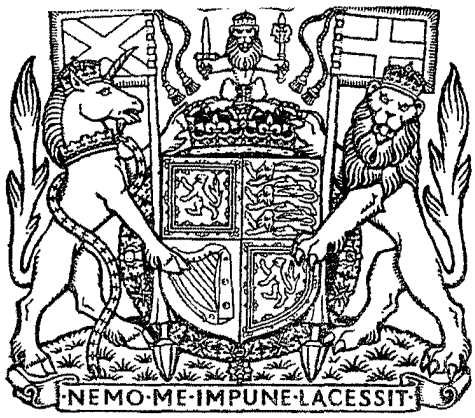

LAW COMMISSIONS ACT 1965

SCOTTISH LAW COMMISSION

Proposal for Reform of the Law of Evidence Relating to Corroboration

Laid before Parliament
by the Secretary of State for Scotland and the Lord Advocate
under Section 3(2)
of the Law Commissions Act 1965.

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Hon. Lord Kilbrandon, LL.D., *Chairman*

Professor A. E. Anton, M.A., LL.B.

Mr. G. D. Fairbairn, S.S.C.

Professor J. M. Halliday, M.A., LL.B.

Professor T. B. Smith, Q.C., D.C.L., LL.D.

The Secretary of the Commission is Mr. A. G. Brand, M.B.E., M.A., LL.B. Its Offices are at the Old College, University of Edinburgh, South Bridge, Edinburgh 8.

SCOTTISH LAW COMMISSION

To: THE RIGHT HONOURABLE WILLIAM ROSS, M.B.E., M.P.,
Her Majesty's Secretary of State for Scotland, and

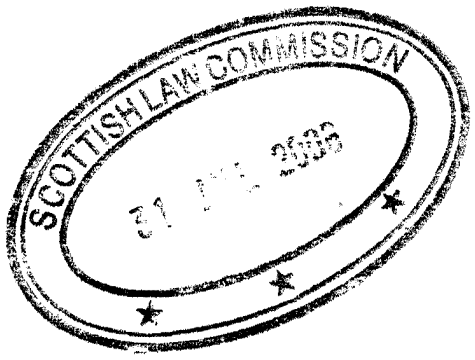
THE RIGHT HONOURABLE GORDON STOTT,
QUEEN'S COUNSEL,
Her Majesty's Advocate

In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, we submitted to you on 16th September 1965 our First Programme for the examination of several branches of the law of Scotland with a view to reform. The Programme was approved by you on 21st October 1965.

The first item in the Programme is "Evidence". In the course of our study of this subject, we have reached certain conclusions relating to corroboration which we have the honour to submit as a proposal for reform of the law.

C. J. D. SHAW,
Chairman.

16*th February*, 1967.



SCOTTISH LAW COMMISSION

Proposal for Reform of the Law of Evidence Relating to Corroboration

I. Introduction

1. The Scottish Law Commission have received from individual members of the public, members of the legal profession and representatives of trade unions complaints relating to the rules requiring corroboration in civil actions, especially those arising from personal injury. When a man can prove, by his own testimony accepted as true by the Court, that he has suffered injury through the fault of another, it is felt to be unjust that he cannot succeed in an action against that other unless he can produce corroborating evidence in support of his own. The number of persons whose rights have been affected by this rule of procedure can never be known, because it includes not only those whose cases have failed in Court, but also the presumably much larger number of those who have accepted legal advice, correct as the law now stands, that they ought to abandon their claims because lack of corroboration makes them untenable.

2. Our First Programme includes the examination of the law of evidence with a view to reform and codification, and work is proceeding in that field, but it will necessarily be some time before this examination can be completed and comprehensive recommendations submitted. We are, however, satisfied (a) that the complaints we have been receiving with reference to the requirement of corroboration are well-founded, (b) that the amendment of the law is a matter of some urgency and (c) that this amendment need not await our presentation of a draft code of the whole law of evidence. For these reasons we now recommend that immediate effect be given to a proposal, which can properly be taken in isolation, substantially to curtail the doctrine of corroboration as it stands at present. From this recommendation we exclude criminal causes, consistorial causes, and actions of affiliation.

II. The Present Law and Its History

3. The present law has been stated thus. "By the law of Scotland, the testimony of one witness, however credible, is not full proof of any ground of action or defence, either in a civil or criminal cause. Accordingly, if the only evidence in support of a case is the uncorroborated testimony of one witness, it is the duty of the Court to direct the jury that the proof is not sufficient in point of law. But this rule does not require that two witnesses should swear to every fact in the case. The direct evidence of one witness, supported by facts and circumstances, is sufficient."[1] Lord President Normand has said, "There is sufficient

1. Dickson, *A Treatise on the Law of Evidence in Scotland*, 3rd Edition, §§1807 and 1808.

corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied."[1] Thus a pursuer who has suffered injury by accident and is suing for damages must produce the evidence of at least a second witness to corroborate his own evidence either directly or by establishing facts and circumstances which corroborate it.

4. Historically, the rule was derived from the system of procedure in use in the ecclesiastical courts in mediaeval times, a system which was largely adopted by the Court of Session on its creation. Under that procedure the testimony of a single witness was not acceptable as proof; it was merely a "half-proof" (*semi-plena probatio*). A "full proof" (*plena probatio*) required the evidence of two unexceptionable witnesses (*testes classici*), though the evidence of a single witness might be supplemented by other adminicles of evidence which together added up to another half-proof. There is ample evidence of the adoption of this theory of proof in the early practice of the Court of Session and it is analysed in the earliest treatise on its procedures, Skene's *Ane Short Forme of Proces* (see chapters XVI–XXX, especially chapter XXII). This theory of proof had the authority of various scriptural and Roman texts and was widely adopted throughout Europe. Nevertheless, while its rigour was understandable at the time of its introduction when the alternatives were the ordeal or compurgation,[2] it became increasingly obsolete with the passage of years. The safeguard which it provided against the decision of cases by the evidence of a single false witness was counterbalanced by the disadvantage that it excluded many legitimate claims. For this reason the rule was abolished in France after the Revolution and subsequently in many other European countries. The matter has been examined by Dr. H. A. Hammelmann[3] who sums up the position as follows, "The time is gone when, in accordance with an artificial system of arithemetical proof, a verdict could only be secured if two or more witnesses were prepared to testify to the facts, so that, in Napoleon's words, one honest man could not, by his testimony, secure the conviction of a rogue, while two rogues could secure the conviction of an honest man."

5. The question of corroboration in civil cases was recently canvassed in the case of *Cleisham v. British Transport Commission*;[4] Lord Devlin (at page 24) stated the rule thus, "It is unnecessary for the pursuer to do more than to establish that, in the light of the surrounding circumstances, her account is more probable than any other account that is given in evidence or can reasonably be suggested, so as not to leave it a case of one man's word against another's." As the rule remains, however, it may still be necessary for a judge to say to an injured workman, "I believe your evidence but I cannot hold your claim proved because the surrounding circumstances do not sufficiently corroborate it." This is unsatisfactory; the Court should be entitled, when it is satisfied as to the

1. *O'Hara v. The Central S.M.T. Co., Ltd.* 1941 S.C. 363, at page 379.
2. See Stair Society publications, Vol. 20, *An Introduction to Scottish Legal History*, page 303.
3. In an unpublished thesis entitled *A Comparative Study of the Law of Evidence.*
4. 1964 S.C. (H.L.) 8.

truth of one version of the facts, to draw the legal conclusions which follow naturally from it. Corroborating evidence should not be a *sine qua non* as a matter of law. From enquiries which we have made, it is evident that there are many cases where pursuers, having sustained injuries when working alone or in darkness, are unable to pursue a claim through absence of corroboration. Defenders lie under a similar disability in issues, such as contributory negligence, in which the burden of proof lies on them; they may be unable to discharge that onus through lack of corroboration.

III. Other Legal Systems

6. The law of England on this matter has been stated as follows,[1] "On the general rule that a single witness, unconfirmed, is sufficient, the following exceptions have been engrafted either by statute or by rule of practice, there being this distinction that when corroboration is required by statute and is not forthcoming the case must be withdrawn from the jury, whereas when it is merely required by the rule of practice, the case must be left to the jury." There follow a number of exceptions, of which all are in the criminal law except for breach of promise, bastardy, claims to property of deceased persons, and certain aspects of divorce proceedings. There thus seem to be three situations as to the requirement for corroboration; (a) in the general case it is not required, (b) in some matters it is required by statute, (c) in other circumstances it is the duty of the judge to warn a jury of the danger of convicting on uncorroborated evidence. Examples of the last situation are afforded by the evidence of accomplices, very young children, the prosecutrix on sexual charges, and disreputable people in general.

7. The following is a quotation from the Evidence Code of the State of California, 1965, "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact".[2] The similarity with the law of England is apparent.

8. The rule requiring corroboration, as already explained, has been abolished in most European countries. We are informed that in Sweden it was abolished by statute in 1948. Professor W. L. Haardt of The Hague has reported to us that new draft Rules of Evidence abolishing the corroboration rule in the Netherlands are expected to be enacted in 1967 or 1968. We understand that the rule remains only in Portugal. For the reasons given above, we consider that the law of Scotland in the matter of corroboration should be amended so as to bring it into harmony with most other systems.

IV. Recommendation

9. We therefore recommend legislation to the effect that in any civil cause, not being a consistorial cause or an action of affiliation, the Court may treat the evidence of a single credible witness as sufficient proof of any averment which requires to be established by evidence given by a witness in person.

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1. Phipson on *Evidence*, 10th Edition, para. 1566, page 608.
2. §411.

10. Criminal causes are excluded from the recommendation for this reason. In criminal causes it is the general rule that the prosecution must prove its case "beyond reasonable doubt", which is a higher standard of proof than the "balance of probabilities" required in civil causes. We appreciate that in most jurisdictions the corroboration rule, as we may call it, does not apply either in criminal or in civil causes. Nevertheless we have not as yet studied its effect in criminal causes in Scotland and we would therefore not be prepared at this stage to recommend an alteration in criminal practice. It is arguable that there should be a higher standard of proof in causes where the liberty of the subject can be in question. It may, however, be observed that there are already instances in the criminal law where, by statute, the evidence of one witness is sufficient proof of a particular fact.

11. There are some faults which may alternatively or cumulatively give rise both to civil and criminal proceedings. Examples are negligence, fraud, and breach of statutory duty. The last named is the commonest. Our proposal would mean that, when a workman had been injured by coming into contact with an unfenced machine, the employer could not be convicted criminally on the evidence of a single witness, but could on such evidence be found liable in damages, since the law calls for a higher standard of proof in the criminal proceedings.

12. Consistorial causes are also excluded from the recommendation. "Consistorial causes" are defined by A. G. and N. M. L. Walker as "actions of declarator of marriage, of declarator of nullity of marriage, of declarator of legitimacy and bastardy, of separation *a mensa et thoro*, and of divorce, actions of adherence, an action of reduction of a decree of divorce, and any other action affecting the status of the parties with regard to marriage".[1] The standard of proof required in proceedings for divorce or judicial separation on the ground of adultery is the same as that in criminal trials, [2] and this standard is understood to be applied in practice in all consistorial actions, presumably because to have different standards of proof in different consistorial actions would be undesirable. In view of the affinity of consistorial with criminal actions, both have been excluded from our recommendation.

13. We have here to state the opinion of one of our members that consistorial causes ought not to be distinguished from other civil actions, and that the rule of corroboration ought to be departed from in such cases also. In support of this opinion it may be observed that in England "in undefended cases, corroboration, though always advisable, is only essential where there are circumstances of suspicion".[3]

14. Actions of affiliation are not covered by the recommendation, although it appears that the standard of proof here is only "balance of probabilities". By their nature these actions resemble actions of declarator of legitimacy or bastardy, which are consistorial actions. Also, by the nature of the case, caution has to be exercised in accepting the evidence of a woman raising an action of affiliation. In this respect the evidential requirement resembles that in criminal

1. *The Law of Evidence in Scotland.* page 166.
2. *Burnett v. Burnett* 1955 S.C. 183; Walton, *A Handbook of Husband and Wife according to the Law of Scotland,* 3rd Edition, page 58; Walkers, *The Law of Evidence in Scotland,* page 167.
3. Phipson on *Evidence,* 10th Edition, para. 1571, page 611.

charges of sexual assault. Further, in actions of affiliation only, there is a special rule of "corroboration by false denial"—i.e. if the defender denies in his evidence some material fact which is proved to be true, this may provide corroboration of the pursuer's evidence.[1] It is, as we have noticed, not only in Scotland that corroboration of a pursuer's evidence is required in cases of this class.

15. The recommendation is not intended to affect the present rules for the authentication of writs. If this means that in some cases authentication may require two witnesses, but that a deed can be successfully challenged, e.g. on the ground of non-execution, on the evidence of one, we will only say that this anomaly will be dealt with in the Code of Evidence which we have undertaken to produce.

16. We have already indicated our view that the law of corroboration requires immediate reform. Any serious and unexpected difficulties or anomalies to which that reform may give rise can be dealt with as opportunities occur, and as the branches of law in which they arise become the subjects of examination. To wait for reform of any branch of the law until every possible anomaly could be dealt with would mean that the whole of the law would have to be examined before any proposal such as the present one could be put forward. This would be an example of the best being the enemy of the good.

17. Certain statutory provisions relating to evidence are mentioned in the Appendix hereto. At present we consider that these provisions should be left unaltered.

18. We consider that the legislation which implements our recommendation should apply only to actions which are raised after the date of the legislation coming into operation.

V. Consultation

19. In accordance with a practice which we have found to be useful and convenient, an indication of our intention to submit recommendations on this topic was given to the Lord President of the Court of Session, the Faculty of Advocates, and the Law Society of Scotland, who were all asked for their informal comments. These were generally unfavourable to our proposals. At that stage it was our intention to confine the alteration of the law in relation to corroboration to actions of damages for personal injuries, on the view that this was the field in which reform was most urgently called for and at the same time one in which less controversy was likely to arise. The Faculty of Advocates submitted two informal memoranda, from both of which it was plain that the proposals as stated would probably not command the approval of the Faculty, and that the principal objection was to the difficulties and anomalies which would arise from the confining of any new rules to so narrow a class of action. Thus one of these memoranda states, "It is of course accepted that some injustices occur. While that may be, it would appear that the Faculty would be strongly opposed to the present proposal, which is apparently confined to actions of damages for personal injuries." We have come to the conclusion that the objection to the proposal as originally stated is sound. The shortcomings of the

1. Walkers, *The Law of Evidence in Scotland*, page 179.

present rule are most obvious in actions of damages for personal injury, but there is no doubt that serious difficulties might arise in the application of different rules of evidence in various classes of case. Obvious examples are actions of relief or for professional negligence, which may require the proof of facts relating to personal injuries. Moreover, the criticism of the present rule is just as cogent in civil causes other than those arising from personal injury.

20. Both the Faculty of Advocates and the Law Society of Scotland expressed concern at the proposal to legislate piecemeal rather than by general review. This opinion is entitled to respect, but if the fact be that injustice is being done now, as we believe it is, and if it is possible to isolate this particular matter and to deal with it separately, then we submit that society ought not to be obliged to put up any longer with an unjust law which can easily be altered. An additional advantage of dealing with this matter separately is that some experience will have been gained of its working before the time comes to decide whether to incorporate it in our proposed Code of Evidence.

21. Another opinion expressed was that with a little diligence on the part of his advisers, any party who has no eye-witness of his accident can secure the necessary corroboration from surrounding circumstances if his story is true. We were satisfied from our own experience that this suggestion had no foundation, but we made enquiries and were informed by a number of solicitors experienced in this branch of the law that such corroboration is not always available. A typical reply (received in June, 1966) is as follows, "In fact since 1st January (1966), I have opened up 116 files for such claims. In this number, I have had approximately ten repudiations of liability to date. In, I would say, half these repudiations, my client was unable to press his or her claim because of inability to corroborate the circumstances of the accident even although it was quite apparent that if such evidence had been available, the claim was a sound one." Another reply states, "I find that, particularly in the Textile Industry with the ever increasing size of machinery coupled with the fact that one operator can now control many functions of a machine, people work in isolation. From this point of view it is becoming increasingly difficult to obtain corroborative evidence as to the circumstances surrounding an accident."

22. Other objections which have been put to us are:

(*1*) *The present law has been the law of Scotland for centuries.*

We have set out our reasons for thinking that the law is now in need of change.

(*2*) *It is dangerous to rely exclusively on the uncorroborated evidence of one witness, especially as perjury appears to be on the increase.*

It is inevitably the task of the tribunal with which the decision lies to assess the credibility of witnesses and to discriminate between honest and perjured evidence. This is true of all systems, whether corroboration is required or not. The problem is not peculiar to Scotland and Portugal. In any event there are no indications of any significant increase in perjury in Scotland.

(*3*) *The recommendation might result in the uncorroborated word of a party to the action, who has an interest in the decision in his favour, being enough to win the case for him.*

This objection, at base, is as old as the arguments for the rejection of the evidence of parties and other interested persons, which was swept away over 100 years ago. The question will always be, whether the evidence is credible and sufficient. The interest of the party may affect the weight of his evidence, but can afford no wider criticism.

(4) *If a single witness's observation is to be regarded as sufficient, it would require an experienced tribunal to assess this fairly and reliably, and the proposed change in the law would necessitate the elimination of jury trials.*

We do not agree with this conclusion. One of the memoranda from the Faculty of Advocates states that the question of jury trial is not considered to be crucial to this issue. The rule of corroboration was a feature of systems which lacked jury trial, and conversely there are systems, such as those of Northern Ireland, the Republic of Ireland, and most if not all of the United States, which have trial by jury without the rule of corroboration.

(5) *The recommendation means that just because there is some different rule in England, therefore it should be adopted in Scotland.*

We have made no such suggestion. We are required by the Law Commissions Act 1965 s. 3(1)(f) to take note of foreign solutions to legal problems if these are likely to assist in our review of the law.

(6) *For the purpose of determining* probabilis causa, *Legal Aid Committees accept the precognitions submitted as being truthful. The recommendation would result in the virtually automatic admission on the merits of applications which are supported by a single precognition, resulting in a spate of legal aid actions which it would pay defenders to settle rather than to fight.*

We do not consider that this procedural point is a valid argument against the substantive change which we propose. In any event, it would appear to be open to Legal Aid Committees to call for further precognitions, and if these were contradictory of an improbable precognition by the applicant, the Committee would hardly feel bound to find "probable cause". The criteria upon which Legal Aid Committees judge credibility and sufficiency, although necessarily based on less adequately presented facts, are substantially those relied upon by a Court of Justice.

VI. Conclusion

23. The rule requiring corroboration is a survival from the early history of Scots law. It is no longer justified in the class of case in which we recommend its abolition. It is unknown or has long been abandoned in most other systems of jurisprudence. We are not convinced by any of the reasons which have been advanced for its retention. It is causing real hardship to individuals in Scotland today.

APPENDIX

Para. 17

Statutory Provisions requiring more than one Witness

*Citation Act 1540 (c. 10 (c.75))—witnesses required to service of summons.

*Subscription of Deeds Act 1579 (c.18 (c.80))—witnesses required to subscription of deeds.

*Hornings Act 1579 (c.45 (c.94))—witnesses in proof of tenor of letters of horning.

*Mines and Metals Act 1592 (c.31)—requirement for working of mines to be made before a notary and four witnesses.

*Registration Act 1661 (c.243 (c.31))—witnesses required to execution of comprisings.

*Subscription of Deeds Act 1681 (c.5)—only witnesses subscribing a writ to be probative witnesses.

*Citation Act 1686 (c.5 (c.4))—citations and executions to be subscribed by witnesses.

Debtors (Scotland) Act 1838 (c.114) s. 25—two valuators to be witnesses to poinding.

Citation Amendment (Scotland) Act 1871 (c.43) s. 4—in small debt proceedings, no witnesses required to citation or service of documents by an officer of the court, except in cases of poinding, sequestration or charging.

Conveyancing (Scotland) Act 1874 (c.94) s. 4(2)—two witnesses required to delivery or posting of a notice of change of ownership.
s. 39—writings *inter alia* attested by two witnesses not to be invalid because of informality of execution.
s. 41—"notarial execution" before two witnesses.

Conveyancing (Scotland) Act 1924 (c.27) s. 18(1)—"notarial execution" before two witnesses.

Succession (Scotland) Act 1964 (c.41) s. 21—two affidavits required to prove handwriting in a holograph testamentary disposition.

Registration of Births, Deaths and Marriages (Scotland) Act 1965 (c.49) s. 18(1)(a)—signature of register of births by father of an illegitimate child before the mother and the registrar.
s. 30(2)—Marriage Schedule to be signed by at least two of the witnesses present at the marriage.
s. 49—a person unable to write may "make his mark" in presence of the registrar or two witnesses.

* The Acts of the Parliaments of Scotland are cited in accordance with *The Acts of the Parliaments of Scotland 1424–1707* Second Revised Edition, H.M.S.O., 1966. Where a second chapter number is given, this refers to the Duodecimo Edition; where no second chapter number appears, either the chapter number is the same in the Second Revised Edition and the Duodecimo Edition, or the Act concerned does not appear in the Duodecimo Edition.

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