



1962

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### Recommended Citation

Gilbert G. Ackroyd, *Corroboration of Confessions in Federal and Military Trials*, 8 Vill. L. Rev. 64 (1962).  
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CORROBORATION OF CONFESSIONS IN  
FEDERAL AND MILITARY TRIALS

GILBERT G. ACKROYD†

## THE BACKGROUND

IN ENGLAND AND OTHER PARTS of the British Commonwealth which follow the course of the common law, no actual rule of law appears to have been developed which requires that confessions in criminal cases be corroborated in order to merit consideration by the jury in deciding the question of guilt or innocence. Instead, a rule of practice seems to have evolved in the beginning of the nineteenth century indicated by a number of cases in which it was judicially mentioned that an accused "ought" not to be convicted merely on the basis of his confession. This probably was an outgrowth of the feeling prevalent among common law judges in the late eighteenth and early nineteenth centuries that confessions were a weak form of proof in any event, subject to suspicions of foul play and to a number of economic and sociological pressures many of which were inherent in the social and legal systems of those times. Normally, these expressed judicial desires for corroborative proof, or, rather, for additional proof often amounting to physical or even visible evidence of the crime, were voiced from the bench only in homicide cases, but reliance upon confessions was limited and sometimes flatly refused in other cases as well.<sup>1</sup>

Wigmore, in his work on Evidence, suggests that the policy behind any rule requiring corroboration may be lacking in validity in what we like to describe as a more enlightened age, but there are those who would disagree with him. In fact, a majority of American courts feel that some rule of corroboration is required,<sup>2</sup> for although social and legal systems have changed considerably between the nineteenth and twentieth centuries, various pressures, particularly psychological and often undisclosed, upon an accused person to confess are still frequently present even if they do exist in a different and some-

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1. 3 WIGMORE, EVIDENCE §§ 865-866 (3d ed. 1940); 7 WIGMORE, EVIDENCE §§ 2070-2071 (3d ed. 1940); See, 10 Halsbury's Laws of England, 438, 439, 469 (3d ed. 1955).

2. 7 WIGMORE, *op. cit. supra*, Note 1, §§ 2070-2071.

times more sophisticated form. Indeed, it may be that the refinements of present day life and procedures have actually accentuated the problems in this field. In his travels, the author has noted that continental free European judges, like their American counter-parts, are also somewhat loath to put much trust in uncorroborated confessions, although in the continental systems, as in the British system, crystallized rules are often lacking in this respect.

In the United States, a positive rule of law requiring corroboration of confessions early made its appearance, apparently as a result of Greenleaf's writing on evidence and the work of other text writers. The rule took two forms: one, holding that the corroboration might be of any sort so long as it in fact supported the truthfulness of the confession, and the other, the majority rule, which had its genesis in the early English practice, requiring that the corroboration must specifically show a probability that the offense, the *corpus delicti*, had really been committed by someone, not necessarily the accused.<sup>3</sup>

The most celebrated early federal decision on the subject was the opinion of the late Judge Learned Hand in the case of *Daeche v. United States*,<sup>4</sup> decided in 1918. In that case, Judge Hand, in one part of his opinion, said, "The corroboration must touch the *corpus delicti* in the sense of the injury against whose occurrence the law is directed."<sup>5</sup> In a later part of the opinion, however, Judge Hand said, ". . . any corroborating circumstances will serve which in the *judges' opinion* go to fortify the truth of the confession. Independently, they need not establish the truth of the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of proof."<sup>6</sup> The opinion went on to indicate that the judge need not charge the jury on the subject of corroboration, for this was a matter for him to decide.

It can be seen that the first statement concerning corroboration seemed to follow the *corpus delicti* rule, whereas the second statement could be read as giving adherence to the rule requiring merely that the confession be corroborated. Consequently, the case caused much confusion through the years, and many courts quoted the first statement without referring at all to the second, or the second without mentioning the first. However, both the habit of careless interpretation of the *Daeche* opinion and Wigmore's suggestion that no rule of corroboration was necessary in the twentieth century were sharply taken to task in the case of *Forte v. United States*,<sup>7</sup> a District of

3. 7 WIGMORE, *op. cit. supra*, Note 1, § 2071.

4. 250 Fed. 566 (2d Cir. 1918).

5. *Id.* at 571.

6. *Ibid.* (emphasis supplied).

7. 94 F.2d 236 (App. D.C. 1937).

Columbia Court of Appeals case decided in 1937. Said the Court of Appeals:

For this premise [that there is even now a real danger of false confessions, coerced or psychopathic] there seems now, whatever may have been the state of that data in 1923, the date of Mr. Wigmore's work [2nd Ed.], substantial foundation not only in the annals of the courts in the sense of the reported decisions thereof, but also in dependable reports of criminological investigations.<sup>8</sup>

The court went on to say, after pointing out the frequent misquotations from, and misinterpretations of, the *Daeche* case:

. . . there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and [following what was described as the "better view" in the Federal courts] such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence of the *corpus delicti and the whole thereof*. We do not rule that such corroborating evidence must, independent of the confession, establish the *corpus delicti* beyond a reasonable doubt. It is sufficient . . . if, there being, independent of the confession, substantial evidence of the *corpus delicti* and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and the defendant's connection therewith.<sup>9</sup>

The conviction was reversed because there was no independent evidence of the scienter—knowing that the stolen vehicle alleged to have been transported in interstate commerce was in fact stolen. The court also pointed out that although the *corpus delicti* rule does not properly require independent evidence of the agency of the accused as a criminal, there are certain crimes involving scienter in which it is impossible to separate the scienter and the agency of the accused.

#### MANUAL FOR COURTS-MARTIAL PROVISIONS

It was against the above background that the rules governing corroboration of confessions appearing in the various Manuals for Courts-Martial were drafted. In the 1917 Manual,<sup>10</sup> the following statement appears, which was either written or largely influenced by Wigmore:

[There must be] some proof of the fact that the crime charged has probably been committed by some one so that there

8. *Id.* at 238.

9. *Id.* at 240 (emphasis supplied).

10. Para. 225(a).

will be some corroboration of the confession. It is not requisite that this outside evidence constituting proof of the *corpus delicti* shall be sufficient to convince the court beyond a reasonable doubt of the guilt of the accused, nor need it cover every element contained in the charge. For instance, where desertion is charged proof of absence without leave would be considered as proving the *corpus delicti* . . . and in cases of larceny and selling clothing, the fact that the property alleged to have been stolen or sold was missing is sufficient proof.

Obviously, this is the corpus delicti rule, but it constitutes only a half-way compliance with the rule. For example, the corpus delicti in desertion is not only absence without leave, but is absence without leave plus an intent to remain away permanently.

The rule in the 1921 Manual<sup>11</sup> remained substantially the same as the rule in the 1917 Manual, but apparently the drafters of the 1928 Manual had some doubts about the omissions in the rule as announced in previous Manuals. Although the rule in the 1928 Manual<sup>12</sup> retained the statement that the outside evidence need not cover every element in the charge, the desertion example was omitted and a significant change was made in the examples concerning larceny and unlawful sale. These examples now required a showing that the property was missing *under circumstances indicating that it was probably stolen or probably unlawfully sold*.

Although the 1949 Manual<sup>13</sup> contained in effect the confusing and inconsistent language of the 1928 Manual, the 1951 Manual<sup>14</sup> omitted the statement that the evidence of the corpus delicti need not cover every element in the charge. In 1953, in the case of *United States v. Isenberg*,<sup>15</sup> the Court of Military Appeals took notice of this change and came to the conclusion that it was the intent of the drafters of the 1951 Manual to adopt the rule of corroboration requiring full evidence of the corpus delicti, "and the whole thereof," as set forth in the *Forte* case. The *Isenberg* case is interesting in view of the provisions of earlier Manuals, for the offense was desertion and the only proof of the corpus delicti was absence without leave. The Court of Military Appeals held that this was not enough and that there would also have to be independent evidence of the intent to remain away permanently to support a conviction of desertion. And in *United States v. Mims*,<sup>16</sup> the Court of Military Appeals pointed out that the rule that evidence

11. Para. 225(c).

12. Para. 114.

13. Para. 127a.

14. Para. 140a.

15. 2 U.S.C.M.A. 349, 8 C.M.R. 149 (1953).

16. 8 U.S.C.M.A. 316, 24 C.M.R. 126 (1957).

of the corpus delicti need only show that the offense charged was probably committed by *someone* is not a rule to be blindly followed in every case, stating that: ". . . when the specification alleges use of narcotics that someone must, of necessity, be the accused."<sup>17</sup>

Thus it can be seen that the rule of the *Forté* case, at the moment at least, appears to be the rule of corroboration followed in the military. One question remains unresolved, however, and that is whether the law officer—the military trial judge—should charge the fact finding members of the court with respect to the rule requiring corroboration and require them to find in the course of considering their verdict whether or not the corroborative evidence is to be believed. Although the matter was raised by the defense before the Court of Military Appeals in *United States v. Landrum*,<sup>18</sup> the court refused to decide the point, there being other fatal error in the case. In passing, however, Chief Judge Quinn noted that a number of State and Federal courts have held that when the evidence of the corpus delicti is not substantial, the trial judge must instruct the jury that it must find a probability of the commission of the offense from the independent evidence before it can consider the accused's pre-trial statements. The late Judge Brosman, however, asserted that he thought that the question of corpus delicti was solely for the trial judge and not for the jury. Judge Brosman's position seems somewhat inconsistent with the stand taken by the Supreme Court of the United States in *Weiler v. United States*,<sup>19</sup> in which it was held that the question of corroboration in a perjury case where only one witness sustained the charge should go to the jury.

Prior to the Uniform Code and the 1951 Manual for Courts-Martial, the Naval rule as expressed in Naval Courts and Boards<sup>20</sup> left one to wonder whether the corpus delicti rule or the mere corroboration rule applied in the Navy. The Naval provision read:

It [the confession] must be corroborated by independent evidence. This evidence, however, need not be such as alone to establish the *corpus delicti* beyond a reasonable doubt, it is sufficient if, when considered in connection with the confession, it satisfies the court beyond a reasonable doubt that the offense was committed and that the accused committed it.

Thus far it could be said that the intent was to adopt the corroboration rule, but the next sentence seems to infer that the corpus delicti rule was meant. It reads:

17. *Id.* at 318, 24 C.M.R. 128 (1957).

18. 4 U.S.C.M.A. 707, 16 C.M.R. 281 (1954).

19. 323 U.S. 606 (1944), *Accord*, *United States v. Crooks*, 12 U.S.C.M.A. 677, 31 C.M.R. 263 (1962).

That the evidence of the *corpus delicti* should be introduced before the confession is good practice, but the court in its discretion may determine the order of evidence.

Whatever rule was formerly used in practice in the Navy is only of historical interest now, for all services are presently governed by the Uniform Code, the 1951 Manual for Courts-Martial, and the decisions of the Court of Military Appeals.

#### THE OPPER AND SMITH CASES

In 1954, the Supreme Court of the United States decided the case of *Opper v. United States*.<sup>21</sup> The petitioner had been convicted of conspiring with and inducing a federal employee to accept outside compensation for services rendered in a matter before a federal agency. Petitioner claimed that the independent evidence was insufficient to corroborate certain admissions made by him which had been introduced by the Government at the trial. The Court, after first determining that admissions as well as confessions required corroboration if they are to be used to support a conviction against the accused (this is also the military rule<sup>22</sup>), and after discussing the *Daeche* and *Forte* cases, stated:

However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. . . . *It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth.* Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.<sup>23</sup>

The case of *Smith v. United States*<sup>24</sup> was decided on the same day as the *Opper* case. This was an income tax evasion case in which the Government had proved its case by the net worth method plus certain extrajudicial statements of the petitioner. The defense had contended that these statements had not been sufficiently corroborated. The Court, after pointing out that in a crime such as tax evasion there is no

21. 348 U.S. 84 (1954). Mr. Justice Frankfurter concurred in the result. Mr. Justice Douglas believed the *Forte* case stated the better rule on corroboration.

22. Manual for Courts-Martial, United States, 1951, para. 14a.

23. 348 U.S. 84, 93 (1954) (emphasis supplied).

24. 348 U.S. 147 (1954). This was a unanimous opinion.

tangible injury which can be isolated as a *corpus delicti*, a crime committed merely by *someone*, and that in such offenses the corroborative evidence must implicate the accused in order to show that the crime had been committed (a distinction not mentioned in *Opper*), laid down the following rule:

In addition to differing views on the substantiality of specific independent evidence, the debate [concerning the type and content of corroboration] has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone . . . and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged . . . . We answer both questions in the affirmative. All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused.<sup>25</sup>

As in the *Opper* case, the Court found in the *Smith* case also that the Government had met its burden of corroboration.

The *Opper* and *Smith* cases plainly indicate that the Supreme Court of the United States has cast aside the *corpus delicti* rule in favor of the corroboration only rule, but the two cases considered together provide a much more lucid enunciation of that rule than heretofore has been available. In essence, the rule seems to be that for each element or requirement of proof of the offense which the Government intends to establish primarily through a confession or admission of the accused, it must provide independent corroborative evidence *sufficient to raise a jury inference of the truth of the portion of the confession or admission relied upon*. Note carefully the term "jury inference." This would seem to require an instruction to the jury on the matter in accordance with the principles laid down in the *Weiler* case.<sup>26</sup> However, this point was not raised by a request for instructions or otherwise in either of the cases, and the Court did not mention the matter. As might be expected, the *Opper* and *Smith* cases have been followed by the United States Courts of Appeals.<sup>27</sup> They have *not* been followed, however, by the United States Court of Military Appeals,<sup>28</sup> although Chief Judge Quinn prefers the *Opper* and

25. *Id.* at 156.

26. *Supra*, note 19.

27. See, for example, *Herman v. United States*, 220 F.2d 219 (4th Cir. 1955); *Braswell v. United States*, 224 F.2d 706 (10th Cir. 1955); *French v. United States*, 232 F.2d 736 (5th Cir. 1956). *But see*, *Cutchlow v. United States*, 301 F.2d 295 (9th Cir. 1962).

28. *United States v. Villasenor*, 6 U.S.C.M.A. 3, 19 C.M.R. 129 (1955); *United States v. Mims*, 8 U.S.C.M.A. 316, 24 C.M.R. 126 (1957); *United States v. McFerrin*, 11 U.S.C.M.A. 31, 28 C.M.R. 255 (1959).

*Smith* rule. Judge Ferguson bases his adherence to the corpus delicti rule on the ground that he believes it to be the better rule for the military, and former Judge Latimer based his adherence on the ground that he felt himself bound by the Manual for Courts-Martial.

#### OPPER AND SMITH RULE PREFERABLE

The author personally believes that the corpus delicti rule, as found in the Manual and as followed by the Court of Military Appeals at the moment at least, is in essence an artificial rule which could now be quite safely abandoned in view of the guidance furnished by the *Opper* and *Smith* cases. The corpus delicti rule has been found wanting whenever any complicated or difficult application of its principles is demanded. For example, we have seen that at least one of its precepts—that independent proof is required to indicate only that someone, not necessarily the accused, has probably committed the crime—cannot be applied in quite a large category of cases. Furthermore, only incidentally does it have anything to do with corroboration of the confession or admission, which after all is supposed to be its principal justification for existence. There are no clear, or even reasonably acceptable, standards for its application when one seriously tries to determine what the components of a *probability* that a crime has been committed really are, as distinguished from a possibility or proof beyond a reasonable doubt. The *Opper* and *Smith* rule, on the other hand, contains a clear, workable formula which can easily be applied by either judge or jury—independent evidence sufficient to raise an inference of the truth of the confession or admission. It is submitted that the object of this rule is the only justification for any rule of corroboration, for apart from questions of voluntariness of confessions or admissions, the only permissible test of their exclusion or admission should be their trustworthiness and this is a problem which should be attacked directly, as it is in *Opper* and *Smith*, and not obliquely as is the case under the corpus delicti rule.

#### CORROBORATING EVIDENCE

It would be a fruitless task indeed to attempt to catalogue the various types of evidence or factual situations which might or might not be sufficient to corroborate a confession or admission of the accused under either the *Forte* or the *Smith* and *Opper* rule, for both rules lay down only broad juristic principles which, of course, must be applied on a case by case basis. There is, however, at least one area in the field of sufficiency of corroboration that merits discussion on the

plane of legal theory, and that is the question whether a confession or admission can be corroborated by other evidence of a type which in turn requires corroboration under its own rule of corroboration.

In *United States v. Mounts*,<sup>29</sup> the Court of Military Appeals, in reversing the accused's conviction of a sex offense, held that an out of court utterance of the child victim's twin brother, which described the offense and was claimed to have been made by the brother while he was still in a state of excitement as a result of having observed the event, had erroneously been admitted in evidence under the spontaneous exclamation exception to the hearsay rule because no evidence "independent" of the exclamation had been introduced which tended to show that the shocking event had actually occurred. This independent corroborative evidence, seemingly, would have to amount to something more than the mere apparent mental perturbation of the declarant at the time the statement was made. The holding of the court, although partially based on an interpretation of some of Dean Wigmore's language in discussing the spontaneous exclamation rule, was principally bottomed on a similar decision of the Court of Appeals for the District of Columbia in *Brown v. United States*.<sup>30</sup> However, in the *Brown* case there was no confession by the accused, whereas in the *Mounts* case the accused had confessed and this confession had been admitted in evidence at the trial. This difference in the two cases was rather swiftly passed over by the court, without case or other citation, with the statement: ". . . the record is totally devoid of other evidence of the shocking event essential to admissibility—apart from . . . the confession of the accused, the acceptance of which hinges on the establishment of the corpus delicti."<sup>31</sup> The court then declared that both the spontaneous exclamation and the confession were inadmissible for lack of corroboration.

In *United States v. Anderson*,<sup>32</sup> the Court of Military Appeals again held invalid a sex offense conviction on the ground that the only evidence of the crime, aside from the accused's confession, was an "uncorroborated" spontaneous exclamation of the child victim. In addition to the *Brown* case, the court relied upon a later decision of the Court of Appeals for the District of Columbia in the case of *Jones*

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29. 1 U.S.C.M.A. 114, 2 C.M.R. 20. The Court held that the statement of the brother was also inadmissible on the ground that the record "was unclear" as to whether the statement was actually based on personal knowledge. The victim's own out-of-court statement was held inadmissible principally on the ground that it was calm and deliberative and not spontaneous. The confession having been held inadmissible as well, and there being no other evidence, the conviction was reversed.

30. 152 F.2d 138 (App. D.C. 1945).

31. 1 U.S.C.M.A. 114 at 121, 2 C.M.R. 20 at 27.

32. 10 U.S.C.M.A. 200, 27 C.M.R. 274.

*v. United States*.<sup>33</sup> An examination of this decision, however, reveals that in this case also no confession of the accused had been introduced in evidence. In *Anderson*, the court stated that the appellate Government (Navy) counsel had "conceded" that the confession should be considered to be uncorroborated if the spontaneous exclamation was held inadmissible. Chief Judge Quinn dissented on the ground that he thought there was independent evidence of the spontaneous exclamation apart from the confession.

One might ask if the federal courts would adopt the same attitude as the Court of Military Appeals concerning the question as to whether a confession could corroborate a spontaneous exclamation and the exclamation could in turn corroborate the confession, thus making both admissible. It is doubtful that the federal courts would follow the Court of Military Appeals in this regard. In *Fountain v. United States*,<sup>34</sup> the Court of Appeals for the District of Columbia had before it a case in which the accused had been convicted of an assault with intent to commit rape upon a female child but had been acquitted of a charge of taking indecent liberties with the same child. The accused, in his "confession," had admitted the indecent liberties but had denied the assault with intent to commit rape. The child's spontaneous exclamation, introduced in evidence through the testimony of adults since it was ruled that she was incompetent to testify, was corroborated only to the extent of the facts admitted in the confession, for there was no medical testimony, no physical markings, and apparently no eyewitnesses. Accordingly, the court reversed the conviction of assault with intent to commit rape, *for as to this crime* there was no confession to corroborate and the spontaneous exclamation as to assault with intent to commit rape was itself uncorroborated. With respect to the indecent liberties charge, however, the court, in what must be considered dicta in view of the accused's acquittal, held that a conviction of indecent liberties would have been proper and said:

*Absent some such proof [medical testimony or physical markings] in this case, the confession, taken separately, fails to establish a carnal knowledge case for it deals with an exciting act which rendered the child's statements of evidentiary value only as to the indecent liberties count.*<sup>35</sup>

There would seem to be no reason from any legal, ethical, or psychological standpoint why a voluntary confession of an accused should not be sufficient to corroborate an apparently spontaneous ex-

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33. 231 F.2d 244 (D.C. Cir. 1956).

34. 236 F.2d 684 (D.C. Cir. 1956).

35. *Id.* at 686 (final emphasis added).

clamation made by another, and vice versa, when both statements relate to the same offense. When a confession is shown to be voluntary, the only logical purpose in requiring corroboration, under any of the rules of corroboration, is to allay suspicions that the inculpatory statement might have been untruthful due to factors operating upon the personality of the defendant other than outside force or persuasion. In other words, a voluntary or even pathological untruthfulness must be the principal concern here. Also, when determining whether a "spontaneous" exclamation is admissible, the primary object of the inquiry is whether the exclamation is in fact spontaneous—is in fact the result of an exciting event—for it is this very element which is the oath substitute and which thus makes the exclamation admissible as an exception to the hearsay rule. It is at once obvious that the confession is "other," "outside," or "independent" evidence of the exciting event with respect to the spontaneous exclamation, and that the latter exists quite independently and apart from the confession. Indeed, the two pieces of evidence spring from different sources, persons, and impulses. Parenthetically, speaking merely of the matter of order of proof, it should here be noted that a confession is not *inadmissible* because uncorroborated at the time it is offered, for the law requires only that it may not be considered by the jury in deciding the issue of guilt or innocence unless it stands corroborated after all the evidence is in.<sup>36</sup> Consequently, apart from a somewhat mechanical application of supposed "rules," the only possible rationale for denying corroborative force on a mutual basis to both the confession and the spontaneous exclamation would be some fear that there might be collusion between the makers of the two statements, an event most unlikely to happen considering the fact that in the ordinary case the parties will represent completely opposing interests. The coincidence of the two statements, springing from separate sources but both telling the same tale, should effectively dispel any qualms of possible fabrication.<sup>37</sup>

#### CONCLUSION

In conclusion, the author is of the opinion that, whatever rule of corroboration might be used in considering the admissibility of inculpatory statements of an accused person, the reason for the rule

36. 7 WIGMORE, EVIDENCE § 2073 (3d ed. 1940).

37. In *United States v. Knight*, 12 U.S.C.M.A. 229, 30 C.M.R. 229 (1961), the author, then Chief of the Army's Government Appellate Division, invited the Court to overrule its earlier decisions denying mutual corroborative force to confessions and spontaneous exclamations. However, since the decision in favor of the Government was on another ground — that the corroborative evidence of a spontaneous exclamation need only relate to *an* exciting event and not necessarily to the precise event charged — the question of mutual corroboration was not mentioned in the opinion, except perhaps inferentially in Judge Ferguson's dissent.

being employed must be kept in proper perspective in relation to the facts—and *all* the facts—of the case at bar. It would appear that the rule has no legitimate purpose other than affording to accused persons a protection from being convicted of confessed crimes which they have not committed or which have not been committed at all. The rule should not be permitted to become a breeding ground of undue legalism, nor should it be elevated to the position of occupying a high place in the norms of our free society, as has happened in the case of the right against self-incrimination and other rules springing from constitutional sources which are often applied, and perhaps not improperly so, for reasons of policy having little to do with justice in the particular case. With respect to the general problem of corroboration of confessions, the *Opper* and *Smith* cases have certainly provided an enlightened approach, but as has been indicated in various places in this paper a considerable amount of tidying up remains to be done in this field.