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Confessions, Admissions and
Declarations by Persons Accused
of Crime Under Scots Law.

A historic and comparative study

by

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Volume 1

Degree of Doctor of Philosophy

Department of Private Law

University of Glasgow

March 1992

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No criminal justice system deserves respect if its wheels are turned by ignorance.

(Law Reform Commission of Australia, 1975)

Preface and Acknowledgments

In 1981 as a comparatively junior depute in the Procurator Fiscal's Office in Glasgow I had the remarkably good fortune to be entrusted with the setting up of a project to introduce the revived judicial examination procedure into Glasgow Sheriff Court. I think my colleagues and I made a reasonable success of our remit and we certainly confounded all the gloomy predictions about judicial examination leading to a total seizing-up of the court timetable and the like. It is regrettable that the judicial examination procedure has not fulfilled the hopes of the Thomson Committee and is in danger of becoming little more than an irrelevant excrescence, but that is a separate issue. On a personal level, this fascinating project gave me a particular interest in the accused's words as evidence in court and the present study is a direct, if rather delayed, result.

I am happy to acknowledge the assistance of many people in the preparation of this work. In the University, Mr Iain Dyer of the Department of Private Law has been my supervisor and I am most grateful for his help. I am also grateful to Professor Joe Thomson for his interest. Mrs Liz Wilson the Clerk to the Faculty, also deserves a word of thanks for her assistance. The Library staff both in the Workshop and on the fourth and fifth floors of the University Library have been unvaryingly helpful and a marked contrast to the rather surly junior staff members I

had the misfortune to encounter more than once at the Mitchell Library.

Outwith the University I would like to thank Assistant Chief Constable William Mc Master, Chief Superintendent Lawrence McIntyre, and Miss Kate Wilson, all of Strathclyde Police, for their help and in particular for arranging for me to have access to the excellent library facilities at the training school in Oxford Street, Glasgow. Miss Wilson's help in obtaining material from the police training colleges at Tulliallan and Bramhill was particularly appreciated. Miss Mary Stocks, the Crown Office Librarian also gave me much valuable assistance as did the staff of the National Library of Scotland.

Many present and former colleagues in the Procurator Fiscal Service have contributed (generally unwittingly) but several are due particular thanks. Mr Alexander Jessop (now a Sheriff in Aberdeen) was responsible for starting the whole thing off when he put me in charge of the judicial examination project. In more recent years as Regional Procurator Fiscal in Glasgow he took great interest in the progress of the thesis and gave me much encouragement. Thanks are also due to Mr Roderick Urquhart for the loan of some valuable and rare source material, to Dr Robert Shiels without whose practical advice and help this work would probably never have been started, and would certainly never have been finished, to Mr Bill Gilchrist, Assistant Solicitor in Crown Office for arranging study leave for me and to my current boss,

Mr A. Taylor Wilson, Procurator Fiscal in Airdrie, for so willingly allowing me actually to take the time off.

I must also thank my wife Ann, who has the good fortune to know virtually nothing about law, for encouraging me, for tolerating my frequent lengthy disappearances from the domestic scene as well as the detritus of academic study littering most horizontal surfaces in the house, the floors not excluded, and for providing the endless supply of tea (and the occasional stronger beverage) which has fuelled the project from inception to completion.

Finally I would like to make it clear that the views expressed in this work are my own personal opinions and should not be taken as being in any way representative of the Procurator Fiscal Service. The errors and omissions are likewise entirely my responsibility.

I have endeavoured to state the law of Scotland as at 31st December 1991. The laws of other jurisdictions are considered on the basis of sources available to me on that date.

David B. Griffiths

Glasgow,

March 1992.

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Abbreviations (other than standard law reports)

1975 Act - Criminal Procedure (Scotland) Act 1975

1980 Act - Criminal Justice (Scotland) Act 1980

A & NZ Jo Crim - Australia and New Zealand Journal of
Criminology

Alison - *Principles and Practice of the Criminal Law of Scotland*
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Am J Crim L - American Journal of Criminal Law

Archbold - *Pleading, Evidence and Practice in Criminal Cases* by
J.F. Archbold. 42nd edition by S. Mitchell et al.
London, 1985.

Aust LJ - Australian Law Journal

Burnett - *A Treatise on Various Branches of the Criminal Law of*
Scotland by J. Burnett. Edinburgh, 1811

Camb LJ - Cambridge Law Journal

CLRC - Criminal Law Revision Committee, 11th Report: Evidence
(General) (Cmd 4991, 1972)

Crim LQ - Criminal Law Quarterly

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Cross - *Cross on Evidence* by R. Cross. Unless otherwise
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Baron Hume, 4th edition by B.R. Bell. Edinburgh, 1844

ICLQ - International and Comparative Law Quarterly

JLSS - Journal of the Law Society of Scotland

Joy - *On the Admissibility of Confessions and Challenge of Jurors
in Criminal Cases in England and Ireland* by H.H. Joy.
Dublin 1842

JR - Juridical Review

JSPTL - Journal of the Society of Public Teachers of the Law

Lewis - *Manual of the Law of Evidence in Scotland* by W.J. Lewis.
Edinburgh, 1925

LQR - Law Quarterly Review

LS Gaz - Law Society's Gazette

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Edinburgh, 1944

Mirfield - *Confessions* by P. Mirfield. London, 1985

MLR - Modern Law Review

NILQ - Northern Ireland Legal Quarterly

OJLS - Oxford Journal of Legal Studies

PACE - Police and Criminal Evidence Act 1984

RCCP - Royal Commission on Criminal Procedure

Renton & Brown - *Criminal Procedure according to the Law of Scotland* by R.W. Renton and H.H. Brown. Unless otherwise specified references are to the 5th edition by G.H. Gordon et al. Edinburgh 1983.

Sc Law Gaz - Scottish Law Gazette

SCOLAG - Scottish Legal Action Group Bulletin

Sheehan - *Criminal Procedure in Scotland and France* by A.V. Sheehan. Edinburgh 1975

Sheehan Procedure - *Criminal Procedure* by A.V. Sheehan et al. Edinburgh 1990

SLR - Scottish Law Review

Walkers - *The Law of Evidence in Scotland* by A. Walker and N.M.L. Walker. Edinburgh, 1964.

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Abstract

This work examines in depth the issue of the accused's own words as evidence against him in a Scottish criminal court. The work begins with a brief consideration of the historic development of the modern Scottish criminal justice system with particular emphasis on the position of the accused within that system. The literature of the topic is next considered. The right to silence is discussed in some detail, encompassing the modern law in both Scotland and England as well as the various, mainly English, proposals to attenuate the right under the guise of law reform. The early history of confessions in Scotland is examined before turning to the issue of the admissibility of confession evidence. The bulk of this discussion focusses, not surprisingly, on confessions to the police with the development of the law being traced on a case-by-case basis, but all other types of confession evidence are also treated. A comparative note on the English law is included. The issue of corroboration of confession evidence has recently received a considerable amount of attention in the press both legal and lay, and the present work examines both the general issues involved as well as the particular dangers caused by the development of the so-called "special knowledge" confession. Once again comparison is made with English law. The exceptional situation in Northern Ireland is considered in order to demonstrate, albeit in an extreme form, the dangers of unsupervised interrogation and other activities by the forces of "law and order" and the inquisitorial system is likewise con-

sidered to see what lessons, if any can be learned and to identify the dangers and pitfalls of the main alternative procedural system.

The conclusions drawn are (a) that at the stage of police proceedings there is no good reason to interfere with the present law on the right to silence; (b) that while there is no case for making the accused a compellable witness there is a case for changing the law at the judicial stage (both trial and pre-trial) to permit more robust comment on the failure of the accused to speak at judicial examination and to give evidence at his trial; (c) the existing test of "fairness to the accused" as the criterion for admissibility should continue but the courts should articulate more clearly the policy and rationale behind their decisions; (d) there are no good grounds for changing the existing law in relation to legal advice during police questioning; (e) the issue of corroboration of confessions should be reconsidered as a matter of urgency and the historic requirement of Scottish law, that short of a recorded plea of guilty no person may be convicted solely on the basis of his own confession, should be restated; and (f) the protection of the accused against possible police malpractice is most likely to be achieved by means such as tape-recording (and possibly video recording) and steps should be taken to extend the availability of such recording and to make it a condition of admissibility of confession evidence.

Chapter 1. Background and Theory

1.1 A Brief Outline of Ancient Scottish Criminal Evidence and Procedure

The purpose of this work is to study in depth one particular area of the Scottish law of evidence - the confession of the accused as evidence in a criminal court. ' As well as problematic questions of evidence, confessions may also require the resolution of complex procedural issues and thus where necessary the law of procedure will be considered.

The historical development of the law will be traced, and it will be seen that the starting point of the present study is essentially the penultimate decade of the sixteenth century when a series of reforming statutes began to lay the ground for the development of the modern Scottish system of evidence and procedure. Little of the law prior to that date has any continuing influence on modern practice or procedure, and, although of considerable historical interest, can be dealt with briefly in the present context.

In the event, little is known about early Scottish criminal court procedure which, unlike other areas of the law, was relatively undeveloped. Although certain early Scottish kings, most notably David I (1124-1153), succeeded in establishing a measure of central control and a limited uniformity of law enforcement based largely on the Norman model, these reforms ceased in the early

fourteenth century and from then until the late sixteenth or early seventeenth century the history of Scotland is largely one of lawlessness, weak monarchy, wars, internal strife and the lack of a continuous, strong central government. As one modern textbook puts it: -

"Disorder was rampant and crimes went unpunished; courts and legal officers became corrupt and inefficient; the administration of justice became localised to the detriment of the evolution of a national system; indeed, in the words of one writer 'justice, outlawed, was in exile beyond the bounds of the kingdom.'" 2

Such a situation was clearly inimical to the development of a sophisticated system of criminal law and procedure. As Hume points out in the course of discussing criminal appeals, the requirement for speed of execution (in the literal as well as the figurative sense) exceeded the need for careful contemplation: -

"In the condition of the country in those times, it seems indeed more likely, that the ordinary course of this branch of justice might not be subject to the same delay or interruption as in civil matters, which could much better bear such a stoppage. The sharp and speedy execution of the law on common thieves, plunderers, sorners, raisers of fire, and shedders of blood, was, in

those disorderly times a thing of indispensable necessity."³

There was certainly not the same emphasis on the proper investigation of crime or "due process" as exists today and there was not the same clear distinction between civil and criminal matters. For example in the barony court ⁴ actions fell roughly into three categories, civil, criminal and matters relating to "the weill of the tenandis and keiping of guid nichtbarheid." Civil jurisdiction would include several matters which today would be regarded as criminal, notably "bloodwite", a fine for the shedding of blood, and "deforcement", the forcible prevention of an officer of law in the execution of his duty. Neighbourhood cases would also include matters which today would be dealt with in the criminal courts such as drunkenness and scurrilous speech and failure to comply with various Acts of Parliament. ⁵

When an offender was caught *in flagrante delicto* justice was summarily given to him "within that sun", this being the literal provision of the Act 1426 c.89 but later this came to be defined as within three days. ⁶ Where the accused's guilt was less obvious it was necessary to have a system whereby the issue might be determined and Scots law seems to have recognised at various times trial by ordeal, trial by combat, compurgation and trial by jury.

Trial by ordeal would require the accused to carry out some task such as carrying a red-hot iron for a distance of nine feet, or lifting a stone from a cauldron of boiling water. If his hand was uninjured after three days he was declared innocent, otherwise he was found guilty. The Lateran Council of 1215 prohibited clerical assistance at ordeals and with the withdrawal of religious sanction, trial by ordeal seems to have died out by around 1230.

Trial by combat, a Norman innovation, had begun to replace trial by ordeal in the eleventh century although it too was disapproved by the Lateran Council in 1215. Nevertheless it continued for sometime falling generally into desuetude in the thirteenth century although isolated references may be found later. ⁷ The last actual combat seems to have been in 1597. ⁸ (In 1985 two accused who were charged with armed robbery apparently discovered that trial by combat had never actually been abolished in Scotland and sought to prove their innocence by battle with the Lord Advocate. However wiser notions prevailed and the idea was abandoned. Instead one of them lodged an alibi stating that he was on a number 14 Edinburgh bus at the relevant time!) ⁹

Compurgation was known in pre-Norman times and was virtually extinct by the mid fifteenth century, although an isolated example can be found in a barony court in 1622. The accused was brought before the court and made a simple denial or assertion under oath in which he was supported by a number of compurgators

or oath helpers who swore a similar oath, not because they could give corroborative evidence, but because they supported the credibility of the accused. The number of compurgators varied depending on the crime and if the accused failed to find sufficient or if any compurgator failed to take the oath in the approved form the accused was convicted. Compurgation was in the nature of an ordeal and should not be thought to resemble in any way the giving of evidence in the modern sense.

Trial by jury appears to have become general practice during the thirteenth century. The Acts 1230 cc. 5 and 6 gave the accused an option to elect for trial by jury or inquest and this form of trial gradually replaced the other forms in all the criminal courts. The early jury would consist of "suitors" ie feudal tenants who held land by suit of court and for whom attendance at court was a feudal burden. In selecting the jury preference would be given to persons who had knowledge of the accused or the facts of the case.

By the fifteenth or sixteenth centuries juries had ceased to base their verdicts on personal knowledge and their decisions had come to be based on the evidence of witnesses speaking to the facts of the case. However, prior to 1587 it was generally the case that the witnesses' "evidence" would consist of little more than giving their assent to the precognitions (ie statements) which they would previously have given in private before the Sheriff.

The Act 1587 c.57, one of several reforming enactments of that year, introduced important procedural reforms and its influence may still be felt today, particularly in the general rule that all the evidence must be led in the presence of the accused, whose attendance at his own trial had not hitherto been regarded as necessary, and the rule that nobody might contact the jury after it had retired. The right of an accused to legal representation at his trial was another major reform in 1587 and it is noteworthy that it was to be 250 years before an equivalent right became generally available in England.

One striking, indeed almost startling, feature of the jury trial, even until comparatively recently, was its extreme brevity although pre-trial procedures could sometimes be lengthy. To give but three examples, when the Justice Ayre went on circuit to Jedburgh in 1491 it disposed of 193 cases in six days, in 1838 two judges at the High Court in Glasgow dealt with 81 trials in six days and in 1847 a Glasgow sitting of the High Court dealt with 96 cases (53 of which went to trial) in nine days. ¹⁰

The remarkable throughput of jury trials was also assisted from 1587 until the middle of the nineteenth century by the very restricted circumstances in which an adjournment might be granted once the jury had been sworn, which could on occasion result in a court sitting continuously for over forty hours. ¹¹ In addition there were various classes of persons who were not competent

witnesses although most of these restrictions were removed by a series of statutes between 1840 and 1898.

Many of the cases would be trivial, to modern eyes at least, and even as late as the middle of the nineteenth century, when summary trial was still restricted to the most trivial matters, many cases which today would be tried before the Sheriff summary court (if not the District Court) required a jury. Examples would include theft by housebreaking or opening a lockfast place and theft "even of a few pounds only, if from the person, and by a practised thief." ¹²

As will be explained more fully later, before 1828 a trial still required to take place even when the accused pled guilty. Even if the accused pled not guilty, proof might consist of little more than the reading of a self-incriminating declaration with minimal corroboration. While the accused had the right to question the crown witnesses he was for long neither allowed to challenge their evidence nor to lead contrary evidence of his own. This situation appears to have changed between the time of Mackenzie and that of Hume. The last great reform came in 1898 when the Criminal Evidence Act granted the accused the right to testify on his own behalf.

Although the actual structure of the courts is only of peripheral relevance to the present study, the founding of the High Court of Justiciary in 1672 ¹³ was probably the single most important step

forward in the development of Scottish criminal law and procedure. ¹⁴ The High Court replaced the courts of the Justiciars and their deutes who had, more than a little erratically, held circuit courts or "ayres" throughout Scotland since the twelfth century and provided in Baron Hume's words "an entire new and more provident order such as might be attended with more honour and authority, and afford a higher security for the qualifications and good deportment of the Judges, than under those occasional and discretionary nominations of Justices-depute and assessors." ¹⁵

The regime established in 1672 is recognisably the basis of the modern High Court of Justiciary. Today the High Court is Scotland's supreme criminal court with universal jurisdiction over all indictable crime in Scotland and exclusive jurisdiction over the pleas of the crown. ¹⁶ It is also the only competent court of criminal appeal in Scotland hearing appeals from the inferior courts and also from itself at first instance. This latter aspect is the only fundamental change which has affected the High Court since 1672, the accused being given the right to appeal against conviction in the High Court by the Criminal Appeal (Scotland) Act 1926.

1. *Brevitatis causa* the expression "confession" is, unless the context dictates otherwise, used in this chapter to denote any incriminatory statement by the accused and includes declarations and other admissions.
2. Sheehan Procedure p12 §1,23. The quotation is from W.C. Dickson *Scotland from the Earliest Times to 1963*
3. Hume ii p7
4. A charter granted to a feudal baron would normally give him the right to

- administer justice within his barony
5. P. McIntyre *The Franchise Courts in An Introduction to Scottish Legal History* (Stair Society vol 20) pp376-377
 6. Sheehan Procedure p27 §1,41
 7. In 1567 Bothwell offered to prove his innocence of Darnley's death by battle - see Irvine Smith *Criminal Procedure in An Introduction to Scottish Legal History* p426
 8. I.D. Willock *The Jury In Scotland* (Stair Society vol 23) p21
 9. H.M. Advocate v John and Paul Burnside The Glasgow Herald 19 and 23 April 1985
 10. Sheehan Procedure p37 §1,55, Irvine Smith op cit note 7 supra p437
 11. Sheehan Procedure p39 §1,58
 12. Alison ii p57
 13. Act 1672 c16
 14. See generally W.C. Dickson *The High Court of Justiciary in An Introduction to Scottish Legal History* (Stair Society vol 20) p408
 15. Hume ii p18
 16. The "pleas of the crown" have varied slightly down the years. Today the term connotes murder, treason, rape, breach of duty by magistrates and deforcement of messengers.

1.2 The Investigation of Crime and Institution of Proceedings ¹

Historically there were various methods of arresting an accused and bringing him before the court. At common law an individual present at the scene of a crime has always had the right to arrest the perpetrator and certain old statutory provisions gave the lieges additional rights to pursue and arrest criminals. ² A Sheriff has always had the right to pursue and arrest and by the end of the seventeenth century he could authorise the informer or others to do so. Justices of the peace had statutory powers to appoint constables who had certain powers of arrest. In the seventeenth and eighteenth centuries many towns had watchmen or guards to keep the peace and arrest troublemakers. However these measures tended to prove ineffective and recourse had to be made to the army when necessary.

The idea of a crime as a wrong against the community which the community itself might punish is a comparatively modern concept. In early days the prime purpose of the criminal courts was conceived as the provision of a remedy to private parties seeking compensation or revenge and the responsibility and title to institute criminal proceedings lay with the victim or his relatives who would also be responsible for the investigation of the crime. However such an approach had obvious disadvantages. A weak victim would be reluctant to prosecute a powerful criminal, a rich criminal could bribe his way out of trouble and certain crimes had no victim and hence no one had title to

prosecute. By the fifteenth century the abuses to which private prosecution were subject and the extreme lawlessness of the country necessitated some form of public prosecution.

Such a public prosecutor gradually began to emerge. References to the "king's commissioner" and "king's procurator" can be found in the fifteenth century and at some indeterminate point it became the practice for private parties to obtain the consent of the "King's Advocate" before commencing proceedings. The Act 1587 c. 77 gave the Lord Advocate (concurrently with the king's treasurer) the right to pursue criminal prosecutions for "slaughters and utheris crimes" although "the parties be silent or wald utherwayis privily agree" and from then until the present day the Lord Advocate has been the public prosecutor in the Justiciary Court and its successor the High Court.

Some 250 years later Alison was to write:

"And experience has abundantly proved the wisdom of this system, which in practice generally vests the right of prosecution in a public officer of professional character and public responsibility, instead of a multitude of private individuals, whose prosecutions, sometimes begun in anger, are frequently abandoned from inconstancy, caprice or the load of the expenses attending criminal proceedings." 3

The office of procurator fiscal is also of considerable antiquity and may date back to Norman times. ⁴ By the seventeenth century the procurator fiscal was well established as the public prosecutor in the Sheriff Court and today he has (with a few unimportant exceptions) the exclusive right to prosecute in the public interest before the Sheriff and District courts and will normally do so at his own instance. He will also appear on behalf of the Crown in jury trials in the Sheriff Court, although on this occasion he will be acting under instructions issued by or on behalf of the Lord Advocate.

With the rise of the public prosecutor it became necessary for someone other than the victim to take responsibility for pre-trial investigation. This task began to devolve on the Sheriff and after the Heritable Jurisdictions (Scotland) Act 1746 he was given a specific duty of making immediate inquiry into every crime committed within his jurisdiction as soon as a complaint was laid before him by the procurator fiscal or the victim. This investigative work was burdensome and to an extent in conflict with the sheriff's judicial function and in practice it came to be delegated to the procurator fiscal who more and more began to assume the character of an investigator.

The rise of the modern police was largely a phenomenon of the nineteenth century and took place against this long-established background of investigation by the Sheriff and the procurator fiscal. ⁵ Initially the functions of the police were largely

keeping the peace and preventing crime and the actual investigation of crime lagged a long way behind. The courts long continued to fight a rearguard action against what they saw as the police usurping their functions and this was particularly apparent in relation to the right of the police to interrogate suspects. Voluntary confessions have always been admissible, but the courts have been jealous to prevent suspects being coerced by the police: -

"The cases which govern voluntary statements have evolved within a particular historical background. Originally the interrogation of a suspect was carried out by the sheriff and not by the police. When the police began to assume a more positive role in the examination of suspects, concern arose to protect an accused against abuse by the police. In particular there was concern in case a suspect might be induced to confess by unfair treatment or pressure being applied to him by police interrogators. Thus a body of distinct rules and principles has evolved over the years but these relate and are intended to relate only to the situation where the commission of a crime has been reported or noted and the police collect evidence directly from a suspect particularly by way of an incriminatory statement. The fundamental objective is always to ensure that no unfair

methods are used to induce a suspected person to
incriminate himself" 6

The use of the word "assume" is important as this is precisely what happened: the police eventually simply assumed the responsibility for the investigation of crime from the procurator fiscal. There was never any formal handing over process, let alone a statutory enactment, transferring power from the fiscal to the police and this assumption of powers by the police is a trend which is by no means spent and which is not only apparent in Scotland.

Because the system of public prosecution pre-dated the emergence of the modern police, the Scottish police, unlike their English counterparts have never had the right to institute criminal proceedings themselves, their duty being to report to the "appropriate prosecutor" (nowadays invariably the procurator fiscal). Today the Scottish police have almost total control of the investigative process. The modern procurator fiscal is almost exclusively a prosecutor although he does retain the right to issue instructions to the police in relation to the investigation of crime and the police must comply with such instructions. 7

The modern Lord Advocate is a minister of the crown and assisted by the Solicitor General heads a small, compact professional public system of prosecution. It is important to understand that

although the Lord Advocate is answerable to parliament, and will be, at least to a point, controlled by the powerful traditions of his great office, he is independent of the courts and the police. Accordingly:

"It is for him to decide when and against whom to launch prosecution and upon what charges. It is for him to decide in which court they shall be prosecuted. It is for him to decide what pleas of guilt he will accept and it is for him to decide when to withdraw or abandon proceedings." *

The procurators fiscal are under the control of the Lord Advocate but they too are independent of the courts and the police, enjoying a considerable measure of autonomy and discretion, particularly in summary matters. As a broad proposition it may be stated that no-one, other than the Lord Advocate (and certainly not the police) can compel a procurator fiscal to commence, continue or abandon a prosecution. Although a residual right of private prosecution continues to exist in Scotland, * for practical purposes the public prosecution system enjoys an unchallenged monopoly. This monopoly position of the public prosecutor has two aspects of particular relevance to the present study.

Firstly, this independence of the procurator fiscal is an important principle of Scottish criminal justice and is (the writer hopes) jealously guarded. Nevertheless it has to be

admitted that particularly in summary matters this independence may be more apparent than real. In modern practice the fiscal will generally take his initial decisions on the basis of a summary report from the police and it is self evident that in this situation the fiscal can only know what the police choose to tell him. In solemn procedure the procurator fiscal will normally go through a process known as "precognition" in the course of which he effectively takes over the conduct of the inquiry, but this takes place at a comparatively late stage and the fact remains that today in Scotland for practical purposes the police alone are responsible for the initial investigation of crime.

The writer can testify from personal experience that one of the most difficult situations for a prosecutor is to be presented with a police report which discloses sufficient evidence in law to justify proceedings but which the prosecutor personally finds unconvincing. In the writer's experience this has not been uncommon in relation to alleged confessions and developments such as tape recording of police interviews will, it is hoped, go a long way towards assisting procurators fiscal who alone must take these vital early decisions.

Secondly, it is equally self evident that the courts can only pronounce on what comes before them. The small, centralised public prosecution service enjoys virtually total control of criminal matters in Scotland, including, as already noted, an

absolute discretion on whether or not to prosecute, the charges to be brought and the acceptance of reduced pleas. Many cases involving unlawfully obtained evidence or other flaws simply never see the light of day. Reasons for not proceeding with a particular case are rarely given and Crown Office policy on prosecutorial decision making is generally confidential. ¹⁰ It follows from this, as Sheriff Gordon has noted, that the Crown can "materially alter the law in practice while leaving it unchanged literally". ¹¹

Although improbable in the extreme, it would be theoretically possible for the Lord Advocate to take a policy decision that (for example) no case was to be prosecuted which relied for proof on a confession to the police which had not been tape recorded. Such a decision would clearly have far reaching consequences but it would be most unlikely to be made public and even if it were, it would be unchallengable. Likewise at local level a procurator fiscal would be entitled to take a similar decision although such a policy would be liable to be overruled by the Lord Advocate.

Notes

1. See generally Lord Mackay of Clashfern *The Relationship between the Police and the Prosecution* (1984) 52 Sc Law Gaz 11 and authorities cited in note 2 below
2. Sheehan Procedure p28 §1.43, J Irvine Smith *Criminal Procedure in An Introduction to Scottish Legal History* (Stair Society vol 20) p426
3. Alison vol ii pp83-84
4. Sheehan Procedure p16 §1.30
5. See further *infra*
6. Weir v Jessop (No.2) 1991 SCCR 636, Lord Caplan at p 647F
7. Police (Scotland) Act 1967 Section 17(3)
8. Boyle v H.M. Advocate 1976 JC 32.
9. Ranton and Brown p24 §4-04

10. For an exception see Benton v Cardle 1987 SCCR 738
11. G.H.Gordon *Criminal Law* (2nd edn) pp4 & 5

1.3 The Comparative Aspect

(1) Scottish and English Law

Although Scottish criminal law has been served by several writers of the highest distinction, notably Sir George Mackenzie, Baron Hume and Sir Archibald Alison, one surprising feature of its history has been the absence of influential calls for radical reform. Scotland has no equivalent of Montesquieu or Bentham. While this can be taken to indicate a general level of satisfaction with the *status quo* there is a danger that pride in one's own law can lead to smugness, insularity and a lack of awareness of the possibilities of other approaches to the same problems. Thus, despite the unequivocally Scottish stance of the present study, in the writer's view it is of the highest importance that academic authors should examine other systems in order to see what alternative approaches are followed and what lessons can be learned.

However it was pointed out by Hume, ' has been repeated frequently since and will be emphasised several times in this work, that what functions well in one society at one particular period is not necessarily going to function equally well in another society or at a different time. The writer will, accordingly, bear in mind Professor Kahn-Freund's caution:

"In most respects the organisation of the courts
and of the legal profession, the law of procedure
and the law of evidence help to allocate power,

and belong in Montesquieu's sense to the *lois politiques*. Comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organisation and procedure may lead to frustration and may thus be a misuse of comparative method." ²

The first, and most natural, point of comparison is English law which, apart from its geographical proximity to Scots law, has influenced the systems of many countries, particularly the United States and the former Empire. English law has, of course, had considerable influence on Scots law, normally to the disadvantage of the latter, but this baleful influence has been least in the sphere of criminal matters where the Scottish law has developed more or less independently of Anglo-American influence. Substantive Scottish criminal law, and Scottish criminal evidence and procedure remain largely untouched:

"The law and procedure relating to crime are parts of the legal system with a particularly Scottish flavour. They are parts of which Scotland can justifiably feel proud, for they have developed through experience and have proved eminently capable of meeting changed requirements." ³

In part this can be attributed to a lack of interest on the part of the English-based government in Scottish criminal law but it

also owes something to the fact that in criminal, unlike civil, law there is no appeal from the Scottish courts to the House of Lords. ⁴

If a brief digression might be permitted, the writer makes no secret of his utter horror at the recent suggestion by "Justice", a self-appointed, largely English body, that the appellate jurisdiction of the House of Lords should be extended to Scottish criminal matters. ⁵ To appreciate what could be in store, one has only to think of such pearls of judicial wisdom and understanding as Bartonshill Coal Company v Reid (1858) 20 D (HL) 13 where the English doctrine of common employment was foisted on Scotland with the comment, "If such be the law of England, on what ground can it be argued not to be the law of Scotland?" While such an extreme example of blinkered, chauvinistic ignorance may be less likely today the involvement of the House of Lords would unquestionably lead to pressure for the assimilation of Scottish and English law, and indeed this would appear to be one of Justice's aims. It is submitted that the burden of proving the inadequacy of the present appeal arrangements rests with those advocating change. Even if a serious case could be made out for providing a further right of appeal beyond the High Court (which the writer doubts) it is by no means self evident that the appropriate response is to open up an avenue of appeal to a foreign court.

One remarkable feature of modern Scottish law is the extent to which both substantive criminal law and the law of criminal evidence continue to be largely dependent on the common law, what Hume termed the *lex non scripta*. Scotland has neither a criminal code nor a statutory consolidation of the graver crimes although there are, of course, a number of statutes applicable to Scotland enacting particular crimes as well as a multitude of enactments imposing (often minor) criminal sanctions on activities which are purely *mala prohibita*. Likewise, while certain individual aspects are subject to statutory regulation, there is no general statutory provision governing the law of evidence, which remains overwhelmingly a matter of the common law. Criminal procedure is, in general, codified by the 1975 Act and its subsequent amendments but in many cases the legislation does little more than restate ancient rules.

The Scottish position was well summed up in the following terms:

"Apart from legislation, the sources of the criminal law are to be found in the practice of the criminal courts, influenced to some extent by the Civil and Canon law and mediated through the institutional writers and the judiciary reports."⁶

This reliance on the common law, and the absence of the dead hand of legislation, undoubtedly allows Scottish criminal law a considerable degree of flexibility which is sometimes thought to be

absent in England. In fact, in relation to confession evidence, the English law prior to the passing of PACE was also almost entirely common law, based on the concept of voluntariness although the actual formulation of the rule was awkward and the rule tended to become rigid and artificial. ⁷ However in addition to the exclusionary rule the English courts operated an exclusionary discretion and Section 78(1) of PACE itself specifically retains the right of a court to exclude a confession as a matter of discretion. It will be shown that although they travelled by very different routes, in many cases the application of common law principles in the two countries would lead to results which were generally comparable.

Nevertheless, there is no doubt that the general English law of criminal evidence has tended to become bogged down in a collection of fragmented and sometimes illogical individual rules and it is tempting to prefer the the broad sweep of the Scottish "has it been fair" approach as an alternative to deciding whether a statement had been obtained "by fear of prejudice or hope of advantage exercised or held out by a person in authority or by oppression." However, it will be shown that the Scottish approach is not without its disadvantages and dangers and that while it might be suitable for a relatively small country of some five million it would be unlikely to operate successfully on a much larger scale elsewhere.

In England PACE has radically altered the relationship between the police and the suspect in custody and English law now has a comprehensive code governing the treatment of persons in police custody. Despite the pessimistic results of one survey,⁸ it is the writer's view that, at least in relation to confessions, the effects of PACE have been almost exclusively beneficial. They have been made even more so by the remarkably robust approach which the English judiciary have, contrary to expectations, taken to enforcing compliance with the law on reluctant police officers particularly in relation to the provision of legal advice (a problem which generally does not arise in Scotland) and the keeping of the prescribed records. Provided the English courts do not suffer a change of heart even the most obtuse policeman should eventually get the message that he, like every other citizen, is expected to comply with the law and if he does not do so he should no longer expect the courts to wink at his transgressions. The end no longer justifies the means.

Another area where it will be argued that the contrast between Scotland and England is more apparent than real is the matter of corroboration of confessions.⁹ In England it is theoretically possible for an accused person to be convicted solely on the evidence of a confession without any supporting evidence while in Scotland this is theoretically impossible. However it will be argued that the development of the doctrine of the "special knowledge" confession in Scotland has been pernicious and has led to there being little practical difference between English and

Scottish law, although the former at least has the merit of being honest and does not, unlike the latter, strain language and logic by continuing to pretend that an accused cannot be convicted solely on his own confession.

Nevertheless, despite certain reservations about certain individual aspects of Scottish criminal law and procedure, the writer still believes in its integrity as a system and in its ability to deal effectively and justly with most circumstances which are likely to arise. Accordingly English law is treated almost exclusively on the basis of comparison and the writer would oppose any attempt to remodel the Scottish system along English lines.

The wise words of George Tait, written in 1824 and with civil proceedings mainly in mind, express almost precisely the present writer's assessment of the situation in modern criminal law and procedure:

"But although the English system of evidence taken as a whole, with the mutual dependency of the various parts upon each other, may, in practice, be found to be a very equitable system, perhaps little inferior to that of Scotland, yet the author has not been able to discover, notwithstanding a pretty extensive consideration which he has felt it to be his duty to bestow upon that system, that it would be at all suitable or

expedient, except in certain rare cases, and with extreme caution, to introduce detached fragments from so different a system, in order to supply any blanks which may be supposed to exist in the law of Scotland, and still less in any case in order to displace any of its ancient homogenous doctrines." 10

Notes

1. Hume i 16
2. *On the Uses and Misuses of Comparative Law* (1974) 37 MLR 1 at p20
3. M.C. Meston *Scots Law Today* published as an introductory essay to the revised version of Lord Cooper's celebrated work *The Scottish Legal Tradition* (Saltire Society, 1991)
4. See A.D. Gibb *Law From Over The Border* (Edinburgh, 1950) pp26-28
5. *Miscarriages of Justice* (1989) para 4.39. The report is discussed further infra vol 1 pp188 and 273
6. Unpublished lecture by Sir Thomas Taylor quoted in T.B. Smith *The British Commonwealth, The Development of its Laws and Constitutions* (London, 1955) Vol 1 p696
7. infra chapter 6
8. Sanders and Bridges *Access to Legal Advice and Police Malpractice* [1990] Crim LR 494
9. infra chapter 7
10. Preface to *A Treatise on the Law of Evidence in Scotland* (Edinburgh, 1824) xi.

(11) Scottish Law and Northern Ireland

Scotland has strong historical and cultural links with Ireland, particularly the north, but it is not for this reason that comparisons will be made with the law relating to confessions and police interrogation in Northern Ireland. Although historically Scotland was a lawless nation, in recent times it has been free of civil strife, as also has England, but for many years, and particularly since 1968, Northern Ireland had been the scene of what is, in all but name, a civil war.

Prior to the outbreak of the troubles, in relation to confession evidence Northern Ireland for all practical purposes followed English law but in the early 1970s there was a head-on collision between the requirements of the security situation (or what the security forces conceived to be the requirements) and the English common law exclusionary principles.

Because of the clandestine nature of terrorist activities and the difficulties in obtaining independent evidence, confessions came to assume a particular importance in bringing terrorists before the courts and partly as a result of this and partly because of the need to obtain intelligence, centres specifically dedicated to interrogation of prisoners were established and interrogations were carried out on a large scale. However, the courts refused to depart from the common law exclusionary principles and eventually legislation was required to lower the standard of

admissibility of confessions in terrorist cases and to prevent internment becoming the only effective way of dealing with terrorism.

Although not beyond the bounds of possibility it seems rather unlikely that Scotland will ever be affected by civil strife like Northern Ireland, but the importance of the comparison is nevertheless twofold. Firstly it shows how difficult it can be for society to deal with a major breakdown in law and order by conventional means and how tests which have been settled for many years may suddenly require to be cast aside and in doing so other unfortunate results may occur. In the case of Northern Ireland the Criminal Evidence (Northern Ireland) Order 1988 has produced a radical and unexpected change in the law relating to the right to silence, affecting the whole criminal law and not just terrorist cases, and moreover this has happened with virtually no parliamentary debate. It is submitted that Scottish lawyers (and indeed everybody concerned with civil liberties) should pay careful attention to the way that this fundamental change in the balance between prosecution and defence has been slipped through the back door.

Secondly the Northern Ireland experience has shown what can happen when the legal controls are removed from the forces of "law and order." There is a catalogue of behaviour by the police and army which has unquestionably been oppressive, sometimes brutally so, and which has brought justified opprobrium on the

United Kingdom. It will be argued that this is the main lesson to be learned from Northern Ireland - the danger of not keeping a sufficiently close watch on what is being done in the name of law and order.

(iii) Scottish Law and Continental Systems

Generally speaking systems of criminal procedure may be divided into two types, inquisitorial and adversarial. Variations of the former type are followed in most countries of continental Europe while the latter is characteristic of Anglo-American systems.

The distinction between the two types of procedure will be considered in more detail later ' and at this stage it is sufficient to say that under inquisitorial procedure the inquiry is a continual process conducted by a person of judicial status who will compile a *dossier* which will then form the basis for the trial, the culmination of the investigation. In this system the court itself will actively seek the truth and the accused will be subjected to questioning and otherwise expected to assist in its ascertainment. On the other hand under adversarial procedure the parties, prosecution and defence, will prepare their own cases for presentation before a neutral tribunal which will act as a referee. The court itself will have little or no responsibility for evidence gathering and will be restricted to giving its decision on the basis of the evidence led by the parties.

Modern Scottish procedure is clearly adversarial at the trial stage, and would appear always to have been so, but historically Scotland did make use of certain inquisitorial methods in pre-trial procedure, most notably the practice of the judicial declaration ² and the historic responsibility of the Sheriff, long established as the inferior judge, for the investigation of crime. ³ Even today there are traces of inquisitorial procedure to be found in the modern statutory form of judicial examination and the secret investigation by the procurator fiscal, both of which are unknown in "pure" Anglo-American procedures. However these really are only traces and modern Scottish procedure conforms largely to the adversarial model.

It is the writer's view that miscarriages of justice will always occur, whatever the system of procedure, simply because human beings are fallible. However, when such travesties as the "Guildford Four" or "Birmingham Six" are brought to light there is a natural tendency to cast around for alternative methods which, it is hoped, will prevent such scandals recurring. In England several of the worst scandals have involved confession evidence and it is becoming increasingly common to hear the suggestion that they would not have happened had there been earlier judicial involvement in the investigation of the crime and/or judicial supervision of the police. Most recently, and most publicly, the Home Secretary, Mr Kenneth Baker, has suggested that the adoption of certain aspects of the inquisitorial system by English law should be considered. ⁴

Although Scotland has not yet been proved to have suffered a major confession-based scandal, it will be argued that this is purely fortuitous and despite the absence of influential calls for reform comparable to those heard in England it seems to the writer appropriate to examine continental methods. However, somewhat to his own surprise, the writer has come to the conclusion, which will be argued in this work, that modern inquisitorial methods would be unlikely to afford the accused any more protection than presently exists under Scottish and English law and could lead to considerable disadvantage, particularly in terms of delay. It will be argued that the protection of the accused against police malpractice is more likely to be enhanced through steps such as the compulsory tape-recording of interviews and a major reassessment of the requirement of corroboration than through the wholesale adoption of the inquisitorial system.

A second, completely unrelated, reason for considering continental legal methods is that historically Scotland had a long association with Europe, principally though by no means exclusively with France and the Netherlands. Between about 1600 and about 1800, about sixteen hundred Scottish students studied law at the University of Leiden alone.⁵ Many of the most eminent Scottish lawyers between the fifteenth and seventeenth centuries studied on the continent - for example Sir James Balfour at Wittenberg, Sir George Mackenzie at Bourges and Sir Thomas Craig at Paris and possibly also Poitiers, Toulouse or Bourges.⁶

"From their sojourn in Holland the aspirants to

practice in the Parliament House brought back with them not only the principles which they had imbibed from the masters of the Roman-Dutch law, but also the treatises with which the law schools of the Dutch universities were so prolific. No Scots lawyer's library was complete in those days which did not contain the works of Grotius, Vinnius, the Voets, Heineccius and other learned civilians." 7

Roman law was an important formative influence on Scots law, but although it has been stated to have been "the origin and foundation of our criminal law" 8 Roman influence on Scots criminal law declined markedly between the time of Mackenzie and the time of Hume. Mackenzie was able to write:

"We follow the Civil Law in judging Crimes, as is clear by several acts of Parliament wherein the Civil Law is called the Common Law. ... And that the Civil Law is our rule, where our own Statutes and Customs are silent, or deficient, is clear from our own Lawyers." 9

Nevertheless, divergence from the European tradition did become more marked as time went on, particularly after the Napoleonic wars cut off the long-standing Scottish connection with the continent. The divergence became even more marked when the

continental countries, under French influence, began to codify their law.

By time of Hume the position of Roman law was merely persuasive and modern Scottish criminal law and procedure is almost wholly a native system with few remaining traces of Roman influence.

The true, lasting influence of Roman law has, as Professor T.B. Smith points out, been on Scottish legal thought and legal method rather than substantive law and it has helped Scots law to retain its own identity:

"It had inculcated a respect for principle rather than precedent; it had encouraged the profession to look to the learning of Europe for solutions to new problems, and it may well have saved Scots law from absorption by English law." ¹⁰

Notes

1. infra chapter 10
2. infra chapters 3.3 (i) and 5.2 (i)
3. supra chapter 1.2
4. Address to the (English) Bar Council 28 September 1991
5. T.B. Smith *The British Commonwealth, The Development of its Laws and Constitutions* vol 1 p697
6. D.M. Walker *The Scottish Jurists* (Edinburgh, 1985) *passim*
7. Lord Macmillan in *Stewart v L.M.S.* 1943 SC (HL) 19 at 38
8. *John Smith* (1838) 2 Swin. 28 at 50
9. *Laws and Customs of Scotland in Matters Criminal* p4
10. op cit note 5 supra p621, cf *H.M. Advocate v Stark* 1968 SLT 10

1.4 Fundamental Issues and Related Problems in the Modern Law

(i) General Introduction

This work will adopt the definition of a confession set out in McKenzie v H.M. Advocate 1982 SCCR 545 viz a statement which is clearly susceptible of being regarded as an incriminating statement.

Although all aspects of confession evidence will be examined, it is inherent in the nature of the topic that confessions to the police and issues arising therefrom will form by far the largest part of this work.

The work addresses the topic of confession evidence largely on the basis of two fundamental questions:- (a) to what extent is a confession admissible in evidence or, to put it another way, under what circumstances will a court exclude evidence of a confession and (b) *esto* the confession is admissible, what is its evidential value - is it conclusive proof of guilt or must there be another source of evidence before conviction can follow?

While certain individual topics have been the subject of legislation, as previously noted the Scottish law of criminal evidence depends largely on the so-called "common law", judge-made rules built up case by case and interpreted by text writers, and this is very much the case in relation to confession evidence.

The Walkers define admissible evidence in the following terms:

"Admissible evidence is evidence which a court of law may both receive and consider for the purpose of deciding a particular case. To be admissible in this sense, evidence must satisfy two requirements - it must be relevant and it must conform to the peremptory rules of evidence. Relevancy ... depends upon the existence of some sort of logical relationship between the evidence and the subject matter of the case. Irrelevant evidence is never admissible, but even relevant evidence may be made inadmissible by one of the peremptory rules which the law prescribes. These rules, which are mainly negative in character, are imposed by the law for reasons of policy. They spring from the knowledge that the discovery of the truth by a human tribunal from what is said by human witnesses is a difficult task, and they attempt to limit the evil consequences of error by excluding certain kinds of evidence as being insufficiently reliable, or too remote, or as creating the possibility of unfairness or confusion."

Issues of relevancy seldom arise in relation to confession evidence - clearly a statement by the accused that he committed the offence with which he is charged is in the highest degree

relevant to the proof of the case against him. Accordingly, the main focus in regard to admissibility of confession evidence is the "peremptory rule" which excludes a wrongfully obtained confession. Issues of admissibility almost always relate to the circumstances under which the statement in question came to be made and it has been pointed out that in Scottish terms what has normally been in issue has been not so much the truth of the accused's statements as the propriety of the circumstances in which they were made. Statements improperly obtained are not evidence however reliable and obviously true. They are excluded by the courts because "an exclusionary rule is the only effective weapon possessed by the courts to control police interrogation."²

Notes

- 1, Walkers pl
- 2 Thomson Committee para 7.02

(ii) The Right to Silence

It can be stated, broadly, that most, if not all, of the difficult issues addressed in this work stem from the collision of two factors: on the one hand the so-called right to silence by virtue of which a suspect need not answer police questions and an accused person need not give evidence at his trial and on the other hand the need of the police and prosecution to obtain evidence from the accused.

In Scots law an accused person has never been compellable as a witness at his own trial and he has only been competent to

testify in his own defence since 1898. ¹ Likewise although the accused could not prevent himself being subjected to judicial examination he could not be compelled to answer questions, a situation which has been maintained by the modern statutory form of judicial examination, although in the latter case there is a limited possibility of adverse comment being made at the trial.

Apart from certain particular statutory provisions, nobody is under any obligation to answer police questions, a situation which the police naturally dislike. A quick confession, particularly one containing "special knowledge", will save a great deal of police time and may lead to the solving of an otherwise insoluble crime.

To a considerable extent the early development (if that is the right term for a very haphazard process) of the law of confessions in Scotland was influenced by the historic right of the Sheriff alone to investigate crime. For many years the courts clung to the notion that the police had no right to do anything with a prisoner other than bring him with all dispatch before a magistrate for the purpose of emitting a declaration and the legitimacy of police questioning was only accepted gradually and grudgingly. Indeed it was to be 1922 before the High Court explicitly accepted the legitimacy of investigative police questioning ² and 1967 before the ghost of the judicial declaration was finally laid. ³

In England the issue of the right to silence tended to be particularly associated with breaches of the Judges Rules and Administrative Directions which purported to regulate police practice between 1912 and the passing of PACE. It will be shown that the attitude of the courts towards such breaches fluctuated and latterly became supine. Since PACE the English courts have excluded irregularly obtained confessions in a manner which must have been an unpleasant surprise to police officers used to the lax (and latterly almost non-existent) enforcement of the Judges Rules.

Leaving aside the differences occasioned by procedural systems, noticably in the pre-trial situation, the right to silence today depends on generally similar principles in Scotland and England. In the latter country it has for some twenty years been a matter of controversy, largely due to lobbying by the police and their supporters who, from a Benthamite standpoint, claim that it allows "sophisticated professional criminals" to escape "justice". If only, the argument goes, all "criminals" were required to tell the police everything, were required to submit to questioning at their trials and silence provided corroboration or at least the possibility of adverse conclusions, conviction rates would rocket and the police would be able to tackle sophisticated professional crime in a way hitherto denied to them.

Although the same controversy has not been generated in Scotland, and there does not appear to be any imminent plan to change the Scottish law, there have been various proposals made to reform the English law, certain of which the writer admits to finding frankly alarming. These proposals are examined in some depth because, given the general similarity of the law, there would not appear to be any reason to prevent the government restricting the right to silence in Scotland if it were minded to do so, possibly in parallel with a similar step in England. The Criminal Evidence Act 1898 which is the foundation of the right to silence at the trial stage is, after all, a United Kingdom statute.

There must be a danger that by taking the tough line they have, the English courts will begin to be perceived as anti-police or, in a blood-chilling phrase used by the CLRC, "tender to criminals". Given the power of the police lobby it will not be surprising if there is a legislative attempt to interfere with the PACE regime. In the writer's view this would be something to be deprecated and resisted.

Lord Cameron's observations in 1975, an obvious though oblique reference to the CLRC, are still highly pertinent:

"Recent disquieting increases in the incidence of crime have led to demands from certain sources, both legal and lay, for relaxation of these rules of practices (sic) in order to make conviction of the guilty more certain. These rules have been

developed over the years as a result of experience and a careful balance of the two interests, that of the accused in obtaining a fair trial and of the public in securing an effective and honest administration of criminal justice. Any material relaxation of these rules, the effect of which would be to lessen the protection which the subject enjoys against any degree of compulsory self-incrimination, would, it is thought, not necessarily increase the number of convictions of guilty persons who under the present law are acquitted, which would be the avowed purpose of a change in the law, but would increase the risk of the adoption of illegitimate or improper devices by police officers to secure convictions by means of confessions or "voluntary" statements and consequent risk of conviction of the innocent persons (sic)." 4

Notes

1. Criminal Evidence Act 1898
2. Costello v Macpherson 1922 JC 9
3. Miln v Cullen 1967 JC 21
4. *Scottish Practice in Relation to Admissions and Confessions by Persons Suspected or Accused of Crime* 1975 SLT 265 at 267

(iii) The Fairness Test

Before 1884 the Scottish courts largely addressed the issue of police questioning as one of competency, but since then, following the judgment of Lord Young in Gracie v Stuart (1884) 5 Couper 379 the issue has, with some unimportant exceptions, been viewed as one of fairness.

On one view the test which the modern Scottish courts purport to apply in relation to the admission of confession evidence admits of the simplest possible formulation as appears from the following observation by Lord Justice-General Emslie:

"The simple and intelligible test which has worked well in practice is whether what has taken place has been fair or not." 1

However, it is submitted that it is wrong to describe this as a "rule", whether peremptory or otherwise. It is nothing more than a statement of judicial discretion, as his Lordship made plain later in the same passage:

"In each case ... it will be necessary to consider the whole relevant circumstances in order to discover whether or not there has been unfairness on the part of the police resulting in the extraction from the suspect of the answers in question. Unfairness may take many forms."

This flexibility is a typical, and often admired, feature of Scottish criminal law and is claimed to give it the ability to adapt to changed circumstances. However, the debit side of the equation is that it can, and does, lead to uncertainty in the law:

"The Scottish approach to criminal law has throughout been characterised by the robust application of common sense and the rejection of nice theoretical distinction. This has frequently given rise to uncertainty in the law, but on the other hand it has introduced great flexibility and has enabled the law to develop to meet changing social conditions." ²

Exposition of the law is not helped by the way in which the Scottish judges have been reluctant to discuss principles and authorities in any depth and from time to time the approach of the Appeal Court to important issues has verged on the perfunctory, producing results which have often been unsatisfactory and on occasion simply wrong. This trend has been particularly apparent in relation to the doctrine of the "special knowledge" confession where, as will be shown, the need to safeguard the accused against police malpractice is at its greatest. In addition, remarkable as it may seem, the writer has failed to uncover a single instance where a judge has seriously attempted to explain either the policy or the rationale behind the test of fairness.

The test of "fairness" is itself capable of uncertainty - in particular, to whom is it necessary to be fair? It will be shown that there has been something of a pendulum swing in the application of the test. From the late 1920s until the early 1950s the Scottish judiciary, at least partly under the influence of Lord Cooper, went through what can only be described as an "anti police" phase which culminated in the celebrated case of Chalmers v H.M. Advocate 1954 JC 66. At this time it was clear that "fairness" meant fairness to the accused and no one else and there was a definite tendency towards a strict exclusionary rule, although such was never actually achieved. However within a few years the whole climate had changed and by the late 1960s, largely due to Lord Wheatley, the test had become bilateral. The courts were now to consider "fairness to the public" and to "seek to provide a proper balance to secure that the rights of individuals are properly preserved, while not hamstringing the police with a series of academic vetoes which ignore the realities and practicalities of the situation and discount completely the public interest." ³

There is clearly some merit in this sensible and pragmatic approach, but in 1979 a danger signal was seen when in Hartley v H.M. Advocate 1979 SLT 26 Lord Grieve, in a generally obscure and poorly reasoned judgment, stated that fairness meant not only fairness to the accused but "fairness to *those who investigate crime* on behalf of the public." ⁴ This may only have been a slip of the judicial tongue, but nonetheless it is unfortunate.

Fairness to the public interest is one thing, fairness to the police is something else altogether and, it is submitted, a factor which should not enter into consideration.

It can be argued that the vagueness and uncertainty inherent in the test of "fairness" is in itself unfair to those involved in the legal process whether as investigators, prosecutors or legal advisors:

"One problem about this state of affairs is that it makes the law unknowable, for everything will depend on how judges in particular cases weigh the conflicting rights and interests involved, and although each case may well have one right answer which the balancing test will provide and which the judges will usually arrive at, this cannot easily be known in advance. Accordingly the use of the balance as part of the judicial technique puts a major hole in the desideratum of legality that laws be clear and knowable." ⁶

While this passage might, with respect, be overstating the case ⁶ it is surely not too much to ask that the judges should themselves make clear what they are likely to regard as unfair and why they will take that particular view. Apart from a recent trend towards regarding the cautioning of a suspect as a *sine qua non* of admissibility, and a few generalised, inconsistent references to "interrogation, cross-examination and pressure" and

similar phrases, this they have signally failed to do, and indeed the obiter comment has been made that the fairness test "is not answered mainly by rigid precedent or the attempt to apply judge-made rules of the past." 7

Before PACE the position in England was, if anything, worse with on the one hand a more or less rigid exclusionary rule based on an eighteenth century concept of voluntariness and the absence of inducement (with the later addition of the absence of oppression) which could lead to absurdities, and on the other hand an ill-defined judicial discretion to exclude confessions in the interests of fairness. The latter came largely, though not exclusively, to be associated with breaches of the Judges Rules. An already confused situation became even worse because on occasion the courts failed to distinguish between the exclusionary rule and exclusionary discretion.

Fortunately matters have changed considerably since PACE which has now laid down a clear test for the English courts to apply: has the confession been obtained by oppression or by anything said or done which was likely to render it unreliable? Judicial discretion has also been retained and as previously noted the courts have not been slow to use their new powers.

The conclusion which will be argued in this work is that the fairness test is in some respects unsatisfactory because it is so vague and can vary at the whim of the trier of fact. Flexibility

can be carried too far in either direction, as it undoubtedly was in cases such as Rigg ⁹ and Chalmers ⁹ during the High Court's anti-police phase and it is at least arguable that matters have now gone too far in the other direction. As A. A. S. Zuckerman has pointed out in a different but related context, as a legal principle the notion of fairness is "unhelpful since it can refer to a multitude of aspects and merely furnishes an excuse for achieving whatever result is wanted without rigorous justification." ¹⁰

However English experience has shown that even where detailed statutory provision is made for the admissibility of confessions, exclusion will always be, at least to a point, an exercise of judicial discretion. Moreover, PACE continues to allow the courts a discretion to exclude, in the interests of fairness, evidence which does not fall precisely within the statutory provision. The problems caused by the manner in which the Scottish courts currently operate the fairness test are not considered sufficiently acute to warrant statutory intervention, which would in any event still require to leave the courts with some form of discretion. This would, in all probability, require to be based on an overriding test of fairness thereby rendering the entire exercise somewhat circular and arguably futile.

In Scotland the procedural aspects have also undergone a pendulum swing comparable to the fairness test itself. Before Chalmers the question of fairness, and hence admissibility, fell to be

determined by the judge. Chalmers did not alter this rule but it did introduce the trial-within-a-trial, similar to the English *voir dire* whereby the disputed evidence was to be heard outwith the presence of the jury. However the trial-within-a-trial has not found much favour in Scotland and although it is still available judges are discouraged from using it and the trend is very much towards leaving the issue of fairness to the jury. The judge should only withdraw a confession from a jury if he is satisfied "on the undisputed relevant evidence that no reasonable jury could hold that the statement had been voluntarily made." ¹¹ This approach leads to the jury having to take a decision of mixed fact and law, a situation which English commentators find incomprehensible, ¹² and which requires an absolute faith in the ability of a jury to follow complex directions and, if necessary, to ignore evidence which they have heard.

Notes

1. Lord Advocate's Reference (No.1 of 1983) 1984 SLT 337 at p340, repeating almost verbatim the words of Lord Justice-General Clyde in Brown v H.M. Advocate 1966 SLT 105.
2. J.E. Drummond Young [1979] Camb, LJ 218
3. Miln v Cullen 1967 JC 21
4. at p31. Italics added.
5. G. Maher *Balancing Rights and Interests in the Criminal Process* in A. Duff and N. Simmonds (eds) *Philosophy and the Criminal Law* (Wiesbaden, 1984)
6. For contrary argument see J. Cottingham *The Balancing Act* in the same work p109, especially pp110-111
7. H.M. Advocate v Stark 1968 SLT 10
8. 1946 JC 1
9. 1954 JC 66
10. *Illegally-obtained Evidence - Discretion as a Guardian of Legitimacy* 1987 Current Legal Problems p55 at p60
11. Balloch v H.M. Advocate 1977 JC 23
12. Mirfield p201

(iv) Supporting Evidence

In a recent article in the Law Quarterly Review, Dr Rosemary Pattenden, a leading English commentator with a particular interest in confessions wrote:

"It is widely assumed that had the Guildford Four been tried in Scotland they would have gone free. This is not necessarily a correct assumption to make because there were some authentic details in the Guildford confessions (as well as mistakes and inconsistencies) which might conceivably have provided sufficient corroboration under Scots law. Accurate details do not always mean a confession is genuine. Therein lies the difficulty with the Scottish approach. ... Convincing details may be found in a confession through coincidence, because the information was in the public domain, because of contact with the real criminal or a lesser degree of criminality than that confessed to and/or deliberate police assistance with the composition of the statement or unconscious transmission of information to the suspect during questioning by leading questions and dissatisfaction with answers In fact the confessions of the Guildford Four contained no more information about the crimes than the police already possessed. As it stands the Scottish

corroboration rule does not preclude conviction on a false confession and may too readily allay appellate court and jury doubts about the accused's guilt." ' 1

This passage clearly and effectively states the argument which will be presented in this work: - that in relation to confessions Scottish law has departed so far from the requirement for corroboration in any meaningful sense that it offers no protection to the accused against conviction resulting from a false or fabricated confession. English law has never pretended to require corroboration of confessions and, Guildford notwithstanding, appears to be unlikely to move in that direction.

Scots law generally requires the crucial facts of the prosecution case to be corroborated, ie established by two or more independent sources of evidence. Nominally this applies equally to confessions and in theory no person can be convicted solely on his own confession, other than a recorded plea of guilty in a court of law. However the reality is considerably different, particularly where the confession contains elements of what has generally become known as "special knowledge", ie facts which indicate a level of knowledge which gives rise to the inference that the accused was the perpetrator of the crime.

Even where "special knowledge" is absent, provided the confession is unequivocal, the courts have held that all that is required is

evidence from another source which points to the truth of the confession.

Where the "special knowledge" could clearly only have been known to the perpetrator, an obvious example being the whereabouts of a buried body or a disposed-of weapon, there can be no objection in principle or logic to treating the recovery of the article as corroborative of the confession, but Scots law has totally departed from the position that the information given in the confession should be known to no one other than the accused. It is merely a matter for the jury to assess that the police knew everything before the accused opened his mouth or that the details of the crime were matters of common knowledge.

The "special knowledge" confession is a recent phenomenon, although the principle on which it is based (and which in the writer's view has become totally subverted) was laid down by Alison in 1833.² The first reported case was in 1958³ and involved the application of the true Alisonian principle, but from then on, as will be shown, it has been, in the colloquial phrase, "downhill all the way" leading to a situation which almost invites malpractice by the lazy or dishonest police officer.

Fortunately since the Guildford Four scandal in England, Scottish lawyers, both practicing and academic have begun to express concern over the "special knowledge" confession, although as yet

there have been no signs in the case reports that this concern has been having any impact on the thinking of the judiciary. Throughout the cases there is an assumption, normally tacit but sometimes stated, that since a confession is a statement against the accused's interest, it can be assumed to be true. Their Lordships nowhere consider either the possibility of a false confession or of police malpractice.

It was therefore as astonishing as it was welcome to hear a recent call by Lord Justice-Clerk Ross for the police to put their house in order and an admission by his Lordship that "Although to date we have not had cases like the Guildford Four or the Birmingham Six, we certainly have had cases where there must be a strong suspicion that the police have given false evidence." ⁴ Although the press report does not show his Lordship making specific mention of "special knowledge" confessions, it is to be hoped that these observations will mark the beginning of reappraisal of such evidence by the Scottish judges

While allegations of "verballing" are easy to make, the plain fact remains that it is also easy for a policeman to "verbal" a suspect, a danger recognised by Dickson over a hundred years ago. Unless the danger of "verballing" is tackled, there is probably little point in worrying about corroboration since, as Dr Pattenden points out, "police who make-up (sic) confessions can also fabricate corroboration". ⁵

It will be argued in this work that in the first instance the law should be changed to render *prima facie* inadmissible a confession which has not been tape-recorded. Thereafter the corroboration requirement should be reappraised with a view to re-establishing the historic requirement of Scottish law that there should be two *independent* sources of evidence. One likely result of such a rule would be an increase in the number of acquittals of guilty as well as innocent accused which would be unlikely to be welcomed in certain quarters. Nevertheless it is the writer's personal view that unless effective steps are taken Scotland could easily produce a Guildford Four or Birmingham Six and in his opinion such an event simply cannot be contemplated by a legal system which regards itself as civilised. If the price for avoiding such a scandal is the need for effective police action to secure alternative sources of evidence, that is a price which the writer considers should be paid.

However, if this price is considered too great, Dr Pattenden offers a solution which the present writer will argue can and should be adopted in Scotland - an explicit judicial warning of the need for caution in dealing with disputed confessions. It is established practice in England that where identification evidence is disputed the judge should warn the jury of the risks inherent in such evidence ⁶ and Dr Pattenden argues in favour of the adoption of a similar practice in relation to disputed confessions. In the field of identification, the Scottish courts follow a similar though less rigid practice ⁷ and since they are

prepared to acknowledge the risks inherent in identification evidence, there seems no reason in principle why the same should not also apply in relation to disputed confessions.

Notes

1. *Should Confessions be Corroborated?* (1991) 107 LQR 317 at 336
2. Alison ii 580
3. Manuel v H.M. Advocate 1958 JC 41
4. Glasgow Herald October 10 1991
5. op cit note 1 supra p337
6. R v Turnbull [1976] 3 All ER 548, [1977] QB 224
7. *Identification Procedures Under Scottish Criminal Law* Cmnd 7096 (HMSO, 1978); McAvoy v H.M. Advocate 1991 SCCR 123

(v) The Accuracy of the Record

Many of the problems addressed in this work would be ameliorated, if not totally eliminated, if there were available a demonstrably accurate record of what the accused said and the circumstances under which he said it.

Confession evidence is frequently vigorously contested in the courts. The vast majority of confessions tendered in evidence in Scotland have been made to police officers in circumstances where only the accused and the police are present and either side may have an interest in telling something other than the whole truth. Allegations of "verballing" and "fitting up" are not infrequent and while it is easy to make such an allegation it is, as already pointed out, also easy for an unscrupulous or dishonest police officer to "verbal" or "fit up" a suspect, particularly if he genuinely believes him to be guilty. How is the court to deal with such allegations and are there steps which can and should be

taken to improve the accuracy of the record and hence the court's ability to reach a correct conclusion?

It is becoming something of a truism that jurors are increasingly reluctant to believe the unsupported evidence of the police, a situation which Lord Justice-Clerk Ross recently acknowledged. ¹ While the point may not often be made, the perverse acquittal of a guilty accused can be argued to be, in principle, as much a miscarriage of justice as the wrongful conviction of an innocent person although the latter is obviously a greater wrong involving, as it invariably does, the imposition of unmerited punishment. ² Where the main evidence against the accused is a confession a perverse acquittal may come about as the result of unfounded jury prejudice or a wrongful conviction may result from malpractice by the police, who, in all probability, genuinely believe in the suspect's guilt. Can steps be taken to prevent either or both of these undesirable outcomes?

Traditionally British courts have relied on the oral evidence of police officers as to what took place, supplemented in certain circumstances by written statements signed by the accused.

However the inadequacy of such methods were first recognised in the United States and around the time of the Second World War experiments were carried out into the feasibility of the recording of police interviews.

These ideas crossed the Atlantic in the early 1950s, although initially to little effect, but by the 1960s the courts were gaining experience of tape recording in other contexts and the idea that police interviews should be recorded began to take hold.

The momentum for change really began to build up in the mid 1960s, but there was, not surprisingly, total opposition from the police themselves who refused to be subject to "electronic surveillance". It is the writer's personal view that the vigour of the opposition alone showed that the police had something to conceal. ^a

However for once the police were on a hiding to nothing. In Scotland the Thomson Committee came out firmly in favour of tape-recording as did the RCCP in England and following experiments in both countries, a rolling programme now exists to introduce tape-recording in most police stations throughout Great Britain.

Although undoubtedly a quantum leap in the protection of suspects in police stations, it will be argued that tape-recording is not a universal panacea. Firstly in neither Scotland nor England is tape-recording a requirement of admissibility, nor is there any legally enforceable requirement that police officers should be required to justify a decision not to record. Secondly only C.I.D. interviews are to be recorded. Thirdly, and most fundamentally, interviews with terrorist suspects are excluded

from the tape-recording scheme in both Scotland and England. Given the recent events in England the dangers of this situation should be self-evident.

This work also examines other proposals for improving the accuracy of the record including the improvement of written records and interrogation before magistrates, but the conclusion is that tape-recording is the foundation on which protection for suspects should be built. A confession which is not tape-recorded should *prima facie* be inadmissible and the onus should be on the prosecution to prove beyond reasonable doubt that tape recording was impossible.

Although certain experiments have been carried out with video recording, there would seem to be considerable scope for further and more detailed research into the possibility of using both fixed cameras in police stations and hand held cameras elsewhere, with a view to assessing whether it offers additional benefits over tape recording. It is gratifying to note that one of Scotland's most senior judges was recently quoted as having said:

"If a film was available showing the parties during the interview and during their discussions leading up to the confession, then if the suggestion were made that the confession had been unfairly obtained, the jury would be able to look at the film and conclude for themselves whether

the confession had been fairly obtained in the
circumstances." 4

Notes

1. Glasgow Herald 10 October 1991
2. cf CLRC para 27
3. cf Glanville Williams in [1979] Crim LR 6 at p22
4. Lord Ross loc cit note 1 supra

(vi) Some Assumptions and an Exclusion

This work is an extended study of one particular aspect of the law of criminal evidence - the confession of the accused.

However, no single aspect can exist in isolation from the multitude of other principles and rules which make up the modern Scottish system of criminal evidence.

Although not addressed as specific issues in their own right, certain fundamental principles of Scottish criminal evidence and procedure are nonetheless of vital importance in the consideration of any rules of evidence, and particularly so in relation to confessions. The most important of these, whose existence and influence are assumed throughout, are succinctly summed up in the words of Lord Justice-Clerk Thomson:

"The presumption of innocence is a fundamental tenet of our criminal procedure. It follows that the burden of proof rests on the Crown to displace this presumption. It is further a fundamental tenet that the standard by which this burden falls to be discharged is the establishing of the guilt of the accused beyond reasonable doubt." '

Lewis points out that the presumption affects all aspects of a criminal trial:

"In applying the rules of evidence in the sphere of crime, the ascertainment of fact for judicial

purposes is affected throughout by the presumption in favour of innocence and against guilt. This presumption, recognised as one of great weight, is a factor which has a material bearing on criminal evidence. Apart from the special features in procedure which are involved, this presumption renders necessary the utmost degree of regularity in the conduct of a prosecution, it requires the strictest regard to the rules of evidence, and it demands the highest possible degree of cogency in judging the weight of the evidence." ²

Of course the presumption of innocence is by no means unique to Scottish law. ³ It can be stated in virtually identical terms in England and Northern Ireland and the continental systems also adhere to the concept, although the methods of inquisitorial investigation tend to render the presumption rather less meaningful than under adversarial procedure, and the standard of proof will be different.

The presumption of innocence and the burden of proof are merely different sides of the same coin:

"When it is said that an accused person is presumed to be innocent, all that it means is that the prosecution is obliged to prove the case against him beyond reasonable doubt." ⁴

However it may be expressed, the point is that the prosecution

must prove the accused's guilt and the accused need take no steps to prove his innocence, even where he has lodged a special defence. ⁵

On one view it might be argued that Scottish law is even more jealous of the presumption of innocence than English law since in England there is a well-established practice of giving a "discount" in sentence where the accused pleads guilty, which could be argued to be an inducement to tender a plea which may not be appropriate. While the writer is well aware that certain Scottish Sheriffs informally operate such a system, it has been disapproved by the High Court ⁶ and must therefore be taken as being officially non-existent in Scotland.

"Beyond reasonable doubt" means simply what it says. The crown is not required to prove guilt to a degree of mathematical certainty, which would be impossible, but equally, since the accused's liberty may well be at stake, a standard higher than the civil test of "the balance of probabilities" is applied in criminal cases. If the court is to acquit there must be evidence before it of such quality as to provide a basis upon which a reasonable doubt can be founded. ⁷ Such a test is obviously more easily applied in summary procedure, and there is no practical way that a jury can be prevented from acquitting in the face of the evidence if they are so minded, but many judges when charging juries adopt or paraphrase Lord Cooper's comment that reasonable

doubt means more than "a strained or fanciful acceptance of a remote possibility".⁸

Accordingly, throughout this work the existence of the presumption of innocence is assumed as is its corollary, the burden of proof on the crown and it is also assumed that the guilt of the accused falls to be established beyond reasonable doubt before he is liable to conviction. It is also assumed that this position will not be radically altered in the future.

Finally, and by way of exclusion, the writer is a lawyer, writing from a legal standpoint, and as such has taken a conscious decision not to address what might be termed the "psychological" aspect of confessions. In other words issues such as the extent to which an individual may be brought to confess (possibly wrongly) by psychological pressure from the police and the question of persons who falsely confess to crimes of which they could not be guilty are not discussed except insofar as they relate to the legal aspect of the subject.⁹ There are two simple reasons for this. In the first place the work is substantial enough as it is and secondly the writer has no qualification in psychology, sociology or other related discipline. The exploration of these issues could form a rewarding field for a separate study by those more appropriately qualified than the present writer.

Notes

1. McKenzie v H.M. Advocate 1959 JC 32

2. Lewis p283. See also Slater v H.M. Advocate 1926 JC 94 which is almost exactly contemporary with this passage
3. cf Article 6.2 of the European Convention on Human Rights
4. Cross p125
5. H.M. Advocate v Brogan 1964 SLT 204
6. Strawhorn v McLeod 1987 SCCR 413
7. Tudhope v Craig 1985 SCCR 214
8. Irving v Minister of Pensions 1945 SC 21
9. cf Dickson pp263-265 99380-384

Chapter 2. Literature

2.1 Literature on Confessions

Given the enormous importance of the confession in the law of evidence, it is rather surprising that only two textbooks have been written in the United Kingdom dealing specifically with confession evidence as an issue in its own right, and both these books deal primarily with the English law.

In 1842 Henry H. Joy, an Irishman practicing as a barrister in England and Ireland, wrote a modest volume entitled *On the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland*.¹ Despite the rather odd conjunction of subjects, Joy's work is a valuable compendium of English (and Irish) law and practice in the early nineteenth century. He summarises and considers virtually every English case on the subject as well as a number of Irish and American authorities. Rather surprisingly for the period, Joy not only acknowledges the separate existence of Scottish law but several times draws comparisons with it, largely under reference to Alison.

In fact Joy's treatment of his subject much resembles Alison's, with the author's conception of the law being set forth in a series of comparatively brief statements which are then justified on the basis of decided cases and other authorities. The author's aim was to attempt to bring some sense into the mass

of apparently contradictory case law then existing, "the obscurity and discordance of the cases" which he did by adopting the principle of Grotius - *Sicut in facti quaestionibus, id pro vero habetur, unde plures maximeque idonei stant testes, ita SENTENTIARUM eas sequendas, quae plurimis praestantissimisque nitantur AUCTORIBUS.*" ²

Having done so, Joy's conclusion was that the law "on this important branch of evidence in criminal cases, as deduced from principle and supported by the weight of authority is, in most instances, definite and clear." ³

Joy's work is only of historical interest today but it is clearly a book of considerable importance and the present author was rather surprised at the difficulty which he encountered in locating a copy. Normal inter-library sources completely failed and eventually with the assistance of the National Library of Scotland access was obtained to the copy belonging to the Advocates' Library, which appears to be the only one in existence north of the border.

Much more recently, in 1985, Peter Mirfield, barrister and Fellow of Jesus College Oxford, a leading English academic writer with a particular interest in the law of evidence, produced a book simply entitled *Confessions*. ⁴ This well written and readable monograph is the only modern textbook to tackle confession evidence as an issue in its own right and as such is uniquely

important in the present work. Although the work is written by an English author primarily about English law, Mirfield considers and compares both Scottish and American law. While the present writer is unqualified to comment on Mirfield's grasp of the American situation, it is encouraging to see an English author who has so obviously taken the time and trouble to study and understand the law of Scotland. The only minor irritation is the use of English-style square brackets round the dates in Scottish case citations!

Mirfield's work is not a particularly long book and the present author finds it rather surprising that certain issues which he considers important, notably the right to silence and the role of confessions in modern policing, are scarcely mentioned let alone addressed as issues in their own right. It has also been suggested elsewhere that the book rather falls between a number of stools.⁵ Nevertheless, as the only modern text to deal with confession evidence as an issue in its own right, as a sound examination of the history of confessions in England, as a skilful examination of the jurisprudential basis of the rules relating to confession evidence and as a bridge between the English common law and PACE, Mirfield's work is a unique, major achievement.

Mirfield begins with a general discussion focussing in particular on the problem of the accuracy of the record. He starts the discussion by defining two questions, which he terms the

"confession issue" and the "exclusion issue". The first deals with the question of whether the accused did in fact confess in the terms alleged, and while most of Mirfield's book is concerned with the "exclusion issue", the author is careful to ensure that the "confession issue" is addressed also. In his view, the "confession issue" is largely a factual one and clearly the decision of the trier of fact will be assisted if an accurate record is available. Mirfield considers the written statement and the oral confession before going on to deal with proposals for reform: interrogation before magistrates, interrogation before a solicitor, tape recording and video recording. It is no surprise that by far the longest part of the discussion of proposed reforms deals with tape recording which is thoroughly considered with the author adopting a fairly conservative view, stopping short of advocating the exclusion of all unrecorded statements, although he does suggest that the government should reconsider the position if the police were to frustrate the recording provisions.

Mirfield then turns his attention to the history of confessions in England and provides an excellent summary of the development of the law from the earliest records to the mature exclusionary rule of Ibrahim,⁶ before analysing the principles behind the exclusion of confession evidence. Attention then shifts to the exclusionary rule itself and a comparison between common law and the statutory principles laid down by PACE. Procedural issues and other ancillary matters are also addressed.

A similar treatment is applied to discretionary exclusion before Mirfield turns to consider possible alternative approaches. He examines the ways in which American and Scottish law deal with confessions and looks at the question of supporting evidence under reference to both Scottish law and the Fisher Report ⁷ noting that there seems to be a tendency in the Scottish cases to diminish the weight required of the supporting evidence "almost to vanishing point." A critique is also offered of the report of the RCCP.

One reviewer of Mirfield's book comments that he "does not end on a resolute note" ⁸ but nevertheless his conclusions are most interesting. He notes that though the detention of a suspect for the purpose of questioning is now clearly lawful "it does not follow that we should accept that misuse of the opportunities thereby presented to serve an alien purpose has become any less serious or abhorrent; indeed one might convincingly argue the converse." The author also makes the highly pertinent point, which might almost have been written for the Northern Ireland situation, that while "it may well be that the system of criminal justice could not operate acceptably without confession evidence ... we should be aware of the equally unacceptable possibility of it operating with little else."

Drawing on his examination of the Scottish and American authorities, Mirfield finds that the lesson is that "where the judges are not persuaded by the strong language of the leading case ⁹

that the rights it accords to the suspect in the police station merit protection ... they will dodge and weave their way away from the conclusion dictated by adherence to that case." As a result the law becomes "dishonest and disreputable when it advertises wares which it cannot produce" and a low level of protection such as that offered by the new exclusionary rule under PACE "may have something to be said for it."

This rather bleak conclusion was drawn in the early days of PACE and in England matters have moved on somewhat since Mirfield wrote with the courts enforcing compliance on the police rather more vigorously than might have reasonably been foreseen and if Mirfield's book goes to a second edition several assumptions which he made will have to be revised. Nevertheless, *Confessions* remains in the present writer's opinion the definitive modern study of the subject and a work which is unlikely to be improved upon in the foreseeable future.

Notes

1. Dublin, 1842
2. Joy pp3-4. The present writer's rather inadequate Latin would translate the passage as "Just as in the deciding of cases truth is found to lie with the witnesses whose number is greater and whose credibility is of the highest, so it follows naturally that the judgments which are greater in number and pre-eminence are the ones on which commentators should rely."
3. *ibid*
4. London, 1985
5. J. Baldwin [1986] Crim LR 764
6. Ibrahim v R. [1914] AC 599
7. The *Confait* case. See *infra* chapter 7,4 (i)
8. Baldwin *op cit* note 5 *supra*
9. ie Chalmers v H.M. Advocate 1954 JC 66 and Miranda v Arizona (1966) 384 US 436 respectively

2.2 Historic Scottish Texts

If one considers date of compilation rather than date of publication, the earliest Scottish text to be referred to in this work is Sir James Balfour's *Practicks*, probably compiled between 1574 and 1583 although not published until 1754. ' The word "practick" meant a decision or a precedent and this type of literature consisted of a collection, usually intended for the compiler's personal use, of notes of decisions, abstracts of statutes and other sources as well as practical observations on the work of the courts. The fact that Balfour's *Practicks* is in Scots rather than Latin shows clearly that it was intended for practical use by working lawyers. One of the main values of Balfour's work is that it preserves matter from earlier collections now lost and covers the whole field of Scots law including an extensive treatment of criminal law. This is dealt with largely as a collection of rules about specific crimes with much about procedure. The law set out in the *Practicks* is recognisably an early version of modern Scottish law.

The first Scottish work to deal exclusively with the criminal law was Sir George Mackenzie's *Laws and Customs in Matters Criminal* first published in 1678 and revised in 1699. Mackenzie, "that eloquent and ingenious lawyer" as Hume called him, had been a practicing criminal lawyer most of his life and *Laws and Customs* draws heavily on his personal experiences. Although it is no longer a major source of the modern law, even after three hundred

years it is impossible to overstate the value of *Laws and Customs* as a historical document.

Mackenzie himself is, of course, a figure of great historical interest. He lived at a time of considerable social and political turmoil and eventually had to leave Scotland. Justice-depute, member of parliament, Lord Advocate, Dean of the Faculty of Advocates, founder of Advocates' Library, devotee of learning and literature, and gifted man of letters, he was also "Bloody" Mackenzie persecutor of the Covenanters, who prided himself that few escaped the penalties and boasted that "no king's advocate has ever screwed the prerogative higher than I have". He was certainly not above stretching the law to secure convictions. ²

Mackenzie's literary output was considerable and included political and historical writings and even a solitary novel as well as legal texts. It is a source of wonder how he found time for a fraction of his activities. Nevertheless, *Laws and Customs* is a well-arranged, lucid and highly instructive book. There was no comparable work before it and it gave a thorough, detailed and systematic exposition of the whole of Scottish criminal law. It was, as Hume puts it, a valuable present to the lawyers of his day.

The work was in two parts the first dealing largely with the substantive law and the second dealing with the adjective law, including much about evidence and procedure. An entire chapter

is devoted to "Probation by Confession" ³ and this is invaluable as the first clear exposition of the subject in the Scottish context.

Apart from a brief and unsatisfactory treatment in Erskine's *Institute of the Law of Scotland*, ⁴ Mackenzie's *Laws and Customs* stood alone as the only comprehensive text on Scottish criminal law for over a century, but it was a century of great and rapid change and *Laws and Customs* became outdated. By the end of the eighteenth century the student, practitioner or judge had no adequate, modern book to guide them, a situation compounded by the absence of adequate regular case reports. The gap left was more than adequately filled by Baron Hume's monumental *Commentaries on the Law of Scotland Respecting Crimes*.

David Hume, nephew of the philosopher of the same name, was a practising advocate and Sheriff (initially of Berwickshire and latterly of Linlithgow) as well as part-time Professor of Scots Law at Edinburgh University from 1786 to 1822. In 1811 he was appointed a Principal Clerk of Session and resigned his shrieval post. Sir Walter Scott was a colleague and apparently a good friend at this time. Also in 1811 Lord President Blair died unexpectedly and it was widely believed that Hume should and would succeed him, but he had no wish to do so and remained a Principal Clerk and part-time Professor until he was appointed a Baron of the Court of Exchequer in Scotland in 1822.

Hume annually delivered a course of about 150 lectures covering the whole spectrum of private law, conveyancing and evidence and procedure. He also gave a short summer course on criminal law, probably in imitation of his own teacher, Professor John Millar of Glasgow University.

The *Commentaries* was first published in four volumes between 1797 and 1800. The work was revised and reprinted in 1819, this time in two volumes, the first dealing with the substantive law and the second with the adjective law. It was again revised in 1829 and is most familiar today in the 1844 edition which incorporates substantial additional notes by Benjamin Bell.

In the *Commentaries* Hume professed to offer to the public "the substance of those observations on the Description and Punishment of Crimes which in the discharge of my duties as Professor of the Law of Scotland in the University of Edinburgh I have for some years had occasion to deliver as part of a course of Academical Lectures."

From the start Hume's *Commentaries* has been regarded both by practitioners and by the courts as being of the highest authority and today is the only truly institutional work on Scottish criminal law. One of the greatest strengths of the work is the author's meticulous research into the records of the Court of Justiciary from 1524 onwards. No decision of importance during that period escaped Hume's eye and despite the vast amount of

material (and the burdens imposed by his many other commitments) he succeeded in bringing order out of chaos and fusing it into a systematic statement of principles which has formed the basis for every subsequent writer on the criminal law of Scotland down to the present day. Hume's work puts the modern scholar in direct contact with the sources and repositories of Scottish criminal law. Even at the comparatively early date at which he was writing, Hume was concerned to avoid the dangers of excessive English influence and the uncritical acceptance of English doctrines and he was determined to uphold the distinctness and merits of native Scots law. ⁵ If any one individual was responsible for the survival of Scottish criminal law as an independent system, it was Baron Hume.

Hume only devotes a comparatively short chapter of some twenty pages to "Proof by Confession and by Declaration" ⁶ and since the *Commentaries* pre-dated the emergence of the modern police, we do not know what his views would have been on many of the subjects which are most controversial today. He deals with the twin subjects of confessions and declarations in a historical context and covers both admissibility and sufficiency in the one chapter.

The true measure of Hume's achievement is the extent to which the *Commentaries* has retained its status as the pre-eminent work on Scottish criminal law and procedure for close on 200 years, a position which shows no sign of changing although, of course,

Hume may on occasion be superceded by statutory reformulation and changes in social conditions.

1811 saw the posthumous publication of John Burnett's *Treatise on Various Branches of the Criminal Law*. In comparison to Hume, this is a slight and derivative work and is restricted in scope. However it does offer the results of the author's diligent note taking throughout eleven years office as an Advocate Depute and seven years as Sheriff of Haddington. In the present context, Burnett's work is of particular interest as being the first to deal explicitly with confessions to the police, the author's views being less than flattering. 7

Apart from Hume's *Commentaries* the most important of the early texts is undoubtedly Sir Archibald Alison's *Principles and Practice of the Criminal Law of Scotland* published in two volumes in 1832 (*Principles*) and 1833 (*Practice*). Alison's work is much more substantial than Burnett's. He acknowledged Hume's work as "the foundation of our criminal jurisprudence" but observed that "a treatise was much wanted of more immediate application to the business which actually comes before the Court." In addition, since the publication of the *Commentaries* changes in society had both rendered obsolete many crimes dealt with by Hume and resulted in "a complete new set of delinquencies, of which little is to be found in the records prior to the last twenty years."

Like Mackenzie, Hume and Burnett, Alison was a practicing advocate and worked as an Advocate Depute between 1823²⁸ and 1830, later becoming Sheriff of Lanarkshire. In writing the *Principles and Practice*, Alison's aim was to supplement Hume and render the law applicable to the daily work of the courts. Alison cites Hume and Burnett extensively, and Mackenzie to a lesser extent, but he draws heavily on his experiences in the Crown Office and quotes about a thousand unreported cases in most of which he himself had been involved. The approach is severely practical and the pattern is generally to state propositions in numbered paragraphs, followed by comment and illustration. Of particular interest is Alison's treatment of English material which he quotes, particularly in *Practice*, "not as authorities to be obeyed, but as rules to be adopted or not according as they seem consonant to the dictates of justice and in unison with the principles of our jurisprudence."

Like Hume, Alison devotes a single chapter to confessions and declarations, dealing with admissibility and sufficiency in the same chapter.²⁹

Alison's work has never achieved the same status as Hume's and much of the contents of *Practice* is now only of historical value. Nevertheless, as an authority Alison is second only to Hume whose work he complements. As Professor Walker puts it:

"Hume was the scholar who searched the Justiciary records and extracted principles from evolving

practice; Alison is the experienced advocate-depute who states what recent and current practice is, what the courts currently do, without bothering much about the history or theory of the matter." 10

Finally, though perhaps not a major historical text, mention should be made of the *Practical Treatise on the Criminal Law of Scotland* by Sir John Hay Athole Macdonald, later Lord Kingsburgh, which was first published in 1866. This work, which eventually ran to five editions the last in 1948, was intended by its author to be a brief summary of the law pertaining to indictable crimes for use by the practitioner. Macdonald cites Hume and Alison extensively, but the work is brief (as it was intended to be) and consists of little more than a statement of general principles with virtually no discussion.

Macdonald's work has been the subject of harsh criticism. Professor Walker observes that its reaching of a fifth edition was "undeserved" and adds:

"It was a completely shapeless book and in this respect represented a retrogression from the works of Hume and Alison. It was discreditable to Scots law that this was the standard book on the subject for nearly a century." 11

The then Professor Gordon remarked that it was "little more than a convenient digest and ... confused and inaccurate." ¹²

In the fifth edition, edited by Walker and Stevenson, a mere three pages is devoted to judicial examination and evidence generally is dealt with in the course of an exposition of trial procedure, some four pages being devoted to the subject of confessions.

Notes

1. Now reprinted by the Stair Society as vols. 21 and 22 (1962 and 1963)
2. D.M. Walker *The Scottish Jurists* (Edinburgh, 1985) p159
3. vol ii tit, xxiv
4. 1773
5. vol i pp3-5
6. vol ii chapter xii
7. infra chapter 5,3 (ii)
8. This date is given by Sheriff J. Irvine Smith in his introduction to the 1989 reprint of the *Principles and Practice*, Professor Walker (op cit note 2 supra p355) gives the date as 1828,
9. vol ii chapter xiii
10. op cit note 2 supra p358
11. op cit note 2 supra pp390-391
12. Gordon p4

2.3 Scottish Texts on Evidence and Procedure

Macdonald was the last author to attempt to deal with both substantive and adjective criminal law in a single work and in more recent times it has been the practice for authors to confine themselves to one particular branch of the law. Thus Sheriff Gordon's monumental work on Criminal Law does not deal at all with either evidence or procedure.

The earliest Scottish work specifically on evidence which treated the criminal aspect of the subject in any depth¹ was *A Treatise on the Law of Evidence in Scotland* by W.G. Dickson² which is best known today in its third edition of 1887, edited by P.J. Hamilton Grierson. Dickson is a substantial work of two volumes, dealing with both civil and criminal evidence and it was the standard text for almost a century, notwithstanding the publication of Lewis's work in 1925, and is still regularly consulted today.

In dealing with criminal matters, Dickson, as one might expect, relies heavily on Hume and Alison, especially the latter, but the discussion of confessions and related matters and in particular of the judicial declaration, is extremely thorough and is much relied upon in the present work. Interestingly, Dickson includes an examination of some of the reasons why false confessions are made,³ which, apart from a brief passage in Burnett, is unique in Scottish legal literature. Another interesting feature of

Dickson's work is his comparative treatment of English and, unusually, American authority

Like virtually all the main Scottish legal authors of the nineteenth century and before, Dickson was an advocate. It is therefore pleasing to note that the next major work on evidence, W.J. Lewis's *Manual of the Law of Evidence* ⁴ was the work of a solicitor. Lewis was Reader in Evidence and Procedure in Edinburgh University, and it is probably for this reason that his work was heavily relied upon for university teaching until the 1960s. Although Lewis, like Dickson, deals with both civil and criminal evidence, he does not range as far and wide as his predecessor and his aim, like Alison, was to produce a practical handbook for everyday use. Interestingly Lewis specifically eschews the citation of English authority even on a comparative basis. Only some 50 pages of text out of a total of 336 is actually devoted specifically to criminal evidence, but it is a measure of Lewis's success in achieving his aim of producing a practical handbook that even in this short span there are no notable omissions.

There is little discussion of theory or principle in Lewis, but the book is generally a clear, concise and well laid out text amply supported by authority, and it is the present writer's opinion that it tends to be underrated.

Lewis was only superceded by the publication in 1964 of *The Law of Evidence in Scotland* by A.G. Walker and N.M.L. Walker. At the time of publication, the former author was Sheriff of Lanarkshire and the latter had previously been Sheriff-substitute at Glasgow. The work owed its origin to a draft manuscript which Sheriff W.J. Dobie, author of well-known texts on sheriff court practice and sheriff court styles, had left at the time of his early death in 1956. The Walkers produced what was, in effect, the first completely new book on evidence since Dickson. Again this book deals with both civil and criminal law and soon came to be regarded as a work of the highest authority. Subsequent writers such as A.B. Wilkinson ⁵ and David Field ⁶ have generally failed to improve upon the Walkers, although Field does offer a more theoretical approach as well as a useful statement of the modern law of confessions and admissions, many of the most interesting developments having take place since the Walkers wrote.

Finally, before passing from texts on evidence, mention must be made of one further, remarkable work, the immense research paper on the law of evidence which Sheriff I.D. Macphail wrote for the Scottish Law Commission and which that body published in 1979. The paper had been written with the aim of identifying those areas of the law which should be considered with a view to reform and was never intended to be a comprehensive statement of the law. However such was the reception by the legal profession of this enormous and scholarly work that the author was prevailed upon to update it and it was published as a book under the simple

title *Evidence* in 1987. Although the layout of the work is complicated and less than ideal, reflecting the fact that the work was never intended to be a practical text, the real value of Macphail's book lies in the depth of his scholarship, which in the present writer's opinion has few rivals, as well as the copious citation of authority and, uniquely among Scottish authors, a thorough examination of the jurisprudential basis of the modern law.

While Macphail purports only to offer supplementary comments on the treatment of the admissibility of confession evidence in Renton and Brown and the Thomson Committee, in fact he discusses the question in some depth and again uniquely in Scotland examines the issues involved in the trial-within-a-trial procedure.

Turning now to literature on criminal procedure, for long the standard, and indeed the only, Scottish text has been *Criminal Procedure According to the Law of Scotland* by Robert W. Renton and Henry H. Brown, first published in 1909 and in its fifth, annually updated, loose leaf edition since 1983. Renton and Brown were both experienced procurators fiscal and like many other authors sought to produce a practical text for everyday use around the courts, particularly the Sheriff court. Both authors, particularly Brown, had previously written on the subjects of evidence and procedure and both had assisted in the drafting of the Summary Jurisdiction (Scotland) Act 1908 so it was natural

that they should collaborate in the preparation of this work which was rich in practical experience, useful tips, time tables and forms. Evidence was only briefly considered and then, naturally, from a procedural point of view, evidence of statements by the accused occupying less than two pages.

The second and third editions ⁷ attempted to turn the book away from the severely practical original and to produce a general treatise on criminal procedure while at the same time maintaining its practical usefulness. The treatment of the law of evidence gradually expanded and in the third edition there was a substantial discussion of the admissibility of statements by the accused extending to some six and a half pages of text backed up with ample citation of authority.

The fourth and fifth editions were both edited by G.H. Gordon and while the former was little more than an update of the third edition, the latter was virtually a new book, considerably expanded and now published in loose leaf format with an annual updating service.

At first sight it is perhaps surprising that a book on procedure should contain what is undoubtedly the clearest and most practical exposition of the law on the admissibility of statements of the accused since Dickson. However, Sheriff Gordon has a major interest in the law of evidence and has written extensively on the admissibility of confessions elsewhere so it is really not

so remarkable that he should build on the foundation laid down in the earlier editions of the book to produce a comprehensive and generally authoritative exposition of the modern law.

The fifth edition of *Renton and Brown* is a large and expensive book which is rather too detailed for teaching purposes (even if it were within the financial reach of students) or for anybody other than the specialist criminal pleader. Although it is unlikely ever to be supplanted as the leading text on the topic, it has recently been supplemented by *Criminal Procedure* by Albert V. Sheehan and others.⁸ This much less expansive text is actually a by-product of the Stair Memorial Encyclopedia of the Laws of Scotland and although much smaller and handier than *Renton and Brown* contains much useful material, particularly that dealing with the historical background to the modern law.

Notes

1. James Glassford's *Principles of Evidence* (Edinburgh, 1820) and George Tait's *Law of Evidence in Scotland* (Edinburgh, 1824) both deal exclusively with civil matters and both were, in any event, superseded by Dickson's work,
2. (Edinburgh, 1855)
3. §§380-384
4. (Edinburgh, 1925)
5. *The Scottish Law of Evidence* (Edinburgh, 1986)
6. *The Law of Evidence in Scotland* (Edinburgh, 1988)
7. 1928 edited by G.R. Thomson and 1956 edited by F.C. Watt
8. (Edinburgh, 1990)

2.4 Periodicals, Collections and Other Scottish Sources

Scottish Law is, for a small jurisdiction, reasonably well served by legal periodicals, chief among which are the Scots Law Times, the Journal of the Law Society of Scotland and the Juridical Review. The Scottish Law Gazette, journal of the Scottish Law Agents Society, concerns itself with criminal matters only infrequently. More recently these publications have been joined by the SCOLAG, the journal of the Scottish Legal Action Group, which, under the editorship of Professor I.D. Willock, contains much interesting material and although it has no pretence to be in the same class as the other publications, it fills a niche in the market and provides an outlet for material which might otherwise not be published.

The Scots Law Times, the Journal and the Juridical Review attract contributions from all sections of the profession, judicial, academic and practising, many of the contributors being of high distinction in their fields. In addition Scottish law occasionally features in publications in other jurisdictions and though the view taken is more often than not favourable to Scotland, one does sometimes wish that English writers on Scottish matters would have their articles proof-read by a native who is knowledgeable about the subject under discussion. '

Clearly it is neither practical nor necessary to comment on every individual magazine article referred to in this work, but there are certain pieces which are of particular importance and which

are much relied upon, and a few observations will be offered on these.

In 1954 the Juridical Review published Professor A.D. Gibb's famous article *Fair Play for the Criminal*.² Gibb was both a Scottish advocate and an English barrister and was a much loved and respected professor at Glasgow University from 1934 to 1958. Rather like his successor D.M. Walker, (who is also admitted to the bar in both countries) Gibb was fierce in his pride in Scots law and utterly, almost ruthlessly, opposed to anglicisation.³ He wrote little on criminal matters but *Fair Play* is an entertaining, trenchant piece, in which the author argues vigorously, under reference to decided cases, that the courts of the day had gone too far towards protecting the accused and hampering the police and had carried the concept of "fair play" beyond all reason. Gibb considers other forms of irregularly obtained evidence apart from confessions, but confession evidence and the decisions in cases such as Aitken⁴ Rigg⁵ and Chalmers⁶ forms the main part of the article.

In 1970 also in the Juridical Review was published an article entitled Chalmers and After - Police Interrogation and the Trial Within a Trial by J.W.R. Gray⁷ which in a sense is *Fair Play* sixteen years on. This erudite and comprehensive essay charts the development of the law since Professor Gibb wrote and draws interesting and valuable comparisons with English and American authority and practice.

From time to time the Scottish journals will publish the text of a talk or lecture given by an eminent figure and in 1975 under the title *Scottish Practice in Relation to Admissions and Confessions by Persons Suspected or Accused of Crime* the Scots Law Times printed a paper which the judge Lord Cameron had delivered at the fourth Commonwealth Magistrates Conference in Kuala Lumpur.²⁰ Lord Cameron does not adopt any particular stance nor does he argue in favour of reforms of the law, but the article is a valuable insight into the personal thoughts of an influential, if fairly conservative, judge as well as being a useful short summary of the law.

Eminent Scots writers are sometimes invited to contribute articles on Scottish matters to publications in other jurisdictions and in 1968 the Northern Ireland Legal Quarterly published a piece by G.H. Gordon entitled *The Institution of Criminal Proceedings in Scotland*. Although this article is not specifically concerned with confession evidence it does deal at some length with the judicial declaration and the admissibility of statements to the police.

The indefatigable and prolific Sheriff Gordon also contributed to the collection *Reshaping the Criminal Law*²¹ a most worthwhile essay entitled *The Admissibility of Answers to Police Questioning in Scotland*. This piece is one of the most thorough examinations of the development of the law relating to confession evidence, and traces it through all its main stages from its nineteenth

century beginnings to the late nineteen seventies. One unusual feature is that when he discusses several reported cases the author goes behind the standard report and fills in a considerable amount of background detail which would otherwise be unknown. The present author makes no secret of the extent to which he has relied on this excellent piece of writing.

Another, perhaps more minor, source is the Second Report of the Thomson Committee. ¹⁰ The Committee was first established in 1970. Its remit covered virtually the whole field of Scottish criminal procedure and the second report is much the most important of the three which it produced. In the present work this report is, naturally, much referred to for its conclusions and recommendations, but it also contains a useful summary of the then existing law and its historical background, particularly interrogation, judicial examination and the evidence of the accused.

Finally, the writer must admit to having indulged his personal enthusiasm for the writings of the inimitable William Roughead, one of the most industrious and delightful chroniclers of the byways, oddities and occasional horrors of Scottish legal history. Roughead, a practising Writer to the Signet, originally began by writing some entertaining essays, mostly based on criminal trials, for the *Juridical Review*. He also edited several volumes in the *Notable British Trials* series although these are not referred to in the present work. One of Roughead's

1. For example see A. Grosskurth *Scotland's Pitfalls* [1991] Legal Action 7 which contains several splendid howlers including the assertion that in a murder case the Crown will instruct two separate post-mortems by independent pathologists.
2. (1954) 66 JR 199
3. See in particular *Law From Over the Border* (Edinburgh, 1950)
4. 1926 JC 83
5. 1946 JC 1
6. 1954 JC 66
7. 1970 JR 1
8. 1975 SLT 265
9. ed P.J. Glazebrook (London, 1978)
10. *Criminal Procedure in Scotland* Cmd 6218 (HMSO, 1975)
11. *With Braxfield on the Bench* in *The Riddle of the Ruthvens and Other Stories* (Edinburgh, 1919); *The Hanging of James McKean* and *The Bi-centenary of Lord Braxfield* both in *Glengarry's Way and Other Studies* (Edinburgh, 1922)

2.5 English Literature

The works by Joy and Mirfield dealing specifically with confessions have already been considered ¹ and Mirfield's book in fact forms the basis for the discussion of English law in the present work. However certain other English texts are of particular relevance and these will be outlined here.

In 1822 John Frederick Archbold, Barrister of Lincoln's Inn, produced the first edition of his *Pleading and Evidence in Criminal Cases* which is still in print today having progressed to no less than forty-three editions. ² In the preface to the first edition, Archbold wrote that he had taken "great pains to compress the whole into the smallest possible compass consistent with perspicacity; and to clothe it in language plain and unadorned." "In fact," he continued, "my sole object has been to make this a practically useful book." Never having seen a first edition *Archbold* the writer can express no view on how well this aim was achieved, but *Archbold* is now a book of awesome dimensions, the forty-second edition having 2319 pages of text, excluding introduction, indices and appendices, some three times the size of *Renton and Brown*, which is an eloquent comment on the state and complexity of modern English criminal law.

Today *Archbold* is the work of reference on criminal evidence and procedure in England but despite its size it remains resolutely practical and contains a comprehensive and detailed consideration

of the law of confessions and related procedural issues but with very little by way of theory or jurisprudence. ³

One of the most influential and important English writers on evidence and related matters in the twentieth century was Professor Sir Rupert Cross whose book *Cross on Evidence* ⁴ is an authoritative exposition of the English law and discusses both the theory and the practice of the subject. This combination of the theoretical and the practical makes *Cross* uniquely valuable for the outsider (such as the present writer) who seeks, without having unlimited resources of time, to understand both the underlying issues and the practice of the English law. Indeed, although it is unquestionably an English text, *Cross* is by no means irrelevant to the Scottish lawyer since many rules of evidence are common to both countries and used with discrimination *Cross* can fill in much of the theory which Scottish writers, with the honourable exceptions of Sheriff Macphail (who frequently cites *Cross*) and to a lesser extent Mr Field, have so noticeably failed to address. Sir Rupert Cross's comparatively early death robbed English law of one of its finest teachers and authors and his own involvement with *Cross on Evidence* ceased with the fifth edition. However Colin Tapper, Reader in Law at Magdalen College, Oxford has now edited both sixth and seventh editions and although the book is inevitably beginning to move away from its origins, it remains recognisably the work of its creator.

As well as *Cross on Evidence* itself, Sir Rupert's views and writings are of particular importance in relation to the right to silence.⁵ His was one of the first and most influential voices to speak out publicly against this "sacred cow",⁶ he was a member (clearly an influential one) of the Criminal Law Revision Committee whose iconoclastic Eleventh Report is discussed in depth later in this work⁷ and when the furore over this report erupted he was the only person of influence and standing to attempt a public defence.⁸

Finally of the remaining English texts relied upon in the present work, the most important are *The Principles of Criminal Evidence* by A. A. S. Zuckerman⁹ and *The Police and Criminal Evidence Act 1984* by Michael Zander.¹⁰

Zuckerman, Fellow and Praelector in Jurisprudence at University College, Oxford was a protégé of Cross and in many ways *The Principles of Criminal Evidence* takes up where *Cross on Evidence* leaves off. Like so many other books, *Cross* deals with both civil and criminal evidence. While there are clearly sound reasons for doing this, it does on occasion make the text complex and, of course, it requires the reader constantly to bear in mind the distinctions between the two forms of procedure. Zuckerman's work, dealing solely with criminal matters, therefore immediately starts with the advantage of clarity and simplicity of layout. As one might expect the approach is primarily theoretical with the law being discussed rather than expounded. The modest size

of the book belies the depth of the author's scholarship and the *Principles of Criminal Evidence* supported as it is by plentiful citation of authority, forms an excellent supplement to *Cross* and an invaluable basis for further research.

Zander, politically leftward-leaning Professor of Law at the London School of Economics, is, through his media work, notably as legal correspondent for *The Guardian* newspaper, a well-known figure in English law. His work on *PACE* is exclusively practical, and eschews any consideration of the merits of the law, but given the extensive discussion of the issues behind the legislation elsewhere in the legal press, nothing is lost thereby. *The Police and Criminal Evidence Act 1984* consists of a section-by-section commentary on the Act as well as, unusually, a series of questions and answers on the most important provisions. The real value of Zander's work is the way in which he has brought together and reconciled the torrent of cases since the enactment of the legislation and produced the definitive study of this complex and radical enactment.

Many English magazine articles and other sources are used in the present work, particularly those culled from the pages of the *Criminal Law Review*. This invaluable publication (would that there were a Scottish equivalent!) is a clear measure of the much greater status which the study of criminal law enjoys in England in comparison with Scotland. It has appeared every month since 1954 and covers the whole spectrum of English criminal law both

substantive and adjective, and it occasionally dips into criminology. It attracts contributions from writers of the highest distinction, principally though by no means exclusively academic, scholars of the calibre of Peter Mirfield, Andrew Ashworth, Glanville Williams and Adrian Zuckerman being regular contributors. Throughout its history the Review has concerned itself with police questioning and issues arising therefrom and it has returned to the subject again and again as proposals for reform have been made and the law has developed. There is never a development in English criminal law which escapes the attention of the Review and at the very least a thought-provoking editorial will be offered. The Review also keeps a neighbourly eye on developments in Scotland and although contributions by native Scots are rare, the comments offered on Scottish matters are never less than interesting.

Notes

1. *supra* Chapter 2, 1
2. The present work was well under way before the 43rd edition was published. Since the only area of relevance in which there had been important developments was PACE, which was fully covered by other texts, the writer decided to continue to base this work on the 42nd edition. The size and cost of the 43rd edition were also factors, especially as the University Library has not seen fit to acquire a copy!
3. Chapter 15 in the 42nd edition
4. 1st edition London, 1958. Now in its 7th edition (1990)
5. *infra* chapter 3, 6 (ii)
6. (1970) 11 JSPTL 66
7. *infra* chapter 3, 7 (ii)
8. [1973] Crim LR 329
9. Oxford, 1989
10. 2nd edition, London, 1990

2.6 Northern Ireland Literature

It is not the purpose of this work to explore the historical and political background to the current, apparently insoluble, problems of Northern Ireland. Apart from the present writer's lack of qualifications in either history or politics, such would clearly be out of place in what is simply a comparative look at the treatment of confession evidence due to an exceptional situation existing in the United Kingdom.

The writer has, accordingly, restricted his consideration of literature dealing with Northern Ireland to texts which, to a greater or lesser extent, deal with the issues from a legal standpoint. In so doing, a problem was immediately encountered in that there is a shortage of writings which deal with the topic in a wholly objective manner. There is very little written on Northern Ireland by authors who are not themselves Irish (in the broad sense) or otherwise have a direct interest in the situation. The majority of commentators whose work has been studied by the present writer adopt a noticably political "anti-establishment" stance. The present writer pretends no understanding of the underlying causes of the "Ulster Problem" and it is necessary to take great care that one does not treat as legal textbooks works which are in fact little more than political tracts.

This observation is particularly applicable to the work of D.J.P. Walsh, including his book *The Use and Abuse of Emergency Legislation in Northern Ireland*.¹ Walsh is a barrister and lectures in Law at University College, Cork. This short book was written while he was in receipt of a Cobden Trust Research Studentship at Queens University, Belfast and its title is virtually self-explanatory, with the author focussing on what he considers to be, essentially, British legal oppression. At the risk of being accused of lack of objectivity himself, the present writer will admit to being further prejudiced against this work by Walsh's statement that the Judges' Rules operated throughout Great Britain.² Walsh is not alone in making this error, and indeed it is quite possible that he simply copied it from *Ten Years on in Northern Ireland* by Boyle, Hadden and Hillyard but nevertheless an error of this magnitude (particularly when the writer is so strongly arguing a nationalist position) does as little for one's confidence in his research as it does for the blood pressure!

To a lesser extent the criticism of lack of objectivity can also be levelled at *Law and State: The Case of Northern Ireland*³ and its sequel, the work just mentioned, *Ten Years on in Northern Ireland*⁴ by Kevin Boyle, Tom Hadden and Paddy Hillyard. Boyle is Professor of Law at University College, Galway and a founder of the human rights pressure group "Article 19" in connection with which he has acted for a number of Northern Ireland complainants in connection with proceedings at the European

Commission and the European Court of Human Rights. Hadden is a part-time Professor of Law at Queens University, Belfast and Hillyard is Senior Lecturer in Social Administration ^{4*} at the University of Bristol and an executive member of the National Council for Civil Liberties. Given the authors' backgrounds the stance taken by these two works is not surprising.

From the point of view of objectivity, the best textbook is unquestionably *Political Violence and the Law in Ireland* by Gerald Hogan and Clive Walker.⁵ Hogan is Lecturer in Law at Trinity College, Dublin and Walker is Lecturer in Law and Director of the Centre for Criminal Justice Studies at Leeds University. He is also an acknowledged expert on the anti-terrorist legislation. The only problem with *Political Violence* is that it is limited in scope, containing little comment on the situation prior to 1973, since the authors took a positive decision not to go over ground already covered by others. Accordingly, for want of anything better, it is necessary to rely on Walsh, Boyle *et al* as an essential supplement to Hogan and Walker.

A further difficulty encountered by the outsider who seeks to chart a way through the complexities of the Northern Ireland situation is the lack of reported judicial decisions. Several important single-judge decisions, if they are reported at all, are only reported in the Northern Ireland Judicial Bulletin, which is not readily available in Scotland, and never find their

way into the Northern Ireland Law Reports. Fortunately the deficiency is partly supplied by two excellent and comprehensive surveys of the case law in the Northern Ireland Legal Quarterly by Professor D.S. Greer, the only Northern Irish author seeking to tackle the topic in any depth. €

The Northern Ireland situation has been the source of an astonishing number of reports by government-appointed committees and similar bodies. In the present work, no fewer than six such reports issued between 1972 and 1984, those by Compton, Parker, Gardiner, Diplock, Bennett and Baker, are considered in depth. The Bennett Report in particular is an outstanding piece of work and apart from its own conclusions and recommendations, it contains a comprehensive, valuable (and wholly objective) summary of the existing law.

Notes

1. Cobden Trust, 1983
2. p44.
3. London, 1975
4. Cobden Trust, 1980
- 4a The present writer does not pretend to know what "social administration" is.
5. Manchester University Press, 1989
6. (1973) 24 NILQ 199 and (1980) 31 NILQ 205. Greer is now editor of the NILQ.

2.7 Literature on Comparative Criminal Procedure

In relation to the historic aspects and the development of the inquisitorial system of procedure, this work draws heavily on *A History of Continental Criminal Procedure* by Adhémar Esmein, latterly Professor of law in Douai and Paris and one of France's front-ranking jurists. Esmein's substantial and admirable work, the first text to tackle in any depth the history of criminal procedure, was written between 1877 and 1880 and published in French in 1882 under the title *Histoire de la procédure criminelle en France, et spécialement de la procédure inquisitoire depuis le XIII siècle jusqu'à nos jours*. It immediately achieved the highest degree of respect and was awarded a prize by the French Academy of Moral and Political Sciences.

Although some thirty years were to pass, when the opportunity arose to have an English version of the book published, Esmein welcomed the idea and prepared a revised, though not substantially altered, text specifically for the English edition. This was translated by the American legal writer and linguist John Simpson and published in 1913 with certain additional material from other sources added in order to render the book "more comprehensive and serviceable to Anglo-American readers."

The scope of Esmein's work is wide, considerably wider in fact than is necessary for the present work, and traces in minute

- , detail the development of French criminal procedure from Roman, through Germanic to Canon law and thence to the *Ordonnance* of 1670 which fixed the inquisitorial procedure in French law for a century before the upheaval brought about by the Revolution and the unwise importation of English adversarial procedure. This was short lived and soon gave way to the "mixed" procedure of the *Code d'Instruction Criminelle* of 1808 which still recognisably influences modern French procedure.

The other main text used in this section is *Criminal Procedure in Scotland and France* by A. V. Sheehan. ' Subtitled "A comparative study, with particular emphasis on the role of the Public Prosecutor" this unusual and interesting work was the result of a Leverhulme Fellowship awarded to the author, then a member of the Procurator Fiscal Service, to enable him to spend a year in France studying French methods and actually working with the criminal authorities. The main value of Sheehan's book is that it provides firstly a clear, straightforward account of the criminal courts and system of prosecution in France laid out in a simple, logical sequence and secondly a similar treatment of the Scottish equivalents. It also contains some fascinating transcripts of real French judicial proceedings which convey the flavour far more effectively than a simple narrative.

Sheehan could possibly be criticised for confining himself exclusively to factual exposition and for making no attempt to discuss or analyse the similarities and differences between the

two systems or the theoretical issues raised thereby. However the present writer is firmly of the view that any attempt to compare inquisitorial and adversarial methods with a view to proving that the one is in some way superior to or better than the other is futile since no system of criminal procedure can exist in isolation from its historical roots and the society in which it has evolved and the "superiority" of one or other system would, in the end of the day, come to no more than personal opinion. Therefore it is the present writer's view that Sheehan was right to take the approach which he did and leave it to his readers to draw their own conclusions. In the present writer's opinion the absence of philosophical discussion is in fact one of the strengths of Sheehan's book. It is one of the few texts in English which describes what actually happens in continental practice as opposed to the theory and this make it uniquely valuable.

Regrettably the book is now substantially out of date and a second edition would appear to be highly unlikely.

Various magazine articles and other sources are also used in the present work, and there would, once again, be little point in discussing each individually here. Such an exercise would, in any event, be beyond the constraints of space. The points of importance will be discussed later in their appropriate context. Only some general observations will be offered at this stage.

Some eighty years ago in the preface to Esmein's *History* Professor W.E. Mikkell noted from the American point of view:

"Whatever the debt the student of English law owes to Sir William Blackstone, it must be said that to him in no small degree is due the lack of interest of the English and American lawyer of the past hundred years in the laws and legal institutions of other nations. Blackstone never tired of giving thanks that the English law was not like other law. It has been a source of wonder to the youthful students of his pages how other nations preserved any semblance of civilisation and freedom without the many great "palladia of liberty" possessed by the Anglo-Saxon. He never tired of drawing comparisons between the English law and the laws of other countries always to the detriment of the latter. It may not be the result, but it is at least a coincidence, that with the cessation of the use of Blackstone's Commentaries as an entrance to the study of law [in America] there is a growing demand for a knowledge of the legal systems of other countries." 2

The first thing which immediately stuck the writer when he began to research continental methods was how little had been written by British commentators and indeed how little serious interest

comparative criminal procedure appears to attract among British academic writers. An honourable exception can, not surprisingly, be made in the case of contributors to the *International and Comparative Law Quarterly*, although the interest of that publication in criminal matters seems to be little more than occasional and several of the articles are by foreign writers seeking to explain their own systems rather than native British authors seeking to draw comparisons with foreign methods. Apart from Sheehan's book, one of the very few practical texts, to which much reference will be made in the present work, is an article by another Scottish writer, Professor A.E. Anton, simply entitled *L'Instruction Criminelle* but it is noteworthy that this was published in America. ³

It can, of course, fairly be said that from a practical point of view a knowledge of the criminal procedure of other countries is possibly of less value than a knowledge of foreign law on certain other branches. While this is undoubtedly true in relation to the practical day to day procedural details it is no reason for not examining the underlying issues to see what lessons can be learned. Professor Mikell again:

"To him who joys in watching the never ceasing battle between the forces of repression and liberty - the nice adjustment of which spells true civilisation; to him who would see how a great people have worked out a great problem, - the

study of the history of French criminal procedure
offers a fascinating subject." 4

The position was quite different in America, particularly during the 1970s when there was a positive flood of writing on comparative criminal procedure much of it inspired by problems in American courtrooms and law enforcement generally. Some of these pieces suffer from an attitude of "if you've seen one you've seen them all" towards the diverse European systems, but despite this and although the present writer has no intention of opening the Pandora's box of confessions in America, this literature is nonetheless valuable for the light that it can shed on continental methods. It would appear that the problems inherent in transplanting elements of a foreign system, let alone the complete system itself, began to dawn on the Americans in the early 1980s and since then the flood of writing has substantially abated.

Notes

1. HMSO 1975
2. Esmein p xxvii
3. (1960) 9 American Journal of Comparative Law 441
4. loc cit note 2 supra

[Blank]

Chapter 3. The Right to Silence

3.1 Introduction

The law relating to confessions is inextricably linked with the right to silence and before considering the way in which the law treats confessions the right to silence must be examined. For the purpose of the present discussion the right to silence may be defined as the right of the accused not to testify at his trial and the right of the suspect to refuse to answer police questions without incurring adverse consequences such as a penal sanction, a presumption of guilt or adverse comment at the trial.

The right to silence is related to but distinct from the privilege against self incrimination. The latter privilege is wider in scope and entitles any witness, not necessarily an accused person, to refuse to answer a question if the true answer would be liable to lead to his conviction for a crime.

The right to silence at the stage of police interrogation has arisen from the right to silence at the trial stage. The accused cannot be compelled to give evidence at his trial or submit to cross-examination in court, therefore

"if it were competent for the police at their own hand to subject the accused to interrogation and cross-examination and to adduce evidence of what he said, the prosecution would in effect be making the accused a compellable witness, and laying

before the jury, at second hand, evidence which could not be adduced at first hand even subject to all the precautions which are available for the protection of the accused at a criminal trial." ¹

Accordingly in this chapter the subject of the right to silence will be treated in what might at first sight appear to be the reverse of the natural order, examining firstly the trial stage, and then passing backwards, as it were, to the stage of questioning by the police. Thereafter the theoretical issues and the major proposals for reform will be considered.

It is accepted that the state may, by statutory provision, modify or even abolish the right to silence at any or all stages of the criminal process. In Britain this has been haphazard but the tendency has been to abrogate the right at the investigative stage rather than at the trial. ² One of the best known examples of this is the right of the police, now contained in Section 172(2) of the Road Traffic Act 1988, to require information as to the identity of the driver of a motor vehicle who is alleged to be guilty of an offence.

A provision of this nature has appeared in successive Road Traffic Acts since 1930 and one of the very few Scottish examples of judicial consideration of the abrogation of the right to silence is Foster v Farrell 1963 SLT 182 which concerned the relevant section of the Road Traffic Act 1960. In this case the High Court held that information could only be required by an

officer who was authorised by or on behalf of a chief officer of police, but such information could be required from the driver himself and if the information were properly obtained it was admissible in a criminal prosecution. ³

In Scotland judicial examination under the 1980 Act in a sense derogates from the right of silence but it will be argued that it only does so in an indirect way and the right is only affected if the accused gives or leads evidence at his trial, an act which remains voluntary. Judicial examination in no sense compels the accused to talk to the police or to testify at his trial. If he is consistent throughout and says nothing at judicial examination and neither testifies nor leads evidence at the trial he will not suffer adverse consequences. ⁴

Notes

1. Chalmers v HM Advocate 1954 JC 66 per Lord Justice General Cooper p79
2. For a full discussion from the English point of view see J D Heydon *Statutory Restrictions on the Privilege Against Self-Incrimination* (1971) 87 LQR 214
3. See also Whiteside v Scott, unreported C.O. Appeal Circular A22/91, Galt v Goodsir 1981 SCCR 225
4. Walker v HM Advocate 1985 SCCR 150

3.2 The trial stage

(i) The statutory background

For many years prior to 1898 the question of whether the accused had the right to silence at his trial simply did not arise in either Scotland or England since in neither country was the accused a competent witness in his own defence. Silence was enforced on the accused rather than being a right which he might exercise or waive as he saw fit. The reasons for this situation coming about are not at all clear. In Scotland the matter seems to have been bound up with an almost pathological fear of perjury while in England several writers, following Bentham, suggest that it arose from a reaction against the detested Courts of Star Chamber and High Commission which before their abolition in 1641 had interrogated on oath anyone unfortunate to stand trial before them. The problems which the law caused will be considered later as will the issues which were debated before it was changed.

The Criminal Evidence Act 1898 Section 1 allowed the accused for the first time to give evidence on oath in his own defence. This section is still in force in a slightly modified form in England and in Scotland Sections 141 and 346 of the 1975 Act are its direct descendants. These latter Sections (as amended by the 1980 Act) provide *inter alia*:

- (1) The accused shall be a competent witness for the defence at every stage of the case, whether

the accused is on trial alone or along with a co-accused: Provided that -

(a) the accused shall not be called as a witness
... except upon his own application... ;

(b) the failure of the accused to give evidence
shall not be commented upon by the prosecution;

...

(e) the accused who gives evidence ... may be
asked any question in cross examination
notwithstanding that it would tend to incriminate
him as to the offence charged;

...

(g) every person called as a witness in pursuance
of this section shall ... give his evidence from
the witness box... .

Thus, if the accused chooses to waive the right to silence, he must go into the witness box, take the oath and is subject to cross-examination like any other witness.

Notes

1. For discussion of this idea and some alternative views see M MacNair *The Early Development of the Privilege Against Self Incrimination* (1990) 10 OJLS 66

(11) The factors which weigh against the right to silence

(a) The pressure to testify

It is clear that the statute envisages the giving of evidence as the voluntary act of the accused and it emphasises competency rather than compellability.

"In my view it is of the very substance of the remedy introduced by the Criminal Evidence Act 1898 that the evidence of the accused in criminal cases is to be made available to the court only upon his own application."

Despite the terms of the statute, however, it is argued that there is still pressure on the accused to give evidence at his trial. The prosecution case may be so overwhelming that it makes any meaningful exercise of the right to silence impossible. Lord Justice-Clerk Grant expressed it thus:

"...the silent defender [sic] does take a risk, and, if he fails to challenge evidence given by witnesses for the Crown by cross-examination, or, in addition, by leading substantive evidence in support of his challenge, he cannot complain if the Court not merely accepts that unchallenged evidence but also, in the light of all the circumstances, draws from it the most unfavourable and adverse inferences to the defence that it is capable of supporting."²

The same point has been made in the English context by Elliot and Phipson:

"Nevertheless, most accused persons find themselves reluctantly leaving the dock and entering the witness box, there to run the

gauntlet of cross-examination by the Crown and any co-accuseds [sic]. In practice the privilege of giving evidence is one which it is usually very risky to forego."³

The authors then quote Lord Goddard C.J.:

"Everybody now knows that absence from the witness box requires a very considerable amount of explanation."⁴

A further difficulty will face the accused who is appearing on several charges on the one indictment or complaint. Even if he wishes to give evidence on one charge only, by entering the witness box he becomes liable to cross examination on all the charges. In England a bold attempt to resolve the dilemma by applying for separation of charges failed⁵ and the point does not appear to have arisen in Scotland.

Notes

1. Scott (A.T.) v HM Advocate 1946 SLT 140 per Lord Moncrieff p143
2. McIlhargey v Herron 1972 JC 38. See also *Where Silence is Golden* 1958 SLT (News) 13
3. *Manual of the Law of Evidence*, (12th edn) (London, 1987) p187
4. R. v Jackson [1953] 1 WLR 591 at 595
5. R v Phillips (1988) 86 Cr App R 18

(b) Statutory Provision

Apart from an express abrogation of the right to silence, a statute may place the burden of proving, say, "reasonable excuse" or "lawful authority" on the accused. Such provisions do not impinge directly on the right to silence, rather they limit the

presumption of innocence. However if the presumption of innocence is restricted, there is a corresponding pressure on the accused to testify in his own defence. If the prosecution establish a *prima facie* case against the accused, the shifting of the burden of proof renders the right to silence purely theoretical. If the accused does not testify he is almost bound to be convicted.

Notes

1, eg Prevention of Crimes Act 1953 Section 1; Road Traffic Act 1988 Section 172 (3)

(c) Comment by the Prosecutor

It might be thought that the terms of the statute forbidding comment by the prosecution are mandatory and a breach thereof would result in the conviction being overturned. However the Scottish courts have not taken this view and have generally taken the position that a breach of the prohibition, while something to be deprecated, will not result in the quashing of the conviction. There is no reported example of a Scottish conviction being quashed because a prosecutor breached the statutory prohibition.

The point first came before the High Court in two summary cases which were dealt with on the same day, Ross v Boyd (1903) 4 Adam 184 and McAttee v Hogg (1903) 4 Adam 190. In Ross v Boyd it was alleged that the prosecutor had stated to the court that the accused had not given evidence on his own behalf and had failed to do so because he could not honestly deny the truth of the

charge. The prosecutor denied that he had said any such thing and the High Court proceeded on the basis that the denial was true. The High Court's observations are thus strictly *obiter*. However all three judges agreed that even if the alleged comments had been made the conviction would not have been quashed. The Lord Justice-Clerk observed that it would undoubtedly be the duty of a judge to interfere with the prosecutor and check him at once if he made any such comment, and if the judge were trying the case with a jury to tell the jury that they must pay no attention to what has been said. However in his Lordship's opinion it was an "extravagant contention" to suggest that the whole proceedings in a trial for murder should *ipso facto* be nullified and the accused liberated. Lord Moncrieff was prepared to contemplate the possibility that in a trial before a jury, such comments by the prosecutor, "suffered to be made without reproof from the judge", might be held to be sufficient to justify the Court in setting aside a verdict.

The circumstances of McAttee v Hogg were generally similar although this time the prosecutor claimed that he had simply remarked to the presiding judge that the accused had not given evidence. He had not intended to refer further to the fact and had not done so. The High Court appear to have accepted that even this limited comment was improper but once again they upheld the conviction.

The other reported cases all deal with jury trials. In Clark v HM Advocate (1977) SCCR Suppl. 162 the Procurator Fiscal, in the course of his address to the jury, made the odd remark "He has not given evidence in this case but that is not a matter for comment." In his charge to the jury, the Sheriff apparently did not refer specifically to the Fiscal's comment, contenting himself with referring in the usual terms to the presumption of innocence and the fact that no obligations attached to the accused. The High Court were not prepared to say that the Fiscal's remark amounted to a contravention of the prohibition but even if it did, any possible prejudicial effects had been elided by the Sheriff's charge.

A short time later the point arose again in McHugh v HM Advocate 1978 JC 12. McHugh was convicted in the High Court on the basis that he had been found in recent possession of stolen property in incriminating circumstances. In his address to the jury the Advocate Depute referred some five times to the fact that McHugh had not given evidence. In refusing an appeal against conviction, the court referred explicitly to Ross v Boyd treating it as authority for the proposition that

"a conviction ... may yet be saved ... if, in all the circumstances of the case, including the way in which the trial judge deals with the contravention, an Appeal Court is able to hold that the breach in question cannot have been

prejudicial in any material sense, or to any material degree, to the accused concerned."

McHugh is a problematic case. In a remarkable passage later in his judgment the Lord Justice-General comes very close to implying that the burden of proof actually shifts to an accused person facing evidence of the type found in the present case:

"Such evidence was in this case sufficient to imply guilt on the part of the appellant in the absence of a reasonable explanation, which only he could give."

Even more remarkably his Lordship continues,

"He did not give evidence and in the circumstances we find it difficult to see how the prosecutor, the Advocate Depute, could have presented his case to the jury without commenting on the absence of any explanation from the accused ...".

To this one is tempted to reply that that was the Advocate Depute's problem! Cases depending on the doctrine of recent possession are by no means uncommon and the absence from the reports of any other cases similar to McHugh suggests that other prosecutors have managed to find satisfactory solutions.

Most recently the point arose in Upton v HM Advocate 1986 SCCR 188. In this case the breach of the prohibition was beyond doubt and could not be excused even by the sort of indulgence shown by the Lord Justice-General in McHugh. The Sheriff had directed the

jury to ignore the improper remarks and expunge them from their minds and the High Court, relying once again on Ross v Boyd, refused the appeal.

Upton was strongly criticised by an anonymous writer in the Scots Law Times. ² The main thrust of the author's criticism is that there is no guarantee that a jury will in fact follow the judge's directions. He (or she) concludes

"It may well be that neither judge nor prosecutor should be allowed to comment, for such inevitably leads to the accused losing his right to silence and can thus amount to a suggestion that the accused has a burden of proof to discharge.

However the effect of Upton is to reduce to meaninglessness the prohibition in Section 141 (1) (b)."

It is submitted that the last sentence of this is a fair comment and it is undesirable to have the High Court effectively conniving at the disregard of an explicit statutory provision in this fashion. Nevertheless few would disagree with the Lord Justice Clerk in Ross v Boyd that it is extravagant to suggest that a an otherwise impeccable conviction for a serious offence should be quashed because of a breach by the prosecutor of the statutory prohibition on comment.

The Thomson Committee were unanimously against making the accused compellable at his trial but they recommended, rather as a corollary to their proposal for the introduction of the English "no case to answer" procedure, that once the Crown had established a prima facie case against the accused it should be competent for the prosecution to comment on the failure of the accused to give evidence. ^a

Given the lack of legislative action on the Thomson proposal, a solution to this issue is not easy to suggest but, given the number of trials which take place every day in Scotland, there have been few problems and perhaps the safest course is to leave the matter to the professionalism and objectivity of Scottish prosecutors.

On the present state of Scottish law, it thus appears unlikely that a breach by the prosecutor of the prohibition against comment will be fatal to the conviction. In a jury trial the result will depend on whether (and presumably how) the trial judge deals with the matter in his charge to the jury. In a summary trial, as the Walkers point out,

"... a magistrate, and certainly a sheriff, is bound to notice that the accused has not given evidence and may be expected to give the fact its proper effect in the circumstances whatever the prosecutor may say."⁴

There is little English authority on this topic, the only case wholly in point being R. v Morley [1966] Crim LR 332 the circumstances of which are very similar to Clark v HM Advocate. The prosecutor said to the jury "The accused has not given evidence which is a course he is perfectly entitled to adopt since it is for the prosecution to satisfy you of his guilt." The Court of Appeal were not prepared to say that this was a breach of the prohibition and indicated that, even if they had been so prepared, they would still have affirmed the conviction.

Notes

- 1, Lord Justice-General p15
- 2, *The Right to Silence* 1987 SLT (News) 17
- 3, Thomson Committee para 50,15, See also Macphail 55,12
- 4, p381, 5357

(d) Judicial Comment

Despite occasional judicial hesitancy, it is now settled law in Scotland that the trial judge is entitled in appropriate cases to comment on the failure of the accused to give evidence and to draw that failure to the attention of the jury. In a summary trial the judge is likewise entitled to take the failure into account when assessing the evidence and *a fortiori* there is no restriction on his right to comment.

The question first arose in a summary case Brown v Macpherson 1918 JC 3. In that case one of the grounds on which suspension was sought was that the magistrate had "commented on the fact that the accused had not given evidence on his own behalf and founded on the fact as one which affected his judgment."

Suspension was refused the Lord Justice-General observing

" I am of the opinion that the magistrate was quite entitled to take [the failure to give evidencel into consideration. No doubt the prosecutor is precluded from offering any comment upon the fact that an accused does not go into the witness box; but the judge may and in my opinion should, in exceptional cases, comment upon the fact and bring it distinctly under the notice of the jury, who are, of course, always entitled to consider the fact that an accused - who, it may be, is the only man in possession of the full

knowledge of the facts - refrains from going into the witness box for the purpose of clearing his feet and establishing his own innocence."

These remarks are strictly *obiter* but have nonetheless formed the basis for the subsequent decisions.

The question of judicial comment next came before the High Court in Scott (A.T.) v HM Advocate 1946 JC 90. Lord Justice-General Normand's opinion stressed that comment should be made with restraint and only where there are special circumstances which require it. His Lordship also stressed the importance of judicial comment not distorting the evidence. In the same case, Lord Moncrieff expressed doubts about the decision in Brown v Macpherson and hoped that it would be reconsidered.²

The opportunity to do so did not occur until Knowles v HM Advocate 1975 JC 6 when the High Court took the view that in light of their experience of the use of judicial comment there was in fact no need to reconsider Brown v Macpherson "at this stage".

The next case in this sequence is Stewart and Others v HM Advocate 1980 SLT 245 where one of the grounds of appeal was that the trial judge had "unnecessarily and unjustifiably" commented on the accused's failure to give evidence. The High Court expressly followed Lord Normand's opinion in Scott and added

"This is a particularly delicate area in which

comment has necessarily to be carefully considered lest a jury should receive the erroneous impression that they are entitled to treat the fact that the accused has not entered the witness box as a piece of evidence corroborative of the case for the prosecution, or worse, a piece of evidence which is to be added to a body of evidence which would be insufficient to satisfy them that guilt has been established beyond reasonable doubt."³

Writing several years before Stewart the Walkers observed:

"It would also seem proper, where innocent explanations for the accused's conduct have been suggested unsuccessfully in cross-examination or suggested in the speech for the defence, for the judge to point out to the jury that such explanations would have come better from the accused, who would have been liable to cross-examination."⁴

Although this passage was not expressly referred to by the High Court it is now clear following Stewart that it is a correct statement of the law.

Most recently, in Dorrens v HM Advocate 1983 SCCR 407 Sheriff AC Macpherson attempted to take matters one stage further. The Sheriff had made a "very proper observation" to the jury on the fact that the accused had not given evidence but when passing

sentence he told Dorrens inter alia:

"... I take note that you did not content yourself with testing the prosecution evidence but that you put it to your counsel that the police were lying and that that contemptible defence has been rejected by the jury. I will be reflecting that in the sentence It is one matter to say the police are lying and give evidence in support of it, it is quite another to hide behind your right to silence and snipe from there."

This novel idea was given short shrift by the High Court who held it to be a "quite irrelevant consideration".

The High Court has never attempted to lay down any sort of approved formula for judicial comment and there are too few reported examples to enable the drawing of any conclusions as to the feasibility or desirability of such a step.⁶

The Thomson Committee, in addition to proposing a specific right for the prosecution to comment on a failure to give evidence, also proposed that in cases where the judge or jury had some doubt as to whether to accept the evidence for the Crown, they might draw an inference adverse to the accused from his failure to attempt to refute the Crown case. The jury were to be informed that the accused was not bound to give evidence, but they were also to be told that they might take note of his

silence and draw from it whatever inference they considered proper in the light of all the other evidence. *

No legislative effect was given to this proposal and the present Scottish position therefore is that judicial comment on the failure of the accused to testify is permissible but should only be made in exceptional circumstances and without undue frequency or emphasis. The judge must take great care not to misrepresent the evidence and must avoid giving the jury the impression that the failure to testify can be treated as corroboration of the prosecution evidence.

The English position⁷ is broadly similar although the English courts regard the decision to comment as a matter of general judicial discretion and there is not the same emphasis on the circumstances being "exceptional" as there is in Scotland. Indeed prior to Waugh v The King, [1950] AC 203 it was thought that the matter was outwith appellate control. * However, Waugh made it clear that where the comment is excessive in the circumstances of the case, the conviction may be quashed. It was also laid down that the judge ought to make it clear to the jury that the accused is not obliged to give evidence and no comment should be made which conveys to the jury that failure to give evidence is inconsistent with innocence or that the only reasonable inference to be drawn is that the defendant is guilty.

In R. v Bathurst [1968] 2 QB 99 at page 107 Lord Parker CJ said that the defendant

"is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box."

In the later case of R. v Mutch [1973] 1 All ER 178 the court held that this form of comment should be adopted in all cases where comment was felt necessary although there might be certain exceptional cases where the judge might make a stronger comment.

The English authorities were reviewed by Lawton LJ in R. v Sparrow [1973] 1 WLR 488 which was held to be one of the "exceptional" cases where a strong comment was called for. After referring to Bathurst his Lordship continued:

"What is said must depend upon the facts of each case and in some cases the interests of justice call for a stronger comment. The trial judge who has the feel of the case is the person who must exercise his discretion in this matter to ensure that a trial is fair. A discretion is not to be fettered by laying down rules and regulations for its exercise ..."

Cross sums up the English position as follows:

"All that can be said on the authorities is that the questions whether the judge should make any comment, and how far he should go in commenting, depend on the particular facts, and that it is essential for the judge to make two things plain to the jury, first that the accused has a right not to testify, second, that they must not assume that he is guilty because he does not do so. R v Sparrow also decides that the mere fact that the judicial comment on this failure occurs several times in the course of the summing up does not render it improper."⁹

Notes

1. Lord Dundas in Brown v Macpherson 1918 JC 3, 2 SLT 134; Lord Moncrieff in Scott (A.T.) v HM Advocate 1946 JC 90
2. The same hope was expressed in *Where silence is Golden* 1958 SLT (News) p13
3. p252
4. p381, 5357
5. Of the cases under consideration only Stewart actually quotes what the trial judge said to the jury. For an example of a strong comment which was apparently not appealed see HM Advocate v Hardy 1938 JC 144.
6. Thomson Committee paras 50,12 and 50,15. See also Macphail 95,12
7. See generally Archbold pp496-497, Cross pp384-386,
8. eg R v Voisin [1918] 1 KB 531 at 537
9. Cross p386. Professor Cross himself described the distinction between the permission to comment and the prohibition of inference as "gibberish". See [1973] Crim LR 329 at 333.

(e) Comment by co-accused

There is no Scottish authority on whether or to what extent a co-accused may comment on the failure of an accused to testify. In Collins v H.M. Advocate 1991 GWD 31-1896 the High Court expressly

reserved their opinion on this issue, Lord Justice-Clerk Ross stating that although such comment was not prohibited it was inconsistent with the principle behind Section 141(1)(b) of the 1975 Act. Although the report is no more than a note, it implies that the court felt that there might be different considerations where two accused were incriminating each other and one gave evidence and the other did not. Renton and Brown ' consider that the English case of R. v Wickham (1971) 55 Cr App R 199 would be followed in Scotland. In this case such comment was held to be permissible. Given decisions such as Upton and the decision of the High Court in Slane v HM Advocate 1984 SCCR 77 where counsel for a co-accused gratuitously brought out the appellant's previous convictions and the conviction was upheld it seems highly unlikely that a conviction would be overturned on this ground.

Notes

1. Para 18-10, note 12, See also D,M,R,Esson *Comment on Co-accused* 1972 SLT (News) 17

3.3 Pre-trial Judicial Proceedings

(1) Scotland - "Old" style judicial examination

It was the practice in Scotland whenever a person was charged with an offence to take him before a magistrate (normally the Sheriff-substitute) in order that he might emit a declaration and give his account of the matter. It is not clear when or how this practice began but it was well established by the seventeenth century. In early practice it was common for the declaration to be admitted before the Lords of Justiciary. ¹

What the prisoner had to say would be written down, read over to him and signed by him, the magistrate and two witnesses. If the prisoner was unable to write or refused to sign, the declaration would be docquetted to the appropriate effect and signed by the magistrate. Thereafter it became admissible in evidence against the prisoner at his trial.² The accused might emit several declarations on different charges or on the same charge if more evidence became available.

Although it sometimes happened that innocent persons were able to explain circumstances which seemed to throw suspicion on them, a far more common result was the obtaining of a declaration which supported the Crown by containing express or implied admissions of guilt or at least of circumstances prejudicial to the prisoner.³ William Roughead puts it thus:

"It may be remarked that although the ostensible

object of a judicial declaration is to enable an accused person to explain such circumstances as tell against him, in practice it is apt to prove merely a net to entrap him. The uneducated criminal invariably gives himself away, and even intellectual malefactors, however adroit and wary, often are tripped up by its invidious meshes. The wise say nothing, or are content simply to deny the charge; but there is in human nature a curious itch of self-justification which few so situated, be they innocent or guilty, seem able to resist, and to this amiable weakness the judicial declaration ingeniously appeals." 4

The declaration was not taken with a view to being used as evidence for the prisoner and even if it contained material favourable to him it could not be read to the trial court without the consent of the Crown. Although this consent was usually given it was from time to time withheld sometimes without any real justification. 5

The accused enjoyed the right of silence at this judicial examination and could not be punished for contempt even though he refused to answer any questions at all. The presence of the magistrate was at least in part intended to protect the prisoner against improper examination, the ideal presumably being that he was both present and awake throughout the proceedings although

neither of these could be taken for granted. It was the magistrate's duty to ensure that the prisoner was aware of his right to silence and he was also to warn him that his declaration could, and probably would, be used against him at the trial.⁶ This was traditionally referred to as "judicially admonishing" the prisoner and the first edition of Renton and Brown gives as a suggested formula:

"You have heard the charge which has been read over to you. You have been brought here for the purpose of being judicially examined in relation to that charge. You are not bound to answer any questions which are put to you; but if you do answer, what you say will be written down and may be used in evidence against you at your trial."

One of the witnesses who gave evidence to the Colonsay Commission suggested that there may have been a practice in some courts of the magistrate adding a rider to the effect that the declaration could not be evidence in favour of the prisoner.⁷

The prisoner was not placed on oath "because it is most unfair and oppressive to place an accused person in the dilemma of either confessing his guilt or perjuring himself." ⁸ If the prisoner was placed on oath, the declaration would certainly be inadmissible and in Alison's view it was "at least extremely doubtful" that the prisoner could afterwards be brought to trial at all. ⁹

Although the phrase "emit a declaration" suggests the spontaneous making of a statement by the prisoner, this was not in fact what happened and in reality the prisoner would be interrogated. It can only safely be said that practice varied and little is known of the earlier methods although Gordon suggests that these were "robust".¹⁰ They would certainly appear to have been flexible. William Roughead describes one case in 1765 in which the accused were apprehended and brought before the Sheriff-Substitute at Forfar where they were examined. A week later having been transported to Edinburgh for the purpose of trial they were again examined before the Sheriff-Substitute there.¹¹ Roughead also describes a case of violating sepulchres in 1881 where the prisoner, having already been examined once before the Sheriff, was brought before him again and then on the application of the Fiscal taken firstly to the spot where the body had been found and then to view the body itself, being asked various questions on each occasion.¹²

However by the time of the Colonsay Commission in the mid 1860s, the practice was, in general, for the Procurator Fiscal to question the accused in the presence of the Sheriff and for his answers to be written down at the dictation sometimes of the Fiscal, but more commonly of the Sheriff.

In general the proceedings seem to have been conducted fairly and although one of the Commission's witnesses, a Sheriff Clerk by the name of Henry Cowan Gray, expressed the view that the Fiscal

"having a full knowledge of the case when the party is brought up, frames his questions with the view, if possible of getting a certain answer" ¹³ and added later "I have always thought that there is a tendency on the part of the prosecutor to make it almost a personal matter to obtain a conviction ..." ¹⁴ other witnesses denied that this was done. Dickson states that declarations were almost always emitted in answer to questions put by the Procurator Fiscal, in order to direct the prisoner's attention to the matters on which his statement is required. However he adds gravely

"It would manifestly be an abuse of this practice to importune or press the prisoner by a searching examination and a declaration obtained by such unfair means would be rejected." ¹⁵

This was exactly what happened in Agnes Kelly (1843) 1 Broun 543 where the Lord Justice Clerk rejected a declaration running to twenty three pages and displaying a "long and skilful course of questions upon a great variety of details ... ". His Lordship described the examination as a "very great abuse of the objects for which a party accused was brought before a magistrate for a declaration" and added that he "saw little difference between such a system and the practice in France of subjecting parties accused to an examination upon every point in the whole case except that in the latter it was done in public and with greater securities."

On the other hand it is apparent that a long examination was not *per se* improper nor were repeated examinations. The first edition of Renton and Brown, published in 1909 refers to "... the old days, when [the declaration] often extended over the greater part of the day." In Jessie McIntosh or McLachlan (1862) 4 Irv 220 the accused underwent three judicial examinations the first of which lasted some four hours. On objection being taken at the trial Lord Deas repelled it. His opinion probably typifies the then current judicial attitude:

"The second ground is that there are a great many questions which were put in the course of the declaration. That is nothing more than what is done in every declaration that is taken. The length of the declaration must depend in every case on the nature of the case and in this case it was quite right that the prisoner should have the fullest opportunity of explaining everything that she could explain and I think we will find that a great deal of it consists of explanations which I rather take it [counsel for the pannel] will not willingly throw aside."

When the prisoner refused to answer questions, the questions and refusals would be set out in the declaration and would be admissible at the trial. ¹⁶ In James Scott (1827) Syme 278 the prisoner was examined twice and, apart from admitting his age at the first examination, remained silent. An objection to the

admission of these "declarations" was repelled. In Hugh Thomson and James Watt (1844) 2 Broun 286 Thomson had remained silent at examination and it appears that the record of this was read at the trial without objection. In James Bell and Others (1846) Ark 1 one of the pannels, Gibson, had remained silent and objection to the "declaration" was again repelled. The Lord Justice Clerk found the "declaration" to be quite competent and observed

"It is useless, no doubt, to put a string of questions to a prisoner when he says that he will not answer; but here it is not stated that he said he would not answer any questions and it was the magistrate's duty to put these questions at least till it was quite clear that the prisoner did not mean to answer."

By the time of the Colonsay Commission some twenty years later, the view was being expressed that questioning should cease once the prisoner intimated that he did not wish to answer any further questions ¹⁷ and in HM Advocate v Brims (1887) 1 White 462 Lord Young held (at p465) that this was what should happen. His Lordship also expressed strongly the view that the questions should be put by the magistrate and not the Procurator Fiscal. Although this decision was not binding, it subsequently came to be accepted as a definitive statement of the law, although in some areas the Fiscal seems to have continued to ask the questions. ¹⁸

Reference has been made to the possibility of the magistrate being either asleep or physically absent. In Murdo Mackay and Others (1831) Bell's Notes 242 the declarations were long and tedious and the Sheriff fell asleep at intervals the longest period being about a quarter of an hour and the total time being about half an hour. However he was actually awake when the declarations were read over and explained to the prisoners. This latter point seems to have persuaded two of the three judges to admit the declarations although Lord Mackenzie, who dissented, considered that when the Sheriff was asleep he "must be held as away."

Alison suggested ¹⁹ that it was permissible for the magistrate to be absent occasionally during the declaration as long as he was "substantially" present and in particular if the declaration was read over to the prisoner and adhered to in his presence. However in Glasgow this practice was allowed to develop to the situation, sharply criticised by the Lord Justice-General in Mahler and Berrenhard (1857) 2 Irv 634, where the Sheriff would judicially admonish the prisoner and then remove himself to an adjoining room to attend to other business returning only at the conclusion of the examination to read the declaration to the prisoner. His Lordship described this as a "vicious" practice and stressed the need for the Sheriff to be present "in order to check anything stated to the prisoner, having the nature of holding out an inducement to him to confess."

Any attempt by a person connected with the examination to induce the accused to answer questions would put the admissibility of the declaration as evidence in the trial at risk and although the cases are not entirely consistent it is clear that the inducement did not have to amount to anything like a threat or a definite promise of favour. In Jas. Wilson (1820) Hume 11 401 the pannel had made two declarations. The Sheriff-substitute who took the first one deponed "I think I told him that he was at liberty to say what he thought proper, but my opinion was that the more candid he was in his declarations the better it would be for himself. I said that he was at full liberty to say what he thought proper. It would be taken down as he said it; but my opinion was he should be candid and tell the truth. I said, if I were in the same situation I would be candid and speak explicitly." The declaration was ruled inadmissible as was the second one (which consisted of the pannel adhering to the first and declaring in continuation) since the second magistrate had simply given the "usual caution" that the prisoner was not obliged to answer anything and the court considered that this was insufficient to undo the damage done by the first admonition.

On the other hand in Robert Fulton (1841) 2 Swin. 564 a declaration was admitted even though the Procurator Fiscal had told the thirteen year old accused "that he was not bound to answer the questions put to him, but that he ought to speak the truth and tell no lies".

Inducements offered by police officers, particularly those of high rank, would seem likewise to have imperilled the declaration although again the cases are inconsistent and the earliest, Ferguson and Brunton (1819) Hume ii 327, is to the opposite effect. However, in McLaren and Grierson (1823) Hume ii 324 objection was taken to the declaration on the basis of an alleged inducement by a police superintendent and a preliminary proof was allowed, although in the event the objection was repelled. Similarly in Joseph Darling (1832) Bell's Notes 241 objection was taken to the production of the declaration on the basis that a police officer (of unspecified rank but presumably more than a mere constable) had induced the accused to tell all by saying that it would be better or greatly in his favour to do so. The court held that if this was proved the objection would be good although in the event it was not proved and the declaration was admitted. Dicta in Mahler and Berrenhard (supra) suggest that the rank of the officer offering the inducement was a relevant consideration, the more junior he was the less likely it was that the declaration would be rejected, and Dickson ²⁰ also takes this view.

Any confession or admission contained in the declaration could be used in evidence against the prisoner at his trial although it could never be conclusive. ²¹ Where the accused had declined to answer questions, that fact would become known to the jury when the declaration was read. There does not appear to be any authority specifically on the question of what the jury were to

make of such a declinature or whether they were entitled to draw adverse inferences (which they probably did anyway) but Dickson says that

"a general declinature ought never to weigh with the jury, because it does not raise any inference tending to inculcate the prisoner. Yet a refusal to answer individual questions may be material, especially where, from their being latently connected with the charge, the prisoner's unwillingness to speak upon them shows that he is aware of their importance." 22

Section 17 of the Criminal Procedure (Scotland) Act 1887 gave the prisoner for the first time the right to an interview with a law agent before the examination and to the presence of the law agent at the examination although he was not permitted to interfere therein. The Act did not specifically require anybody to inform the accused of his right to legal advice, but in HM Advocate v Goodall (1888) 2 White 1 Lord McLaren held that, at least where the charge was serious, (the instant case being a charge of murder against an illiterate female) the magistrate should inform the accused of the right and because this had not been done, the declaration was rejected as inadmissible.

As has already been noted, the Criminal Evidence Act 1898 Section 1 allowed the accused the right to give evidence on his own

behalf and there was thus less practical need for the accused to give his side of the story at judicial examination.

The final death blow for the old form of judicial examination was Section 77 of the Summary Jurisdiction (Scotland) Act 1908 which entitled the accused to refuse to emit a declaration and made it competent to commit him without one. Thereafter it became the norm for the accused to exercise his right to silence. The first edition of Renton and Brown comments

"In future an agent will probably advise a declaration only where the accused has something to say. This course will be adopted when the agent perceives that the prisoner is able at once to clear himself from the charge, or when he wishes to found upon the statement in his future defence." 23

Judicial examination thereafter fell rapidly into almost total disuse and although the ritual of bringing the accused before the Sheriff "for examination" was gone through in almost every solemn case for the next seventy years the proceedings were rarely more than the briefest formality with the accused's agent simply announcing "no plea, no declaration" and the Procurator Fiscal moving for committal.

Notes

1. James Douglas (1682) Hume ii 322; W. Roughead *The Ghost of Sergeant Davies in Twelve Scots Trials* (Edinburgh, 1913) p92
2. See generally Dickson vol i pp231-235, §§327-336

3. *ibid.* p225, §314
4. *Locusta in Scotland in Glengarry's Way and Other Studies* (Edinburgh, 1922) p79
5. eg *Elizabeth Kennedy or Potts* (1842) 1 Broun 497. The report refers to another case in the same circuit, *Margaret Wright*, where consent was also refused by the same Advocate Depute.
6. Hume vol ii, pp80-81; Alison ii 131; Dickson vol i, p227, §319
7. Colonsay Commission Q 4245
8. Dickson p228 §321
9. Alison ii 132
10. *The Admissibility of Answers to Police Questioning in Scotland* in Glazebrook (ed) *Reshaping the Criminal Law* p317 et seq
11. *Katherine Nairn* in *Twelve Scots Trials* p106
12. *The Dunecht Mystery* in *Twelve Scots Trials* p259
13. Colonsay Commission Q 1604
14. *Ibid* Q 1611
15. Vol i p226, §316
16. Dickson vol i p 231 §236
17. See Q 4258, 4259, 16896
18. See Lord Thankerton *The Administration of the Criminal Law in Scotland* (1937) 49 JR 35; GH Gordon *Institution of Criminal Proceedings in Scotland* (1968) 19 NILQ 249 at 256
19. Alison vol ii p561
20. Vol i pp226-227, §317 & 318
21. Dickson vol i p238 §339
22. Vol i p231 §326
23. p38

(ii) Scotland - the 1980 Act Procedures

As has been shown, judicial examination fell into disuse in the early years of this century. Declarations continued to be made from time to time but no accused person was subjected to questioning at the hands of the prosecution. As Lord Kilbrandon noted ¹ "The inquisitorial system stands available but disused." From time to time calls were made for judicial examination to be revived ² and in their second report the Thomson Committee accepted the arguments in favour of revival. The report notes that some witnesses had been strongly opposed on grounds of principle to the revival of judicial examination, considering that it conflicted with the concept of the accusatorial system of procedure. It was also argued that the presumption of innocence was paramount and that an accused person should not be put in the position of having to incriminate himself by becoming in effect a compellable witness and so being forced to help the Crown prove its case against him. It was said that an accused person could not be compelled to give evidence at his trial and he should not be compelled to give evidence against himself at an earlier stage in the proceedings.

The Committee met these arguments by saying that

"if judicial examination will assist in the
ascertainment of truth ... we see no good reason
why it should not be re-introduced into our system
in a realistic form. ... In any event our concern

is to evolve fair procedural rules which will increase the chance of the conviction of the guilty and reduce the chance of the innocent being brought to trial." 3

Judicial examination was envisaged as having three objects:

- (a) to afford to an accused at the earliest possible stage in the judicial process an opportunity of stating his position as regards the charge against him;
- (b) to enable the Procurator Fiscal to ask an accused questions designed to prevent the subsequent fabrication of a false line of defence;
- (c) to protect the interests of an accused who has been interrogated by police officers and who has given answers or made statements to the police, so as to ensure as far as possible that any such answers or statements which are to be used as evidence at the accused's trial have been fairly obtained and are not distorted out of context. 4

The Committee accordingly recommended that questions at judicial examination should be restricted to such questions as are relevant to these purposes.

The right to silence obviously exercised the committee but they drew a clear distinction between questioning by the police and judicial examination and concluded:

"If an accused refuses to answer questions at judicial examination and puts forward a positive defence at his trial, it will be for the jury on the whole evidence before them to decide what inference should be drawn from the refusal. The right to maintain silence has evolved as a matter of practice since 1887. It has never been a statutory right and we see nothing unfair in permitting the jury to consider the refusal of an accused to answer questions at judicial examination as a factor affecting the weight of any evidence led." 5

They accordingly recommended that:

"the jury should be entitled to take account of, and draw any appropriate inference from the accused's failure to disclose at judicial examination a particular line of defence on which he relies at his trial. What inference is appropriate and what weight can properly be placed on silence will be matters for the jury, and will obviously vary from case to case." 6

The Committee's recommendations formed the basis for much of the 1980 Act. There was vigorous opposition to this legislation prior to and during its passage through parliament and, although the bulk of the criticism was focussed on the proposed extension of police powers, the revival of judicial examination was also

condemned as being an infringement of the right to silence and an attack on the presumption of innocence. ⁷ One English Peer went so far as to describe the Bill as a "legislative assault " on the right to silence.⁸

Notwithstanding this opposition, parliament eventually enacted Section 6 of the 1980 Act which added two new Sections, 20A and 20B, to the 1975 Act. Section 20A provides:

(1) Subject to the following provisions of this section, an accused on being brought before the Sheriff for examination on any charge ... may be questioned by the prosecutor in so far as such questioning is directed towards eliciting any denial, explanation, justification or comment which the accused may have as regards -

(a) matters averred in the charge:

Provided that the particular aims of a line of questions under this paragraph shall be to determine-

(i) whether any account which the accused can give ostensibly discloses a category of defence (as for example alibi, incrimination, or the consent of an alleged victim; and

(ii) the nature and particulars of that defence;

(b) the alleged making by the accused to or in the hearing of an officer of police of an extrajudicial confession (whether or not a full

admission) relevant to the charge ^s : ...

(c) what is said in any declaration ¹⁰ emitted in regard to the charge by the accused at the examination

(2) The prosecutor shall, in framing questions in exercise of his power under subsection (1) above have regard to the following principles -

(a) the questions should not be designed to challenge the truth of anything said by the accused;

(b) there should be no reiteration of a question which the accused has refused to answer at the examination; and

(c) there should be no leading questions; and the Sheriff shall ensure that all questions are fairly put to and understood by the accused.

(3) The accused, where he is represented by a solicitor at the judicial examination, shall be told by the Sheriff that he may consult that solicitor before answering any question.

(4) With the permission of the Sheriff, the solicitor for the accused may ask the accused any question the purpose of which is to clarify any ambiguity in an answer given by the accused to the prosecutor at the examination or to give the accused an opportunity to answer any question which he has previously refused to answer.

(5) An accused may decline to answer a question under subsection (1) above; and, where he is subsequently tried on a charge mentioned in that subsection or on any other charge arising out of the circumstances which gave rise to the charge so mentioned, his having so declined may be commented upon by the prosecutor, the judge presiding at the trial, or any co-accused, only where and in so far as the accused (or any witness called on his behalf) in evidence avers something which could have been stated appropriately in answer to that question. ...

The rules for taking and verifying a record of the proceedings are complex and a detailed exposition is unnecessary here. Broadly stated, however, the proceedings will be tape recorded and also noted verbatim by a shorthand writer provided by the prosecutor.¹¹ A verbatim transcript will be served on the accused and his solicitor within fourteen days of the examination and will be deemed accurate unless one of the parties within ten days of service gives notice that it is incomplete or inaccurate. There are provisions of awesome incomprehensibility for rectification of errors.¹² The transcript, or the amended transcript if it has had to be rectified, is admissible in evidence at the trial without being spoken to by witnesses

Beyond the requirement of Section 20A (3) that the Sheriff should inform the accused of his right to consult his solicitor, there is, somewhat surprisingly, no specific statutory requirement for a judicial admonition in the modern procedure. However, the Act of Adjournal (Consolidation) 1988 Section 14 requires the procedure to be "in accordance with existing law and practice" and since a judicial admonition was always given in the "old style" procedure it is invariable practice for the Sheriff to inform the accused prior to questioning that he has the right to decline to answer questions but that failure may lead to adverse comment at his trial. Practice varies widely among different Sheriffs as to the form of the admonition, some confining themselves to a few words and others giving lengthy and involved explanations.¹³ There is, as yet, no case law on an appropriate format for the admonition but Sheriff Macphail suggests the following ¹⁴:

"AB you have been brought here for the purpose of being judicially examined in regard to the charge against you in the petition. Do you understand the charge?" [Await reply] "You are now going to be asked certain questions by the Procurator Fiscal, which will give you an opportunity to say anything you want in relation to the charge. You are not bound to answer any questions which may be put to you: and you may consult your solicitor before answering any question. If you do answer

any question, what you say will be written down and may be used in evidence at your trial. If you do not answer any question, and if at your trial you or any of your witnesses say something which you could have appropriately said in answer to that question today, then the fact that you failed to answer the question today may be commented on at your trial, and may go against you. Do you understand that?

The permissible limits of questioning by the Procurator Fiscal have likewise not been the subject of a reported judicial decision but it is submitted that clearly there should be no interrogation and no attempt to elicit an admission. In one unreported case, HM Advocate v Leitch (24 June 1982), the trial judge refused to allow a transcript to be read to the jury because there had been a "substantial departure" from the principle that there should be no leading questions. Beyond this, the matter does not appear to have arisen in the reported decisions.

In a paper presented to a Crown Office Seminar on judicial examination in 1982, Sheriff Macphail considered the case of the accused who refused to answer any questions, or made non-committal replies such as "On the advice of my solicitor I have been advised not to answer questions". The learned Sheriff quoted with apparent approval the practice of the Procurator Fiscal at

Dunfermline which was for the Fiscal to remind the accused of his position by asking him:

(a) "Do you understand that you are being given this opportunity to put on record now any defence which you may have to the crime with which you are charged?"

(b) "Do you understand that if at any trial against you on this charge arising out of the same circumstances you say something by way of defence or answer to the charge which you could have said today but did not, the fact that you did not say anything today may be commented on by the prosecutor, the judge or any co-accused?"

If, notwithstanding these questions from the Fiscal, the accused persisted in his attitude, Sheriff Macphail considered that it was essential that he be questioned with a view to eliciting any ostensible defence and for the purpose of having his refusal recorded to be available for possible comment at the trial. He suggested that the most basic of questions would be the most telling and would "highlight the absurdity of the attitude taken by the accused in his responses."

In his paper, Sheriff Macphail considered that a solution would require to be found to this problem perhaps in the form of an authoritative ruling from the High Court as to the kind of direction which the trial judge should give to the jury.

The first case to consider the point was Gilmour v HM Advocate 1982 SCCR 590. In that case the accused had refused to answer questions at judicial examination. It appears that the transcript of the examination was read to the jury and the accused in evidence explained that he had declined to answer because he was following the advice of his solicitor. The report does not contain any information as to how (or even whether) the prosecutor dealt with the matter in cross examination but it does appear that no comment on it was made by either party in speeches to the jury. The trial judge, Lord Dunpark, took it on himself to direct the jury in the following terms:

"So my advice to you ladies and gentlemen is to ignore the judicial examination altogether. You must assume that he refused to answer the questions on the advice of his solicitor, he had the right to remain silent, and the judicial examination is not evidence which you may consider as relevant evidence in relation to his guilt."

In the appeal, it was unnecessary for the High Court to comment on this direction and they did not do so.

The subject next arose in Alexander v HM Advocate 1988 SCCR 542. In this case three accused persons were charged with assault and robbery. At judicial examination all three refused to answer questions, giving as their reasons the fact that they had been so advised by their lawyers.¹⁵ The following exchange took place between the Procurator Fiscal and the third accused :

"It is my information that this happened at a quarter to nine on the morning of the date in question. Do you deny being at the post office at the time and on that date? -- On the instructions of my lawyer I don't wish to say anything.

Do you deny the charge of assault and robbery? -- On the instructions of my lawyer I don't wish to say anything."

At the trial he lodged a special defence of alibi and gave evidence in support thereof. After explaining the judicial examination procedure to the jury the trial judge commented on the fact that each of the accused had failed to answer. In relation to the third accused his Lordship quoted the above passage from the transcript and said:

"So again there is no mention of the alibi by the third panel. You can make what you like of the matter, ladies and gentlemen. The Sheriff quite properly told each of them they did not have to answer questions and they were entitled to consult their lawyer, but he also told them that if they had a defence which they could state then and they did not do so that it might go against them later. It is a matter for you to assess in weighing the evidence ladies and gentlemen ..."

The third accused was convicted and appealed on the ground that:

"1. There has been a miscarriage of justice in that the trial judge misdirected the jury in

drawing their attention to and commenting on the appellant's failure to answer questions at judicial examination; where it was clear that such failure had been as a result of legal advice."

The High Court refused the appeal but although an opinion was apparently given it was not recorded. However this omission was partially rectified by McEwan v HM Advocate 1990 SCCR 401.

In McEwan Lord Dunpark was once again the trial judge, but this time he took the opposite view to the one he had taken in Gilmour. The accused had repeatedly refused to answer at judicial examination on the advice of his solicitor and at the trial he led evidence of an alibi. In his charge to the jury Lord Dunpark commented several times on the failure to mention alibi at the judicial examination and directed the jury that they could take McEwan's silence into account in assessing his credibility. On appeal, although the actual language used was criticised, it was not disputed by the defence that his Lordship was entitled to comment on the accused's failure to answer even though this was on the basis of legal advice. Gilmour was not referred to in McEwan and it can now be taken that it no longer represents the law.

Alexander and McEwan can be taken as clear authority for the view that comment may be made on, and adverse inference drawn from, any failure to answer at judicial examination even where this is the result of legal advice. It is submitted that this is as it

should be; for the High Court to have held otherwise would have left open the possibility of one of the main aims of judicial examination, namely the prevention of fabricated defences, being subverted and could, as Sheriff Gordon pointed out in his commentary to Gilmour, have led to the whole judicial examination procedure atrophying.

McGhee v H.M. Advocate 1991 SCCR 510 does not alter the position as laid down Alexander and McEwan, but it does provide an example of what the High Court regard as a judicial comment going too far. The trial judge also appears rather to have got hold of the wrong end of the stick. He said to the jury "If Mr McGhee told his lawyer that at the time of the robbery he was in his own flat in company with his brother, his father and daughter ... would it not be extraordinary that the lawyer should tell Mr McGhee not to say anything and not to give that account and just to say 'No comment'?" This observation was made despite the fact that the accused had told the court that his own lawyer had not been present and he had been advised by a substitute lawyer who would appear to have been unknown to him and to whom he gave no details of his defence. It would appear that the substitute lawyer had sought an adjournment to have the accused's own lawyer present but this had been refused.

Insofar as the High Court appear to regard the absence of the accused's "own" lawyer as justifying the accused's "no comment" at judicial examination, the decision in McGhee is to be

regretted. One wonders what was to stop the "substitute" lawyer, having realised that the judicial examination was going ahead, seeking a brief adjournment in order to discuss the matter with the accused and obtain details of his defence. Indeed one might well wonder what the purpose of the "substitute's" presence was at all since he hardly seems to have taken steps to inform himself of his client's position. It may be a simplistic point of view, but surely the accused either has a statable defence or he does not and whether the solicitor who appears with him at judicial examination is his "own" or not is, it is submitted, completely beside the point.

The modern judicial examination in a sense derogates from the accused's right to silence. Although the accused is entitled to refuse to answer questions, he runs the risk of having comment made at the trial if he gives or leads evidence. The refusal is not evidence in its own right and could never provide corroboration, but it is a matter for the jury to weigh up when considering the evidence and they are fully entitled to draw an adverse inference. However, judicial examination has no effect on the question of whether the accused either talks to the police or gives (or leads) evidence at the trial. If the accused is consistent throughout the judicial process and, having refused to answer at judicial examination, also declines to give or lead evidence, no adverse comment may be made.¹⁶

Despite the controversy and emotive language with which the revived judicial examination was met, research, in which the writer participated as a witness, has established that its impact on the judicial process has been minimal. ¹⁷ Many of the problems which were anticipated have simply not arisen and although it has derogated slightly from the right to silence it has done so in an indirect way and it cannot, on any criterion, be regarded as having led to a major departure from the right. Indeed the writer, who has been involved with judicial examination from the moment of its re-introduction, is of the opinion that it is on the verge of becoming nothing more than an irrelevant excrescence. The judiciary, both sheriff and High Court, have failed to give the procedure any real "teeth", for a variety of reasons, including resource considerations, it has found little favour with the Procurator Fiscal service and it has rapidly become apparent to accused persons and their advisors that in fact there is nothing to lose by refusing to say anything.

In a report published in 1989, ¹⁸ Justice described judicial examination as having "fairly significantly modified" the right to silence, a description which is at variance with the research findings and the writer's personal experience. Justice conclude that "the procedure appears to have worked well in Scotland to deal with the problem of the false confession and the false defence." This statement invites the obvious question whether there is any evidence that such problems in fact ever existed in Scotland. The writer is unaware of any Scottish research on

these matters and he is only aware of one Scottish cases this century where a person has been convicted on the basis of a confession later proved to have been false. Since this case involve a plea of guilty, judicial examination would not have made the slightest difference. ¹⁹

While it is always interesting and occasionally valuable to have the views of outsiders on Scottish procedures, it is suggested that the overwhelmingly English composition of Justice has led them to the common error of assuming that problems which exist in England also exist in Scotland and hence to conclusions which are not justified by the reality of the Scottish situation.

Notes

1. *The Accused* p66
2. eg Lord Kilbrandon *loc cit*, TB Smith *British Justice - The Scottish Contribution* pp128-134
3. Par 8,10
4. Par 8,14
5. Par 8,24
6. Par 8,25
7. See for example Hansard HC Vol 982 col 841 (Mr Bruce Millan) and *ibid* col 896 (Mr Norman Hogg)
8. Hansard HL Vol 404 Col 40 (Lord Foot)
9. Defined in McKenzie v HM Advocate 1982 SCCR 545 as a "statement which is clearly susceptible of being regarded as incriminating." It was held in Moran v H.M. Advocate 1990 SCCR 40 that the question of whether a statement amounts to an extrajudicial confession falls to be determined at the time of the trial and in light of the other evidence.
10. The right voluntarily to emit a declaration was unaffected by the legislation.
11. This is a departure from the old procedure where the declaration would have been noted by the Sheriff Clerk and would have been ruled inadmissible if written by anyone connected with the prosecution. See Dickson p231 5327.
12. See Renton and Brown par 5-67 et seq
13. This is based on personal observation in Glasgow Sheriff Court
14. (1982) 27 JLS (Workshop Supplement)
15. The responses of the second accused John Concannon Alexander eloquently exemplify Sheriff Macphail's point about "highlighting the absurdity of the attitude of the accused."
16. cf Walker v HM Advocate 1985 SCCR 150

17. S Moody *The Operation of the Judicial Examination Procedure: a Study in Two Scottish Cities* (Scottish Office, 1986)
18. *Miscarriages of Justice* (London, 1989). The report is the subject of an article by Sheriff Gordon in (1989) 34 JLSS 359.
19. Boyle v H.M. Advocate 1976 SLT 126 where an army deserter pled guilty to a robbery he had not committed in the hope of avoiding military detention, discussed further *infra*. In another altogether bizarre case (Glasgow Herald 6th October 1990) an anonymous accused pled guilty in the High Court in 1986 to various charges of incest and related offences with a girl believed by all concerned, including the accused himself, to be his daughter. He was later charged with another offence involving the same girl and this time Crown DNA testing established that he could not have been the girl's father. The earlier conviction was quashed of consent. However it is submitted that this is not truly a *false* confession since the accused had clearly committed the "crime". Rather it was a confession tendered under essential error. See further chapter 7.2 *infra*.

(iii) England

Pre-trial judicial proceedings in England have long been mainly concerned with determining whether the prosecution have produced sufficient evidence to justify committing the accused for trial and England has no procedure equivalent to the Scottish judicial examination.

In early practice preliminary inquiry and committal were the responsibility of the grand jury, but over the years this function was gradually absorbed by the justices of the peace. Their inquiry was at first held in secret, the accused having no right to be present while the evidence of the witnesses was being taken, although he was brought before the justices to answer questions. However by the nineteenth century it was becoming recognised that the preliminary inquiry was a form of legal process in which the accused should have some rights.

In 1836 the Trials for Felony Act allowed the accused person to inspect the depositions taken from the witnesses and in 1848 the Indictable Offences Act was passed. One of the most important features of the 1848 Act was the setting forth for the first time (in Section 18) of a form of caution to be used by the justice when addressing the accused after the prosecution witnesses had been examined:

"Having heard the evidence do you wish to say
anything in answer to the charge? You are not

obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you at your trial."

One writer ¹ suggests, without quoting any authority, that the practice of administering a caution developed in England at least as early as the beginning of the eighteenth century. However, H.H. Joy, writing in 1842 states that the practice of telling a prisoner not to say anything to criminate himself "is not recognised by law". Joy quotes Gurney B. as saying:

"To dissuade a prisoner from confessing is wrong. He ought to be told that his confession will not operate at all in his favour; that he must not expect any favour because he makes a confession; that if anyone has told him it will be better for him to confess, or worse if he does not, he must pay no attention to it; and that anything he says to criminate himself will be used as evidence against him on his trial. After that admonition he ought to be left entirely to himself, whether he will make any statement or not; but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice." ²

On the other hand, according to Lord Devlin ³ the 1848 Act codified the "existing practice". However in the present context the question is of little practical importance as whatever the position may have been at common law, the 1848 Act superceded it and the rules it provided are still recognisably the basis for committal proceedings which do not proceed under the short form first introduced by the Criminal Justice Act 1967. All witnesses are to be examined in the presence of the accused who is entitled to put questions to them, although in certain limited circumstances the personal presence of the accused may be dispensed with. ⁴ Once the prosecution evidence has been given, unless the justices decide not to commit for trial, the charge is to be written down, read over to the accused and explained to him in ordinary language. Then the justices must ask the accused whether he wishes to say anything in answer to the charge and if he is not represented by counsel or a solicitor they must, before asking him, say to him words to the effect of:

"You will have an opportunity to give evidence on oath before us and to call witnesses. But first I am going to ask you whether you wish to say anything in answer to the charge. You need not say anything unless you wish to do so. Anything you say will be taken down and may be given in evidence at your trial. You should take no notice of any promise or threat which any person may have made to persuade you to say anything." ⁵

Anything which the accused does say must be put into writing,

read over to him and signed by one of the examining justices and the accused himself if he wishes. ⁶ The record of anything said by the accused will then be forwarded to the court of trial.

At the trial anything said by the accused at the committal proceedings after being duly cautioned by the justices is admissible, even although there may have been a prior inducement.⁷ Oral evidence may be given against the accused of statements made by him when questioning a witness before the justices, although if the statements have been reduced to writing as part of the depositions they may only be proved as part of the depositions and not by oral evidence. ⁸Any deposition by the accused will be admissible in evidence at his trial even if he declines to give evidence at that trial.⁹

Notes

1. P Softley *Police Interrogation* Home Office Research Study No 61 (London, 1980)
2. Joy p47. The quotation comes from Greene 5 C&P 312
3. *The Criminal Prosecution in England* (London, 1960) p6
4. Magistrates Court Act 1980 s4(3) and (4)
5. Magistrates Court Rules 1981, Rule 7(7)
6. *ibid* Rule 7(8)
7. R. v Bate (1871) 11 Cox 686
8. R. v Taylor (1874) 13 Cox 77
9. R. v Bird (1898) 15 TLR 26; R. v Boyle (1904) 20 TLR 192; R. v Chapman (1912) 29 TLR 117

3.4 The Police

(1) Scotland

(a) Introduction

At this stage consideration will only be given to the right to silence in relation to the police and the general subject of confessions to the police will be discussed later. ¹

As has already been remarked, statutory exceptions apart, no crime is committed by any person who refuses to talk to a police officer. In broad terms therefore it may be asserted that Scots law recognises the right to silence of the suspect in a criminal investigation. This was recognised by the Thomson Committee when, dealing with the topic of interrogation, they set out as two of their six general principles:

(a) Subject to statutory exceptions no one should be under a legal obligation to give information to the police.

(b) The police should not exert pressure on any person to make him give information to them. In particular they should not offer inducements, threaten, bully or deprive of rest or food.²

It can be said that the right to silence is only meaningful if the person who has the right is aware that he has it. Accordingly, in modern practice the police are required to inform the suspect of his right to silence at certain stages by administ-

ering a caution. The law has developed case by case, in a haphazard and at times inconsistent way and has been much affected by the fact that the investigation of crime had historically been the function of the Sheriff and not of the police; the early police officer's main duty was to apprehend an offender and bring him with all dispatch before a magistrate. It was no part of the police officer's functions to question or interrogate the suspect himself. Since the early police officers were often little more than glorified street sweepers it is not surprising that the courts were initially reluctant to concede to them powers which historically had been the sole prerogative of the judiciary.

Notes

- 1, infra chapter 5,3
- 2, Para 7,03

(b) Development of the Police Caution in the Nineteenth Century

The growth of the police in Scotland was essentially a phenomenon of the nineteenth century. The early practice in relation to cautioning of suspects is unclear and complicated by the tendency on the part of the courts to regard questioning by the police as *per se* objectionable. At this time the courts were generally hostile to any questioning by the police other than the absolute bare minimum which was essential in the investigation of the charge against the prisoner and one of the clearest and earliest distinctions was between statements made at the time of arrest and those made subsequently, particularly once the prisoner was

in custody. While answers to questions at the time of arrest would probably be admitted, those in answer to questions after arrest would almost certainly be excluded.'

The earliest explicit reference to cautioning by the police so far traced is in Kerr v Mackay (1853) 1 Irv 213 where the Lord Justice-Clerk distinguished between police questioning after arrest, of which his Lordship disapproved, and the situation where a prisoner chose to volunteer a statement to the police. In the latter case, however, it was his Lordship's opinion that the prisoner should be cautioned that the statement might be used against him. Beyond this his Lordship did not elaborate but the almost casual nature of his observation suggests that by the middle of the nineteenth century the use of a form of caution was established.

Dickson only mentions the caution indirectly:

"Of late years the Court have excluded confessions elicited by the police questioning prisoners after they had been lodged in the police office. Nor will it render such examination admissible that the prisoner was told he was at liberty to decline answering, for the police authorities are not entitled to examine him without the protection of a magistrate. The Court have not extended the same rule to confessions obtained in answer to questions from the police on apprehending the

prisoner or while conducting him to the police office"²

In the following paragraph he continues:

"There is no rule which excludes confessions made by a prisoner spontaneously to the procurator-fiscal or officers of police, either immediately on apprehension or after having been lodged in the police cells if he have been duly warned."³

The question of what constituted "duly warned" was considered in John Proudfoot (1882) 4 Coup. 590 where the point in fact arose twice. Proudfoot was charged with offences of dishonesty and following judicial examination was confined in Inverness prison. He appears to have been in a state of excitement and agitation, so much so that the governor, Mr Lunnan, was concerned about the possibility of suicide. Lunnan accordingly asked Proudfoot if he intended to injure himself and although his response is not revealed in the report it clearly must have been incriminating. On objection being taken, Lunnan admitted that at no time had he warned Proudfoot that anything he said might be used as evidence against him. Although the governor was motivated by considerations of humanity and a desire to do his duty and it was never suggested that he consciously tried to elicit a confession, Lord Craighill ruled (with considerable hesitation) that Proudfoot's reply was inadmissible. ⁴

Sometime after the conversation with Lunnan, and indeed after he had been committed for trial, Proudfoot attempted to engage a warder in conversation about the crime. The warder warned him not to tell him anything but Proudfoot insisted saying, "I know you won't tell on me." To this the warder replied, "I do not believe that my evidence will be brought against you, but still you had better not tell me." Nevertheless Proudfoot was not dissuaded from making an incriminating statement. On objection being taken at the trial, the advocate depute conceded that the statement was inadmissible unless the prisoner had been warned but contended that what Cameron had said was sufficient. This time Lord Craighill had little difficulty in rejecting the statement:

"Such warning, it is said, was given, and, no doubt, some words were used which might be so construed. But their effect, in my opinion, was overcome by the immediately preceding expression of belief by the warder that he would not be called upon to give evidence. An equivocal or ambiguous warning is in effect no warning at all."

Notes

1. See for example Agnes Christie or Paterson (1842) 1 Broun 368, Gracie v Stuart (1884) 5 Coup. 379; cf Helen Hay (1858) 3 Irv. 181
2. p242 §347
3. p243 §348; cf Smith v Lamb (1888) 15R(J) 54
4. Professor Gibb criticises this ruling as "over strict"; *Fairness to the Accused* (1954) 66 JR 189 at 213

(c) The Twentieth Century

In 1909, the first edition of Renton and Brown described the procedure following arrest thus:

"The officer first informs his prisoner of the charge against him. If asked, he shows his warrant (if any) but retains possession of it. He warns the prisoner that he need not say anything with reference to the charge, but that if he does so, what he says will be written down and may be used in evidence against him. He ought not to put questions to the prisoner, but any voluntary statement with reference to the charge should be noted in writing at the time."

No authority is quoted in relation to the administration of the caution, but it is clear that the practice referred to is of long standing and it is apparent from the passage from Dickson quoted above that what was regarded as unacceptable was police questioning after "lodging in the police office". Accordingly, provided the prisoner was duly cautioned, anything he said in reply to the charge would be admissible.

Although judicial examination was in terminal decline by the time when Renton and Brown were first writing, the courts for long clung to the notion that the police themselves should not question the suspect following arrest but should take him before a magistrate; indeed such ideas were still surfacing occasionally as late as the 1960s when they had patently become unrealistic.²

However, the move towards permitting some police questioning of suspects was irresistible and the courts had, reluctantly, to accept the reality of the situation. The emphasis then shifted to protecting the suspect against unfair treatment at the hands of the police.

As already noted, the requirement of a caution at the stage of charging is of long standing. The reason is identified by the Walkers:

"It is proper practice that, when a person is charged with a crime, the caution should be given, since without it, the reading of the charge may be interpreted as a question, or as an invitation to reply, in which case any statement then made is not spontaneous and voluntary." 3

However in his influential textbook "The Scottish Police, Their Powers and Duties," published as recently as 1944 Mill firstly shows that there was still doubt among the police as to the correct procedure and secondly advocates a procedure which positively invites the accused to reply:

"The writer has frequently been asked - should a prisoner be cautioned and then charged or charged and then cautioned? He knows of no authority either way but considers it better to start with the caution and then read the charge slowly and distinctly - thus ... 'Now listen carefully to me.

Say nothing meantime. I am going to read out a charge against you. When I have done so you will have an opportunity of saying anything you wish to say. You need not say anything, but if you do, it will be noted and may later be used in evidence.'

Do not add the words 'against you'. Having read over the formal charge the officer may, unless the accused at once volunteers a statement, follow it by the question 'Well, do you wish to say anything?' Except to clear up in accused's interests an ambiguity in his reply, there should be no further prompting or questioning." 4

Notes

1. p32
2. See HM Advocate v Christie 1961 unreported but referred to in 1961 SLT(News) 179
3. p39 §45
4. Mill p89

(d) Is a Caution now an Essential Prerequisite of the Admissibility of a Statement by a Suspect?

Apart from the stage of charging, in Scottish practice the fact that a caution had or had not been given was, until comparatively recently, regarded simply as one of the factors to be taken into account in assessing whether what had taken place between the police and the suspect was fair and the statement had been "spontaneous and voluntary". It scarcely needs to be said that if the police questioning is otherwise unfair no amount of cautioning will make the results admissible. '

However it is now clear that the caution itself has acquired something of a special status and, although it may be going too far to say that a caution is an essential prerequisite of the admissibility of a statement by a suspect, failure to caution in the proper terms at anything other than the preliminary stage of an inquiry will certainly put the admissibility of any incriminating statement at risk.

The conventional wording of the modern common law caution is:

"You are not obliged to answer but if you do,
your answers will be noted and may be used in
evidence".

Appropriate prefixes are added depending on the stage of the proceedings at which it is being given. Any police officer who departs from this formula does so at his peril as was demon-

strated in HM Advocate v Docherty 1981 JC 6 where a police officer of high rank and long experience "cautioned" a suspect "...I am going to ask you some questions. I must warn you that any answers you give will be noted and may be given in evidence." What he did not tell the accused was that he was not obliged to answer. Lord Cowie rejected the resulting statement pointing out that:

"It is a basic right of every accused person (sic) to be allowed to remain silent when he comes under suspicion of a crime. ... So there we have a case of an accused person under suspicion who is not informed of one of his basic rights."

The current (5th) edition of Renton and Brown identifies the case of HM Advocate v Von 1979 SLT 62 as the starting point for the trend towards giving the caution a special status. This was a decision by Lord Ross sitting as trial judge and not a decision by the Appeal Court. Von had been detained on a Saturday under the Prevention of Terrorism (Temporary Provisions) Act 1976 Section 11 of which, broadly, penalises a person who has information about acts of terrorism and fails "without reasonable excuse" to disclose that information to the police. The provisions of Section 11 were drawn to his attention by the police but they omitted to mention the "reasonable excuse" proviso. Von was interviewed several times and on the Sunday he informed the police he would make a statement regarding his own involvement but would not incriminate anyone else. At this point

the police warned him that what he said could be used in evidence but did not administer a full caution. Lord Ross held the statement inadmissible on the basis that the accused had not been given sufficient warning that he was not obliged to incriminate himself.

In the subsequent case of Tonge v HM Advocate 1982 SLT 313, the police were again confused by a recent and novel statutory provision, on this occasion Section 2 of the 1980 Act. Section 2(5) provides

"Where a person is detained under subsection (1)

... a constable may-

(a) put questions to him in relation to the suspected offence; Provided that this paragraph shall be without prejudice to any existing rule of law as regards the admissibility in evidence of any answer given;"

Section 2(7) provides:

"A person detained under subsection (1) ... shall be under no obligation to answer any question other than to give his name and address, and a constable shall so inform him both on so detaining him and on arrival at the police office ..."

Two youths, Tonge and Gray, were detained under Section 2 on suspicion of rape. The evidence against them was, at best, thin and the temptation for the police to bolster it by obtaining

incriminating statements must have been substantial. Gray was apparently cautioned at common law when he was detained and both were given the statutory warning under section 2(7) but neither was cautioned at common law before being interviewed. "Interviewed" indeed may not be the correct description since what happened was that the police, without any preliminaries, simply accused the two of having participated in the crime. Both then proceeded to make incriminating statements. Objection was taken to the statements at the trial but the trial judge let them go to the jury who subsequently convicted both.

On appeal it was held that he should not have done so since it was plain that "no reasonable jury could have held that the statements had been voluntary and had not been induced by unfair or improper means."² In holding this, the Lord Justice General said:

"In my judgment ... it is abundantly clear that the rules of fairness and fair dealing were flagrantly transgressed. I do not say that in no circumstances will a statement by a detainee ... be inadmissible merely because when it was made he had not received a full caution. What I do say is that the failure of the investigating officers to caution Gray and Tonge in the special circumstances of this case is fatal to the contention that the rules of fair dealing and fairness were properly observed.

In Gray's case the hope of the two officers was that when they saw him he would provide what was conspicuously lacking, namely, self-incriminating evidence. ... It is of critical importance to notice what they did. They accused him of participation in the crime. [His Lordship then quoted the passage from Walkers referred to above] I go further and say that the proper practice is now so long and so well entrenched that it may be taken that a full caution before a charge is made is a requirement of the law itself. The reading of a charge is calculated to provoke a response from the accused and it is quite essential that he should know, in advance, of his right to silence, and of the use which may be made of any response which he chooses to make. To charge an accused person without cautioning him is to put pressure upon him which may induce a response and I have no doubt that by accusing Gray, although not in the formal language of a charge, the accusation was clearly calculated, as a formal charge is calculated, to induce a response from the person accused. The accusation placed pressure upon Gray and I am persuaded that since no caution was administered before it was made, it is impossible to regard the statement made in response to it as spontaneous and voluntary. It was plainly induced

by the accusation and in the circumstances it was induced by unfair means. It cannot be left out of account either that no caution was administered when the first sentence uttered by Gray made it plain that he intended to make a statement and that no caution was administered when it became obvious that he was about to incriminate himself. As the evidence of the police officers demonstrated it would have been proper practice to caution a suspect in Gray's position before he was allowed to proceed with a statement and in my opinion nothing in section 2 ... excuses compliance with that practice."

Lord Cameron appears to have had rather more sympathy for the police, and he pointed out that it is not immediately apparent what useful purpose the provision in section 2(7) serves, but nevertheless he agreed that the absence of a caution in this case was fatal.

If Tonge was initially thought to establish the simple rule that any statement to the police had to be preceded by a caution in order to be admissible, it is now apparent that this is not so.

In Wilson v Heywood 1989 SLT 279 the report is less than ideally explicit but it appears that the suspect was cautioned and questioned in relation to one specific incident to which he made an incriminating statement. Thereafter the police, without

administering a further caution, questioned him about other matters and further admissions were made. In accordance with "common practice" the police appear to have cautioned Wilson a second time after he had made these further admissions but before they had been noted, a practice which it is submitted seems somewhat pointless. In any event, the High Court distinguished Tonge without any hesitation on the basis that no caution at all had been given in that case whereas in the instant matter

"... before any questioning took place at all he was given a common law caution and was thus aware that he was not obliged to say anything and that anything he did say would be taken down and might be used in evidence." *

In Custerson v Westwater 1987 SCCR 389, the charge was one of contravening section 1 of the Prevention of Crimes Act 1953. The police had received information from one witness that the accused was in possession of a knife. Having heard that the police were looking for him, the accused went voluntarily to the police office. After some conversation about other matters, an officer informed him of the complaint, to which the accused made no response, and the officer then asked him if he had a knife. No caution was administered. The accused thereupon produced a knife and said, "Twice before I have nearly been strangled by people and I have the knife to protect myself. I carry the knife on my person and with me all the time." The trial Sheriff admitted the statement despite objection and his decision was upheld on

appeal. Custerson's counsel argued that the case was on all fours with Tonge, but, strangely, conceded that the question "Do you have a knife" was itself unobjectionable. The High Court distinguished Tonge on the basis that in the instant case there was no question of the police going with the intention of charging the accused in the knowledge that they had insufficient evidence and with the object of securing, if they could, an incriminating response.

Custerson was followed in the very similar case of Wingate v Mackinnon 1989 Crown Office Appeal Circular A27/89 and this time there was no concession by defence counsel as to the propriety of the police question. In rejecting the appeal, the Court again distinguished Tonge and stated:

"In the present case there was no question of a charge being levelled or made against the appellant. He was simply asked a question. We are quite satisfied that, at the preliminary stage of any investigation, such as this was, police officers are entitled to ask questions without administering a caution. Quite apart from that, bearing in mind that the offence in this instance is having an offensive weapon without lawful authority or reasonable excuse, it can be readily understood that, if a preliminary question such as was put in the present case namely, why was he carrying the pick axe handle, had been preceded by

a caution, *the result might be to inhibit the person questioned from putting forward a reasonable excuse which he might have for having the weapon there.*⁴ That reinforces our opinion that there was nothing objectionable in the asking of the question in this case although no caution had been administered."

The idea that cautioning is undesirable because it might stop somebody talking to the police is certainly novel and it remains to be seen whether there will be a retreat from Tonge or whether these cases simply represent an over-optimistic interpretation of that case by defence counsel.

Notes

1. If any authority is needed for this proposition it may be found in HM Advocate v Friel 1978 SLT(N) 21
2. Lord Justice General p512
3. Lord Justice Clerk p281
4. Emphasis added

(e) The Evidential Effect of the Right to Silence

Silence when questioned by the police, in the early stage of an inquiry, may, in certain very limited circumstances, be regarded as a "criminative circumstance" in the doctrine of the recent possession of stolen property. ' Beyond this, however, silence in the face of police questioning is not evidence against the accused. If the accused, when properly cautioned, exercises his right to silence and says nothing to the police, "no legitimate inference in favour of a prosecutor can be drawn from the fact

that a person, when charged with crime, either says nothing or says that he has nothing to say. He is entitled to reserve his defence and is usually wise to do so." ²

Whether such a reservation of the defence may be the subject of adverse prosecutorial or judicial comment at the trial does not appear to have arisen, but it is submitted that such comment would be improper, particularly when the accused has been told in terms that he is not obliged to say anything.

Notes

1. Fox v Patterson 1948 JC 104. The doctrine itself is considered in GH Gordon *The Burden of Proof on the Accused* 1968 SLT (News) 29
2. Robertson v Maxwell 1951 JC 11, Lord Justice General at p 14. See also Wightman and Collins v HM Advocate 1959 JC 44

(ii) England(a) Introduction and Early History

The general principles relating to the right to silence of suspects are similar north and south of the border.

"It seems to me quite clear that though every citizen has a moral duty, or if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority." ' "

An English suspect for the present enjoys the right to silence every bit as much as his Scottish counterpart and the English police are required to inform a suspect firstly that he has this right and secondly of the consequences of giving up the right by administering a caution at certain stages of the proceedings.

The reality of police questioning was accepted much earlier in England than in Scotland although early practice was haphazard and even in the early 1840s evidence of answers to police questioning was regarded as admissible though no caution had been given. In 1842 Joy wrote:

"So in confessions made to constables or others, it is not only unnecessary to prove, on the part of the prosecution, in order to render a

confession admissible, that the prisoner was cautioned or told that what he would say would be used in evidence against him; but such confession, if voluntary and free, is admissible, although it appears that he was *not* cautioned." 2

As has already been mentioned, Section 18 of the Indictable Offences Act 1848 for the first time set out a form of caution. This particular formula was intended for use at the stage of committal proceedings but since the prosecution had to prove that any statement made by the prisoner was made voluntarily, the practice grew up of the police telling the prisoner that he need not say anything unless he wanted to:

"By the law of this country, no person ought to be made to criminate himself, and no police officer has any right, until there is clear proof of a serious crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to." 3

Notes

1. Rice v Connolly [1966] 2 QB 414, per Lord Parker CJ
2. Joy p46
3. R. v Barriman (1854) 6 Cox CC 388, per Erle J

(b) The Judges' Rules and Administrative Directions

The police themselves formulated their own rules of good conduct in the Police Code of 1882. The preface to this was taken from an address to constables by Mr Justice Hawkins (later Lord Brampton) a leading criminal judge of the day and it can be seen as the forerunner of the Judges Rules of some thirty years later:

"When a crime has been committed, and you are engaged in endeavouring to discover the author of it, there is no objection to your making enquiries of, or putting questions to, any person from whom you think you can obtain useful information. ...

When, however, a constable has a warrant to arrest, or is about to arrest a person on his own authority, or has a person in custody for a crime, it is wrong to question such person touching the crime of which he is accused. Neither judge, magistrate, nor juryman can interrogate an accused person - unless he tenders himself as a witness - or require him to answer questions tending to incriminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody. On arresting a man a constable ought

simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases. For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong."

The Judges Rules came about when, in 1906, the Chief Constable of Birmingham wrote to the Lord Chief Justice asking him to clarify the circumstances in which a caution should be administered. This request came about because on the same circuit two judges had given opposite rulings, one censuring a constable for having failed to caution and another censuring a different officer for having administered a caution in almost identical circumstances. The Lord Chief Justice consulted with the other judges of the Kings Bench and gave the requested ruling but other similar requests appear to have been made and ultimately the first four of the Judges Rules were formulated in 1912. Further rules were formulated in 1918 and a new set of Rules was promulgated in 1964. '1

The 1912 Rules advised a police officer to caution in the following situations:

(1) when he had made up his mind to charge a person with a crime he should caution before asking any questions or any further questions if questioning had already begun (Rule 2);

(ii) persons in custody should not be questioned without being cautioned (Rule 3); and

(iii) if a prisoner wishes to volunteer a statement, he should receive the usual caution (Rule 4).

Rule 6 covered the situation where a statement was made before there was time to caution the prisoner. Such a statement was not inadmissible merely because no caution had been given, but the caution was to be given as soon as possible.

The old form of police caution ran "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence against you." The Rules discouraged the use of the words "against you" on the basis that they might prevent an innocent person making a statement which might assist to clear him of the charge.

The original Rules were regarded as forbidding the questioning of suspects in police custody and in practice they were frequently evaded. The 1964 restatement made the Rules somewhat clearer and in particular legitimised questioning of a person in custody. The police officer was now required to caution in the following situations:

(1) as soon as he had evidence which would afford reasonable grounds for suspecting that a person had committed an offence, before questioning or further questioning that person (Rule 2);

- (ii) when a person was charged or informed that he might be prosecuted for an offence (Rule 3a);
- (iii) in the exceptional case where it was necessary to question the accused after charge (Rule 3b); and
- (iv) where the police brought to the attention of a person who had been charged, a written statement made by a co-accused and the person said he would like to make a statement or started to say something (Rule 5).

The question of what constituted "evidence which would afford reasonable grounds for suspecting" was considered by the Court of Appeal in R. v Osborne and Virtue [1973] QB 678 and Lord Justice Lawton laid down the following test:

"A police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer the charge. He reaches a stage when he has got the beginnings of evidence. It is at that stage that he must caution ... he is not bound to caution until he has got some information which he can put before the court as the beginnings of a case."

This case was followed in Walmsley v Young [1974] Crim LR 548 where a DHSS investigating officer had no evidence against the accused until she got him to admit that a signature on a form was his. She therefore did not caution him but simply asked him whether the signature was indeed his, which he admitted. It was

held that she was correct and no caution was necessary until the suspect had supplied the evidence against himself by his admission. (One may take leave to wonder what point would be served by cautioning thereafter).

In R v Halford (1978) 67 Cr App R 318 the Court of Appeal also held that where the police were taking preliminary witness statements from a number of people involved in an affray they were not required to check each person individually to see whether they had evidence against him within the meaning of Rule 2 so as to make it necessary to administer a caution.

The Judges Rules were never "real" law, only administrative directions and a breach of them would not of itself render a confession inadmissible. The court would take the breach into account in deciding whether to exercise its general discretion to exclude the confession as not being voluntary:

"The test of the admissibility of a statement is whether it is a voluntary statement. There are certain rules known as the Judges Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court

can always refuse to admit it if the court thinks there has been a breach of the Rules." ²

It follows from this that a failure by the police to administer a caution would not necessarily have resulted in a confession being ruled inadmissible, although clearly that would have been a possible consequence and one made even more likely where failure to caution was coupled with other improprieties. ³ Mirfield notes ⁴ that there is no reported post-war English case in which an appeal court has overturned the decision of a trial court to admit a confession solely on the basis that one or more of the required cautions was not given.

Notes

1. The 1964 Rules are reported at [1964] 1 All ER 237. They were reissued by the Home Secretary in Annexe A to Home Office Circular 89/1978 the full text of which is set out in Archbold §15-46.
2. R v May (1952) 36 Cr App R 91, per Lord Goddard p93
3. eg R v Williams [1979] Crim LR 471 where the failure to caution (admittedly only affecting one out of four interviews) was coupled with a failure to observe a Home Office Circular on interviewing the mentally handicapped.
4. p146

(c) The Police and Criminal Evidence Act 1984

The Judges Rules were swept away by the Police and Criminal Evidence Act 1984 (hereinafter referred to as PACE) which now provides an elaborate series of Codes of Practice regulating police behaviour in various areas including the questioning of suspects. The questioning Code now requires cautioning in the following situations:

- (1) where the officer intends to question a person, whom there

are grounds to suspect of an offence, for the purpose of obtaining evidence which may be given to a court in a prosecution the person must be cautioned; no caution is necessary where the questioning is for a purpose other than evidence-gathering (eg establishing the person's identity or his ownership of a vehicle) (Par C:10.1);

(ii) a person not under arrest who is being or is to be interviewed at a police station or other premises must be cautioned and must also be told that he is not under arrest and is not obliged to remain (Par C:10.2);

(iii) a person not cautioned immediately prior to arrest must be cautioned on arrest unless this is impractical because of his condition or behaviour (Par C:10.3);

(iv) where there has been a break in questioning under caution, the interviewing officer must ensure that the suspect is aware that he remains under caution and in cases of doubt must caution him again when questioning resumes (Par C:10.5)

(v) when a detained person is charged or informed that he may be prosecuted for an offence he must be given a written notice showing particulars of the offence, which notice must begin with a caution (Par C:17.2)

(vi) in the exceptional case where questioning is permissible after charge, the accused must be cautioned before being questioned (Par C:17.5)

The caution laid down (in Par C:10.4) is "You do not have to say anything unless you wish to do so, but what you say may be given

in evidence." It is specifically provided that minor deviations do not invalidate the caution as long as its sense is preserved and the officer administering it is permitted to explain the terms and significance of the caution where the suspect has difficulty understanding these. ¹

The PACE Code is considerably more comprehensive than the Judges Rules ever were and certain of the requirements, notably that of cautioning at the time of arrest, are new. ² Looking back to the 1912 Rules, a most striking feature is the way in which the police have been required to caution a suspect at progressively earlier stages of their inquiries. In 1912 a caution was not required until the officer had made up his mind to charge the person with a crime. In 1964 the test was whether the officer had evidence which would afford reasonable grounds for suspecting that the person had committed an offence and, as explained above, this was interpreted to mean evidence which could be put before a court. Now it is simply a matter of grounds to suspect; there is no longer any requirement for the grounds to be "reasonable". It remains to be seen how the courts will interpret this provision of the Code and whether they will follow Shaaban Bin Hussein v Chong Fook Kam [1969] 3 All ER 1626 where Lord Devlin described "suspicion" in the following terms:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking. 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation of

which the obtaining of prima facie proof is the end. ... Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all ... "

As with the Judges Rules, the PACE Code is not law and a breach (although possibly amounting to police disciplinary offence) will not *per se* render a confession inadmissible. The test of whether the statement was voluntary has now given way to whether it was obtained by oppression or in consequence of anything said or done which was likely to render it unreliable. ³ The courts also have a general discretion to exclude evidence where its admission would be unfair. ⁴

A failure to caution in proper terms appears to have come before the courts only once since PACE. In R v Saunders [1988] Crim LR 521 the defendant was told "I must remind you that you are under caution and that anything you say may be given in evidence." There were also other breaches of the Code in relation to notes of the interview. Unsurprisingly, evidence of the interview was ruled inadmissible. There had been a clear breach of paragraph C:10.4 of the Code; the vital part of the caution, ie the fact that the defendant did not have to say anything, had been omitted. ⁵

It may be that since the Code expressly permits the police to deviate from the wording and explain the terms and effect of the

caution, the English courts will require to consider more frequently the motives of the police in departing from the specified formula (which is so brief that no police officer should have any difficulty remembering it). It also seems probable that decisions on admissibility will vary from case to case depending on whether the court holds that the police have acted in good faith or not.

Notes

1. Notes C; 10C & D
2. The 1964 Rules and the original Code are compared in Mirfield p144 *et seq*
3. PACE s76(2)
4. *ibid* s78 R v Keenan [1989] Crim LR 720
5. *cf* HM Advocate v Docherty 1981 JC 6

(d) The Evidential Effect of the Right to Silence

The law of England in relation to the evidential effect of silence in face of accusation is confusing and even English commentators find it difficult to expound. ¹ The general rule appears to be that silence in the face of an accusation is not evidence against the accused although this has to be qualified by the possibility of the accused, in a situation where denial would be natural and expected, being taken to accept the statement so as to make it in effect his own - *qui tacet consentire videtur*. ² Clearly there can be no question of any reaction being expected where the accused has been cautioned that he need not say anything and accordingly, as a general principle, the accused's silence after caution cannot be evidence against him. ³ It also follows that silence in the face of accusation by itself cannot amount to corroboration of the evidence against the accused.

It was held in Hall v R. [1971] 1 All ER 322 that where a police officer, without cautioning, informed the accused of an allegation by another person, his silence could not be taken as an acknowledgment of the truth of the allegation. The caution does not "give" the accused the right to silence, it merely reminds him that he possesses it at common law and in Hall the Privy Council held that the fact that the accused had not been cautioned did not mean that his silence was not in exercise of that right. It appears, however, that Hall will not be followed where the accused has a solicitor present at the time of questioning since in that situation the parties are on equal terms. ⁴

The extent to which the judge might, under the present law, comment on the failure of the accused to answer and, in particular, to disclose a defence in advance was considered in R v Gilbert (1977) 66 Cr App R 237. The Court of Appeal held that no comment was permissible which implied to the jury that they were entitled to draw an inference adverse to the accused from his exercise of the right to silence.

Notes

1. Phipson & Elliot *Manual of the Law of Evidence* p171-177; Archbold §§15-67 - 15-70
2. R v Christie [1914] AC 545; cf Parkes v R (1977) 64 Crim App R 25. The rule itself is ancient - see Joy p77
3. R v Lecky [1944] KB 80. For discussion of this case and earlier authorities see (1944) 60 LQR 33 and 130
4. R v Chandler (1976) 63 Crim App R 1

(iii) Does the Reality of Police Interrogation Respect the Suspect's Right to Silence?

Apart from one study into tape recording of police interviews¹ no recent research has been carried out into police interviewing techniques in Scotland. However, there have been a number of important studies in England and the picture which emerges is not encouraging for those who revere the right to silence. As DJ Galligan points out, "... despite the caution, the evidence tends to show that the police expect the right of silence to be waived and the suspect to talk. That expectation governs their whole approach to interrogation and results in subtle but pervasive pressures being applied to encourage disclosure."²

It is self-evident that a legal right is only meaningful if the person concerned is aware of its existence. If it is accepted that the purpose in administering a caution is to inform the suspect (a) that he has the right to silence and (b) of the consequences of waiving that right, it must follow that the caution ought to be administered in a way which makes this apparent to the suspect and enables him to take an informed decision on an appropriate course. The research indicates that in England this frequently did not happen.

In his study of interrogation in four police stations, Softley noted "... in several cases the way in which the caution was delivered, or the manner of its phrasing, seemed to present the

right to silence as an option which the suspect was not seriously expected to entertain." ³ Recently the same practice has been noted in the advising of suspects of their rights under PACE. ⁴ Although the American position is outwith the scope of this work, research suggests that a similar problem may also exist in that country. ⁵

What is also clear from the research however is that despite cautioning, the majority of English suspects in fact choose to waive their right to silence and make statements to the police. Of the statements made many are full confessions. For example in one survey, ⁶ out of a total of 400 defendants at Worcester Crown Court, 394 had been interrogated by the police. Of these no fewer than 215 made a full, written confession and a verbal statement, 35 made a verbal confession to some or all of the charges but no written statement, 29 made a verbal confession to some or all of the charges and also a written statement. A further 57 made verbal or written statements which did not amount to confessions but were classed as damaging. These results are broadly in line with other studies carried out by other researchers in other locations.⁷

In the absence of comparable Scottish research findings, it is impossible to say whether the behaviour of the Scottish police is similar or whether Scottish suspects are as forthcoming with confessions or other damaging statements. Wozniak's research was undertaken for one specific purpose and did not purport to be a

study of police interviewing techniques, but his figures do suggest that in Scotland the number of suspects confessing or making damaging admissions is somewhat less, at least when they are being tape recorded. ²

Given the generally higher standard of proof in Scotland, and particularly the almost universal requirement for corroboration, it would be surprising if the police were not on occasions tempted to apply pressure to secure an unequivocal admission of guilt. This possibility must surely be increased by the recent decisions of the High Court relating to corroboration of confessions. The question of evidential sufficiency of confessions will be considered later ³ and at this stage it is sufficient to note the position in general terms.

Firstly, in a line of cases beginning with Sinclair v Clark 1962 SLT 307 the High Court have indicated that where there is such an unequivocal admission of guilt, the corroborative evidence need only amount to "a sufficient independent check" of the admission. No subsequent judge has gone as far as Lord Justice Clerk Thomson did in Sinclair when, in an observation unworlly even by the then standards of the High Court, he described the requirement for an admission to be corroborated at all as "a somewhat archaic rule the merit of which under modern conditions is not always obvious" but it is now an established rule of law that what is required is extrinsic evidence consistent with the confession of guilt.¹⁰ In other words the evidence required to corroborate a confession is

less than that required to corroborate another source of evidence.

The second factor which, it is submitted, must increase the temptation for the Scottish police to press for a confession is the way in which the High Court has developed the concept of the special knowledge admission. This began in a pure and totally unobjectionable form in Manuel v HM Advocate 1959 SLT 23 where the police could not possibly have known the whereabouts of a corpse unless Manuel had told them. However the position has now been reached where so-called special knowledge confessions are being admitted despite the fact that the police know all the details which subsequently appear in the confession long before the suspect is even apprehended.¹¹ It is submitted that the danger of police malpractice is self evident.

In an article arguing against the complacent Scottish assumption that the Guildford Four case could not happen here,¹² Professor Ian Willock points out, "Nowhere do the [Scottish] judges even hint at the possibility that the police might fabricate a confession or, more plausibly, touch up a genuine one to make it more convincing. Yet the police in cases [which attract a lot of public attention] are under tremendous pressure from the media to get results and their own professional pride is at stake. It would not be surprising - indeed almost excusable - if they were to embellish evidence to ensure the conviction of someone who they were convinced was the criminal. ... In not alluding to that

possibility judges are either remarkably naive in assuming that a confession against the interests of the accused is thereby likely to be true, ignoring the possibility that it is not, or not wholly his; or are confirming the hypothesis that they see themselves as conducting a war against crime in alliance with other forces of the law and order apparatus."

To this sentiment could be added the possibility that the confession had been obtained by a breach of the right to silence subsequently denied by the police. It is trite to point out that in cases such as HM Advocate v Docherty or R v Saunders (*supra*) the evidence of the confession is only likely to be excluded if the police are either honest enough to admit their own transgressions or too stupid to anticipate the consequences of doing so and it is equally trite to point out that the rights of the suspect require protection against this sort of malpractice. The various proposals for increasing the protection of the suspect will be considered later.

Notes

- 1, Wozniak *The Tape Recording of Police Interviews with Suspected Persons in Scotland* (SHHD 1985)
- 2, *The Right to Silence Reconsidered*, 1988 Current Legal Problems 69
- 3, *Police Interrogation; an observational study in four police stations*, Home Office Research Study No 61 (London, 1980) p28
- 4, A Sanders and L Bridges in *The Independent*, 1st December 1989 recount an incident which arose when one of them, in the course of researching the operation of the duty solicitor scheme, unexpectedly entered a charge room. Two shoplifting suspects were being perfunctorily read their rights. The researcher was asked by the police officer if he was "the chap from Mothercare" to which he replied that he was "the chap from Birmingham University" at which point the officer "... flushed and began again, slowly and deliberately."
- 5, For a discussion of some of the American studies see Zander *The Right of Silence in the Police Station and the Caution* in Glazebrook (ed) *Reshaping*

- the Criminal Law* p344
6. Mitchell [1983] Crim LR 596
 7. eg Zander [1979] Crim LR 203; Baldwin & McConville *Confessions in Crown Court Trials* (London, 1980)
 8. Wozniak op cit p56 et seq
 9. infra chapter 7
 10. Hartley v HM Advocate 1979 SLT 26, Lord Dunpark at p33
 11. Smith v McPherson (1983) unreported, Crown Office Appeal Circular A5/83; cf Wilson v HM Advocate 1987 SCCR 217
 12. (1989) 158 SCOLAG 168

3.5 Investigators other than the Police

Investigators other than the police may be divided into those who enjoy special statutory powers to require information and those who do not.

(i) Where there is a special statutory power to require information

Several statutes, typically those involving "white collar" crime, give to investigators the power to require a suspect to answer questions and/or produce documents. These powers may result in a drastic curtailment of the right to silence although in every case it is necessary to refer to the specific terms of the statute concerned to see precisely what is authorised. Only a few examples can be given here. ¹

For example by Sections 434 of the Companies Act 1985 a Department of Trade and Industry inspector who is investigating the affairs of a company may require officers and agents of the company to attend before him, produce relevant books and documents and "otherwise give ... all assistance in connection with the investigation which they are reasonably able to give." The inspector may examine on oath and a person who fails to attend, to produce documents or to answer questions is liable to be held in contempt of court. ² Moreover, any answer which is given to the inspector may be used in evidence against the maker.

Similar provisions may be found in Sections 177 and 178 of the Financial Services Act 1986 where the inspector is investigating "insider dealing." ³

By contrast Section 2 of the Criminal Justice Act 1987 permits the Director of the Serious Fraud Office to require a person under investigation to attend before him and answer questions or otherwise furnish information with respect to any matter relevant to the investigation. However a statement so made is only admissible in evidence against the maker if he gives evidence inconsistent with it or if he is prosecuted under Section 2 (14) for making a false statement.

Section 20(2)(j) of the Health and Safety at Work Etc Act 1974 empowers an inspector under that act to require any person whom he has reasonable cause to believe to be able to give information relevant to any examination or investigation within the inspector's field of responsibility to answer such questions as the inspector may think fit to ask and the inspector may also require a person to sign a declaration of the truth of his answers. However, Section 20(7) expressly provides that no answer given under subsection (2)(j) shall be admissible in evidence against the person giving it or their husband or wife.

Notes

- 1, See generally J.D. Heydon *Statutory Restrictions on the Privilege Against Self Incrimination* (1971) 87 LQR 214 and Mirfield pp92-93
- 2, For a brief discussion of this topic see J. Plumptre *The Right of Silence Disappears* (1989) 139 New LJ 1070.
- 3, Section 436

(ii) Where there is no special statutory power

Where the investigator is not possessed of some special statutory power to require answers to questions, it appears that the general principle of fairness will apply in relation to his questioning of a suspect. ¹

In Morrison v Burrell 1947 JC 43 a postmaster was suspected of misusing his position to place fraudulent horseracing bets. He was seen by post office investigators, a caution was given and the accused's confession was held admissible. Lord Justice General Cooper drew a distinction between a police investigation and the present situation which he described as "a domestic investigation by the proper officials of a public department into an apparent irregularity in the conduct of a public service." Lord Moncrieff added that he saw no difference between the present situation and the interrogation by senior employees of an employee of a commercial enterprise. ²

In McCuaig v Annan 1986 SCCR 535 a shop manager had, without cautioning a suspected shoplifter, asked her why she had stolen certain articles. The suspect had then made an incriminating reply. The fairness test was again applied and it was pointed out that the manager was not a policeman and could not be expected to be aware of how to administer a caution.

In Irving v Tudhope 1987 SCCR 505 the situation was very different. Here two officials specifically employed to investigate

television licence evasion called at the appellant's house. They were aware that she did not appear on the current list of licence holders and on obtaining entry to her house they observed a television set in operation. Without cautioning her they asked whether she held a licence and she admitted that she did not. In upholding the conviction the High Court referred to McCuaig v Annan and pointed out that there was nothing to show that the officials even knew how to administer a caution. In any event there was no question of them trying to provoke an incriminating reply. The earlier case of Walkingshaw v McIntyre 1985 SCCR (Sh Ct) 389 was overruled.

While the actual decision to uphold the conviction in Irving is entirely consistent with cases such as Custerson v Westwater and Wingate v Mackinnon ³ it is submitted that officials who are employed for the specific purpose of investigating whether members of the public are breaking the law are in a very different position from shop managers or senior employees in a commercial undertaking, and should be aware of the requirements of the law in relation to cautioning. It remains to be seen how the High Court will deal with a failure to caution by a non-police investigator after the preliminary stage of the inquiry is past. ⁴

Although there is no case directly in point, it scarcely needs saying that an attempt by the police to use a person, not a member of the police force, to circumvent a suspect's right to

silence will result in any statement made being held to be inadmissible. ⁵

In England Rule 6 of the 1964 Judges Rules obliged "persons other than police officers charged with the duty of investigating offences or charging offenders" to comply with the Rules "so far as may be practicable." In R v Nichols (1967) 51 Cr App R 233 it was held that the intention was to apply the Rules to professional investigators who were not police officers. The circumstances of Nichols were very similar to McCuaig v Annan (*supra*) and the court had no difficulty in holding that a store manager was not a professional investigator and was not bound to administer a caution before questioning a suspected shoplifter.

PACE makes no specific provision for confessions to investigators other than police officers but the terms of section 76(2) are clearly wide enough to allow the court to exclude such a confession (which need not have been made to a "person in authority" - section 82(1)) if it is satisfied that the suspect's right to silence has been infringed.

One point which does not appear to have arisen either in Scotland or England is the admissibility of a statement made to an official who has a statutory power to require answers but who does not in fact use his power, as for example where a person volunteers information to a Factories Inspector that he has been responsible for an industrial accident. *Prima facie* such a statement would

appear to be admissible against its maker, but once against the writer would submit that in such a situation admissibility should be subject to the same criteria as exist in relation to the police. If the right to silence is to exist at all it should exist in relation to any other state investigators as it does in relation to the police.

Notes

1. HM Advocate v Friel 1978 SLT (N) 21; Renton & Brown 518-39
2. cf Waddell v Kinnaird 1922 JC 40. The Walkers (p37 540) and Macphail (par 20,19) consider that this decision would not be followed today,
3. 1987 SCCR 389 and unreported CO Circular A27/89 respectively, discussed *supra*
4. cf Lawrie v Muir 1950 JC 19 where it was said that inspectors employed to check on the use of milk bottles were persons who "ought to know the precise limits of their authority",
5. cf Waddell v Kinnaird (*supra*), Lord Ormidale at p52; HM Advocate v Campbell 1964 JC 80. See also Lord Cameron *The Scottish Practice in Relation to Admissions and Confessions by Persons Suspected or Accused of Crime* 1975 SLT (News) 265 especially p268

3.6 The Debate on the Right to Silence

(1) Should the Accused be permitted to give Evidence?

To modern lawyers the above question may seem strange, even faintly ridiculous. However as has already been pointed out, prior to 1898 it was a long established rule of Common law in both Scotland and England that the accused was incompetent as a witness in his own defence.

Dissatisfaction with the accused's incompetence was recognised in England earlier than in Scotland and from around the 1830s English judges began to allow defendants to make unsworn statements from the dock. The probative value of such a statement was obviously low since it was neither given on oath nor tested by cross-examination.

In the latter half of the nineteenth century, before the Criminal Evidence Act 1898, several individual statutes allowed the accused the opportunity to give evidence on his own behalf. These provisions led to absurd anomalies, especially in England, where, for example, a person who entered a house and committed rape was competent in his own defence, but a person who entered the same house and committed murder was not.

In 1879 the (English) Draft Code had proposed to supercede all the individual statutory provisions with a general rule allowing a defendant to be sworn at his own option and allowing him to be

cross examined on his own evidence. The Draft Code was rejected by Parliament (to the lasting detriment of the English law, according to Glanville Williams) but this particular provision was rescued and eventually formed the basis for the 1898 Act. ³

There does not appear to have been so much overt dissatisfaction with the situation in Scotland. The issue did not trouble the witnesses who gave evidence to the Colonsay Commission. Such discussion as there was concerned whether the accused should have the right to insist on his declaration being read at the trial, most witnesses who were asked considering that he should. ⁴ It simply did not seem to occur to anyone that the accused might actually give evidence.

In summary cases the accused would often not have had the opportunity to emit a declaration and the difficulty caused by his incompetence as a witness was thus more acute than in solemn procedure. Occasionally ingenious arguments were employed to try to get round the problem although such arguments were uniformly unsuccessful. The case of Blair v Mitchell (1864) 4 Irv 545 (a case which raises several interesting matters) will serve as an illustration. ⁵ In this case the accused were prosecuted under the Salmon Fisheries (Scotland) Act 1862. In the Sheriff Court it was argued successfully that the case was quasi-civil and the accused were thus competent witnesses. ⁶ The accused were allowed to give evidence on oath and the charge against them was found not proven. The prosecutor appealed and on appeal it was held

(with Lord Deas dissenting) that the proceedings were clearly criminal and the accused ought not to have been permitted to give evidence. Lord Ardmillan expressed himself strongly:

"I consider this case as of the utmost importance, because it is contrary to the most settled and most sacred principles of our law that a prosecutor should have the power to put on oath and examine against himself a party whom he accuses of an offence"

This statement encapsulates the issue - the courts in protecting the accused from being compelled to give evidence against himself overlooked the fact that this also prevented the accused who wished to give evidence from doing so.

Why was this principle "settled and sacred" as Lord Ardmillan put it? The reason can be found in the Latin maxim *nemo tenetur jurare in suam turpitudinem*. One of the arguments most strongly deployed against giving the accused the right to testify was the possibility of a guilty accused being forced into the position of having to admit his guilt or commit perjury. In other words the sacredness of the oath was paramount. To modern secular eyes this seems absurd and it misses the point, obvious nowadays, that an innocent accused might well have been convicted by the perjured evidence of a prosecution witness without any opportunity to tell what was in fact the truth. To quote Professor Cross (writing from an English perspective but equally

applicable to Scotland): "It has always seemed ... to be one of the nicer ironies of legal history that a privilege against self-inculpation should have been invoked in support of a bar on self-exculpation, that the plea which prevailed in England up to the last two decades of the nineteenth century should have been 'Let us not permit the innocent to prove their innocence by their evidence in chief lest the guilty should reveal their guilt in cross-examination.'" 7

Before Hume's time the fear of perjury had been carried to its logical conclusion and no evidence contrary to the libel at all was admitted. 8 As Mackenzie unequivocally put it "To admit contrary probations were to open the door to perjury." This practice appears to have continued until the early eighteenth century but it was extinct by Hume's own day.

A similar practice existed in England, apparently based on the premise that since the burden of proof rested on the prosecution, the defence need do nothing, hence the defence could neither call witnesses nor engage counsel. If the crown proved its case, that was the end of the matter; if it did not the failure would be apparent despite the silence of the defence. 9

Hume pointed out the obvious danger that such a practice might "powerfully tempt to perjury on the part of the prosecution." In his view the truth could only be ascertained by comparing the testimony on either side: "And where the interests at stake are

so important, the light is not to be shut out, and injustice to be done from too anxious a dread of perjury: the care of conscience must be left on these occasions where it naturally lies, with the witnesses themselves."

Hume does not extend the same strictures to the accused's situation and indeed he seems to have approved of the notion that the accused should not give evidence. In one particular crime, that of usury, statute provided that proof might take the form of reference to the pannel's oath a practice which Hume describes as "... repugnant to the ordinary tenor of our practice ... that a person should be placed in this distressing situation, where conscience is at war with the strongest propensities of our nature." 10

Another argument deployed against giving the accused the right to testify was the effect that it would have on an accused who chose not to give evidence. The prosecutor had to prove the accused's guilt by independent evidence and if there was any failure in the proof, the prisoner had to receive the benefit of the doubt. If an accused who had the right to do so was to decline to go into the witness box that declinature would, it was said, supply the one weak point in the prosecutor's case and resolve the doubt the benefit of which presently went to the accused. 11 In other words the burden of proof on the prosecution would be lightened and the permission to testify would in fact become a compulsion to do so.

Others opponents were concerned for the welfare of the accused who, it was said, was liable to be confused and terrified by cross-examination which would tend to prejudice the jury against him. One anonymous writer was concerned that the accused might be tried for perjury as well as the principal offence - if he were convicted of the principal offence it would be harsh to punish him a second time, particularly as his attempt to deceive had failed; if he were acquitted he would effectively be tried a second time. ¹² Accused persons have indeed been prosecuted for perjury at their own trials but this has been infrequent and in unusual circumstances and, although such prosecutions are still competent in both Scotland and England today, they are wholly exceptional. ¹³

It was suggested that judicial impartiality might be compromised, the new Act being seen as having a tendency to turn a judge into a prosecutor or cross-examiner, this being a particular danger in the (apparently not infrequent) event of the prosecution advocate being young and inexperienced. Hindsight shows that this danger, although not by any means fanciful, has not been as much of a problem as was anticipated.

One writer suggested a compromise. Instead of the accused being given the right to testify on oath, the judge should, one by one, direct his attention to the heads of the evidence against him and invite him, if he wished to do so, to provide an explanation. ¹⁴

Finally, it was said that a jury would, more or less, expect the prisoner to lie on oath and the value of his testimony would be little increased by being on oath. ¹⁵ This may well be a valid point, and it is certainly not one which can be discounted, even today, but the fact that he might be disbelieved is hardly a reason for stopping the accused from telling his side of the story at his trial.

Notwithstanding the vigorous arguments against it in the House of Commons, ¹⁶ the 1898 Act passed on to the statute book in what Cross describes as "a great victory for common sense." As has already been shown, ¹⁷ the Act contained provisions designed to lessen as far as possible any effects which might be seen as compelling the accused to testify and the right to make an unsworn statement from the dock was retained. ¹⁸

Even after the 1898 Act was in force the debate continued in much the same vein. One indignant correspondent wrote to the Scots Law Times: "Accused persons are now going into the witness box and, in many cases, denying everthing, even facts conclusively proved. It is not a pleasant spectacle, and it must do harm." The author then proceeded to advocate the abolition of the oath before concluding "If we cannot avoid a flood of falsehood in the witness box, we can at least stop the profanity of confirming it with an oath." ¹⁹

In an article in the Scottish Law Review of December 1900 ²⁰ the author (whose grasp of the differences between Scottish and English procedure and terminology was, at best, shaky) claimed that the previous practice was more beneficial to the accused and argued that the Act had removed the privilege against self incrimination, one of the "bulwarks of criminal defence." He was particularly critical of the operation of the Act in the burgh courts and finished by describing the Act as "inadequate and unworkable" and "at variance with traditional practice."

Even as late as 1933 another (apparently English) writer in the Scots Law Times showed a lingering degree of ambivalence. ²¹ The language of this particular article, liberally peppered with references to "terrors of cross-examination," "back to the wall," "rigour of the game" and the like, invites mild derision today but at least the author was prepared to concede that the Act has probably been beneficial to innocent accused. However he considered:

"It would not be surprising if a preponderance of legal opinion in the British Empire were found to support the view that the reception of prisoners' evidence, while helpful to innocent persons, tends to secure the conviction of persons who are guilty in fact, but who would not be convicted if the law had not made them competent witnesses. Whether that is a desirable result is a question that every country contemplating the adoption of the

British legislation of 1898 must answer for
itself."

Notes

- 1, eg Merchant Shipping Act 1871 Section 11 (on which see HM Advocate v Watt (1873) 2 Couper 482); Criminal Law Amendment Act 1885 Section 20
- 2, Hansard 4th Series vol LVI col 978 (the Attorney General); see also *ibid* vol LIV col 1172 (the Lord Chancellor)
- 3, Williams *The Proof of Guilt* (London, 1963) p46 et seq
- 4, See eg Q5737 et seq; Q8870 et seq,
- 5, Other examples are listed in H.H. Brown *The Evidence of the Accused in Criminal Procedure* (1898) 5 SLT 182
- 6, Since the Evidence Act 1853 the parties to a civil action had been competent witnesses.
- 7, (1970) 11 JSPTL 66
- 8, See generally Hume vol ii p297 et seq
- 9, T.F. Plucknett *A Concise History of the Common Law* (London, 1956) p438
- 10, Vol ii pp336-337
- 11, (1897) 5 SLT 5
- 12, (1899) 15 LQR 121
- 13, HM Advocate v Cairns 1967 JC 37. Some of the few English examples are referred to in Williams *op cit* note 3 *supra* at p67
- 14, See correspondence between A Lyttleton and others quoted in (1897) 5SLT 126
- 15, *ibid*
- 16, Hansard 4th Series vol LVI col 977-1082; *ibid* vol LX col 516-586, 649-750, 662-754,
- 17, *supra* chapter 3,2
- 18, This right which only existed in England (Gilmour v HM Advocate 1965 JC 45) was abolished in 1982. Some of the problems which unsworn statements caused (which to Scottish eyes appear abstruse in the extreme) are discussed in M. Cohen *The Unsworn Statement from the Dock* [1981] Crim LR 224
- 19, (1898) 6 SLT 126
- 20, *The Working of the Criminal Evidence Act 1898* (1900) 16 SLR 305
- 21, *Prisoners' Evidence* 1933 SLT (News) 29

(ii) Should the accused suffer adverse consequences if he refuses to answer police questions or testify at his trial?

(a) Introduction

The issue discussed in the previous section has long since ceased to be of anything other than historical interest. In the second half of the twentieth century the debate has shifted to whether it is justifiable that the accused should continue to be entitled to refuse to answer police questions and to refuse to testify at his trial. It is fair to say that this debate has tended to be English rather than Scottish but from time to time Scottish commentators have entered the discussion, although typically this has been to advocate the reintroduction of judicial examination rather than the abolition of the right at the stage of interrogation or trial. '

This section examines the main arguments put forward both for and against the right to silence as it presently exists and the following section considers the various proposals for changes in the law.

No critic of the right to silence has ever gone so far as to advocate making it a criminal offence generally to decline to answer police questions (although as has been shown there are certain statutes which have this effect in specific cases) nor has it been strongly advocated that failure to testify should amount to contempt of court. Rather the debate has centred on

whether failure to answer questions and/or testify should entitle the court to draw adverse inferences or make adverse comment and the following arguments will be considered on that basis. It is accepted that it is rather artificial to attempt to categorise the various arguments since several overlap and others are in fact different variants of the same basic argument. However the writer would seek to justify the attempt on the basis that it focusses the issues in this complex debate.

Notes

1. See for example Lord Kilbrandon *Scotland: Pre-trial Procedure* in Coutts (ed) *The Accused* p56 at p66; TB Smith *British Justice, the Scottish Contribution* ppl30-131, cf AD Gibb *Fair Play for the Criminal* (1954) 66 JR 199 who attacks the way in which the courts have interpreted the law rather than the right to silence itself

(b) Arguments in Favour of the Right to Silence

The Right to Silence is a Fundamental Right

It is sometimes asserted that the right to silence is in itself a fundamental right akin to freedom of speech or freedom of religion and is a part of the unwritten British Constitution. Those who advance this argument, often politicians or those with a political axe to grind, rarely explain why this is, or should be, so, but tend to assume that the point is so obvious that it is beyond discussion. It is certainly true that in present-day Britain citizens enjoy a general right to withhold information from the authorities. ¹ However, this right may be overridden if the interests of justice require it - in Scotland the Procurator Fiscal may require a potential witness to be precognosced on oath; a witness is liable to punishment if he fails to attend

court when cited or if he prevaricates in the witness box. Is it therefore justifiable that the one person who (the critics say) in all probability knows most about the question of guilt or innocence should be the one person who is entitled to withhold that knowledge from the police and the courts?

It can be argued that the right to silence is a fundamental right in a system of adversarial procedure. It can be said to reflect the state's fundamental values, protect the suspect from inhumane treatment and abuse at the hands of the state, and promote a fair balance between the state and the individual. ² Arguments of this nature beg many questions, not least whether the implied claim of moral superiority for the adversarial system is justified. At the simplest level one is entitled to ask whether adversarial British justice reflects fundamental values noticeably more civilised than those which pertain in inquisitorial France, Belgium or West Germany. It is submitted that the answer is that it quite manifestly does not. Those who espouse this argument also tend to overlook the fact that inquisitorial systems which do not recognise the right to silence as discussed here often provide safeguards for the accused, typically the presence of a judicial official to supervise or conduct the interrogation, which are absent in the adversarial system.

The Right to Silence is Justified by History

The argument that the right to silence has stood the test of time and created a satisfactory tradition is generally true, but it is

submitted that such an argument is little more than an appeal to reverence and is unhelpful in considering whether the right to silence should continue on its present footing. It is akin to saying that the continuation of a practice, no matter how misconceived, can be justified solely on the basis that it has existed for a long time. It also overlooks the fact that the right has only existed in its present form since 1898.

The Right to Silence Protects Individual Privacy

As a broad generalisation it may be stated that British law recognises the right of individual privacy. If the right of individual privacy is regarded as fundamental, it can be argued that an accused person who is compelled to provide evidence against himself has suffered a violation of his fundamental rights. However it scarcely needs to be said that the right of privacy can be overridden by statute if the legislature deems it appropriate and many modern statutes do require the disclosure of personal information. Arguments in support of the right to silence from privacy also tend to be weakened by the fact that the right to silence only applies to the accused in a criminal prosecution. If the right to silence is justified by a fundamental right of privacy, why does privacy not entitle one to refuse to disclose one's financial affairs to the Inland Revenue? ³

A variation of this argument is put forward by D.J. Galligan who argues ⁴ that the right to silence protects privacy which in turn protects personal identity and autonomy. In general outline his

argument goes as follows: Without a zone of privacy identity, autonomy and personality cannot exist therefore a zone of privacy is essential to personality. No-one has any duty to provide personal information about himself to a stranger and the zone of privacy is important enough to justify duties on others to respect it. Privacy should only be sacrificed if that is justified by a more important consideration. In the case of the suspect, the conflict is between privacy and crime control. The police have no claim on direct access to personal information and accordingly no claim on the suspect to lower his shield of privacy, which shield is of particular importance when the object of interrogation is to obtain evidence which can be used to the disadvantage of the suspect. This argument also helps to explain why a suspect should be treated differently from any other witness - what is being sought from him is information *which can be used against him*. Galligan himself recognises the difficulties inherent in this argument, not least the paradox that the more serious the crime the greater is society's interest in detecting the offender and accordingly the greater the permissible intrusion into privacy and he eventually concludes that the problems are "substantial".

The Right to Silence Enhances the Privilege against Self-Incrimination

It is said that nobody ought to be made to provide evidence against himself - *nemo debet prodere se ipsum*.⁸⁵ This privilege may be invoked in two different situations. Firstly it entitles

a witness who is not an accused to refuse to answer questions which would tend to incriminate him. Secondly, and of more concern in the present discussion, it entitles a person suspected or accused of crime to withhold from the authorities information concerning the offence attributed to him and to refuse to testify at his trial. In other words in an adversary system it is for the prosecution to prove the case against the accused and it should do so without his help. The *locus classicus* of this principle is found in the American case of Miranda v Arizona 384 US 436 (1965):

"the constitutional foundation underlying the privilege is the respect a government - state or federal - must accord to the dignity or integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load ... to respect the inviolability of 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 the cruel, simple expedient of compelling it from his own mouth. In sum the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will."

The Right to Silence Helps to Ensure a Fair Trial

It is self-evidently a fundamental right of the individual not to be wrongly convicted. It is clearly a greater wrong that an innocent person should be wrongly convicted than a guilty person should escape punishment. In other words, if the judicial system is to err, which from time to time it inevitably will since the perfect system of evidence and procedure does not exist, it is better that it should err in favour of acquitting the guilty rather than convicting the innocent. To this end the law imposes certain restraints on the admission of evidence and the manner in which the proceedings are conducted. In turn the right to silence and the rules of evidence which are associated with it can be seen as contributing to the fairness of the trial by ensuring that only confessions which are made freely and voluntarily are received in evidence. By excluding confessions which are involuntary or unfairly obtained, the right to silence, it is said, filters out evidence which is regarded as likely to be unreliable and thus helps to ensure that innocent people are not convicted.

The same argument can also apply to the rules of procedure which are influenced by the right to silence. The failure of the accused to testify may be due to factors other than guilt - a commonly given example is where it is considered that he will be a poor witness - and by restricting (albeit in a somewhat half-hearted way) adverse comment and prohibiting adverse inference the law attempts to ensure that the accused is not prejudiced. *

Such arguments are perhaps sounder in theory than in practice. It is impossible (and recognised as such) to prevent a jury from drawing adverse inferences from the accused's silence and judicial instructions not to do so may well only serve to draw attention to the problem. At the stage of police interrogation, greater reliability might be achieved by removing the right to silence and replacing it with a requirement to answer questions coupled with stringent safeguards involving tape- and/or video-recording and the presence of a legal advisor for the suspect. However, as Galligan points out, the rejoinder might be made that the present conditions of interrogation are so far removed from those which would be required to insure against unreliability, that the right to silence is the best device available. 7

The Right to Silence Helps to Place the Burden of Proof on the Prosecution

It has been said that the right to silence "is the concrete and visible assertion of the fundamental principle that the prosecution must prove their case and that no obligation lies upon the accused to prove his innocence." 8 This idea can be viewed as an aspect of the presumption of innocence. The right to silence helps to ensure that the prosecution cannot discharge the burden by requiring the suspect to provide evidence against himself. It also stimulates the search for alternative sources of evidence and thus acts as a control on the activities of the police who would otherwise be tempted to apply improper pressures on the suspect to "cooperate" and compensates for the generally greater

resources available to the state. It is argued that if the right to silence is diminished that has the effect of easing, or possibly even removing, the prosecution's burden of proof. However, despite its superficial attractions, it is submitted that this argument does not provide a strong justification for the right to silence in its present form.

Only the most devoted supporter of the right to silence could argue that it should be absolute and if it is accepted that the police are entitled to ask some questions of a suspect, the question then becomes one of where the limit should be drawn. The answer to this question is ultimately one of opinion and will in all probability vary depending on circumstances and the particular crime in question. It has already been shown that there are various statutory provisions which require the giving of information to the police and other investigators but parliament has shied away from giving the police a general power to compel citizens to provide information. On the other hand it would obviously be helpful to the police to have such a power and the present situation is in some ways an unhappy and unsatisfactory compromise.

This dilemma can clearly be seen in Section 1 of the 1980 Act which entitles a police officer to request an explanation from a person whom he has reasonable grounds for suspecting of an offence, but does not go on to make it an offence for a suspect to fail to explain himself. Even if such a failure were declared

to be an offence, it could hardly be said to reverse the burden of proof since the prosecution would still have to prove its case although doing so might well be made easier.

If it is accepted that the modern form of judicial examination results in an erosion of the right to silence, the point becomes clearer. The prosecutor is entitled to question the accused and if certain conditions are fulfilled, his refusal to answer may carry adverse effects for him at his trial. The existence of judicial examination has not resulted in any shift in the burden of proof nor, it is submitted, has it resulted in any major inroad into the presumption of innocence. In other words, a change in the balance between the state and the suspect does not of itself necessarily lead to a shift in the burden of proof or the lessening of the presumption of innocence.

Notes

1. See AAS Zuckerman *Trial by Unfair Means - The Report of the Working Group on the Right to Silence* [1989] Crim LR 855
2. For a trenchant critique of this line of argument see Cross *The Right to Silence and the Presumption of Innocence - Sacred Cows or Safeguards of Liberty?* (1970) 11 JSPTL 66 at p72
3. This line of argument is fully explored in M.A. Manlowe *Bentham, Self-Incrimination and the Law of Evidence* (1988) 104 LQR 286
4. *The Right to Silence Reconsidered* 1988 Current Legal Problems 69 especially pp88-89
5. For a full discussion of the effects of this principle and its history see Mirfield p65 et seq
6. This argument does not commend itself to Cross. See [1973] Crim LR 325 at p336
7. loc cit note 4 supra p87
8. *Evidence in Criminal Cases* Memorandum by the Bar Council (1973) par 12

(c) Arguments Against the Right to Silence*The Right to Silence Protects the Guilty*

Opponents of the right to silence often pray in aid the opinions of Jeremy Bentham and particularly his celebrated observation:

"If all criminals of every class had assembled, and framed a system after their own minds, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence." ¹

It is therefore argued that the only people who would have anything to fear from the reduction or removal of the right to silence are the guilty and in particular the "sophisticated professional criminals" whose knowledge and experience, it is said, enable them to manipulate the system to their own ends. This line of argument is, naturally, one much favoured by the police and it was adopted strongly by the Criminal Law Review Committee in their ill-fated Eleventh Report.

In his original Research Paper, published in 1979, Sheriff Macphail pointed out the dangers of adopting such reasoning in Scotland ² since it appeared that sophisticated professional crime was not a major problem in Scotland. The writer's opinion is that this is still the position. It may also be argued that any attenuation of the right to silence would be much more likely

to affect minor offenders rather than successful professional criminals whose very success is likely to be due to their knowledge of the rules and their ability to adapt to circumstances.

Even in England this argument appears to have little or no factual basis. The pre-PACE research which established that English suspects rarely exercise the right to silence at the questioning stage has already been discussed. Research has also shown that confession evidence was only of crucial importance in about twenty per cent of cases; in the other cases it simply gave support to the prosecution case and made it easier to prove. Of the small number of suspects who refused to speak, the majority were nevertheless convicted. ³ The most recent research on police interrogation ⁴ suggests that following PACE there may have been a decline in the admission rate in serious cases, although the authors are at pains to point out that their sample was of an inadequate size and confirmation will have to be awaited from another source.

The English studies show that where the suspect confesses, his chances of acquittal are slight and therefore it follows that although a confession may not be necessary to provide a legal sufficiency of evidence, it greatly increases the chance of an outcome which is successful from the police point of view. Moreover, the suspect who exercises his right to silence will frequently delay the inquiry and cause extra work for the police

(or stimulate the search for independent evidence, depending on one's point of view) and the reason for the police hostility is obvious. If every suspect exercised the right to silence, the impact on the work of the police would be enormous.

Clearly a balance requires to be struck between the rights of the suspect and the needs of the police investigation, between the conflicting aims of pursuing the truth and controlling the pursuers, and where the line should fall is necessarily a matter of opinion. PACE has undoubtedly resulted in a shift of the balance in favour of the suspect ⁵ while in Scotland judicial examination shifted the balance (albeit slightly) in favour of the prosecution. As will presently be shown, the Working Group on the Right to Silence recommend a further shift in England, this time back towards the prosecution, and it remains to be seen whether a further change will be deemed necessary in Scotland.

The Right to Silence is Outmoded

A related argument sometimes advanced is that the right to silence is outmoded. The rules, it is said, grew up at a time when an accused was much more at a disadvantage than he is today and the result nowadays is a system which is excessively biased in favour of the defence, or as the Criminal Law Revision Committee put it, "tender to criminals." Once again this is a matter of opinion and opinions have tended to differ according to whether the holders see the dangers of crime outweighing the dangers of a major reduction in the rights of the suspect. ⁶

Nevertheless proposals to restrict the right frequently overlook the fact that even modern suspects tend to be ignorant, inarticulate, badly educated and, from time to time, innocent. It is submitted that this is clearly one situation where different considerations apply at the interrogation stage and the court stage. At the interrogation stage any such reduction ought to be accompanied by the introduction of methods of safeguarding the propriety of the proceedings. There is probably less need for such safeguards at the trial and there is much to be said for the compromise suggested by Wigmore ⁷ that there should be a right to silence out of court to guard against oppressive officials, but in court the accused is adequately protected and should be required to speak up once there is a prima facie case against him.

The Right to Silence Leads to Unnecessary Complications in the Rules of Evidence and Procedure

This argument is particularly associated with Cross. He has argued vigorously that the right to silence (or at least the way the law has developed in England) has led to rules of criminal procedure which are "offensive to common sense" and rules of evidence which are "gibberish." ⁸ Cross is particularly scathing about the way the law permits judicial comment on the accused's failure to give evidence but prohibits the drawing of an adverse inference from the accused's silence. ⁹

Although this argument has only been stated in the English context, it is equally applicable in Scotland, and indeed the Scottish jury is further liable to be confused by the additional need for the judge to direct them in regard to the evidential value of the judicial examination. Thus, to extend Cross's argument to Scotland, the Scottish judge could well be required to direct the jury that the fact that the accused said nothing to the police is not evidence against him and they can draw no adverse inference from it, but in view of the fact that he remained silent at judicial examination and then gave exculpatory evidence at the trial they can take his silence at judicial examination into account when assessing the evidence which he gave at the trial although silence at judicial examination is not evidence of guilt. This is coming close to Cross's view of "gibberish". Furthermore, even in this situation, where comment is explicitly sanctioned by statute, the High Court have said that such comment ought to be "restrained" and it is clear that an explicit judicial direction that guilt could be inferred from silence at judicial examination would be regarded as a misdirection. ¹⁰ Cross would undoubtedly have considered this as "offensive to common sense".

The Right to Silence Encourages Dubious Practices by the Defence

Finally, a further variation of the protection of the guilty argument comes from Glanville Williams, another noted opponent of the right to silence. In an article discussing the difficulty which the right to silence causes for the Crown in proving *mens*

rea, '1 Williams has pointed out that the right to silence allows defence counsel "to sow the seeds of doubt in the jury's mind by inventing imaginary explanations of his silent client's conduct, even though counsel knows them to be untrue or grossly misleading. All that is required is that the advocate puts them forward as hypotheses and not as facts." If this be true, and in the writer's experience as a Scottish prosecutor from time to time it is, surely the remedy is to strike at this type of behaviour if and when it arises, for example by requiring the judge to direct the jury in suitable terms if the defence behave in this way? '2 Abolishing the right to silence entirely seems a very drastic remedy for the sins of a few.

Notes

- 1, *Treatise on Evidence* p241
- 2, See now Macphail 91,07
- 3, See D.J. Galligan *The Right to Silence Reconsidered* 1988 Current Legal Problems 69 at p74
- 4, Irving & McKenzie *Police Interrogation: the Effects of the Police and Criminal Evidence Act 1984* (London, 1989)
- 5, See A.A.S. Zuckerman *Trial by Unfair Means - The Report of the Working Group on the Right to Silence* [1989] Crim LR 855
- 6, Compare eg McKenna [1972] Crim LR 605 and Cross [1973] Crim LR 325. For the police view see Sir Robert Mark *In the Office of Constable* (Glasgow, 1978) pp161-162
- 7, para 2251
- 8 *The Right to Silence and the Presumption of Innocence - Sacred Cows or Safeguards of Liberty?* (1970) 11 JSPTL 66; also *The Evidence Report: Sense or Nonsense?* [1973] Crim LR 329
- 9, [1973] Crim LR 329 at 333
- 10, McEwan v H.M. Advocate 1990 SCCR 401; McGhee v H.M. Advocate 1991 SCCR 510
- 11, *The "Right of Silence" and the Mental Element* [1988] Crim LR 97
- 12, cf the decision in Boyne v H.M. Advocate 1980 JC 47

3.7 Proposals for Reform

(i) Scotland

(a) The Thomson Committee (1975)

The Thomson Committee's influential Second Report did not discuss the right to silence as an issue of its own but dealt with it as and when it arose in the context of other matters. In respect of police interrogation, the Committee did not recommend any substantial change in the law. They acknowledged that the issue was the creation of a fair balance between the right of the individual to be left alone by the police and the need to allow the police reasonable powers to carry out their duties. Their view was that a system which required a suspect to answer police questions was "too heavily weighted against the suspect" ¹ The caution was to be retained largely in its existing form because there was no point in a man having the right to silence unless he was aware of it and while the practiced criminal and the educated citizen might know their rights, others in the hands of the police for the first time might not. ² The committee also rejected the idea that adverse inferences should be drawn from silence in the face of police questioning on the obvious ground that it would be unfair to found upon a refusal to answer questions which the suspect has been told he need not answer.

So far as protection of the suspect was concerned, the Committee repeatedly stressed that interviews and statements at a police station should be tape recorded. They specifically recommended

that a solicitor should not be permitted to intervene in police investigations before charge since the purpose of interrogation was to obtain from the suspect such information as he may possess regarding the offence and that purpose might be defeated by the participation of a solicitor. However once the suspect had been charged he was entitled to an interview with a solicitor and if he indicated that he wished to make a voluntary statement he should be offered such an interview before the statement was made.

The views of the Committee in relation to judicial examination have already been discussed. ^a

When they came to consider the question of the accused as a witness, the Committee, despite an earlier difference of opinion, eventually recommended that the accused should not be a compellable witness. They considered that an accused who had heard the evidence against him was in a position to tailor his evidence to meet the case against him and truth would better be served by judicially examining him immediately after he had been charged and when he did not know the evidence against him. Where the accused failed to give evidence, the jury were to be told that they might draw whatever inference they considered proper. In a summary case the judge would also be entitled to draw such an inference. The Committee also recommended that the prosecutor as well as the judge should be entitled to comment on the failure of the accused to give evidence where a *prima facie*

case had been established. ⁴ No legislation has followed on these proposals.

Notes

- 1, Par 7,05
- 2, Par 7,13b
- 3, supra chapter 3,3 (ii)
- 4, Pars 50,09 - 50,16, This view is criticised in *The Right to Silence* 1987 SLT (News) 17 at p19

(b) The Scottish Law Commission (1980)

In 1980 the Scottish Law Commission published its Memorandum No. 48 on the Law of Evidence. Although this was a discussion document and did not contain firm proposals for reform, it is included here for completeness. The publication of the Memorandum was preceded by the publication of an exhaustive and scholarly research paper by Sheriff Macphail in which the issues involved in the right to silence were more fully canvassed.¹ While the Law Commission tended to support the Thomson Committee's view that the accused should not be compelled to give evidence, it was pointed out that the question of the compellability of the accused could not be considered in isolation from other proposals to reform the law.² The Commission also endorsed the view that the prosecution should be allowed to comment on a failure to testify and the judge or jury should be entitled to draw an adverse inference from such a failure. It was further proposed that the right of comment should be extended to any co-accused.

Notes

- 1, See now Macphail 555,04-5,12
- 2, Memorandum Para E,08; Macphail 55,11

(ii) England(a) The Criminal Law Revision Committee (1972)

In 1972 the Criminal Law Review Committee published their eleventh report entitled Evidence (General).¹ This lengthy report made a long series of recommendations virtually all of which were designed to assist the prosecution. Some of these amounted to far reaching changes in the law which, had they been implemented, would have resulted in the right to silence as it had been known virtually disappearing.

The Committee took the view that the right to silence in the police station was "contrary to common sense and, without helping the innocent, [gave] an unnecessary advantage to the guilty." They proposed that where a suspect on being questioned by the police about an offence or being charged with an offence failed to mention any fact which he could reasonably have been expected to mention and upon which he subsequently relied at his trial, the court or jury might draw such inferences from the failure as seem proper and the failure was to be capable of amounting to corroboration.² The requirement to caution was to be swept away and at the stage of charging the police were to hand the suspect a written note advising him to mention any fact on which he intended to rely in his defence otherwise "your evidence may be less likely to be believed and this may have a bad effect on your case in general."³

In relation to the trial stage the proposals were every bit as radical. Once a prima facie case had been made out against the accused the court was formally to call on the accused to give evidence. If he then did not do so, or without good cause refused to answer any question, that was to give rise to such inferences as seemed proper and could amount to corroboration.⁴

Unsurprisingly the report provoked a major controversy⁵ with only one voice, that of Professor Cross,⁶ being publicly raised in its defence. In the event most of the report was lost, not merely those parts relating to the right to silence, and the Committee's work of eight years went for nothing because they had misjudged the mood of the times. Zander has pointed out that the Committee might have been better advised to have left matters as they were since their proposals, although seeming almost dangerously radical, would probably have made little practical difference to the functioning of the criminal justice system.⁷ This point would also appear to be borne out by research in Singapore where changes in the law virtually identical to the Committee's proposals were introduced in 1976 without any noticeable effect⁸ and most recently by experience in Northern Ireland.⁹

Notes

1. Cmnd 4991
2. Draft Bill Clause 1(1)
3. Report par 44
4. Draft Bill Clause 5(1)(3)
5. See eg McKenna [1972] Crim LR 605; Muir [1973] Crim LR 341; Miller ibid 343. These and other reactions are discussed by Zander [1974] LS Gaz 954
6. [1973] Crim LR 329

- 7, *The Right of Silence in the Police Station and the Caution* in Glazebrook (ed) *Reshaping the Criminal Law* p344
- 8, MH Yeo *Diminishing the Right to Silence; the Singapore Experience* [1983] Crim LR 89,
- 9, *infra* chapter 9,9(i)

(b) The Royal Commission on Criminal Procedure (1981)

The Commission was established following the report by Sir Henry Fisher into the *Maxwell Confait* case in which three juveniles had been wrongly convicted of murder and arson on the basis of confession evidence. ¹ Its remit was focussed on pre-trial matters, especially police powers, and the system of prosecution.

One of the most telling criticisms levelled against the Criminal Law Revision Committee's report was the absence of any sound empirical basis for the proposals. The Committee had worked behind closed doors and had neither taken evidence nor conducted research. The same could certainly not be said of the Royal Commission who solicited and received much evidence, travelled widely both at home and abroad and, above all, commissioned a number of important research studies.

By a majority the Royal Commission recommended that there should be no change in a suspect's right of silence either in or out of court and the present restrictions on the drawing of inferences should remain. ²

The Royal Commission's work was combined with some parts of the Criminal Law Revision Committee's Report to lead to PACE which,

as has been seen, made no change in the right to silence either at the police station or in court. Its main impact has been on police procedures. The only tangible effect on the right is the requirement that the police should now caution at an earlier stage, so it could be argued that the right has in fact been strengthened. The research also showed that the right to silence was not the obstruction to "justice" that the police and the Criminal Law Revision Committee had believed it to be since most suspects in fact talked to the police, usually without any great pressure to do so. The Royal Commission were thus aware that the right of silence did little harm to police investigations and the most recent research seems to suggest that the impact of the PACE procedures has not altered this position significantly. ³

Notes

1. Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6, (HMSO, 1977)
2. Pars 4.47 - 4.66
3. Irving & McKenzie *Police Interrogation: the effects of the Police and Criminal Evidence Act 1984* (London, 1989)

(c) The Working Group on the Right to Silence (1989)

In July 1987, the then Home Secretary, Mr Hurd, in the course of a lecture to the Police Foundation, reopened the whole question of the right to silence. The right to silence had never been an issue in the debates on the Royal Commission's report or on the PACE bill and the Home Secretary's initiative was thus somewhat surprising. It appears to have been prompted by complaints from the police that the strengthening of the suspect's right to legal

assistance had, to quote the Home Secretary, "increased their difficulties in bringing the guilty to book." Since the government were not prepared to curtail the right to legal assistance, the curtailment of the right to silence was back on the agenda. One interesting, and worrying, factor is that the Working Group's terms of reference were to advise on how to change the law and not on whether change was desirable. It was also distinctly alarming, given that the Northern Ireland office was represented on the Working Group, to find the Group's work being pre-empted in relation to Northern Ireland by the Criminal Evidence (Northern Ireland) Order 1988. '

Their proposals are a modified and toned down version of those of the Criminal Law Revision Committee in 1972. The courts should be entitled to draw inferences from silence in the face of police questioning. The primary inference to be drawn from a failure to answer questions or to mention a salient fact should be that the subsequent line of defence is untrue. However silence should not to be taken as corroboration or as evidence of guilt.

A new form of caution should be introduced: "You do not have to say anything. A record will be made of anything you do say and it may be given in evidence. So may your refusal to answer questions. If there is any fact on which you intend to rely in your defence in court it would be best to mention it now, If you hold it back until you go to court you may be less likely to be believed."

The Group regard access to legal advice as a "key safeguard" for the suspect and they are also aware that "the tape-recording of interviews and the taking of contemporaneous notes each protect the suspect against the inaccurate recording of interviews and the falsification of statements" although they do not consider the courts should be prohibited from taking silence into account in the absence of a tape recording of an interview.

At the Crown Court the prosecution, the defence and the judge should be able to comment on the accused's failure to mention to the police a fact on which he subsequently relies in his defence and the prosecution should be allowed to cross examine the accused on the failure. Judges are exhorted to use their existing rights of comment more robustly and more often and defence lawyers should be required to warn the accused of the possibility of adverse judicial comment if he does not give evidence.

At the time of writing, there is an imminent general election and although the government initially appeared to have committed itself to bringing forward legislation at an early date, no such legislation has yet been firmly proposed. Such public comment as there has been has been muted but critical and concern has been expressed that ill considered reform could damage the protection now afforded to suspects under PACE.²

Although the Guildford Four and Birmingham Six scandals may well have an effect on the final decision and the final direction of any reform, there is on record a clear proposal to change the law of England in a way that would materially restrict the right to silence in the sense in which it has been discussed in this chapter. However such a change may not be as drastic as that statement implies since the English courts have gone quite a long way towards the position envisaged by the Working Group. A strong line has been taken to ensure the availability of legal advice for suspects in custody and there are signs that a more critical view is being taken of a suspect who fails to cooperate with the police. ³

Notes

1. *infra* chapter 9,9 (i)
2. See eg Zuckerman *Trial by Unfair Means - The Report of the Working Group on the Right to Silence* [1989] Crim LR 855
3. R v Samuel [1988] 2 All ER 135; R v Alladice (1988) 87 Crim App R 380. For a detailed discussion of this point see Zuckerman *The Principles of Criminal Evidence* (Oxford, 1989) p325 et seq. See also note by H. Fenwick in (1989) 52 MLR 104. For the police view of R v Samuel see *A Shocking Verdict* "Police" February 1988 p10

(d) Justice

Justice, the British section of the International Commission of Jurists, have concerned themselves with police interrogation and related matters on a number of occasions and with varying results. In 1960 they produced a report which recommended, with the dissent of Sir John Foster QC, that to deprive the accused of his right to silence was "alien to the general conception of justice in this country" under which it was "for the prosecution

to prove its case and not merely to assert a case which the prisoner is left to disprove." ¹ Sir John Foster's dissenting view was, in effect, that the accused's privilege of silence was often responsible for wrongful acquittals and was one of the factors preventing a higher conviction rate. ² As has been shown, views of this nature became more widely accepted during the 1960s and in 1967 Justice, this time with Sir John Hobson dissenting, recommended that the privilege of the accused to keep silent before his trial should be abolished, subject to the safeguard that any confession of guilt to the police should be inadmissible in evidence unless made and recorded before a magistrate. This was seen as a safeguard to protect the accused from pressure from over-zealous police officers. ³ Most recently, in their 1989 report on Miscarriages of Justice, Justice recommend that the modern Scottish judicial examination should be introduced in England. The Royal Commission had considered a form of judicial examination with the police questioning a suspect before a magistrate ⁴ but they rejected it as impractical. Justice do not address the practicality of their own proposal.

Notes

1. *Preliminary Investigation of Criminal Offences* [1960] Crim LR 793 at p812
2. loc cit note 1 at p818
3. These proposals are discussed in detail in (1969) 117 New LJ 607
4. Pars 4.58 - 4.62

Chapter 4 The Early History of Confessions in Scotland

4.1 "Judicial" Confessions and Declarations

The earliest mention of confessions in Scots law can be found in Balfour's Practicks where it is stated that

"Confessioun maid in judgment and accepit be ony persoun havand interes thairanent, or be ane uther in his name, is prejudicial to the maker thairof, and makis sufficient probatioun and faith aganis him in all things that ar confessit." ¹

The first clear discussion of confessions in early Scottish criminal law, as opposed to Balfour's bald statement of principle, appears in Mackenzie. ² For him a "judicial" confession means a confession emitted before the judges who are sitting in judgment on the pannel. He describes the pannel's judicial confession as "the most secure" means of proof. However even at this early date Scots law was concerned to avoid the possibility of a false confession and if there were any doubts about the genuineness of the confession or the accused's state of mind, the confession, though not rendered inadmissible, had to be supported by other evidence:

"But because Men will sometimes confess a Crime, rather out of Weariness of their Life, than a Consciousness of Guilt; therefore the Law hath required, that if there appear any Aversion for Life, *tedium vitae*, or any Signs of Distraction or

Madness, that these Confessions should not be relied upon, except they be adminiculated with other Probation."

Mackenzie asserts that "such as confess are oft-times condemned without the knowledge of an inquest" ie without being remitted to a jury. However on closer examination this assertion is only supported by two cases, both involving special circumstances,³ and, if such a practice existed, (which Hume doubts) it was restricted to non-capital cases. According to Hume ⁴ it was a long established rule of Scottish procedure that a confession of guilt was not of itself sufficient to permit the court to proceed to sentence.

From about 1665 onwards this applied even where the confession was made in open court before the full assize. What was required was a confession to the actual jury chosen to try the case. Thus notwithstanding that the accused had pled guilty before the whole assize, a jury still had to be chosen, the accused was required to renew his plea before them and they were required to return a verdict convicting him before sentence could be passed. If the accused changed his mind and withdrew his confession or refused to renew his plea before the jury, the matter had to proceed to trial and the jury were entitled to acquit the accused if they considered it appropriate. In special circumstances, even where the confession had been repeated to the jury, the prosecutor might decide to strengthen the case against the accused by

leading further evidence, although Hume states that this was uncommon. ⁵

Apart from confessions made in their presence, practice seems to have varied over the years as to exactly what sort of confession was sufficient to entitle a jury to convict. ⁶ It also has to be borne in mind that many of the early cases are political in nature and, before the High Court of Justiciary was founded in 1672, the Privy Council was wont to interfere with the administration of justice by the Justiciars. ⁷

Mackenzie and Hume refer to a number of seventeenth century cases where confessions to magistrates, clergymen, Privy Councillors and even judges outwith the presence of an assize were all held to be sufficient. Confessions to magistrates, clergymen and the like had to be proved in court but those to Privy Councillors or the Lords of Justiciary which had been reduced to writing were held "judicial" and to prove themselves. Such did not require to be spoken to by witnesses although on one occasion a remarkably independently minded jury acquitted a prisoner in the face of two declarations, one emitted before the Lords of Justiciary, because "they did neither hear the party confess the said crymes, nor the alleadged confession of the pannel, given in for probation thereof, owned be the pannel, nor otherwise proven." ⁸ There were doubts about the correctness of relying on such confessions, and particularly on the question of when a confession was "judicial". Ultimately in 1685 statute ⁹ laid down that declarations before

Privy Councillors were only "judicial" in the case of treason and only then if emitted after the service of the indictment.

Mackenzie describes the embryonic judicial examination thus:

"The custom with us is that the Advocate doth, in Presence of the Justices, examine the party to be accused, and if he confess, either he subscribes his Confession, if he can write, or else the Justices subscribe for him, or which is securer, make two Notars and four Witnesses subscribe; ..."

Evidence of the confession might then be led at the trial. The practice was not entirely consistent and examples may be found of confessions in declarations emitted at judicial examination being treated as "judicial, irretractable, sole and conclusive evidence of the pannel's guilt, as if emitted to the assize themselves." However it was argued that the use of a declaration in this way offended against the Act 1587 c.91 which required "the haill accusatioun, ressoning, writtis, witnesses and utheris probatioun and instructioun quhatsumeuer of the cryme salbe allegit ressonit and deducit to the assyse in the presence of the party accusit in face of iudgement and in no utheris wayes." 10

By Hume's time it was settled law that while a declaration was admissible against the prisoner, it required to be acknowledged by him or proved by witnesses and any confession which it contained was not conclusive. Such a confession was nevertheless a circumstance "of no mean weight" in the prosecution case. 11

There is also early precedent for the admission of a declaration emitted in connection with a civil matter as evidence against the accused in a criminal trial. ¹²

Notes

- 1, 381 c.1
- 2, Part II tit. xxiv.
- 3, Rutherford's Case 9 July 1622, Job's Case 19 January 1650 Mackenzie Part II tit. xxiii, No. iii
- 4, Vol ii p320
- 5, Vol ii p320
- 6, See generally Hume vol ii pp321-323
- 7, Hume vol ii p 27 et seq
- 8, James Douglas (1682) Hume ii 322
- 9, 1685 c10
- 10, Finlay McNab 7 December 1669 Mackenzie Part II tit. xxiv No. iii; Erskine IV, iv, 96.
- 11, Hume vol ii p324 et seq
- 12, Maciver and Maccallum (1784) Hume ii 326

4.2 Other Verbal Confessions

For the earliest statement of the law it is once again necessary to refer to Balfour who quotes the case of Andro Rutherford contra James Dempster in 1559 as authority for the proposition that:

"Confessioun maid be ony man outwith judgment, and instrument tane thairupon is sufficient probatioun aganis the maker thairof in judgment; as gif ony man havand ony gudis or geir in his possessioun confessit the samin to appertene to ane uther, and the uther or ony in his name, tak instruments thairupon, the samin prelvīs sufficientlie that the gudis pertenis to that uther." ¹

Balfour's statement would appear to refer to a civil matter rather than a criminal one, although it should, of course be borne in mind that at this period there was not the same clear-cut distinction between civil and criminal matters as there is today. Attempts to elucidate the early Scottish practice are further hampered by the fact that once again Mackenzie and Hume disagree. The former states that:

"because Confessions are oft-times emitted negligently, the Confessors thinking that their private Confessions cannot prejudice them, therefore the Law doth only give Credit to judicial Confessions, and not to these that are extrajudicial, and *extra bancum* which Maxim is stronger with us, than elsewhere, because by a particular Act of Parliament, *James VI Parl. 11 cap. 90* all Probation should be led in presence of the Assize." ²

Hume states that it was always Scottish custom to allow proof of verbal confessions of guilt made at or near the time of the crime although the evidential value of such confessions was less than that of those which were reduced to writing, and made with more solemnity and deliberation:

"In a case of theft, if on being seized with the stolen goods upon him, the thief instantly confess his crime, and offer back the goods, or tempt the owner with a bribe to let him go; or in a case of

murder, if the killer be taken red-hand, and brought into the presence of the dying man, and there lament his rashness, and ask forgiveness of his victim: Such incidents are not mere words of acknowledgment; they are links in the chain of circumstance, and equally bear evidence against the pannel, as blood on his clothes, or the goods found concealed on his person." ³

Confessions of this nature which were intimately connected with the crime were to be taken into consideration and assessed in the circumstances of each individual case. Such evidence was obviously weighty and Hume quotes many examples although he disapproves of one case where the accused was hanged for murder solely on the basis of confessions to bystanders and the finding of the body of the deceased. ⁴

Hume also quotes several examples of confessions which he regards as more questionable being admitted in evidence.⁵ These include confessions made to a jailer, to fellow prisoners, to the members of a kirk session, to a minister of the kirk for whom the prisoner had sent "to disburden his conscience", ⁶ to an Advocate Depute who had visited the prisoner in jail, and to the Solicitor General, again while the prisoner was in jail, and under the delusion that he would become a Crown witness. Hume makes his disapproval quite clear:

"There are obvious and not trivial reasons of

repugnance, which will offer themselves to the reader, against the use of such disclosures as these, made hastily at unguarded moments, in circumstances of extreme distress of mind, and under the faith, in some measure, of secrecy and confidence. But beside these reasons, it may be questioned how far the sort of testimony that can ordinarily be had to such confessions, and to the manner, true motives and precise import of them, unconfirmed as they are by connection with any overt fact, is of such a kind as makes them fit to be received, or at least to be fully credited, especially in capital cases." 7

In the case of confessions to clergymen it must be borne in mind that in seventeenth and eighteenth century Scotland, ministers were very active in trying to bring the ungodly to repentance with vigour and persistence and often with remarkable success. Such spiritual mentors were in a position to exercise considerable power over prisoners. 8

One writer scathingly commented,

"I leave it to casuists in religion to determine as to the efficacy of auricular confession in the salvation of the soul; but I cannot help thinking that for a priest to reveal this confession in a criminal court to the destruction of the body,

deserves to be placed right at the top of the
scale of human depravity." 5

Notes

1. Practicks 381 c.1
2. Part II, tit, xxiv, No,ii
3. Vol ii p333
4. James Bartleman (1679) Hume ii 333
5. Vol ii p334 et seq
6. Hume was prepared to allow certain confessions to clergymen being admitted in evidence. See Hume ii 350 discussed infra vol I, p483 et seq.
7. ibid p336
8. For a graphic example see W. Roughead *The Doom of Lady Warriston in Twelve Scots Trials* (Edinburgh, 1913) p16
9. Arnott, quoted by Roughead op cit note 8 supra p57

4.3 Torture

Professor T.B. Smith has pointed out that much evidence elicited by torture was doubtless true and could be cross-checked by corroborative testimony but to secure convictions by such means debases the society which permits them.¹ Scottish criminal procedure escaped the worst excesses of medieval inquisitorial practice, but although torture never became institutionalised in Scotland the way it did in certain continental countries,² it was by no means unknown and was regarded as "a justifiable, as well as effectual, method of drawing truth from the pannel by his own confession."³ The use of torture was chiefly, although not exclusively, associated with two particular crimes, namely witchcraft and treason.

There were three great outbreaks of witchhunting in Scotland, 1590-97, 1640-44 and 1660-63.⁴ The witchcraft cases constitute a dark stain on Scottish legal and (even more so) ecclesiastical history and following even a cursory examination it is difficult not to agree with W.G. Scott-Moncrieff that "our first impulse is to conclude that all concerned in them, judges, juries, counsel for both prosecution and defence, and for the most part, the parties at the bar, were insane."⁵

Hume, less removed in time, observed:

"Such was the substance of the charge, such also was the course of procedure against the abhorred

offender, and the proofs admitted to substantiate his (sic) guilt: In both all regard was lost, not only of all ordinary rules, but of humanity and common sense." 6

The investigation of witchcraft could be carried out by almost any person in any sort of authority, but the leading persecutors were undoubtedly the presbyterian clergy and kirk sessions often in conjunction with Commissioners appointed by the Privy Council. Trials would normally take place before Commissions or other special tribunals, who would appear to have been responsible for the more barbaric practices, rather than the normal courts. Certain records of the Justiciar's court suggest that it at least was largely free from torture and most witchcraft cases which came before it would be subject to the normal rules of procedure. 7

Nevertheless there were many abominations. The favoured mode of proof of witchcraft was the confession of the party which, certainly in earlier practice, would commonly be extracted by torture. A supposed witch might be tortured at the discretion of the investigators or the Commissioners. Indeed torture was so freely used that torturing witches became something of a trade to be passed from master to apprentice. 8 The Privy Council favoured the use of the thumb screws and the boot, and pricking of the flesh was also widely used, but the lay and clerical torturers of supposed witches seem to have gone in more for sleep deprivation

which could be justified on the basis that if the witch were allowed to sleep her old master would re-establish his power over her. ⁹ Sleep-deprivation seems to have been very effective and, as Scott-Moncrieff drily observes, "by producing delirium greatly added to the fascination of the confessions."

G. F. Black who has studied all the Scottish witchcraft cases of which records are known to exist, states that an examination of the "confessions" made by the witches show that they are not the spontaneous utterances of the accused but the answers to specific questions shaped into substantive confessions to the extent that it became impossible to distinguish what had been put into the mind of the victim by her torturers from what might have been there before as the result of a common superstition. ¹⁰

William Roughead has described, in inimitable style, a series of witchcraft trials in the time of James the Sixth involving practices which can only be described as frightful ¹¹ and there is at least one known example of torture being applied not only to the supposed witch herself but also to her husband, son and seven year old daughter all in her presence. ¹²

Sir George Mackenzie, who had personal experience of trying alleged witches between 1661 and 1663, wrote his *Laws and Customs of Scotland in Matters Criminal* in 1678, about fifteen years after the last great persecution had died down. In this work, Mackenzie furnished a valuable contemporary account of the law

and practice relating to witchcraft ¹³ and although he stopped short of an outright denial of the existence of witches his concern and distaste for the cruelties and excesses is patent:

"Most of these poor creatures are tortured by their Keepers, who being persuaded they do God good service think it their Duty to vex and torment poor Prisoners, and I know *ex certissima scientia* that most of all that ever were taken were tormented after this manner, and this Usage was the Ground of their Confession: And albeit the poor Miscreants cannot prove this Usage, the actors being the only Witnesses, yet the Judge should be afraid of it, as that which at first did elicit the Confession and for Fear of which they dare not retract it."

Mackenzie was of the view that of all crimes witchcraft "required the clearest Relevancy and most convincing Probation" and he condemned unequivocally "those cruel and too forward Judges who burn Persons by Thousands as Guilty of this Crime." Where proof was by confession, which was the normal mode, Mackenzie warned that:

"the Probation here should be very clear and it should be certain that the person who emitted it is not weary of Life or opprest with Melancholy. Albeit *non requiritur hic ut constet de corpore delicti*, this being a crime which consists of

times *in animo* yet it ought to be such as contains nothing in it that is impossible or improbable."

Professor Walker suggests that Mackenzie may have had a hand in discouraging witchhunting which had abated by the time he resigned as justice-depute in 1663. ¹⁴

The last execution of a witch in Scotland was in Sutherland in either 1722 or 1727 and this dark chapter was finally ended by the Witchcraft Act 1735 (9 Geo. II c.5) which abolished the crime of witchcraft.

Witchcraft stands apart from the rest of the criminal law. In the case of other crimes, Mackenzie comments that torture "is rarely practiced with us" although he then goes on to say that "I remember to have seen Mitchel lately tortured upon his retracting a Confession emitted by him in Presence of his Majesty's Privy Council." ¹⁵

Hume states that in the case of treason and other crimes, torture was chiefly inflicted on the orders and under the direction of the Privy Council, others, even the Court of Justiciary, being in theory unable to employ it without a warrant from the Privy Council. Before torture could be ordered there had to be "grounds of presumption" against the accused although exactly what would amount to such grounds is unclear. ¹⁶ Mackenzie states

that an extrajudicial confession which was "adminiculated" might be sufficient.¹⁷

When torture was used in Scotland, any confession extracted was admitted in evidence against the prisoner at his trial. However the converse did not apply and the prisoner did not gain immunity from further questioning or persecution no matter how well he endured his ordeal. Indeed if an alleged witch had the fortitude to withstand her torments, the most likely conclusion would be that the Devil was helping her.¹⁸

Torture in Scotland never achieved the sophistication of practice which there was in certain continental jurisdictions, for example France after 1670,¹⁹ where in order for a confession made under torture to be admissible the prisoner had to be interrogated a second time without torture to see if he adhered to the confession. Mackenzie suggests that such a practice did in fact exist in Scotland,²⁰ and his accounts of his own involvement with witchcraft suspects tend to bear this out,²¹ but it would appear to have been a matter of practice and never became a requirement of the law. Similarly there was never any provision in Scotland preventing the repetition of torture or granting immunity from further questioning or prosecution.

Hume was clearly repelled by torture but Erskine took a more pragmatic view:

"[I]ts effect depends almost entirely on the

pannel's natural constitution. If he have an uncommon resolution and firmness of mind, he will stand the torture and persist in his denial, though he be guilty; but if he be not possessed of a degree of fortitude beyond the common run of mankind, he will, though innocent, be soon brought to take upon himself the guilt he was charged with." ²²

In other words, the problem with torture was its unreliability rather than its inhumanity.

Despite Erskine's assertion otherwise, the Claim of Right ²³ did not declare torture *per se* contrary to law, but only torture used "*without evidence or in ordinary Crymes.*" and torture was not finally abolished in Scotland until 1709. ²⁴

Dickson's relief at the disappearance of these barbaric practices is palpable:

"It is not necessary now, as it would have been a hundred and fifty years ago, to expose the utter worthlessness of confessions wrung from an accused person by the torture. Nor are the records of our criminal courts likely to be again darkened by charges of witchcraft; many of which were in olden times proved by the admission of the accused - a striking illustration of the effect of excited

imagination, and morbid desire of notoriety, in
producing false confessions." 25

Notes

1. *Scotland: The Trial Process* in Andrews (ed) *The Accused* (London, 1966) p72
2. See generally A. Esmein *A History of Continental Criminal Procedure* (trans Simpson) (London, 1913)
3. Erskine IV, iv, 96
4. For a comprehensive account and a list of all cases of which records are known to exist see G.F. Black *A Calendar of Cases of Witchcraft in Scotland 1510-1727* (New York, 1938)
5. Introduction to *Justiciary Court Proceedings* (Scottish History Society vol xlviii) p.xxiv
6. Vol i p589
7. J. Irvine Smith and I Macdonald in *An Introduction to Scottish Legal History* (Stair Society, 1958) p290
8. Hume vol i p590
9. Black op cit note 4 supra p15
10. Black op cit note 4 supra p13
11. *The Witches of North Berwick* in *The Riddle of the Ruthvens and Other Studies* (Edinburgh, 1919). The same volume also contains essays about two later series of trials in which torture is largely absent: *Bargarran's Daughter* and *The Devil in Pittenweem*.
12. Alison Balfour (1596) Hume i 591
13. Part II, Tit. x
14. *The Scottish Jurists* (Edinburgh, 1985) p158
15. *Laws and Customs* Part II, tit xxiv, no. iii. "Mitchel" was charged with attempting to assassinate Archbishop Sharp. When he was first brought to trial Mackenzie acted for him. Mitchell withdrew a confession he had made and the diet was deserted. When he was reindicted Mackenzie prosecuted him, securing conviction by the same confession in very dubious circumstances. See D.M. Walker op cit note 14 supra p159
16. Hume vol i p542; vol ii pp323-324
17. Loc cit note 15 supra
18. Black op cit note 4 supra p16
19. Esmein op cit note 2 supra at p234
20. Loc cit note 15 supra
21. *Laws and Customs* Part II, tit x
22. Erskine loc cit note 3 supra
23. 1689 c.28
24. Treason Act 1708 (7, Anne c.21)
25. Dickson p265 §382

4.4 Interrogation on Oath and Reference to Oath

In early practice in matters concerning the state or which
excited great interest, interrogation on oath was also commonly

employed, sometimes alone and sometimes along with torture. The last example of the practice noted by Hume was in 1634 and it had been extinct for a long time when he was writing. ¹

Distinct from interrogation on oath was proof by reference to the oath of the accused. Although reference to a party's oath was long available in civil procedure ² only one wholly exceptional example of proof by reference to the oath of the pannel ever existed in Scottish criminal law. This was the crime of usury, which according to Hume had a quasi-civil status and was often pursued in the civil courts. An Act of 1597 stated that the charge should "be tried by aith of party, and all uther lawful probation, conjoyned therewith, competent of the law." This ambiguous provision was clarified by the Act 1600 c.7 which made it clear that it was the oath of the pannel which was intended and the libel was to be proved "by the writte or aith of party receaver of the said unlawful profite and be the witnesses insert in the said security made for the said summes." Hume is very critical of this provision, regarding it as "contrary to the ordinary rule of law," and he quotes only two examples of this procedure being used, both of consent of the pannel. He reserves his opinion on whether such procedure would have been competent in the absence of consent. ³

This unique provision was the creation of statute and it was never lawful at common law to refer a criminal libel to the oath of the pannel. ⁴ *Nemo tenetur jurare in suam turpitudinem.* Hume

implies that the Privy Council made use of reference to oath in proceedings relative to state crimes and he also quotes a few examples of its use in unusual circumstances before the ordinary courts. These latter examples are all quasi-civil in nature and are clearly wholly exceptional. The Claim of Right stated "That the forceing the leidges to Depone against themselves in capitall Crymes however the punishment be restricted is Contrary to law."

Erskine and Hume were both prepared to countenance proof by reference to oath in minor crimes although no examples were ever found.⁵ However by the time of Alison, apart from usury, which in any event was in desuetude, it was settled that reference to oath was wholly incompetent.⁶ In one case a pannel who had been sentenced "to stand in the jugs for prevarication" had his sentence suspended because the court of trial had used a statutory provision permitting proof by "*the oaths of witnesses or the confession of the party*" to allow the pannel to be put to his oath. It was held that this provision referred only to a free and voluntary confession and not one compelled by the sanction of an oath.⁷

Notes

1. Vol ii p323
2. Walkers p337 et seq; Macphail §14.01 et seq
3. Vol i pp506-507
4. Hume vol ii pp336-337; Alison vol ii p586
5. Erskine IV iv 94; Hume vol ii p337
6. Alison vol ii p586
7. Lachlan Graham (1800) Hume ii 337 note 2, Alison ii 587

Chapter 5 The Admissibility of Evidence of Confessions in Scotland

5.1 Introduction

Evidence of what an accused person said to another witness is admitted as a recognised exception to the rule against hearsay on the basis that what someone says to his prejudice is likely to be true and therefore free from the disadvantage of unreliability, which is one of the main reasons for the exclusion of hearsay evidence. ¹ This chapter deals with the rules of law which govern the admissibility of such evidence.

It should be made clear that the present study is primarily concerned with confessions and admissions as evidence of the accused's own acts and based on the accused's own knowledge. It is a general rule of Scottish law that a confession made by accused A and incriminating accused B is not admissible as evidence against B, since it is, in an issue concerning B, hearsay evidence. ² Even the so-called "vicarious confession" where A makes his statement in B's hearing, which might at first sight appear to be an exception to this principle, is not truly so since the evidence against B is his reaction to A's statement and the statement is admissible only for the purpose of explaining B's reaction. ³

Although there is no Scottish authority directly in point it is thought that the Scottish courts would follow the English view that admissions which are not based on the accused's personal knowledge are not admissible to prove the acts of other persons who are not accused:

"A voluntary statement made by an accused person is admissible as a 'confession.' He can confess as to his own acts, knowledge or intentions, but he cannot 'confess' as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an 'admission' of this nature." ⁴

In other words, if A says, "B told me he had stolen the goods," that statement would clearly be admissible against A himself if he were on trial for theft, since it establishes guilty knowledge. However it is thought that such a statement would not be admissible to prove that the goods were in fact stolen and the Crown would require to prove this by other evidence apart from A's statement.

From the earliest times confessions have been categorised as "judicial" and "extra-judicial".⁵ The phrase "judicial confession" in this context connotes a "confession on record", i.e. a plea of guilty which is accepted by the prosecutor.

Confessions or admissions in declarations or other judicial proceedings are, on this basis, "extra-judicial" although such terminology is confusing and, in any event, of little practical importance. This work adopts the categorisation in the fourth edition of *Renton and Brown* and deals with all statements made in a judicial setting under the heading of "Judicial Statements"

Out of court, extrajudicial confessions and admissions are most commonly made to the police and the bulk of this chapter is concerned with this type of confession although consideration is also given to confessions made in circumstances other than police questioning.

Notes

1. Wilkinson pp41 & 44
2. McIntosh v H.M. Advocate 1986 SCCR 496
3. This issue and the other apparent exceptions to the general rule are discussed infra chapter 5,5 and 5,6.
4. Suruipaul v R. [1958] 1 WLR 1050
5. Burnett p578; Dickson p209 §§286, 287

5.2 Judicial Statements

(1) "Judicial" Confessions and Admissions

"A confession by a prisoner in open court, and in presence of the assize is of all sorts of evidence the best and most convincing; it being an attestation of guilt, *sua ipsius voce et indicia*." 1

As already noted procedure from before the seventeenth century required a plea of guilty by the pannel to be referred to a jury, who had to return a verdict, before the court could proceed to

sentence. Burnett, echoing Mackenzie, explains the reason for this:

"For, as confessions, even in open court, may be the effect of undue means antecedently used; - may arise from a derangement of intellect and '*rather out of weariness of life, than a consciousness of guilt;*' and as the law has laid great weight upon the way and manner in which a confession is elicited, measuring exactly the degree of constancy of fear appearing in the pannel, as well as considering the motives by which he may be induced to confess; and joined to all these, as confessions may be qualified, and in circumstances annexed to them, the import of which may admit of doubt, it has been deemed wiser to entrust the cognizance of this sort of proof, as well as of every other, to a jury, leaving it to them to judge of it, and to inquire, if they see needful, into the situation of the prisoner, his state of mind at the time, and the circumstances or motives which may have induced him to confess." 2

In other words the court had to be sure that the confession was truly voluntary and made without the influence of hope or fear.

The Circuit Courts (Scotland) Act 1828 made it unnecessary, although not incompetent, to refer a plea of guilty to a jury and in modern Scottish practice, a plea of "guilty as libelled" will

normally be accepted without any inquiry by the court, no considerations of admissibility normally arising. Nevertheless, in solemn procedure the accused is still required to attest the voluntariness of his confession by signing a copy of the plea, which must be countersigned by the judge. ³ In summary procedure an accused who is present in court must personally tender his plea unless he is incapable of doing so. ⁴

Similarly no question of admissibility normally arises when the accused, in the course of giving evidence on oath, makes a confession or admission. Such simply becomes part of the evidence against him and the view has been expressed that if it amounts to a clear admission of the charge against him it is conclusive. ⁵ There is, however, a lack of decided authority.

The prosecutor is not obliged to accept a plea of guilty in either solemn or summary procedure. ⁶ Where the accused tenders a plea of guilty which is rejected the prosecution may not found on that plea. ⁷ Similarly in solemn procedure no reference may be made in the course of a trial to any charge on the indictment to which the accused has pleaded guilty, since such a charge is no longer before the jury. ⁸ Sheriff Macphail states that the same rule applies where the accused tenders a plea which he later withdraws but no authority is quoted for this proposition. ⁹

Although the question of withdrawal of pleas is, strictly, outwith the scope of this work, it is submitted that the present

state of the law is unsatisfactory and could, with advantage, be clarified. In summary procedure the withdrawal of a plea of guilty, if not exactly a matter of routine, is by no means infrequent and it is submitted, with all respect to the Shrieval bench, too often allowed. ¹⁰ A more robust attitude is apparent where the plea has been tendered with legal advice ¹¹ and also in solemn proceedings. In solemn procedure it has been held competent to withdraw a plea in the Sheriff Court, but this may only be done where the plea has been tendered under some real error or misconception or in circumstances clearly prejudicial to the accused. ¹²

In summary procedure a recorded plea of guilty to one charge may be taken into consideration by the court if it involves an admission relevant to proof of another charge on the same complaint. ¹³

Facts and documents may be admitted in both solemn and summary procedure by lodging a written minute with the clerk of court although the accused must be legally represented. ¹⁴ Apart from statutory authority, no fact can be established in a criminal trial by admissions on the part of the accused since a person accused of crime is not in a position to make admissions with safety to himself. Admissions made without statutory authority by the accused's agent are likewise incompetent. ¹⁵

Notes

1. Burnett p576

- 2, *ibid*
- 3, 1975 Act Section 103(1),
- 4, Act of Adjournal Rule 119(1) and (2)
- 5, Lord Cameron *Scottish Practice in Relation to Admissions and Confessions by Persons Suspected or Accused of Crime* 1975 SLT 265; cf Backhurst v MacNaughton 1981 SCCR 6 See also *infra* chapter 7, 2 (iii)
- 6, David Peter and John Smith (1840) 2 Swin 492; Strathearn v Sloan 1937 JC 76. See also *An Aspect of Criminal Procedure* (1956) 72 SLR 221
- 7, Cochran v Ferguson (1882) 5 Couper 169; Brown v Macpherson 1918 JC 3; Strathearn v Sloan 1937 JC 76
- 8, Walsh v HM Advocate 1961 JC 51
- 9, Macphail §2, 25. See §2, 26 et seq for criticism and proposals for reform
- 10, This statement is based on the writer's personal experience. See also Renton and Brown para 14-29, Owens v Wilson 1991 SLT 165
- 11, MacGregor v MacNeill 1975 JC 57; Pirie v McNaughtan 1991 SCCR 483
- 12, Healy v H.M. Advocate 1990 SCCR 110 cf Evans Petitioner 1991 SCCR 160
- 13, McColl v Skeen 1980 SLT (N) 53
- 14, 1975 Act Sections 150 and 354. A verbal admission is insufficient - Jessop v Kerr 1989 SCCR 417
- 15, Tullis v Millar (1899) 3 Adam 3

(ii) Judicial Examination: "Old" Form

It has already been mentioned in general terms that a declaration proved to have been freely and voluntarily emitted by the accused was admissible against him at his subsequent trial. ' Provided the declaration itself was admissible, any confession or admission which it contained would thus become part of the evidence against the accused at his trial. The declaration could be, and frequently was, acknowledged (ie admitted) by the accused. This appears to have been the general practice other than in capital cases.² However, if the declaration was not acknowledged it was, prior to 1887, necessary to prove it. The declaration required to be identified as that made by the prisoner at the bar and had to be proved to have been emitted by him freely and voluntarily while in his sound and sober senses. Proof was normally by the magistrate and one of the two attesting witnesses. Section 69 of the Criminal Procedure (Scotland) Act

1887 made it unnecessary to prove a declaration unless it was challenged.

Some of the factors which could lead to the declaration being ruled inadmissible have already been noted in the context of the right to silence viz, excessive interrogation, absence of the magistrate and inducement³. In addition, a declaration would be held inadmissible if the prisoner had been drunk, hysterical or insane at the time of emitting it ⁴; if it had not been read over to the prisoner ⁵; if it had been emitted in a language which one of the witnesses did not understand ⁶; if it had been written by the Procurator Fiscal or a person connected with the prosecution⁷; or if it had been emitted before a clerk of court and not a magistrate ⁸.

If the prisoner had previously been precognosced on oath as a witness a subsequent declaration would be inadmissible. Dickson, following Burnett and Alison, explains that this rule arose "because if facts tending to criminate him have been extorted when he was sworn, and when he may have believed himself constrained to answer, a repetition of them may have been elicited in his declaration to his serious prejudice." Where the precognition had not been on oath there was no bar to the prisoner's declaration being taken although it had to be emitted *de novo* since the precognition statement, having been taken when he was not an accused person and before his attention had been

directed to his rights, could not be used to form the declaration. ⁹

Where the prisoner emitted more than one declaration, the earlier declaration(s) had to be read over to him before he commenced his new statement in order that his mind was refreshed and he had the opportunity of supplementing or correcting his earlier story. If this was not done the subsequent declaration was inadmissible. ¹⁰ At the trial the Crown were required to produce all the declarations if they wished to rely on any of them, a rule which was strictly applied irrespective of the contents of the earlier declaration. ¹¹ Before 1887 each declaration had to be individually proved. An earlier declaration could not be proved by the later one containing a statement that the first had been read over to the pannel and adhered to. ¹²

No clear rule emerged on the admissibility of a declaration emitted on a charge different from that on the indictment although it would appear that the declaration was admissible where the indictment was a lesser charge arising from the same *species facti* but not where it was more serious. In James Stewart (1866) 5 Irv 31, a trial for murder, Lord Ardmillan refused to admit a declaration emitted before the death of the victim and when the prisoner had been charged with assault to danger of life. On the other hand in Macdougall v MacLulich (1887) 14R(J) 17 a declaration emitted on a charge of assault, mobbing and rioting and breach of the peace was held admissible

in a trial for breach of the peace only, the court holding, in effect, that the *nomen juris* was irrelevant. Much later the reasoning of these two cases was applied in the context of police questioning. ¹³

Notes

1. Supra chapter 3,3 (i)
2. Dickson p233 §334
3. Supra chapter 3,3 (i)
4. Dickson p226 §316. The declaration of an insane accused might be admissible for the limited purpose of establishing his state of mind shortly after the crime - Alexander Milne (1863) 4 Irv 301
5. Galbraith v Sawers (1840) 3D 52
6. Dickson p231 §327
7. Roderick Mackenzie (1839) 2 Swin 345, Bell's Notes 241
8. Dickson p225 §315; John Erskine (1818) ii Hume 328, Susannah Hughes (1811) ibid 329; see also John Stewart (1857) 2 Irv 614 where the declaration was rejected even though the Sheriff Clerk in question held a deputation as Sheriff-substitute
9. p 228 §321
10. Murray Steward (1817) ii Hume 330. See also Dickson p 229 §322
11. Thomas White (1814) ii Hume 326 where the earlier declaration contained nothing more than the prisoner's refusal to be examined because he was drunk! This case is the subject of an essay by William Roughead entitled *The Intemperate Midshipman in Mainly Murder* (London 1937) p47. See also Alison vol ii p572 approved in Thomas Loch (1837) 1 Swin. 494.
12. Catherine McGavin (1846) Ark. 67; Simon Hossack 1858 3 Irv 1
13. Willis v HM Advocate 1941 JC 1; HM Advocate v Graham 1958 SLT 167, cf HM Advocate v Cunningham 1939 JC 51, McAdam v H.M. Advocate 1960 SLT 47

(iii) Judicial Examination: 1980 Act Procedures

The statutory provisions governing the new form of judicial examination have already been described.¹ The transcript of the judicial examination must be lodged as a production² and is admissible in evidence without being spoken to by witnesses.³ Either prosecution or defence may apply to the court to refuse to allow a part or the whole of the transcript to be received.⁴ Sheriff Macphail⁵ suggests the following as possible grounds:- disclosure of previous convictions; reference to other charges

not on the indictment; reference to an extrajudicial confession which has been held inadmissible; irregularity in the conduct of the examination such as a departure from the statutory principles regarding questioning by the prosecutor.

If the transcript or the appropriate part of it is admissible any statement or admission which it contains becomes part of the evidence against the accused. Sheriff Macphail puts it thus:

"If in the course of the examination the accused has made a material admission, as that he was present at the locus of the crime charged when it was committed, or that he was implicated in certain of the events comprised in the charge, or if he has made statements suggesting special knowledge of these events, such admissions or statements may provide corroboration of other evidence to the same effect, in the same way as other statements made by him either extra-judicially or in the witness box." 6

When the accused makes an admission but qualifies it (for example admitting the blow but claiming self defence) the position appears to be that where the statement is led by the Crown or by the defence without objection the whole statement is admissible as evidence of the facts it contains, the assessment thereof being a matter for the jury. 7 This will presumably also apply to statements in the course of judicial examination.

Notes

1. *supra* chapter 3,3 (ii)
2. 1975 Act Section 78(2), HM Advocate v Cafferty 1982 SCCR 444
3. 1975 Act Sections 151(1) and 352(1)
4. *ibid* Sections 151(2) and 352(2)
5. Macphail §§20,14C
6. *ibid* §§20,14D
7. Morrison v H.M. Advocate 1990 SCCR 235, The issue of "mixed" statements is discussed further *infra*

(iv) Other Judicial Proceedings

Dickson states "As no person has a just reason to complain of his deliberate statements being used in evidence against him, those which a party has made in one cause may in general be used against him in another cause, although with a different opponent." ¹ In modern practice the evidence which he gave on oath in a previous civil action or judicial inquiry (eg a Fatal Accident Inquiry) is, subject to statutory exclusion in certain specific areas, ² admissible against the accused at his trial.³

It is sometimes thought that a witness who gives evidence for the Crown at a criminal trial thereby becomes immune from prosecution in respect of an offence emanating from the same incident but this view is incorrect. In reality immunity only extends to a *socius criminis* and then only in respect of the libel in support of which he has given evidence. ⁴

A witness for the defence in a criminal trial knows no immunity from prosecution and anything which he says in evidence may be admitted against him subsequently. It is routine for such a witness to be warned that he need not incriminate himself and it

has been suggested ⁵ that in the interests of fairness such a warning should be given in an appropriate case to a Crown witness also, although the absence of such a warning in respect of a Crown witness is clearly not a bar to a subsequent prosecution.

It was never authoritatively decided whether an "old style" declaration was admissible in proceedings unrelated to the charge in respect of which it was emitted. In Agnes Wilson (1860) 3 Irv 623 it was held competent to cross-examine a defence witness on a declaration she had previously emitted. However in George Milne (1866) 5 Irv 229 where a witness had originally been a suspect and had emitted two declarations which were, apparently, at variance with his evidence the defence were not allowed to prove the declarations on the basis that they were privileged in respect of the purpose and in the circumstances under which they were taken. Although the point has not as yet arisen in connection with the 1980 Act procedures it is thought that the provisions of Sections 147 and 349 of the 1975 Act, which permit a witness to be examined on any previous inconsistent statement and proof of that statement to be led, would now apply to a statement made in the course of judicial examination.

Notes

1. p210 §288
2. eg Bankruptcy (Scotland) Act 1985 Section 47(3)(a)
3. Lewis p318; Walkers p31 §33; Renton and Brown §18-21, Banaghan v HM Advocate (1888) 1 White 566; McGiveran v Auld (1894) 1 Adam 448
4. O'Neill v Wilson 1983 SCCR 265 approving McGinley & Dowds v MacLeod 1963 JC 11 cf Jones and Collins v H.M. Advocate 1991 SCCR 290
5. By Sheriff Gordon in his commentary to O'Neill v Wilson

5.3 Confessions and Admissions to the Police

(1) Background - The Rise of the Modern Scottish Police

A detailed description of the history of policing in Scotland is outwith the scope of this work but it is appropriate to outline it in general terms by way of background to the development of the law. ¹

When Justices of the Peace were first appointed in Scotland in 1611 they were empowered to appoint two constables from each parish for the purpose of apprehending criminals. Two subsequent statutes ² required the appointment of two constables from each parish or large town and defined their powers of arrest. The constable was required to take anyone he arrested to a magistrate so that the person could be dealt with according to law. ³ Both the Justices and the constables seem to have been inadequate for their tasks and Sheriff Irvine Smith describes the latter being "derided by the populace." He suggests that this is one reason why the Justices of the Peace did not enjoy more success in Scotland. ⁴

The word "police" was in use in Scotland somewhat earlier than in England, indeed the first recorded use of the word in Great Britain was the appointment by Queen Anne of seven "Commissioners of Police" for Scotland in 1714. The duties of the early police were distinct from those of the constables and far removed from what we now understand as police work, largely concerning matters

such as paving, lighting and cleansing.⁵ Hume uses the phrase "criminal police" in reference to officials concerned with the administration of justice.⁶

It appears that the earliest involvement of the police in the suppression of crime concerned behaviour which interfered with the free operation of the market place and although "watching" gradually became a recognised function, this happened at different times in different areas and there was no clear transition from the old type of police to the modern. Largely because of the need to suppress poaching and vagrancy, rural police forces tended to assume the characteristics of the modern police rather earlier than their urban counterparts. Eventually the police took over all the functions of the constables, the latter being relegated to acting as bar officers at the Sessions

Aberdeen was the first Scottish city to obtain a private police Act (in 1795) followed five years later by Glasgow and from this period on there was a general move towards the establishment of local police forces which was helped by enabling statutes in 1833 and 1847 before becoming compulsory for the counties under the Police (Scotland) Act 1857. By the end of the nineteenth century Scotland was largely fully policed in the modern sense.

Glasgow appointed Scotland's first "criminal officer" (ie detective) in 1819⁷, and by 1853 it was spending some £26,000 per annum on its criminal, preventive and detective police

departments. However in the same year the Superintendent of the Glasgow Police, on being asked by the Select Committee on the Police whether his men had to devote a great deal of their time to sanitary matters, complained that "hitherto the time of the Glasgow police has been more taken up in keeping the city in proper order than with reference to crime or criminals."

Thus the police were often little more than street-sweepers and against this background it is perhaps less surprising that the nineteenth century Scottish judges were so reluctant to allow them anything more than a minimal right to question prisoners when judicial examination was available.

Notes

1. See generally Lord Mackay of Clashfern *The Relationship between the Police and the Prosecution* (1984) 52 Sc Law Gaz p11
2. 1617 c.8 and 1661 c.38
3. Hume vol ii p76; Boyd *Justices of the Peace* (Edinburgh, 1787) Book 1 p33
4. Introduction to Scottish Legal History (Stair Society, 1958) p40 and pp427-428
5. W.G. Carson *Policing the Periphery: The Development of Scottish Policing 1795-1900* 1984 ANZJ Crim 207 & 1985 ANZJ Crim 3
6. Vol ii p141
7. Grant *The Thin Blue Line* (London 1973) p23. See also C Muir *Glasgow: The Early Force* (1985) 58 Police Journal

(11) The Views of Burnett

Since the police were still in an embryonic state when Hume was writing, it is hardly surprising that he makes no reference to the matter of confessions to the police or police questioning. Accordingly it is to Burnett that one must look for the earliest comments on the subject.

Burnett deals with the matter in the general context of extrajudicial verbal confessions ' and he clearly attaches little value to confessions to police officers:

"When [extrajudicial verbal confessions], as often is the case, are made immediately upon detection, are accompanied with entreaties of forgiveness, and sorrow for what had happened, and when they are addressed, not to the inferior officers of justice, whose severity he may dread, and wish by any means to deprecate, but to the parties injured, they are strong and important circumstances, though not of themselves conclusive."

After commenting that the value of such confessions are diminished if they have been obtained by "undue means" and they are wholly inadmissible if obtained by threats or promises he concludes:

"Hence it is that from the influence which the inferior officers of police are supposed to have over those whom they are employed to apprehend, as well as from the bias, and even interest which their situation creates, to lead them to misrepresent or misapprehend words uttered by the accused, their evidence on this subject ought always to be received with caution and distrust."

Notes

1. p530

(iii) The Nineteenth Century Cases up to Smith v Lamb(a) Introduction

As there was no appeal from a decision of the High Court until 1926, the early cases are mostly single-judge decisions taken at first instance and are occasionally inconsistent. Certain general principles can nevertheless be traced although a very wide judicial discretion was permitted ' and from time to time judges would express their disapproval of police conduct but at the same time admit the evidence.

Notes

1. McRae v Blair (1855) 2 Irv 568

(b) The Time and Place of the Questioning

The first reported case on the admissibility of a confession to the police is Robert Alexander and John McCourt (1831) Bells Notes 244 where a criminal officer gave evidence that while escorting McCourt through the streets he questioned him about the charge against him and McCourt confessed implicating Alexander. He said he had said nothing to induce the confession and the evidence was admitted despite "some doubt" being entertained on the bench as to its regularity.

Lowrie and Cairns (1836) Bells Notes 244 marks the first appearance of judicial dislike of questioning in the police station. Although the Lord Justice-Clerk held evidence of questioning at the police office to be "not incompetent" he went on to warn that

the Court "did not wish that sort of examination to be made by the police after a man was taken to the office." However a few years later in John Martin and Catherine Robb (1842) 1 Broun 382 this view changed and thereafter evidence arising from questioning after lodging in the police office was generally considered inadmissible. ¹ Nevertheless, Lowrie was never overruled (despite Dickson's claim otherwise) and was quoted with approval almost 90 years later. ²

The distinction, which would become familiar, between questions at the time when the charge was first made and an inquisitorial examination later at the police office was first drawn by Lord Cockburn in Agnes Christie or Paterson (1842) 1 Broun 388. His Lordship held that there was no impropriety in the former. ³

The most authoritative of these early cases, if only because it was decided by four judges, is Lewis v Blair (1858) 3 Irv 16, a Bill of Suspension from Greenock Sheriff Court. Lewis, an American, was second mate on an American ship and while the ship was at anchor off the Tail of the Bank there was a fracas on board in the course of which Lewis and the first mate, one Sawyer, seriously assaulted a seaman called Fraser. In the course of the incident Lewis also threatened Fraser and a second seaman called Freeman with a gun although it is not clear whether the gun was in fact discharged. On the same day as the incident the Procurator Fiscal at Greenock obtained a warrant from the Sheriff "to apprehend and bring the said Benjamin Lewis and the

mate of the said ship 'Ophelia' complained on, before him for examination." The warrant, which also apparently authorised a search for the gun in question, was given for execution to an officer called Wylie.

Sawyer and Lewis were both arrested but Sawyer absconded before the trial and Lewis stood trial on his own. At the trial Wylie gave evidence that he had gone on board the ship with his warrant, apprehended both mates and asked for the pistol which (he said) Lewis had fired. Sawyer said he would show him it and went to a state room returning with a pistol which he gave to Wylie. Wylie then asked if that was the pistol which had been used, to which Sawyer replied that it was. Wylie then asked "Was the pistol loaded when used?" After a defence objection had been repelled he said that Sawyer had admitted that it had been loaded, and in answer to a further question, that it had been loaded with powder and ball. The entire conversation had taken place in Lewis's hearing.

The earlier part of Wylie's evidence was led without objection but the part about the loading of the pistol was objected to on the basis that the statements by Sawyer were not spontaneous and, since the warrant only authorised the officer to apprehend the two mates and take them before the Sheriff for examination, he had no right to usurp the magistrate's position and question the prisoners. This objection was repelled as was a further

objection to the admissibility of Sawyer's statements against Lewis.

On appeal the High Court by a majority of three to one (Lord Handyside dissenting) upheld the conviction although the Lord Justice-Clerk recalled that in the past he had pressed the necessity of "putting a stop to what had been allowed to go too far, viz the system adopted by police officers of questioning prisoners after apprehension." His Lordship also said that it might have been better "if the prosecutor could have made out his case without this evidence." The opinions are fairly short and although several earlier cases were cited in argument no review of these cases is attempted. The majority of the Court found nothing to criticise in Wylie's questions which had been few in number, restricted to the subject matter of the charge and put at the time of apprehension on the evening of the day of the incident. The Lord Justice-Clerk also emphasised the distinction between questions put at the time of apprehension and those put later once the prisoner had been removed from the scene or locked up for examination.

Shortly after Lewis the subject of questioning of prisoners in custody arose again in William Wylie (1858) 3 Irv 218. Wylie, who was eventually found insane, was in police custody in connection with a murder which had happened a short time before. A hat had been recovered at the scene which the police showed to the prisoner (without cautioning him) and which Wylie admitted

was his. Objection was taken to this evidence firstly, on the ground that he had not been cautioned and secondly, on the ground that such an examination by the police was generally incompetent. The Court did not address itself to the question of the caution but admitted the evidence on the basis that the questioning had taken place immediately after the crime and while the accused had only been in the hands of the police for a short time. Again the distinction was drawn between this situation and police questioning some time after the accused had been in custody.

Gracie v Stuart (1884) 5 Couper 379 is the final nineteenth century case on this point. The accused was charged with reset and, having been taken to the police office and charged, he was asked some questions after he had been in custody for about half an hour. He gave two false replies which the Crown sought to adduce at his trial. An objection was repelled and the Sheriff permitted the evidence to be led. On appeal the High Court dealt with the matter shortly, the Lord Justice-Clerk simply observing

"I have always discouraged such questions, but I do not think that they are incompetent evidence.

In some cases the question may arise quite naturally, and without any intention to entrap or obtain information unfairly."

Lord Young's judgment is of interest as the first explicit statement that the matter was one of fairness to the accused rather than competency:

"The rule is that a statement made by a person on

the occasion of his being apprehended, without threat or pressure, is competent, but if it shall appear that the matter was carried too far the Court will stop the examination on the grounds of fairness to the prisoner. It is not a question of competency at all."

Notes

1. Dickson p242 5347. See also Theodore Dowd (1852) J Shaw 575; Isabella Laing and Others (1871) 2 Couper 23; John Bruce aka Wood (1842) Bells Notes 245; Catherine Beaton or Bethune (1856) 2 Irv 457.
2. Waddell v Kinnaird 1922 JC 40, LJC Scott Dickson p442
3. See also Isabella Laing and Others note 1 supra

(c) The Usurpation of Judicial Examination

Another related theme which recurs again and again, the Court's dislike of police officers acting as "examinators" of prisoners, was first taken up by Lord Medwyn in Catherine Symon (1841) Bells Notes 245. His Lordship pointed out that by questioning the prisoner the police had done what the magistrate and no one else was entitled to do, although he actually ruled in favour of admitting the evidence.

The most frequently quoted case on this point is Helen Hay (1858) 3 Irv 181 where a criminal officer enquiring into a murder apprehended the accused without a warrant on the basis of "common report" that she had been guilty of the crime. He questioned her and she made replies which were presumably incriminating. At her trial defence counsel objected to evidence of this conversation on the basis that it amounted to a declaration taken without

cautioning and without the protection of the magistrate. Crown counsel sought to argue that confessions and admissions made at the time of arrest without improper inducement had been repeatedly admitted in evidence. The objection was upheld by the Lord Justice-Clerk who took the opportunity to tell the officer "that when a person is under suspicion of a crime, it is not proper to put questions, and receive answers, except before a magistrate." '

Notes

1. See also John Bruce aka Wood (1842) Bell's Notes 245; John Martin and Catherine Robb, (1842) 1 Broun 382; Catherine Beaton or Bethune (1856) 2 Irv 457, cf John Thomson aka Peter Walker (1857) 2 Irv 747 where despite adverse judicial comment the evidence appears to have been admitted without defence objection.

(d) Police Malpractice

Professor Gibb has pointed out that it says much for Scottish police methods that the books contain virtually no account of statements extracted by actual or threatened violence. '

However it was recognised early that any malpractice by the police such as pressure, inducement, deceit or an attempt to entrap a prisoner into making a confession would result in the evidence of such confession or admission being excluded.² The first case on the point, Ann Watt or Ketchen (1834) Bell's Notes 244, is minor but illustrates how slight a degree of dishonesty was required before the evidence would be disallowed. The accused had given the policeman part of the stolen money and when he asked her for the rest she said she would give him half a

crown if he would say no more about it. He made no such promise but admitted at the trial that he had used expressions intended to lead the accused to believe he would hush the matter up. Despite the minor nature of the deceit the court held the evidence inadmissible.

An altogether more serious example of police dishonesty was Kerr v Mackay (1853) 1 Irv 213 although the accused herself was not the person tricked. In this case Kerr was charged with reset along with two other women, Fraser and Macfarlane. A senior police officer, Superintendent Anderson, falsely told Macfarlane that Fraser had confessed, whereupon Macfarlane made a confession implicating Kerr. Following on this confession Kerr was seen at home and charged. Anderson then, without cautioning her, interrogated Kerr regarding the whereabouts of the stolen items as a result of which she made certain admissions. Anderson's evidence was admitted at Kerr's trial but on appeal it was held that it should have been rejected. Superintendent Anderson appears to have had a narrow escape from punishment at the hands of the Lord Justice-Clerk who had some very trenchant things to say about his behaviour but the main point of interest in the case is in his Lordship's clear distinction between a voluntary statement and one elicited by police questioning:

"...while it was obviously a policeman's duty to intimate to parties whom he apprehended the nature of the charge against them, he had no right to enter into any argument with them, or attempt to

extort a declaration of guilt. If they chose to volunteer a statement, the case of course was wholly different, though even then they should be cautioned that it might be used against them."

In Ditrich Mahler and Marcus Berrenhard (1857) 2 Irv 634, Mahler was persuaded to make certain, presumably incriminating, statements to a civilian witness by the police who visited him repeatedly while he was in custody and eventually gave him a written memorandum promising that if he gave information he would "in all probability" be admitted as Queens evidence. It was held that such assurances ought not to have been given and the evidence was ruled inadmissible.

Even if the deceit had been for a good reason, for example to persuade a mentally disturbed accused to "come quietly", and not intended to entrap him into a confession, the evidence would still be held inadmissible. ³ In one case it was held that evidence of a conversation between a female prisoner and a policeman's wife was inadmissible even though it was clear that there had been no improper motive. The mere possibility of the accused being entrapped into a confession was sufficient to exclude the evidence. ⁴

An *obiter dictum* of Lord McLaren encapsulates the issue:

"There are cases where the relation between the witness and the accused constitutes an objection,

as where the witness is in a position of authority and has the opportunity of using pressure from which the accused requires protection." 5

Notes

1. *Fair Play for the Criminal* (1954) 66 JR 199 at p207, cf the description of American practices in J.W.R. Gray *Police Interrogation and the Trial Within a Trial* 1970 JR 1 at p13
2. Dickson p240 5344
3. George Bryce (1864) 4 Irv 506
4. May Grant (1862) 4 Irv 183 cf John Millar (1859) 3 Irv 406
5. Smith v Lamb (1888) 15R(J) 54

(e) Statements Volunteered to the Police

Provided there had been no attempt to entrap, any confessions or admissions volunteered or blurted out to the police were admissible even though no caution had been given. The clearest statement of this is Smith v Lamb (1888) 15R(J) 54. The accused, on the day he had been liberated on bail, approached the policeman who had arrested him and engaged him in conversation in the course of which certain admissions were made. The High Court had no trouble in dismissing the appeal. Lord Young stated:

"No doubt when a man is in durance, in jail, the law is jealous of conversations between him and his warders. It is not the business of a jailer or a turnkey to go into the cells and converse with the prisoners about the crimes with which they are charged. The law guards a prisoner against confessions or statements induced by promises made to him by his jailers, and the Court will inquire into confessions and statements made by persons in custody in order to see that no

undue advantage is taken over such persons by reason of the opportunities possessed by their custodiers. The natural incidents of an apprehension or statements made by accused persons when not in custody are a totally different affair."

Lord McLaren was more succinct:

"The appellant went up to the constable and spoke about his case. It is no part of the duty of a police constable to warn every person who casually addresses him not to say anything in case it may be used in evidence against him."

(f) The State of the Law at the End of the Nineteenth Century

Insofar as it is possible to summarise what was essentially a matter of judicial discretion, the law at the end of the century may be described as follows. '

The prime duty of the police officer was to apprehend an offender and bring him before the magistrate for examination. It was no part of his duty to interrogate the prisoner or attempt to obtain a confession of guilt and the questioning of a prisoner in custody, if not actually prohibited, was strongly discouraged. However evidence of a statement made by a prisoner to a police officer would be admissible if:

(1) it was made at or shortly after the time of

arrest;

(ii) it was made freely and voluntarily;

(iii) it was made after he had been informed of the charge against him and preferably, though not necessarily, after he had been cautioned;

(iv) there had been no more questioning than was absolutely necessary in the circumstances and the questioning had related to the subject matter of the charge, and had arisen naturally without any intention to entrap or obtain evidence unfairly;

(v) it was made without inducement by threats, bribes or false representations.

Some writers also suggest, by analogy with judicial examination, that it was necessary for the accused to be in his sound and sober senses although this is not entirely supported by the cases.

Notes

1. See generally Anon, *Police Evidence* (1896) 12 SLR 203; HH Brown *The Evidence of the Accused in Criminal Procedure* (1898) 5 SLT 182

(iv) The Early Twentieth Century up to Waddell v Kinnaird

The turn of the century found judicial examination in decline and the police rapidly approaching their modern form. Nevertheless the cases during the first twenty years of the twentieth century continued the trends set during the previous seventy years. With only one exception, the early twentieth century cases are all summary appeals from police court decisions. On several occasions defence counsel attempted to argue that the admission of inadmissible evidence ipso facto rendered the conviction bad even though there was sufficient other evidence to justify it. The High Court had a noticeable tendency to decide these cases on the simple ground that there was sufficient other evidence without seriously addressing the question of the confession evidence. However later they did begin to try to make some sense out of the earlier cases.

The one single judge decision, HM Advocate v Smith (1901) 3 Adam 475, was a simple matter of police questioning going beyond the bounds of what the court considered necessary and as such is of little interest. Russell v Paton (1902) 4F(J) 77 is similarly of little interest other than the re-emphasis yet again by the Lord Justice-Clerk that "what is proper in one set of circumstances may be improper in another set of circumstances."

In Cook v McNeill (1906) 5 Adam 47 Cook had been interviewed as a witness in the course of preliminary police inquiries into a

charge of reset. He gave evidence for the Crown at the trial of one of the reseters. Subsequently he was also charged with the reset and evidence of his statements to the police was led at the trial. On appeal it was held that the statements, being in the nature of precognitions, were inadmissible, a point which the Lord Justice-Clerk held to be "well established," and the High Court found it unnecessary to deal with the question of his previous testimony. This case is something of an historical curiosity and if it were brought at all today, which is highly unlikely, it would almost certainly be decided the other way round. The Crown would probably be held barred from prosecuting Cook because of his previous testimony while statements made in the course of preliminary police inquiries would be likely to be held admissible.

In Hodgson v Macpherson (1913) 7 Adam 118, a case of betting contraventions, a police officer executing a search warrant made a casual remark to one of the accused to the effect that he was surprised that he was engaging in a particular form of business. The accused, who had previously been cautioned, replied that he was sorry that he had started it and went on to explain why he had done so. This evidence was admitted at the trial despite objection, the police court judge holding it to have been voluntarily made. The leading opinion in the High Court was given by Lord Kinnear but it is confused and unsatisfactory and appears to justify the admissibility of the statement on the basis that the accused could have gone into the witness box and

disputed the police officer's evidence. However, in a passage later to be quoted with approval in Chalmers, his Lordship once again disapproved of police officers usurping the function of the judicial declaration:

"A criminal officer is not entitled to examine a person suspected of a crime in order to obtain confessions or admissions from the criminal, and so in fact to obtain from him what is to serve the purpose of a declaration without giving him the protection of the magistrate before whom alone declarations have to be taken."

Cook and Hodgson were considered in Brown v Macpherson 1918 JC 3, a classic police court case of resetting lead. The facts bore a number of similarities to Cook, the accused having gone to the police station and there, without being cautioned, having identified one of the people who had stolen the lead. Evidence of this was admitted at the trial. On appeal it was contended that the statement was not voluntary and was in fact a pre-cognition to be used in the case against the thief. The High Court side-stepped the issue on the basis that there was sufficient other evidence to uphold the conviction.

Cook, Hodgson and Brown were distinguished in Costello v Macpherson 1922 JC 9. Two railway police officers had seen the accused in suspicious circumstances carrying a parcel which, despite his assertion that it contained paper, was found to

contain coal. The accused then claimed to have got the coal from a miner called Fairgreave. At this point a sergeant of the regular police appeared on the scene and requested that all parties should go to the police station to have the matter verified. The accused was neither cautioned nor charged at this stage. En route to the police station, without any prompting, he said "To save trouble, I may as well tell the truth; I took the coal from the bunker." Evidence of the accused's statements to the police was admitted at the trial.

At the appeal hearing defence counsel conceded that there could be no objection to the accused's statements to the railway police officers but argued that the statement on the way to the police station was inadmissible because the accused was in custody and had not been cautioned. From a modern perspective it is difficult to regard the appeal on this point as anything other than a lost cause and indeed Lord Justice-Clerk Scott Dickson upheld the admission of the contested statement on the basis that it had been voluntarily made before the accused had been charged. His Lordship's opinion also marked a step towards the modern position with the first explicit judicial acknowledgment of the legitimacy of investigative police questioning:

"The first two statements were made at a time when there was no charge at all, when the railway police, in the ordinary course of their duty, having had their suspicions aroused, asked the man what he was carrying. This, I think, they were

entitled to do, because, if policemen are not entitled to make inquiries when they believe ... that a crime had been committed, the due discharge of their duties would be seriously hampered."

However in a later passage which is clearly nineteenth rather than twentieth century in origin, his Lordship went on:

"Now I have no doubt that *when a person has been charged* he cannot be questioned by the police without being duly cautioned that he is not bound to answer, and that anything he says may be used in evidence against him." ¹

The final case in this group, Waddell v Kinnaird 1922 JC 40, has been described by Sheriff Gordon as "in a sense the last nineteenth century case." ² The circumstances were not unlike those in Costello. Waddell, a railway employee, was arrested by a railway policeman, Wilson, in connection with the theft of a quantity of paraffin. The railway officer cautioned and charged him and shortly thereafter an officer from the regular police appeared on the scene. Since Wilson was required to inform the stationmaster before removing a railway employee from his post, the two policemen and Waddell went to his office where Wilson explained the circumstances. Without any reference to the police officers, and without any caution or warning, the stationmaster questioned Waddell and he made certain remarks which were in fact not particularly incriminating. Evidence of this conversation was admitted at the trial and the accused was convicted. He

appealed and for the first time the appeal court had the benefit of a full citation of authority.

Lord Justice-Clerk Scott Dickson considered that the interview was not an 'official interrogation' and was in any event *unico contextu* with the accused's arrest and the caution and charge. His Lordship reviewed a number of earlier cases including Gracie, Hodgson and Brown before concluding that the question was one of competency rather than fairness:

"In the present case it has not, in my opinion been shown that the evidence objected to was incompetent. It related to what the accused said after he had been warned; it was neither made to nor elicited by the police or by anyone for whom the prosecution can be held responsible; no inducements were held out; no promises or threats were made, the statements in themselves were not of such a character as could be regarded as of the nature of a confession or admission of the charges which had been preferred against the accused; and there is nothing which suggests any miscarriage of justice."

Lord Salvesen was also in favour of rejecting the appeal but for different reasons. In a lengthy and perceptive judgment his Lordship accepted that there was a body of opinion to the effect that evidence of statements obtained by questioning after the

prisoner had been lodged in the police station was inadmissible. However the reason for this was that by that stage the proper person to question the prisoner was the magistrate and not the police. There was no rule of law excluding answers to questions from the police at the time of apprehension or on the way to the police station. His Lordship adopted the view of Lord Young in Gracie which, he considered "puts this much-discussed question on its proper basis" ie that the matter was one of fairness to the accused and not competency:

"As [Lord Young] says, it is not a question of competency at all, because any statement made by a prisoner which is not made in precognition is perfectly competent, although its value may be detracted from by the fact that it is spoken to by some person who is connected with the prosecution. As a matter of procedure, the Judge who presides at the trial must use his discretion as to whether the question should be allowed to be put on considerations of fairness. But I know of no case where, when the answer has been admitted, a subsequent conviction has been set aside on the ground of the incompetency of the evidence admitted. The case of Gracie is a distinct authority to the contrary which is binding upon us and has never been challenged, and, I think it lays down succinctly the whole law that is applicable to the case in hand."

Sheriff Gordon observes that if Gracie is the whole law "it can fairly be said that there is hardly any law at all, merely an equitable discretion in the court to exclude evidence" and he also points out that too much stress should not be laid on the point about the absence of a successful appeal since there was, as already noted, no appeal against a conviction in the High Court until 1926 and most of the reported cases involved High Court trials. ^a

The third judge in Waddell, Lord Ormidale, dissented vigorously (Sheriff Gordon describes his language as "almost intemperate" in the context of the case) and his judgment is, in many ways, the most interesting part of the whole case, particularly because of its influence on the subsequent development of the law. Having said that, however, it is submitted that Lord Ormidale's description of the conversation as an "interrogation" and "in effect an inquiry at the instance, or, at any rate, with the connivance and assistance, of the police into the probable guilt of the prisoner" is extravagant and without any foundation in the facts of the case.

Nevertheless the real importance of Lord Ormidale's judgment is that it lays the foundation for the tripartite division of the stages of a police inquiry later to become so familiar in Chalmers and other cases although it was to take some time yet for the law to develop. His Lordship stressed the distinction between a person who has been charged with a crime and a person

who has not:

"The fallacy underlying the respondent's argument appears to me to be that it omits to give effect to the vital consideration that, before the questions were put, the appellant had been arrested and charged with a crime. They were not of the nature of questions put prior to a man's arrest, with a view to giving him an opportunity of assisting the police, and himself, by helping to clear up suspicious circumstances. A policeman is entitled in the due discharge of his duty to put questions before going on to arrest."

After considering Costello and distinguishing it on the facts his Lordship continued:

"... it appears to me to matter not at all that [the inquiries] were made not in the police office but on the way to the police office the appellant being at the time in custody on a charge of theft."

Later in the judgment his Lordship animadverted on the usurpation of judicial examination:

"On the other hand the whole trend of more recent authority is against the admission of statements induced by the police, where they have constituted themselves either directly or indirectly examiners of a prisoner. ... The insistence of an interrogation by the police of itself amounts

to pressure and answers elicited under pressure are in an entirely different category from statements made spontaneously and of the prisoner's own accord."

Despite its dubious factual basis and the extravagance of the language used, Lord Ormidale's judgment, rather than that of his two colleagues, formed the basis for the subsequent development of the law

Notes

1. Author's italics
2. *The Admissibility of Answers to Police Questioning in Scotland* in Glazebrook (ed) *Reshaping the Criminal Law* p317 at p325
3. Loc cit p323

(v) Some minor cases

1926 was a fertile year for cases on confessions although only one of the four cases reported is of lasting importance. In HM Advocate v Keen and Others 1926 JC 1, police officers had overheard a shouted conversation among a number of prisoners in the cells. In a decision contrary to earlier precedent ' as well as, it is submitted, common sense, Lord Ormidale refused to admit evidence of this. Keen is clearly an aberration and would not be followed today although it has never been overruled.

In HM Advocate v Lieser 1926 JC 88 the accused, who had been charged with murder, was still within the charge room of the

police station when the policeman who had been talking to him addressed a question to a colleague. Lieser mistakenly thought the question was addressed to him and made a reply which was, presumably, incriminating. Lord Constable considered the point to be on the borderline but in the event disallowed evidence of the reply.

Another decision which must be regarded as, at best, doubtful by modern criteria is HM Advocate v McFadyen 1926 JC 93 where Lord Moncrieff held that evidence as to a voluntary statement made by a prisoner who had been duly cautioned was admissible even although it indicated the accused's previous bad character. The statement was part of the *res gestae*. In this case the reply was "The idea is ridiculous, it is big things I go in for." ²

Notes

- 1, Robert Brown (1833) Bells Notes 244; James Miller (1837) ibid; John Johnston (1845) 2 Broun 401 (in which the accuracy of Alison's report of Tait and Stevenson (1824) Alison ii 537 is doubted.)
- 2, See Renton and Brown §10-44

(vi) The Development of the Concept of Fairness - HM Advocate v Aitken and its Progeny

The fourth case from 1926, HM Advocate v Aitken 1926 JC 83 a single-judge decision in a murder case, represents another, albeit tentative, step forwards in the development of the law. The circumstances were straightforward. Aitken, who was 16, was suspected of having murdered his grandmother. She had been killed on a Friday and on the Saturday afternoon Aitken was taken into police custody and detained on suspicion. He was not charged and there was no warrant in force for his arrest. In the course of the Sunday morning he was spoken to by a Detective Inspector McGhee who cautioned him. Aitken was apparently unwell, feeling sick and shivering, and McGhee told him to go and lie down and put his coat over him. He then left to deal with some other business, returning after about half an hour. He then cautioned Aitken again and asked him some questions about his work and about whether he had been to a ball on the Friday night. Aitken then began to make a statement but McGhee stopped him and told him he would have to make the statement to another officer. This was done about an hour later although it was not clear whether he received a further caution. The completed statement was handed to Aitken to read but, apparently due to his disturbed mental state, he was unable to do so. At some point on the Sunday a solicitor tried to see him but was refused access and the statement was thus made without the benefit of legal advice.

At the trial objection was taken to the evidence of the statement on several grounds: - (a) Aitken was de facto under arrest at the time even though he had not been charged; (b) the statement was not voluntary, having been indirectly prompted by McGhee's questions; (c) it would have been unfair to him to admit the statement on account of his youth, his illness, the absence of legal advice, the inadequacy of the warning given to him, and his abnormal mental state; (d) to admit statements of this nature would destroy the protection afforded to the accused by the rules regarding judicial declarations. Defence counsel quoted a number of earlier authorities including, for the first time, the English case of Ibrahim v R [1914] AC 599. Crown counsel simply argued that in the circumstances the statement was voluntary and thus admissible.

Lord Anderson refused to admit the statement in the circumstances of the case. He held that the test was whether it was fair *in the circumstances of the accused person* ' to admit the statement. This would involve the court in considering, firstly, the nature of the charge which was being investigated; secondly, the mental capacity of the prisoner at the time the statement was made; and thirdly, the circumstances in which the statement was made. In the instant case, his Lordship considered that Aitken's youth, the fact that the charge was murder, his illness, his abnormal mental condition and the absence of legal advice, all inevitably led to the rejection of the statement. He was also prepared to hold that Aitken had been "in a sense" interrogated since

McGhee's questions had a bearing on the matter which the police were investigating.

His Lordship drew a distinction between a statement made by a person who had been accused of a crime ² and a person who had not been so accused but had been detained by the police on suspicion. He rather turned defence counsel's first point inside out by holding that the court ought in fact to be more jealous to safeguard the rights of a detainee on suspicion who had not been charged:

"In the former case, that is to say, where a charge has been made, the prisoner is protected by several circumstances. In the first place, if the arresting officer does his duty, the prisoner is, at the time of his arrest, charged and warned by the arresting officer that anything he may say in answer to the charge may be used against him at a later time; in the second place, a person who is accused is entitled, from the moment of apprehension, to have the advice of a skilled law-agent, who will advise him whether or not he ought to make a statement and what statement he ought to make; and in the third place, if a person has been accused of a crime and desires to make a statement, he is by Act of Parliament entitled to do so before a neutral official, to wit, a magistrate, in whose presence - still under the

advice of his law-agent - he may make what is called a judicial declaration. Where a person has been accused of a crime and has these protections, the law is quite settled that, if he does choose to make a statement which is purely voluntary, that statement must be received in evidence; but if he makes a statement which the law holds to have been made in response to interrogatories put by and official, and which is therefore not completely voluntary, such a statement will not be admitted in evidence."

A prisoner who was merely detained on suspicion did not have these rights. Moreover, in Lord Anderson's view, there was a temptation on the police to justify the detention and, where the evidence was otherwise not very strong, to try to buttress it by getting a statement from the prisoner.

In an article to which further reference will be made, ³ Professor A.D. Gibb, who is very critical of what he terms "feverish anxiety to smell out unfairness," grudgingly admits that Lord Anderson was probably correct in his decision but only on the basis of mental confusion. He considers that the other grounds of possible exclusion listed by his Lordship would not justify making any exception to the rule of voluntary statements. It is respectfully submitted that Gibb overlooks several important issues in this case, not least the dubiety about whether Aitken was adequately cautioned and also Aitken's anomalous status as a

prisoner who had not been charged with any crime. It is also submitted that Lord Anderson was wrong in his view that the accused was entitled to legal advice and assistance "from the moment of apprehension." The law was, and still is, that the accused is entitled on arrest to have intimation sent to a law agent but the only entitlement to an interview with the law agent arises before judicial examination. There is, as a matter of strict law, no entitlement to such an interview in the course of police proceedings prior to caution and charge. ⁴

It has previously been pointed out that Lord Ormidale's judgment in Waddell laid the foundation for the tripartite division of the stages of a police inquiry by distinguishing between a person who had been charged by the police and a person who had not. Lord Anderson's statement of the law introduced the third category, namely a person detained on suspicion. In such a case the police were subject to at least as stringent restrictions as they were in the case of somebody who had been arrested.

Some nine years later Lord Anderson was one of the members of the Appeal Court when the case of Mills v HM Advocate 1935 JC 77 was decided although he contributed nothing to the decision other than a simple concurrence with the leading opinion of Lord Justice-Clerk Aitchison. This was another case of the murder of a relative, on this occasion the accused's stepmother. Before the accused was arrested he told the police that he had not seen the victim for some time. He was subsequently arrested on

suspicion and placed on an identification parade before which he was cautioned in the usual general terms. Having been identified at the parade he then, without a further caution, made a highly incriminatory verbal statement to a senior police officer. After having been cautioned and charged with murder he made a written statement which was preceded by a caution.

Both statements were admitted in evidence at the trial despite objection. Before the Appeal Court it appears to have been accepted that the second statement had been properly admitted but the defence, echoing several of the points in Aitken, levelled a number of criticisms at the decision to admit the first statement. It was claimed that the first caution had been directed solely to the identification parade and the officer to whom the verbal statement was made had not been present when it was administered, that the accused had not had access to a solicitor and, in a blatant attempt to assimilate the instant case to Aitken, that the accused "must have been much agitated" at the time of the statement since he had just been identified on the parade.

Though he found the point "not free from difficulty" the Lord Justice-Clerk disposed of this ground of appeal in a paragraph, on the basis that the first caution had adequately warned the accused that he did not require to say anything and the verbal statement had been made voluntarily:

"If a person in the custody of the police freely,

and of his own will, makes a statement and does so without any interrogation or invitation, express or implied, and without the stimulus of any inducement to speak, or threat, or any form of pressure, it is, in my view, in the interests of public justice to admit such a statement in evidence: but it is a sound rule of practice that a caution should be given."

His Lordship quoted Aitken with approval and made it clear that it was a question for the judge in each case to decide whether the admission of the statement was fair to the accused.

Another case which attracted Professor Gibb's strictures was HM Advocate v McSwiggan 1937 JC 50, another single judge decision, this time by Lord Robertson. McSwiggan had been arrested and detained on a charge of incest with his sister, who had become pregnant. While he was in custody a police officer took him out of his cell and asked him some general questions about his family and personal circumstances. Without any prompting by the policeman, McSwiggan started to explain how he could not be responsible for his sister's pregnancy. The officer cautioned him and told him not to speak about the matter but he insisted. Another officer was summoned and he also cautioned McSwiggan but nevertheless he went ahead and made a signed statement detailing how he had had intercourse with his sister and the precautions he had taken to avoid getting her pregnant. The accused appears to have been not very bright and one of the police officers said

that he gathered the accused thought that there was no crime if there was no child.

At the trial objection was taken to the evidence of the statement on various grounds including the absence of a solicitor and the accused's misunderstanding of the true nature of the charge. The defence also argued that the statement should have been made before a magistrate. The Crown argued that the statement was admissible having been voluntarily made after due warning and it had to be presumed that the accused knew it was a criminal offence to have intercourse with his sister. Various authorities, including Aitken, were cited in argument although by whom and to what extent is not made clear in the report.

In a decision which Professor Gibb describes as "unfortunate," Lord Robertson rejected the evidence despite finding that the statement had been voluntarily made and the conduct of the police had been suitable and proper. According to Lord Robertson, they should have refused to hear McSwiggan's statement and taken him before a magistrate to emit a declaration, this despite judicial examination having long been an empty shell. His Lordship also, remarkably, took the view that, since the accused was unaware of the true nature of the crime with which he was charged, he had not been adequately warned with regard to the making of the statement and the statement was thus inadmissible. It is submitted that Professor Gibb's opinion of this case is fully justified.

A short time later the High Court required to pronounce on police actions which most certainly were not "suitable and proper." In Stark and Smith v HM Advocate 1938 JC 170 the accused had not only been arrested (on a charge of stealing a quantity of sausage skins) but had appeared before the court and been committed to prison pending further inquiry although it appears that they were still detained in the police station. Some three days after they had been committed, the police, having received further information referring to a much larger quantity of skins, visited Smith in custody, informed him of the additional information, cautioned him and asked him for an explanation. Smith then made a statement which incriminated himself and Stark whereupon the police took him into Stark's presence and repeated the statement, Smith himself adding, "Yes I have told him everything." Stark refused to say anything until he had seen his solicitor.

In a decision which, it is submitted, would be unthinkable today, the Sheriff at the trial admitted Smith's statement as evidence against both accused and on appeal the High Court had little difficulty in holding that he had been wrong. Lord Justice-General Normand laid down as "a salutary rule which ought to be observed in the future" that when a prisoner had been committed for further inquiry the police ought not to approach him on any question touching the crime with which he had been charged. An accused person in Smith's position was under the protection of the court and it was the court's duty to see that the police did nothing which would prejudice his trial. Ten years later, the

High Court made it clear that where an accused had been cautioned and charged, the rule in Stark and Smith applied to prohibit any questioning by the police relating to the matter with which he had been charged. ⁵

The three judges in Stark and Smith all mentioned the fact that Smith was represented by a solicitor, Lord Fleming pointing out that the police should have channelled their enquiries through him. In a pre-echo of parts of Lord Cooper's judgment in Chalmers v H.M. Advocate 1954 JC 66, which will be discussed in detail later, Lord Moncrieff also pointed out that the prisoner was not on equal terms with the police "when they make their way into his solitary cell in order to interrogate him."

The question of a statement made in connection with a charge other than that on the indictment arose again in HM Advocate v Cunningham 1939 JC 61. This case bears examination as touching on aspects of Aitken to which the previous cases make no reference and also as showing the trial judge, Lord Moncrieff, taking a rather more realistic and progressive view than many of his bretheren and indeed correctly anticipating the decision in McAdam v H.M. Advocate 1960 SLT 47 which finally settled this vexed matter.

Cunningham was cautioned and charged with assault to danger of life and robbery and detained in police custody. On the way to the cells, the policeman escorting him pointed out and explained

a notice in the cell passage to the effect *inter alia* that prisoners were allowed to communicate with a law agent. The officer also told him that if he could not pay for a lawyer he would be entitled to the services of an agent for the poor and arrangement could be made at court the next morning. Some two hours later the accused, who had been allowed to sit in the charge room because his cell was cold, expressed a desire to make a statement and, after having been cautioned once more, made a statement to the police which was apparently incriminatory.

At this time the victim was still alive, but he died later and Cunningham was indicted for murder. At the trial, the defence argued that the statement was inadmissible. It was argued that Cunningham had not received adequate and timely intimation of his "right" to the "immediate" services of a law agent, that the police ought to have declined to receive the statement and taken him before a magistrate, and that the statement having been taken in respect of a less serious charge was inadmissible in respect of the murder charge, the caution, having been in respect of the assault and robbery charge, was not a caution in respect of a murder charge. Aitken was cited in support of the first two points and McSwiggan in support of the third.

The Crown sought to distinguish these cases on the facts (the Advocate Depute obviously doubting the soundness of McSwiggan) and argued that the acts with which the accused was charged with committing were the same irrespective of the charge on which he

was tried, and the victim's death must have been within the accused's contemplation when he made the statement.

Lord Moncrieff held that in the circumstances Cunningham had received adequate intimation of his entitlement to legal assistance although he considered that in the future it would be in the spirit of Section 17 of the 1887 Act if such intimation was made earlier in the proceedings, before the accused was charged. ⁶

Notably, his Lordship also refused to affirm that it was the duty of the police in all cases to refuse to accept a statement and insist that such be made before a magistrate and, in a refreshing burst of realism, commented,

"If the police observed every requirement of fairness and did not in any sense elicit information - and I think that these requirements are satisfied in this case - I see no reason in principle why an item of evidence, which the interests of justice may require should be made available, should nevertheless be excluded from the cognisance of an assize."

Finally Lord Moncrieff held that the death of the victim did not affect the relevancy or materiality of the statement, pointing out that the earlier charge was also a grave one.

In charging the jury his Lordship explicitly left it to them to decide whether the statement was voluntary. The jury convicted Cunningham of robbery and culpable homicide and he was sentenced to twenty years penal servitude, but apparently there was no appeal against the conviction.

Cunningham was implicitly doubted, though not overruled, in Willis v H.M. Advocate 1941 JC 1 where a statement made in connection with a charge of murder was admitted in a trial for culpable homicide arising from the same facts. On appeal the High Court had no difficulty in holding that since the statement had been made in connection with a more serious charge which included the lesser one the statement had been correctly admitted. Lord Justice Clerk Aitchison adopted the reasoning of Macdougall v MacLulich (1887) 14R(J) 17 where the same point had arisen in connection with a declaration.

Aitken was again quoted in H.M. Advocate v Olsson 1941 JC 63 when Lord Jamieson refused to admit a statement made without an interpreter by a Swedish sailor. His Lordship rejected the statement on the self evident grounds that, since the accused had only a limited command of English, the court could not be satisfied either that he had understood the caution which he had been given or that the police had properly understood what he had been trying to say to them. 7 However his Lordship also held that the accused should have been informed of his "right to consult a law agent" and took the view that if he had had the opportunity of so

consulting, he would have been advised that he should not make any statement.

Notes

- 1, Author's italics
- 2, ie cautioned and charged with the crime,
- 3, *Fair Play for the Criminal* (1954) 66 JR 199
- 4, Criminal Procedure (Scotland) Act 1887 Section 17, now 1975 Act Section 19, Different criteria apply when the accused wishes to make a voluntary statement after having been charged - *infra* Chapters 6,7 and 8,2(i)
- 5, Wade v Robertson 1948 JC 117. The police seem to have been slow to learn the lesson - see also H.M. Advocate v Davidson 1968 SLT 17 an almost exact repeat of Stark and Smith.
- 6, Lord Moncrieff reiterated this view in H.M. Advocate v Fox 1947 JC 30
- 7, cf Montes v H.M. Advocate 1990 SCCR 645, Lord Weir at pp672-673

(vii) The Three Stages of a Police Inquiry

The next step forwards in the development of the law came in Bell v H.M. Advocate 1945 JC 61 when the strands came together and the High Court for the first time in a reported case set out what it considered to be the three stages of a police inquiry. Although it was clearly implicit that different rules of admissibility applied at the different stages, their Lordships failed to develop their ideas and in particular no clear distinction was ever to be explained between the rules of admissibility applying to a statement by a person detained on suspicion ' and one made by a person who had been arrested and detained in custody.

Bell, a ship's cook, was charged along with a shipmate, Campbell, with rape. It was clear from the earliest stage that there were two men involved and Campbell was soon identified as one of them and arrested. However the identity of the second man was more difficult to establish and the police, logically, began their inquiries with the crew of Campbell's ship. Two officers, Mackenzie and Stalker, went on board and spoke to Bell. Without cautioning him they told him that they were inquiring into an assault on a young girl at a particular time and asked him for an account of his movements during the relevant period. Initially, Bell claimed to have been drinking with some American sailors and, on Stalker asking if anyone else had been present, he said that Campbell had been there. Stalker immediately told him that Campbell had been identified as one of the two rapists whereupon

Bell, according to the shorthand notes of the trial, said "I tried to interfere and he struck me on the jaw. I held the girl on her side." ² Stalker immediately cautioned Bell and asked him to accompany him to the police station. Apart from giving his name, Bell does not appear to have said anything further to the police.

The remainder of the evidence against Bell was thin and the statement to Stalker was of crucial importance. It was admitted at the trial and on appeal it was contended that this had been wrong since Bell had not been cautioned. The defence relied on Aitken and Mills and also on a passage in the fourth edition of Macdonald's Criminal Law which, following Lord Anderson in Aitken, stated "The rights of a person against whom a charge has not been made will be more jealously guarded by the Court than where a charge has actually been made against the person under detention." ³ The defence argued that Stalker should have cautioned Bell immediately he mentioned that he had been in Campbell's company.

In upholding the decision to admit the statement, Lord Justice-Clerk Cooper stressed the fact that Stalker had *told* Bell of Campbell's identification and the latter had then blurted out his admission without further questioning. Whatever may be one's view of the decision reached in this case, this point is surely without substance, since a statement may invite a reaction every bit as much as a question and it is difficult to imagine why

Stalker would inform Bell of Campbell's situation if it were not in order to hear his response.

Lord Cooper then went on to set out what he considered to be the three stages of police investigation:

"... a clear distinction must be drawn between admissions, confessions or other incriminating statements given or obtained from a person (1) who has been charged with a crime and is in custody awaiting trial, (2) who has been detained on suspicion, and (3) who has not been detained or charged, against whom perhaps there may be no evidence whatever justifying either detention or charge or even suspicion, but who is merely being questioned by the police in the exercise of their duties of investigating the commission of a crime."

Lord Cooper emphasised the public interest involved in not needlessly hampering the detection of crime, before declaring that Bell fell into the third category. It was, according to his Lordship, plain that until Bell blurted out his statement the police had nothing to justify charging him with any crime or rendering a caution necessary.

Lord Mackay, while concurring with Lord Cooper, took the opportunity to add some observations of his own and attempted to return Aitken to its rightful place as a decision on its own

facts. His Lordship had presided over an unreported appeal, Berkovitz v H.M. Advocate, 20th February 1942 in which the same point had arisen and several earlier cases, Waddell, Costello, Brown v Macpherson, Aitken and Mills, had all been considered. In his Lordship's opinion, Lord Anderson's words and the passage from the fourth edition of Macdonald had been "in too many cases misread in presenting subsequent cases before a jury or representing them in appeals." Lord Mackay was clear that

"Lord Anderson never meant, nor are his words to be read as meaning this, that in cases like the present or cases like Berkovitz the criteria of competence which he laid down for the circumstances existing in Aitken are criteria apt to be accepted."

Lord Mackay took the view in the present case that the police were simply in the process of investigation in order to find out who might possibly be the second man and all that they had done was to invite Bell to make a statement about his movements on the night in question. His admission had been wholly voluntary and blurted out. It would be "perfectly improper and unfair" to hamper the police by saying that in the circumstances they were not entitled to ask the members of the crew to account for their movements.

As has already been noted, the High Court in Bell did not attempt to lay down detailed guidelines as to how the police were to deal with persons in the three categories. However in the fifth

edition of Macdonald's Criminal Law, published in 1948, the tripartite division is set out and the passage continues as follows:

"In the [third] case statements made in answer to reasonable questioning are as a general rule admitted, while in the first case if the prisoner desires to make a voluntary statement he ought ordinarily to be taken before a magistrate to emit his statement in the form of a judicial declaration." ⁴

The point about taking the prisoner before a magistrate flies in the face of Lord Moncrieff's view in Cunningham and is nothing more than the personal opinion of James Walker, one of the editors of Macdonald, who, when elevated to the bench would follow "an idiosyncratic practice of rejecting post-arrest statements to the police on the ground that they should have been made to a magistrate." ⁵

Notes

1. Prior to the passing of the 1980 Act, as a matter of strict law the police actually had no legal right to take anybody into custody unless they arrested him
2. The judge's note was "I helped the girl on her cycle"
3. In *The Admissibility of Answers to Police Questioning in Scotland* GH Gordon traces the evolution of this passage from the first to the fifth edition.
4. p313
5. Gordon op cit note 3 supra, p328; DB Smith *A Note on Judicial Examination* 1961 SLT(News) 179

(viii) The "Feverish Search for Unfairness" - Rigg and Chalmers

(a) H.M. Advocate v Rigg 1946 JC 1

From the perspective of 45 years later, H.M. Advocate v Rigg must be one of the most flagrant examples ever reported in Scotland of a judge usurping what is now considered to be the function of the jury. The case has been described as the high water mark of the anti-police approach to the question of unfairness. '

The circumstances of Rigg were not far removed from those of Aitken. Rigg was a youth of seventeen who was indicted for the indecent assault and murder of an eight year old girl. He claimed to have found the body in an air-raid shelter and reported this to the police, taking an inspector to the locus where he made a non-incriminatory statement. This took place around 3pm and thereafter Rigg went to his work in a local cinema. For reasons not entirely apparent, the cinema manager later telephoned the police who asked him to "keep an eye" on Rigg. Later still, around 7pm, another officer, a superintendent, went to the cinema and took Rigg to the police station. Rigg made a statement which was about 400 words long and was taken in writing. Again there was nothing incriminating in it.

The superintendent left Rigg in the police station for some time while he pursued other inquiries but the boy was apparently willing to remain all night if necessary. He was offered food

but refused it. It is not at all clear exactly what his status was or how much suspicion, if any, he was under but he had not been detained, far less arrested. When the superintendent returned about 9pm he apparently told Rigg that he was "desperate" to find out who had last been with the child and he would go over the statement again to see if there was anything that he had forgotten. Rigg then said "Take this. I will tell you what happened." Realising that he might be about to incriminate himself, the superintendent cautioned him and offered him the presence of a parent or other relative or a lawyer, all of which were declined. He then made a further statement of about seven hundred words which was described as "a coherent and elaborate account of his movements and of the relevant facts of the preceding day and the day in question, with numerous references to persons, places and hours." Presumably it was also incriminating.

At the trial objection was taken to the admission of the statement, the defence arguing firstly, under reference to Aitken and Bell, that its admission would be unfair in the circumstances, secondly that it was taken while the accused was under suspicion and, thirdly, that it could not be regarded as having been made voluntarily.

Lord Justice-Clerk Cooper, who was sitting as trial judge, made his personal feelings quite clear when he said,

"I am bound to say that I have viewed with growing

uneasiness and distaste the frequency with which in recent years there have been tendered in support of prosecutions alleged voluntary statements said to have been made to the police by persons charged, then or subsequently, with grave crime."

Rigg's condition was variously described as excited, partially collapsed, trembling and shuddering although not particularly at the time when he made the statement and, unlike Aitken, there was no suggestion of mental impairment. Lord Cooper considered that he was "in a substantial sense under suspicion" and the police were under a special duty to observe every requirement of fairness which the law demands. Short of saying the police were not being truthful, it is difficult to see how their conduct in this case fails such a test. Rigg was humanely treated by the police, he was properly cautioned, he was offered parental presence and legal advice, yet Lord Cooper excluded the statement with the result that the Crown had to withdraw the indictment. As Professor Gibb says, the superintendent of police might well be pardoned for wondering what he had done amiss in the conduct of the investigation. ²

Lord Cooper appears to have held, without any basis other than personal opinion, that the statement simply could not have been made without questioning and thus the statement could not be truly spontaneous and voluntary. In effect he appears, without actually saying so, to have considered that the police were

indeed lying about the making of the statement. However, his Lordship had made his personal position perfectly clear.

Notes

1, Renton & Brown (4th edn) §18-24

2, Gibb *Fair Play for the Criminal* (1954) 66 JR 199 at p214

(b) Chalmers v H. M. Advocate 1954 JC 66

Eight years later, Lord Cooper presided over the specially convened bench of five judges who sat to decide Chalmers v H. M. Advocate. Chalmers was a watershed and on the basis of the amount of attention it has received both within and without Scotland it is one of the most important cases ever decided by the High Court.

The facts of Chalmers are well known. The accused was a sixteen year old foundry worker who was charged with the robbery and murder of a fellow employee. Two days after the assault (and while the victim was still alive) he was interviewed by the police as part of their general inquiries and made his first statement dealing with his movements at the relevant time. About a fortnight later, the victim having meantime died, he was again interviewed by the police and made a second statement. About a week after that the police received information which tended to cast doubt on the two statements and decided to interview Chalmers again.

Chalmers, who was now under suspicion, was brought to Falkirk police station having apparently been roused from bed sometime after ten a.m.. He was cautioned and questioned by a detective inspector and after some questioning, which lasted only five minutes, but which the police admitted involved cross-examination, tears came into his eyes. The inspector cautioned

him again and offered him the presence of his father or a solicitor both of which Chalmers declined, saying he would make a statement. Another officer came into the proceedings to take this third statement and he again cautioned Chalmers and offered him the presence of his father or a solicitor, both of which were again declined. The statement was then taken down. Thereafter Chalmers was asked some more questions and, in consequence of the answers he gave, the police took him to a cornfield in Larbert where he showed them the whereabouts of the deceased's purse. Finally he was taken back to the police station where he was formally cautioned and charged in the presence of his father and made a fourth statement.

At the trial the first statement was led without objection, the second was not tendered by the Crown, the third was initially tendered but, objection having been taken, the Advocate Depute decided not to attempt to prove it. Nevertheless it was necessary for Lord Strachan, the trial judge, to consider the circumstances of its making to rule on the admissibility of the evidence of the visit to the cornfield and the fourth statement.

The defence argued that evidence of the third statement would be inadmissible because the police proceedings by which it was obtained were unfair and the subsequent events, ie the visit to the cornfield and the reply to caution and charge, were tainted with the same unfairness.

His Lordship was clear that at the material time Chalmers was a person "detained on suspicion" and thus fell within the second category in Bell v H.M. Advocate. Accordingly the interrogation to which he had been subjected was unfair and also contrary to the rule, stated by Dickson, ' that the examination of the prisoner was not a police function. His Lordship pointed out that a caution was not a preliminary which would regularise cross-examination by the police. Although the circumstances of the taking of the third statement had been fair, it followed so closely on the unfair interrogation that the statement was tainted thereby. However, in the absence of authority, his Lordship decided to rule in favour of admitting the evidence of the visit to the cornfield and the recovery of the purse. He also took the view, with hesitation, that the reply to caution and charge (the fourth statement) was admissible due to the lapse of time since the interrogation and also since the police conduct had been fair at that stage. Chalmers was convicted and appealed.

Although it was not strictly before the Appeal Court, the admissibility of the third statement was obviously an important issue and the Court permitted it to be argued. The Crown, somewhat forlornly, attempted to argue that since Chalmers had not been arrested the police could interrogate him provided there was no improper pressure. They also argued, under reference to Lawrie v Muir ² that even if there had been an irregularity it did not follow that the statement was inadmissible. Lord Cooper, while

recognising that there was a distinction between routine exploratory questioning and interrogation after arrest, was in no doubt that the statement was inadmissible:

"But when a person is brought by police officers in a police van to a police station, and, while there alone, is faced with police officers of high rank, I cannot think that his need for protection is any less than it would have been if he had been formally apprehended. The ordinary person (least of all a youth of sixteen) is not to know that he could have refused to be taken to the police station or to answer any questions and, even if he knew that, he would be unlikely to adopt such a course and it would probably avail him little if he did."

A statement obtained by the methods used in this case could not possibly be said to be "voluntary" or "spontaneous".

The High Court overturned Lord Strachan on both the visit to the cornfield and the fourth statement. The question of "forbidden fruit" will be considered later ³ and at this stage it is sufficient to note that Lord Cooper considered the accused's actings in the field to be indistinguishable from a statement as to the whereabouts of the purse which, in his Lordship's view, would have been inadmissible. Accordingly the evidence about the circumstances surrounding the finding of the purse (although

apparently not the actual finding itself) was equally inadmissible.

His Lordship also considered that the reply to caution and charge was inadmissible although he preferred to rest his final decision to quash the conviction on the ground that once the recovery of the purse was eliminated there was insufficient evidence.

In a sense the facts in Chalmers are almost irrelevant since the main importance of the case lies in the views expressed by Lord Cooper and Lord Justice-Clerk Thomson on the general subject of police questioning and related procedures. It is, incidentally, also worthy of note that Lord Cooper commented adversely on the practice of the police of detaining people "on suspicion", a practice which was not to be regularised for another twenty six years. * Like Lord Anderson in Aitken, Lord Cooper pointed out that detaining a person on suspicion put him in much the same position as a suspect who had been arrested but deprived him of the privileges and safeguards to which an arrested person was entitled. According to Lord Cooper the police station was regarded by most people as a "sinister" venue, the dice were loaded against the suspect who was usually alone when confronted by several police officers, often of high rank, and who had no one to corroborate him as to what took place.

Lord Cooper made the conventional noises of sympathy for the police in the "difficult position in which they are often placed"

but explicitly declined to lay down rules for their guidance, quoting a passage from Lord Sumner's speech in Ibrahim v R. ⁵ to the effect that the decision to exclude evidence of statements by an accused was a matter of judicial discretion. However, Lord Cooper was at pains to point out that Scots and English law were not the same and the English courts would admit certain evidence which would be rejected in Scotland. Any self-incriminating statement tendered before a Scottish court would be jealously examined, in light of all the proven circumstances, to ensure that it was spontaneous and if it did not satisfy that test evidence of the statement would usually be excluded. The ghost of the declaration before a magistrate was also raised, somewhat inconclusively, and coupled with the novel suggestion that such a procedure might be used before arrest although Lord Cooper later claimed that he was only restating the existing law.

In a much quoted, and not infrequently misunderstood, passage his Lordship laid down that:

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and if carried

too far, eg to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded."

Lord Cooper explained the prohibition on police interrogation on the basis of the right to silence - an accused person could not be compelled to give evidence at his trial, and if the police were entitled to interrogate him and adduce evidence of what he said, that would have the effect of making the accused a compellable witness.

The judgment of Lord Justice-Clerk Thomson is shorter and clearer than that of Lord Cooper, with whom he concurred. Lord Thomson acknowledged that in the course of routine police enquiries the person ultimately charged might be interviewed and, provided there was no bullying or other impropriety, the answers to ordinary and legitimate questions would be admissible. However, in another famous passage his Lordship went on:

"But there comes a point of time in ordinary police investigation when the law intervenes to render inadmissible as evidence answers even to questions which are not tainted by [improper] methods. After the point is reached, further interrogation is incompatible with the answers being regarded as a voluntary statement, and the law intervenes to safeguard the party questioned

from possible self-incrimination."

His Lordship appreciated that the crucial point was difficult to define but nevertheless considered that the honest and conscientious policeman ought to realise when the person he is questioning comes under serious consideration as the perpetrator of the crime. His Lordship continued:

"Once that stage of suspicion is reached, the suspect is in the position that thereafter the only evidence admissible against him is his own voluntary statement. A voluntary statement is one which is given freely, not in response to pressure and inducement, and not elicited by cross-examination. This does not mean that, if a person elects to give a statement, it becomes inadmissible because he is asked some questions to clear up his account of the matter, but such questions as he is asked must not go beyond elucidation. It is important to keep in mind also that the point of time when the axe falls is not necessarily related to the person being in custody or detention of some sort. The fact that he is detained may point to his being under suspicion but he may come under suspicion without being detained."

Chalmers was clearly intended by the judges to settle the law on police interrogation for the future and, in the short term, as

Sheriff Gordon has pointed out, " the case was taken by most Scots lawyers and police officers to have established (1) that statements by a suspect in answer to police questioning were not admissible as evidence, at any rate if given in a police station; (2) that the police have no power to detain a suspect without charging him; and (3) that improper questioning could not be cured by cautioning. It was regarded as laying down a firm exclusionary rule and the only scope for manoeuvre lay in deciding when a person became a suspect. However, Sheriff Gordon also points out that on closer examination the decision does not necessarily support any such firm rule since Lord Cooper stressed the facts of the case, denied any power to give instructions to the police, and made frequent use of qualifying words and phrases.

Needless to say, the decision was castigated by Professor Gibb 7:

"... if what was done by the police in the cases of Rigg and Chalmers really infringes in any way the principle of fair play then that expression must have acquired in our criminal law a meaning totally alien to its meaning in ordinary speech."

It is submitted that the influence of Chalmers on the development of the law of evidence was more apparent than real. For one thing Lord Cooper retired shortly after Chalmers and died the following year. His successor, Lord Justice-General Clyde, was obviously of a different mind (one may wonder what would have

happened in cases such as Manuel if Lord Cooper had still been presiding over the appeal court). The police themselves do not appear to have regarded Chalmers as bringing about any change in the interpretation of the law². There were comparatively few cases on police questioning during the rest of the fifties and by the mid-sixties the retreat from Chalmers was well established. Indeed, the next major case, Manuel, in 1958, shows a noticeable relaxation of judicial attitude. Never again were the High Court to take such a strict line on police questioning.

In procedural matters, however, the influence of Chalmers was much greater and may still be felt occasionally today. Lord Strachan had excluded the jury during the legal argument but before giving his ruling on the question of admissibility, had heard the evidence of the circumstances of the making of the statements in their presence. This was entirely in accordance with contemporary procedure and there had been no hint from the appeal court that there was anything wrong with such a practice. However at the hearing of the appeal the appellant was allowed to add to the grounds of appeal that evidence of the circumstances attending the disputed actings and statement was heard in the presence of the jury before any ruling as to admissibility was given.

Lord Cooper held that the course taken at the trial was open to objection and should no longer be followed. Instead the judge should hear the evidence outwith the presence of the jury. If he

ruled in favour of admitting the evidence it would be led a second time before the jury. If he ruled against, the jury would hear nothing of the matter. Lord Thomson agreed with this approach and thus the trial-within-a-trial, similar to the English *voire dire* was introduced into Scottish procedure. ⁹

Notes

1. p242 §347
2. 1950 JC 19 a case which deals with the admissibility of evidence of an irregular search of premises,
3. infra chapter 6,8
4. 1980 Act Section 2
5. [1914] AC 599 at 614
6. *Reshaping the Criminal Law* p330
7. op cit p215 et seq
8. [1961] Crim LR 70
9. see further chapter 6,9 infra

(ix) The rest of the 1950s

Chalmers was followed some four years later by H.M. Advocate v Graham 1958 SLT 167, a case of capital murder. The accused had been charged by the police with assault causing grievous bodily harm (sic) and had made a reply. About a week later, after the death of the victim, he was cautioned and charged with murder and replied "I have nothing more to say." At the murder trial, the earlier statement was ruled inadmissible and an attempt by the Crown to argue that the terms of the reply to the murder charge could be regarded as incorporating the earlier reply also failed. The trial judge, Lord Sorn, reviewed the earlier authorities, Stewart, Cunningham and Willis, and stated that he found the matter on the borderline. However, his Lordship considered that if on the earlier occasion the accused had been charged with capital murder he might have been more careful in what he said or indeed might have preferred to hold his tongue altogether. His Lordship also made it clear that he was not laying down a general rule.

An altogether different set of circumstances were before the High Court in Manuel v H.M. Advocate 1958 JC 41. This case is more commonly regarded as an authority on sufficiency of evidence rather than admissibility and will be discussed further in that context later in this work. In the context of admissibility it is perhaps of more interest for what was *not* decided rather than for any contribution to the development of the law.

Manuel is certainly among the most sensational trials ever held in Scotland and the facts of the case are well known. The accused was an aggressive psychopath who was eventually indicted for three thefts by housebreaking, the theft of a car, and eight capital murders in Scotland between January 1956 and January 1958. He almost certainly committed a ninth capital murder in England. Six of the murders were committed by breaking into the homes of total strangers and shooting the occupants dead in bed.

Manuel had been under a degree of suspicion for some time and had been questioned by the police in January 1956 following the first murder, that of Anne Kneilands. On 14th January 1958 about 6.45 a.m. police officers in possession of a search warrant attended at the house where Manuel lived with his parents. Manuel himself was removed to the police station, never to be at liberty again, and the house was searched. As a result of that search, his father was charged with the theft or reset of certain items and also arrested.

About 1 p.m. Manuel was placed on an identification parade. Shortly thereafter he indicated to the police that he wanted to talk about money and after being cautioned made a statement about the theft of some banknotes from the house of the Smart family, the most recent murder victims, falsely implicating a man called Mackay. About 7.15 p.m. he was confronted with Mackay who denied any knowledge of the theft. Following a further identification parade Manuel was, about 11.10 p.m., cautioned and charged with a

theft by housebreaking and, much more importantly, the murders of the three members of the Smart family. No reply was made.

After a night in police custody, Manuel was taken before Hamilton J.P. Court on 15th January where he was remanded in custody for four days and returned to the police station. Following his return he made several requests to speak to Detective Inspector McNeill who eventually visited him at 2.50 p.m. along with an Inspector Goodall. ² When McNeill asked why Manuel wanted to see him, he said it was important and concerned unsolved crimes in Lanarkshire. McNeill cautioned him immediately, reminded him that he was on a grave charge, advised him to think before he said anything and offered him the services of a solicitor, which offer was not taken up. Manuel asked to see his parents and then went on to say that he would clear everything up for the police and, particularly that he would take them to "the place where the girl Cooke is buried." The police again warned him and advised him that he could have a solicitor present but Manuel proceeded to write two short statements.

In the first statement (Production 140) he said that he was willing to give information about "crimes of homicide" and asked that he might see his parents in order "to make a clean breast of it to them." In the second (Production 141) he undertook to supply information about the murders with which he was eventually charged on condition that his father was released from custody. The police advised him that they could give no undertaking with

regard to his father's release as that matter was now in the hands of the Procurator Fiscal.

Following a further caution, Manuel went on to make a detailed verbal statement about the murder of the Smart family after which he was allowed to see his parents in the presence of the police. He told his mother that he had killed the girl Kneilands at East Kilbride and also that he had shot "the three women in the house at Burnside", a reference to the murders of Mrs Watt, her daughter and her sister. He then told his parents that he intended to show the police where he had buried Isobel Cooke before finally repeating his confession to the Smart murders.

In the small hours of the following morning, (16th January) Manuel made good his promise to show the police where Isobel Cooke was buried and between about 4.15 a.m. and 6.15 a.m., while he was once again in Hamilton police station, he wrote out a third, detailed statement, Production 142. ^a There was then a bizarre interlude while Manuel and the police relaxed over a cup of tea before he suddenly volunteered to show them where he had disposed of the two guns which had been used. This offer was accepted with alacrity and the guns were eventually recovered.

Manuel was finally returned to prison and had no further contact with the police until 18th January when he was brought before the Sheriff. That afternoon he was put on a further identification parade and later took the police on a third and final trip, this

time round the East Kilbride area in connection with the Kneilands murder.

The presiding judge at the trial was Lord Cameron, taking his first murder case since his elevation to the bench. Defence counsel (later to be dismissed by a singularly ungrateful client) took objection to the admissibility of the three statements on the grounds that they were not voluntary statements as that phrase had been construed in the authorities. After holding a trial-within-a-trial, which lasted for a day and a half, Lord Cameron ruled in favour of admitting the statements. It is worthy of note that at the time when he wrote production 142, Manuel had been in police custody for almost 24 hours and, it would appear, had had hardly any rest. Nevertheless, Lord Cameron was clearly of the view that there was nothing unfair in the way in which the police had dealt with him. Defence counsel also argued that in the particular case, because of its gravity, the proper course would have been for the police to take the accused before a magistrate (or even a notary public, although on what authority was not made clear). However, Lord Cameron would have none of it:

"I am not prepared to accede to the view that unless a statement from an accused person or a suspect is made before a magistrate it is inadmissible in evidence as being not truly voluntary. It may well be that if such a course is taken it would secure an accused or suspect

against cross-examination, which is not the complaint here, but it would still leave open the question whether the accused or suspect had been brought to the point of emitting a statement by pressure or inducement exercised or offered by the police."

His Lordship accordingly allowed all three statements to go to the jury.

When he came to give evidence on his own behalf, ⁴ Manuel, who by this time had dismissed his counsel, painted a wholly extravagant picture of repeated questioning by the police coupled with threats to ruin his family if he did not write out a confession. Clearly the jury did not believe a word of it because they convicted him of six capital murders, one non-capital murder, two thefts by housebreaking and the car theft. He was sentenced to death.

On appeal it was argued that no statement elicited from a person detained by the police could be admitted in evidence where any form of inducement caused the statement to be made. Manuel's father had later been released from custody as the accused had wanted and this factor, it was argued, was sufficient to raise doubt about the spontaneity of the confessions. Moreover, under reference to Aitken, Rigg and Chalmers, Manuel had had no legal advice and had been kept out of contact with the outside world for a considerable period of time. The police had exceeded

the bounds of fairness and it was significant that remorse, which was out of character, should only visit him when he was in custody and without access to the outside world. The voluntariness of the statements was, at least, open to grave doubt. The police should have taken steps to see that no statement was taken unless before a neutral person such as a magistrate.

Lord Justice-General Clyde agreed that:

"The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police from any risk of being driven or cajoled or trapped into admissions of guilt, even though this may complicate the quite legitimate detection of crime by the authorities."

However there was nothing to prevent a person in the hands of the police from making a voluntary statement if he chose to do so. The test was whether the statement was fairly obtained and, following Chalmers, it must have been freely given, not in response to pressure or inducement and not elicited by cross-examination, other than what is directed simply to elucidating what had been said. In the present case Lord Cameron had precisely followed the procedure laid down in Chalmers and had rejected Manuel's claims of police pressure. Manuel was 32 years old, in good health and fully and rationally aware of what he was doing. The police conduct was a model of fairness and propriety.

Manuel might have confessed because he was afraid that his father might be implicated in them but that was not evidence of inducement by the police. The possibility of the statements having been taken before a magistrate did not even merit a mention. The appeal failed and Manuel was hanged a fortnight later.

It is difficult to describe Peter Manuel without using phrases such as "evil incarnate", and it could not seriously be argued that the result of the trial was in any sense wrong or unjust. However, some eight years later, Lord Kilbrandon expressed reservations in relation to the hoary chestnut of the judicial declaration.⁵ As already noted, Lord Cameron had rejected the idea and Lord Justice-General Clyde had not even bothered to mention it, but Lord Kilbrandon was clearly of the school which felt that the police should not receive even voluntary statements. He refers with approval to Lord Robertson's decision in McSwiggan to certain dicta in Chalmers and also to H. M. Advocate v Christie⁶ where Lord Walker *ex proprio motu* refused to admit a voluntary statement because the police had not taken the prisoner before a magistrate. In Lord Kilbrandon's opinion:

"it may be unfortunate that in Manuel v H. M. Advocate the point was not discussed in relation to the confession made by the accused to the police which formed so important a part of the proof in a case of several capital murders. ...

[F]or my part I understand the law of Scotland now to be that if a person in custody who has been

charged with a crime makes a statement about that crime that statement will not be allowed in evidence unless it has been emitted before a magistrate in due course of law, and this seems to me to be a most salutary provision."

With all respect to Lord Kilbrandon this is a departure from reality. The subject was discussed (and rejected) in Manuel, the main statement, production 142, had been made between 4.15 a.m. and 6.15 a.m. when it was hardly likely that a magistrate would be readily available, and he also misses the point, correctly identified by Lord Cameron, that Manuel's statements, particularly production 142, related to matters with which he had not, at that stage, been charged. It is fascinating to imagine what might have happened had Lord Kilbrandon, Lord Walker or even Lord Cooper presided over Manuel's trial rather than Lord Cameron. Public opinion might be expected to cope with the occasional acquittal of a bewildered teenager such as Aitken, Rigg or Chalmers. However had Manuel's statements been rejected he would certainly have been acquitted of the Watt murders, and depending on how far the court had been prepared to exclude the real evidence, he could well have been acquitted of the entire indictment. It is not difficult to imagine the public reaction to a murderous psychopath with a fondness for shooting people in their beds being allowed to walk free because of the non-observance of a practice which had not been followed for half a century.

Notes

1. J.G. Wilson *The Trial of Peter Manuel* (London, 1959) p230
2. The following account is taken from Wilson op cit p113 et seq
3. The full text is set out in Wilson op cit pp119-122
4. Wilson op cit p170 et seq
5. J.A. Coutts (ed) *The Accused* pp64-65
6. Unreported. See D.B. Smith *A Note on Judicial Examination* 1961 SLT (News) 179

(x) The State of the Law in the Early 1960s

The early 1960s saw the publication of two significant textbooks, the third edition of *Renton and Brown's Criminal Procedure* and the *Law of Evidence in Scotland* by the Sheriffs Walker and it is appropriate to take stock of the changes that had occurred since the turn of the century.

In essence the law had moved from a wide ranging judicial discretion to a more or less strict exclusionary rule, but the ultimate test was fairness to the accused and judicial discretion still had a large part to play. However the High Court judges were by no means unanimous in their views and it was (and still is) impossible to state the law at this period with certainty. The old-style judicial examination, although dead for all practical purposes, had become a spectre which returned at unpredictable intervals to haunt the courts. The trial within a trial had also been become part of Scottish procedure.

It had been laid down that there were three relevant stages of a police investigation: (1) before suspicion had focussed on the accused; (2) while the accused was detained on suspicion; and (3) after the accused had been charged.

In the first category, any statement by the accused to the police was admissible even though made in response to questioning (*ex hypothesi* proper) and even though it had not been preceded by a

caution. If in the course of questioning the person questioned came under serious consideration as the perpetrator questioning was to cease and thereafter only a voluntary statement would be admissible.

In practical terms there was little distinction between the second and third categories, and indeed the Walkers treated the subject under two headings only, viz before and after suspicion had focussed on the accused, but the court should be particularly jealous to safeguard the rights of a person detained on suspicion, who was at a disadvantage compared to the person who had been arrested. While detention in custody was indicative of suspicion, a person might be under suspicion but not in custody.

Once suspicion had focussed on the accused or once he had been arrested only a truly spontaneous and voluntary statement was admissible. A reply to the reading of the charge would normally be admissible, provided the accused had been cautioned and provided it was not tainted by prior improper interrogation. In determining the admissibility of statements the whole surrounding circumstances would be examined and in order to ensure there was no prejudice to the accused, the evidence was initially to be heard by the judge outwith the presence of the jury. Factors to be considered included the age of the accused, any mental or physical distress he might be suffering, the gravity of the crime and the refusal of access to legal advice.

One of the few clear rules was that once a charge had been made, the police were no longer entitled to question the accused about the matter with which he was charged and any statement made in response to such questioning was inadmissible. This applied even more strongly once the accused had been committed for further examination or for trial since such an accused was under the protection of the court.

It must ultimately remain a matter of speculation why certain of the Scottish judges clung so tenaciously to the idea that the police should not receive a statement from a prisoner but rather should take him before a magistrate for judicial examination while others saw no need for such a procedure. Judicial examination of the old type was, by the 1960s, nothing more than an historical relic of the days when the accused was not a competent witness. While it is submitted that the actions of Lord Walker in H.M. Advocate v Christie were wrong and quite unfair to the Crown, nevertheless the views of lawyers of the calibre of Lord Cooper and Lord Kilbrandon (and Professor T.B. Smith¹) cannot be dismissed as mere crankiness. The inherent conservatism of the judiciary and a strong feeling for the historical aspects of the Scottish criminal justice system must have been factors, as well as a mistrust of the police. Lord Cooper certainly mistrusted the police and advocated judicial examination as a means of protecting the accused against prejudice. He even went so far as to suggest the possible use of

judicial examination in "situations which arise before apprehension and charge." ²

Lord Kilbrandon was quite forthright in his opinion that police interrogation was objectionable because it put too much temptation in the way of the police to solve their cases by fabricating admissions, a point also made by Renton and Brown when they say, "It may also be suggested that suspicion must always attach to a statement in the absence of which the accused would have had a reasonable chance of being acquitted." ³

Furthermore, according to Lord Kilbrandon, in any dispute as to what was actually said the scales were heavily weighted against the accused. Questioning, even to the extent of cross-examination, before a judge could not be open to such objections. However, unlike Lord Cooper, Lord Kilbrandon did not see judicial examination solely as a means to protect the accused against police pressure, he also saw it as a means of assisting the conviction of the guilty arguing that an innocent man could not incriminate himself but the answers, or refusals to answer, of a guilty person might have a devastating effect when reported at his trial. ⁴

It is somewhat ironic that Lord Cooper and Lord Kilbrandon should see judicial examination as a means of safeguarding the accused against unfairness at the hands of the police and Lord Walker should regard it as so fundamental that he was prepared *ex proprio motu* to exclude a statement made without it, yet fifteen

years later certain witnesses before the Thomson Committee would argue strongly against its reintroduction on grounds such as conflict with the concept of the accusatorial system and the right to silence. ⁵

Notes

- 1, [1960] Crim LR 816-817, See also *British Justice; The Scottish Contribution* p131 and *The Accused* p73
- 2, Chalmers v H.M. Advocate 1954 JC 66 at 78
- 3, 3rd Edition p413
- 4, *The Accused* p66
- 5, Thomson Committee par 8,09

(xi) The Cases in the Early Sixties

The law on the admissibility of a reply to a charge other than the one on the indictment was finally settled in McAdam v H.M. Advocate 1960 SLT 47, a case which also shows the limitations of fairness to the accused as a test of admissibility. The accused had originally been charged by the police with assault to severe injury but was indicted for attempted murder. He was convicted and on appeal it was argued that his reply to the original charge ought not to have been admitted, defence counsel contending that a statement in reply to a lesser charge was not admissible in relation to a more serious crime.

Lord Justice-General Clyde refused to accept counsel's argument that a reply was only admissible if the original charge was identical to that on the indictment since that conflicted with Willis v H.M. Advocate which had already laid down that a statement in reply to a more serious charge was admissible where the trial was for a lesser charge. His Lordship pointed out that in almost every case the full facts are not known to the police when the original charge is made and it would be unreasonable to exclude from the jury's consideration a reply to the theft of four articles merely because the accused was later indicted for stealing five.

His Lordship laid down two general considerations which must be kept in view:

(1) the evidence can only be admitted if the crime charged on each of the two occasions falls into a single category - both must be crimes inferring dishonesty or inferring personal violence.

(2) each of the charges must substantially cover the same *species facti*. His Lordship stressed that the facts should be substantially similar (as opposed to identical) since the full extent of the theft or of the victim's injuries might not have been discovered at the time the charge was made. Where this was the case, justice demanded that the jury be informed of the reply made to the original limited charge.

It followed that if the original charge was assault and the indictment alleged aggravated assault, which his Lordship considered to include culpable homicide and non-capital murder, the reply to the original charge could be proved provided the *species facti* in both charges were substantially the same. His Lordship indicated *obiter* that he was prepared to consider the possibility of a different rule in the case of capital murder but the point never arose in the few years which remained before the death penalty was abolished.

After this endless parade of murder and violence it is almost a relief to turn to the middle-class crime of drinking and driving. The first appearance of road traffic law in a case involving admissions to the police came, somewhat belatedly, in the interesting case of Foster v Farrell 1963 SLT 182 which afforded

the High Court an opportunity to consider the effect of Section 232 of the Road Traffic Act 1960. This section, which began life as Section 40 of the Road Traffic Act 1930 and still exists as Section 172 of the Road Traffic Act 1988, enacted

"(2) Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies - (a) the owner of the vehicle shall give such information as to the identity of the driver as he may be required to give - (1) by or on behalf of a chief officer of police; ... (b) and any other person shall, if required as aforesaid give any information which it is in his power to give and may lead to the identification of the driver."

The case was a classic example of a driver, who had been drinking, being involved in an accident and making off from the scene without stopping. Ironically, but by no means exceptionally, the accident was not Foster's fault as a drunken pedestrian had stepped off the pavement into the path of his car. The accident happened about 10 p.m., the car number was noted, and about 10.20 p.m. two policemen, Reeve and Jarvie, saw the accused at home. The car was in the garage and still warm and the accused was clearly under the influence of drink to an extent which rendered him unfit to drive a motor vehicle. The officers told him that they were inquiring as to the identity of the driver of the car which was alleged to have knocked a man down some twenty minutes

previously. Reeve, without cautioning the accused, then called on him to say who the driver was and after some quibbling the accused admitted that he had been driving.

Following a trial at which the evidence of his admission to the police was held admissible, Foster was convicted of driving while unfit through drink and failing to stop after an accident.

At the appeal the Crown conceded that the accused's admission to the police would have been inadmissible at common law and the appeal therefore turned on whether it was admissible under statute. Unless this concession was made for the purpose of forcing a ruling on the statutory provision, it seems rather unwise. In any event Lord Justice-Clerk Grant held that the statement was not one to which the statute applied since there was no finding that it had been required "by or on behalf of a chief officer of police" and it was not argued by the Crown that Reeve had been authorised either generally or specially by his chief constable to require such information to be given. Since the statutory provision before the court made a deep inroad into the general common law principle that a person cannot be compelled to give information which might incriminate him it had to be complied with strictly. Since there was insufficient evidence without the statement the conviction had to be quashed.

After dealing with a matter which is outwith the scope of this thesis, the Lord Justice-Clerk went on to consider, *obiter*, an

argument which defence counsel had put forward to the effect that a statement obtained under Section 232 could only be used by the police to assist their investigation and was not admissible in evidence. The defence had relied on Chalmers for this proposition but Lord Grant had no hesitation in holding that that case, which dealt solely with the common law position, had no relevance to a statement obtained lawfully and properly under express statutory authority.

Finally, his Lordship made it clear that it was unnecessary for the police to warn or caution somebody before requiring information under Section 232, such warning or caution being wholly out of place when the person concerned was bound by statute and under penal sanction to give the information required. '

Lord Mackintosh delivered a rather rambling judgment to the same general effect and Lord Strachan simply concurred.

Lord Justice-Clerk Grant was sitting as trial judge when the question of "trickery" by the police arose in H.M. Advocate v Campbell 1964 JC 80. The circumstances were unusual. The accused had telephoned a newspaper and asked a reporter to meet him in a public house so that he could make a statement, apparently with a view to obtaining payment. He said that the reporter was not to bring the police with him. The paper nonetheless informed the police and a police officer disguised as a

second reporter went to the meeting. The accused brought with him a pair of bloodstained trousers which he handed over to the disguised policeman. The accused again raised the question of payment and the "real" reporter assured him that payment would be forthcoming although no amount was agreed. He then made a statement which the reporter took down, asking a few questions to clear up some ambiguities. After the statement had been made, and had presumably been incriminating, the policeman, who up to this point had taken no part in the proceedings identified himself and cautioned the accused.

At the trial, objection was taken to the admissibility of the statement. There were authorities either way, but Lord Grant dealt with the matter shortly, holding that the accused had to be treated as being under suspicion at the time the statement was made. The sole purpose of the policeman being there was to hear the statement and in the circumstances there was a duty on the him to warn or caution the accused before the statement was made.

It would have been interesting to have had Professor Gibb's view of this case, which would doubtless have been forthright. The writer would submit, without hesitation, that this decision is an aberration, contrary to principle and to common sense. Just as people who shout out incriminating remarks in a police station must be taken to accept the possibility of policemen overhearing, surely people who voluntarily offer to sell stories of their murderous activities to the press must be taken to accept the

possibility of the police being tipped off. The policeman in this case did nothing to induce the statement, and acted merely as a passive observer of a course of conduct on which the accused had already embarked.

It might be asked whether Lord Grant would have decided differently if the reporter had gone unaccompanied but had tape recorded the conversation and handed the tape over to the police. The answer must surely be yes and this highlights the absurdity of the decision. It is also difficult to see any reason of principle to distinguish the circumstances in the present case from those in cases such as Hopes and Lavery v H.M. Advocate 1960 JC 104 where the police used a radio transmitter and a tape recorder to overhear and record a conversation between a blackmailer and his victim. In Hopes and Lavery Lord Justice-General Clyde observed, "It hardly lies in the mouth of a blackmailer to complain that the jury are told the truth about his conversations, when he is exerting pressure on his cornered victim. His remedy is not to blackmail." The same can be said about a murderer who volunteers to sell information to the press. His remedy is not to murder, or at the very least not to try to make money from his crime. The decision in Campbell also conflicts with decisions reached elsewhere in the United Kingdom around the same time. ²

Campbell was a case of murder and the with the next case, Law v McNicol 1965 JC 32, it is rather a matter of the sublime to the

ridiculous, since the charge in the latter case was the theft of a number of containers and 16½ stones of fish! Law was taken into police custody about 8 a.m. on Christmas Eve. He stated that he wished to see his solicitor and shortly after 9 a.m. the police contacted the solicitor who said he had an engagement but would come as soon as possible. When he had not arrived by 9.30 a.m. a police officer pointed out to Law that the court would not be sitting the following day and if the case was not disposed of that morning he might be in custody until 26th December. The police then cautioned and charged Law and in reply to the charge he made an incriminating statement.

Although the Sheriff-substitute was satisfied that the police had not had any improper motive, he nonetheless ruled the reply inadmissible on the basis that they had "erred in procedure" in cautioning and charging the accused before the solicitor had arrived and also because he could not dismiss the possibility that the accused might have been influenced by the thought that otherwise he might have to spend Christmas in custody.

On appeal it was held that the Sheriff-substitute had been entitled to exclude the statement, although the High Court dealt with the matter on the general ground of fairness, making it clear that there was no rule of procedure which prevented the police from cautioning and charging a person before he had an opportunity to consult his solicitor. Lord Strachan, who gave the leading judgment, was notably less favourably disposed

towards the police than the Sheriff-substitute had been, and pointed out that there was probably no good reason for the police to keep the accused in custody even if the case had not been disposed of that morning.

The idea of Chalmers as laying down a firm exclusionary rule, received its first major blow in Brown v H.M. Advocate 1966 SLT 105. This case once again involved a charge of murder, coupled this time with the theft of some items of property from the deceased woman. The accused was first seen by the police in the course of routine inquiries the day after the murder when he gave them some information about his movements the previous night. Following the receipt of further information, the police again saw the accused and invited him to go to the police office where under caution he made a lengthy non-incriminating statement. After the statement had been taken, one of the police officers was informed by a colleague that other witnesses had put the accused in the company of the deceased for most of the previous evening, information which contradicted the accused's version of events. The officer, whose suspicions had by now focussed on the accused, then informed him that there were discrepancies between his statement and the other information which he wished to clarify. A further caution was administered but before any question was asked the accused broke down and said "I kill't her". He was then cautioned and charged with murder. Later he took the police to a park where the murder weapon was recovered

and to a point near his home where the deceased's purse was found.

The similarities with Chalmers are immediately apparent, right down to the tears, although the report does not say how old the accused was. However, after a trial-within-a-trial, the trial judge repelled an objection to the admission of the confession and the finding of the real evidence and Brown was convicted.

At the hearing of Brown's appeal, the defence founded strongly on Chalmers, arguing that since the stage of suspicion had been reached, the police had no right to question him further and, moreover, to start to put other people's evidence to him was, in the circumstances, tantamount to cross-examination. If the confession was tainted, the subsequent finding of the knife and purse were likewise tainted. In refusing the appeal, the High Court, Lord Justice-General Clyde, Lord Migdale and Lord Cameron, began the process of reinterpreting Chalmers which would ultimately cause that case, in Sheriff Gordon's words, "to disintegrate into yet another assertion that the only criterion is fairness."

All three judges stressed the absence in the present case of any undue pressure, bullying or inducement by the police. Lord Clyde accepted that the border between legitimate and tainted questioning was a difficult matter which would vary from case to case. Indeed his Lordship expressly warned against laying too much

stress on the circumstances of individual cases and the resulting creation of subtle distinctions. In his Lordship's opinion,

"It is not possible to lay down *ab ante* the precise circumstances in which answers given to the police prior to a charge being made are admissible in evidence at the ultimate trial or where they are inadmissible. This is so much a question of the particular circumstances of each case and those circumstances vary infinitely from one another. But the test in all of them is the simple and intelligible test which has worked well in practice - has what has taken place been fair or not?"

There are two main points of interest in Brown. Firstly the court can be seen to adopt a narrow view of the term "suspect" in the context of police questioning, restricting it in effect to the prime or only suspect. In the present case, although the police did, on their own admission, regard Brown as a suspect, they were still in the process of eliminating other people from the inquiry and thus, according to Lord Clyde, it was not in the least unfair of them to try to clear the matter up since they were still in the investigative stage.

Secondly, Lord Cameron quoted the passage from Lord Cooper's judgment in Chalmers in which he referred to the "theory of the law" ³ and pointed out that while interrogation designed to lead

to self incrimination by a suspect goes far beyond the limit of permissible and legitimate inquiry,

"[I]t is also clear that not all answers to all questions addressed to a person under concentrated suspicion are necessarily inadmissible. The principle of fairness to an accused can and should always be invoked and applied to protect him from improper pressures or inducements or bullying in order to extract incriminating evidence or confessions of crime, but at the same time in obvious public interest it is undesirable to hamper unduly police officers legitimately engaged in the investigation and detection of crime."

Shortly afterwards Lord Cameron applied the reasoning of Brown in similar circumstances in H.M. Advocate v McPhee 1966 SLT (N) 83 where the police at the material time were starting to regard the accused as a "mild" suspect although they thought that there was a chance that he might be a witness. The police inquiry was only at a preliminary stage and the field of suspicion had not narrowed itself down to one person, far less the accused.

Notes

1. This somewhat self-evident point still causes occasional problems. See Tudhope v Dalglish 1986 SCCR 559
2. R v Masqud Ali, R v Ashiq Hussain [1965] 2 All ER 464; "The criminal does not act according to the Queensberry Rules. The method of the informer and of the eavesdropper is commonly used in the detection of crime," - per Marshall J, p469; R v Murphy [1965] NI 138; "Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plain clothes ...". See also Cross p486. Campbell has very recently been

disapproved, though not overruled, by Weir v Jessop (No. 2) 1991 SCCR 636,
Lord Justice Clerk Ross at p643

3. 1954 JC 66 at 78.

(xii) The Retreat from Chalmers begins in earnest

By the middle of the 1960s, the attitude of extreme suspicion of the police which the High Court had shown in cases such as Rigg and Chalmers was beginning to wane and there was a growing acceptance that police questioning was a necessary part of the investigation of crime. It has already been shown that in Brown the High Court had begun to restrict the scope of Chalmers by adopting a narrow definition of the term "suspect", but the decline of Chalmers really began the following year with the case of Miln v Cullen 1967 JC 21. Lord Wheatley is generally regarded as having been the driving force behind the reinterpretation of the law and Miln v Cullen is the first reported case in which his views are made clear.

The circumstances of Miln v Cullen were straightforward. A collision had taken place between a lorry and a car and a short time later two policemen chanced on the scene. The lorry driver pointed Cullen out to the police as having been the driver of the car and opined that he was drunk. At this point Cullen was standing with a group of men about 100 yards from the scene of the accident. As the policemen went over to speak to him, he detached himself from the group whereupon one of the officers, Constable Blair, who had formed the opinion that he was unfit to drive, asked him if he was the driver of the car. No caution was given and the constable had no authority from the Chief Constable

under Section 232 of the Road Traffic Act 1960. Cullen admitted to having been the driver and he was then cautioned and charged.

At the trial, the defence relied strongly on Foster v Farrell, where, it will be remembered, the Crown had conceded that the accused's admission of driving was inadmissible at common law, a concession which was absent in Miln v Cullen. The Sheriff-substitute considered himself bound to follow Foster and disallowed the evidence of Cullen's admission with the result that he was acquitted. The prosecutor appealed.

The High Court, Lord Justice-Clerk Grant, Lord Strachan and Lord Wheatley, had no difficulty in holding that Foster v Farrell had no application in the present circumstances since, as the result of the Crown's concession, it had been concerned solely with the position under statute. In the circumstances of Miln v Cullen the only test to be applied was whether what had taken place was fair or not.

Lord Grant pointed out that "incrimination" and "unfairness" were far from being synonymous terms. The court had to look at the realities of the situation. While the policemen and the lorry driver had all formed the view that Cullen was unfit to drive, the lorry driver's evidence that he had actually been driving was uncorroborated. In that situation the constable, in asking the simple question which he did, was not only acting reasonably, properly and fairly but was acting in accordance with his duty.

Although the Crown conceded that Cullen was under suspicion at the material time, Lord Grant was prepared to hold that matters had never progressed beyond the stage of investigation. In an observation which contrasts remarkably with his own decision in Campbell, his Lordship added,

"It is well to keep in mind that, in applying the test of fairness, one must not look solely and in isolation at the situation of the suspect or accused: one must also have regard to the public interest in the ascertainment of the truth and in the detection and suppression of crime."

Lord Strachan was prepared to hold that Cullen had been under suspicion at the time when Constable Blair asked his question but the mere fact that a suspected person was asked a question by a policeman before being cautioned was not, in his Lordship's view, in itself unfairness.

Lord Wheatley's judgment is appreciably longer than those of his two colleagues put together. After reviewing the facts and distinguishing Foster v Farrell, his Lordship went on to address what he regarded as "certain misconceptions" which had arisen in the interpretation of Chalmers. He stressed that the basic and ultimate test at all stages of a police investigation was fairness. However,

"While the law of Scotland has always very properly regarded fairness to an accused person as

being an integral part of the administration of justice, fairness is not a unilateral consideration. Fairness to the public is also a legitimate consideration, and in so far as police officers in the exercise of their duties are prosecuting and protecting the public interest, it is the function of the court to seek to provide a proper balance to secure that the rights of individuals are properly preserved, while not hamstringing the police in their investigation of crime with a series of academic vetoes which ignore the realities and practicalities of the situation and discount completely the public interest."

Even after caution and charge questioning was not necessarily inadmissible. All that Chalmers had decided was that at that stage questions or actions which induced statements which were not voluntary or spontaneous were *liable to be ruled inadmissible*. '1

Although the point was not actually before the Court, the new realism was also applied firmly to the judicial declaration, which Lord Wheatley regarded as "manifestly impractical" in the multitude of cases which the police had to handle.

In the case of a "suspect", provided a caution was properly given and understood, it was in Lord Wheatley's opinion unrealistic to

proceed on the basis that questions which might elicit answers which might tend to incriminate the accused should automatically be disallowed. To adopt such a rule would be so to circumscribe police investigation that the public interest, the protection of the public and the administration of justice might be completely ignored.

When he came to apply this test to the facts of Miln v Cullen, Lord Wheatley pointed out that Constable Blair's question was directed solely to discovering whether Cullen had been the driver of the car, not in itself a criminal offence, and nothing more. The position might have been different if Blair had, without cautioning, tried to elicit from Cullen an admission of culpability for the accident or an admission that he was drunk. The officers were still at the point of initial investigation and such suspicion as they had was tenuous, resting only on the unsupported evidence of an interested party. They had to elicit the facts and obviously their first duty was to identify the driver of the car. Even when they had done so they still had to make further inquiries to ascertain whether the driver had committed an offence.

Cullen's counsel had argued that at the very least Constable Blair should have cautioned the accused but Lord Wheatley pointed out that if the lorry driver had been unable to identify Cullen, the argument put forward by defence counsel would have meant that the police would have had to caution every person they inter-

viewed, a proposition which "cannot stand the scrutiny of any test of bilateral fairness".

Further observations on the question of fairness towards persons under suspicion were made by Lord Cameron in Bell and Others v Hogg 1967 SLT 290. This case was concerned with the taking by the police of rubbings from the palms of the appellants' hands, which had been done without cautioning in circumstances of urgency, and his Lordship's remarks are obiter. Nevertheless they are of interest as being a development of the views which he had earlier expressed in Brown v H.M. Advocate and H.M. Advocate v McPhee. Lord Cameron considered that in the circumstances of the case the appellants had been under suspicion when the police had taken the rubbings and he went on to draw an analogy with questioning:

"But [the police] would not have acted unlawfully if at that time they had to put questions to the appellants or any one of them with a view to testing their story. After all the possibility was quite open at that stage that by further examination of their movements that night the appellants could satisfy the inquirer of their complete innocence of association with the theft of the telegraph wire. The test of inadmissibility of any replies given in such circumstances is whether there had been unfairness or improper pressure or inducement exercised or offered in

eliciting these replies. This is not a matter of police interrogation; it by no means follows that a person who has come under suspicion may not be further questioned and his replies given in evidence. This I think is implicit in the giving of a caution, otherwise a caution in the normal terms would be pointless." 2

All three judges in Bell v Hogg (Lord Justice General Clyde and Lord Migdale as well as Lord Cameron) stressed the bilateral nature of fairness and Lords Clyde and Migdale both quoted with approval Lord Wheatley's opinion in Miln v Cullen.

A further obiter observation on the test of fairness was made by Lord Avonside in H.M. Advocate v Stark 1968 SLT 10. In this case his Lordship was required to decide whether a statement made by a witness to the police was a precognition and having decided that it was not, Lord Avonside added:

"[Although I am conscious of the fact that when one is dealing with statements made by an accused person and when one is dealing with statements made by a witness in regard to an accused person, there may be certain differences in approach, I am not myself convinced that these differences are decisive. In my view, in recent years there has been, not un-understandably, (sic) a progress from the narrow approach of the past in matters of this

kind. The test on these matters will always, and must always be, the test of fairness in the pursuit of justice. That test is not answered mainly by rigid precedent or the attempt to apply judge-made rules of the past."

Thompson v H.M. Advocate 1968 JC 61 was chosen by Sheriff Gordon to illustrate the operation of the law during the period of the decline of Chalmers.³ As Sheriff Gordon points out, the circumstances bear an uncanny similarity to Aitken.

Thompson was charged with having murdered his grandmother, with whom he lived. She had apparently been killed in the early afternoon but her body was not found until around 7 p.m.. Various members of the family were interviewed including the accused, who was not in fact traced by the police until early the following morning. Since Thompson could not go back to the deceased's house, the police kept him at the police station until they were able to find other accommodation for him. From Sheriff Gordon's account, the police seem to have been somewhat equivocal about whether Thompson was a detainee or a free agent, but in any event they still apparently regarded him as a potential witness although he was obviously under some suspicion, there being a suggestion that his account of his movements might be incorrect.

After chatting inconsequentially with a policeman for several hours, Thompson suddenly blurted out "It was either her or me".

The policeman immediately summoned a senior colleague who administered a caution following which Thompson made and signed a full confession including the information that he had hit the deceased with a hammer, which was not known to the police at that time.

The trial judge was Lord Wheatley who, following the now well established trial-within-a-trial procedure, ruled in favour of admitting the evidence of this confession. The standard case report makes no reference to his judgment, but Sheriff Gordon quotes his Lordship as saying, when repelling the objection to the statement,

"The test as I have said is one of fairness balancing both points of view. The Court can only refuse to admit evidence of this nature if as a result of the preliminary inquiry it is clear to the Court that no reasonable jury could hold that the evidence had been fairly obtained."

Later his Lordship added,

"I would only add that the time has perhaps come when the views expressed in Chalmers ... may have to be considered by a full Court."

When he came to charge the jury, Lord Wheatley directed them that if they accepted that the statements were made, they could reject them as unfair only on certain conditions. He said that once a person has become a suspect and further questioning is going to

take place he must be warned, and that this is to ensure that he is not coerced into making a statement which condemns him out of his own mouth. His Lordship went on:

"You must in the first place, looking at it from the point of view of the accused be satisfied that there was no unfairness in that the statement was made not voluntarily or spontaneously but was coerced or was induced or produced as a result of trickery. On the other hand you have got to make up your mind that if the police in the course of a very difficult and serious investigation have got to keep asking questions and probing and probing and probing then as long as they are doing that fairly having regard to their task and their duty, and that nothing unfavourable or unfair to the accused was done either by word or by deed or by trickery, then, of course, anything that they can elicit is normally competent and acceptable evidence."

Thompson's conviction was upheld on appeal, the opinion of the Appeal Court being given by Lord Justice-General Clyde. His Lordship picked up Lord Wheatley's point about the need to review Chalmers quoting the opinion of Parke B. in R. v Baldry

"I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of con-

fessions in evidence ... justice and common sense have, too frequently, been sacrificed at the shrine of mercy." ⁴

Lord Clyde also pointed out that experience of the trial-within-a-trial had proved it to have undesirable features. It lengthened trials, afforded the opportunity for the reconstruction of evidence and denied the jury the opportunity to consider any inconsistencies between the evidence at the two "trials." His Lordship suggested that it would be better for the evidence to be led once and for all in the presence of the jury. If the judge considered that the Crown had not led evidence that the confession was freely and voluntarily given, he could direct the jury to disregard it. ⁵

Lord Wheatley had, in effect, directed the jury that it was for them to decide on the question of fairness. Lord Clyde made no criticism of this aspect of the charge but he himself did not go so far, preferring to leave the decision on admissibility to the judge. Later, however, as will be shown, it was Lord Wheatley's view which prevailed.

Notes

1. Author's italics
2. cf Lord Cooper in *Chalmers* at p75 where the fact that the police decided to caution the accused was held to be indicative of their view that he was a likely perpetrator of the crime.
3. Gordon *Admissibility* p333 which is based on the transcript of proceedings and contains quite a lot of additional information not included in the case report.
4. (1852) 2 Den C.C. 430 at p.445
5. Professor Walker has pointed out (1969 JR 48) that the only way in which the

trial-within-a-trial is ever going to be reconsidered is if a trial judge to declines to follow the Chalmers procedure, thereby presumably opening the way for a defence appeal which would be heard by a bench of at least seven judges.

(xiii) The 1970s

By 1970 the re-interpretation of Chalmers, insofar as it related to admissibility of statements by suspects, was complete. The courts had come to accept that police questioning was a legitimate part of the detection of crime, "old style" judicial examination had finally been interred and although Chalmers had not been overruled (and still has not been overruled) the perception of that case had been radically altered. The fourth (1972) edition of *Renton and Brown* puts it thus:

"The courts will now look with sympathy on the need of the police to ask questions in detecting and bringing home guilt to offenders, and in cases of doubt the courts may be expected to admit statements made in response to questioning which does not smack of unfairness, whether because it is oppressive, or is of the nature of cross-examination, or involves threats, inducement or trickery. The mechanics of this change have been twofold. They have involved some redefinition of the stage of suspicion, and also a rejection of the notion that the existence of suspicion is in itself a paramount consideration. Recent cases adopt Lord Cooper's view of Chalmers and emphasise its tentative and pragmatic aspects."

It may be remarked in passing that it is not beyond doubt whether the later interpretation of Lord Cooper's judgment is entirely in accordance with his Lordship's true feelings and intentions. His trenchant observations in Rigg and indeed the decision in Chalmers itself, which has been described as "a decision which on any realistic criterion it is difficult to support" ² are, it is submitted, more consistent with a firm exclusionary rule than a mere reiteration of the fairness test. Since Chalmers was a full bench decision it could only be overturned by a larger bench and the restrictive interpretation of the term "suspect" avoided the need to overturn or even reconsider it. Chalmers was effectively neutralised by being simultaneously "explained" and sidestepped.

Until the end of the 1970s the cases largely continued the trend established in Miln v Cullen. The subject of police questioning arose indirectly in Jones v Milne 1975 JC 16. It was strictly unnecessary for the High Court to express any opinion on the subject but Lord Justice-General Emslie, who had by then succeeded Lord Clyde, took up where his predecessor had left off and pointed out that it was not the law of Scotland that a suspect's answers to police questioning would never be admissible. His Lordship regarded Miln v Cullen as showing that,

"[T]he objection is to interrogation in the proper sense of that word and to answers which can be seen to have been extracted from the suspect. ...

The mere fact that a suspected person is asked a question or questions by a police officer before

or after being cautioned is not in itself unfairness, and if answers are to be excluded they must be seen to have been extracted by unfair means which place cross-examination, pressure and deception in close company."

Once again the criteria for unfairness were being restricted. It seems implicit in Lord Emslie's judgment that something more than simple cross-examination (if there is such a thing) was now required.

In the next case chronologically, H.M. Advocate v O'Donnell 1975 SLT (Sh. Ct.) 22 Sheriff Macphail repelled an objection to the admissibility of evidence of a shouted conversation between prisoners in police cells which had been overheard by police officers. In a typically careful and scholarly judgment, the learned Sheriff reviewed the earlier case law, including H.M. Advocate v Keen 1926 JC 1 ³ which he found to be of "little assistance" and he quoted with approval Professor Gibb's opinion that "Men in a police station who shout their observations must surely be taken to know that policemen will hear them". ⁴ Sheriff Macphail's view was later to be approved by the High Court ⁵ but one might, in passing, wonder what conclusion he would have reached had he been faced with the opinion of the High Court in Jessop v Stevenson 1987 SCCR 655 that a decision by a single judge of the High Court (presumably even one as patently wrong as Keen) was binding on all inferior judges.

Murphy v H.M. Advocate 1975 SLT (N) 17 was the final case chosen by Sheriff Gordon ⁶ to illustrate the development of the law since Chalmers. The accused had been detained in London by a mixed team of Scottish and English policemen in connection with crimes committed in Glasgow. He was cautioned but not charged as the police were waiting for the arrival of a petition warrant which was apparently delayed by the intervention of Christmas. Initially Murphy was reluctant to talk, but subsequently he volunteered the information that he had burned the stolen money. Later he changed this story and claimed he had hidden it in a dustbin, although a search proved unsuccessful. Later still the police asked him where the money had come from and told him that one of his co-accused had made a statement although the contents of the statement were not disclosed. Murphy at one point remarked "I don't want to talk about it" thus prompting one of the policemen to ask "What don't you want to talk about" (1) which the officer eventually admitted at the trial was indeed to get Murphy to talk, although he denied that he had been trying to encourage or pressure him into a statement. Shortly after this, Murphy made an incriminatory remark and then, having been left on his own for a while, asked if he could see a signature on a statement. This was refused, but one of the English officers offered to tell him what the police knew about the details of the crime. After other incriminatory remarks Murphy then made a statement which was written down by the police.

At the trial all the evidence was objected to as resulting from the interrogation of a suspect but, was admitted following a trial-within-a-trial. As Sheriff Gordon observes, "that in itself may be thought to be enough to show that the law had changed radically - unless there is one law for Scottish detectives interviewing tearful teenagers and another for English one interviewing remorseful robbers." The trial judge does seem to have had some doubts about his own decision since Sheriff Gordon refers to him saying at one point that "I don't want to talk about it" could be regarded as a red light to the police. However he eventually let the matter go to the jury, remarking, somewhat plaintively, "I am in doubt only as to whether I should allow a jury to decide whether something is fair ... the test is a jury test - how can I usurp the function of the jury?"

Murphy appealed against conviction and the judgment of the Appeal Court was given by Lord Wheatley who had succeeded Lord Grant as Lord Justice-Clerk. At the appeal, the defence argued that at the material time Murphy had been a "chargeable suspect." This concept had been introduced by Professor Gordon (as he then was) in the fourth edition of *Renton and Brown* ⁷ to indicate a suspect against whom the police had sufficient evidence to justify a formal charge but who had not actually been charged. The idea stemmed from the fear that the police might deliberately delay charging somebody in order to obtain further evidence from him, and the "chargeable suspect" was, it was claimed, in the same position as a person who had actually been charged. Lord

Wheatley found it unnecessary to decide whether the concept of the "chargeable suspect" was sound, but the tone of his comments suggests disapproval and although reference to the "chargeable suspect" still appears in the fifth edition of *Renton and Brown* ² the only subsequent judicial comment to which it has been subject is in the unreported case of H.M. Advocate v Caithness and Fraser 1985 Dundee High Court where Lord Ross excluded evidence of an interview by a suspect who had been arrested at the conclusion of the six hour detention period but not charged until the police had questioned him further. In this case his Lordship held that the accused was "not just a chargeable suspect, he was a person who had been told that he was to be charged and the charges were delayed for the express purpose of questioning him with a view to his answers being admissible in evidence." In this situation the police had acted improperly and unfairly.

Returning to Murphy, Lord Wheatley reminded everybody that the test of fairness was a bilateral one and went on to agree with the trial judge's approach:

"In considering whether the presiding judge erred in his decision at the trial within the trial it must be borne in mind (1) that if an issue turns on credibility it is for the jury to decide that issue and not the judge; (2) that if two possible interpretations can properly be put on the situation, one of which falls into the category of fairness and the other into the category of

unfairness, the judge should leave the
determination of that issue to the jury; ... "

Sheriff Gordon comments that Murphy disposes finally of the rule that there is any stage (or, just possibly, any stage just short of formal arrest, caution and charge) at which answers to police questions are *ipso facto* inadmissible, or at which questioning ceases to be a proper police function.

Murphy was followed by Balloch v H.M. Advocate 1977 JC 23 where once again Lord Wheatley gave the leading judgment. Balloch was convicted of the particularly unpleasant murder of a man by the name of Pinder with whom he lived and with whose wife he had formed an illicit association. He was taken to the police station along with Mrs Pinder about 8.30 p.m. for the purpose of identifying property recovered from the body of the deceased and was apparently in a distressed condition. He had apparently telephoned the police to tell them that Pinder was missing and at this stage he was only regarded as a witness. The police began taking statements from both Balloch and Mrs Pinder, in the case of the former this began about 10 p.m.. At about 11 p.m. the officer taking Balloch's statement began to suspect the affair with Mrs Pinder and, by coincidence, the officer interviewing her reached the same conclusion about the same time. Police inquiries were meantime continuing in other directions and certain other evidence tending to incriminate Balloch also came to light about this time. There were discrepancies in his answers and the same officer continued to interview him, again showing him the objects taken from the body to "see what his reaction was". By midnight the interviewing officer was sure that Balloch was lying, a view which he reported to a senior officer who then spoke to Balloch and without cautioning him asked him if he was sure he was telling the truth whereupon Balloch broke down, put his hands over his face and said, "I did

it for Marion's sake." He was then cautioned and made a detailed confession.

The trial judge admitted the evidence following a trial-within-a-trial and his decision was upheld on appeal. Lord Wheatley found it unnecessary to rehearse the trend of the recent authorities and said:

"Suffice it to say, a Judge who has heard the evidence regarding the manner in which a challenged statement was made will normally be justified in withholding the evidence from the jury only if he is satisfied on the undisputed relevant evidence that no reasonable jury could hold that the statement had been voluntarily made and had not been extracted by unfair or improper means. Applying that test to the instant case, we are of the opinion that, to say the least, the question was so open that the trial Judge acted perfectly correctly in allowing the issue to go to the jury for their determination."

Counsel for the appellant had also argued that in any event a judge should be reluctant to let such an issue go to the jury because the question of the fairness of the eliciting of a statement is not readily understood by a jury. Lord Wheatley dismissed this as a "somewhat startling" proposition, which

"... not only flies in the face of the test which

the Judge has to apply in deciding whether the evidence should be admitted to or excluded from the jury, but would appear to desiderate that the Judge should usurp the function of the jury in what *ex hypothesi* has become a question of fact."

A writer in the Scots Law Times, ¹⁰ criticised Balloch, and the whole trend of the decisions leading up to it, on the basis that the jury were being asked, in effect, to regard as "unfair" the confession and consequent conviction of an accused whom *ex hypothesi* they regard as guilty. The same writer observed that it was open to doubt whether the degree of latitude allowed to the police in Balloch was in the minds of the judges who decided Chalmers. He (or she) questioned whether the judge's function as defined in Balloch left any room for the trial within a trial at all and suggested that the High Court should reconsider Chalmers and move unequivocally in one direction or the other.

Commenting on Balloch from the English point of view, Peter Mirfield describes Lord Wheatley's view that fairness was "*ex hypothesi* a question of fact" as "puzzling". ¹¹ The English would regard such a question as encompassing questions of law as well as fact. Mirfield draws a distinction between the issue of what was said and done, an issue of pure fact, and the issue of whether what one decides was said and done amounts to unfair treatment of the accused, an issue involving the application of law to facts. It follows, he says, that either the judge must

decide the facts and apply the law to them (the English and Chalmers approach) or the jury must do this and, while there may be reasons for adopting the latter method, it is unhelpful to castigate the former as usurping the function of the jury. Like the anonymous Scots Law Times contributor, Mirfield considers that Lord Wheatley's approach gives insufficient weight to the difficulty which juries might have in excluding from their minds evidence which they have decided is inadmissible and he adds that juries would be likely to be tempted to use the evidence anyway without coming to any decision on the question of admissibility.

It was clear that some commentators were becoming uneasy about the extent to which Balloch had removed from the police the check of a firm exclusionary rule. These fears were further confirmed a couple of years later by the decision in Hartley v H.M. Advocate 1979 SLT 26 a case which prompted one writer to observe, "The elasticity of the concept of fairness is no doubt of immense value to the courts in this delicate task of balancing but it is questionable whether in Hartley it has not been overstretched and whether the police, looking at the decision and acting on it might not in the not too distant future be called again to heel."¹²

Once again Hartley involved a youth of seventeen charged with murder, on this occasion the murder by drowning of a five year old boy in a burn in Cumbernauld. The accused was first seen by the police on a Tuesday evening in the course of routine

inquiries when he gave an account of his movements which placed himself working in the general area where the crime had taken place at the material time. He agreed to meet the police about 8 a.m. the following day (Wednesday) to show them exactly where he had been working but failed to turn up. Later that day he was traced in Glasgow, taken to Cumbernauld police office and then on to the burn. Following this he returned voluntarily to the police station where, about 2.40 p.m., he gave a second statement inconsistent with the first. He then agreed voluntarily to remain with the police while further inquiries were made although in fact two senior officers had instructed that he be detained. It is not entirely clear from the report what happened during the ensuing period, but he was apparently "seen" and presumably spoken to by several police officers. Eventually about 2.30 a.m. on the Thursday morning he was seen by a detective superintendent who considered him a suspect. This officer cautioned Hartley, went over his statement in detail, showed him a photograph of the deceased and asked him if he had seen the child, which Hartley initially denied. Eventually he asked "Are you sure?" at which point Hartley became agitated, made a short, garbled, non-incriminatory statement, then paused and said "It was me." He was again cautioned and made a clear confession. At some point he broke down and while the detective superintendent tried to comfort him, Hartley said that he wanted to tell everything, but when told that he would have to make a statement to officers not connected with the inquiry, said he would only talk to one particular policeman. This officer, a detective sergeant, was

located and arrived at the police station about 4 a.m.. He again cautioned Hartley who once more admitted the crime, saying that he took "turns" and became violent. About 5 a.m. he was cautioned and charged with murder.

At the trial the line of evidence was objected to and there were also allegations of police brutality but the trial judge, following the "lamentable process" ¹³ of a trial-within-a-trial, admitted the evidence and his decision was upheld by the High Court (Lords Avonside, Grieve and Dunpark).

Defence counsel argued that there were five factors which, taken together, branded the confession as improperly obtained, viz. (1) the age of the accused, (2) the fact (not apparently known to the police) that he had been to a special school, (3) the fact that he had been in custody for twelve hours, (4) the fact that he had not slept, and (5) the fact that he had neither legal nor parental advice. However, their Lordships had no doubt that the police actions had been fair throughout. Lord Avonside, in commenting on Lord Cooper's judgment in Chalmers, said,

"Firstly, police officers may question a suspect so long as they do not stray into the field of interrogation. Secondly and most importantly, cross-examination is just what it means. It consists in questioning an adverse witness in an effort to break down his evidence, to weaken or prejudice his evidence, or to elicit statements

damaging to him and aiding the case of the cross-examiner."

Lord Grieve found "some similarities" with the circumstances of Rigg but distinguished it on the basis that the facts of the present case disclosed no evidence of the kind of interrogation which Lord Cooper found to be present in Rigg. His Lordship was clear that questions along the line of "Are you sure," which was the nearest the police had come to cross-examination, could "seldom be said to have been extracted by unfair means." It was not illegitimate to question a suspect. His Lordship considered that what was illegitimate was

"... to use means to extract from a potential accused extra-judicial admissions which could not have been extracted from such a person in judicial proceedings against him, an accused person not being a compellable witness."

It is not entirely clear what his Lordship meant by this passage but he appears to be referring to the opinion of Lord Cooper in Chalmers '4. While this point may have some logic in the context of a firm exclusionary rule, it is, it is submitted, unsound in the context of an acceptance of the legitimacy of police questioning of suspects. Since an accused person is not a compellable witness at his own trial, it follows that he cannot be questioned at all unless he voluntarily enters the witness box in which case the prosecutor becomes, by statute, entitled to

cross-examine him. It does not assist the understanding of an already difficult area of the law to propound a test which is factually and legally a *non-sequitur*.

The writer of the article referred to above is also highly critical of Lord Grieve's view that the test of fairness meant not only fairness to the accused but "fairness to those who investigate crime on behalf of the public." He (or she) submits that fairness to the police is an irrelevant factor in the equation which seeks to balance the interest of society in the successful detection and suppression of crime and the individual right of the accused to a fair trial. The writer argues that the policy basis of the exclusionary rule in Scotland whereby the court feels obliged to consider the activities of the police in such investigations is wrongly placed. In his (or her) opinion there can be no question of a police interest being taken into account.

Returning to Hartley itself, Lord Dunpark also distinguished Rigg and Chalmers. In his opinion:

"The police are entitled to question suspects about parts of their previous statements which appear not to fit into the jigsaw puzzle which the police are endeavouring to construct, and a self-incriminating response to the question "Are you sure?" is not necessarily inadmissible as evidence against the suspect at his trial."

Later his Lordship appeared to consider that cross-examination amounted to more than interrogation:

"Interrogation there certainly was, but no leading or repetitive questions or any unfair pressure which could reasonably be classified as cross-examination and thus render the answers inadmissible as evidence against the accused.

Indeed this confession emerged, not in answer to a question, but as a correction of his immediately preceding statement It has all the hallmarks of a truly spontaneous confession, and, in my opinion, the five background factors founded on by counsel for the accused cannot convert this voluntary confession into one improperly obtained."

The "no reasonable jury" test from Balloch was also referred to with approval.

The last cases on admissibility in the 1970s were H.M. Advocate v Von 1979 SLT (N) 62 and its sequel Kane v H.M. Advocate 1979 unreported, C.O. Circular A30/79. The former has already been discussed in the context of the right to silence ¹⁵. A statement had been obtained from Von by the police purporting to act in terms of Section 11 of the Prevention of Terrorism (Temporary Provisions) Act 1976 but they had omitted to inform him at any stage that he was not obliged to incriminate himself. In an

attempt to support the admissibility of the statement, the Crown argued an analogy with Foster v Farrell but the trial judge, Lord Ross, distinguished that case on the basis that a car owner asked to identify the driver is not normally a suspect, 's and if he says that the car was driven by a third party he is not liable to prosecution. Von was detained under a statutory provision and was undoubtedly a suspect, therefore, in his Lordship's view, the court was thrown back on the familiar test of fairness. His Lordship indicated that if Von had been cautioned or otherwise informed that he was not obliged to incriminate himself, he would have admitted the statement. However, in the absence of such warning, the statement had been unfairly obtained:

"I do not consider that a statement can be regarded as being fairly obtained if the accused was never advised of the fact that under our law no person is required to incriminate himself. In enacting the provisions of the Act of 1976, if parliament had intended to make statements of suspects admissible against them in the event of their being subsequently charged I would have expected parliament to have made that clear. I cannot believe that parliament intended to alter the well-established principle of our law that no man can be compelled to incriminate himself. ... No doubt statements may be taken from suspects under the Act, and such statements may assist the police in their inquiries; but they will not in my

opinion be admissible against a suspect who is subsequently charged unless the suspect has been advised that he cannot be compelled to implicate himself"

Kane v H.M. Advocate is of minor importance, but it does show that in modern practice a statement is not necessarily tainted by preceding improprieties. Like Von, Kane had been detained under the Prevention of Terrorism Act and questioned and the evidence of what he said was ruled inadmissible on the same grounds ie lack of proper cautioning. However about five days after he had been arrested, Kane informed the police that he wished to make a further statement. On this occasion independent officers were brought in and the procedure, including the cautioning, was impeccable. The day before this statement was made Von had been "improperly" questioned and it was argued that this "tainted" the later, correctly taken statement which was thus inadmissible. The presiding judge held that it was a question for the jury to determine whether unfairness and prejudice had been suffered by the accused and he directed them accordingly. On appeal the High Court merely observed that he was "correct in doing so."

Notes

1. par 18-29 p378
2. J.W.R. Gray *Chalmers and After* 1970 JR 1
3. Supra p332
4. *Fair Play for the Criminal* 1954 JR 199
5. Jamieson v Annan 1988 SLT 631
6. Gordon *Admissibility* p336 which again contains much information not included in the very brief standard report.
7. par 18-25 p374
8. par 18-33 p463. See also Sheriff Gordon's commentary to Gilmour v H.M.

Advocate 1982 SCCR 590 at pp610-611

9. The report does not indicate that it was either proved or conceded that the appellant became the prime or only suspect before blurting out his admission.
10. Anon. *A Question of Fairness* 1977 SLT 140
11. Mirfield p201
12. Anon. *Interrogation and the Test of Fairness* 1979 SLT 189
13. Lord Avonside p28
14. 1954 JC 66 at 79
15. *Supra* p204
16. The writer's experience as a prosecutor leads him to suggest, with all respect to Lord Ross, that this observation may not be factually accurate.

(xiv) The Thomson Committee and The Criminal Justice (Scotland) Act 1980

Apart from the cases already considered, the other event of significance in the 1970s was the publication in 1975 of the Second Report of the Thomson Committee which devoted a substantial chapter to interrogation.

The Thomson Committee noted that Scots law "has proceeded not so much on any fundamental constitutional or philosophic basis, such as the privilege against self-incrimination, as on a conception of fairness and a determination by the courts to control police activity in the interest of fairness." They pointed out that what has been in issue has been not so much the truth of statements by accused persons as the propriety of the circumstances in which they were made. Statements improperly obtained were never evidence no matter how reliable and obviously true because an exclusionary rule was the only effective way the courts could control police interrogation. It was also noted that Scots law excluded not only statements extracted by unfair methods but also those whose "only taint is that they were made at a certain stage of investigation."

The Committee based their approach to interrogation on six general principles:

- (a) Subject to statutory exceptions no one should be under a legal obligation to give information to the police.

(b) The police should not exert pressures on any person to make him give information to them. In particular they should not offer inducements, threaten, bully, or deprive of rest or food.

(c) It is reasonable and necessary for the police to ask questions in the course of criminal investigation.

(d) It is unreasonable and unrealistic to expect the police not to ask questions of a person whom they suspect of an offence.

(e) Once the police have reached the stage where the person concerned should be arrested and charged, any further answers to their questions should be inadmissible as evidence.

(f) There should be a reliable record of police interrogation.

On the state of the law in 1975 only the last point was of any real novelty. The Committee accepted the need for police questioning of suspects and, although they recommended the revival of judicial examination in an amended form, they acknowledged that it would be impractical to arrange judicial examinations at all hours of the day or night. They were of the view that, notwithstanding the revival of judicial examination, it would be "quixotic in the extreme" to reject answers to police questions if the circumstances of their making were unobjectionable. They eschewed any notion of making answers to police questions obligatory but added that under any system the court should reject statements which had been unfairly obtained.

The then current law was discussed under three headings:

(1) Before the police have reasonable cause to suspect any

particular person of having committed the offence;

(2) After the police have reasonable cause to suspect a particular person but are not in a position to charge him;

(3) After a person has been, or ought to have been, charged.

In relation to Stage 1 no change to the existing law was proposed. In relation to Stage 2 the Committee reviewed the decisions, noting the two main trends of the post Chalmers cases, ie less stress on the stage at which answers are made and more stress on general considerations of fairness and the restriction of the term "suspect" to the prime or only suspect. They commented that one unfortunate result of the present state of the law was that the police might be tempted to take answers to questioning over a period, put them together into a single statement and present that to the court as a spontaneous voluntary statement. The Committee acknowledged the reality of the situation and concluded that there was nothing improper in the police asking questions, checking the answers and coming back to the subject to ask for his explanation of any discrepancies. They recommended that it should be competent for the Crown to lead evidence of statements made by a suspect before arrest in answer to police questioning but admissibility of such statements were to depend on four qualifications:

(a) The statement must have been fairly obtained. It was not a function of the police to extract a confession from a suspect.

(b) Before questioning, the suspect must have been cautioned.

(c) Interrogation of suspects in police stations was to be

recorded on tape.

(d) Where an accused was proceeded against on petition, the record of any interrogation should not be admissible unless it had been put to the accused at judicial examination.

Point (b) has already been discussed in the context of the right to silence and point (c) will be discussed later in the context of a fuller consideration of the issues involved in the accuracy of the record. No legislative effect was given to point (d).

Where a suspect said to the police that he wished to make a statement it was recommended that he should again be cautioned, the statement should be taken by a police officer, not necessarily an "independent" officer, it should be tape recorded if made at a police station, and it would not be admissible if not put to the accused at judicial examination. Spontaneous remarks short of a voluntary statement to or in the hearing of the police were to be admissible, subject to being put to the accused at judicial examination. Finally the Committee recommended that a solicitor should not be entitled to intervene in police investigations before charge since such intervention might defeat the purpose of interrogation which was to obtain from the suspect such information as he may possess regarding the offence.

When they turned to consider Stage 3, ie statements after charge, the Committee, despite the nod in the direction of the concept of the "chargeable suspect", did not offer any views on the

soundness or otherwise of that concept. Instead they proceeded straight to the point of charge, recommending that the accused should be cautioned and after charge should be specifically asked if he had anything to say in reply. No change in the law relating to questioning after charge was proposed, the view being taken that questioning should cease at the stage of arrest and charge, although a voluntary statement made after charge would continue to be admissible. Although the Committee considered that there was much to be said for requiring such a statement to be taken before a sheriff, they accepted that such a procedure was impractical. Instead they set out seven conditions for the admissibility of a voluntary statement:

- (a) The statement must have been preceded by a caution and an offer of an interview with a solicitor.
- (b) The statement must have been recorded in a document written either by the accused or by the police at his dictation.
- (c) The statement must contain an acknowledgment by the accused of his right to silence and a statement that he has seen a solicitor or has decided not to see one. The statement should conclude with an acknowledgment that he has read it over and a reference to any amendments desired and the accused should sign it on the last page as should "a" witness.
- (d) The proceedings must have been tape recorded if they took place in a police station or prison.
- (e) The statement must have been voluntary and not made in response to any invitation, threat or promise by the police.
- (f) The police officer taking the statement must not have

interrupted or asked questions except for clarification and any questions must have been inserted in the record of the statement.

(g) Where an accused was proceeded against on petition, the statement should not be admissible unless it had been put to the him at judicial examination.

Once again remarks blurted out to the police or made to third parties and overheard by the police were to be admissible, subject to having been put to the accused at judicial examination.

Many of the Committee's recommendations did no more than endorse the existing law, but, had they been enacted, certain of their proposals could have had the effect of importing into Scotland what Sheriff Gordon calls "an alien rigidity". ' For example it is submitted that to render a non-tape recorded voluntary statement inadmissible because the policeman writing it had omitted to record an unimportant clarifying question (e.g. "Who is this 'Jimmy' you're talking about?") is contrary not only to the test of bilateral fairness but also to common sense. "Is it not better," argues Sheriff Gordon, "to accept that the ultimate question is "was it fair" and to leave that to the jury? the question, after all, is whether the police behaved in a way acceptable to society as a whole today."

In the event few of the Committee's detailed proposals passed into legislation and in particular the rigid requirements for

tape-recording and the putting of statements at judicial examination as conditions of admissibility ² have never received legislative effect. However experiments with tape recording of police interviews began in Dundee and Falkirk in 1980 and in Aberdeen and Glasgow in 1982 and, as will be discussed later, tape recording is now becoming an established part of police procedure.

The greatest effect on the practice of the police has been brought about not by the Committee's proposals in relation to interrogation but by the introduction of detention under Section 2 of the 1980 Act. ³ Section 2 sought to tidy up two major loose ends. In the first place it gave an express power to the police to detain a person on suspicion without charging him, a process which, it will be remembered, had been criticised in Chalmers, and secondly it put beyond doubt the entitlement of the police to question a person detained on suspicion. The maximum period of detention is strictly limited to six hours ⁴ but there is nothing to prevent a person voluntarily going to a police station or voluntarily remaining there once he has arrived. Presumably there is also no reason why a person who has been a detainee should not continue to remain voluntarily with the police once the six hour period has elapsed, although the point does not appear to have arisen.

What Section 2 has attempted to do is to clarify the issue so that a person is either a detainee or he is not ⁵ and it

certainly limits the possibility of an extended police investigation taking place after a suspect has been detained. It will be remembered that Peter Manuel was in the hands of the police from 6.45 a.m. until 11.10 p.m. before he was charged with the first "batch" of crimes and Robert Hartley was with them for fifteen hours, with a very nebulous status, before he was charged. Whether this is a desirable development or not is necessarily a matter of opinion, although it has to be said that the problems have been very infrequent ⁶ and Section 2 does not appear to hamper the police unduly in their activities, particularly given the continuing availability of "voluntary" attendance. ⁷

However it is submitted that at the very least Section 2 has the essential merit of making the legal position with regard to the questioning of suspects considerably clearer and more easily understood than it had been and that in itself is undoubtedly a desirable development.

Notes

1. Gordon *Admissibility* p342
2. cf H.M. Advocate v Cafferty 1984 SCCR 444
3. Thomson Report Chapter 3
4. cf Grant v H.M. Advocate 1989 SCCR 618
5. cf the unsatisfactory situation in Thompson v H.M. Advocate 1968 JC 61 supra
6. One of the few examples of the police attempting to circumvent Section 2 is H.M. Advocate v Caithness and Fraser 1985 unreported Dundee High Court where they arrested the accused at the conclusion of the six hour period but delayed charging him until they had questioned him further. The resulting admissions were held to have been unfairly obtained. See also Grant v H.M. Advocate 1989 SCCR 618.
7. This subject, which is outwith the scope of this thesis is fully discussed in J.H. Curran and J.K. Carnie *Detention or Voluntary Attendance?* (Edinburgh, HMSO, 1986), particularly at Chapter 7

(xv) The Early 1980s

The 1980s have not witnessed any major developments in the law, although since the publication of the Scottish Criminal Case Reports began in 1981 a proportionately greater number of cases have been reported than in previous years. It is also noteworthy that the first two occasions on which the Lord Advocate's Reference procedure ' was used concerned the admissibility of statements to the police.

Chalmers and Hartley both featured in Boyne and Another v H. M. Advocate 1980 JC 47 which adds little new to the law but throws an interesting sidelight on the relationship between the concept of fairness to the accused and the right of silence. The accused was, yet again, a youth of sixteen charged with murder. He had been questioned at some length by the police and certain admissions had been made. At the trial no objection was taken to the evidence of the police questioning and, although he did give evidence, the accused said nothing about unfairness or anything else done by the police having influenced him. The trial judge directed the jury:

"[I]n the case of Boyne in this case no objection was taken to any line of questioning by the police of Boyne, no evidence was led which showed that the police officers had strayed into the realm of cross-examination or interrogation or illegal methods. It would have been perfectly possible

for the accused to give evidence on this matter but he did not do so, and he did not say that there was anything unfair about the giving of these statements, or that anything unfair had been done. ... There is accordingly in this case against Boyne no evidence before you from which you could hold that these statements had been extracted unfairly in the legal sense from Boyne, and I so direct you. ... You would of course be quite entitled to consider all the circumstances in which they were taken, his youth and the length of time and all that sort of thing, but these criticisms in the circumstances would go to the quality of the evidence in the statements and not to their competence."

On appeal the High Court considered that on this aspect there was nothing objectionable in the judge's charge. They added their own observations on the failure to give evidence on the question of unfairness:

"The points taken by [defence counsel] to support his claim for unfairness were founded not on any direct evidence but on inferences to be drawn from the youth of the appellant ... the length of the questioning and the hours at which the questioning took place. There was, however, no evidence, and least of all from the appellant, that these

factors had any effect on him in giving the statements on influenced him in any way. ... [T]he judge was entitled to hold that there was no evidence on which a reasonable jury could find that the statements had been extracted unfairly from Boyne in the legal sense."

The High Court did not, of course, say that the accused is required to give evidence expressly on the question of unfairness (or even give evidence at all) before the judge will be entitled to withhold a confession from the jury. However it is clear that before he can do so there must be actual evidence of unfairness. Counsel's theories and inferences are not good enough.

In H.M. Advocate v Whitelaw 1980 SLT (N) 25 Lord Cameron, sitting as trial judge, was moved by defence counsel to hold a trial-within-a-trial for the purpose of determining the admissibility of an incriminating statement to the police. His Lordship refused, making it clear that he was not in favour of any extension of the procedure "unless the circumstances already established or admitted are such as to be prima facie indicative of unfairness towards an accused who is in the hands of the police and of transgression of the fundamental rules of fairness which lie at the root of our criminal procedure." In a passage later to be quoted with approval in Tonge and the first Lord Advocate's Reference Lord Cameron said:

"Evidence as to statements of a possibly incrim-

inating character alleged to have been made by an accused person is prima facie of the highest relevance and the jury's function should not be in fact usurped and unless it is abundantly clear that the rules of fairness and fair dealing have been flagrantly transgressed it would be better for a jury seized of the whole evidence in the case and of all the circumstances, under such guidance as they should receive from the presiding judge, themselves to take that decision as to the extent to which, if at all, they will take into account evidence of statements ... given by a suspect after due caution."

A trial-within-a-trial was held in H.M. Advocate v Anderson 1980 SLT (N) 104 where the circumstances, as ultimately established, were clearly unfair. Anderson who was 17 was suspected of involvement in various crimes and went voluntarily to the police station for the purpose of an identification parade. While he was waiting for the parade to take place he was seen by an officer, not connected with the inquiry, who knew him as a footballing friend of his own son. This officer engaged him in conversation as to why he was there, at first receiving a non-committal reply. However he then invited Anderson to his own room and told another officer to listen to the conversation. He then cautioned Anderson who made certain incriminating remarks. Even from the very brief report, the officer's evidence appears

to have been vague and unsatisfactory although he did admit that the accused was apparently pleased to see a friendly face and was willing to talk to him. Lord Allanbridge held the statements to be inadmissible but did not issue a written opinion.

H.M. Advocate v McGrade and Stirton 1982 SLT (Sh Ct) 13 is an interesting and unusual case which shows vividly how practices of questionable legality can be allowed to grow up unchallenged until they become, in effect, part of normal procedure. In this case the accused were arrested in Glasgow and charged under Section 155 of the "Glasgow Powers" (ie the now repealed Glasgow Corporation Consolidation (General Powers) Order Confirmation Act 1960) with being known thieves found in possession of property for which they could not give a satisfactory explanation. They were taken before Glasgow District Court where the Stipendiary Magistrate, purporting to act under Section 328 of the 1975 Act, remanded them to Craigie Street police office for a period of four days "for further inquiry" whence they were duly returned. However they were then taken to Maryhill police office by officers from another police division who were investigating the housebreakings from which the stolen property was believed to have come. En route to Maryhill the accused made certain admissions. At the trial, which eventually took place in Dumbarton Sheriff Court, objection was taken to the admissibility of these admissions and this was upheld by Sheriff David Kelbie who, in a remarkable pre-echo of his opinion in the Orkney child abuse case some nine years later, held that the whole procedure

was "fundamentally flawed" and in particular there was no authority for the police to do anything with the accused other than detain them at Craigie Street. As the Sheriff put it,

"The idea that accused persons could be kept in the custody of the police for four or five days, without being near a court, and without the benefit of professional advice, being moved about and possibly questioned by various police officers conducting various inquiries seems to me so alien to our system of justice as to vitiate anything that passed between the accused persons and the police officers."

Sheriff Kelbie does not appear to have held that the procedure was unfair in the circumstances of the particular case, rather that it was fundamentally irregular and potentially dangerous. Although the Sheriff accepted, as he had to do, that he could not overrule the warrant granted by the District Court it was quite clear that he considered it inept. Having been a prosecutor in Glasgow between 1980 and 1991, the writer can speak from personal experience of the frequency with which "four day remands" were granted at Glasgow District Court in the early 1980s and until McGrade it does not appear to have occurred to anybody to challenge the procedure. However this is by no means the first time that a procedure which has simply been allowed to evolve has been found to be illegal when it is properly scrutinised. ² In passing it is worthy of note that a similar procedure appears to

have been followed by Hamilton J.P. Court in Manuel and no point was taken either at the trial or at the appeal. On one view it may be unfortunate that the crown did not seek to have the issue tested in the High Court, but the "four day remand" procedure died an instant death.

H.M. Advocate v Mair 1982 SLT (N) 471 was the first occasion on which the courts were required to consider the admissibility of a statement by a person detained by the police in purported exercise of the then novel powers under Section 2 of the 1980 Act. The Section, it will be remembered, permitted the police for the first time a specific right to question a person detained on suspicion. Mair, a deaf mute, was interviewed by the police through an interpreter but without legal advice at a time when he was the prime suspect. The police interview consisted of "assertions of guilt expressed by an officer who had made up his mind that the accused was the perpetrator of the crimes." ³ Lord Hunter applied the proviso to Section 2(5)(a) which safeguarded the existing (common law) rules of admissibility and held that it was clear from the transcript of the interview that the questioning comprised interrogation, cross-examination and pressure the purpose of which was to extract a statement from the accused. On the existing authorities the evidence was accordingly inadmissible. Although his Lordship had not been asked to hold a trial-within-a-trial, he nevertheless added his own voice to the criticisms of that procedure which he considered to have "a number of unsatisfactory and rather dangerous features." His

Lordship considered that the procedure "should only be used sparingly and in very special circumstances."

Section 2 again featured in Tonge and Others v H.M. Advocate 1982 SLT 506 which has been considered in detail in the context of the right to silence. It will be remembered that Tonge strengthened the trend, first noted in H.M. Advocate v Von, of the caution being a legal requirement of admissibility.

Gilmour v H.M. Advocate 1982 SCCR 590 did not have any effect on the development of the law but it was described by Sheriff Gordon as "an interesting example of acceptable police procedure". The accused was charged with rape and murder. A few days after the crime he was interviewed by the police who questioned him for an hour about discrepancies in his account of his movements. Following this interview the accused was "agitated and crying" and made a confession which included drawing a sketch. He subsequently retracted the confession in the presence of a senior police officer who, with more astuteness than some of his colleagues appear to have credited him with, decided not to charge him at that stage. As Lord Dunpark pointed out in his charge to the jury, if Gilmour had been charged the police would not have been able to question him further.

Two months later he was arrested on a charge of indecent exposure. Another senior officer had been asked to review the evidence in the murder case and he arranged to see Gilmour while

he was at court in connecting with the indecent exposure. This officer believed that if the accused confirmed his earlier confession (ie withdraw the retraction) there would be sufficient evidence to charge him with the original crimes. He therefore cautioned the accused and asked him various questions, going somewhat further than simply asking him if he still wished to deny his earlier statement. In the course of his replies the accused repeated the substance of his earlier confession and he was then charged.

At the trial the accused alleged that he had been bullied into making the earlier statement and denied having made the admission contained in the later one. Lord Dunpark directed the jury that on the police account of how the first confession was obtained it had been freely and voluntarily given and he also directed them that the second senior officer was entitled to put the original confession to the accused to find out what the accused would say about it. The fact that he could have charged the accused before the interview did not make the interview unfair since, in his Lordship's view, the accused was entitled to an opportunity to repeat his earlier claim that the first confession was false.

In H.M. Advocate v Gilgannon 1983 SCCR 10 the accused was medically examined while in police custody and found to be, in the opinion of the police doctor, mentally subnormal and unable to give a clear account of the incident in connection with which he was in custody. For some reason this finding does not appear

to have been communicated to the police officers who took a voluntary statement from the accused some four and a half hours after the examination. At any rate, no steps were taken to ascertain whether he was fit to make the statement. There was no question of the police resorting to improper threats or bullying but Lord Cameron held the statement inadmissible. His Lordship was clear that the court should look at the circumstances in which the statement was taken as well as the manner in which it was obtained and elicited. It is also noteworthy that although both Crown and defence counsel urged Lord Cameron to hold a trial-within-a-trial his Lordship declined to do so.

It has already been mentioned that the experimental tape recording of police interviews began in Dundee and Falkirk in 1980 and was extended some two years later to Aberdeen and Glasgow. There had been several conflicting single-judge decisions as to the admissibility of evidence of tape-recorded interviews, notably H.M Advocate v McFadden, unreported, August 1980 in which Lord Jauncey excluded a whole interview on the ground of cross-examination despite finding that a great deal of it was "entirely fair to the accused", and H.M. Advocate v Anderson, unreported, March 1981 in which Lord Wylie left the issue of fairness to the jury. It was clear that there was urgent need for the clarification of the law. ⁴

Lord Advocate's Reference (No. 1 of 1983) 1984 SCCR 62 concerned the admissibility of answers given in the course of a tape

recorded interview in Aberdeen. The accused, only referred to as "A", was tried before Lord Brand and a jury on a charge under the Misuse of Drugs Act 1971. Lord Brand followed Lord Jauncey's approach and disallowed all the evidence of the police questioning of A on the basis that what had been said could not have been voluntary and spontaneous because it had been said in answer to questions some of which were leading. As a result the case against A fell on a submission of "no case to answer".

It has to be said that his Lordship's views as disclosed in the case report appear to be rather out of step with those of certain of his brethren and the middle course of excluding the answers which he regarded as objectionable and allowing the rest to go to the jury does not appear to have been considered. The Crown invoked the then novel Reference procedure and posed two questions: (1) Were the answers given by A as evidenced by the transcript of his tape-recorded interview by the police admissible in evidence? (2) Alternatively, and in any event, did said transcript of itself disclose unfairness such as entitled the trial judge to rule all evidence thereanent inadmissible and to withhold it from the jury?

The leading judgment on the Reference was given by Lord Justice-General Emslie who had "no doubt whatever" that the answers given were clearly admissible in evidence. His Lordship considered (somewhat optimistically, it is suggested) that the law on the admissibility of statements by suspects was well settled and to

be found "without difficulty" in the line of authority from Chalmers to Tonge. He quoted Lord Wheatley's judgment in Miln v Cullen, Lord Justice-General Clyde's opinion in Brown and his own opinion in Jones v Milne. His Lordship emphasised that

"... where in the opinions in the decided cases the word "interrogation" or the expression "cross-examination" are used in discussing unfair tactics on the part of the police they are to be understood to refer only to improper forms of questioning tainted with an element of bullying or pressure designed to break the will of the suspect or to force from him a confession against his will."

Although this was sufficient to dispose of the Reference, his Lordship went on to reiterate the "no reasonable jury" test and to quote with approval Lord Cameron's opinion in Whitelaw. Finally he stated that although certain individual answers might have to be excluded from the jury's consideration if, for example, they disclosed previous convictions or had been obtained by unfair questioning, this would not normally justify a trial judge from withholding the remainder of the transcript from the jury.

Notes

- 1, 1975 Act Section 263A inserted by 1980 Act Section 37
- 2, cf Mahler and Berrenhard (1857) 2 Irv 634 discussed supra
- 3, per Lord Hunter p473
- 5, These cases and other judicial decisions in the early days of tape recording

are referred to in E.C.M. Wozniak *The Tape Recording of Police Interviews with Suspected Persons in Scotland* (S.H.H.D. 1985)

(xvi) The Later 1980s

The subject of alleged confessions and the admissibility thereof arose rather indirectly in Lord Advocate's Reference No.1 of 1985 1987 SLT 187. This case concerned the not unfamiliar situation of a witness denying a statement which he had previously made to the police and claiming that the statement had been fabricated and he had been forced to sign it by assaults, threats and inducements. The witness was later tried for perjury and by the time of the trial seems to have shifted his ground to allege that he had indeed made the statement but it had been obtained from him by means of assaults and other unfair treatment. In charging the jury, Lord Cowie directed them to the effect that if they found the statement to have been elicited unfairly, or if the evidence raised a reasonable doubt on that score, the statement would require to be treated as inadmissible and could not found a charge of perjury. It was contended for the Crown that these directions confused the position of an erstwhile witness tried for perjury with an accused against whom it was sought to lead evidence of admissions or confessions. Lord Justice-General Emslie had no difficulty in finding that the law governing the admissibility of evidence of alleged confessions by accused persons had no part to play in the question of whether a statement, denied on oath, was in fact made. In his Lordship's opinion what mattered was whether the statement to the police was made and the circumstances in which it was made were of no moment in that issue.

The trial-within-a-trial was proved not to be a spent force by Aiton v H.M. Advocate 1987 SCCR 252 when Lord Weir held one before deciding on the admissibility of a statement by an accused person who had been cautioned and charged with murder. The issue in Aiton was whether the police had induced the accused to make a statement. He had been in a police car en route to court and had, according to the police, asked if his co-accused was "sticking him in." The police had cautioned him before telling him that the co-accused had made a statement although the contents thereof were not divulged and the accused then made an incriminating remark. His Lordship distinguished the earlier cases of H.M. Advocate v Lieser, Stark and Smith v H.M. Advocate and Wade v Robertson and held that the statement had not arisen from interrogation, invitation or inducement. The police had simply answered his question. On appeal his Lordship's decision was upheld.

In MacDonald v H.M. Advocate 1987 SCCR 581 the police were investigating a series of robberies. They arrested the accused and charged him with conspiracy to commit robbery and committing one specific robbery in furtherance of the conspiracy. They then proceeded to question him about other similar robberies and a statement was made. He was later tried on an indictment which charged several completed crimes and made no reference to conspiracy. At the trial objection was taken to this statement on the basis that (following Stark and Smith v H.M. Advocate and Wade v Robertson) once a person had been cautioned and charged in

relation to a crime he should not be questioned further about that crime. It was contended that what he was questioned about was simply an enlargement of the original crime of conspiracy. This argument was repelled by the trial judge whose decision was upheld on appeal, all three appeal judges saying, in effect, that the problem would not have arisen if the police had not unnecessarily charged the accused with conspiracy. The leading judgment was given by Lord Justice-Clerk Ross who was quite clear that the specific crimes about which the accused was questioned could not be regarded as an enlargement of the original conspiracy charge since they had taken place at different loci and on different dates from the specific robbery which had formed part of the conspiracy. His Lordship also pointed out that conspiracy was not libelled in the indictment and this, in his opinion, supported the view that the specific offences on which he was questioned were not connected with the charge which had already been made.

Custerson v Westwater 1987 SCCR 389 which concerned the circumstances under which the police were required to administer a caution has been considered in the context of the right to silence.

In Jamieson v Annan 1988 SLT (N) 631 police officers had overheard a shouted conversation of an incriminating nature between two accused who had been cautioned and charged and detained in separate police cells. It appears that one of the

officers had accidentally overheard the start of the conversation and had then brought in other officers to listen to what was being said. The High Court approved Sheriff MacPhail's judgment in H.M. Advocate v O'Donnell and applied the test of bilateral fairness, holding that what had been said had been entirely voluntary and without and inducement or trap. It is submitted that on the facts this decision was inevitable but it remains to be seen what view the High Court will take if the police know or suspect that accused persons will try to communicate with each other and, for example, station officers in the cell passage specifically for the purpose of listening out and recording anything that is said. Dickson was of the view that the court would not exclude evidence of such conversations if picked up by eavesdropping '.

Wilson v Heywood 1989 SLT 279 has already been discussed in the context of the right to silence. It was held that there was no unfairness in the situation where the accused had been cautioned and questioned about one specific incident and was then questioned about further matters, without any further caution being administered.

Thomson v H.M. Advocate 1989 SLT 170 had little to contribute to the law but made the rather self-evident point that there was no issue of fairness in the taking of a statement from an accused who had consumed alcohol but was not unaware of his actions.

Of considerably greater interest is Fraser and Freer v H. M. Advocate 1989 SCCR 82 where the circumstances were not unlike those in H. M. Advocate v Anderson. The two accused had been charged with serious assault and placed in separate cells. There they were visited by a police officer, Wylie, who was friendly with both of them through a mutual interest in football. Unlike the officer in Anderson who was unaware of the accused's presence in the police station and happened across him by chance, Wylie knew Fraser and Freer to be in custody in connection with a serious assault and he went to their cells expressly for the purpose of conversing with them. He did not caution either. He spoke firstly with Fraser and inter alia asked him if he had told the police his side of the story. When Fraser said he hadn't, Wylie asked him if he wanted to make a statement and he said he did. Wylie himself then took the statement in the course of which Fraser gave certain information about the part played by Freer. Later Wylie spoke to Freer who also decided to make a statement which was taken by another officer but only because Wylie was otherwise occupied.

Sheriff Fraser repelled objections to the admissibility of the statements and left the question of fairness to the jury. Both accused were convicted and appealed on the basis that the statements had been induced and were accordingly unfairly obtained. However at the hearing of the appeal, counsel conceded that the Sheriff's decision to leave the matter to the jury was proper, a concession which, as Sheriff Gordon points out in his commentary,

rendered the appeal unarguable. It is submitted that this concession ought never to have been made. As Sheriff Gordon observes, under reference to Stark and Wade,

"It has hitherto always been accepted as more or less trite law that once a person has been cautioned and charged, the police should be careful to keep their distance from him (or rather that they must do so if anything said by him to them is to be admissible in evidence, whether or not they may properly approach him for other purposes). ... The instant case was not one in which the accused sought advice ... from a friend who happened to be a policeman; it was a case in which accused persons in a police cell were visited shortly after their arrest by a police officer who happened to be a friend."

On one view Fraser and Freer can be regarded as diluting the effect of Stark and Wade and allowing the police rather more leeway in dealing with accused persons who have been charged. Indeed the court said that it was "not the law that after a man has been cautioned and charged there must be no contact between him and police officer". This is undoubtedly so, but it certainly used to be accepted as a simple rule of law that once an accused had been cautioned and charged any answers given to police questioning about the subject of the charge would be inadmissible in evidence. It also opens up the possibility of a

divergence of views on what constitutes "inducement". On the basis of the plain use of language the statements were "induced" by the police since neither of the accused had any intention of making a statement until the idea was (to put it no stronger) put into their heads by Wylie. Freer in particular seems to have declined to make a statement on more than one occasion before Wylie spoke to him.

It may well be that Fraser and Freer is a decision on its own facts and in particular on the concession that was made, and further decisions will be required before it can be stated confidently whether the distinction between a person who has been charged and a person who has not, which was the earliest component of the tripartite division of a police inquiry, is going to be modified or possibly even swept away altogether.

The same Sheriff featured in Heywood v Smith 1989 SCCR 391 a case which shows the High Court intervening when a trial judge misdirected himself on the question of fairness and which incidentally highlights the problems of corroboration which can sometimes arise in remote parts of Scotland. The accused, who was smelling of cannabis, was detained and searched under Section 23 of the Misuse of Drugs Act 1971. The search was carried out by a single police officer and in the course of it the accused seized and swallowed a piece of brown resinous material which the police officer had found among the contents of her shoulder bag. Some four hours later two officers cautioned and charged her with

attempting to pervert the course of justice and she made an incriminating reply.

At the trial Sheriff Fraser excluded evidence of the reply on the basis that the procedure followed by the police had been unfair since in his view they had had insufficient evidence against the accused and no prospect of obtaining any more. By charging the accused they could have led her to believe that they had sufficient evidence against her which could have influenced her reply. In his opinion the police could, and should, have cautioned the accused and asked her why she had acted the way she did, and any response by her would have been admissible. On appeal by the Procurator Fiscal, the High Court dealt with the matter shortly, simply stating that the course followed by the police could not possibly be criticised. ²

Wingate v Mackinnon Crown Office Circular A27/89 has already been considered in the context of the right to silence and is the most recent example of a question being asked without a caution at the stage of preliminary inquiry.

In Grant v H.M. Advocate 1989 SCCR 618 the accused had been detained under Section 2 of the 1980 Act and had been questioned within the six hour period and an incriminating reply had been made. However he was not arrested until some twenty minutes after the six hour period had expired and it was argued that this invalidated all that had gone before and the reply was thus

inadmissible. The Appeal Court held that there was nothing in the Section to justify such a proposition and the statement was admissible. This, of course, only applies where the questioning takes place within the statutory framework and any attempt to adduce evidence obtained by questioning a suspect illegally detained beyond the six hours would almost certainly be unsuccessful. ³

Notes

1. Dickson p243 5348 and authorities there cited. It should be noted that in John Johnston (1845) 2 Broun 401, the accuracy of Alison's report of Tait and Stevenson (1824) Alison ii 585 was doubted
2. Sheriff Gordon's commentary on this case shows that he has still not given up the concept of the "chargeable suspect".
3. cf H.M. Advocate v Calithness and Fraser 1985 unreported, Dundee High Court

(xvii) The 1990s

Forbes v H.M. Advocate 1990 SCCR 69 is an interesting and unusual case in which the admissibility of a confession is only one of many issues raised. The accused was charged on indictment with conspiracy to further by criminal means the aims of the Ulster Defence Association and with contravening Section 10(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1984. The main plank of the case against him was a series of statements made while he was in police custody. Forbes had been taken into custody under Section 12 of that Act which permits detention for up to forty eight hours, a period which might be extended by the Secretary of State, as was in fact done in the present case.

Under Section 3A of the 1980 Act, a person arrested under the terrorism provisions is entitled to have intimation of his detention and of the place where he is being detained sent without delay to a solicitor, but an officer not below the rank of superintendent may authorise a delay for a maximum of forty eight hours from the start of the detention where that is in the interests of the investigation or prevention of crime or the apprehension, prosecution or conviction of offenders. Where such a delay is authorised, the police are required to record the reason.

There was some dubiety about the validity of the arrest in this case, which is not directly relevant to the present discussion,

but one thing which is abundantly clear from the report is that the defence could have made a much better job of cross examination than they did in fact do. It appears that evidence in relation to the delay was only taken from one police officer, who only had second-hand knowledge, and at no stage was the issue of who had actually authorised the delay properly canvassed with any of the senior police officers. It was only when the crown sought to lead the actual evidence of the statements that objection was taken. This was, not surprisingly, repelled by the trial judge.

No evidence of a written record of the reason for the delay was produced but while the High Court made it clear that they were not to be understood as diminishing the importance of accurate recording of matters required to be recorded, they said:

"The proof of making of the record and its production will be of the greatest importance where the evidence of the senior police officer who took the decision is not available to be heard and considered by the jury. In such cases a failure to produce the written record might well be fatal to the admissibility of any statements made by the accused person during the period of the delay. But in the present case the evidence of Detective Chief Superintendent Fisker was available for consideration by the jury because his evidence was led by the Crown and he was open to cross-examination on this matter on the

appellant's behalf. The issue was presented to us as being one of fairness in the end of the day, and we cannot leave out of account the fact that the point about the grounds on which the delay was authorised was not put to Detective Chief Superintendent Fiskin on the appellant's behalf, and in particular that the question as to the reliability or otherwise of his evidence on this matter in the absence of the production of the record, if a record was made, was not raised at the trial. In these circumstances we are not persuaded that the absence of any such record from the productions resulted in such unfairness to the appellant as to amount to a miscarriage of justice in this case."

The second case on confessions reported in 1990, McGungle v H.M. Advocate 1990 SCCR 320 is described by Sheriff Gordon as "an odd little case". The circumstances and the procedure followed at the trial were both unusual. McGungle and a co-accused, Reid, were detained in police custody charged with assault and robbery. Some twenty hours after their original apprehension and twelve hours after their arrest, despite having previously been uncooperative with the police, they allegedly gave voluntary statements which were, in effect, confessions to their involvement in the robbery.

At the trial objection was taken to the statements and the Sheriff decided to hold a trial-within-a-trial in order, as he explained, "to discover if there was any undisputed basis of fact upon which I could make a decision in law as to the admissibility of the statements." During this procedure the accused gave evidence alleging actual and threatened violence by the police. The only witness led by the Crown was one of the police officers who had taken the statement who was unable to say whether there had been any pressure put on the accused but conceded that McGungle had seemed unhappy and ill at ease. The Sheriff was clearly inclined to believe the accused and commented that the taking of statements from accused persons some twelve hours after they have been cautioned and charged was "quite an unusual procedure" which he thought the Crown ought to have explained. However, following Balloch he decided to let the statements go to the jury.

The accused did not give evidence before the jury, which meant that the jury were deprived of the opportunity to hear the evidence led before the Sheriff. The accused appear to have been left in the position of relying on their judicial examination transcripts and what little they could glean from the police in support of their allegations of unfairness.

The writer would seriously question the wisdom of the course adopted by the defence in this case and it is to be regretted that the High Court did not comment on it. In the event a

potentially interesting appeal fizzled out since Crown Counsel conceded that the confessions should not have been taken into account. Reid's conviction was quashed and McGunnigle's was upheld since there was other evidence against him.

The "no reasonable jury" test cropped up again in slightly unusual circumstances in Montes v H.M. Advocate 1990 SCCR 645. The case involved the importation of a large consignment of drugs. There was a dispute as to whether one of the co-accused, Veenstra, had an adequate command of English, he having been interviewed by officers of Customs and Excise without either an interpreter or a solicitor. He gave evidence at the trial through an interpreter and there was a certain amount of evidence that his command of the language was poor. However the trial judge left the issue to the jury and on appeal his approach was upheld. Montes accordingly makes it clear that the ability of the accused to speak and understand English is simply an aspect of fairness to be considered in judging the admissibility of any statement alleged to have been made by him.

A most interesting question was raised, but unfortunately not persisted in, in McGee v H.M. Advocate 1990 SCCR 710. The accused had been interviewed on tape and at his trial objection was taken to the admissibility of the taped interview and its transcript on the grounds of unfairness. Having heard the parties the trial judge upheld the objection on the view that the accused had been subjected to "systematic questioning which

amounted to cross-examination". However, defence counsel then proceeded to cross examine one of the interviewing officers in relation to information given to him by the accused in the course of the interview. The Crown argued that it would be contrary to the interests of justice to allow only selected excerpts of the interview to go to the jury and that by, in effect, seeking to lead part of the accused's statement, the defence must be held to have waived the objection previously taken. The trial judge upheld this submission and, notwithstanding his earlier ruling, allowed the whole interview to be put in evidence, leaving it to the jury to decide at the end of the day whether the statement had resulted from unfair interrogation.

When the matter came before the Appeal Court, defence counsel intimated that he was no longer proposing to argue this issue. However, as Sheriff Gordon observes, the appeal court will have to deal with it one day.

H.M. Advocate v Graham 1991 SCCR 56 has many similarities to H.M. Advocate v Campbell, ' which was considered in argument, and is subject to many of the same criticisms. In Graham the accused was a suspect who had already been interviewed by the police. It came to their notice that he was going to have a meeting with a Mr Rahman on matters which were likely to be relevant to the police inquiry. The information appears to have come from Mr Rahman himself and he was "wired up" with a radio transmitter. The meeting took place and certain incriminating statements were

apparently made and recorded by the police. It appears that after the meeting was over, Mr Rahman himself introduced certain topics into the conversation and this resulted in the most important admissions being made. The trial judge took the view that:

"... the panel had already been interrogated by police officers under full common law caution; he was then a suspect. He continued to be a suspect, and thus one in whose favour the law may intervene to safeguard him when questioned, from possible self-incrimination. Against this background, the police officers, with no evidence available to them against the panel, but proceeding upon wholly unsupported suspicion, then promoted the eavesdropping upon the conversation between the panel and Rahman, who was aware of the purpose for which the equipment was provided. ... If such questions had been put at that time by police officers in the course of interrogation of the panel without due caution, statements made in response to them would have been inadmissible. I can see no reason why such statements should be rendered admissible by the fact that they were secured by a third party, not a police officer, where the third party asks them in the knowledge that he is being overheard by police officers concerned in an enquiry into the matters about

which he is asking questions, and who has been provided by the police with equipment to enable them to overhear what passes. ... In principle I see no distinction between a case such as the present one where the third party is provided by the police officers investigating the crime with a list of questions to ask the suspect in the hope of securing admissions of guilt, or the example of inadmissible evidence cited in Macdonald on the Criminal Law of Scotland (5th edn) p314 where an official procures a fellow prisoner to inveigle the accused into conversation to be overheard by the official, which last could only be regarded as entrapment."

The statement was rejected with the result that the indictment required to be withdrawn. Sheriff Gordon comments that this decision seems to set a special standard for the police.

"Indeed," observes Sheriff Gordon, "it may depend on their having been obtained specifically by police deception which would suggest that the aim of the law is to ensure that the police act like gentlemen. It is unlikely that the statements would have been rejected if Rahman had acted off his own bat, without any police involvement at all, but with the intention of obtaining evidence from the accused which he could present to the police. But the accused might feel just as "fooled" by that situation as

by one in which Rahman was acting with the connivance of the police".

While Graham is only a single judge decision, it is nonetheless unfortunate that the case reports should include another Campbell and it is to be hoped that the faint hint of disapproval in Weir v Jessop (No. 2) 1991 SCCR 636 (together with the more explicit disapproval of Campbell) ² will be maintained when this issue eventually reaches the appeal court as it inevitably must do sooner or later.

In H.M. Advocate v B. 1991 SCCR 533 Sheriff Neil Gow excluded a statement by a fifteen year old boy who had been roused from bed about 2 a.m., cautioned, arrested and taken to the police station without being charged. The boy's mother was present when he was taken into custody but it was not suggested to her that she had any right to accompany her son to the police station and/or to have access to him there. The report does not make clear exactly what transpired at the police station, but an incriminating statement was apparently made.

Sheriff Gow was "not satisfied that there is a hard and fast rule that a person cannot be detained by the police without being charged (apart from Section 2 detention)," a view with which the present writer would respectfully disagree. However he did exclude the statement on the general ground of fairness, citing the fact that the boy had been taken from his bed in the middle

of the night, escorted to a police station without being formally charged with any offence and without his parent being given the opportunity to accompany him or have access to him. As the Sheriff pointed out, had the police followed the correct procedure of detaining the accused under Section 2 of the 1980 Act the accused, as a child, would have had the additional statutory protection provided by Section 3(3) of that Act. In this case the relevant evidence was undisputed and as there was no issue of credibility to determine, the Sheriff took the view that no reasonable jury could hold the statement to have been fairly obtained and accordingly he excluded it.

Notes

- 1, supra chapter 5.3, xi
- 2, Weir v Jessop is not directly concerned with confessions and is not considered further. The disapproval of Campbell and the doubting of Graham are strictly obiter.

(xviii) Statement Constituting the Offence

Finally in this discussion of fairness in relation to police questioning it should be noted that the Scottish courts will not apply the concept of fairness in the unusual situation where the statement to the police itself constitutes the offence. In Tung Wang Ming v H.M. Advocate 1987 SCCR 110 the accused, a Chinese restaurateur, had gone to the police station following the arrest of one of his employees. There was some dubiety about the employee's true name and while this was being discussed the accused offered the police officers bribes in the form of free meals and money to secure the employee's release. The police warned him of his position but the only effect of the warning was

to increase the sum of money on offer! One of the officers sought the advice of a superior and the superior and another officer listened from a concealed position while the accused was again asked the name of the employee, whereupon he offered all the money in his pocket for his release. The concealed officers then revealed themselves and the accused was cautioned and charged.

In this situation Sheriff A. G. Johnston explicitly directed the jury that they were not to consider the issue of whether what the police did was fair or not and on appeal he was upheld. The High Court stressed that at the material time Tung was not in the position of an accused or a suspect, and was not being questioned about his own alleged guilt of any offence. The evidence of what the accused said was evidence of the crime itself.

5.4 Confessions and Admissions to Persons Other Than the Police

(1) Prison Officers

Generally prison officers have been assimilated to police officers for the purpose of determining the admissibility of confessions or admissions made to them. ¹ However there is a dearth of modern authority, the question not having arisen this century. Hume disapproved strongly of any confession by a person in prison being received in evidence ² and historically the courts have been very careful to ensure that no person who had the custody of a prisoner abused his or her position of influence over the prisoner. ³ In one very unusual case, Janet Hope or Walker (1845) 2 Broun 465 the keeper of the prison had become in effect a religious adviser and confidant of the accused and in the course of his conversations with her she had made certain admissions. The evidence of these was rejected at the trial although the court made it clear that the case was "very special" and was not to be taken as laying down a precedent.

It would appear that a prison officer should caution the accused and any statement which was elicited by questions (and presumably by any other form of unfairness) runs the risk of being held inadmissible. ⁴ However the statement in the current edition of Renton and Brown that "prison officers should probably not receive confessions at all, but send for a magistrate or perhaps for the police" must be doubted as not being in accordance with modern views. It is thought that the courts would apply the

normal modern criterion of bilateral fairness and it must be considered highly unlikely that a voluntary statement to a prison officer would be rejected on the basis that he had not sent for a magistrate.

Notes

1. Dickson p240 §344; Walkers p38 §41; Renton & Brown §18-38
2. Hume Vol ii pp335-336
3. See Catherine Beaton or Bethune (1856) 2 Irv 457; May Grant (1862) 4 Irv 183
H.M. Advocate v Proudfoot (1882) 4 Coup 590. Proudfoot is fully discussed in the context of the right to silence at p198 *supra*.
4. Macdonald p314, following Proudfoot; MacPhail §20.18

(ii) Statements to Fellow Prisoners

Despite Hume's disapproval, it has long been established that a confession made by a prisoner to a person confined along with him is admissible, provided that the person to whom he makes it has not been induced to converse with him by anybody connected with the prosecution. ¹ This would appear to apply irrespective of whether evidence of the conversation is given by the fellow prisoner or by a prison official who has overheard the conversation. In the latter case the same rules would appear to apply as do in the case of police officers. ²

Notes

1. e.g. Robert Emond (1830) Bells Notes 243; Wm Wright (1835) 1 Swin 6; James Miller (1837) Bells Notes 244; Alison ii 584; Dickson p243 §348
2. Renton & Brown §18-40; cf Robert Brown (1833) Bells Notes 244

(iii) Statements to Public Officials and Investigators other than the Police

There have been a number of cases involving statements to persons

acting in official or quasi-official capacities. Hume quotes with disapproval early examples of confessions to magistrates, an Advocate Depute and the Solicitor General being accepted in evidence. ¹

The earliest example of a confession to an official being rejected is Alexander Robertson and Elizabeth Robertson or Bennet (1853) 1 Irv 219 in which certain admissions relating to the paternity of an incestuous child made to an inspector of the poor were held inadmissible on the basis that they had been obtained by undue influence. This was followed shortly afterwards by Philip Turner and Peter Rennie (1853) 1 Irv 284 when the court expressed doubt as to the competency of evidence of a statement by a naval rating to a superior officer on the ground that the statement could not be said to be voluntary, the rating being under a duty to give his commander a full account of anything which occurred during the time he was on duty. The point was not pressed and later in the same case the court sustained an objection that a statement to the Procurator Fiscal (who had come on board the ship for the purpose of making inquiries) was a precognition and hence not evidence.

The case of Waddell v Kinnaird 1922 JC 40 which has already been discussed ² can also be seen as falling into this category, since the accused was questioned by his stationmaster, albeit in front of two police officers and indeed the magistrate held that the conversation was a business conversation outwith the strictly

criminal investigation and the majority of the appeal court agreed with him. Lord Ormidale's strong dissent has already been noted and it is considered by some authorities ³ that his dissenting judgment would now be followed. However the dissent was on the basis that the presence of the police made the stationmaster's questioning a police inquiry and Lord Ormidale expressed no views on the propriety of such questioning in the absence of the police, although he did not accept the idea that it was simply "a business conversation" since the accused, being a mere lampman, would normally be under a duty to reply to questions from the stationmaster.

Morrison v Burrell 1947 JC 43 has already been discussed in the context of the right to silence. ⁴ In that case, as already noted, Lord Justice-General Cooper drew a clear distinction between an investigation by the police addressed to a citizen charged with or detained on suspicion of a crime and a "domestic investigation" by officials of a public department into irregularities in the conduct of a public service. His Lordship upheld a decision to admit statements made under caution by the accused post-master to questions from post office investigators who appear to have had in their minds a strong suspicion that he had breached post office regulations but only a possibility of his conduct having been fraudulent. In the circumstances his Lordship held that there was an "absence of any hint or trace of impropriety, unfairness or mis-use by the investigators of their

position - a factor of vital importance in all cases of this kind."

Somewhat surprisingly there has been no reported decision on an "internal" investigation since Morrison and, given the number of checkout operators, shop assistants and the like who are prosecuted for "dipping the till", pilfering and so on, there is a remarkable dearth of recent authority on the permissible limits of interrogation by "security officers" and senior colleagues. It is thought that nowadays the High Court would simply apply the test of fairness in the circumstances of each individual case. ⁵

H.M. Advocate v Friel 1978 SLT (N) 21 concerned the questioning by officers of Customs and Excise of a person suspected of V.A.T and income tax offences. The questioning began as part of a routine inquiry with the accused not being suspected of any specific offence and a possibility that he could have exculpated himself if he had given satisfactory answers. However suspicion of specific offences did come to focus on him and although he was cautioned he was subjected to sustained and forceful questioning involving repeated and searching questions which were pressed on him. Lord Ross applied the fairness test and refused to admit evidence of the accused's reply to this questioning. His Lordship quoted with approval Lord Cooper's observation in Chalmers to the effect that interrogation would have the effect of making the accused a compellable witness at his own trial and added

"The fact that a caution was administered does not remove the unfairness. Giving a caution does not justify an interrogator in conducting a searching and forceful cross-examination of a suspected person."

It would accordingly appear that revenue officials are subject to the same general principles as apply to the police.

McCuaig v Annan 1986 SCCR 535 was a straightforward example of a shop manager catching a shoplifter who had left the shop in possession of stolen property. He asked the accused to return to the store which she did voluntarily. The manager then summoned another member of staff and in her presence asked the accused (a) why she had taken the stolen items to which she replied that a friend had told her and (b) whether she had anything else she had not paid for to which she replied that she had not. When the manager said he was going to phone the police the accused became tearful and offered to pay for the stolen items.

When the police arrived, one officer without cautioning the accused asked her why she had taken the property and she again answered that a friend had told her to.

The justices at the trial held that there had been no cross-examination, duress or undue pressure from the store manager and the evidence of the admission to him was fairly obtained and accordingly admissible. The justices also made the point that

civilian store employees could not be expected to know how to administer a caution. " However the statement to the police was held inadmissible on the basis that the accused was clearly a suspected person and should have been cautioned before being questioned.

On appeal the decision to admit the statement to the manager was upheld. Lord Justice-Clerk Ross observed:

"No doubt when one is considering whether or not to admit evidence of questions of this kind, the general test of fairness will fall to be implied (sic). Mr Guild however was not a police officer, and as the justices point out in their note he could not be expected to be aware of how to administer a caution. ... Equally it is not surprising in the circumstances that he should have thought it appropriate to address some questions to her regarding the matter. Whether or not the questions put and the actings of Mr Guild were fair was a matter for the justices to determine."

McCuaig is only of importance in that it deals with, and clarifies, an everyday situation and while the Lord Justice-Clerk was at pains to stress that the decision on fairness (and hence admissibility) was one for the justices, the High Court would,

nevertheless, have intervened if the justices had misdirected themselves. ⁷

Irving v Tudhope 1987 SCCR 505 ⁸ has already been considered in the context of the right to silence. ⁹ This case overruled the Sheriff Court decision in Walkingshaw v McIntyre 1985 SCCR 389 and held in the circumstances that the post office officials were merely investigating the possibility of an offence (of having no television licence) having been committed. Accordingly there was no requirement for them to administer a caution.

As already stated, the writer submits that persons employed by official bodies specifically for the purpose of investigating whether members of the public are complying with the law should be assimilated to the police (and apparently nowadays revenue officers) and should be subject to the same legal requirements with regard to cautioning and fairness generally. However there are no Scottish decisions on statements to non-police investigators beyond the stage of preliminary enquiry and the point cannot be regarded as anything other than wide open.

Notes

1. Hume vol ii pp 335-336. See also supra p277
2. supra p327
3. Walkers p37 §40; MacPhail §20.19
4. supra p234
5. cf McCuaig v Annan 1986 SCCR 535 per Lord Justice-Clerk Ross at p537
6. *Quaere* the position of store detectives or shop security staff whose main job is to detect and apprehend thieves, cf R v Nichols (1967) 51 Cr App R 233
7. cf Heywood v Smith 1989 SCCR 391 discussed supra
8. Also reported *sub nom* Irving v Jessop at 1988 SLT (Notes) 53
9. supra p234

(iv) Statements to Private Persons

Once again the task of stating the law on this topic is complicated by the absence of modern authority and also a degree of confusion as to the definition of a "private" person. Hume lists a number of cases from as early as 1663 where confessions to private persons have been accepted in evidence. ¹ As he points out such confessions are frequently so interwoven with the other facts and circumstances of the case that they "cannot without violence be separated from them; nor the witnesses give their evidence intelligibly, or with the due connection, without relating this part of the story also." ² In none of the cases to which he refers was any pressure apparently brought to bear on the accused to confess.

Alison argues that confessions to private persons are admissible even if made "on a promise of safety or protection from the injured party or anyone else," provided the person making the promise is not connected with the prosecutor. ³ The latter category he restricts to "the public prosecutor or any person identified with him as the Procurator Fiscal, Sheriff, Clerk of Court, or the like." Thus, he says, nothing is more common than for a prisoner to confess, upon an understanding, express or implied, to the party injured that he is not to be prosecuted. Such a confession is, according to Alison, admissible provided the assurance of safety is given by "the private party only, or an officious third person, as a constable or sheriff-officer, or

the like" such, apparently, not being regarded as "identified" with the public prosecutor. While Alison concedes that such inducements could well affect the weight of the evidence with the jury, he justifies his argument on the basis "that it is not in the power of a private party, by any promises or indiscretions on his part to tie up the hands, or restrain the proof of the public prosecutor."

Alison's argument, on closer inspection, turns out to be based on one case only, Honeyman and Smith (1815) Hume 11 335 where the promise of safety came from the manager of premises which had suffered a housebreaking. It is thought that Alison's view of constables and sheriff officers was incorrect and it was doubted by Dickson. ⁴ Apart from this point, however, Dickson largely follows Alison's reasoning that inducement by a private person not connected with the prosecution does not render a confession inadmissible. ⁵ Macdonald, quoting Dickson, simply states that "Statements made to private individuals cannot be objected to, even although made in answer to questions, provided they are not extracted." ⁶

The only writers to question this view are the Walkers ⁷ who state:

"The view has been expressed that confessions are equally admissible in evidence, even if made as the result of *threats, undue influence* or inducements by persons not associated with the

judiciary, prosecutor or police. The decisions, however, do not uniformly support this view. It is thought that fundamentally the matter is one of fairness to the accused and the likelihood or otherwise that the inducement or threat resulted in the making of a false confession."

Although the words which the writer has placed in italics have occasionally been used in cases ^a neither Alison nor Dickson to whom the Walkers attribute this view actually made any reference to threats or undue influence. The Walkers refer to three cases which "do not uniformly support this view" viz Alexander Robertson and Elizabeth Robertson or Bennet (1853) 1 Irv 219, Philip Turner and Peter Rennie (1853) 1 Irv 284 and H.M. Advocate v Graham (1876) 3 Coup 217. The first two of these have already been mentioned in connection with "Statements to Public Officials and Investigators other than the Police." All these cases refer to persons acting in, at least, a quasi-official capacity and the circumstances in Graham were quite extraordinary involving a town councillor offering a prisoner a reward of £100 for information leading to the recovery of stolen property. Part of the difficulty at least appears to stem from a failure to define firstly what is meant by a "private individual" and secondly what constitutes a threat.

Nevertheless it is thought that on the basis of cases such as McCuaig v Annan the fairness test would nowadays be applied and,

as Lord Cameron has put it, ⁹

" [a] confession to a private party will be admissible unless the circumstances in which it has been made or extracted are such as to raise doubt as to whether it has been falsely made in order to escape from further pressure or in response to inducements offered, and that this is an issue which is essentially for the jury to determine upon the evidence laid before them."

It scarcely needs to be said that any attempt by the police to use a private person to obtain a confession which would be inadmissible if obtained by the police themselves would result in the confession being rendered inadmissible. ¹⁰

Turning now to the few cases that there have been, it seems clear that confessions to friends or relatives are admissible even if the result of questioning, provided they have not been extracted by unfair means. ¹¹ This statement is, of course, subject to the general rule that the spouse of an accused is not a compellable witness for the prosecution. ¹² In one case, H. M. Advocate v. Parker 1944 JC 49, a statement by the accused to his brother while in prison on a charge of murder was admitted against him.

Notes

- 1, Hume vol ii pp333-334
- 2, ibid p333
- 3, Alison ii p581
- 4, Dickson p240 §344
- 5, Dickson p242 §§345-346

6. p315
7. p37 540
8. eg H.M. Advocate v Parker 1944 JC 49
9. 1975 SLT (News) 265 at 268
10. Lord Cameron op cit note 9 supra; cf Mahler and Berrenhard (1857) 2 Irv 634; Waddell v Kinnaird 1922 JC 40; H.M. Advocate v Campbell 1964 JC 80
11. Renton & Brown paras 18-40 & 18-41
12. 1975 Act Sections 143(2) and 348(2)

(v) Statements to Medical, Legal and Religious Advisers

There is a total absence of Scottish case law on the admissibility of a confession to the accused's own medical adviser. In general information given to a doctor by a patient, although confidential in the sense that the doctor has a duty not to publish it, is not regarded as being subject to legal privilege and the doctor is bound to reveal it if required to do so. ¹

In H.M. Advocate v Duff (1910) 6 Adam 248 voluntary statements to a police casualty surgeon were admitted. However it is noteworthy that the doctor was not examining the accused, his only task at that stage being to examine the dead body and certify the cause of death. The admissibility of a confession to a doctor examining the accused on behalf of the police has not been the subject of express judicial decision, but in one case² the Crown conceded that a police doctor examining the accused for the purpose of the drink-driving legislation was "acting as the hand of the police, and not as an independent medical referee, still less as the suspect's medical adviser."

In Reid v Nixon 1948 JC 68 a Full Bench laid down rules to govern the procedure for the medical examination of an accused under the drink-driving provisions and stated that the examination should take place outwith the presence of police officers and "any interrogation of the accused by the doctor with regard to recent events should be directed solely to testing his memory and coherence and not to eliciting information bearing on his guilt, and any information bearing on his guilt which may be incidentally elicited must not be communicated to the police."

In one English case, R v McDonald [1991] Crim LR 122 the Court of Appeal had to decide on the admissibility of a statement to a doctor on a non-medical matter. The defendant had been seen by a psychiatrist for the purpose of determining the issue of fitness to plead. The psychiatrist asked him why he had written a certain letter to which McDonald replied that he had had to make up some reason for his behaviour. This statement was held to be admissible although it was observed that it will be rare to seek to adduce evidence of what the defendant has said to a doctor where the issue being tried is non-medical and each case would have to be dealt with on its own circumstances.

When it comes to legal advisers the position is also unclear. At the two extremes the law appears to be settled - thus a statement to the accused's legal adviser in the course of seeking his advice or instructing him is privileged and the latter is neither entitled nor bound to disclose its contents without the accused's

consent ³ and at the other extreme no privilege attaches to communications made in furtherance of a criminal purpose, as where the accused seeks advice for the purpose of committing a crime. ⁴

However there is a substantial grey area and the position is unclear where the statement is made in contemplation of the solicitor-client relationship as, for example, where the accused gives certain information to a solicitor who then declines to act for him. In this case it is thought likely that the Scottish courts would follow the English view that such a communication does attract privilege. ⁵ Another possible problem could arise where the statement was essentially a gratuitous remark, made outwith the context of seeking advice. Professor Black has expressed the tentative view that the test of whether privilege applies is the accused's purpose in disclosing the information to the solicitor. Did he do so with a view to getting professional advice? If he did not, then the statement is not protected from disclosure in legal proceedings irrespective whether the relationship of solicitor and client existed, or still existed, or was contemplated at the time. ⁶

In one unusual case, Williamson v H.M. Advocate 1978 SLT(N) 38 the defence had lodged a special defence of self-defence which was later withdrawn. The prosecutor sought to question the accused on why this had been done (which was, in essence, because the defence solicitor had lodged the special defence without the

accused's agreement) and it was held that solicitor-client confidentiality did not apply in this situation.

Privilege, however, in all cases flies off if the accused calls the solicitor as a witness. ⁷

The position regarding confessions or admissions to clergymen is similarly unclear. In one old case, ⁸ which appears to be the only reported example, a clergyman was allowed to give parole evidence of a confession to incest which the female pannel had emitted before a Kirk Session, but this is clearly a different situation from a private confession to the clergyman.

Hume's view was that such should only be excluded when made by the pannel in prison, preparing for his trial and in need of spiritual consolation. ⁹ Such a communication was, in his view, a separate and later incident, and no part of the story of the pannel's guilt. However Hume figured the example of a man who attempts unsuccessfully to poison his wife and then being himself in poor health unburdens his conscience to a clergyman.

Thereafter, having recovered his health, he resumes his attempts to kill the woman and this time is successful. Hume argues that in that situation the confession is "the history of the murder and a strong circumstance in the train of the evidence against the pannel." Accordingly, in his view, such ought to be admissible in evidence. It was also, Hume considered, "not expedient to hearten criminals in the prosecution of their

crimes, or to nourish them in the hope of impunity and peace of mind, by securing the secrecy, in every event, of such communication." 10

Alison disagreed with Hume's view (which he may have misunderstood) and argued that all communications with clergymen, these "most sacred of human communications," should be confidential. "Certainly," he said, "it would be a strange anomaly if disclosures made to an attorney about the most trivial affair relating to temporal property are inviolable, and those made to a priest, for the far higher concerns of eternal welfare enjoyed no protection." 11

Dickson simply repeats what Hume and Allison wrote and concludes that the point must be considered open, adding, "It is not likely that the Court will refuse to protect communications of this nature, unless in some extreme case, such as put by Baron Hume." 12

The law has not really progressed beyond this point and it still cannot be regarded as settled. In one case a Roman Catholic priest was allowed to plead the privilege of the confessional, but in relation to a statement made by the dying victim, not by the accused but the case is a single judge decision and is reported by a writer who cannot be regarded as impartial. 13

Sheriff Macphail suggests that the issue is of little practical importance since the communication is known only to the clergyman and the person who made it "and it is difficult to envisage circumstances in which, as a practical matter, there is any likelihood of the clergyman being asked to disclose it in the Scottish courts." While it may be unlikely, the situation could arise if a suspect for a serious crime says to the police "I've told Father X the whole story" and then refuses to say anything else. It could well be a matter of some consequence to find out what the suspect said to the priest and whether it disclosed, say, "special knowledge". In such a situation, and given the increasingly secular nature of modern society, the writer, (who is not a Roman Catholic), finds it difficult to accept that the "privilege of the confessional" should lead to acquittal, or possibly even non-prosecution, particularly where the accused himself has divulged the fact of the communication.

The Scottish Law Commission considered that the issue of confessions to clergymen should be left alone and any problems arising resolved by the exercise of existing judicial discretion.¹⁴

Finally there is also an absence of Scottish authority on the question of a confession *induced* by a religious advisor, ie where the accused has been persuaded by the cleric to unburden himself to his gaoler or to some other third party. Historically such a

confession was certainly admissible in England ¹⁵ and Alison considered that it would be admissible in Scotland also. ¹⁶

Notes

1. Hume vol ii p350; Alison ii p471; Walkers p419 §397(c); Wilkinson p105.
2. Reid v Nixon 1948 JC 68; cf Forrester v H.M. Advocate 1952 JC 28
3. Hume vol ii p350; Alison ii p468; Walkers p414 §393; Wilkinson p94 et seq
4. Dickson p921 §1678 and authorities cited in previous note.
5. Minter v Priest [1930] AC 558. Two of the Law Lords in this case were Scottish although it was an English appeal. R Black *A Question of Confidence* (1982) 27 JLSS 299 and 389; Wilkinson p96; Cross pp389-390
6. Black op cit note 5 supra
7. 1975 Act Sections 138(4) and 341(4)
8. William and Isobel Cuthbert (1842) 1 Broun 311
9. Hume vol ii p350, See also Anderson and Marshall (1728) Hume ii 335, cf Janet Hope or Walker (1845) 2 Broun 465
10. Hume vol ii p350
11. Alison ii p471
12. p924-5 §1684-5
13. H.M. Advocate v Daniels 1960 quoted in J. Beltrami *The Defender* p197
14. Macphail 18,38 - §18,44
15. Joy p49
16. Alison ii 586

(vi) Miscellaneous Statements

In the case of William and Isobel Cuthbert (1842) 1 Broun 311,

to which reference has been made above, a statement made to a Kirk Session was admitted although it came as the result of questioning. This case can be regarded as an historic curiosity and the likelihood of a modern Kirk Session questioning a woman as to the paternity of her child is so remote that it can be discounted although a similar point could conceivably arise in connection with another religious group which exercises more control over its adherents than the contemporary Church of Scotland does.

In Robert Emond (1830) Bells Notes 243 evidence of an exclamation uttered while the accused was asleep in prison was admitted. Macdonald doubts the propriety of doing so but concedes that if the exclamation led to the discovery of real or circumstantial evidence it might be admissible to explain the discovery of the evidence. ¹ Sheriff Macphail has stated the view, with which the present writer respectfully agrees, that it is wrong in principle to 'admit as evidence of its truth a statement uttered when the maker is not exercising his conscious mind. ²

The admissibility of a confession or admission made by a prisoner in a letter written to a private individual and intercepted by the prison authorities is unclear. Most of the leading Scottish authorities ³ considered such evidence to be admissible and in a two old cases ⁴ it was allowed. However in H.M. Advocate v Walsh 1922 JC 82 the admissibility of such evidence was implicitly doubted, although the court did not require to decide the point.

In one English case the accused, shortly after the crime, wrote a letter to his wife containing highly incriminating admissions and entrusted it to a colleague for posting. The colleague intercepted it and it was passed to the police. A majority of the House of Lords upheld a decision by the Court of Appeal that the letter was admissible against the accused. ⁵

Notes

1. Macdonald p315
2. Macphail 20,21
3. Hume vol ii p396, Burnett p487, Alison ii p611

4. Main and Atchieson (1818) Hume ii 326; H.M. Advocate v Fawcett (1869) 1
Coup. 183
5. Rumping v D.P.P. [1962] 3 All ER 255. See discussion in [1962] Camb, LJ 136

5.5 Implied Confessions and Admissions

It has already been pointed out that silence in the face of police questioning, or when cautioned and charged, is, in general, not evidence against the accused. No inference of guilt may legitimately be drawn from the fact that the accused when charged with the crime either says nothing or says that he has nothing to say since he is entitled to reserve his defence.

However, where A makes a statement in B's hearing which incriminates B and B does not disassociate himself from the statement, A's statement is relevant to support an inference that, by remaining silent, B impliedly admitted the statement. His silence in the face of accusation is tantamount to a confession. It is not correct, as is sometimes said, that A's statement is evidence against B since A's statement is hearsay and not admissible as to the truth of its contents. Rather the evidence against B is his own reaction (or lack thereof) to the statement and A's statement is only admissible for the purpose of explaining the reaction. This principle which is of considerable antiquity and appears to have been first stated by Dickson¹ remains well understood although it has been subject to virtually no reported judicial decision until recently.²

An implied admission can only arise if B was reasonably afforded the opportunity to repudiate A's statement³ and any attempt by the police to engineer the situation, for example by bringing A

into B's presence solely for the purpose of making the statement, will be liable to be held unfair. ⁴ It has been suggested that the disposition of the individual affected by the statement is a material consideration but there is no modern authority to support or contradict this view. ⁵

It is clear from Chalmers that the general law of fairness and admissibility of confessions applies to what Sheriff Macphail terms "non-verbal assertive actions" ⁶ and it is a question of facts and circumstances in each case whether the accused's conduct can be held to amount to an admission of guilt. ⁷

Notes

1. ii §5363, 368
2. Glover v Tudhope 1986 SCCR 49; cf Annan v Bain and Hamill 1986 SCCR 60 described by Sheriff Gordon as "contrary to authority and principle."
3. Dickson ii §370; Walkers p33 §34
4. cf Stark and Smith v H.M. Advocate 1938 JC 170
5. Dickson ii §372
6. Macphail §20, 26
7. eg Douglas v Pirie 1975 SLT 205- a person who complies with a statutory requirement to provide a specimen of breath or urine does not thereby admit that he was driving; Hipson v Tudhope 1983 SCCR 247- a passenger in a stolen car which is stopped by police who does not disassociate himself from the other occupants is not thereby to be inferred guilty of reset.

5.6 Vicarious Confessions and Admissions

It is a well established rule that a statement made by one accused incriminating a co-accused and made outwith the latter's presence and hearing is not admissible against the co-accused.

However where concert is proved between two or more accused, anything said or written by any of them in relation to the

preparation, execution or completion of the common enterprise is admissible against all of them:

"If acting in concert is proved, the evidence against each is, no doubt, evidence against all, but only if concert is proved." ¹

All the authorities emphasise the need for the proof of concert and although there is no decision directly in point it is clear that a confession of guilt after arrest by one accused would not be admissible against another since it is not made in furtherance of the common design. ²

The only recent decision where a statement of this nature has been held admissible is H.M. Advocate v Docherty 1980 SLT(N) 33 where concert between the accused and a person now deceased was alleged. Statements by the deceased incriminating the accused but made outwith his presence were held admissible. ³

Notes

1. Tobin v H.M. Advocate 1934 JC 60 per L J-C Althison, Emphasis added. See also H.M. Advocate v Camerons 1911 SC(J) 110 (the "Pearl Necklace Case"), In McIntosh v H.M. Advocate 1986 SCCR 496 the Crown failed to prove concert.
2. Alison ii 519; Dickson ii §363; Macdonald pp315-316; Walkers p35 §37
3. In Jones v H.M. Advocate 1981 SCCR 192 the accused was charged while acting along with another man who had pleaded guilty. Evidence of a statement by the latter implicating Jones, made outwith his presence, was agreed to be inadmissible. (This point would be unlikely to arise today since the erstwhile co-accused is now a competent witness for the Crown - 1975 Act Sections 141(3) and 346(3) as amended by 1980 and 1987 Acts.)

5.7 Legal Persons

It has been held recently in Industrial Distributions (Central

Scotland) Ltd v Quinn 1984 SCCR 5 that admissions by directors of a limited company to officers of Customs and Excise who were investigating the affairs of the company were admissions by the company itself. The High Court accepted a Crown argument that the directors were the agents of the company, their admissions were to be regarded in law as the admissions of the company and a company was a legal *persona* but one which could only speak and act through the voice of an agent.

5.8 "Mixed" Statements

(i) Introduction

Difficult issues can arise when an accused person makes a statement containing material both incriminatory and exculpatory, the two classic examples being "I hit him in self-defence" and "I had sex with her but she was willing."

This issue has had a long and somewhat troubled history in Scotland. The question is easy to pose: how much of such a statement is admissible and to what effect? The answer is rather more difficult and the problems stem from the collision between two general rules of Scottish law, viz that admissions by the accused against his interest are generally admissible as evidence against him, and that previous exculpatory statements by an accused person are not evidence in his favour. ¹ Difficulties were also caused by the fact that the most authoritative of the earlier texts, principally Hume and Alison, were written at a time when the accused was not a competent witness and the views which they expressed were not necessarily consistent with the situation after 1898. There was also, until recently, a paucity of case law and such decisions as there were dealt, in typically Scottish fashion, with the specific issue before the court and did not consider the wider issues.

The law has now been settled by the seven judge decision in Morrison v H. M. Advocate 1990 SCCR 235 but before discussing this

case it is appropriate to consider the background and the problems which have arisen.

Notes

1. Such statements may however be admissible to show that the accused's story has been consistent; Macphail §19-39, Wilkinson pp57-59

(11) The Text Writers

Hume and Alison both considered the issue in the context of the declaration since, as has already been noted, at the time when they were writing the accused was not competent as a witness. However it is submitted that there is no distinction in principle (certainly in modern law) between "mixed" statements made at the stage of police questioning, judicial examination or at any other time. ¹

Hume considered that the declaration should be taken with any qualification which the accused chose to make:

"Of course it cannot weigh at all against any other pannel and even as against himself, it must be taken qualified as he has chosen to give it, but liable always to be overcome in those favourable particulars, by the other evidence or presumptions in the case which often prevail against it." ²

Apart from the declaration, Hume expressed the view that while evidence of an oral confession of guilt was admissible,

"There are obvious reasons why a pannel's denial of his guilt, or his statements in conversation afterwards of his defences against the charge, or his narrative of the way in which the thing happened cannot be admitted as evidence on his behalf." 3

However he was prepared to accept that there were situations where this rule did not apply, particularly statements made at the moment when the fact libelled took place, such being part of the *res gestae* and so interwoven with the circumstances as not to be naturally seperable. Hume commented that such statements were not liable to the same suspicion as stories told on a later occasion. He gives as an example of the practical application of the law the case of James Wilson 4 where the accused's defence was that he had been constrained by fear against his will to join an armed mob. Evidence was admitted (after a debate) that he had said to a witness that he was unable to help his situation and as soon as he could he would make his escape. 5

In a passage later to be criticised in Morrison, Alison took a different view of the declaration:

"... the principle of law and the rule of common sense is, that every deed done, and every word spoken by the prisoner subsequent to the date of the crime charged against him, is the fit subject for the consideration of the jury, and that if

duly proved, it must enter into the composition of their verdict. Of course, among the circumstances which may be of weight, either for or against him, none can be more material than what he deliberately said himself when brought before the magistrate for examination. If the story then told is probable in itself and agrees with what the witnesses have proved, in those particulars in which it is susceptible of confirmation, it is as material a circumstance in his favour, as, if it is absurd or incredible, and contradicted by their testimony, it is a circumstance of weight against him. And this is the true view of the prisoner's declaration. It contains his account of the matter laid to his charge, just as the libel contains the story in regard to it told by the prosecutor. The libel may be pleaded against the prosecutor but it cannot be evidence in his favour; and in like manner the declaration may be evidence against the prisoner but cannot be founded on by him as containing proof in his favour. But though a prisoner is no more entitled to refer to a declaration as evidence of the truth of what it contains, than the prosecutor is to found on the libel for the same purpose, yet he is fully entitled to found upon the declaration as a material circumstance in his favour, if it

contains a full, fair and candid statement, such as bears probability on its face and if it is confirmed by what the witnesses, either on one side or the other prove at the trial. To this extent a declaration may, and often is, of material service to a prisoner, for during the collision of evidence and argument in a jury trial, it is rare that truth is not in the end extracted; and when that takes place, the balance almost always inclines to the party which has first and most openly spoken it." 6

Dickson does not address the question of "mixed" statements in criminal cases, but he does consider the parallel position in civil causes, and adopts a view similar to Hume:

"It would be in the highest degree subversive of justice were it permissible for a party to pick out certain expressions in a conversation, or certain letters in a correspondence, and found upon them as instructing an admission by his antagonist, and not permissible for the latter to prove the whole conversation or correspondence, of which these expressions or letters form selected portions. ... When an admission is made under a qualification, the party who founds on it must take it as it stands, and he may not adduce the

portion which is favourable to him and exclude the remainder." 7

Dickson's only observation on the evidential effect of an exculpatory statement in a declaration is brief:

"It sometimes happens that a declaration, from being probable in itself, and coinciding with other evidence, assists the case of the prisoner, in its general appearance of truthfulness leading the jury to believe his explanations of suspicious circumstances." 8

Macdonald's concise opinion was later also to be criticised in Morrison:

"Statements by the accused are not evidence in his favour. Thus an accused cannot prove letters written by herself to prove ignorance of the probable date of the birth of a child which she was accused of murdering. But where what is said is part of the *res gestae* it may be proved, as shewing that the accused has throughout told a consistent story. But the facts stated are not thereby set up in his favour. It is only upon the making of the statement that he can found." 9

Although Lewis's view was probably incorrect in strict law at the time when he wrote it (1925), it is more realistic than Alison or

Macdonald, and much simpler:

"Statements made by the accused in his written declaration, when it has been duly taken before a magistrate, are admissible, and may be evidence either against the accused or in his favour, their weight and effect depending on the other evidence in the case." 10

Notes

1. See Brown v H.M. Advocate 1964 SLT 53 per L J-C Grant at p55, Lord Strachan at p57. There is a faint hint in Morrison v H.M. Advocate 1990 SCCR 235 at p247 that the modern judicial examination may be in a special position, but needless to say the point is not developed.
2. Hume ii 327
3. Hume ii 401 note a
4. loc cit note 3 supra,
5. See also Neil Moran and others (1836) Bells Notes 285; John Forrest (1837) ibid; Jane Pye (1838) ibid.
6. Alison ii 555
7. Dickson §§311, 312
8. Dickson §341
9. Macdonald p316
10. Lewis p314

(iii) The Modern Cases

As previously noted there was, until recently, a dearth of modern case law on "mixed" statements. The issue arose incidentally in Owens v H.M. Advocate 1946 JC 119. In this case the accused, who was charged with murder, lodged a special defence of self defence and gave evidence in support of it, in course of which he admitted having stabbed the deceased. The Lord Justice-General observed *obiter*:

"The panel relieved the Crown of the first part of the burden [of proof] by himself admitting the stabbing with a lethal weapon, but attached to this admission the explanation of its being done in self-defence in the circumstances explained by him. The Crown cannot, we think, take advantage of the admission without displacing the explanation or at all events presenting to the jury a not less strong case that shows directly or indirectly that the explanation is false. ... He can rely on his own sworn statement that he was acting in self defence and rely on his own credibility to outweigh any colourable case the Crown has laid before the jury"

Although Owens dealt solely with the issue of a "mixed" statement given in the witness box, Sheriff Gordon has argued ' that this decision, taken along with the first passage from Hume quoted

above, provides a possible way of dealing with "mixed" extra-judicial statements, by saying in effect that if the Crown wish to rely on the statement they must take it with its qualifications.

The first twentieth century case to deal squarely with the issue of a "mixed" extra-judicial statement was Brown v H.M. Advocate 1964 SLT 53. In this case the accused was charged with causing death by dangerous driving contrary to Section 1 of the Road Traffic Act 1960. When the police cautioned and charged him some three weeks after the accident, he replied "The only thing that happened to me and the only thing I mind of is a car coming behind and going past me. I held in. My wheels caught in the soft grass. I pulled round to the other side. That is all I remember. I don't normally travel fast." This statement was not inconsistent with the circumstances of the accident. The accused did not give evidence at the trial but, in accordance with normal practice, the Crown led evidence of the reply to caution and charge.

The Sheriff-substitute directed the jury that "that explanation of the accused of itself, unless it were established really by substantive evidence is not an explanation that you would be entitled to pay any attention to." The High Court, Lord Justice-Clerk Grant, Lord Mackintosh and Lord Strachan, unanimously held that this had been a misdirection and quashed the conviction. After a review of the authorities, their Lordships came to the

conclusion that a statement such as had been made in the present case, having been led by the Crown, became part of the evidence in the case. It would be both unreasonable and illogical for the Crown to argue that evidence which they themselves had led was not competently before the jury for consideration. The accused was entitled to found on it but only for the purpose of proving that it had been made and not as evidence of the truth of its contents.

Brown was approved in Hendry v H.M. Advocate 1985 SCCR 274 where the decision was clearly inspired by a growing trend by defence lawyers to use the judicial examination transcript as a substitute for evidence on oath. ² Hendry was charged with attempted murder. At judicial examination he gave an explanation which substantially involved self-defence but which also contained an admission of having hit the victim once or possibly twice and to having picked up a knife. The evidence was confused and confusing and the Crown put the transcript of the judicial examination in evidence. The accused did not give evidence and the trial judge directed the jury that "If in the course of [judicial] examination the accused makes a statement which incriminates him, then of course that would be evidence against him but ... any statement which he makes in his favour, any exculpatory statement, is not evidence in his favour. It is only if he makes an incriminating statement that that is evidence against him."

After considering the passage from Alison quoted above, and approving the decision in Brown, Lord Justice-Clerk Wheatley went on:

"How then should a self-serving statement made at a judicial examination be dealt with when the record of the examination has been introduced into process by the Crown and read to the jury as part of the evidence in the case and the accused has not given evidence? In our opinion the trial judge should in the first place explain to the jury the conditions under which such a statement is made, and in particular point out that the statement is not made on oath and is not subject to cross-examination, leaving it to the jury to determine what weight should be attached to the statement in the circumstances. He should proceed to direct them that anything in the statement which is self-incriminatory is competent evidence against the accused which they are entitled to take into account, but that anything in the statement which is self-exonerating cannot be used by the defence as evidence in the case to that effect, since the law provides that the statement cannot prove its contents in these circumstances. It is a matter for the discretion of the judge whether he should go on to say that the place for such a self-exonerating statement is the witness

box. On any view, however, it behoves the judge to point out to the jury that the statement has been placed in evidence and is before them, and is relevant for purposes other than as a substitute for evidence in the witness box, such as (1) proof that such a statement was made at that early stage of the judicial proceedings and (2) for their consideration whether it is acceptable, and, if it is, whether it confirms other evidence in the case of an exculpatory nature from whatever source, thus adding weight and credibility to such other evidence."

Thus, where the record of the judicial examination was put in evidence by the Crown, it became evidence against the accused, but it did not become evidence in his favour, although it might be used to establish the fact that the statement had been made or to enhance the credibility of other evidence.

Some interesting and pertinent comments were made on this case in an anonymous article in the Scots Law Times ³ where the issue is considered in the context of the rules relating to hearsay evidence. The writer commented that "Pragmatically, the distinction for jurors is undoubtedly meaningless; and legally, since there need only be some other positive evidence for the self-serving statement to act as supportive evidence, it is difficult to see how there is any distinction between making

evidence more credible and being evidence itself in favour of the accused." ⁴ The same writer also pointed out that there was no reason in principle to distinguish, as the court appeared to do, between the situation where the transcript was led as part of the Crown case and where it was led by the defence. His (or her) conclusion was that Hendry "perpetuates the odd rule, which is founded on a somewhat unworkable distinction between evidence supportive of other evidence and evidence simpliciter."

Another point which might have been made against the decision in Hendry was that it was an overreaction to a comparatively insignificant problem which might have been better dealt with by more robust use of judicial comment on the failure to give evidence on oath.

Given that it had been decided by a bench of five judges including both the Lord Justice-General and the Lord Justice-Clerk, that it purported to restate an historic rule of Scots law and that it approved an earlier case which had stood undisturbed for over twenty years, Hendry, imperfect as it was, might reasonably have been expected to settle the law for a very long time. However it was not to be and within five years it had been overruled by a bench of seven in Morrison v H.M. Advocate 1990 SCCR 235. The catalyst would appear to have been the decision of the House of Lords in the English case of R v Sharp [1988] 1 WLR 7. The specific issue in that case was whether the exculpatory parts of a statement by a defendant to a police officer

constituted evidence of the truth of the facts alleged therein. Sharp approved the earlier decision of R v Duncan (1981) 73 Cr App R 359 and in particular the view of Lord Lane C.J.:

"Where a "mixed" statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

Morrison was almost the classic "mixed" statement situation, a case of rape where the accused had admitted to the police that he had had intercourse with the victim but claimed she had been a

consenting party. Evidence of his statement to the police was led by the Crown and the accused did not give evidence. The trial judge directed the jury, in accordance with Hendry, that a statement which was self-exonerating was not a substitute for evidence in the witness box.

Initially defence counsel, who relied heavily on Sharp sought to persuade the Appeal Court merely to distinguish Hendry on the basis that that case had concerned judicial examination but, in the event, it became clear that Hendry ought to be reconsidered and eventually the Crown conceded that it had been wrongly decided. The High Court reviewed the earlier authorities, explicitly disapproving the passage from Alison (*supra*) as no longer being in accordance with modern practice, (and the decision in Brown insofar as it was based on Alison), and criticising the passage from Macdonald (*supra*):

"In our opinion the first sentence of that passage is stated too widely and is incorrect. Statements by an accused may be evidence in his favour where there is a mixed statement containing material which is capable of being both incriminatory and exculpatory. The third sentence referring to statements which are part of the *res gestae* is also, in our opinion, incorrect. If a statement is part of the *res gestae*, it is evidence of the truth of the facts (Walker and Walker, *Law of Evidence in Scotland* pp398-400). The authorities

which are relied on to support the proposition contained in the third sentence are in fact cases dealing with the admission of a de recenti statement by an accused for the purpose of showing that he has told a consistent story (H.M. Advocate v Forrest, ⁵ H.M. Advocate v Pye ⁶). But if words spoken are truly part of the *res gestae* as described in Teper v The Queen ⁷ and O'Hara v Central S.M.T. Co ⁸, they are available as evidence of the truth of the facts."

Their Lordships set out three rules to replace those in Hendry:
 (1) As a general rule hearsay is inadmissible as evidence of the facts contained in the statement. The English definition of hearsay was accepted, viz "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted." ⁹ Their Lordships also approved Hume's view that a panel's denial of guilt or his statements in conversation afterwards were inadmissible ¹⁰ and the opinion of the Court in Meehan v H.M. Advocate 1970 JC 11 that

"[I]t has never been competent for the defence to avoid the giving of evidence by the accused by leading evidence of the accused having denied his guilt extrajudicially to friends or advisers as proof of his innocence."

Accordingly an accused is not entitled to lead in evidence a

prior statement, which is to any extent exculpatory, as to the truth of its contents unless the statement is truly part of the *res gestae*.

(2) Where the Crown lead in evidence, or where evidence is led by the defence without Crown objection, of a prior statement which is capable of being both incriminatory and exculpatory, the whole statement is admissible as evidence of the facts it contains, since it would be unfair to admit the admission without the explanation. The trial judge should direct the jury that they must consider the whole statement and determine whether the whole or any part of it is accepted by them as the truth.

(3) A prior statement of an accused which is not to any extent incriminatory is admissible for the limited purpose of proving that the statement was made and of the attitude or reaction of the accused at the time when it was made, but not as evidence of the facts contained in it. Such a statement is only admissible for the purpose of proving that the accused's story has been consistent. An accused could lead evidence of such a statement where he has given evidence and his story has been challenged as a late invention, but only for the purpose of rebutting the challenge to his credibility. This rule is also to apply in the situation where the Crown lead evidence of an exculpatory statement (most probably a reply to caution and charge); in this case the accused may found on the statement but only for the purpose of showing that his story has been consistent.

Their Lordships also stated that when directing a jury regarding a "mixed" statement, the trial judge may well feel it desirable to comment on the weight which the jury may wish to place on the different parts of the statement, and particularly the fact that it was not made on oath and was not subject to cross-examination. However the Scottish reluctance to comment on a failure to give evidence once again raised its head, and although their Lordships said that they did not seek to inhibit the right of a judge to make such a comment, it "should be made with restraint and only where there are special circumstances which require it."

Morrison has now settled the basic issue of the admissibility of a "mixed" statement, such a statement is admissible as evidence of its contents and it is up to the jury to decide what to make of it. However it does leave some important points undecided, notably the question of evidential sufficiency. Is the statement to be separable into its component parts or is it to be treated as a single indivisible unit? If the former approach is correct, a statement such as "I hit him in self defence" would be capable of providing the Crown with corroboration of the victim's evidence since the jury could believe the first part ("I hit him") and disbelieve the second ("in self defence"). However, if the second approach is correct, as Sheriff Gordon appears to believe, "such a statement would have to be taken with its qualification and accordingly would not be capable of corroborating an unlawful assault. Sheriff Gordon bases his

argument on Owens, which was not mentioned in Morrison and is clearly unaffected by that case.

Another unresolved issue in Morrison is the suggestion ¹² that different rules may apply in the case of statements made at judicial examination. It has already been submitted that there is no basis in principle for such a distinction and it is difficult to understand why their Lordships hinted at such a distinction, particularly as they overruled the only case to deal expressly with the evidential effect of the modern judicial examination. If such a distinction exists, one might have expected their Lordships to develop the point and lay down rules as to the way in which such statements were to be treated. It is hardly satisfactory or fair to the Crown to lay down, on the one hand, clear rules for dealing with replies to caution and charge and the like but not to follow the matter through and lay down similar rules for judicial examination.

Morrison was applied, retrospectively as it were, in Jones and Collins v H.M. Advocate 1991 SCCR 290 where the trial judge had directed the jury on the basis of Hendry shortly before that case was overruled by Morrison. The Crown conceded that there had been a misdirection. One odd feature of Jones and Collins is that Jones himself had actually given evidence and the Lord Justice-Clerk pointed out that the direction complained of had thus no application to him. It is therefore difficult to understand why the court then went on to hold that there had been a

miscarriage of justice in relation to Jones, although as Sheriff Gordon points out the decision can be justified on the ratio that the judge's charge as a whole was confusing in its terms.

Notes

1. Commentary to Morrison v H.M. Advocate 1990 SCCR 235 at 249
2. A practice which had received support from the opinion of the Sheriff in H.M. Advocate v Cafferty 1984 SCCR 444
3. *Hearsay Evidence and Self-serving Statements at Judicial Examination* 1985 SLT (News) 355
4. The same point has been argued by Professor Wilkinson; *The Rule Against Hearsay In Scotland* 1982 JR 213
5. (1837) 1 Swin 404
6. (1838) 1 Swin 187
7. [1952] AC 480
8. 1941 SC 363
9. Cross (6th edn) p38 approved in Sharp at p11
10. Hume ii 401 quoted in full supra
11. loc cit note 1 supra
12. p247E

