"Thinking up" about the right of silence and unsworn statements

by the Hon. Mr. Justice K. H. Marks of the Supreme Court of Victoria

His Honour contends that "the inability of a tribunal of fact to draw adverse inferences from a suspect's refusal to answer investigative questions on the one hand and the unsworn statement on the other are grist to the mill of disputation which prolong unnecessarily the length and expense of criminal trials"

At 6 o'clock every morning Jawaharlal Nehru used to stand on his head for five minutes. He said it "subjected the vertebrae and abdominal muscles in a sudden and highly beneficial way", "cleared the mind of fatigue and pessimism" and prepared one both physically and psychologically for a hard day!

C. L. Arlington, an old sinologue in pre-war Peking, naval adviser to the Manchu throne, writer and sage with more than fifty years in China, used to say that if you wanted to understand China you had to "stand on your head and *think up*".

So here is a suggestion for those bewildered by what they see and hear in our criminal courts today.

Inverted or upright, the view, I think, is less than perfect, the essential symmetery disturbed by complexity, prolixity and a dreadful obfuscation of purpose.

Administration of justice is an arm of government, which is no more strong or credible than its weakest link. The more that ends and means of a justice system become unrelated the weaker that link. Douglas Meagher Q.C. illustrates well what is at stake in his "Organised Crime" papers which he presented to the 53rd ANZAAS Congress in May 1983, (as does Commissioner Costigan Q.C. himself and the various Drug Inquiry reports).

Strangely enough, it is confusion about the purpose of a trial that nags the law, a confusion which feeds on the thriving assumption that there is none.

This paper attempts to demonstrate that the law does not clearly grapple with this matter of a trial's purpose. The reason is that we have inherited rules from times when the purpose which rationally might meet 20th century ideals could not be achieved.

I refer initially to times when trials in England were merely ritualistic appeals to supernatural powers for "signs". "Proof" by more rational means was slow to evolve, for printing was not invented until 1477, there was no police force until the 19th century, no forensic science or investigative techniques before that time, no fundamental legal structures for ascertainment of truth until relatively recent times. With social, political and technological advances, of course, the law has changed; but only slowly, although many highly sophisticated and beneficial rules have built up. But it is possible we are falling behind and that trial procedures and the criminal law now preside over a process which is less credible than it ought to be. A reason is that there is law which remains for historical reasons, strikes a customary barrier against change, and which teases our *raison d'être*.

In particular there are, I think, three rules bequeathed us by history that operate to provide too much mischief to a process, the only justification for which is its service to the participants in ascertaining, as fairly as possible, the sustainability of an allegation. One rule is that no adverse inference can be drawn from a suspect's silence in the face of investigative questions, another that no comment can be made about an accused's silence at his trial, and the third that a legally represented accused may still (in some States) make (even read) a statement in his defence without being cross-examined.

The history of the privilege against self-incrimination helps to explain their existence and it is that with which, in some small measure, I deal. The resource material is extensive and difficult to compress. Some is less known than might be expected. What appears is the anomalous nature of these rules; that their emergence was not for the ends they now tend to serve.

Writing in 1891 on the maxim *nemo tenetur seipsum prodere*, which is now read to embody the privilege against self-incrimination, John Henry Wigmore concluded:
"I think that the history of the privilege shows us that in deciding these questions we may discard any sanction which its age would naturally carry".[1]
Sixty to seventy years earlier Jeremy Bentham had said the rule was "one of the most pernicious and most irrational notions that ever found its way into the human mind".[2]

The irrationality of the rule has been long recognised by intelligent legal commentators but change is resisted. Change always meets opposition. When in 1780 Sir John Fielding proposed for the first time a regular police force it was bitterly opposed throughout England led by the Lord Mayor and "all the justices of the Kingdom".[3]

When in 1836 full right of counsel was to be given to accused charged with felony it was strongly opposed by twelve out of fifteen judges, one of them (Mr. Justice Park) threatening resignation if it became law.[4]

So also the *Criminal Evidence Act* 1898,[5] which gave the accused a right to give sworn evidence, took years of debate to achieve.

The difficulty the law has in unravelling substance from form is superbly illustrated by the way it dealt with an accused who refused to plead. At one time his strict right was to be tried by a traditional method — battle, compurgation oath or ordeal, but later, as that became displaced by jury trial, an accused still could not be tried by jury for a felony, except treason, unless by his plea he consented. As conviction resulted in forfeiture of all the accused's goods to the Crown he had a motive not to plead.[6] In 1275, under Edward I, a prisoner who refused to plead was put in *prison fort et dure*, which became by 1400 *peine fort et dure*, involving being staked down and having weights piled on him until he agreed. In 1772 it was enacted[7] that his refusal to plead be taken as a plea of guilty. It was not until 1827 it was enacted[8] the plea be entered as not guilty. As Holdsworth observes,[9] it took the common law five hundred years to arrive at the obvious answer, to empanel a jury and try him whether he consented or not.

The right of silence tends to be inviolate for many people, particularly lawyers. Its mention touches an emotional chord. The reason is its association with past struggles for liberty and civil rights. But those struggles from which the privilege emerged were for the right to think according to one's

conscience, i.e., to decriminalise religious and political dissent. What was involved was what ought or ought not to be a crime, not whether a particular person was or was not a Catholic, Puritan, Brownist, Calvinist or Separatist, as well he might have been, but whether he should be deprived of liberty for being so. Freedom of conscience is today unassailable but not because the right of silence exists or protects it or has any relevance to it at all. What then and who, does it protect? What is its present justification?

The context of the present discussion is solely conduct which the community universally accepts as criminal. No one would rationally suggest that in the investigation of that conduct it would be wrong or unfair to ask a suspect what he has to say about an alleged crime if it is legitimately in the community's interest to know. If a suspect refuses to answer, the inference which common sense dictates ought not to be proscribed. In my view, that does not transgress any fundamental concept of liberty. No modern community can survive unless its citizens accept accountability as a fundamental duty.

Questioning a suspect by the *juge d'instruction* has long been a fundamental of French criminal procedure with counterparts in other European countries. The suspect does not have to answer questions, but almost invariably does because adverse inferences may be drawn from his silence.[10]

In 1983 the High Court[11] and the Victorian Full Court[12] held that the privilege against self-incrimination is not just a rule of evidence confined to testimonial proceedings but of general application unless clearly abrogated by statute.

It is apt, therefore, that the utility of the rule be raised again for discussion. But there is another reason. The rule, in my view, avails ordinary offenders little,[13] but is of great value to the experienced who, of course, invoke it most.

It is my contention that the inability of a tribunal of fact to draw adverse inferences from a suspect's refusal to answer investigative questions on the one hand and the unsworn statement on the other are grist to the mill of disputation which prolong unnecessarily the length and expense of criminal trials. Amendment of the law in both respects need not augment unfairness. On the contrary, police might be agreeable to new procedures, such as the use of video and tape recording machines, which would put beyond all doubt the nature and voluntariness of the suspect's responses to investigation. Any measure which aids simplification of the issues must assist a jury's task and serve the interests of the community.

It has been observed[14] that probably no aspect of the procedural law has such a fascinating history as the common law privilege against self-incrimination. As will be seen, it originated, as Holdsworth[15] observed, as a "somewhat illogical outcome" of disputes about other things. It is a history which is associated with a revolution; in the beginning a revolution against a religion, in the end a revolution against the State.[16]

The privilege (or right) was not confirmed until the end of the seventeenth century and became wedded to the idea that the guilt of an accused should be proved from sources other than himself. This arose out of political and social, not legal, philosophy, although lawyers and the courts played an important role.

Historically, protection against self-incrimination was not an inherent part of the English system of justice. On the contrary, inquisitorial procedures, including torture, were practised by the common law courts even at the time of Star Chamber and High Commission. The principal procedural difference was the requirement in the common law courts that there be "due presentment", that is, a specific charge and solemn accusation, before an accused was required to respond. This changed during and after the seventeenth century but not entirely. It was not until the *Indictable Offences Act* 1848 (Sir John Jarvis' Act) that the power of a magistrate to examine an accused at preliminary examination was proscribed.

The Norman Conquest

At the time of the Norman Conquest the legal system was ritualistic, the outcome of trials being dependent on perceived supernatural "signs". Investigation and proof by witnesses were, of course, unknown.

No distinction was made between civil and criminal or secular and eccesiastical cases. After preliminary statements by parties the court rendered judgment not on the merits but on the manner by which the dispute should be resolved.[17] The form of a trial might be by compurgation, by ordeal, or, after the Norman Conquest, by battle. Except in trial by battle, only one party was put to his "proof". Proof was regarded as an advantage and was usually awarded to the accused party who in effect had the privilege of proving his own case. Trial by exculpatory oath and compurgation consisted of a sworn statement to the truth of one's claim or denial, supported by the oaths of a certain number of fellow swearers. It was presumed that no one would swear falsely because of fear of divine retribution.

The Normans brought the trial by battle to England, a savage yet sacred method of proof which was also thought to involve divine intercession on behalf of the righteous.

Plucknett[18] writes that the greatest result of the Norman Conquest was the introduction of precise and orderly methods into the government and law of England. This provided a milestone in the development of English law, particularly in the great survey of the kingdom which came to be recorded in the *Domesday Book*. The original two volumes, together with the chest constructed for their preservation, are still in the Public Record Office in London. In it the land was described county by county, village by village, the owners and sub-tenants were listed and their holdings valued, even the farm stock was recorded, with a view to settling clearly the rights of the Crown and the taxable resources of the country. It was inspired by a desire for more efficient revenue collection.

William's work was pre-eminently that of systematisation. The Frankish *Inquisitio*, the prerogative right of the Frankish kings, was used to compile the great fiscal record which was the *Domesday Book*. The *inquisitio* or "inquest" was also known as the *recognitio* or "recognition", which means a solemn answer or finding or declaration of truth. This was the origin of the sworn inquest of neighbours — the seed of the modern jury system. As a method of determining fact, it was, of course, a great advance on compurgation, ordeal and trial by battle.

The Norman Conquest involved great social change in other ways. William brought with him the advanced feudal system of France and Normandy. He dispossessed Saxon land owners and peasants, and claimed the broad land of England as his own by right of conquest. He granted land to his warriors on condition of military service. Foreign nobles and soldiery came into possession of the soil and swore fealty to their master from whom they held it. Saxon bishops were deposed and foreign prelates appointed to rule over the English church. The King took counsel with the officers of his state and household, the bishops, abbots, earls, barons and knights with whom he surrounded himself. These took over from the old *witenagemot* of Anglo-Saxon days and formed the nucleus of the "lords temporal" that in modern times is known as the House of Lords and regarded as one of the three estates. The archbishops and bishops who held an eminent position in the council of Saxon and Norman Kings ranked first among the "estates" whilst the "commons", comprising representatives from shires and boroughs (originally to assist administration of tax collection), has come to be the "third estate". The demarcation of these estates, which became important in the development of the courts, the law and parliament drew greater lines at the time of the Norman Conquest with the "inquiries" and administration which resulted in the compilation of the *Domesday Book*[18c]

In 1086 the King's representatives went into the counties, summoned men from each "hundred" or county subdivision, put them under oath, and demanded their verdicts or truthful answers concerning who owned what and how much.

Tollefson[19] says that law and morality being closed related, the church not only participated in the trials in the King's courts in pre-Norman times by administrating the oaths and the ordeals but also had its own court which claimed jurisdiction over cases relating to church property, persons in holy orders, matrimonial and testamentary cases and an amorphous group of matters having a moral or religious aspect.

Prior to the 13th century the procedure in the ecclesiastical courts followed much the

same pattern as that in the King's courts except that ecclesiastical procedure reflected some borrowing from Roman law. A case was commenced by an individual swearing an *accusatio*, alleging the defendant was guilty of a specific wrongdoing. However the accuser was subject to punishment if the proofs (ordeal etc.) indicated innocence. As a result there was reluctance for accusers to come forward. To overcome this, the ecclesiastical courts permitted a second form of procedure known as the *denunciatio* by which all that was required was *fama* (common report), and it was not necessary for an accuser to assume any obligation for the successful prosecution of the defendant. These initiating procedures were referred to in the canonist rule from which the maxim *nemo tenetur seipsum prodere* was later excised by common lawyers. As will be seen, it was taken out of context to mean the opposite of the rule.

It was this practice in the ecclesiastical courts of proceeding without an accuser which led to the divergence between its procedures and that in the King's courts where "due presentment" was required, that is, a specific charge and solemn assertion by accusers or a presenting jury that a person was suspected of wrongdoing[20]. In the King's courts the defendant therefore was not required to take the first step of providing the accusation.

According to Mary Hume Maguire[21] there was a third ecclesiastical rule, imitated from Roman civil law inquisition, by which the *judge himself* cited the party on the basis of "common report".

Even in the reign of Henry I (1110-1135) there were serious power struggles between church and monarchy.[22] In his reign, however, the law was substantially Anglo-Saxon and administered locally by the sheriffs according to ancient custom which varied throughout the country.[23]

The reign of Henry II (1154-1189) is critical in the history of the common law. The separation of the ecclesiastical courts by William the Conqueror had caused the development of a large mass of canon law with the church claiming wide jurisdiction. Archbishop Thomas Becket, whose conflict with the King has been the subject of much modern literature, determined to apply the church jurisdiction rigorously. Many people had become amenable to the jurisdictions both of the church and the common law, with Becket proclaiming that such people should be tried in the church courts only. This led to the landmark in the development of the common law known as the *Constitutions of Clarendon*, which were laws made by the King at a council held at Clarendon in Wiltshire in 1164 to check the power of the church and to restrain the prerogatives of ecclesiastics. There were sixteen ordinances which defined the limits of the patronage and jurisdiction of the Pope in England.

Henry II disliked and distrusted the traditional form of proof.[24] He took crimes of a serious nature to be offences against the King's peace, requiring settlement in the King's court by the King's system of justice whenever possible rather than by the older proofs only; and the King's system was founded on the "inquest" — the representative verdict of the neighbourhood. What was once only an administrative inquiry became the foundation of the jury of accusation and the jury of trial in both civil and criminal matters. Compurgation had become too easy a proof — almost a certain success for the party, however culpable or liable, who happened to be awarded the right to resort to his oath with the support of oath helpers.

Henry II sought to supersede the older forms of proof by discrediting them and making available to litigants an alternative and more equitable form of proceeding. The *Consititutions of Clarendon* prescribed the use of a "recognition" (inquiry) by twelve sworn men to decide any dispute between laymen and clergy on the question whether land was subject to lay or clerical tenure. They also provided that laymen should not be sued in ecclesiastical courts on untrustworthy or insufficient evidence. O. John Rogge[25] writes that what Henry II did was to take the royal Frankish inquisition and fashion it into our grand and petit jury system among a people to whom this kind of inquisition was familiar as well as congenial.

The Assize of Clarendon was recodified in 1176 by the Assize of Northampton which extended the list of felonies and substituted maiming for hanging as the punishment of the accused felon who was "undone" at the ordeal.

The great events of the reign of Henry II have been summarised[26] to include extension of the system of itinerant justices; growing definition of the courts of law; widespread use of the jury; establishment of the Assizes as speedy methods of trying cases of recent dispossession of land (*novel disseisin*); remodelling criminal procedure and systematising the presenting (grand) jury (the Assize (enactment) of Clarendon 1166); the Assize (enactment) of Northampton which strengthened the claims of an heir to land against the feudal lord; the re-organisation of local defence and police measures (*Assize of Arms* 1181).

Fourth Lateran Council

All this meant that the law had inched forward from pure ritual toward investigation of facts. 1215 was not only the year of *Magna Carta* but also of the Fourth Lateran Council. Both are significant in the history of the privilege against self-incrimination, but probably the latter more so.

Magna Carta is often referred to as the oldest of "liberty documents". It has come to serve as the prototype of all bills of Rights — as Faith Thompson[27] says — "a symbol, a slogan that comes readily to the tongue of a public speaker". In the various episodes of the constitutional and legal conflicts which led to the establishment of the privilege in the late 17th century *Magna Carta* was invoked by the common lawyers as "precedent". In particular the lawyers quoted the celebrated Chapter 29 which, although not guaranteeing trial by jury because its use in criminal trials was still unknown at that time, ensured that indictment and trial by whatever was the appropriate test, whether battle or ordeal, must precede sentence. Whether *Magna Carta* on its literal construction deserves the credit often given it for guaranteeing liberty is highly debatable but probably irrelevant. Be that as it may, *Magna Carta* was never said to aid any right of silence but merely the common law procedural right that a suspect be given to know of what he is accused before being required to respond.

The significantly different procedure of the ecclesiastical courts, which did not recognise, that right received confirmation and new life by events in the same year (1215) at the Fourth Lateran Council. Just as the Frankish kings had become dissatisfied with the old procedures and modes of proof, so did the church. Pope Innocent III was a great papal legislator who devised inquisitional techniques in a series of decrees beginning in 1189-90, perfecting them in one which he issued through the Fourth Lateran Council held in the Lateran Basilica, Rome, November 1215.[28] The assembly there included clerical leaders from almost every country in Christendom and representatives of many temporal rulers — 412 bishops, 800 abbots and priors, the heads of various religious orders, ambassadors from the Kings of Hungary, Aragon and Cyprus and the Latin emperor of Constantinople and delegates from the republican states of Milan and Genoa and from other free cities of Italy. The Council issued a total of seventy canons and decretals which forbade the clergy to participate in the administration of trial by ordeal, thereby divesting that proof of its rationale as a judgment of God. As a result the ordeal died as a form of trial in western Europe. This had an effect not only in the church courts but the King's courts, which had no alternative than to promote trial by jury. Because the law still gave the accused a choice, the court began to resort to devices to force him to choose jury trial. So it began to offer the unattractive alternative of hard imprisonment (*prison fort et dure*) until he accepted. As time passed, a special kind of torture was added (*peine fort et dure*) to extract a plea which recognised the court's right to proceed to trial.

Of even greater consequence was the acceptance by the Lateran Council of the procedure *per inquisitionen* as a third possible mode of trial in the ecclesiastical courts. By this technique an official by virtue of his office (*ex officio*) had power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all things he would be questioned about.

Under Innocent's decrees the *inquisitio* was supposed to proceed on some basis in either common report (*per famam*) or notorious suspicion (*per clamosam insinuationen*). In practice the third form (*inquisitio*), by use of the *ex officio* oath, became the invariable rule and the system spread

throughout Christendom and to the organs of the state of the mainland of Europe beginning in France.[29] It appears, however, not to have been introduced into England until 1236 when Cardinal Otho, Legate of Pope Gregory IX, visited to attend a conference at St. Paul's on 18 November. He there promulgated constitutions chiefly concerned with regulating the bestowal and proper holding of ecclesiatical benefices, but which stated and also defined the proper mode of hearing and determining causes in ecclesiastical courts. In this latter connection he introduced the "oath of calumny" which led to constant conflict between canon and common law procedure.[30] He ordained that the oath against calumny be required in every ecclesiastical suit "notwithstanding the previous custom to the contrary".[31] The oath of calumny was practically indentical with the oath *ex officio* which afterwards came into prominence in the course of the oath controversy. The "notwithstanding the previous custom to the contrary" refers to the practice obtaining in the ecclesiastical courts before that time.

In the same year, 1236, Henry III took a French wife who brought with her to England her four uncles, one of whom, Boniface, was placed in the see of Canterbury as Archdeacon.

By the mid-13th century the church perceived itself in danger from mass heresy.[32] St Thomas Aquinas required truthful answers to incriminating questions and advocated death for heretics in order to save the faith from their corruption; and Pope Innocent IV explicitly sanctioned the use of torture.

Events of this time have been chronicled by a Matthew Paris, upon whom much reliance is placed by the scholars. Thus it appears that when the new procedure was first used in 1246 by Bishop of Lincoln, Robert Grosseteste (1235-53), it was the source of much strain between King and Church.[33] In 1272, Boniface as Archbishop of Canterbury, revitalised Otho's constitution of 1236, widening the oath procedure of the ecclesiastical courts so that wherever there was inquiry "into the sins and excesses of subjects requiring punishment, laymen shall be compelled by oath *de veritate dicenda*, under sentence of excommunication if necessary".

Wigmore finds that the struggle that then ensued (after 1272) between the King and his court and the ecclesiastics concerned only the jurisdiction of the ecclesiastical courts, but Maguire and Morgan[33a] have sought to demonstrate that from the beginning there was strong objection in England to the oath's procedure itself.[34]

Articuli cleri — jurisdictional limits on ecclesiastical courts

In 1285 and again 1316, Crown and Parliament respectively sought to delineate the spheres of jurisdiction of each court. In 1285 Edward I had materially enlarged the jurisdiction of the Courts Christian, but in the statute known as *Prohibitio Formata de Statuto Articuli Cleri*[35] a change of policy occurred and the foundation was laid of the privilege against self-incrimination. The Act, whose date is uncertain, named various causes over which the common law courts exercised exclusive jurisdiction and expressly prohibited the ecclesiastical judges from hearing those causes in their courts. Another clause commanded the sheriff to prohibit any layman from submitting to any examination under oath "*except in matrimonial or testamentary causes*".[36] The significance of this statute in the history of the privilege against self-incrimination is that it provided the basis for the later common law writs of prohibition against exercise of jurisdiction by the ecclesiastical courts, it being contentious whether causes were within the exception "matrimonial or testamentary". Wigmore says[37] that the date of the Act is placed by some scholars at some time before the end of Edward II's reign (1326), while Coke attributed it to the first few years of Edward I's time.

Wigmore reads the statutes (*Articuli Cleri*) as conceding fully to the ecclesiastical courts their own methods of procedure, that is by *ex officio* oath if they wished, where they had jurisdiction. Both Morgan and Maguire read them as giving permission to proceed only in matrimonial and testamentary causes although they had jurisdiction in other causes and could there proceed without the oath method.[38]

Wigmore emphasises that there was no repugnance to the oath itself; that the quarrel was jurisdictional.

The following is the translation from the Statutes of the Realm of the critical provision of *Prohibito Formata de Statuto Articuli Cleri*:[39]

"And they suffer not that any Laymen within their Bailiwick, come together in any Places to make any such Recognitions by their Oaths, *except in Causes of Matrimony and Testamentary*". (1 Statutes of the Realm 209).

The check on jurisdiction was not really accepted as final by the church, and over the period climaxing mid-seventeenth century the struggle between church and common law courts waxed and waned. At times the King intervened in support of the church and at times to curb its powers. Levy says[40] that the ecclesiastical courts preserved the inquisitional oath contrary to the statute as a result of the acceptance of heresy as a grave crime. In addition, the King's Council employed the oath, which handicapped opposition to it. The Council exercised executive legislative and judicial powers which gradually became differentiated. Offshoots or special committees of the Council developed on the one hand into the House of Lords and on the other into the central courts of the common law, namely, the Court of Common Pleas (civil) and the Court of King's Bench (criminal). During the fourteenth century, while the Council was becoming a distinct body, its relationship with the central courts was still close, especially on the criminal side. Even after the establishment of the King's Bench as the highest court of criminal jurisdiction, the Council still retained an undifferentiated mass of judicial work, its jurisdiction and procedures being practically disrectionary. When acting as a court, the Council, or a branch of it, sat at Westminster in a room whose ceiling was ornamented with stars and became referred to as the "Sterred Chambre" as early as 1348. What became the Court of Star Chamber developed as the judicial arm of the King's Council.

Professor Kemp[41] says that the first formal description of the procedure whereby a man on mere suspicion was brought before an English court and forced to testify against himself is found in the *Act of the Star Chamber* 1487, the first time that the oath was formally re-organised and received complete description. The authority behind the Star Chamber oath, like that before the Council itself, was the prerogative of the King.

Early in the 16th century the law was that oaths could be administered by ecclesiastics to the clergy in all cases and to laymen in matrimonial and testamentary causes. A restrictive law of Henry VIII was repealed the first year of Philip and Mary but restored by Elizabeth I.

Origin of the *nemo tenetur* rule

The *nemo tenetur* maxim was part of an old and established ecclesiastical one. The full Canonist rule was:

"Licet *nemo tenetur seipsum prodere*, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare."

The translation given by Wigmore[42] is:

"*Though* no one is bound to become his own accuser, *yet* when once a man has been accused (pointed at as guilty) by general report, he is bound to show whether he can prove his innocence and to vindicate himself."

Professor McNaughton, the editor of Wigmore on Evidence,[43] says that the following translation comes closer to the original:

"No one is bound to inform against himself (literally, produce himself); but when exposed by public repute (*fama*), he is held (*tenetur*) and permitted (*licet*) to show, if he can, his innocence and purge himself."

George Horowitz[44] provides another translation:

"Although no one is compelled to accuse himself (i.e. to come forward voluntarily to tell of his misdeeds) yet one accused by rumour is compelled to present himself to show his innocence if he can and to clear himself."

The common lawyers took the words *nemo tenetur seipsum prodere* out of context to mean something quite different — rather the opposite of its modern meaning. The rule did not proscribe interrogation of a suspect. On the contrary, it placed on a suspect the duty to respond to an accusation even received *per famam* (by common report) —

not after presentment on a formal charge. By omitting *licet* and emphasising the next four words out of context the common lawyers sought to establish only the requirement of formal presentment. They did not argue that a suspect did not have to respond once told of the charge and properly presented. What the common lawyers did was a legal tactic or argument in the political and religious struggles of the time.

Heresy

The church was obsessed with heresy but heresy was not only Protestantism in the eyes of Catholics and Catholicism in the eyes of Protestants, but any deviation from establishment doctrine or religious practice.

In 1401 Henry IV proclaimed the famous statute *De Haeretico Comburendo*,[45] passed by the Commons,[46] which legalised the burning of heretics. It was known as the statute *ex officio* because it also authorised the ecclesiastical courts to administer the oath *ex officio*.[47] By it, Henry IV proclaimed himself a "cherisher of the Catholic faith, willing to maintain and defend the Holy Church . . . and to extirpate radically such heresies and errors from our Kingdom of England".[48] From 1401 to 1534, when it was repealed, about fifty persons were burned as heretics and many others imprisoned. The Act of 1401 was from fear of the Lollards, forerunners of the Protestant reformers who believed in individual worship, rejected papacy and a need for formal worship.

Mary Hume Maguire[49] says that the Act[50] is usually remembered as giving the bishops power to imprison heretics and on signification to Chancery to set secular machinery immediately in motion against obstinate offenders or relapsed heretics, but it also authorised ecclesiastical courts to administer the oath *ex officio*.

For a century and a third, the lay authorities and courts co-operated with the ecclesiastical courts in the prosecution of heretics.[51]

Under Henry VIII the opposition to the oath *ex officio* again became vocal, and in 1533 a statute[52] was designed to prohibit the oath by providing for due presentment.[53] Under Mary, the statutes and practices of Henry VIII were repealed and those of Henry IV and the repudiated statute of Richard II revived.

Those whom the church suspected of "heresy" began to defend themselves by objection to the jurisdiction of the church courts and in the late 16th century to allege that the *ex officio* procedure was illegal. The words *nemo tenetur seipsum prodere* were cited as supporting legal requirement of a specific charge — but not a right of silence if it was duly laid.

The first recorded instance of an accused person arguing that the inquisitional oath procedure was contrary to canon law was in the case of John Lambert, who was burnt to death at Smithfield in 1537 in the reign of Henry VIII. He was a priest and Fellow of Queen's College, Cambridge[54] who, on an inquisition before the Archbishop of Canterbury regarding his conduct and beliefs, responded that "... it is written in your own law 'no man is bound to betray himself'."[55] However Lambert is also recorded as having said that a judge could require a person to take an oath to say the truth if the judge did so "in lawful wise".[56] John Foxe, the martyrologist, author of *The Book of Martyrs*, recorded the statement with the footnote *nemo tenetur prodere seipsum*. Tollefson[57] observes that as Foxe's work was published in 1563 and was very popular it is possible that it contributed to a line of cases started in 1568 in which the latin phrase was alleged to have been used by itself (that is out of context) as a legal maxim.[58]

The case of Thomas Leigh came before the Common Law Courts on this basis in 1568. He was summoned before the Queen's Commissioners for ecclesiastical causes (later to be known as the Court of High Commission) to answer charges that he had heard Mass in the house of the Spanish Ambassador. When Leigh refused to answer the allegation on oath he was imprisoned for contempt. The Court of Common Pleas issued a writ of habeas corpus to have Leigh brought before the court to determine the cause of his imprisonment. Chief Justice Dyer is reported as having said before the court that the Commissioners had the right to try Leigh, but they ought not in a case such as this examine him upon his oath *quod nemo tenetur seipsum prodere*, and Leigh was therefore released. This precedent is alleged to have been followed in *Hynde's case* in 1576, but both these cases are known only through citation by Coke, C.J. in *Burrowes, Cox, Dyton et al* in 1615.[58a] Coke claimed to have been quoting from a manuscript of the case in Chief Justice Dyer's own hand but legal historians do not accept Coke as reliable.[58b]

The Reformation and after

The Protestant Reformation of Henry VIII was rather a nationalist divorce from the foreign influence of Rome than a doctrinal revolution.[59] Mary I, daughter of Henry VIII and Catherine of Aragon, temporarily reversed the reformation repealing Henry's *Act of Supremacy* 1534 by which he made the Church of England a separate institution and himself its "Supreme Head".

In the reign of Mary, who, always frail, died at the age of 42, some 300 victims were burnt at the stake; among them reformation leaders Thomas Cranmer, Archbishop of Canterbury, Hugh Latimer, Bishop of Worcester, Bishop Hooper of Gloucester and Nicholas Ridley, Bishop of London.

James Gairdner[60] claims that their fate "created a revolution against Rome that nothing else was likely to have effected".

With the succession of Elizabeth I, Mary's half sister born of Anne Boleyn, that revolution found its expression in the sharp rise of Puritanism. A profound religious change had taken place in England[61] and the old Anglicanism of Henry VIII passed away. The new clergy of Elizabeth was sharply divided and now looking to the Scottish Kirk and the conventicles (meetings or meeting places) of Strasbourg and Geneva. They had little patience with "half purified" Anglicanism and sought the removial of every vestige of Romanism in the etablished church.

The Puritans and their supporters in Parliament attacked the very idea of episcopacy and gradually found themselves in solid opposition to the religious settlement sustained by the prerogative of the Queen.[62] The Queen quickly understood attacks on Anglicanism as a threat to her royal supremacy.

In religion, Elizabeth held the same position as her father save that she was not called "Supreme Head" but "Supreme Governor".[63] Her ecclesiastical power was further defined in the *Thirty-Nine Articles of 1563*, where it was stated that the Queen enjoyed the prerogative "given always to all Godly princes in Holy Scripture by God Himself, that they should rule all estates and degrees committed to their charge, whether they be ecclesiastical or no . . .". This was precisely what Calvinism denied. The Puritans could not serve a Government which, like Anglicanism, compromised with the hated Romanism and continued to tolerate some of its ceremonies.[64]

With the return of the Marian exiles, Puritanism had spread in English university circles and among members of Parliament.[65] As early as 1564 the Puritans began their "prophesyings", which were secret meetings in which the Calvinist scriptures were expounded and the *Book of Common Prayer*, the official liturgy of the Church of England first issued under Archbishop Cranmer in 1549, was held up to ridicule.

The early 1570s saw the rising importance of Puritanism in the national debate between the Puritan leader Thomas Cartwright and the zealous defender of Anglicanism, Archbishop John Whitgift.[66] It was Whitgift who spoke of sedition where his predecessors had spoken of heresy. Sedition, of course, was a matter for the common law courts.

Archbishop John Whitgift[67] is one of the most prominent figures in the history of the oath against self-incrimination. So also was the Puritan leader Thomas Cartwright. The two men had been fellow students at Cambridge. On 4 July 1567 Whitgift became Master of Trinity only to find that Cartwright was one of his Fellows.

Almost immediately on Whitgift's appointment as Archbishop of Canterbury in 1583 he suspended 233 ministers who refused to execute his orders.[68]

The High Commission

The High Commission did not originate as a court. Under Henry VIII there was a commission for ecclesiastical affairs headed by Thomas Cromwell. However, the first Anglican Commission to use the procedure which gave rise to the bitter oath controversy was in 1549, when Edward I granted very broad powers to it to inquire as to heretics and examine for heresy.[69] In 1557, Mary

created a commission by letters patent which expressly permitted the use of the *ex officio* method of procedure in furtherance of her aim to restore the ecclesiastical supremacy of Rome.[70]

Under the authority of the *Act of Supremacy* 1559, Elizabeth I issued letters patent in 1559, 1562, 1572 and 1576 creating commissioners for ecclesiastical causes in aid of her religious settlement. These commissioners, although vested with independent and virtually discretionary authority over offences of religion, functioned under orders of the Privy Council. In practice they took jurisdiction, followed procedure and fixed penalties as directed. The main target of these commissions under Elizabeth were the Catholic recusants, although there were some notable cases involving Puritans. A change occurred when John Whitgift became Archbishop of Canterbury and the President of the High Commission in complete control of it. Three months after his appointment he applied to the Queen for a High Commission "with greatly augmented powers".[71] He and only two others constituted a quorum for conducting business. In practice only a few others attended meetings regularly. The influence of Whitgift, some bishops and several civil lawyers predominated.[72]

The High Commission possessed ecclesiastical jurisdiction and authority in relation to violations of any statutes passed for the maintenance of religion and to all offences punishable by ecclesiastical law. It assumed a supervisory role over the ordinary ecclesiastical courts and would act on "common report" or *fama*, on information of persons taking offence or if there was notorious suspicion (*clamosa insinuatio*) against someone. The High Commission always proceeded *ex officio*, the oath being administered before the accused was told the identity of his accuser.

By Whitgift's time the substantial threat to the authority of the Anglican Church was from the Puritans. On occasions, principally when dealing with non-conformists, the Commission proceeded *ex officio mero*, by which the accuser in the proceeding was the court itself.

In 1584 Whitgift drew up *24 Articles* for use by the Commission against all Puritan suspects. They constituted a set of charges framed in the old inquisitorial style, covering belief and practice respecting the *Book of Common Prayer*, clerical investments, baptism, the sign of the cross, the matrimonial ring, the litany, the burial service, communion, preaching, attendance at conventicles and the episcopacy.[73]

Whitgift's strategy for revealing the Puritan conspiracy against Church and State was to summon a suspect before the Commission, require him to take the oath and then order answers to the *24 Articles*. When the Puritans complained and Lord Burghley wrote to Whitgift, the latter replied defending the oath — claiming the procedure in the Commission was "the ordinary course of other courts likewise; as in the Star Chamber, the Court of the Marches and other places".[74]

All this set the scene for the legal contests about the legitimacy of the oath which featured in the famous trials of the late 16th and first half of the 17th century.

Brownists, Barrowists and John Udall

Although the Puritans gave them most concern, the ecclesiastical courts were also occupied by the activities of other religious sects. In 1583 three men were hanged for the crime of circulating books of Robert Browne. In 1585 Browne's place was taken by Henry Barrow, a gentlemen lawyer, and John Greenwood, a deprived minister.[75]

By 1588, the year of the Spanish Armada, the High Commission was in the ascendency in its campaign against the Puritans. The defeat of the Armada lessened the fears in England of the Catholic powers and dispelled any need of the Puritans to balance out the Catholic threat. At this point, literature by a writer using the pseudonym "Martin Marprelate" began to circulate and touch off the government's most systematic "inquisition against the Puritans". There were many arrests, including that of John Udall, a minister and Hebrew scholar. He was first brought before the High Commission for examination before a special board of inquisitors, comprising several ecclesiastical commissioners augmented by members of the Privy Council. Udall defended himself answering some questions and refusing to answer others. He is recorded as saying: "I will take an oath of allegiance to Her Majesty, wherein I will acknowledge her supremacy according to statute, and upon my obedience as becometh a subject; *but to swear to accuse myself or others, I think you have no law for it*".

Those present included Thomas Egerton, then Solicitor General, later Lord Chancellor Ellesmere, and Chief Justice Edmond Anderson of the Court of Common Pleas.

After six months solitary confinement for refusal to take the oath *ex officio*, Udall was conveyed, in irons, to the Assizes at Croydon and indicted for seditious libel against the Queen under a statute of 1581 making that offence a capital felony. Here he received a common law trial inflenced by High Commission procedure.

Udall was probably the first defendant in a common law trial who claimed a right against self-incrimination, at least in a capital case, even though he had been duly indicted.[76] He died in prison in 1592.

In 1590, Cartwright himself was taken before the High Commission. Burghley advised Whitgift not to sit because of his personal embroilment. In addition to the ecclesiastical members, however, were three common law judges. Cartwright took the oath *ex officio* only on his terms as to the answers he was prepared to give; and was imprisoned. Later Cartwright, with other Puritans, was charged before the Star Chamber with seditious conspiracy to overthrow the established church and erect a Presbyterian system in its place. They refused to answer incriminating questions and remained in gaol although eventually released.[76a]

Bigotry and liberty

Although the persecution of persons for their beliefs has fertilised much romance in historians and modern thinkers, the protagonists on both sides were hardly standard bearers for tolerance and liberty. Only John Lilburne, as we shall see, came to support religious tolerance for all believers. Generally, the members of each sect were bigoted and cruel, prepared to extinguish the lives of those with whom they disagreed. The Puritan leader, William Prynne, had his ears cut off, his cheeks branded with the letters "S.L." ("Seditious Libeler", or, as he ironically said, *Stigmata Laudis* — the scars of Laud), was sentenced to life imprisonment by Star Chamber, fined £5,000, expelled from Lincoln's Inn and disbarred. But in the book he published he exposed the "iniquity of the theatre", condemned the "wickedness of acting" and referred to "Women Actors" as "Notorious Whores". So also Robert Beale, a common lawyer with great learning in canon law, clerk to the Privy Council, who invented the fiction that *Magna Carta* made it illegal to force a person to be a witness against himself, was "an arch persecutor of Catholics".[77]

Collier v. *Collier*

The first reported case in a common law court in which the phrase *nemo tenetur seipsum prodere* appears in the original report is *Collier* v. *Collier*.[78] The petitioner, whose counsel was Sir Edward Coke, had been sued for incontinence in the ecclesiastical court and refused to answer whether he had had carnal knowledge of a particular woman. He sought a writ of prohibition from the court of Queen's Bench citing the Latin maxim in support.

There is some doubt as to the actual decision. There are three reports, one simply saying ". . . the court would advise of it", while the other two that "no one is required to produce evidence against himself to his defamation or discredit except in matrimonial and testamentary causes".[79]

Prohibitions

When Sir Edward Coke came to the Bench, the common law courts had well-established precedents for keeping the ecclesiastical courts within their proper jurisdiction. Writs of *Praemunire* or of Prohibition were instruments for that purpose. The writ of *Praemunire* could be issued on the application of the Crown or of a private suitor. It was founded upon an ancient statute (27 Edward III Cap. 1 (1353); 2 *Statutes at Large 72*) and was in the nature of criminal proceedings against any person who commenced in a Papal court litigation that properly belonged to the King's courts. After the Reformation, the remedy was applied by the common law courts to suitors in the King's ecclesiastical court. The proceeding was called an "Attaint" and brought against the individual who had

commenced in another court litigation which properly belonged to the King's court. Prohibition was more usual. A defendant in an ecclesiastical court could apply to a common law court for the writ.[79a]

The number of prohibition applications mounted as Catholics and Puritans alike challenged the authority of the Court of High Commission to enquire into their beliefs.

In 1606, James I, who had just appointed Coke as Chief Justice of the Court of Common Pleas, requested him and Chief Justice Popham of the Court of King's Bench to give an advisory opinion whether an Ordinary might examine a person *ex officio* upon oath. The opinion was given that no man "ecclesiastical or temporal shall be examined upon secret thoughts of his heart or of his secret opinions" but it did not claim the principle *nemo tenetur seipsum prodere* as part of the English law.[80]

Generally speaking, the common law courts were amenable to prohibition writs on the jurisdictional basis that a minister in Holy Orders might be examined under oath by an ecclesiastical court but laymen could not be, except in matrimonial and testamentary causes (a reference to the *Statute De Articuli Cleri*).

Sir Edward Coke

Coke is not infrequently hailed a hero of the common law battle against the *ex officio* oath. Objectively, it may be well deserved. But what he did should be understood in perspective.

Coke has been credited with arguing for the privilege in the *Collier case*, although that, no doubt, was his brief. No historian denies Coke's great erudition in the law. Lord Campbell[81] observes that Coke was a great judge who showed enormous courage, singlemindedness and implacable resistance to the pressures of the King. However there is a question as to the extent Coke was interested in the protection of human rights and liberty rather than that of the jurisdiction of the common law courts against their ecclesiastical competitors.[82] It is to be remembered that the common law judges shared in the fines collected by their courts, and thus had a personal interest in resort to them. As we shall see, Coke did not lack interest in wealth.

Edward Coke was born on 1 February 1551-2. He became Attorney General in 1594 and took a prominent part in the prosecution of State offenders. Towards the end of Elizabeth's reign he examined many persons committed to the Tower while under the rack.[83] Holdsworth observes[84] that although hatred of Roman Catholics, reverence for the Crown and brutality to prisoners charged with treason or sedition were characteristics of many Englishmen at the time, they appeared in Coke in an exaggerated form and manifested themselves "in so ferocious a treatment of the prisoners which he was called upon to prosecute, that even his contemporaries were occasionally disgusted".

In 1603 Coke conducted the prosecution of Sir Walter Raleigh for high treason by entering into a plot to put Lady Arabella Stuart on the throne. Lord Campbell says his conduct left a permanent stain on his memory. Sir James Stephen[85] says that the "extreme weakness of the evidence was made up for by the rancorous ferocity of Coke, who reviled and insulted Raleigh in a manner never imitated, so far as I know, before or since in English courts of justice, except perhaps in those in which Jeffreys presided".

The case against Raleigh was particularly weak, but he was found guilty and sentenced to be hanged, drawn and quartered, though the sentence was not carried out.

Coke's first wife, by whom he had ten children, died 27 June 1598 aged 34. Coke then courted Lady Hatton, a widow of 20 with an immense fortune, celebrated for wit, birth, riches and beauty! She would consent only to a clandestine marriage by a priest in a private house in the presence of witnesses. This took place and Coke was prosecuted on order by Archbishop Whitgift in the ecclesiastical court but received a dispensation.

In November 1605, Coke conducted the prosecution of Guy Fawkes. In 1606 he was appointed by James I Chief Justice of the Court of Common Pleas, but he soon displeased the King as that Court granted prohibitions to check the High Commission. In various instances he fearlessly stopped proceedings before it which the King was known to favour. In 1611 Coke was included among the judges to sit in the High Commission but he refused to do so and was removed from it.

In 1612, at a meeting at Whitehall summoned by the King, Coke, with the assent of all the other judges, held that the King in his own person "cannot adjudge any case either criminal such as treason felony" etc. or "between party and parties concerning his inheritance or goods . . ." The King is recorded as having replied in great rage "then I am to be *under* the law — which it is treason to affirm".

In 1613, on the death of Fleming C.J., Coke was promoted to Chief Justice of the King's Bench on the advice of Sir Francis Bacon, then Solicitor General, as a device which might reduce Coke's obstruction. Bacon, who had been a rival for the hand of Lady Hatton, and Coke were long-standing combatants.[86]

In 1616, as Chief Justice of the King's Bench, Coke himself undertook the investigation of the murder of Sir Thomas Overbury. He took three hundred examinations himself, writing down the words of the witnesses and the parties accused with his own hand. He granted the warrant for the arrest of the Earl of Somerset and, with other judges who were to preside at the trial, marshalled the evidence and arranged the order of its presentation to the jury.[86a]

The King's dissatisfaction with Coke persisted and he dismissed him as Chief Justice of King's Bench in 1616.

Shortly after, Coke was involved in attempting to force his 14-year-old daughter to marry the much older Sir John Villiers (the elder brother of Buckingham) as a means of regaining favour with the Royal Court. Whilst Chief Justice he had opposed the match. His wife and daughter were strongly opposed and went into hiding. In 1617 Coke applied to the Privy Council for a warrant to search for his daughter. Having difficulty obtaining it, he donned breastplate, armoury and sword and with pistols marched at the head of a band of armed men including his sons, dependants and servants to Oaklands, where they forced open the bolted and barricaded gates to the house where his daughter was. He tore her from her mother, and rode off with her to Stoke Poges, in Buckinghamshire where he locked her up. As a result Coke was prosecuted in Star Chamber, but the proceedings were dropped when Bacon, in some way involved, saw himself in danger of being dismissed as Chancellor.

Between 1617-21 Coke occasionally sat in Star Chamber and acted in several commissions issued by the government. In 1621 he became a Member of Parliament and Leader of Opposition in the House of Commons. In that year he was committed to the Tower along with Selden, the scholar, Prynne and other leaders of the Opposition.

There is thus little to support a romantic portrait of Coke as a fighter for liberty symbolised by his judgments about self-incrimination. He was a bigoted anti-Catholic[86b] whose attitudes and conduct can be well explained in the context of jurisdictional conflicts between the common law courts, supported as they were by Parliament, the Puritans and the rising middle class, against the ecclesiastical courts sustained by the Royal prerogative.

This view is supported by his role in the case of Nicholas Fuller, the barrister who fiercely defended the Puritans in the courts of the High Commission and common law. As counsel for Thomas Ladd, a merchant arrested for attending a conventicle and cited before the High Commission, Fuller applied to the King's Bench for writs of *habeas corpus*. His argument led to his own commitment by the High Commission charged with slander of the Church, the King, the Commission, malicious impeachment and contempt of the Commission, schism, heresy and erroneous and pernicious "opinion in religion". He obtained a writ of prohibition from the King's Bench but James I and Secretary of State Lord Salisbury agreed that Fuller's argument threatened the government. James instructed Salisbury to see to it that the prohibition was not sustained. In the result, the judges, after seeking the advice of Chief Justice Coke, authorised the Commission to proceed against Fuller for schism, heresy, impious error and pernicious opinions. The court refused explicitly to give any opinion on the authority and validity of the Letters Patent or on the interpretation of the *Act of Supremacy* which Fuller contested. The result was to deny the High Commission

jurisdiction over principal charges against Fuller but acknowledge its authority to prosecute him for schism etc. Nothing was said about the Commission's power to fine, imprison or exact the *ex officio* oath. The matter came before the King's Bench on a second writ of prohibition. James I exerted even greater pressure. In the result, the King's Bench refused to act on a writ of *habeas corpus*, finding no error in the High Commission's warrant. James sent thanks to Coke and the other judges, remarking that if they had decided otherwise he would have committed them!

After Coke's dismissal from the Bench in 1616, the oath *ex officio* became for a time a less controversial issue than it had been since 1583.[87]

Archbishop Abbott died in 1633. Until his death there were no more prohibitions in which illegality of the oath was a ground of decision, no more controversies between the common law courts and the ecclesiastical courts and no more cases reported in which the oath was an issue. About the time of the *Burrowes'* decision in 1616 the Commission codified its rules of procedure with Privy Council endorsement, and included a provision that defendants should be examined after taking the oath to make a full and true answer but should not be shown the articles against them until after they had taken the oath.

In 1624 Coke's own daughter and her lover were tried before the High Commission for adultery. She refused the oath *ex officio* claiming that no one was bound by law to accuse himself. Sir Robert Howard,[88] the father of her illegitimate child, also refused the oath.

Coke was a prime mover of the Petition of Right in 1628 and the leading speaker against the Crown — "It is a maxim, the common law hath admeasured the King's prerogative, that in no case it can prejudice the inheritence of the subjects . . . *Magna Carta* is such a fellow that he will have no sovereign". That the Petition of Right did not speak against the oath *ex officio* suggests that it was no longer a pressing grievance whose redress was imperative.[89]

Coke never condemned a confession voluntarily given nor had he supported a right on the part of any defendant to refuse answer to incriminating interrogatories if he had been properly presented, if his case was within the jurisdiction of the trial court and if his truthful answer would not expose him to a penalty higher than one which that court might impose, unless the answer exposed the defendant to loss of life or limb. (The Star Chamber had no jurisdiction in relation to the latter.)

In a common law court the defendant could not be required to answer involuntarily but his silence customarily spoke against him. It invited adverse comment from the prosecution and perhaps even from the trial judge.[90]

Archbishop Laud

In the period immediately following Coke's dismissal in 1616 the court of High Commission proved less zealous in applying its arbitrary procedure. When Archbishop Bancroft died in 1610 (Whitgift having died in 1604) he was succeeded by Archbishop Abbott, who was less agressive and more conciliatory.

However, the appointment of William Laud as Archbishop of Canterbury in 1633 broke the calm and the High Commission resumed its persecution.[91]

Charles I gave a free hand to William Laud, Archbishop of Canterbury, a man, says Levy, of towering ability.[92] At this time there was still active dissent by Puritan preachers. Dr. Henry Burton, a Puritan preacher pamphleteer who had been in and out of Fleet Prison several times, was taken by Laud in 1636 before the Commission. Another was Dr. John Bastwick, a Puritan physician who wrote abusive tracts against the bishops. Their opposition led to convictions before the High Commission and Laud sought a ruling from the common law judges sitting in Star Chamber that Bastwick and others had been lawfully tried and sentenced.

In Laud's time Star Chamber and High Commission became indistinguishable in many respects, heresy and sedition being virtually interchangeable charges, although the former belonged to the jurisdiction of High Commission and the latter to the common law courts. It was the Star Chamber which had punished Prynne in 1633, by debarring him from practise of law, fining him and severing both ears for his Puritanical castigation of dancing, hunting and play-acting. In 1637 the Star Chamber charged Burton, Bastwick and William Prynne with seditious libel. When they were, Chief Justice Finch[93] discovered that Prynne still had ear stumps which could be severed and they were!

By 1637 a popular movement against Laud's policies had grown.

John Lilburne

Late in 1637 officers, called *pursuivants*, of the High Commission arrested a young Puritan named John Lilburne. His story is most remarkable but its significance probably less than that attributed it by common lawyers. His persecution came towards the end not the beginning of the struggle against the *ex officio* oath and at the height of the popular movement.

Lilburne became a radical in religion, politics, economics, social reform and criminal justice and "his ideas were far ahead of his time".[94] In 1637 he was only 23 years of age, a clothier's apprentice, whose formal education had ended at about age 15. In the next twenty years he defied King, Parliament and Protectorate, challenging each with libertarian principles. He stood trial for his life four times, spent most of his adult years in prison and died in banishment aged 43.

Lilburne was first charged with shipping seditious books into England from Holland, including several thousand copies of a pamphlet by Dr. Bastwick. The case was turned over to the Attorney-General for prosecution on an order from the Privy Council. Two of his confederates, one of them John Wharton, had accused him in order to save themselves. Wharton was in his eighties, a veteran of the Puritan wars against the High Commission, who had been imprisoned no less than eight times for refusing to take the oath *ex officio*.

After holding Lilburne in gaol for two weeks the Attorney-General, Sir John Banks, sent him to Star Chamber but did not provide him with a bill of complaint setting forth the charges. Lilburne refused to take the oath as Star Chamber, following the High Commission procedure, required him to do.

Lilburne did not refuse on the basis it was illegal to require him to answer questions but on the basis it was illegal to administer the oath and interrogate him without proper presentment. For his contempt, Lilburne was sentenced to be whipped through the streets on the way from Fleet Prison to the pillory.

On 18 April 1638 the sentence was carried out. His defiance and physical courage are the source of his fame. People lined the streets to watch the spectacle of his flogging, "moaning as they thrilled to his beating and spiritual exultation".[95] Tied to the back of a cart and stripped to the waist, he was lashed every few steps with a three-thonged whip tied full of knots. When placed in the pillory a multitude of people thronged about, shouting words of encouragement. The hole for his neck was so low that he was forced to stand stooped over, unprotected from an "exceedingly hot" sun. Lilburne's own account is preserved in Howell's *State Trial Series*.[96] While in the pillory he addressed the crowd, urging them to read Dr. Bastwick's books, and after it, he was returned to prison. The Star Chamber ordered more punishment for his behaviour in the pillory.

Lilburne's physician was denied access to him and when he was finally admitted found him "in extreme violent fever . . . to the extreme hazard of his life". He was starved for the first ten days and kept chained in a dungeon and without a bed for five weeks.

Lilburne published nine pamphlets during his three years in prison on the first occasion. In his career he published some ninety.[97]

In 1639, while Lilburne was still in prison, others such as Thomas Foxely, a London minister, and John Trendal, a Dover stonecutter, followed his example of refusing the oath.

In the spring of 1640 Charles I called his first Parliament in eleven years. Civil war was becoming closer as a result of the policies fashioned by Laud and Stafford. On 22 October 1640 a mob of some "two thousand Brownists" broke into the court of High Commission as it was preparing to sentence a Separatist and tore the room apart shouting they would "have no bishops nor High Commission".

Six days after the opening of Parliament, Oliver Cromwell, one of the new members from Cambridge, made his maiden speech

on behalf of liberty for John Lilburne. Levy observes[98] that the long Parliament was dominated by Puritans and common lawyers who, when it met, were determined to free victims of oppression, punish their oppressors and institute reforms in Church and State.

In November 1640 Lilburne was released and in 1641 received at Parliament's hands an indemnity of £3,000. Shortly after, Prynne, Burton and Bastwick were also set free and escorted triumphantly by troops and joyous crowds to London. Laud and Stafford were quickly impeached and imprisoned while other high Government officers, including the Lord Chief Justice of England, fled to the Continent.

Petitions from London, Kent and elsewhere were sent to the Commons urging abolition of the oath *ex officio* "and other proceedings by way of inquisition, reaching even to men's thoughts".[99]

Abolition of oath *ex officio*

On 5 July 1641, Charles I reluctantly assented to bills wholly abolishing the courts of High Commission and Star Chamber.[100] The Act against the Star Chamber recited Chapter 29 of *Magna Carta* and four 13th century reconfirmations that endorsed common law procedure as the only procedure when life, liberty or property were at stake.

The Act against the Court of High Commission made it a criminal offence for any person exercising ecclesiastical jurisdiction to fine or imprison or force any person to take "any corporal oath, whereby he or she shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or accuse him or herself of any crime" etc . . .

Thus finally the oath *ex officio* was abolished and the rights against compulsory self-incrimination established — *but only in the ecclesiastical courts.* It did not, in any way, touch criminal procedure in the common law courts where, in the preliminary examination, it was still ordinary practice to press a suspect to confess guilt and in the prosecution before a jury his interrogation was still the focal point of the trial.[101]

However, Sir James Stephen observes: "After 1640 the whole spirit and temper of the criminal courts even in their most irregular and revolutionary proceedings, appears to have been radically changed from what it had been in the preceding century to what it is in our day".[102]

The first sign of respect accorded the right against self-incrimination came in 1642 when twelve bishops (*the case of the Twelve Bishops*)[102a] were put on trial for high treason by the Commons because they claimed that during a period of their exclusion from the long Parliament in 1641 all laws, votes and resolutions made then were null and void.

Lilburne's dissent

After Lilburne returned to London on an exchange of prisoners he became a confidante of Cromwell, returned to the front and became a Lieutenant-Colonel. In time, however, he became increasingly disillusioned with the Parliamentary programme and in the spring of 1645 he resigned from the Army, exchanging his sword for his pen.[103] He became opposed to the intolerance of Presbyterianism and rose to the leadership of those who were contemptuously called the "Levellers". They proposed a written constitution to define the government of England, abolish arbitrary power, set limit to authority, remove grievances and a whole host of egalitarian measures (although they did not support franchise for "paupers and servants"!). Lilburne fell out with Dr. Bastwick, his former friend, and William Prynne, to whom once he had been a law clerk.

As a result of his criticisms, an investigation committee of the House of Commons was responsible for him being imprisoned in Newgate in 1645. He was released shortly after but again re-examined as a result of his writings.

During the winter of 1646-7 people in London and members of the Army, the two sources of Leveller strength, debated politics and religion.[104] In 1647 Lilburne was committed to the Tower for a short time for making accusations against Cromwell. In February 1649 he was again imprisoned but acquitted by the jury of sedition at his trial in the following October.

In 1652 Lilburne was banished but returned from the Low Countries in 1653 and arrested and tried. On his acquittal, which was popularly received, he was nevertheless kept in captivity for "the peace of the nation". He was detained successively in the Tower, Jersey, Guernsey and Dover Castle, but set free in 1655 on giving security for good behaviour. He died in Kent on 29 August 1657.

Levy[105] says that from Lilburne's time, the right against self-incrimination was an established respected rule of English law generally. The right was extended to witnesses at the trial of King Charles I in 1649 and at the trial of Adrian Scroop in 1660, when the newly-restored Stuart regime prosecuted the Puritan regicides for treason. Chief Justice Kelyng told Scroop "you are not bound to answer me but if you will not we must prove it".

From then on it appears to have been recognised in a number of trials, for example, of three Quakers in 1662, William Penn and William Mead[105a] in 1670, Francis Jenkes[105b] and others.

After the deluge

The right against self-incrimination was the cry of the social revolutionaries led by the Parliament and Puritan alliance, which, when victorious, stamped it with permanency. The courts became sufficiently indulgent towards the right to clothe it with new glosses that widened its scope.[106] They came to apply it to questions that exposed one to disgrace or infamy and in civil cases to questions that might require disclosure of information which could be used against the person in a criminal proceeding (and so became applied in the Courts of Chancery and Exchequer), and even with respect to questions that might expose one to the forfeiture of property and penalties.

Procedural reforms at the end of the 17th century altered the imbalance between Crown and accused in a criminal trial to allow the defence to rely on witnesses. Restrictions continued in capital cases. In 1696 an Act of Parliament gave the defence a right to *subpoena* witnesses and offer their testimony under oath. It also guaranteed the accused a copy of the indictment and the right to make his "full defence by counsel learned in the law".[107]

Stephen[108] says that after the revolution the administration of criminal justice became "dignified . . . decorous and humane; and . . . it was mainly left in the hands of private persons (to prefer charges), between whom the judges were really and substantially indifferent . . ." Therefore the circumstances provoking a need to claim the right against self-incrimination substantially diminished.

Disqualification for interest: accused an incompetent witness

At the same time the principle of disqualification for interest, which emerged first in civil cases, gradually extended to criminal cases, rendering the accused incompetent to be a witness in his own cause.[109] It was thought that a person having an interest in the outcome of a trial would be so tempted to perjury that his testimony was untrustworthy. No one could have a greater interest than a party criminally accused. The oath was still regarded as sacred and therefore persuasive. However, an accused was permitted unsworn to speak on his own behalf.

The competency of an accused to testify under oath was not finally established in England until 1898.

Levy[110] says that the accused's incompetency, which was established at about the time when the right against self-incrimination became firmly secured, blended with the idea that he should be safeguarded against cross-examination that might elicit his self-incrimination. He says that it is difficult to say whether the interrogation of the accused at his trial ended altogether because of exaggerated indulgence of his right against self-incrimination or because his word was not trusted. The latter idea, in any event, buttressed the former.[111]

By the early 18th century the right against self-incrimination was supreme except in the preliminary examination of the suspect which continued pursuant to the statutes[111a] of 1554 and 1555, which authorised Justices of the Peace to examine suspects but not on oath. In 1848 a statute[111b] required the suspect to be present at the preliminary examination and gave him the right to cross-examine witnesses.

Fox-hunting and law

One of the first to draw attention to the shortcomings of the right to silence from the community's viewpoint was Jeremy Bentham. He pointed out that interrogation and

torture are not identical, that indeed questioning of a suspect is a necessary investigative tool. The right to silence, he claimed, stands in the way of justice but is of use to "criminals, delinquents, *mala fide* defendants . . ." He said its adoption produces the mischievous result of excluding "the very best possible sort of evidence" and admitting inferior and less trustworthy evidence likely to cause "misdecision", "failure of justice" and "delay, vexation and expense".[112]

In dealing with the rationale of the rule Bentham referred to "the old woman's reason" that it is "hard upon a man to be obliged to criminate himself" and the "fox hunter's" reason,[113] which "consists in introducing upon the carpet of legal procedure the idea of *fairness*, in the sense in which the word is used by sportsmen".

Writing from Tokyo in his earlier essay on the topic, John Henry Wigmore wrote:[113a] "And now what shall we say of this privilege today? It had a use once. Has it a use now? There was a demand for it three centuries ago, as a safeguard against an extraordinary kind of oppression, which, like witchcraft, has passed away forever. Is there a demand now? I think that the history of the privilege shows us that in deciding these questions we may discard any sanction which its age would naturally carry".

He concluded by suggesting, "Let us abolish the old privilege, and provide in its stead for a general freedom of questioning, establishing limits, however, in the shape of certain exceptions".

At the Commonwealth and Empire Law Conference at Sydney in 1965 the Director of Public Prosecutions, Sir Norman Skelhorn Q.C., expressed himself in favour of permitting adverse inferences from silence.

So also in June 1967 a committee of the English "Justice" issued a unanimous report on "the interrogation of suspects" recommending the abolition of the rule against self-incrimination and the introduction of a new procedure of "controlled compulsory interrogation before a magistrate" with a record of such interrogation admissible in evidence or any subsequent trial.

Speaking to the Bentham Club in 1968 on the same topic, Lord MacDermott[114] expressed himself in favour of a similar reform.[115] Professor Paul G. Kauper (University of Michigan Law School) sees in this idea an answer to the third degree and that it is not "violative of the privilege against self-incrimination".[115a]

In its *Eleventh Report* (Command Paper No. 4991) the British Criminal Law Revision Committee, chaired by Lord Justice Edmund Davies, recommended restriction of the "right of silence" so that adverse inferences may be drawn if exercised. However, the Royal Commission on Criminal Procedure chaired by Sir Cyril Philips (Command Paper No. 8092) in 1981 did not by a majority support the recommendation of the Criminal Law Revision Committee, and recommended that the present law on the right of silence in the face of police questioning after cautioning should not be altered.

In his *Proof of Guilt* (3rd ed., 1963) Professor Glanville Williams observed that there has been a swing of opinion against the common law rule in the United States and referred to the statement by the American National Commission on Law Observance (*Report of 1931*) that the privilege "has come to be of little advantage to the innocent and a mere piece in the game of criminal justice". This is similar to the observation of Sir James Stephen[116] that the rule is "highly advantageous to the guilty".

In its *Criminal Investigation Report No. 2*, (Parliamentary Paper No. 280) the Australian Law Reform Commission of 1975 recommended against change. But in its recent *Research Paper No. 15* on its Evidence Reference the matter has been re-discussed and the proposal left open. Ironically, however in its *Research Paper No. 16* on Privilege in relation to the same reference the Law Reform Commission proposes that the privilege for witnesses be abrogated, their evidence, however, not to be used in subsequent proceedings against them. Any apparent contradiction in policy can, I think, only be explained in terms of current politics and emotional heat generated by the topic.

The no change stance was adopted by the *Report on Criminal Procedure in Scotland* (Command 6218, 1975) (the Thompson Committee) and taken by the Committee to examine the Beach Report in 1978 (the Norris Committee).

On the other hand, the South Australian Criminal Law and Penal Methods Committee[117] in 1974 expressed itself in favour of availability of adverse inferences, as also did the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (the Lucas Committee) in 1977.

In 1978 the New South Wales Law Reform Commission (*Report on the Rule Against Hearsay*) recommended no inferences should be drawn from silence on police questioning but in its unpublished working paper *The Accused as Witness* in the same year it recommended that inferences should be permitted from silence of an accused in court.

The unsworn statement

The *Criminial Evidence Act* 1898 enabled the accused for the first time in England to give evidence on oath in all cases. The Act expressly retained the right of the accused to make an unsworn statement. This derived from the time when the accused had not been able to give evidence and the practice which appears to have developed by the judges as a means of permitting the accused at least to say something in his defence. The Criminal Law Revision Committee in 1972 (Command Paper No. 4991 (11th Report, para 104)) recommended its abolition. This recommendation has been endorsed by the Royal Commission on Procedure 1981 (Command Paper No. 8092 para 4.67).

In Australia the right of the accused to make an unsworn statement was abolished in Western Australia by an amendment to its Evidence Act in 1976, by Queensland in 1975 and the Northern Territory in its new code to operate in 1984.

The right to make an unsworn statement was abolished in New Zealand in 1966 (*Crimes Amendment Act* 1966 s. 5, *Crimes Act* 1961 s. 366A (in summary proceedings, the *Summary Proceedings Amendment Act* 1973 s. 3).

In Canada the unsworn statement was not preserved by its enactment which gave the accused the right to testify (*Canada Evidence Act* 1893).

The right of an accused to make an unsworn statement is thus preserved in New South Wales, South Australia, Victoria and Tasmania. In Report No. 11, the Victorian Law Reform Commissioner, Sir John Minogue, in 1981 recommended retention of the right in Victoria.

In my view the right to make an unsworn statement should be abolished. There is no better statement of the reasons than that expressed by the Royal Commission on Criminal Procedure (Command Paper No. 8092, 1981) para 4.67:

"Although it is of relatively long standing, its purpose has long since gone. And there are some positive objections to it. It provides an opportunity for the accused to engage in attacks on the prosecution or upon his co-accused, which cannot be tested in cross-examination. Its status is unclear and may be confusing to a jury and Magistrate; since it is not on oath and cannot be tested by cross-examination it is not formal evidence. But the jury can scarcely ignore it, *and have to be instructed merely to make of it what they wish.* In our view, this is extremely unsatisfactory" (my emphasis).

In Victoria, the accused more often than not makes use of the right to make an unsworn statement.

In its *Third Report*, July 1975 the Criminal Law and Penal Methods Reform Committee of South Australia recommended that the right of the accused to make an unsworn statement in South Australia be abolished. (See also Neasey J. expressing the same opinion, 43 A.L.J. 482, and Fullagar J. in *R. v. Lane*, Court of Criminal Appeal, unreported, Victoria, 22 April 1983. In 1983 Beach J. in Supreme Court of Victoria also, from the Bench, expressed the same opinion).

Conclusion

The law about silence and unsworn statements is substantially the fortuitous product of long past religious social and political upheavals. Perhaps that does not necessarily make it bad, but might explain why, as I think is the case, its operation has failed to satisfy the needs of today's community.

It is accepted that compulsion of suspects or accused to answer questions is incompatible with a civilised system of justice. But the law may be seen as irrational and socially mischievous where it disallows consideration of potentially inculpating conduct, such as ominous silence, in the circumstances here

considered. It is not as though the pertinence of that conduct is in dispute, for the law acknowledges as much by allowing, as it does, its consideration in analogous circumstances, for example those which give rise to an "adoptive admission".[118]

The history to which I have referred is conceivably enlightening in two ways — one as revealing that the right to silence was not historically part of the philosophy of the law and the other that probably its presence in the law is unintentional.

As to the latter, it would seem that the unavailability of adverse inferences from silence really stems from the actual wording of the Judges' Rules, even though they were merely the subject of advice, administrative and not law (see *R.* v. *Voisin* (1918) 1 K.B. 531). In advising the Rules, the judges clearly did not advert to the distinction, not readily apparent, between a right to silence and a right not to be compelled to answer questions. Once the judges advised, and it became the practice, that a suspect be informed he was not required to answer questions, the law was rationally obliged to hold that his consequent declination could not be used against him.

It would have been consonant with the law as it evolved after the Restoration for the judges to have advised, and the practice followed, that an accused be warned merely that he could not be compelled to answer questions but that his refusal might be used against him at his trial.

That is what should have happened and what should be the practice, save that a suspect should be only subject to adverse inference from silence if he has been given a choice to answer questions in the presence of an independent observer. A suspect should be entitled to ensure that what he says is accurately recorded and to require an environment which maximises his ability to do himself justice by what he says.

The matter is clearer in the case of the unsworn statement. It was permitted and later sanctioned by the legislature in times when an accused, rarely legally represented, was unfairly handicapped in the full presentation of his defence. The law, however, has undergone great changes. It is now the rule rather than the exception that an accused is legally represented. Not only is he now afforded full opportunity to present his defence but also carefully protected against the admission of evidence, even if probative, which has the inflammatory potential to interfere with fair assessment of the prosecution proof of particular charges.

But there has been a change also in the service to which the unsworn statement is put. The vogue, at least in Victoria, is for an accused to read to the court a statement carefully prepared with legal assistance, laced at times with matter which would be inadmissible from the witness box and assertions which generate complexity of the judge's charge.

But above all, there remains the practical impossibility of assessment by a tribunal of fact of a statement of facts untested by cross-examination. The standard direction in this regard provides little, if any, assistance, casting on the jury, as it does, the task of making what it will[119] of that which the accused has said from the dock, without knowing how that function can sensibly be discharged.

The fair trial safeguards now provided by the law render it unnecessary to retain this vestigial anomaly.[120] ■

Footnotes

1. *"Nemo tenetur seipsum prodere"*, John Henry Wigmore 5 *Harvard Law Review* 71. **2.** Williams, G., *The Proof of Guilt* (3rd ed. 1963) p. 49. **3.** Sydney Faculty of Law, Institute of Criminology Proceedings 1973-4 No. 17, p. 36. **4.** Williams, *op.cit.* p. 8. **5.** 61-62 Vict. c. 36 s. 1(h). **6.** Charles H. Randall Jnr., "Sir Edward Coke and the Privilege Against Self Incrimination". *S. Carolina Law Quarterly* 8, 417 at 429. **7.** 12 Geo III Cap. 20 (1772); 29 Statutes at Large 11, 29. **8.** 7. and 8 Geo IV Cap. 28 (1827); 67 Statutes at Large 165. **9.** *A History of English Law* (1927) Vol. 1 at p. 154. **10.** *Privilege against Self-Incrimination in England and Canada* (unpublished doctoral thesis) Edwin A. Tollefson. Dr. Tollefson, Professor Law at University of Saskatchewan, submitted his doctoral thesis on the above subject at Oxford in 1975. A copy has been obtained from the Bodleian Library Oxford for the Victorian Supreme Court Library and is now available there. **11.** *Sorby* v. *The Commonwealth* 57 A.L.J.R. 248; *Pyneboard Pty. Ltd.* v. *Trade Practices Commission* 57 A.L.J.R. **12.** *Morris & Anor* v. *The Police Service Board.* **13.** Gim L. Teh, "The Criminal Suspect's Right to Silence: a Hallowed Shibboleth" 197 *University of Tasmania Law Review* 113. **14.** Tollefson *op.cit.* p. 1. **15.** Vol. IX, p. 199. **16.** Kemp, J. A. "The Background of the Fifth Amendment in English Law: A Study of its Historical Implications" *William and Mary Law Review* 2, 247. **17.** Levy, L. W. *Origins of the Fifth Amendment: The Right Against Self-Incrimination*, O.U.P. (New York) 1968, p. 5. **18.** Plucknett, T. *A Concise History of the Common Law* 3rd ed. (1940) p. 11. **18a** 1939 *Encyclopaedia Britannica* — Parliament. **19.** Tollefson *op.cit.* p. 4. **20.** Levy *op.cit.* p. 5. **21.** Maguire, M. M. "Attack of the Common Lawyers on the Oath *ex officio* as Administered in the Ecclesiastical Courts in England." Mary Hume Maguire in *Essays in Honour of Charles H. McIlwain* (Cambridge, Mass., 1936) pp. 207-8. Mrs. Maguire, under her maiden name Mary Ballantine Hume, submitted her Ph.D. thesis to Radcliffe College on the subject "The History of the Oath *ex officio* in England". She was well known as an historian and teacher until her death in March 1979 at the age of 81. She was born in Ahmednagger, India, going to America at the age of 12 to live in Springfield. She obtained her M.A. degree from Columbia University in 1919 and her Ph.D. from Radcliffe College in 1923. Her work on this aspect of English history is highly regarded and frequently referred to by other scholars as containing material which qualifies the views expressed by Wigmore in his earlier contributions 5 *Harvard Law Review* 71 (1891) and 15 *Harvard Law Review* 610 (1902). The reference under this number is at p. 203. **22.** Plucknett *op.cit.* p. 15. **23.** *Ibid.* **24.** Levy *op.cit.* p. 9. **25.** Rogge, O. J. "Proof by Confession" *Villanova Law Review* (1966) No. 1 p. 1 at p. 4. **26.** Plucknett *op.cit.* p. 18. **27.** Thompson, F. *Magna Carta: Its Rise in the Making of the English Constitution 1300-1629*, p. iv. **28.** Rogge, *op.cit.* p. 6. **29.** *Ibid.*, p. 7. **30.** Maguire, *op.cit.* p. 200. **31.** Wigmore 5 *Harvard Law Review* 71 at p. 73. **32.** Levy *op.cit.* p. 21. **33.** Maguire, *op.cit.* p. 205 ff. **33a.** Morgan, E. M. "The Privilege against Self-Incrimination" Vol. 34 1949 *Minnesota Law Review* 1. **34.** Randall, C. H. Jnr, "Sir Edward Coke and the privilege against Self-Incrimination (1955-6) 8 *South Carolina Law Quarterly* 417 at p. 423. **35.** 9 Edw. II Stat. 1 (1315-16); 1 Statutes at Large 338; 2 Inst. 601. **36.** Levy, *op.cit.* p. 49. **37.** 5 *Harvard Law Review* p. 75. **38.** Randall, *op.cit.* p. 424. **39.** Morgan, *op.cit.* p. 4. **40.** Levy, *op.cit.* p. 49. **41.** Kemp, p. 249. **42.** 5 *Harvard Law Review* p. 83. **43.** Vol. 8 *Wigmore on Evidence* (Rev. ed.) p. 269. **44.** 1958 *Temple Law Quarterly* 121 at p 131. **45.** 2 Hen. IV, c. 15. **46.** Tollefson, *op.cit.* p. 11. **47.** Maguire, *op.cit.* p. 208. **48.** Levy, *op.cit.* p. 58. **49.** *Ibid.*, p. 208. **50.** 2 Henry IV c. 15. **51.** 34 *Minnesota Law Review* p. 6. **52.** 25 Henry VIII, c. 14; 3 Statutes of the Realm 454, 455. **53.** Morgan, *op.cit. p. 6.* **54.** Levy, *op.cit.* p. 3. **55.** John Foxe; Acts and Monuments of the Christian Church Vo. 5 pp. 184, 221; Foxe's Book of Martyrs edited by Dr. A. Clarke M.A., Book IV p. 235, col. 1. **56.** Foxe *op.cit.* p. 221. **57.** *Ibid.*, p. 14. **58.** See also Riesenfeld, S. A.; "Lawmaking and Legislative Precedent in American Legal History" (1949) 33 *Minnesota Law Review* 103. **58a** *Leigh's case* and *Hynde's case* are referred to in 2 Brown and Gold 271; 12 Co. Rep. 26 at 27; and 3 Bulstrode 48 at 50. *Burrowes' case* is at 3 Bulstrode 48. **58b.** Kemp (p. 277) says that Coke twisted medieval precedents to fit his cause. Bentham (*Rationale of Judicial Evidence*, London 1827 Vol. V p. 264n) said Coke was as "inaccurate as he was garrulous" and often argued without any true regard for legal accuracy. W. S. Holdsworth (*H.E.L.* Vol. 5 p. 478) says that Coke's favourite expression was "out of the old field must grow new corn" and that he is accused of having invented precedents and making history support him in questions wholly unrelated to the past. **59.** Tollefson, *op.cit.* p. 12. **60.** English Historian and Assistant Keeper of the Public Record — *Encyclopaedia Britannica* 14th ed. 1939. **61.** Kemp, *op.cit.* p. 254. **62.** *Ibid.* **63.** *Ibid.* **64.** *Ibid.* **65.** *Ibid.* pp. 257-8. **66.** *Ibid.* **67.** *Ibid.* p. 261. **68.** *Ibid.* p. 262. **69.** Randall, *op.cit.* pp. 438-9. **70.** *Ibid.* **71.** Kemp, *op.cit.* p. 262. **72.** Levy, *op.cit.* p. 127. **73.** *Ibid.* p. 134. **74.** Kemp *op.cit.* p. 264. **75.** Levy *op.cit.* p. 154. **76.** *Ibid.* p. 168. **76a.** *Ibid.* p. 188. **77.** *Ibid.* p. 140. **78.** (1590) 4 Leonard 194. **79.** Moore 906; Croke 263. **79a** Randall: 8 *South Carolina Law Quarterly* p. 437. **80.** Tollefson *op.cit.* p. 18. **81.** *Lives of the Chief Justices*, Vol. 1 (1858 Ed) 239. **82.** Tollefson, *op.cit.* p. 20. **83.** Lord Campbell, *op.cit.* p. 251. **84.** *A History of the English Law*, Vol. 5 p. 427 (1945 Ed.). **85.** *A History of the Criminal Law of England*, Vol. 1 p. 333 Note 2. **86.** Kemp, *op.cit.* p. 275. **86a** Lord Campbell, *op.cit.* p. 279-80. **86b.** At the trial of the Earl of Somerset for the murder of Sir Thomas Overbury, Coke charged the grand jury about murder, in particular, murder by poisoning, adding that "poisoning was a popish trick". (Campbell, p. 280) At the trial of a Mrs. Turner, Coke said: "She had the seven deadly sins; for she was a whore, a bawd, a sorcerer, a witch, a papist, a felon and a murderer". **87.** Levy, *op.cit.* p. 257. **88.** *Ibid.* p. 259. **89.** *Ibid.* p. 261. **90.** *Ibid.* p. 264. **91.** Ratushny, E. *Self-Incrimination in the Canadian Criminal Process* p. 170. **92.** *Op. cit.* p. 257. **93.** Levy, *op.cit.* p. 271. **94.** For details of Lilburne's life and trials reliance is placed on Levy, *op.cit.* pp. 272 ff, also "John Lilburne; Democracy's Pillar of Fire" by Harold W. Wolfram, 1952, Vol. 3 *Syracuse Law Review* 213. **95.** Levy, *op.cit.* p. 276. **96.** 3 Howell State Trials 1315 (1637-45). **97.** Levy, *op.cit.* p. 278. **98.** *Ibid.* p. 279. **99.** *Ibid.* **100.** Act for the abolition of the Court of Star Chamber and Act for abolition of the Court of High Commission July 5, 1641 reconfirmed in 1661, 13 Car. II Ch. 12 S4 Constitutional Documents ec. Gardner pp. 186-9. **101.** Levy, *op.cit.* p. 282. **102.** *A History of the Criminal Law of England*, Vol 1 p. 258, 369-70. **102a.** 1642 State Trials IV 63. **103.** Levy *op.cit.* p. 286. **104.** *Ibid.* p. 295. **105.** *Ibid.* p. 313. **106.** State Trials VI 951. **107.** State Trials VI 1189. **108.** Levy *op.cit.* p. 320. **109.** *Ibid.* p. 231. **110.** Op.cit. Vol. 1 p. 426-7, 417-19. **111.** Levy, *op.cit.* p. 324. **111a.** 1 & 2 Phil. & M. C13 (1554) 2 & 3 Phil. & M. C10 (1555) See also Stephen H.C.L. 1, 216 et seq. 441; Holdsworth H. E. 4 IV 529; Plucknett: *Concise History of the Common Law* 5th Ed., 431. **111b** *Indictable Offences Act* (Sir John Jarvis Act) 11 & 12 Victoria C. 42. **112.** *The Rationale of Judicial Evidence; the Works of Jeremy Bentham.* Bowring Edition 1843 Vol. VI Book 2 Chap. IX pp. 332 ff. **113.** *Ibid.* **113a** 5 *Harvard Law Review* at p. 85. **114.** 1968 *Current Legal Problems* 1. **115.** Page 21. **115a** Vol. 30 *Michigan Law Review* 1224 at p. 1255. **116.** *Op. cit.* Vol. 1 p. 441. **117.** Chapter 7 pp. 100-7. Second Report 1974. **118.** See the recent discussion by the Victorian Court of Criminal Appeal in *R.* v. *Salahattin* [1983] V.R. 521; also *R.* v. *Smith* (1897) 18 Cox C.C. 470 at p. 471; *R.* v. *Christie* [1914] A.C. 545 at p. 554; *Weiderman* v. *Walpole* [1891] 2 Q.B. 534 at 539, 540; *Thatcher* v. *Charles* (1916) 104 C.L.R. 57; *R.* v. *Thomas* [1970] V.R. 674; *R.* v. *Stephenson* (unreported Victorian Full Court 21.10.75, on other matters in [1976] V.R. 316) and cases where a person answers selectively: *Woon* v. *R.* (1964) 109 C.L.R. 529; *R.* v. *Wyatt* [1972] V.R. 902; *R.* v. *Barron* [1975] V.R. 496; *R.* v. *Ireland* (1970) 126 C.L.R. 321. **119.** *R.* v. *Shimmin* (1882) 15 Cox C.C. 122, 68 *L.Q.R.* 463; *R. v. McKenna* [1951] S.R. Qd 299, also Prof. C. K. Allen; 69 *L.Q.R.* 22 at p. 25. **120.** See statement to this effect by Prof. Z. Cowen 68 *L.Q.R.* 464.