused's opportunity to commit the crime at the time the accomplice alleged it to have been committed, was held not to be corroborative in *Nthlabiseve v. R.*[19]

It must be remembered of course that section 257 is concerned only with whether there is sufficient evidence in law for a conviction to be competent, which is for the decision of the presiding judicial officer.[20] It remains a matter for the trier of fact to determine whether the sum total of all the evidence leaves no reasonable doubt in the mind so as to warrant a conviction of the accused,[21] for the statute may be satisfied and still no conviction will result.[22] The extent of corroboration required will therefore depend on the nature and quality of the evidence given by the accomplice, which will vary from case to case. In some circumstances no amount of corroboration will strengthen his evidence sufficiently to persuade a court to act with confidence on his story, for instance, where he is of tender years,[23] or has been induced by violence to testify,[24] or is shown to be a completely unreliable witness.[25] Where the accomplice's evidence is not thoroughly defective but he nevertheless appears untrustworthy or tells an inherently improbable story, naturally more corroboration will be required than in other situations.[26] But where the accomplice's testimony is in itself persuasive, the courts have been prepared to find corroboration even in the testimony of a demonstratedly lying witness[27] or a child of tender years.[28]

Satisfactory corroboration of the accomplice's evidence, however, does not mean his evidence must be accepted. It merely makes it more likely to be acceptable. But the requirements of the cautionary rule have still to be met. It is reasoned that an accomplice is likely to be motivated by treachery or revenge, the desire to exculpate himself or at least minimize his own guilt, or to protect others in their or his own interests. Coupled with this motive to misrepresent is the fact that an accomplice, whether because of his own participation in the

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[17] See, e.g., *R. v. Curtis*, 1926 C.P.D. 385; *R. v. Gumm*, 1935 E.D.L. 385; *R. v. Villoen*, 1947 (2) S.A. 56 (A.D.); *Sent'o. R.*, 1958 (3) P.H. H. 365 (A.D.).

[18] *R. v. Pretorius*, 1934 T.P.D. 76 at 79; *R. v. Forster*, 1940 O.P.D. 168; *R. v. D.*, 1958 (4) S.A. 564 (A.D.); *S. v. W.*, 1960 (3) S.A. 556 (A.D.); *R. v. O.*, 1964 (4) S.A. 254 (S.R.) at 266-7, 270. *Contra*, *Papia v. R.*, 1945 N.P.D. 309 at 311-12.

[19] 1946 N.P.D. 549.

[20] See the conflict between *R. v. Kritzinger*, 1952 (2) S.A. 401 (W), and *R. v. Moll*, 1960 (2) S.A. 340 (SR), as to whether the court retains a discretion to refuse an application for the discharge of the accused where the State case has not satisfied the minimum legal requirements of the section.

[21] *R. v. Thielke*, 1918 A.D. 373 at 375; *R. v. Owen*, 1947 A.D. 389 at 394.

[22] *The Queen v. Diedrick* (1885) 3 H.C.G. 359.

[23] e.g. *R. v. Zind*, 1919 C.P.D. 263.

[24] *The Queen v. Buys Oliphant* (1895) 5 E.D.C. 331.

[25] *R. v. Walkey*, 1933 E.D.L. 275. In *Ngamtsweni v. R.*, 1959 (1) P.H. H. 38 (A.D.), the unreliability of the accomplice stemmed from her desire to protect rather than inculpate the accused. See, too, *Dhlabela v. R.*, 1946 N.P.D. 404.

[26] *R. v. Mamelin*, 1917 T.P.D. 549 at 552, 565-6; *R. v. Vallabh*, 1942 G.W.L. 93.

[27] *R. v. Swani*, 1946 N.P.D. 158 at 168.

[28] In *R. v. Kerene*, 1946 E.D.L. 18, the evidence of an 8-year-old was held to provide sufficient corroboration of the accomplice. Compare however *Dhlabela v. R.*, 1946 N.P.D. 404, where Hathorn J. held the evidence of a 6-year-old to be too unreliable for such a purpose.

offence or because of his close association with others so participating, is in a position to deck out his story with a mass of convincing detail and thereby impress a tribunal with his apparent candour and honesty. Indeed, the only inaccuracy in his testimony may be the fact that he is implicating the wrong person or distorting the degrees of guilt of the actual offenders. It is these dangers, against which section 257 so signally fails to protect the accused, that led the courts to formulate the cautionary rule of practice modelled on that observed by the English courts,[30] and given precise formulation and authoritative stamp by the Appellate Division in *R. v. Ncanana*,[31] where Schreiner J.A. said:[32]

> 'The rule of practice . . . is that, even where section [257] has been satisfied, caution in dealing with the evidence of an accomplice is still imperative. The cautious court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice. . . . This special danger is not met *by corroboration of the accomplice* in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone, so that satisfaction of the requirements of section [257] does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although section [257] has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question. . . . [I]t is in my view clear that, where accomplice evidence is the basis of the [State's] case, grave error, to the disadvantage of accused persons, may be caused by treating section [257] as covering the whole field, while similar error, to the disadvantage of the [State], may be caused by insisting, before there can be a conviction, that, save where the accused gives no evidence or false evidence, there must be corroboration in a respect implicating the accused.'

A failure to exercise such caution amounts to an irregularity.[33]

What is required, then, is a comparison of the respective merits of the testimony of the accomplice and the accused, and a clear superiority of the former over the latter before the caution should be regarded as safely overcome. In the absence of such clear superiority, corroboration implicating the accused to the extent alleged by the accomplice will achieve the same result.[34]

[30] The Cape courts had early formulated the rule and distinguished its requirements from those of sec. 12 of Ordinance No. 72 of 1830, corresponding to sec. 257. See, e.g., *R. v. Hoffmann* (1906) 2 Buch. App. Cas. 342 at 345; *R. v. November* (1909) 26 S.C. 412 at 413; *R. v. Prinsloo*, 1918 E.D.L. 284 at 287. In *The Queen v. Blombosch* (1880) 3 M.C.G. 695, Lawrence J. stated at 696: 'It may be that the principle to which we are now giving effect is one of "judge-made law"; but some of the most useful principles of legal practice and judicial decision may be traced to this same origin, to the case it was the duty of the magistrate, as judge, to warn himself, as juror, that it was unsafe to convict on such evidence as he had before him; and had he done his duty as judge, he would doubtless have done what was right as juror, and acquitted the prisoners.' However, occasional doubts were expressed as to the existence of the cautionary rule—see, e.g., *R. v. Ayo* (1909) 30 N.L.R. 426; *Rahimo v. R.* (1916) 37 N.L.R. 29 at 21; *R. v. Kibi*, 1946 E.D.L. 197; and cf. *R. v. Kubuse*, 1945 A.D. 189—before the Appellate Division finally spoke.

[31] 1948 (4) S.A. 399 (A.D.). The rule had of course been applied in that court before this, e.g. in *R. v. Meyers*, 1946 A.D. 57, and *R. v. Mohanaj*, 1947 (2) S.A. 63 (A.D.) at 72.

[32] At 405-6.

[33] E.g., *Ngandwani*, 1959 (1) S.A. 684 (A.D.) at 695-6.

[34] See, further, *R. v. Mpongoshe*, 1958 (4) S.A. 471 (A.D.); *Goosen v. S.*, 1962 (1) P.H. H. 117 (A.D.); *Letsele v. R.* (1966) 83 *S.A.L.J.* 42; *S. v. Ballito*, 1955 (1) P.H., H. 18 (T): and *R. v. Ncanana*, *supra*.

Father v. *R.*[31] provides a neat illustration of the intersection between the mandatory and the cautionary rules of corroboration. The accused had been convicted by a magistrate on a charge of knowingly receiving stolen property, and the accomplice who had testified against him was the thief. Confirmation in a material respect, for the purposes of section 257, was found in the fact that the accomplice had been convicted and sentenced for the theft,[32] and that part of the stolen property had been found in the accused's possession and part in the thief's. However, as this possession did not prove the accused's *mens rea*, there was no corroboration as to his guilt, and the cautionary rule being thus unsatisfied, the conviction for receiving could not stand.

Who is to be treated as an accomplice for the purposes of the cautionary rule? No precise definition has been formulated, nor does it seem that any more precision is necessary than can be spelt out of the judgment in *S.* v. *Mafinga*,[33] where Holmes J.A. distinguished the two possible factors operating on accomplice testimony which account for the existence of the cautionary rule: first, the presence of 'a possible motive to benefit himself by false implication of others', and second, the fact that 'by reason of his participation in [the crime alleged] he [is] in a position in court to deceive the unwary by a realistic account of it, his only fiction being the deceptive substitution of the accused for the real culprits, or the addition of one or more participants for good measure'. Whenever these two factors are present in the case of a particular witness the cautionary rule then comes into play, whatever the 'juristic niche' into which the witness may be classified.[34] An accessory after the fact is undoubtedly such a witness.[35] The fact that the accomplice has already been convicted and sentenced for his participation in the crime does not obviate the need for caution, for although there is no longer the hope of obtaining more lenient treatment, the motives of revenge or desire to shield others will be unaffected as will the 'inside knowledge' of the details of the offence.[36]

As to what corroboration is required to overcome the caution, this will again vary from case to case. In *R.* v. *Gumede*[37] it was found in the fact that while implicating the accused the accomplice was at the same time incriminating a close relative. Where the confirmation of the accomplice's testimony emanates from the accused himself—conduct giving rise to an adverse inference, extra-curial admissions or his behaviour at the trial—both section 257 and the cautionary rule may thereby be met. Where the accused is charged on several counts, evidence given on other counts, if relevant to the issue of identity, may again

John, 1941 T.P.D. 295. The cautionary rule is observed also in the Rhodesian courts: see *R.* v. *Harman*, 1936 (3) S.A. 700 (F.C.); *R.* v. *Chiangwa*, 1962 (4) S.A. 142 (S.R.); *R.* v. *O*, 1964 (4) S.A. 245 (G.R.).

[31] 1945 N.P.D. 83.

[32] In the light of *Hollington* v. *F. Hawthorne & Company* [1943] K.B. 587, discussed above, p. [illegible], a fact of doubtful admissibility for this purpose.

[33] 1963 (1) S.A. 692 (A.D.) at 693–4. In *R.* v. *Jantjie*, 1937 C.P.D. 294, Davis J. pointed out the undesirability of a precise definition, and considered it should be a matter for the trier of fact to determine whether or not a witness is an accomplice for this purpose; see at 297–8, 300.

[34] See also, De Beer J. in *R.* v. *Dikant*, 1948 (1) S.A. 693 (O) at 699–70; *R.* v. *Mkize*, 1952 (3) S.A. 466 (N).

[35] *R.* v. *Mbeko*, 1960 (4) S.A. 712 (A.D.); *Mfeve* v. *S.*, 1962 (1) P.H., H. 80 (N).

[36] *R.* v. *Matyalwani* (1904) 21 S.C. 368 at 370; *R.* v. *Mbanambi*, 1957 (3) S.A. 272 (A.D.) at 275–6; *Father* v. *R.*, 1945 N.P.D. 83 at 86; *R.* v. *Rangi Hira*, 1946 G.W.L. 36 at 39–40. Cf., however, *R.* v. *Vallabh*, 1942 G.W.L. 93 at 97.

[37] 1949 (3) S.A. 749 (A.D.).

fulfil a dual function.[41] One limitation on the nature of the confirmatory evidence insisted on by Schreiner A.C.J. in *R. v. Mpompothe*,[42] that the evidence of another accomplice could not be regarded as sufficient confirmation to overcome the caution required,[43] has since been departed from by the Appellate Division. In *S. v. Hlopeswla*[44] such corroboration was held to be acceptable subject to the court's awareness of the inherent dangers of convicting on accomplice evidence alone, with its special danger added to by the possibility of a conspiracy between the accomplices falsely to cast the blame on to the accused.[45]

D. Corroboration of Traps

According to *S. v. Malinga*,[46] a trap is 'a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence.' He is clearly to be distinguished from an accomplice, and his evidence is therefore not required to be corroborated in terms of section 257 of Act No. 56 of 1955.[47] However, he has an interest in securing the conviction of the accused, because his employment by the police as a trap, or his remuneration, depends on his efforts yielding a satisfactory result.[48] Even where the trap is a policeman who will receive no additional payments out of the trapping, similar motivation may be present.[49] Accordingly, although a conviction on the uncorroborated testimony of a trap is undoubtedly competent, a cautionary rule, similar to that which has been formulated in relation to accomplice evidence, applies to the evidence in trapping cases. The trap's evidence must be scrutinized and weighed with care amounting to suspicion, and if it is not entirely satisfactory the accused should be given the benefit of the doubt.[50] As with accomplice evidence, substantial corroboration of the trap's evidence, indicating that his story is not concocted, may overcome the caution,[51] or it may be overcome by improbabilities or other deficiencies in the defence, or a failure by the accused to testify at all.[52]

The judiciary has frequently expressed its distaste for trapping operations,[53] but such disapproval may not be translated into a refusal to convict an accused

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[41] *R. v. M*, 1941 N.P.D. 372; *R. v. D*, 1958 (3) S.A. 322 (T), 1958 (4) S.A. 364 (A.D.).
[42] 1958 (4) S.A. 471 (A.D.) at 476.
[43] It clearly suffices of course under sec. 257: *R. v. Thielke*. 1918 A.D. 373.
[44] 1965 (4) S.A. 439 (A.D.). See (1966) 83 *S.A.L.J.* 141.
[45] Cf. *R. v. Tiyeyo*, 1965 (2) S.A. 761 (S.R., A.D.).
[46] 1963 (1) S.A. 692 (A.D.) at 693.
[47] *The Queen v. Pantzi* (1882) 2 S.C. 2; *R. v. Love* (1891) 8 E.D.C. 186; *R. v. Nelmapius*, 1913 C.P.D. 708 at 709. Cf. however, *R. v. Hoet-Jones*, 1908 E.D.C. 44.
[48] *R. v. Jordan*, 1918 E.D.L. 8; *R. v. Littlejohn*, 1912 T.P.D. 781.
[49] See, e.g., *R. v. Bennett* (2), 1940 G.W.L. 58; *R. v. Katz*, 1939 (2) S.A. 408 (C) at 413-14.
[50] *R. v. Ljoony* (1891) 6 E.D.C. 198; *R. v. Nkosie*, 1914 E.D.C. 241; *Brown v. R.*, 1923 C.P.D. 32; *R. v. Gumbu*, 1955 O.P.D. 196 at 200; *Myers and Mtimsen v. R.*, 1907 T.S. 760; *Rendall v. Cliff Constable, Durban* (1921) 42 N.L.R. 554.
[51] See *R. v. McDonald* (1903) 13 C.T.R. 644; *Goldberg v. The Queen* (1885) 5 *H.C.G.* 64; *Berman v. R.*, 1909 C.R.C. 6; *Pillay v. Chief Constable, Pietermaritzburg* (1925) 44 N.L.R. 128 at 123. The presence of corroboration may not be sufficient to overcome the caution mentioned by the trap: see *R. v. Dailey*, 1916 E.D.L. 202; *R. v. Vlok*, 1954 (1) S.A. 203 (S.W.A.); *R. v. Katz*, 1939 (2) S.A. 408 (C).
[52] e.g. *R. v. Bizo*, 1927 C.P.D. 445 at 447; *R. v. Wood*, 1938 E.D.L. 15 at 17; *R. v. Maharaj*, 1947 (2) S.A. 65 (A.D.) at 69.
[53] As in *The Queen v. Muhlament* (1897) 10 E.D.C. 9 at 13-14; *Myers and Mtimsen v. R.*, 1907 T.S. 760 at 762; *R. v. Vlok*, 1954 (1) S.A. 203 (S.W.A.).

person on evidence undoubtedly competent.[54] It may however have the effect that unless the correct procedures were scrupulously observed a conviction will not follow. For instance, where the offence consists in a buying or selling of something, any possibility of the trap finding it possible to acquire or dispose of the article, other than the mode proposed to be charged, must be guarded against. He should be properly searched before and after the transaction, marked money supplied, and if possible the trap should during the entire operation be kept under observation.[55] A failure to observe these precautionary measures will not always prevent a conviction, provided the evidence and probabilities of the case are sufficiently persuasive,[56] but it is to be remembered that the entire trapping plan is one indivisible operation and all those who participate, in whatever capacity, will therefore have the same taint in their testimony.[57] For this reason De Villiers J.A. doubted in *R. v. Bezuidenhout*[58] whether corroboration furnished by the evidence of a fellow-trap could ever sufficiently overcome the caution, but presumably in the light of *S. v. Hlapezula*,[59] those doubts are not now well founded.

There is clearly a difference between a trap and an informer,[60] and between a trap and a private detective,[61] but the cases which have pointed out those differences have also stressed the similarity in the motivation to misrepresent guilt, and the same cautionary rule is therefore applied to all such types of witness.

E. Corroboration of the Evidence of Young Children

Unlike England, South Africa has no statutory requirement of corroboration of the evidence of young children, whether they testify unsworn or on oath.[62] Account is taken, however, of the dangers inherent in their evidence—their imaginativeness, their failure always to appreciate the distinction between fact and fancy,[63] and their receptivity to suggestions made to them[64]—and a cautionary rule similar to that which applies in the case of accomplices must be observed. The trial court must be aware of the special dangers of relying on such evidence.[65]

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[54] See *R. v. Ahmed*, 1958 (3) S.A. 313 (T) at 317; *R. v. Clever*, 1967 (4) S.A. 256 (R.A.D.). The trapping may of course legitimately be taken into account in mitigation of sentence (*R. v. Smak*, 1968 (3) S.A. 561 (R.A.D.)).
The Queen v. Dnese (1899) 13 E.D.C. 130;
[55] See *Goldberg v. The Queen* (1885) 5 H.C.G. 64;
Myers and Misnun v. R., 1907 T.S. 760.
(1923) 44 N.L.R. 120; *R. v. Horwitz*,
[56] e.g. *Pillay v. Chief Constable, Pietermaritzburg*
R. v. De Beer, 1930 T.P.D. 651.
1913 A.D. 324; *R. v. Herbert*, 1929 T.P.D. 630;
1960 (1) P.H., H. 187 (T).
[57] See *Benest v. R.* (1918) 34 N.L.R. 344; *R. v. VC*, 1954 (1) S.A. 203 (S.W.A.), and *Preen v. Preen*,
[58] 1922 A.D. 206 at 211. See, too, *R. v. Vlok*,
1935 N.P.D. 138 at 139.
[59] 1965 (4) S.A. 439 (A.D.).
[60] *S. v. Malinga*, 1963 (1) S.A. 692 (A.D.); *S. v. Letsedi*, 1963 (2) S.A. 471 (A.D.).
[61] *Van Vuuren v. Van Vuuren*, 1931 G.W.L. 42; *Preen v. Preen*, 1935 N.P.D. 138.
[62] *R. v. Manda*, 1951 (3) S.A. 158 (A.D.) at 162; *De Beer v. R.*, 1933 N.P.D. 30 at 33. Cf. *R. v. J*, 1958 (3) S.A. 699 (S.R.) at 701, and *Makhanganya v. R.*, 1963 R. & N. 698 (F.C.).
[63] *R. v. Erasmus*, 1941 O.P.D. 270 at 273; *Wigmore on Evidence*, 3rd ed. II (1940), § 509, quotes Robert Louis Stevenson's *Child's Play* (1881): 'Show us a miserable unbreeched human entity, whose whole profession it is to take a tub for a fortified town and a shaving brush for a deadly stiletto, and who passes three-fourths of his time in a dream and the rest in open self-deception, and we expect *him* to be as nice upon a matter of fact as a scientific expert bearing evidence! Upon my heart, I think it less than decent!'
[64] *R. v. Bell*, 1929 C.P.D. 478; *R v. R.*, 1935 N.P.D. 586; *Manda's* case, loc. cit., and *J's* case, loc. cit.
[65] If the charge is of a sexual nature, or the child is an accomplice, the particular dangers of those circumstances must also be borne in mind. See *R. v. W*, 1949 (3) S.A. 772 (A.D.) esp. at 780.

There is no rigid requirement of corroboration here any more than in the other cautionary rules. Such matters as the age[64] and intelligence of the child, the topic on which it testifies,[67] and other circumstances as whether the accused was previously known to the child so as to reduce the risk of mistaken identity,[68] will all be taken into account in weighing the evidence against the accused. If the nature of the child's evidence is such that it is easily within the comprehension of a child of that age and understanding, corroboration need not be insisted on; if not, corroboration will be required to the degree that the child's evidence is unsatisfactory and convincing.[69] If the child is extremely young, such extensive corroboration will be required to persuade the court to act on its evidence that a conviction may not be obtainable,[70] or it may in fact not be worth calling the child at all if this can be avoided.

While there seems to be nothing in principle to prevent the evidence of one child being corroborated by that of another, who also presumably may be sworn or unsworn,[71] even substantial corroboration furnished in this manner may be insufficient to overcome the caution.[72] The corroboration appropriate to this cautionary rule is evidence to confirm the child's story on that ingredient of guilt which happens to be in dispute—the commission of the offence, the identity of the offender, or whatever other point is in issue in the particular case. Thus in *R.* v. *G*,[73] where the accused denied the 14-year-old complainant's whole story, the Appellate Division sifted the evidence to discern corroboration in separate stages, first as to the commission of the act and second as to identification of the offender.[74] In regard to the argument that proof of facts consistent with the innocence of the accused can never be corroborative, the Court also stated:

> 'A fact could be a pointer towards the probability of another fact without being, by itself, anything near proof of it; and independent testimony of such a fact, fitting into a witness's story and giving some strength to it, would rightly be called corroboration. . . . [T]he cumulative effect of a number of pointers converging from different angles was very much greater than the mere totals of their weights taken in isolation.'

F. Corroboration in Sexual Charges

Where the offence charged is of a sexual nature and the complainant is an accomplice, as in miscegenation offences, his or her evidence requires corrobo-

[64] In *Mokkingapuzje* v. *R.*, 1960 R. & N. 688 (F.C.) at 702, Forbes F.J. suggested that as a rough conclusion, 14 years might usefully be taken as the age below which a child could be considered as being of tender years. Cf. *S.* v. *Artmon*, 1968 (3) S.A. 339 (A.D.). The age of a child witness is always relevant and should appear on the record: *R.* v. *Kemter*, 1946 [L. 18.

[67] *R.* v. *Sauter's* case, loc. cit.

[68] *R.* v. *Kemter*, 1946 E.D.L. 18; *R.* v. *J*, 1966 (1) S.A. 88 (S.R., A.D.) at 91, 94.

[69] See *R.* v. *S*, 1948 (4) S.A. 419 (G.W.); *R.* v. *J*, 1966 (1) S.A. 88 (S.R., A.D.).

[70] See *R.* v. *George*, 1922 T.P.D., 1.S. § 11, quoted in *De Beer* v. *R.*, 1931 N.P.D. 30 at 33; *R.* v. *Bell*, 1929 C.P.D. 476; *R.* v. *R.* 1935 N.P.D. 582; *R.* v. Erasmus, 1941 O.P.D. 176; *R.* v. *Matthews*, 1950 (3) S.A. 671 (W) at 672; *R.* v. *Colliers*, 1950 (2) P.H., H. 125 (S.W.A.). These cases concerned the evidence of children whose ages ranged from 3 to 12.

[71] *R.* v. *Kemter*, 1946 E.D.L. 18. Cf. *R.* v. *Campbell* [1956] 2 All E.R. 272 (C.C.A.) at 275 H.

[72] *R.* v. *Mgedle*, 1951 (3) S.A. 159 (A.D.) esp. at 162, where the case depended on the evidence of three children aged respectively 11, 5 and 3 years; *R.* v. *R.* 1935 N.P.D. 582, where a denial of three children aged respectively 11, 5 and 3 years; *R.* v. *V.J*, 1953 (3) S.A. 699 (S.R.), where 7-year-old and an 8-year-old corroborated each other; *R.* v. *V.J*, 1953 (3) S.A. 699 (S.R.), where the complainant and the corroborating witness were aged 4 and 6 respectively. In all these cases the accused's conviction was set aside.

[73] 1956 (2) P.H., H. 266 (A.D.).

[74] See, too, *R.* v. *Dikeni*, 1948 (1) S.A. 693 (O); *R.* v. *S*, 1948 (4) S.A. 419 (G.W.); *Sikwilile* v. *R.*, 1963 R. & N. 857 (S.R.) (overruled on appeal on a different point, in 1964 (4) S.A. 788 (R.C.)).

tion under the rules relating to the testimony of accomplices, discussed above.[74] If the complainant is not an accomplice, as in charges of rape, under-age rape, indecent assault, or *crimen injuria*, section 257 is of no application, but because of the nature of the charge, a cautionary rule similar to that applied to accomplices must be observed.[75] The reasons for the rule are: the fact that charges of indecent offences are easy to formulate and particularly hard to refute;[76] that jealousy, the desire for revenge, and emotional disturbances[77] or fear-induced hysteria[78] find their most obvious outlet in the invention or exaggeration of such offences; and that an unwanted pregnancy is easily attributed to acts allegedly not consented to or to persons who, if faced with paternity, will be able financially to provide for the child.[79] The reasons given have for the most part been formulated in situations where the complainant is a woman or young girl, but the rule applies equally irrespective of the age or sex[80] of the complainant.

It is clear that a conviction for a sexual offence on the uncorroborated evidence of the complainant is competent, for the rule is not one of law but of practice.[81] But however convincing her testimony, the court is required to warn itself of the special dangers inherent in relying on it alone.[82] The mere exercise of caution may not suffice. For example, in *R. v. W.*[83] the Appellate Division set aside a conviction where the magistrate had been aware of the need for caution on account of the youth of the complainant but did not appear to have directed his attention to the additional dangers arising out of the particular nature of the charge.

Bearing these dangers in mind, her evidence may be sufficiently credible to persuade the court to convict on it alone.[84] If it is not, corroboration in a material degree may augment it enough to convince the court of her honesty and accuracy. The corroboration here required need not necessarily relate to the implication of the accused,[85] for it must go to whatever is in dispute in the case. Whether the defence is a denial of the commission of the act charged,[86] or turns on the issue of consent[87] or on the identity of the offender,[88] it is to that aspect that the confirmation must be directed. And the presence of substantial corroboration may yet be insufficient, for the court must still be persuaded as to its

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[74] *R. v. Traskie*, 1920 A.D. 466; *R. v. M*, 1941 N.P.D. 372.

[75] See *R. v. W*, 1949 (3) S.A. 772 (A.D.) at 780.

[76] The impression of the complainant's maturity and refinement which led the magistrate whose judgment was appealed from in *Eidelman* v. *R*, 1946 N.P.D. 1, to rely solely on her evidence, illustrates one of the main dangers against which the rule is directed. As Wigmore puts it (*Evidence*, 3rd ed., III (1940), § 924a), "On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale."

[77] *R. v. M*, 1947 (4) S.A. 489 (N) at 493-4; *Wigmore on Evidence*, loc. cit.

[78] *R. v. Rautenbach*, 1949 (1) S.A. 135 (A.D.) at 143.

[79] *R. v. W*, 1949 (3) S.A. 772 (A.D.) at 780.

[80] *Pupla v. R.*, 1946 N.P.D. 309; *S. v. C*, 1964 (3) S.A. 301 (N); *R. v. O*, 1964 (4) S.A. 245 (S.R.) at 248; *S. v. C*, 1965 (3) S.A. 185 (N).

[81] *Allen v. R.* (1926) 47 N.L.R. 102; *Sikahane* v. *R.*, 1940 N.P.D. 555 at 556; *S. v. Snyman*, 1968 (1) P.H., H. 169 (A.D.).

[82] *R. v. Rautenbach*, 1949 (1) S.A. 135 (A.D.) at 143; *Botes v. R.*, 1958 (1) P.H., H. 75 (O). Cf. *Chin Nang Hong* v. *Public Prosecutor* [1964] 1 W.L.R. 1279 (P.C.).

[83] 1949 (3) S.A. 772 (A.D.). Cf. *S. v. Van Zyl*, 1966 (1) P.H., H. 246 (O).

[84] *R. v. Windvogel*, 1940 (1) S.A. 442 (C); *R. v. W*, 1949 (3) S.A. 772 (A.D.) at 780.

[85] *Sikahane* v. *R.*, 1940 N.P.D. 555.

[86] *R. v. Meyer*, 1935 T.P.D. 390 at 391; *Marer v. S*, 1962 (1) P.H., H. 81 (N).

[87] *R. v. Macatha*, 1939 A.D. 66. Cf. *Chin Nang Hong v. Public Prosecutor* [1964] 1 W.L.R. 1279 (P.C.) at 1284.

[88] *R. v. Zita*, 1951 E.D.L. 156.

weight,[80] which remains ultimately a requirement of cogent credibility and probability.[81]

What is corroborative naturally varies according to the circumstances of each case. Proof of a contemporaneous complaint is not corroboration since it is not admissible as an exception to the hearsay rule, i.e. for the truth of its contents, but is merely relevant to the consistency of the complainant's present testimony with her conduct at the time.[82] It follows that her distress at the time also is not corroboration if it forms part of the complaint,[83] but if not, may be regarded as having some corroborative value if there is no reason to suspect that the distress was simulated.[84]

The general principle applies to sexual cases as to all others, that evidence which is entirely consistent with the innocence of the accused has no confirmatory effect.[85] On the other hand, where the accused admits a fact deposed by the complainant, but gives it an innocent explanation—a situation which has arisen in several cases—it has been held that his doing so does not deprive his admission of its corroborative character, since the court may still, in drawing its own inferences from the admitted facts, accept the complainant's version rather than the accused's of those facts' significance in the occurrence.[86]

G. Corroboration of Identity Evidence

It is well recognized that the identification of an accused person as the criminal is a matter notoriously fraught with error,[87] and in recent years the Appellate Division has frequently directed trial courts to exercise extreme caution in testing *identity* evidence. To this end, matters such as the identifying witnesses' previous acquaintance with the accused, the distinctiveness of the alleged criminal's appearance or clothing, the opportunities for observation or recognition, and the time lapse between the occurrence and the trial, should be investigated in detail,[88] since without such careful investigations a reasonable doubt as to the identity of the accused must persist.

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[80] *Pople* v. *R.*, 1946 N.P.D. 309; *S.* v. *M.*, 1965 (4) S.A. 577 (N); *R.* v. *O*, 1964 (4) S.A. 345 (S.R.) at 350. In *C* v. *R.*, 1959 (3) P.H., H. 276 (O), a charge of *crimen injuria* where the accused was alleged to have indecently exposed himself to two women, the combined effect of their testimony was held not to be corroborative of either. But as the Court relied on *R.* v. *Mpanyatshe*, 1938 (4) S.A. 471 (A.D.), which has since been overruled by *S.* v. *Hlapezulu*, 1965 (4) S.A. 439 (A.D.), the same decision might not have been reached today.

[81] *See R.* v. *Marathe*, 1939 A.D. 66 at 68; *R.* v. *Rautenbach*, 1949 (1) S.A. 135 (A.D.) at 144; *R.* v. *W.*, 1949 (3) S.A. 772 (A.D.) at 780.

[82] *Sitshakwe* v. *R.*, 1940 N.P.D. 535; *R.* v. *M.*, 1947 (4) S.A. 489 (N) at 494.

[83] *R.* v. *Tarawa*, 1956 (1) P.H., H. 21 (S.R.).

[84] e.g., in *R.* v. *Knight* [1966] 1 All E.R. 647 (C.C.A.) the signs of fear and distress in the 7-year-old complainant coupled with a false story by the accused, were held sufficient to found a conviction.

[85] *R.* v. *W.*, 1949 (3) S.A. 772 (A.D.); *R.* v. *D*, 1951 (4) S.A. 450 (A.D.) at 455; *R.* v. *O*, 1964 (4) S.A. 345 (S.R.); *R.* v. *Ngwane*, 1964 (2) P.H., H. 175 (T). Thus in *R.* v. *Zita*, 1931 E.D.L. 156, on a charge of statutory rape, Graham J.P. set aside the conviction saying (at 157): 'The fact that the complainant gave birth to a child, though it was proof that some person had sexual intercourse with her does not strengthen the case against the accused. . . .' In *R.* v. *Bushokwa*, 1963 (1) P.H., H. 138 (S.R.), evidence of opportunity was held not to constitute corroboration.

[86] *R.* v. *D*, 1951 (4) S.A. 450 (A.D.); *R.* v. *Chiangwa*, 1962 (4) S.A. 142 (S.R.) at 152; *Odijk* v. *R.*, 1965 (1) P.H., H. 73 (S.R.).

[87] *See* (1947) 64 *S.A.L.J.* 152; (1926) 43 *S.A.L.J.* 287.

[88] *Thole* v. *R.*, 1958 (1) P.H., H. 90 (A.D.); *R.* v. *Sibelukile*, 1953 (1) S.A. 636 (T) at 638; *R.* v. *Matake*, 1958 (2) P.H., H. 254 (E); *R.* v. *Mpunga*, 1960 (1) S.A. 765 (T); *S.* v. *Sibanda*, 1968 (3) S.A. 345 (T) at 349.

The direction of the inquiry enjoined will be dictated by the circumstances:[29] thus, for a witness ... describe in detail the particular features of the criminal may be of demonstrable value where the latter was not previously known to him, but where he was so known, it would be more significant to test the opportunities for recognition. In this inquiry the honesty of the identifying witness may be of subsidiary importance. The court is concerned not so much with his sincerity as with his accuracy.[1]

The fact that the witness has previously identified the accused as the criminal may be given weight in evaluating his evidence,[2] but if this prior identification occurred at an identification parade lack of proper safeguards in its supervision may cast suspicion on the evidence. Examples of such a lack would be the fact that the accused was the only person on the parade dressed in the manner earlier described by the complainant,[3] or the fact that a number of persons called to identify were given the opportunity to compare and collate their several recollections of the criminal's features[4], or the failure on the part of the police to warn the prospective witnesses that the alleged criminal might not be on the parade (a precaution necessary to remove any impression that there was a duty to point out somebody).[5]

A voice identification parade may be of use where the criminal's voice was sufficiently distinctive in timbre, pitch or accent, and the usual safeguards in running the parade should be observed.[6]

If no identification parade was held, the fact that the witness is identifying the accused as the criminal for the first time at the trial will also weaken his evidence, as the compromising effect of seeing the accused in the dock can hardly be overestimated.[7] Naturally, where the witness showed himself unable to identify the accused at a parade, his evidence is similarly deprived of credence.[8]

In Natal the cautionary rule relating to identification evidence has been particularly insisted on where the charge relates to faction fighting or inter-tribal feuds, apparently influenced by the early practice in this regard of the Native High Court.[9] In these cases there will usually be a motive to label indiscriminately any member of the opposing tribe as a participant, and the opportunities for observation will in the nature of things have been limited, because of the degree of activity and the numbers of persons involved. Trials in such circumstances should nevertheless be treated as extreme cases calling for the stringent

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[29] *Tsiu* v. *R.*, 1960 (1) P.H., H. 171 (S); *Dladla* v. *R.*, 1962 (1) S.A. 307 (A.D.) at 310; *S.* v. *Mehlape*, 1963 (2) S.A. 29 (A.D.) at 32.

[1] *R.* v. *Masemenge*, 1950 (2) S.A. 488 (A.D.) at 493; *Thulo* v. *R.*, 1958 (1) P.H., H. 90 (A.D.); *S.* v. *Mehlape*, 1963 (2) S.A. 29 (A.D.) at 32.

[2] *R.* v. *Masemenge*, 1950 (2) S.A. 488 (A.D.); *R.* v. *Tiel*, 1957 (4) S.A. 553 (T) at 554; *R.* v. *Hinds* [1932] 2 K.B. 644 (C.C.A.). See further above, p. 000.

[3] *R.* v. *Masemenge*, 1950 (2) S.A. 488 (A.D.); *S.* v. *De Bruin*, 1967 (2) P.H., H. 325 (A.D.); *S.* v. *Sibanda*, 1969 (2) S.A. 345 (T). As to identification by photograph, see the cases discussed in (1970) 45 *S.A.L.J.* 350.

[4] *R.* v. *W.*, 1947 (2) S.A. 708 (A.D.).

[5] *R.* v. *Vera Sweeney*, 1956 (4) S.A. 629 (T) at 631; *R.* v. *Y.*, 1959 (2) S.A. 116 (W). Cf. *Wilkinson* v. *S.*, 1968 (2) P.H., H. 356 (A.D.).

[6] *R.* v. *Gerlach*, 1941 C.P.D. 211; *S.* v. *M.*, 1963 (3) S.A. 183 (T); *R.* v. *Chitate*, 1966 (2) S.A. 690 (R.A.D.).

[7] *Kobi* v. *R.*, 1949 (1) P.H., H. 100 (A.D.); *Filipi* v. *R.*, 1960 (2) P.H., H. 206 (F.C.).

[8] *R.* v. *Masemenge*, 1950 (2) S.A. 488 (A.D.); *R.* v. *Hlangwane*, 1959 (3) S.A. 337 (A.D.) at 339; *R.* v. *Otto*, 1955 T.P.D. 213 at 215.

[9] See *Mncwangwa* v. *R.*, 1942 N.P.D. 125 at 126.

application of the general principle, and not as *sui generis* requiring the formulation of particular rules.[19]

H. Corroboration of the Evidence of Prostitutes

The Transvaal courts almost from the earliest times laid down, as a matter of practice, a requirement of caution where the court is faced with the evidence of prostitutes.[11] All the reported cases have turned on matters as to which the witness may have had a motive to misrepresent—e.g. charges of living on the proceeds of prostitution—even if she was not technically to be brought within the ken of the accomplice rules of corroboration.[12] But the harsh glare of suspicion directed at this kind of witness seems to have been generated not so much by this consideration as purely by instinctive moral disapproval. Thus, in *R.* v. *Christo*[13] Wessels J. regarded the unreliability of the prost witness as increased by the fact of her drunken habits.

However Centlivres C.J., dealing in *R.* v. *George*[14] with a charge of murder, considered that the witness's profession, and her addiction to drink, would not per se impugn her credibility in the absence of any malice or other motive for implicating the accused.[15]

II. THE BEST EVIDENCE RULE

Once considered to be the basic principle of the law of evidence, the best evidence rule has in modern times lost most of its general importance.[16]

This eclipse relates particularly to the inclusionary aspect of the rule, so that it can no longer be argued that evidence normally inadmissible should be received where none other can be obtained.[17] Nor is a party any longer obliged to produce the best evidence available to him by lesser evidence being held inadmissible.[18] Thus circumstantial evidence may be led even where direct evidence could have been brought, and the production of real evidence is not a prerequisite to the reception of oral testimony concerning it.[19] However, a

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[10] *Myeza* v. *R.*, 1936 N.P.D. 580 at 582–3; *S.* v. *Mhlongo*, 1962 (1) P.H., H. 133 (N); *Ngcobo* v. *S.*, 1967 (2) P.H., H. 13 (N).

[11] *Seligman* v. *R.*, 1908 T.S. 390 at 395; *Aranow* v. *R.*, 1908 T.S. 656 at 659; *R.* v. *Weinberg*, 1916 T.P.D. 653 at 654, 656. The courts of the other provinces do not seem to have expressly enunciated analogous principles.

[12] See *Seligman's* case at 394; *Weinberg's* case at 654.

[13] 1917 T.P.D. 420 at 422. At 421–2, the learned Judge said: 'This is not a matter of yesterday; it is an experience that dates back thousands of years. We know that these persons are unreliable, that they are often spiteful and malicious, and would not hesitate to bring a false charge against a person who had crossed their path. . . .'

[14] 1953 (1) S.A. 382 (A.D.) at 389.

[15] In the only other Appellate Division case where the matter has arisen, *R.* v. *Zeelie*, 1952 (1) S.A. 400 (A.D.), the fact that the witness was a prostitute was held to affect the credibility of her story where the accused was charged with having incited her to commit a sexual offence. In these circumstances logically the probabilities of the case would always be affected by her calling. See esp. the judgment of Schreiner J.A. at 402.

[16] *Phipson on Evidence*, 10th ed. (1963), pp. 69 ff.

[17] *Vulcan Rubber Works (Pty.) Ltd.* v. *S.A.R. & H.*, 1958 (3) S.A. 285 (A.D.) at 296–7; *Van Niekerk* v. *Fagan* (1897) 14 S.C. 47 at 50. *Naik* v. *Pillay's Trustee*, 1923 A.D. 471 at 477, is apparently *contra*, but in *R.* v. *Corris*, 1931 T.P.D. 471, Greenberg J. doubted, at 475, whether any intention to lay down a general principle was manifest in *Naik's* case.

[18] A peculiarly South African example is *R.* v. *Abel*, 1948 (1) S.A. 654 (A.D.), where Centlivres J.A. held, at 663–4, that while proof of descent is the best evidence of a person's race, evidence of repute and the real evidence of his appearance is nevertheless admissible.

[19] *R.* v. *Smit*, 1952 (3) S.A. 447 (A.D.); *R.* v. *Radziwill* (1902) 19 S.C. 195.

Ad n. 28 : The court should not question the accused about his age if he does not either give evidence or make an unsworn statement, as pointed out in S. v. Grotus, 1970 (1) S.A. 369 (C)).

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empowered by section 383 of the Criminal Procedure
from the child's appearance.[28] Where this is done it
the record, and wherever possible medical evidence
supplement the court's observation.[29]
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witnesses to the ceremony, is a duly authenticated m
only if this is unobtainable may secondary evidence of
be led.[30]
A *foreign* birth or marriage certificate is admissible
from a register kept in due form in the foreign coun
proper officer in whose country and in whose custody
The best evidence rule is also said to underlie the r

[20] *Smit's* case at 452. An extreme case is *R. v. Louw* (1904) 21 S
considered the existence of the alleged real evidence so improba
testimony concerning it was contemptuously rejected.
[21] 1920 A.D. 58 at 62–3. See, also, *R. v. Kotcho*, 1918 E.D.L. 9
R. v. Undigela, 1940 E.D.L. 107; *R. v. Pandhlemi*, 1942 O.P.D.
8 *Codicillus* 44.
[22] Where this objection does not apply, evidence of the be
admitted, as, e.g., showing their familiarity with a person (*R. v*
locality (*Poswa v. Christie*, 1934 N.P.D. 178).
[23] e.g. *R. v. Lakhoo*, 1943 G.W.L. 10. But see *S. v. Tange*, 196
[24] *Ex parte Commissioner of Child Welfare: in re Schmidt*, 1956
[25] *R. v. Corris*, 1931 T.P.D. 471 at 474; *R. v. Kaplan*, 1942 O.
S.A. 380 (C) at 384.
[26] *R. v. K*, 1951 (3) S.A. 180 (S.W.A.).
[27] *Schmidt's* case, above; sec. 42(3) of the Births, Marriages a
No. 81 of 1963. Other examples of special statutory provision fo
the Bantu Labour Act, No. 67 of 1964; sec. 39(1) of the Shops and
[28] This does not apply where the age of an adult is in issue; *R. v*
R. v. Kaplan, 1942 O.P.D. 232 at 236–7. If the age is an essentia
accuracy of the court's estimate must be beyond reasonable do
S.A. 648 (C)). See opposite.
[29] *R. v. Hadebe*, 1960 (1) S.A. 488 (T); *S. v. Bezuid*, 1964 (3)
[30] Secs. 270 and 271(2) of the Criminal Procedure Act.
[31] *McNeil v. McNeil*, 1945 N.P.D. 287; *Wittekind v. Wittekind*
above, p. 112.
[32] Sec. 270(1)(b) of the Criminal Procedure Act; *R. v. Sherrin*,

party's failure to offer the best evidence he can is likely to cause unfavourable judicial comment on the weight of that which he does produce.[20]

In a few decisions the continued application of the rule can be seen where the evidence tendered was considered so unreliable that it was excluded entirely. For example, in *R. v. Trupedo*[21] evidence that the accused had been tracked and identified by police dogs was held inadmissible, on the ground *inter alia* that the process was too uncertain to justify the drawing of any legal inference therefrom.[22]

The best evidence rule survives most rigorously in relation to proof of marriage and proof of age, where such facts are directly in issue, as for example in charges of bigamy on the one hand, and of under-age rape on the other. Secondary evidence will be received only where these facts are purely collateral and not of vital issue in the case.[23]

The best proof of age is the evidence of the mother or of witnesses to the birth.[24] A witness's statement of his own age is inadmissible as hearsay.[25] Baptismal certificates[26] and birth certificates are also hearsay, but the latter (with marriage and death certificates) have expressly been made admissible by statute.[27] Where no such evidence is available, in the case of a child the judicial officer is empowered by section 383 of the Criminal Procedure Act to estimate the age from the child's appearance.[28] Where this is done it must be noted in full on the record, and wherever possible medical evidence should be obtained to supplement the court's observation.[29]

The best evidence of marriage, apart from that of the officiating officer or of witnesses to the ceremony, is a duly authenticated marriage certificate,[30] and only if this is unobtainable may secondary evidence of cohabitation and repute be led.[31]

A foreign birth or marriage certificate is admissible where it was extracted from a register kept in due form in the foreign country, and certified by the proper officer in whose country and in whose custody the register was.[32]

The best evidence rule is also said to underlie the rules relating to proof of

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[20] *Smit's* case at 452. An extreme case is *R. v. Louw* (1904) 21 S.C. 36 at 41, De Villiers C.J. considered the existence of the alleged real evidence so improbable that, in its absence, oral testimony concerning it was contemptuously rejected.

[21] 1920 A.D. 58 at 62–3. See, also, *R. v. Kotcho*, 1918 E.D.L. 91; *R. v. Ben*, 1925 E.D.L. 89; *R. v. Undigela*, 1940 E.D.L. 107; *R. v. Pandhlewi*, 1942 O.P.D. 145; G. N. Barrie in (1967) 8 *Codicillus* 44.

[22] Where this objection does not apply, evidence of the behaviour of animals may be admitted, as, e.g., showing their familiarity with a person (*R. v. King*, 1943 E.D.L. 191) or locality (*Poswa v. Christie*, 1934 N.P.D. 178).

[23] e.g. *R. v. Lakhoo*, 1943 G.W.L. 10. But see *S. v. Tango*, 1969 (2) S.A. 648 (C).

[24] *Ex parte Commissioner of Child Welfare: In re Schmidt*, 1956 (4) S.A. 787 (T) at 791.

[25] *R. v. Corris*, 1931 T.P.D. 473 at 474; *R. v. Kaplan*, 1942 O.P.D. 232; *R. v. C*, 1955 (1) S.A. 380 (C) at 384.

[26] *R. v. K*, 1951 (3) S.A. 180 (S.W.A.).

[27] *Schmidt's* case, above; sec. 42(3) of the Births, Marriages and Deaths Registration Act, No. 81 of 1963. Other examples of special statutory provision for proof of age are sec. 27 of the Bantu Labour Act, No. 67 of 1964; sec. 30(1) of the Shops and Offices Act, No. 75 of 1964.

[28] This does not apply where the age of an adult is in issue: *R. v. Laberiot*, 1927 O.P.D. 279; *R. v. Kaplan*, 1942 O.P.D. 232 at 236–7. If the age is an essential element of the offence the accuracy of the court's estimate must be beyond reasonable doubt (*S. v. Tango*, 1969 (2) S.A. 648 (C)).

See opposite.

[29] *R. v. Hadebe*, 1960 (1) S.A. 488 (T); *S. v. Butelezi*, 1964 (2) S.A. 519 (N); S. v. [illegible], 1970(1) S.A. 245(N).

[30] Secs. 270 and 271(2) of the Criminal Procedure Act.

[31] *McNeil v. McNeil*, 1945 N.P.D. 287; *Wittekind v. Wittekind*, 1948 (1) S.A. 826 (W). see above, p. 192.

[32] Sec. 270(1)(*b*) of the Criminal Procedure Act; *R. v. Sherrin*, 1913 T.P.D. 474.

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documents, but the insistence in this regard on *primary* evidence, viz. the production of the document itself, historically long antedates the formulation of the best evidence rule. For further discussion, see above[31] under Documentary Evidence.

III. CIRCUMSTANTIAL EVIDENCE

A criminal charge raises two main questions: first, the *corpus delicti*—has the crime alleged been committed? and secondly, was the accused its perpetrator? It is the establishment of the latter which in general involves the greatest demands upon the machinery of the administration of justice, but the former may also cause difficulties.

In simpler cases, these two questions may be established by direct evidence. The accused may have been observed, by someone familiar with his appearance, in the act of stabbing the deceased, whose body has been examined and identified. Where however such relatively straightforward evidence is not available, any aspect of fact which could have been proved directly may in general be proved by circumstantial evidence. For instance, in a murder trial the offender's criminal intention may be inferred from the nature of the weapon[32] or from the nature of the act,[33] and the cause of death from the state and situation of the body.[34] It is not even necessary that the body should have been found, if the alleged victim's death is a fair inference in the circumstances from his disappearance.[35] Similarly, in a charge of theft the fact that the goods were stolen may be proved circumstantially.[36]

Circumstantial evidence may also indicate the identity of the criminal. Thus the accused may be linked with the offence by his motive to commit it,[37] his previous threats to commit it,[38] or by the fact that he is found in suspicious circumstances in the vicinity of the crime.[41]

Where it is necessary to rely on circumstantial evidence, proof may be facilitated by the existence of a presumption of law, so that on proof of one fact the court is required or entitled to draw a conclusion as to another fact,[42] subject usually to evidence in rebuttal. Where no such presumption applies the inference to be drawn from the facts is a matter of logic, because the danger of a wrong judicial inference is added to the always present danger of mistaken or dishonest witnesses. Two cardinal rules of logical inference as laid down by Watermeyer J.A. in *R. v. Blom*[43] must be observed:

> "(1) The inference sought to be drawn must be consistent with all the proved facts; if it is not, the inference cannot be drawn.
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

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[31] See above, p. [illegible].
[32] *R. v. Kewelram*, 1922 A.D. 213 at 216.
[33] *R. v. Mbleka*, 1960 (4) S.A. 712 (A.D.); *R. v. Sikonam*, 1960 (4) S.A. 723 (A.D.).
[34] *R. v. Chetty*, 1941 A.D. 514.
[35] *Mudely v. R.* (1911) 32 N.L.R. 362 at 363.
[36] *Mpuntsa v. R.* (1912) 36 N.L.R. 197 at 204.
[37] e.g. *Rose v. R.*, 1911 E.D.L. 141 at 143, where, on a charge of theft, liquor was missing and the accused was found to an intoxicated state next by. Cf. *R. v. Burton* (1834) 169 E.R. 729 and *R. v. Daniel*, 1938 S.R. 234.
[38] *R. v. Fourie*, 1927 A.D. 37 at 44. See further above, p. [illegible]
[41] *R. v. Ngcobo*, 1922 A.D. 377 at 376.
[42] *R. v. Blom*, 1939 A.D. 188 at 202, 211.
[43] 1939 A.D. 188 at 202-3. See, also, *R. v. Swartz*, 1946 G.W.L. 37 at 39.

The second rule is of course a statement of the criminal standard of proof,[41] simply another way of saying that where the inculpatory facts are as compatible with the innocence of the accused as with his guilt, the inference of guilt should not be drawn. Thus proof that the accused, a pauper, was suddenly in possession of money does not set up even a prima facie case that he was the thief, in the absence of further evidence that he alone had had the opportunity to steal, or some evidence linking the numbers of the stolen banknotes with those in the accused's possession.[42] Similarly, the fact that stock is missing does not prove it was stolen unless the possibility that it strayed has been excluded.[43] Again, the mere presence of the accused's fingerprint on the car he was alleged to have stolen and stripped was held not to justify conviction since the print might have been placed on the car in a number of ways of which the possibility that he was unlawfully working on the car was only one.[44]

It has been said in the Appellate Division that each separate innocent possibility need not be considered separately as long as the aggregate of these possibilities remains negligible,[45] but as Schreiner J.A. has since commented, the weight of the collective hypotheses cannot be more than the sum of their individual likelihood.[46]

False statements by the accused or suspicious conduct by him, such as conspiring to have perjured evidence given on his behalf, can of course be used to assist in drawing the inference of his guilt,[47] as may his failure to testify or to advance an innocent explanation.[48] However, it should be remembered that such factors are essentially makeweights, and may be accounted for innocently, so that the inference of guilt should not be based largely on these considerations. See above, *p.* ***.

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[41] See above, p. 200, 172.
[42] *R. v. Smith*, 1952 C.P.D. 150.
[43] *S. v. Dlamini*, 1965 (1) S.A. 839 (N).
[44] *R. v. De Pienaar*, 1964 A.D. 314 at 321.
[45] *De Plessis's case*, above, at 331; *R. v. Sunday*, 1937 A.D. 266 at 302, approving *Ex parte Slabbert and Prinsloo: In re R. v. Nkwatsala*, 1960 (2) S.A. 542 (A.D.) at 552,
[46] *R. v. Nkwatsala*, 1960 (2) S.A. 542 (A.D.) at 552, approving *Ex parte Slabbert and Prinsloo: In re R. v. Slabbert and Prinsloo*, 1964 T.P.D. 326 at 331.
[47] *Goodrich* v. *Goodrich*, 1946 A.D. 390 at 396-7; *Shaw v. R.* (1904) 25 N.L.R. 310 at 315-14.
[48] *R. v. Nel*, 1946 W.L.D. 405.
[49] *R. v. Nkwatsala*, above. See also above, p. 200, 172.

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