

CHAPTER 36

PROOFS

Hearing parts of proof separately

36.1.-(1) In any cause, the court may-

- (a) at its own instance, or
- (b) on the motion of any party,

order that proof on liability or any other specified issue be heard separately from proof on any other issue and determine the order in which the proofs shall be heard.

(2) The court shall pronounce such interlocutor as it thinks fit at the conclusion of the first proof of any cause ordered to be heard in separate parts under paragraph (1).

Citation of witnesses

36.2.-(1) A witness shall be cited for a proof by service on him of a citation in Form 36.2-A-

- (a) by registered post or the first class recorded delivery service, by the agent for the party on whose behalf he is cited; or
- (b) personally, by a messenger-at-arms.

(2) A certified copy of the interlocutor allowing a proof shall be sufficient warrant to a messenger-at-arms to cite a witness on behalf of a party.

(3) A certificate of citation of a witness-

- (a) under paragraph (1)(a) shall be in Form 36.2-B; and
- (b) under paragraph (1)(b) shall be in Form 36.2-C.

(4) The agent for a party, or a party litigant, as the case may be, shall be personally liable, in the first instance, for the fees and expenses of a witness cited by him to appear at a proof.

(5) Where a party to a cause is a party litigant, he shall-

- (a) not later than 12 weeks before the diet of proof, apply to the court by motion to fix caution for the expenses of witnesses in answering a citation in such sum as the court considers reasonable having regard to the number of witnesses he proposes to cite and the period for which they may be required to attend court; and
- (b) before instructing a messenger-at-arms to cite a witness, find the caution which has been fixed.

(6) A party litigant who does not intend to cite all the witnesses referred to in his application under paragraph (5)(a) may apply by motion for variation of the amount of caution.

Lodging productions

36.3.-(1) Where a proof has been allowed, all productions which are intended to be used at the proof shall be lodged in process not later than 28 days before the diet of proof.

(2) A production which is not lodged in accordance with paragraph (1) shall not be used or put in evidence at a proof unless

- (a) by consent of parties; or
- (b) with the leave of the court on cause shown and on such conditions, if any, as to expenses or otherwise as the court thinks fit.

Copy productions

36.4.-(1) A copy of every documentary production, marked with the appropriate number of process of the principal production, shall be lodged for the use of the court at a proof not later than 48 hours before the diet of proof.

(2) Each copy production consisting of more than one sheet shall be securely fastened together by the party lodging it.

Returning borrowed documents before proof

36.5. All steps of process and productions which have been borrowed shall be returned to process before 12.30 p.m. on the day preceding the diet of proof.

36.6. (Revoked by S.I. 1996 No.2168).

Admissions by parties

36.7.-(1) Where a party admits-

- (a) any matter of fact whether averred in the pleadings or not,
- (b) the authenticity of any document, or
- (c) the sufficiency of a copy or extract of such a document as equivalent to the original,

which has not been admitted in the pleadings or in respect of which a notice under rule 28A.1(1) has not been intimated, a minute of admission signed by counsel or other person having a right of audience for the party making such admission, shall be lodged in process.

(2) An admission made in a minute of admission may be used in evidence at a proof if otherwise admissible in evidence.

(3) In taxing any account of expenses, the Auditor shall disallow the expenses of any evidence led on matters covered by a minute of admission, unless special cause is shown to him.

Lodging of certain written statements

36.8. A party who wishes to have any written statement (including an affidavit) or report, admissible under section 2(1)(b) of the Civil Evidence (Scotland) Act 1988, received in evidence shall lodge the statement or report in process and shall intimate such lodging to the other party or parties.

Attendance, and lists, of witnesses

36.9.-(1) It shall be the duty of each party to ensure that his witnesses, if any, are-

- (a) in attendance in the vicinity of the courtroom; and
- (b) available when called to give evidence.

(2) Each party shall, before his case begins, give to the macer of the court a numbered list of any witnesses of his in the order in which it is proposed to call them.

(3) No witness at a proof shall, except with leave of the court-

- (a) be present in the courtroom during the proceedings prior to the giving of his evidence; or
- (b) leave the courtroom after giving evidence.

(4) No party, other than the party citing a witness, shall have access to that witness while he is in attendance at court.

Administration of oath or affirmation to witnesses

36.10. The Lord Ordinary shall administer the oath to a witness in Form 36.10-A or, where the witness elects to affirm, the affirmation in Form 36.10-B.

Recording of evidence

36.11.-(1) Subject to any other provision in these Rules, evidence at a proof shall be recorded by-

- (a) a shorthand writer to whom the oath *de fideli administratione officii* has been administered on his appointment as a shorthand writer in the Court of Session; or
- (b) tape recording or other mechanical means approved by the Lord President.

(2) The record of the evidence at a proof shall include-

- (a) any objection taken to a question or to the line of evidence;
- (b) any submission made in relation to such an objection; and
- (c) the ruling of the court in relation to the objection and submission.

(3) A transcript of the record of the evidence shall be made only on the direction of the court; and the cost shall, in the first instance, be borne-

- (a) in an undefended cause, by the agent for the pursuer; and
- (b) in a defended cause, by the agents for the parties in equal proportions.

(4) The transcript of the record of the evidence provided for the use of the court shall be certified as a faithful record of the evidence by-

- (a) the shorthand writer or shorthand writers, if more than one, who recorded the evidence; or
- (b) where the evidence was recorded by tape recording or other mechanical means, the person who transcribed the record.

(5) The court may make such alterations to the transcript of the record of the evidence as appear to it to be necessary after hearing the parties; and, where such alterations are made, the Lord Ordinary shall authenticate the alterations.

(6) Where a transcript of the record of the evidence has been made for the use of the court, copies of it may be obtained by any party from the shorthand writer on payment of his fee.

(7) Except with leave of the court, the transcript of the record of the evidence may be borrowed from process only for the purpose of enabling a party to consider whether to reclaim against the interlocutor of the court on the proof.

(8) Where a transcript of the record of the evidence is required for the purpose of a reclaiming motion but has not been directed to be transcribed under paragraph (3), the claimer-

- (a) may request such a transcript from the shorthand writer, or as the case may be, the cost of the transcript being borne by the agent for the claimer in the first instance; and
- (b) shall lodge the transcript in process;

and copies of it may be obtained by any party from the shorthand writer, or as the case may be, on payment of his fee.

Finality of decision on sufficiency of stamp

36.12. The decision of the Lord Ordinary that a document adduced in evidence is sufficiently stamped, or does not require to be stamped, shall be final and not subject to review.

Death, disability, retirement, etc., of Lord Ordinary

36.13.-(1) Where the Lord Ordinary, before whom proof has been taken, in whole or in part, dies, retires or otherwise becomes unable to give judgment or to hear further proof, as the case may be, any party to the cause may apply by motion to the Inner House for directions-

- (a) that the cause shall be continued before, and shall be disposed of by, another Lord Ordinary;
 - (b) that the notes of evidence already taken, as certified by the shorthand writer, shall be evidence in the cause; and
 - (c) that the notes of the Lord Ordinary taken at the proof shall be made available to the Lord Ordinary before whom the cause is to be continued.
- (2) On making directions under paragraph (1), the Inner House may make such other order as it thinks fit.
- (3) On enrolling a motion under paragraph (1), the party enrolling it shall –
- (a) lodge in process four copies of the closed record (incorporating all interlocutors pronounced in the cause and amendments to the record allowed since the closing of the record); and
 - (b) send one copy of that record to every other party.
- (4) It shall not be necessary for any documents to be lodged in support of such a motion unless the court otherwise directs.
- (5) The vacation judge may not hear or determine a motion under paragraph (1).