Held, (1) that the proposed line of questioning was not designed to elicit evidence that the complainer was of bad character in relation to sexual matters, and if any question of admissibility had arisen, it would have been at common law and not under s 274 (para 16); (2) that the trial judge had clearly applied the common law when deciding to refuse the questioning and had correctly concluded that it bore on a collateral matter which had no relevance to the particular circumstances of the charge. Appeal refused.

Generally previous convictions are not classed as relevant evidence but there is one exception in section 266 of the Criminal procedure Scotland act 1995:

(4) An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless—

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(b) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character or impugning the character of the complainer, or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution or of the complainer; or

(c) the accused has given evidence against any other person charged in the same proceedings

**Sexual history cases based on Sexual offences (procedure and evidence) (Scotland) Act 2002- Section 7.**



**<u>Dickie v HMA 1897 2 Adam 331</u>**

High court case. Questions whether it is competent in a rape case to dispute the chastity of the women alleged to have been sexually assaulted and to prove general bad repute at the time, and even to prove individual recent voluntary acts. The complainer had been charged with attempting to ravish and sexually assault Elizabeth Brown. Pleaded not guilty. There was a second diet where the complainer gave notice to the procurator fiscal that it was his intention to impeach the chasity of the main witness for the crown. Due notice was given of the times and places at which, and the persons with whom, the complainer proposed to prove that she had been unduly intimate, and copies of the said notice were duly lodged for the use of the Court.She was cross examined and they asked her

'Had you connexion with Dick at back of Mrs Hastie's house in summer and autumn 1895?' The question was objected to on behalf of the Crown as incompetent, but the objection was repelled. The question being repeated, the Sheriff-Substitute warned the witness that she was not bound to answer the question unless she chose.The complainer objected this, but the witness decided to answer, she declined the statement.  He was found guilty. Suspension refused.

**Corroborative evidence** is described as evidence which confirms or supports the direct evidence of a witness

**Direct evidence** can be circumstantial and an accused person can be convicted solely on circumstantial evidence- if all circumstances point to accused then it can be enough to convict.

The corroborating evidence must be independent of the primary source not just a repeat of the other evidence led.

**Corroboration by being at the crime scene**

The accused can be convicted on thin evidence as long as it is corroborated, as shown in **Armit v O'Donnell 1999 SLT 1035:**

The accused was found by police around midnight standing on a footpath beside premises where a window was broken. He was cautioned and asked about whether he had broken the window and he admitted that he had. There was no one else around.

Police called to disturbance at midnight, he is right next to the window and there is no-one else around. He is cautioned (you don't have to say anything but what you do say may be used against you) He admitted to breaking the window. Admission (usually a source of evidence).

He was convicted on this evidence and appealed saying he suffered miscarriage of justice. The High Court refused the Appeal indicating that very little other evidence was required to corroborate an "unequivocal admission of guilt". There was corroboration because of the facts and the circumstances. He admitted to breaking the window. Police responded quickly, and no one else is around, as it has just happened.



It would have been different had Armit not confessed.

****Where you have a very clear admission of guilt, you don't need much by way of evidence to convict. It is not in your interest to admit guilt, so usually a clear admission of guilt can pass as truthful, strong evidence**.**

**Evidence which is NEUTRAL cannot corroborate-**

Evidence is neutral if it could prove guilt or innocence.

**Gallagher v HMA 2000 SCCR 634**

Appellant identified by complainer as having assaulted him. A week later accused found with blood on shoes (blood was not grouped). Accused admitted being in house with co accused and was seen running away before complainer found injured.

Complainer said clearly that Gallagher assaulted him- clear direct evidence. There was not really any immediate evidence found. Week later he was found with blood on his shoes, but it was not tested to see what type it was. He was interviewed and admitted to being in the

An example would be where A witnesses an assault and tells B who is then called as a witness to speak to the conversation.B would be giving hearsay evidence , even if A is called in the same trial to give evidence.

In civil cases such evidence is admissible but in criminal cases only secondary hearsay is inadmissible – primary hearsay is admissible.

The distinction between primary and secondary hearsay is rooted in the purpose of leading the evidence.- why the party relying on it wants to lead it. If you want to use the hearsay evidence to show what happened was true, it would be secondary hearsay. E.g you could not use hearsay to prove what they said is true but you can use it to prove a conversation took place- secondary hearsay.

If the purpose is to prove the truth of the content of the statement this would be secondary hearsay and inadmssible in criminal cases.

If the purpose is just to establish the content alone ( and not whether it is true or false)this is primary hearsay and is admissible in criminal cases.

**McLaren V McLeod – 1913 SC 61**- Conversation in brothel between two women who were not witnesses but whose conversation was overheard by police-hearsay evidence - prosecution wanted to use it to prove that what the women were talking about was true, but this was not allowed. Admissible to show fact of conversation not truth of contents.

**McLeod v Lowe 1991 JC 187**- People moved into hotel and left stuff in room indicative of drug use. Police recovered items and went to prosecute. In this case what the police said was relied on. When asked why they were at hotel, the police repeated hotel conversation (which is admissible). Sheriff ruled inadmissible but on appeal it was allowed- they could use it to explain what they did after the crime. In this case Sheriff refused to allow police to give evidence of what they were told by hotel staff which led to them detaining persons in terms of the Misuse of Drugs Act 1971.Held – Sheriff was mistaken and evidence could have been given by police or hotel staff.



**Ratten v R 1972 AC 378** – phone call to police made by murder victim asking for help allowed as this was the original. Defence appealed in the criminal murder case. At the trial a prerecording of a phone call made to the police by a victim asking for help was allowed, it wasn't allowed to support the murder but it was allowed to show that she made the phone call and was in distress.

Evidence of fact call made and showed her state at the time.

The rationale of the rule is that hearsay evidence is not the best evidence of what was said or written – it is sometimes viewed as an example of the best evidence rule, so the other party does not have the opportunity to cross examine those who made the statement or had the conversation.

Also the demeanour of the witness is lost- the court cannot judge whether the witness is credible if they are not giving evidence themselves - credibility cannot be judged.

It is not enough to merely suspect a person is committing an offence to search them- there must be reasonable cause to suspect.

The cause to suspect however need not be precise as shown in **Miller v Jamieson 2007 SCCR** 497- officer searched the accused for a weapon because something was bulging out of his waistband. Defence objected as it was not reasonable cause because he did not know what he had on him. Sheriff said evidence could not be admitted because there was no reasonable cause to search. Crown appealed successfully, as he was entitled to search when he thought something might be there. Something makes police suspicious.

If information is old, then the search cannot take place unless something in the present situation gives rise to reasonable cause to suspect. In addition to this, reasonable cause to suspect must be in the mind of the searcher- it does not apply if the person carrying out the search is only doing so because they were told to without any further information as to why.

## Statutory Authority- Search of Premises

There are three types of cases with regards to warrants;

1) Where there is a defect in the warrant which is fatal to its validity and thus any material seized in the search is illegally obtained and inadmissible.
2) Where the warrant is valid but the search has gone beyond the powers granted by it, and therefore again any material seized is illegally obtained and inadmissible.
3) Cases where the warrant is valid but the premises searched are not as specified in the warrant.



**Defect in warrant**

The warrant must be complete.

HMA v Cumming 1983 SCCR 15- there was nothing about where they wanted to search, the warrant said James Cumming instead of John Cumming. The wrong name was not fatal but the lack of specified address was.

HMA V Bell 1985 SLT 349- JP warrant. Name of address not correct in warrant section and was unsigned.- Not valid. The warrant was held to be invalid as it was unsigned.

If the name or address is wrong, then as long as you can say there is only one place it could be then it can be held as valid.

**Exceeding the powers of the warrant**

Where the warrant is valid and specifies the power of search

The power should not be exceeded or the material found will be inadmissible. Most of the cases referred to here cover accidental finds.

**HMA v Turnbull 1951 JC 96-** Evidence of further tax offences outwith the scope of the warrant inadmissible since no urgency and not found accidentally.

**Stage 1**

Before suspicion falls on an individual any questions can be asked without limit.

**Stage 2**

After suspicion crystallizes on an individual the rules of fairness kick in, with relation to questions, protect the individual. Stage 2 is the most controversial - any statement made should be voluntary and not induced by interrogation or cross examination

**Stage 3**

After a person is charged questioning is generally **prohibited**.

Interrogation and cross examination are defined by the Lord Justice General Emslie as "bullying or pressure designed to break the will of the suspect." In the case of Codona, leading and repetitive questioning was added to the definition of interrogation.

The purpose of the interview can be relevant – is it to extract a confession or for the purpose of investigating further?

If this to extract a confession this suggests unfairness whilst further enquiries is a legitimate line of questioning.

**Caution**

Once a person is placed under suspicion, stage 2 has been reached and if an interview is to be had, then the suspect must be cautioned under common law. The caution must consist of two elements-

- The accused must be notified of his right to remain silent
- They must be told that anything they do say may be used at trial.



If the suspect is not properly cautioned then any answers they give may not be admissible as evidence in Court.

There is no certain script or form this must take, as long as the suspect is made aware of both elements.

**Tonge v HMA 1982 JC 130-**given caution under statute- not the full common law caution. Two men detained, but Tonge in particular gave a long explanation, some of which incriminated himself. An objection was taken to the use of his statement because he did not have the common law caution. Appeal was successful because he should have had a common law caution. Where a statutory caution was said to be insufficient, Tonge is an important case and should be looked at.

HMA v Von 1979 SLT (N) 62- allegations of terrorism acts. He was never told he had the right to silence. He was in fact told it was an offence to withhold information regarding terrorist acts and therefore he gave them information. It was inadmissible.

A caution is not always required- the test of fairness will be applied in such cases. This is seen in **Pennycuick v Lees, Custerton v Westwater** and **Miln v Cullen 1967 JC 21**- Road

to do. Anderson was convicted and appealed- appeal was refused as it was said the authorisation covered what was done by the police.

Where a confession is accidently overheard by police it will be allowed as evidence in Court.

**Jamieson v Annan 1998 SCCR 278**- police overheard conversation in cells between the accused which was incriminating. They wanted to use it at the trial but because it was overheard accidentally it was held to be admissible as evidence. No question of inducement or unfairness therefore evidence allowed. Where the overhearing is set up the evidence will be inadmissible.

**HMA v Higgins 2006 SCCR 305**- regarded article 8 of the ECHR 1950. The police moved two suspects into cells next to each other, and posted a person outside in case they said anything which could be used against them. Incriminating comments were made and prosecution tried to lead them as evidence in the trial. Family and private life can apply in eavesdropping case but not an absolute right, can be interfered with if lawful and for prevention of crime.

High court said it was blatantly unfair. While the article 8 could apply, it is not an absolute right- could be breached if it was lawful- held it was not, inadmissible.

**Threats or inducements**

Obvious example is threat of violence or deprivation of liberty or offer of money or even drugs.

**Black v Annan 1995 SCCR 273**- Accused told by police he would be kept in custody until he cooperated then made incriminating statement. Accused told he would be kept in detention until he cooperated and was convicted- appeal court held it was unfairly obtained.

Evidence inadmissible – unfair



**Harley v HMA 1995 SCCR 595**- He was having an affair and did not want it to emerge. Told that the police would question her and would lead to her husband finding out about the affair unless he cooperated. Held to be unfair.

Police told accused they would visit a woman with whom he was associating in such a way that her husband would find out but if he cooperated they would not do that.

**Right to a solicitor**

The accused is entitled to legal advice prior to the interview.

All started with Salduz v Turkey- interrogated without legal advice- appealed due to breach of article 6- successful- see human rights. In Salduz held person in custody had right of access to solicitor prior to interrogation otherwise breach of Article 6.

> **Salduz v. Turkey,**
> *(2009) EHRR 49.*
> *European court of Human Rights*

You can waive your right to a solicitor.

**Jude v HMA**- Waiver of right of access to solicitor- accused didn't understand and didn't realise he was waiving his right.

HMA VP 2011 UKSC44
Accused interviewed without legal advice and told police of friend who could confirm his story. Police saw friend who gave them information which incriminated accused. Tried to argue everything flowed from the interview where he gave info about the witness with no legal advice.
Appeal – nothing inadmissible in what accused friend said and Salduz did not extend to any evidence gained as a result of the interview.

S15A Criminal procedure (Scotland) Act 1995
15A Right of suspects to have access to a solicitor
(1) This section applies to a person ("the suspect") who—
(a) is detained under section 14 of this Act,
(b) attends voluntarily at a police station or other premises or place for the purpose of being questioned by a constable on suspicion of having committed an offence, or
(c) is—
(i) arrested (but not charged) in connection with an offence, and
(ii) being detained at a police station or other premises or place for the purpose of being questioned by a constable in connection with the offence.
(2) The suspect has the right to have intimation sent to a solicitor of any or all of the following—
(a) the fact of the suspect's—
(i) detention,
(ii) attendance at the police station or other premises or place, or
(iii) arrest,
(as the case may be),
(b) the police station or other premises or place where the suspect is being detained or is attending, and
(c) that the solicitor's professional assistance is required by the suspect.
(3) The suspect also has the right to have a private consultation with a solicitor—
(a) before any questioning of the suspect by a constable begins, and
(b) at any other time during such questioning.
(4) Subsection (3) is subject to subsections (8) and (9).
(5) In subsection (3), "consultation" means consultation by such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone.
(6) The suspect must be informed of the rights under subsections (2) and (3)—
(a) on arrival at the police station or other premises or place, and
(b) in the case where the suspect is detained as mentioned in subsection (1)(a), or arrested as mentioned in subsection (1)(c), after such arrival, on detention or arrest (whether or not, in either case, the suspect has previously been informed of the rights by virtue of this subsection).
(7) Where the suspect wishes to exercise a right to have intimation sent under subsection (2), the intimation must be sent by a constable—
(a) without delay, or
(b) if some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is necessary.
(8) In exceptional circumstances, a constable may delay the suspect's exercise of the right under subsection (3) so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor.

float fell open and struck him. He reported the faulty back twice to employers but they did nothing about it. He had no corroboration of his position in the accident and how he had reported the fault previously. If corroborated evidence was available it should be used.

However over time the rule has been more liberally applied

**Thomson v Tough Ropes 1978 SLT (Notes) 5**- Tough ropes used rope making machines. Miss Thomson worked for them and became injured when a removable plate came off the machine and fell on her foot. She had a witness called Miss Beckett. Miss Thomson was a good witness but did not like or believe Miss B and didn't think she was a good witness. Held it was still possible to show it happened without successful corroboration. The judge believed the Pursuer but disbelieved the corroborating witness.

Even a failure to call witnesses who could have provided corroboration is not fatal –

**Mccallum v British Railways Board 1991 SLT 5** - Pursuer was a railwayman and said he had an accident at work. He was trying to link a railway carriage onto a coach and because he had to do certain things a metal bar from a door fell on his foot. He said another employee had taken a pin away which led to the bar falling. The judge in the first case said that the failure to call other witness was fatal because of no corroboration but on appeal it was said that the matters in dispute were only matters of fine detail and it could be accepted on the evidence of one witness.

Since the 1988 Act this position has been adopted.

**Airnes v Chief Constable of Strathclyde 1998 SLT (Sh Ct) 15**- Airnes said she had been punched by police officer, fallen on the ground and had an epileptic fit. She raised the action 5 years after incident. Was successful at first but Chief appealed saying there were a number of witnesses who could have been brought but she did not. Held it was a matter of who was credible and they were happy to rule on her statement alone. A witness to an assault was not called but this was not fatal – even although there was a five year gap between the incident and the hearing and this was pointed out by the court.



On the other hand, the outcome was different in the case of **Gordon v Grampian Health Board 1991 SCLR 213**- Gordon worked in Aberdeen royal infirmary and slipped in kitchen. Sued Grampian health board. There was evidence milk was spilled and two witnesses but at court one of the witnesses were brought but not called. So court could not rule what had happened and it was fatal to her case.

In this case the lack of corroboration was punished. It was also a case which concerned hearsay and is unlikely to be followed.

In practice the significance of the no corroboration rule lies in cases where there is no corroboration available. This is because where corroboration is available it will almost always be used since a party will use his best efforts to prove a case. Where a witness or evidence is said to be unavailable that does not mean there can never be corroboration it means that the corroborative evidence cannot be reliably produced Eg. A witness may have a poor recollection, be dead or not be able to be found

unsafe- their duty to maintain the clothes pole and the area in a safe condition for the residents.

- a clothes pole was not produced by Mrs Stewart, nor was any other evidence of the condition of the pole.

- pointed reference made by initial court and appeal Court to the fact that the pole was not produced.- appeal not successful.

**McGowan v Belling 1953 SLT 77**

- electric fire not produced

Belling made electric fires and the McGowans were suing them for a faulty electric fire which caused an actual fire in the house. Expert evidence disallowed- he never examined the fire which was considered in the issue.

Documentary evidence- in cases where this is fundamental to a claim, failure to produce the original document may be fatal to a claim.

**Inverclyde DC v Carswell 1987 SCLR 145**

In summary cause action for damages copies of day records produced. No explanation as to why the originals were not used and there was an objection- they were disallowed, because the original documents should have been available and no explanation was given for their absence.



**Scottish and Universal Newspapers v Gherson's Trustees 1987 SC 27**

Sales day book not produced – book of daily sales- pursuer argued not their fault – wanted to lead evidence of witness who had seen the document and ask them to speak about what they had seen- disallowed- cannot cross examine someone on their memory of a document if you are not looking at the evidence at the same time.

This issue can be resolved by a Joint minute between the parties agreeing that it is a true copy or where the document is authenticated as true copy under Section 6 of the Civil Evidence (Scotland) Act 1988. This is only allowed if the document is authenticated before the start of the proof or by seeking a declarator from the Court of Session proving the tenor of the lost document. This is a drastic course of action which requires a separate action to be raised.

**Hearsay**

There is no rule against hearsay evidence – this was abolished by section 2 of the CE(S)A 1988 so hearsay is competent.

Four problems arise from hearsay evidence in civil cases:

- The desirability of primary evidence
- Hearsay statements of children

**Oghonoghor v Secretary of State for the Home Dept 1995 SLT 733-** Nigerian lady came into country on visitors visa and stayed beyond date she was allowed to stay. immigration wanted to interview her and she asked if she could remain but was refused. interviewed about overstaying and cautioned. The officials decided she might have been an illegal immigrant in the first place and started to ask her questions about how she had come into the country when the issue was about how long she had stayed. In proceeding to deport her she argued the comments should be inadmissible because they were improperly obtained because she thought she was being asked about overstaying- successful.

Where criminal activity is not alleged the courts will admit the evidence.

Watson v Watson 1934 SC 374- Pursuer said he had discovered an open desk drawer and a torn up draft latter- clearly intended for person with whom he suspected his wife was committing adultery and wanted to use it to prove this. she objected saying letter had never been sent and was a torn up draft. Court said mere fact that it never reached its destination or was torn up did not prevent it from being admissible and it was allowed in evidence.

ECHR Article 8 also has a part to play- whether admission of evidence would cause conflict with right to privacy.

Statutory Documentary Evidence

Civil Evidence (Scotland) Act 1988 section 5

- business documents – no witness needed, section 6 – if authenticated by the author

These are treated as original (before proof)

Public Records – Registration of Births, deaths and

Marriages Act 1985 – extracts or abbreviated certificates are self proving



**<u>Privilege</u>**

Sometmes evidence can be relevant and admissible, but the witness ca have the right to refuse to answer questions. The witness is said to have the privilege of not answering the questions. This is more important in civil cases than in criminal.

It is an inviolable principle which cannot be ignored and must be followed. It does not prevent a question from being put to the witness, but it can prevent them from being obligated to answer.

There are 5 main situations where privilege applies:

- A non accused person has the right not to answer any questions which may self incriminate
- Marital communications privilege
- Legal adviser/client privilege