

Editorial

Maxwell and 'Silence'

The vexed issue of how far the law recognises a "right of silence", has resurfaced recently, with reference to fraud investigations, albeit in two quite different contexts.

In *R v Director of the Serious Fraud Office, ex p Smith*, the House of Lords allowed an appeal by the Director of the SFO from the Divisional Court's decision that a notice under section 2 of the Criminal Justice Act 1987 could be served after a person had been charged, but that a fresh caution had then to be administered. According to the Court, that caution, carrying with it the right to silence, would provide a reasonable excuse for refusing to answer within section 2(13).

In the Lords, Lord Mustill noted that the appeal raised important questions about what is "compactly, albeit inaccurately called 'the right of silence'". However, his Lordship, while conceding that there was a strong presumption against interpreting a statute as taking away the right of silence, at least in some of its forms,

found that statutory interference with the right was almost as old as the right itself. The latter was now in essence a development of the law of evidence relating to the admissibility of confessions, an issue that was not relevant to the present case.

If this decision gives scant comfort to devotees of the notion of an absolute right of silence, the rights and wrongs of the second instance where the "right" was invoked are even less clear. In December 1991, the House of Commons Social Security Committee resolved to extend its inquiry into pension funds to cover the events surrounding the operation of the pension funds of Mirror Group Newspapers and the Maxwell Communications Corporation; and to take evidence from representatives of the trustees of the Mirror Group pension fund, including Ian and Kevin Maxwell. Eventually, the Maxwell brothers appeared, represented by counsel – but declined to answer questions on the prescient grounds that serious criminal charges were imminent, and that public disclosure (particularly in the presence of television cameras) might be incriminating. The Committee,

overtaken by the general election, produced a Special Report (HC 353, 1991–92) calling for the Maxwells to be brought before the House "for their refusal to answer questions properly put to them by a Select Committee".

Kevin Maxwell had, meanwhile, failed in the High Court and the Court of Appeal to assert the privilege against self-incrimination in the context of questioning by a provisional liquidator pursuant to sections 235 and 236 of the Insolvency Act 1986.

The right of silence has entered the mythology of libertarian rhetoric. In its narrow manifestation, as an adjunct to the law of evidence, it has been substantially eroded by statute. And, looking at it more broadly, there is certainly no constitutional protection against self-incrimination, analogous to the US Fifth Amendment. The Social Security Committee was technically within its rights to press for answers; but whether it was wise in the circumstances to do so is very much another matter.