

Corroboration and Distress

A Lecture in honour of Sir Gerald Gordon

Edinburgh – 12 June 2009

Lord Hope

Nobody who knows anything about the criminal law of Scotland is unaware of the name of Sir Gerald Gordon. Some, no doubt, are more aware of its significance than others. The host of accused persons who have had the privilege of appearing before him in his various capacities in the Sheriff Court and the High Court of Justiciary cannot, of course, be expected to view the name of Sheriff Gordon with same affection and admiration as the generations of law students, academics and practitioners for whom Gordon's *Criminal Law* has been an unfailing source of guidance and inspiration. But those on their side of the bar rank him, up there together with Sir George Mackenzie¹ and Baron Hume², as one of the complete masters of this fascinating subject. Judges, from the lowest to the highest in our judicial hierarchy, have looked to him for guidance, and for correction too, as they seek to apply our unique system of criminal law to the ever-changing variety of factual problems with which they must deal. I am no exception. For the seven years that I presided in the High Court as Lord Justice General I was aware that my every word would be studied, and in due course acutely commented on, when the judgments that I had written or dictated appeared each month in the *Scottish Criminal Case Reports* of which he was then and still is the editor. Even now, although I have been detached from Scots criminal law for the past thirteen years, the familiar feeling of anxiety has crept over me as I look at my text and wonder what effect it will have on the mind of the great man. It is a very great privilege, and a very real pleasure, for me to have been invited to deliver this lecture in his honour. But I doubt whether my rather indifferent performance on the bench all those years ago really qualifies me for the task.

I have chosen as my subject an issue with which I grappled from time to time in the Appeal Court as I searched for a way of trying to express it in terms that would settle the problem in a way that I thought most beneficial in the public interest. Given that no one can be convicted under Scots law of a crime however trivial on the testimony of a single witness, can distress exhibited by the victim of an act of indecency that was not seen by anyone else corroborate her account of what was done to her? If the answer is that it can never do so, it must follow that private acts of indecency which leave no trace and the perpetrator does not admit to, however distressing they may have been to the victim, are beyond the reach of the criminal law. Is this acceptable in a civilised society? My failure to provide a solution to this problem that stands up to examination was pointed out by my successor, presiding over a court of five judges that had been convened to review

¹ *Treatise concerning the Law of Scotland in matters Criminal* (1678).

² *Commentaries on the Law of Scotland respecting Crimes* (the first edition was published in 1797).

decisions for which I was responsible, a few months after I had departed for London. The law has now been settled by reversing the coin, as it were, firmly in the other direction. My theme is that, while the law has now been explained with much greater clarity than I was ever able to achieve, difficult questions lurk under the surface that still merit attention. I am encouraged to venture into this sensitive arena by the fact that when Gerald Gordon was invited some 16 years ago to contribute to a volume of essays in honour of Lord Justice General Emslie he chose corroboration as the subject that he wanted to write about³. I should like to begin where he left off. I think that it will not surprise him if I end up in much the same state of uncertainty as he did as the end of his essay.

Let me say a little more about the factual background. The best example is that which is provided by the facts in *Smith v Lees*⁴. This is the five judge case in which it was held that, while the victim's distress could corroborate her account that she was subject to conduct which caused her distress, it could not corroborate the crucial fact that the accused had committed the act of indecency that was libelled against him. Smith and his brother-in-law had taken three girls and two boys to a camp site where they were to camp overnight. One of the children was the complainer, who was aged 13. Two tents were pitched. The boys went into one of them and the girls into the other. The brother-in-law stayed outside beside the fire. Smith decided to sleep in the girls' tent. He lay down between complainer and one of the other girls. Sometime later, according to her evidence, the complainer woke up and found Smith's private member on her hand. As she lay there, pretending to be still asleep, he took hold of her hand and moved his private member up and down against it. When he stopped she left the tent, too frightened and upset to tell the brother-in-law, who was her uncle, what had been going on. Her uncle also gave evidence. He said that child was distressed when she came out of the tent and that she came out of it quickly. She then went to the other tent where the boys were. He was very concerned about what might have happened to her, so the next morning he took her to see his sister-in-law. The complainer gave her an account of what had happened, and the matter was reported to the police. Smith pled not guilty to a charge of lewd, indecent and libidinous behaviour which was brought against him on summary complaint. The sheriff rejected a submission of no case to answer, and there was no evidence for the defence. Having held that the child was a credible witness, the sheriff found Smith guilty as libelled. In the note which he annexed to his stated case he said that he was of the opinion that the distress that the uncle had spoken to was quite sufficient to entitle him to regard it as evidence which could confirm the child's account of what had happened⁵. But Smith's conviction was set aside on appeal by the court of five judges because child's evidence of what he had done to her was not corroborated.

Among the authorities that were considered by the Appeal Court was a decision for which I was responsible that the sheriff did not refer to but which, if sound, would have

³ "At the mouth of two witnesses: some thoughts on corroboration": *Justice and Crime, Essays in Honour of the Right Honourable Lord Emslie* (Edinburgh, 1993), Chapter 3.

⁴ 1997 JC 73.

⁵ For the sheriff's note, see 1997 SLT 690, 692-3.

enabled the Crown to support the conviction. This was *Stobo v HM Advocate*⁶. The complainer in that case was a married woman who had spent the evening with a friend. At about 1 am her friend phoned for a taxi to take her home. She was alone in the taxi. She said that the driver, having made a detour, stopped his vehicle and subjected her to various acts of indecency. He put his hand inside her trousers, fondled her private parts, pushed her face down on his erect private member and tried to force her to have oral sex with her. When she got home she telephoned the taxi company to make a complaint. The controller spoke to having received a telephone call from a hysterical woman who was complaining of a sexual assault. She telephoned her son later that morning in a state of distress, and she was still in a distressed condition when the police called to see her shortly afterwards at her son's request. The taxi driver was tried on indictment in the sheriff court on a charge of sexual assault. The jury found him guilty, and his case came before a court over which I was presiding. There was, of course, no eyewitness to what had happened, as the complainer was alone in the taxi. The taxi driver made no admission, so there was no other evidence that could corroborate the complainer's account of what had happened to her other than her distress. The sheriff told the jury that they had to be satisfied that the complainer's distress was caused by the events of the indecent assault and that it would only be if they were so satisfied that the evidence of her distress could corroborate her own account of what he happened to her. The jury's verdict shows that they were so satisfied.

The taxi driver appealed against his conviction on the ground that the sheriff's direction to the jury was a misdirection. The advocate depute did not oppose the appeal as he accepted the defence submission that, while distress was an adminicle of evidence, it could not corroborate the complainer's account of what was done to her. He said that a previous case which might be taken to suggest the contrary⁷ might need to be reconsidered. In retrospect, I ought of course to have left it there and invited my colleagues to join in me in refusing the appeal. But the consequences of doing so would have been to declare, as Lord Sutherland was later to say in *Smith v Lees*⁸, that cases of that kind faced difficulties of proof that were, according to the law of Scotland, insuperable. Contemplating the opportunities for incidents of this kind to be repeated up and down the country with impunity, I could not bring myself to do this. The complainer's distress, I said, was circumstantial evidence. The question whether it was capable of supporting the complainer's account depended on whether it was consistent with what she had said. This was a matter for the jury to assess according their view of its weight and quality⁹.

My opinion did not, of course, escape the attention of Gerald Gordon. He began his commentary on the report of the case in the *Scottish Criminal Cases Reports*¹⁰ with an entirely appropriate, but carefully worded, rebuke. "It must be quite unusual", he said, "for the High Court to uphold a conviction which the Crown did not wish to support, on

⁶ 1994 JC 28.

⁷ *Horne v HM Advocate*, 1991 SCCR 248.

⁸ 1997 JC 73, 118.

⁹ 1994 JC 28, 34.

¹⁰ 1993 SCCR 1105.

the authority of a case which the Crown wished to have reconsidered and which did not wholly and unequivocally establish the rule of law in question, since there were at least suggestions that there was more than just distress available for corroboration in the case. Moreover, the problem is one which is of some difficulty and raises fundamental questions as to the nature of corroboration, depending as it does on whether the behaviour of a witness can constitute corroboration of his evidence.” After some other observations, he concluded his commentary with these words:

“The instant case provides clear authority for the view that evidence does not need to be incriminatory in order to be corroborative: all that is needed is that it should be consistent with the evidence of the complainer or other eyewitness or, indeed, with a confession. There is nothing new about that statement of the law (see eg *Hartley v HM Advocate* 1979 SLT 26), but judicial descriptions of this matter are not always quite so clear (see my article in *Justice and Crime* (Edinburgh 1993) ed Hunter, chapter 3).”

Astute readers of his commentaries would have observed that these remarks were part of a dialogue that had been going on between the commentator and the court over an extended period. In his commentary on *Meredith v Lees*¹¹, where the accused had confessed to the act of indecency with which he had been charged, he had pointed out that my opinion had failed to make it clear whether, to support a confession, the corroborating evidence must be incriminatory, or merely a check on the confession or just consistent with it. I had taken the hint and, in the context of what was needed to corroborate the complainer’s evidence, I had opted for the latter alternative. This, of course, was my undoing. With unerring accuracy, Gerald Gordon had put his finger on the flaw in my reasoning that was later to be corrected in *Smith v Lees*. The Lord Justice General, Lord Rodger, said that, to be valid, evidence of distress must fit into our law of corroboration as a whole. In other words, it had to be incriminatory. It must show or tend to show that what the witness said had happened did actually happen – what exactly the accused did¹². It could corroborate the complainer’s evidence that she did not consent to the accused’s conduct. But it could not support or confirm her evidence that a particular form of sexual activity occurred¹³.

“Our law of corroboration as a whole”, as the Lord Justice General described it, is the law that is to be found in Hume’s Commentaries, as endorsed more than seventy years ago by a court of seven judges in *Morton v HM Advocate*¹⁴. It is as settled as any aspect of our criminal law can ever be. Indeed, as Lord McCluskey said in *Smith v Lees*, the court was not concerned in that case with issues of policy or what the law ought to be – only with what the law now is¹⁵. But it is worth taking another look at the background. That was what Gerald Gordon did in his essay. He introduced his comments with these words:

“The requirement of corroboration is generally regarded by Scots lawyers as one of the most notable and precious features of Scots criminal law, and as something

¹¹ 1992 SCCR 459.

¹² 1997 JC 73, 80.

¹³ Ibid, 90.

¹⁴ 1938 JC 50.

¹⁵ 1997 JC 73, 102.

that they will defend religiously, perhaps because it is one of the last remaining links between Scots law and the Old Testament, or perhaps because it is a feature which Scots law shares with very few other legal systems, and which, in particular, it does not share with English law. It is not the purpose of this paper to suggest that the requirement is anomalous, or old-fashioned, or in need of alteration or abolition. I merely want to explore some aspects of it, and perhaps to suggest that it is not as simple or straightforward as we sometimes think, or at least say when we pride ourselves on our superiority to the English.”

It is perhaps instructive to work backwards from *Morton v HM Advocate*. That too was a case of indecent assault. A woman was hustled into a close where she was assaulted. There were no eyewitnesses. The problem was primarily one of identification. Nobody else had seen the accused in the vicinity. The complainer picked him out at an identification parade. The only other evidence was from her brother who said that later the same day when she came home in an excited condition and told him about the assault and a neighbour who had heard him screaming and saw a man trying to pull her away but could not identify him. Not surprisingly, the conviction was quashed because the complainer’s evidence that the accused was the man who had assaulted her was not corroborated. But doubts had been created by some earlier cases which appeared to suggest that a witness’s evidence could be corroborated by her own *de recenti* statement¹⁶ or by facts and circumstances that only that witness had spoken to¹⁷. So the court took the opportunity to affirm that by the law of Scotland no person can be convicted, except where the legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged¹⁸. The authority that was quoted for this proposition was Baron Hume¹⁹.

Gerald Gordon says in his essay that the requirement of corroboration has its origins in the bible. He draws attention to a number of formulations of it in the Old Testament. It is to be found in the New Testament too. As Stair puts it²⁰, quoting from a passage in St Matthew’s Gospel²¹ which is obviously based on a statement in almost exactly the same terms in Deuteronomy²², it is confirmed by the word of God: “that in the mouth of two or three witnesses every word may be established.” The notion that two or three are better than one is to be found in other contexts. The Prayer of St Chrystosom, which concludes the Litany in the Book of Common Prayer, says of Almighty God that, where two or three are gathered together in His name, He will grant their requests. The foundation for this assertion is another passage in the Gospel according to St Matthew, where Jesus said that what anything that two of his disciples might ask for on earth would be done for them by his Father who was in heaven, for where two or three are gathered together in his name there he, Jesus, is there in the midst of them²³. From this it followed, said Stair,

¹⁶ *McLennan v HM Advocate*, 1928 JC 39; *McCrinkle v MacMillan*, 1930 JC 56.

¹⁷ *Strathern v Lambie*, 1934 JC 137.

¹⁸ 1938 JC 50, 55, per Lord Justice Clerk Aitchison.

¹⁹ *Commentaries on the Law of Scotland respecting Crimes*, vol ii, 383.

²⁰ *Institutions of the Law of Scotland*, iv, 43.

²¹ Matthew, ch 18, v16.

²² Deuteronomy, ch 19, v15.

²³ Matthew, Ch 18, vv 19, 20.

that one witness could not make sufficient probation, whatever the veracity and quality of the witness. The probation of some points required but two witnesses, while other matters of very great importance required three. These propositions, which suggest a quantitative justification for the rule, can fairly be said to have had their origin in the Scriptures.

In Hume's case, however, the position is much less clear. He gives no indication in his discussion that he was basing his assertion that no one shall in any case be convicted on the testimony of a single witness on what Stair said, let alone on what is to be found in the Bible. Nor is there anything in his Lectures on Scots law that shows that this is where he got his ideas from as to the sufficiency of evidence, as this is not among the topics that he addressed in that context. In the introduction to his work on the criminal law he said that the main store from which he had drawn the material for his treatise was the records of the Court of Justiciary²⁴. His technique was to gather together, topic by topic, as many decisions bearing on the point that he could discover and to draw conclusions from them without too much detailed reasoning or analysis. Corroboration, for him, was concerned with the question of reliability.

There are, it may be thought, two distinct situations that a developing legal system which is concerned to address the question of reliability ought to deal with. The first is how to treat confession evidence. An accused may confess to the crime with which he has been charged for all sorts of reasons. The only safe way of eliminating the risk that it is not genuine, it may be thought, is to require that there must be some other evidence to support it. The second is how to treat the evidence of the complainer or of an eye witness. People make mistakes. The best way of reducing the risk of a wrongful conviction is to require that the evidence of a single witness on the crucial facts must be supported by some other evidence. Hume deals with these two problems in different places and in different ways in his *Commentaries*.

His treatment of confession evidence concentrates mainly on the question whether it was ever proper to admit what he describes as a purely verbal and occasional confession of guilt as proof of the crime charged. He notes the disadvantages that attach to evidence of this character, both in the manner of proof and sometimes in the circumstances that give rise to them. But he concludes that it had become the custom to admit proof of circumstances of that character and to take them into consideration, as he puts it, according to the nature of the things themselves and the other evidence in confirmation of the charge²⁵. It is quite striking however that nowhere in his treatment of this subject is there a clear statement of what was later to be seen as a fundamental rule of Scots criminal law that no accused can be convicted on his confession alone. It was left to Burnet²⁶ and later Dickson²⁷ to declare that in Scotland an extrajudicial confession is not full proof of guilt but must be corroborated by other evidence – not merely that a crime has been committed by someone, but throwing suspicion on the prisoner as the

²⁴ *Commentaries*, vol I, 18.

²⁵ *Commentaries*, vol ii, 333.

²⁶ *Criminal Law* (1811), 509.

²⁷ *Law of Evidence in Scotland* (3rd ed, 1887), section 352.

perpetrator of it. In *Connolly v HM Advocate*²⁸ Lord Mackintosh said that this had been settled in the law of Scotland at any rate since the time of Hume. But, as Lord Justice Clerk Thomson pointed out²⁹, it is uncertain whether the rule relating to confessions was derived from the rule which Hume states with much greater clarity when he is dealing with the evidence of eyewitnesses. It is obviously consistent with it, but it is rather odd that Hume was not more explicit on this point.

The rule which Hume states that the evidence of a single eyewitness must be corroborated is, of course, set out in the clearest terms³⁰. This, he said, was grounded in universal opinion and confirmed with numerous examples in every period of our practice. Four unreported cases are cited as confirming the rule. They date from 1701 to 1792. In the latest of them it was openly admitted by counsel for the Crown that the testimony of a single witness was not lawful evidence whereon to convict. But, as Hume himself acknowledges, two further illustrations which he cites, both dated 1705, seem to be precedents on the other side, as the accused in each of them was convicted on the evidence of single witness only, although the punishment was modified to take account of this. These examples tend to show that, if the rule was indeed grounded in universal opinion, this was a comparatively recent development.

There may also be grounds for doubting whether opinion in favour of the rule was as universal as Hume evidently thought it was. I have inherited from my great-great grand uncle Lord Justice Clerk Hope a copy of the fourth edition of Hume's Commentaries, which was edited after his death in 1838 by Robert Bell and published in 1844. It has been heavily annotated by the Lord Justice Clerk. These words appear in the margin just below the passage where the rule that the evidence of a single witness must be corroborated is stated:

“Wrong. It is merely a Question how far the single witness is in the opinion of a Jury to be believed.”

What are we to make of this observation? The Lord Justice Clerk had been one of Hume's students. He attended his class in Scots law in the session of 1814-1815³¹. He was also one of his many admirers, regarding his services to the law of Scotland as “incomparably beyond any writer in any branch of the law of Scotland except Lord Stair³².” But he was clearly not beyond subjecting what he had written to criticism. He was also a keen observer of how criminal law was being practised south of the Border. In contrast to Hume, who deliberately refrained from referring to the law of England³³, many of his annotations are drawn from English cases. In the context of proof by confessions, for example, he has inserted a cutting of a report in a newspaper of a report of Baron Alderson's summing up in a case where the evidence against the prisoner was very slight, based mainly on his own declarations. The judge told the jury that it was not

²⁸ 1958 SLT 79, 81.

²⁹ Ibid, 80.

³⁰ *Commentaries*, vol ii, 383.

³¹ See the Catalogue of Students at the end of vol 6 of Hume's *Lectures* (Stair Society, 1958), p 411.

³² *HM Advocate v Grant* (1848) Shaw (J) 17, 92.

³³ See his introduction, *Commentaries*, vol i, 3-5.

for an officer to tell a prisoner who was in his custody that he was not bound to say anything. If a prisoner, acting of his own free will, chose to make a statement in connection with the charge against him it was the officer's duty to hear it and detail it afterwards faithfully. To the same effect, the Lord Justice Clerk said in a footnote of his own, were the reported remarks of Lord Denman and Baron Gurney that a prisoner ought not be cautioned from saying anything to incriminate themselves. They should be left to themselves, after being told that whatever they said might be used in evidence against them. Hope's comment that Hume was wrong in his assertion that the testimony of a single witness was lawful evidence to convict is not supported by any reference to authority. One can only speculate as to the basis for it. But we do know that Hume's rule was not part of the law of England. It can be assumed that the Lord Justice Clerk was well aware of this. It seems that, on this matter, he thought that the law of England should be applied here too. He was, as Lord Rodger of Earlsferry has noted elsewhere, accustomed to expounding his arguments in vigorous terms³⁴. But it would require more research than I have been able to conduct to discover how far he put his view on this point into practice and how many of his colleagues, if any, shared that view.

In *Smith v Lees* the court's attention was drawn to a number of cases from England and the Commonwealth where the question whether distress could constitute corroboration in cases of that kind had been considered³⁵. Lord Justice Clerk Ross said that he did not find it necessary to refer to them³⁶. They are not mentioned in the opinions of the other judges. Lord Justice Clerk Hope's annotations suggest that he would not have been so disinterested in what they had to say, although it can no doubt be said that it is one thing to use comparative law for guidance where a point is not settled and quite another where it is. Unfortunately we do not have a list of those cases, as the current practice of the editors of *Session Cases* is to list only those cases that the judges have mentioned in their opinions. Much of the current law elsewhere is, in fact, the product of statute. In South Africa, for example, the statute provides that an accused may be convicted of any offence on the single evidence of any competent witness³⁷. Where a witness is uncorroborated cautionary rules require the decision taker to exercise particular care before accepting that evidence, as it is more likely to be false. But in 2007 the cautionary rule was modified by the South African legislature. The court may not treat the evidence of a complainant in criminal proceedings involving the commission of a sexual offence with caution on account of the nature of the offence.³⁸ This was done on the recommendation of the South African Law Commission, following similar developments in England³⁹, Canada⁴⁰ and all Australian States and Territories⁴¹, as they found that the cautionary rule unfairly prejudiced victims of sexual attacks⁴². Caution may however be exercised where the facts of a particular case require this. As for the relevance of evidence of distress in such

³⁴ *The Courts, The Church and The Constitution* (Edinburgh University Press, 2008), p 33.

³⁵ 1997 JC 73, 93, per Lord Justice Clerk Ross.

³⁶ *Ibid*, 101.

³⁷ Criminal Procedure Act No 51 of 1977, s 208.

³⁸ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 60.

³⁹ Criminal Justice and Public Order Act 1994, s 32(1).

⁴⁰ Evidence Act 2006, s 121(2).

⁴¹ Eg New South Wales Crimes Act, s 450C.

⁴² SA Law Commission Discussion Paper 102 of 2002 on Sexual Offences, Chs 31 and 36.

cases, the Supreme Court of Appeal of South Africa, following English authority⁴³, has held that the evidence of the distressed state of the complainant is admissible to show that sexual contact took place where this is denied⁴⁴.

It is, of course, difficult to make much of the way distress is dealt with in jurisdictions that do not adhere to the fundamental rule about corroboration that Hume identified. But one is perhaps entitled to question whether Hume's views should continue to have such a strong influence on the modern law. Professor Victor Tadros, in a book review that was recently published in the SCOLAG Journal⁴⁵, has described his continuing influence as troubling. He attributes this to the fact that until quite recently Scots criminal law has suffered from a lack of serious doctrinal academic scholarship. As you would expect, he refers to Gerald Gordon's work as the one rare shining exception prior to the book which he was reviewing, which was *Criminal Defences* by James Chalmers and Fiona Leverick⁴⁶. My own experience of sitting in the Judicial Committee of the Privy Council has convinced me of the wisdom of the rule that an extrajudicial confession by an accused must be corroborated. That rule does not apply in the Caribbean, which applies English law. It is hard for someone trained in the discipline that this rule has injected into police and prosecution practice in Scotland to accept that justice has been done when a defendant is found guilty of murder and sentenced to death when the only evidence that connects him with the crime is a confession which he is said to have made to the police while he is in their custody. Once they have his confession the police need look no further for corroborating evidence, and cases from those jurisdictions lack the detailed and painstaking forensic evidence which is adduced every day in the Scottish courts. It is rare to find evidence of that quality in Caribbean cases, as the prosecutor can usually get his man without it. Here is something of real value and importance which, I suggest, we must without any shadow of doubt hang on to.

It is clearly far too late to question the rule about the need for a single witness to be corroborated which Lord Justice Clerk Hope did not agree. But what about corroboration by circumstantial evidence? Hume was quite emphatic on this point. It would not be reasonable, he said, to say that the want of a second witness cannot be supplied by the other circumstances of the case⁴⁷. Indeed, he acknowledged that it was lawful also to convict in respect of circumstances only – something that he said was grounded in reason and necessity and the law and practice of all civilised countries⁴⁸. The examples which he gives of the corroboration of the evidence of a single witness do not provide much guidance as to what is needed. Hume only says that the circumstances must “confirm his testimony”, such as the accused's sudden flight from the spot where a stabbing had taken place, blood on his clothes, his possession of a bloody instrument and so on. The last two examples satisfy the test in *Smith v Lees*. Blood on the accused's clothes or his possession of a bloody instrument will show or tend to show that the stabbing that the

⁴³ *Ramesh Chauhan* (1981) 73 CA Rep 232.

⁴⁴ *Hammond v The State*, Case no 500/03, 3 September 2004.

⁴⁵ SCOLAG Journal, September 2008, p 230.

⁴⁶ W Green, 2006.

⁴⁷ *Commentaries*, vol ii, 384.

⁴⁸ *Ibid*, 385.

single witness has described did actually take place and that the accused had a part in it. The act of running away is more open to question. It links the accused with the place where the incident took place. But, taken by itself, does not tell one anything about what he did there. Hume does not explain whether it would nevertheless be enough on its own to corroborate, or whether it must be taken with one or more of the other examples that he mentions before it will do so.

The Lord Justice General said in *Smith v Lees* that the answer to the question whether the complainer's distress can be accepted as corroboration of her account of what was done to her is not to be found in the old authorities⁴⁹. That, of course, is true. But there are some straws in the wind that make one wonder whether – leaving distress aside for the moment – in order to “confirm” the witness's testimony the circumstantial evidence must, as a rule, be in itself be incriminatory or whether it is enough for the case to go to the jury that it should be consistent with that witness's evidence. This is the question that Gerald Gordon put to me in his commentary on *Meredith v Lees* where the corroboration of a confession was in issue and which I attempted to answer, as to the position of the single witness, in *Stobo*.

The issue to which Hume directed his attention was whether the evidence of the single witness could be relied upon. How high soever the credit and character of the witness, he said, still the law is averse to “rely” on his single word⁵⁰. This suggests that the question whether his word is “confirmed” by the circumstantial evidence may be a question of degree. The more peripheral the circumstances are to the crucial facts that the single witness has spoken to, the less capable it will be of confirming his evidence as the those facts. The closer it comes to the crucial facts, the more capable it will likely to be. The nature of the issue may have a part to play in this too. In *Sinclair v Clark*⁵¹ Lord Justice Clerk Thomson said that the rule that an accused's admission must be corroborated was somewhat archaic and that in modern conditions, where the admission is made in circumstances that are beyond suspicion, its merit was not always obvious. He said that what was required to elide the risk that there might be something phoney or quixotic about it must depend on the facts of the case and, in particular, the nature and character of the admission and the circumstances in which it was made⁵².

An indication of the same approach to what is required to confirm a single witness's evidence is to be found in Alison, a contemporary of Hume, the quality of whose contribution to the law of Scotland is sometimes overlooked. Commenting on what he said seemed at first sight to be an extraordinary difference between the laws of England and Scotland on this point, he suggested that the difference was not all that great when regard was had to what he would have deemed insufficient, and even slighter, that had become acceptable for corroboration in cases of robbery – what we today would think of as highway robbery. The difference in practice, he said, was not so considerable as might be supposed, as in Scotland such confirming circumstances were deemed sufficient as

⁴⁹ 1997 JC 73, 80.

⁵⁰ *Commentaries*, vol ii, 383.

⁵¹ 1962 JC 57, 62.

⁵² See also my observations on this point in *Meredith v Lees* 1992 SLT 802, 804.

amount to little more than is held adequate⁵³. In his description of the crime of robbery he said⁵⁴:

“[It] is evident that, although it is undoubtedly still part of our law that a conviction for robbery, any more than any other offence, cannot take place without more than the evidence of a single witness, yet a very slender support is now deemed sufficient, if that witness is of unexceptional character. It makes up the measure of legal evidence if such corroboration be afforded as the circumstances of the case will admit. Law does not forget that highway robbers generally select for their victim the most unattended defenceless of the people; and for the places of their outrage the most lonely and unfrequented spots. To require the evidence of two witnesses for the conviction of such offenders, would be equivalent to a proclamation of impunity for their crimes. All that is required, therefore, is, that the person injured should himself be worthy of credit, that he should identify the pannel as the author of the violence, and that his narrative before and after the violence should be supported by such persons as had an opportunity of witnessing his previous and subsequent condition.”

I am reminded by this passage of the situation that the complainer found herself in *Stobo*⁵⁵ when she was assaulted by the taxi-driver. The purity of the law was restored by *Smith v Lees*⁵⁶. But sexual abusers are like highway robbers. The places that they select for the outrages that they perpetrate on defenceless women and children – and it is almost always women and children who are their victims – are lonely and unfrequented places where what they wish to do to them will not be seen. The only corroboration that the circumstances are likely to admit is the effect of what they have done has had on the victim. Here too, it might perhaps be said, the law forgets the victim if it will not accept evidence of her distressed condition by persons who observed her afterwards as being the best that the circumstances will admit to confirm what she said had been done to her. The scale of the problem that this creates is not easy to determine. But I noted in 2002 that it appeared that only 20% of cases of sexual assault reported to the procurator fiscal by the police were thought to have a sufficiency of evidence to enable them to be prosecuted.

The decision in *Smith v Lees* came too late for Gerald Gordon to comment on it in his essay in honour of Lord Emslie. He did not say much about it in his commentary in the *Scottish Criminal Cases Reports*⁵⁷. He observed that it put a stop to the development which he had referred to in his commentary on *McLellan v HM Advocate*⁵⁸, where he said that distress had shown signs of developing, by a process of generalisation familiar to students of Scots criminal law, into a rule that distress can corroborate a complainer’s account of what happened to him or her. A few months later, commenting on *Cannon v HM Advocate*⁵⁹, he suggested that the time had perhaps come when we should treat the

⁵³ *Criminal Law*, ii, 554.

⁵⁴ *Ibid*, i, 247.

⁵⁵ 1994 JC 28.

⁵⁶ 1997 JC 73.

⁵⁷ 1997 SCCR 139.

⁵⁸ 1992 SCCR 171.

⁵⁹ 1992 SCCR 505.

concept of distress as corroboration as a relaxation of the rules of corroboration as required in order to take account of the fact that rape, which is what that case was about, is normally committed clandestinely rather than try to see it as a logical outcome of the law of corroboration. Alison, I think, would have agreed with this. But the corollary of that proposition, which I should have foreseen in *Stobo*, is that it cannot survive the logical scrutiny to which it was subjected in *Smith v Lees*.

There are signs that a fresh look is being taken at the use of distress as corroboration in view of the fact that the crime of rape no longer requires the forcible overcoming of the victim's will⁶⁰. A particularly difficult issue is whether, in view of what was said in *Smith v Lees*, it can ever corroborate *mens rea*. This was not usually a problem when force or the threat of force was required. But when force is not alleged and distress cannot provide the corroboration, allegations of rape that cannot be proved by other evidence may share the same fate that has been the lot of sexual assault cases. This is a complex and sensitive issue. It is now under consideration by the Scottish Law Commission⁶¹.

Gerald Gordon said at the end of his essay that perhaps all that can be said is that the only firm rule about corroboration is that there must be two witnesses to prove guilt. Beyond that, and within the limits of relevance, he said, it is all a matter of circumstances. I am not sure that one can be so confident that this is so, at least where distress is in issue. It does seem that a chasm has been opened up for cases of the kind that I have been discussing that is unlikely to be curable without a revision of the law of corroboration by legislation. Whether it is desirable that this should be dealt with by legislation must be open to question. It may be that our law of corroboration, as it has been developed by the judges, leaves us with no alternative. But one would like to think that the last word on this long-running saga will lie, as it so often has done over so many years in Gerald Gordon's incomparable commentaries, with him.⁶²

12 June 2009

Lord Hope of Craighead

⁶⁰ See Mike Redmayne, *Corroboration and Sexual Offences ...*

⁶¹ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, Discussion Paper No 131 (2006).

⁶² I am grateful to my judicial assistant Matthew Hancock for his help in the preparation of this lecture.