THE BEAMISH CASE: A REJOINDER

In the last issue of this Review, there appeared a critical discussion by Professor Payne, who is Professor of Law in the University of Western Australia, of my pamphlet "The Beamish Case". Ordinarily, I do not discuss assessments of my published work; but Payne's arguments could easily be quoted to support the continued imprisonment of Darryl Beamish for a murder of which I firmly believe he is innocent; that murder, having, in my opinion, been committed, in all probability, by Eric Edgar Cooke. The criticism thus demands a reply.

At the outset of his appraisal of my work, and again at the end, Payne accuses me of being in some way 'interested'.[1] Without clearly making any charge—he appears to be 'willing to wound, and yet afraid to strike', in Pope's words—the suggestion is conveyed that I first entered on my investigations with a commission to prepare an arguable case for Beamish. This is utterly untrue.

The papers first came to Melbourne to my then colleague, Professor Cowen.[2] He was asked to prepare an opinion on the case; not to any particular end, but to give an impartial opinion of an outsider as to whether a miscarriage of justice might have occurred. He mentioned, at tea, that he had the papers; and as it sounded an interesting case, I asked if I could look at them. He agreed, and I took them and read them through. Being appalled at what emerged from that reading, I told him that I wished to join him in signing the opinion, and indeed handed him some notes towards it. Later I signed the opinion, and later still, when it had been decided by Beamish's legal advisers to appeal to the Privy Council, I helped him comment on the notice of appeal. When the appeal failed, I determined to bring the matter to public notice. To further that end, and avoid anticipated cries of "Interest!", I renounced any question of royalties.

I see no reason to be ashamed of these activities or motives. Nor have I ever attempted to conceal them. Nor do I see that they in any

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1 (1966) 7 WEST. AUST. L. REV. 583, 604. Hereafter this will be cited simply as Payne.

2 Now Vice-Chancellor of the University of New England. In a personal letter to me, dated 15th May 1967, Professor Cowen expresses his agreement with the accuracy of the above account.

way disqualify me, as Payne suggests they do, from discussing the case objectively. After all, my first acquaintance with the case came from reading the whole of the evidence through and forming an opinion on it. This should, I would think, make my views rather more objective than those of three judges who, having read or heard part of the evidence and formed (and recorded) clear views on its implications, later assembled to decide whether the rest of the evidence could change their previous opinions and lead them to quash (or reverse) their previous recorded decision.

I now turn to the substance of Payne's criticisms. In dealing with these, I shall refer to the materials which he has used (the transcripts), and also to the transcript of the argument which took place on the hearing of the second appeal. This contains material to enable the making of an assessment of Payne's claims.

At various points Payne makes much of the failure of the High Court or the Privy Council to interfere.[3] This is strange, in view of his references to *Craig's* case.[4] There, Starke J. explicitly and briefly explains the requirement of a showing of special circumstances before the High Court will intervene. That Court may be of opinion that the State Court erred, and yet it will not necessarily intervene; this attitude it was still maintaining in 1964[5]—and, indeed, is still maintaining today.[6] The attitude of the Privy Council is, if possible, even more inclined to non-intervention. Moreover, many of the matters canvassed by me were never raised before these courts. The undisclosed medical evidence point, for instance, was not known at the time of the High Court appeal. It is thus totally misleading of Payne to speak of a 'constitutional process in which a jury and twenty judges have taken part'.[7] The melancholy fact is that no jury, and only three judges, have ever dealt with the whole case—the three judges who, in Western Australia, heard the second appeal. Which brings us back to the composition of the (Western Australian) Court.

Payne regards my criticism of this as extravagant. He does not deny my statement that before the hearing opened, the three judges had formed views that Beamish's conviction was soundly based, and that Virtue J., who had recently presided at Cooke's trial, had then formed

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3 See particularly Payne 583.
4 (1933) 49 C.L.R. 429.
5 See Woon v. R., [1964] A.L.R. 868, per Taylor, Menzies, and Windeyer JJ.
6 See Paterson v. Martin, (1967) 40 A.L.J.R. 313, per McTiernan and Menzies JJ.
7 Payne 604.

the view that Cooke was a palpable and unscrupulous liar. The statement could scarcely be denied, because the written records of the judges' own statements are unimpeachable. And I add that the Crown Prosecutor reminded the Chief Justice early in his argument that at the conclusion of Beamish's trial he (the Chief Justice) had referred to the 'amplitude' of the evidence supporting the conviction of Beamish.

Thus, on its face, we have a hearing before judges who start out with clear views in their minds which, unless eradicated, would produce only one conclusion. This, I would have thought—and especially so if that one conclusion is in fact reached—cuts clean across the principle that justice must both be done and be manifestly seen to be done. Indeed, it is clear beyond question that had a retrial been ordered and thereupon heard before a jury possessed of similar prior knowledge, a verdict of guilty by such jury would have been quashed.[8]

Payne attempts to counter this point in three ways. First, without saying why, he finds it difficult to accept my suggestion that judges possess the same feelings as other human beings.[9] Secondly, in a footnote,[10] he apparently suggests that there is a precedent for the judges sitting in the case of *Craig;*[11] but he omits to mention that in that case the judges took their seats at the request of Craig's counsel, or that Evatt and McTiernan JJ. in their dissent remarked on the lack of any precedent for such a course. Finally Payne says that I should have made the equally plausible and more charitable assumption that the judges would have been 'particularly anxious to correct any miscarriage of justice which may have occurred'.[12]

We can test whether this would have been an equally plausible assumption by considering the course of events at the hearing of the second appeal.

There was a brief preliminary hearing, to determine the broad course of procedure, on 27th February 1964. Beamish's counsel submitted that the Court should look at the affidavits filed in support of the petition for mercy which led to the hearing, and hear the Crown in reply, with (if need be) affidavits filed by it; but that the Court should not go outside these and the original trial materials, because if it did where would the enquiry end? The Chief Justice replied:

8 See R. v. Gash, [1967] 1 W.L.R. 474.
9 Payne 603.
10 Id. at 604, n. 11.
11 (1933) 49 C.L.R. 429.
12 Payne 604.

"I don't know. Any creature such as Cooke can say something on oath and you say that the Crown is to be hamstrung."

He was still doubtful about this when Beamish's counsel opened his submission on the first day of the main hearing (17th March). Counsel began by submitting that the Court must be satisfied that the fresh evidence had some degree of plausibility, and the Chief Justice asked: "How would you say that it must be satisfied—not merely by the oaths of this man Cooke?"

The phraseology of these remarks suggests an existing disposition to disbelieve Cooke. But it scarcely evinces a particular anxiety to correct a possible miscarriage of justice. And there was more to come.

When Beamish's counsel was addressing the Court on the points of agreement between Cooke's confession and the proven facts, the judges required him to vouch the facts from the precise words of the transcript; they did not exhibit any willingness to draw inferences from those words. Yet when the Crown Prosecutor made a corresponding address on points where Beamish's statements were said to be consistent with the evidence, he was permitted to argue that certain matters emerged from the evidence at the trial, though they did not appear from the words of the transcript. The Court pressed Beamish's counsel strongly for the precise words in the medical evidence to support his argument that there was a time lapse between the hatchet wounds and the stab wounds. They expressed themselves as unable to draw any inference from the medical evidence without further expert medical evidence.[13] Yet when the Crown Prosecutor suggested that a dog can be so winded by a blow from a door that it is rendered unable to bark for some time and yet show no sign of injury the next day, he was allowed to say that although there was no expert evidence to that effect he understood it to be so. Indeed, the Chief Justice used this same theory in his judgment. (Unfortunately, so much time was spent on discussing the condition and appearance of winded dogs

[13] The next morning, when he concluded his address, Beamish's counsel was able to point to a particular statement by the doctor precisely and directly establishing his point. No judge had, the day before, recollected that answer by the medical witness. Virtue J., however, had recollected, from the evidence of another witness, that a hole in the handle of the murder tomahawk had been drilled (Cooke said the hole was burnt in the handle); but he had not recollected, until it was pointed out to him by Beamish's counsel, that the same witness had said he had a habit of hanging the tomahawk on a wallboard in his garage (Cooke said he took the tomahawk from the wall, Beamish—eventually—from the floor). Quirks of memory such as these are almost inevitable if judges read through transcripts without the assistance of counsel to point out what is significant.

that no attention was paid to the absurdity of supposing that Beamish would drop everything to jam the dog between the door and the wall instead of killing it swiftly with the tomahawk that he was allegedly using to butcher the girl.)

Other instances could be given; of hearing evidence read out as to what Cooke's mother apparently thought (by the Crown Prosecutor), but not as to what his wife thought (by Beamish's counsel); of hearing direct testimony read out about the yacht and sails not being at the garage on the murder night (by the Crown Prosecutor), but not indirect (via Blight, the investigator) and contradictory testimony from the same witness (by Beamish's counsel)[14]—and I observe here that Payne, in his account of this point,[15] sees fit to omit any mention of the contradictory testimony of the witness; of the rejection of evidence that Cooke had a propensity to kill for wanton pleasure (from Beamish's counsel), but not of evidence as to his propensity to lie (from the Crown Prosecutor), or, for that matter, of the argument by the Crown Prosecutor that the murder showed features of sexual perversion that connected it with a sexually-frustrated lad like Beamish. And perhaps the most startling instance is that at one point, when the Crown Prosecutor tendered some affidavits and asked the Court for leave to refer to them, he was at once given permission, though Beamish's counsel had not yet had the opportunity of submitting an argument against this. (He was then allowed to make his argument, and the Court, after hearing it, allowed the Crown Prosecutor to read the affidavits, reserving a decision as to their admissibility until later.)

I digress here to say that this last material related to Cooke's first confession (and immediate retraction thereof) to the Button killing. Apparently the purpose was not to show the truth or falsity of that confession and the retraction, but merely the fact that they had occurred; the suggestion being that Cooke had followed the same pattern in the Beamish case. One would think that the fact of confession and retraction could have been established by a couple of sentences in an affidavit; but the evidence encompassed all the details

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14 I emphasise the word "hearing" in the above passage. All the evidence referred to was in the papers filed with the Court, so probably they read it. And the affidavit by Cooke's mother was eventually struck out. But the point is that in the one case the Court heard the evidence read to them by counsel, and in the other, they did not. I assume, of course, that material read out to a Court is likely to produce a stronger impression than material merely read by the Court for itself.

15 Payne 595.

of the Button confession and retraction and also the police reasons for saying the confession was untrue. This material—on which Beamish's counsel, who was not appearing for Button (or, for that matter, for Cooke), was thus unable to comment—was all read to the Court some two weeks before they embarked on the Button appeal, so that they began the latter after having already heard part of the Crown's opposing case. This weakens my confidence in the Button decision, about which I know nothing other than what appears in the Beamish papers or the press accounts. But since Payne has referred to it, I point out that Virtue J., during this part of the Beamish argument, observed that if the Button confession were true, that fact would not help to establish that the Beamish confession was also true. I agree; but then, I would also think if the Button confession were untrue, that fact would not help to establish that the Beamish confession was untrue.

To return to the conduct of the hearing, let me say that I think much of the trouble arose from the Court's method of deferring decisions on important points of evidence and procedure until they saw how they were getting along. The result was that by the time the picture began to become clear, the damage had been done. Jackson J. apparently saw several of the problems ahead of his brethren and was plainly troubled by them; unfortunately, his interventions did not stop the damage. Moreover, if each problem is discussed separately, the immediate resolution of it seems quite proper. But reading the whole transcript, the impression emerges that Beamish's counsel was much more restricted in the presentation of the whole of his case than was the Crown Prosecutor. Doubtless this was by accident and not by design; but a Court 'particularly anxious to correct a miscarriage of justice'[16] ought, I believe, to have guarded against these problems far more carefully than in fact it did.

As to the standard of credibility which the fresh evidence must meet, both Payne and I have reproduced the relevant passage from *Craig's* case.[17] I see a great difference between evidence of 'compelling' force and evidence merely 'calculated to remove the certainty of guilt' which had earlier been produced by other evidence. Payne sees no difference. I can take the matter no further; and I must decline to enter into debate about the Chief Justice's intentions (my concern is with what he said and did), or to indulge in word-play

[16] Id. at 604.
[17] (1949) 49 C.L.R. 429; and see Payne 583-5.

with such terms as "cogency", "relevance" and "plausibility". The matter is too serious.

Nor do I propose to re-argue the question of hearing witnesses and evaluating their testimony, instead of leaving that task to a jury. This question was complicated at the hearing by the Crown Prosecutor's wish to have the Court evaluate the written materials first, and then let him cross-examine Cooke if they declined to dismiss the appeal on the basis of those materials. He seems to have argued under the impression that the Court had decided to act in this way, which would have allowed him, as Beamish's counsel pointed out, to have two bites at his cherry; in fact, he had misunderstood the Court's position. I still think it is a pity that the Court's attention was not called to *Jordan,*[18] which was then, I think, the most recent reported decision. *Flower,*[19] decided long after the Court had finished sitting, contains no explanation of the decision to hear witnesses. Moreover, it is founded on the outright rejection of a principle[20] (advanced by Flower's counsel) which was accepted and applied by the High Court in *Davies and Cody.*[21] Although *Flower* is thus a doubtful authority for an Australian court, it does show that the defence witness heard by the appellate Court was called on the application of the Crown. This is not a parallel situation with that of Beamish. Cooke was cross-examined after the Crown Prosecutor, having specifically stated that

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18 (1956) 40 Cr. A. R. 152.

19 [1966] 1 Q.B. 146.

20 The principle argued for and rejected by the Court of Criminal Appeal was that even if the Court were utterly to disbelieve the evidence of Mrs Brown (to the effect that she had lied when giving evidence at the trial), it should still order a new trial because it would have been established that she was an unreliable witness and a jury should be given an opportunity to reconsider the evidence which she gave at the trial in that light. This should be contrasted with Davies and Cody, (1937) 57 C.L.R. 170, 184-5, where, faced with a situation where the chief prosecution trial witness as to the identification of the accused had retracted his evidence and then retracted his retraction, the unanimous High Court said:

> . . . the Crown chose to rely upon the man's evidence and press its probative value, and the judge's charge does not advise the jury to reject his testimony. It is now known that it is completely untrustworthy, and ought not to be allowed to enter into the reasons for any verdict of guilty. Whether the jury believed or gave any weight to it in fact cannot be known, but all the evidence implicating the accused depended upon evidence of identity, and, in this case, the jury was not . . . adequately instructed with respect to the matters which they should consider in determining the value of that evidence. In these particular circumstances the facts relating to Stevens' evidence [as to identification] are sufficient, in our view, to entitle the accused to a new trial.

21 (1937) 57 C.L.R. 170.

he was not at that juncture applying for leave to call him for cross-examination, was in effect ordered by the Chief Justice to call him and thereupon formally applied to do so.

As to the Court's rejection of evidence of Cooke's other killings, Payne has wisely abandoned the Chief Justice's view that these would have been inadmissible had Cooke been on trial for the Brewer murder; in view of *Straffen,*[22] it is an untenable proposition. It is also clear—and was assumed by the Court during the hearing—that Cooke could on his own trial for murder have introduced evidence of his other killings to exculpate himself by reason of insanity.[23] But Payne, echoing the Chief Justice, questions whether there is any principle or precedent allowing an accused person to introduce similar fact evidence 'in a self-serving way'[24] to inculpate another person. What the phrase "in a self-serving way" is supposed to mean I simply do not follow; frankly, I doubt whether it has any meaning in this context, and I do not know which "self" (Cooke or Beamish) was supposed to be being served. The only reference in the index of Wigmore's Treatise on Evidence to self-serving material is one to self-serving *statements,* which are rejected on the theory that they may have been fabricated by the accused for the purpose of providing himself with a defence (a theory which Wigmore rightly attacks as being fundamentally incompatible with the presumption of innocence). It can scarcely be suggested that Cooke's conceded murders were carried out for the purpose of helping him to prove that he killed Jillian Brewer! However, a glance at Wigmore's Treatise on Evidence[25] will quickly reveal that both principle and precedent amply support the right of an accused to adduce such evidence as that of the other murders.[26] There is no question of "indulgence" to an accused. To prevent him from putting in such evidence is simply to stop him producing evidence of his innocence.

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22 (1952) 36 Cr. A. R. 132.

23 See the trial of Christie in TRIALS OF EVANS AND CHRISTIE (Notable British Trials series).

24 Payne 587.

25 Paras. 68 and, more especially, 139, 140 and 141. See also PHIPSON, EVIDENCE para. 388.

26 See previous note as to principle.
As for authority, see Hurst v. Evans, [1917] 1 K.B. 352; State v. Scott, 235 Pac. 380; State v. Wallace, 22 S.E. 411; State v. Bock, 39 N.W.2d. 887. In some of these, the proffered evidence, which was ruled admissible, had a far less direct bearing than the rejected evidence of Cooke's other murders. See also THE TRIAL OF WILLIAM GARDINER (Notable British Trials Series).

But, says Payne, this ruling—contrary, as I have just shown, to both principle and authority—was of no bearing, because the Court assumed Cooke's responsibility for the other killings.[27] The Chief Justice certainly said he would assume Cooke's responsibility; but at the time it became relevant he forgot it. For he made special mention of two "incredible" aspects of Cooke's story: first, his statement that he was willing to return to the flat to kill the girl and risk the presence of another person there; second, his risking discovery by going in and out of the flat during the attack. Jackson J. also attached importance to the first point. (Neither judge noticed that it was equally incredible for Beamish to have risked discovery by masturbating himself outside the flat.) Yet both incredible features were proven features of Cooke's killing of Miss Maddrill.[28] And, for that matter, further investigation of the Maddrill killing would have revealed another point of likeness—the silence in each case of a dog that was a notorious barker. (In the Maddrill case the dog was in a garden adjacent to the back lane across which Cooke dragged the body.)

Before leaving this point, let me say that if evidence that Cooke committed sadistic murders and other sadistic crimes has no bearing on whether he committed a particular sadistic murder, I do not see why Beamish's propensity to commit non-sadistic assaults should show (as the Crown Prosecutor argued it did) that he may have committed a sadistic murder. Nor would I, on the same footing, see the relevance

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27 Payne 586.

28 Cooke confessed to the Maddrill murder (so far as I can gather) some time during his early interrogation at the beginning of September 1963. He was charged formally on October 25th 1963 with committing that murder. Detective-Sergeant Neilson, who laid this charge, stated in cross-examination on the hearing of the second appeal that there had been police enquiries into the circumstances before the formal charge was made; and from this I conclude that before charging him the police had satisfied themselves that his confession to this murder was true.

The crime was committed in the early hours of 16th February 1963. According to a statement filed by Sgt Neilson, Cooke had entered the flat to steal, found the girl asleep, wakened her, attacked her by striking her with his fist, and then strangled her with a length of flex. Subsequently, he dragged her body out of the flat, across a back lawn, through a gate giving onto a back lane, and left it on a lawn in front of another house. Before leaving it, he found an empty whisky bottle behind that other house, and placed it in one of the arms of the body. So far as I can gather he also attempted to rape the body. There was another girl sleeping in the flat at the time who heard nothing, and did not wake until the following morning.

Cooke was never tried on this charge of murder, nor did he bring any of the facts relating to it into the trial for the murder for which he was convicted and executed.

of Beamish's alleged tendency from an early age to injure animals and damage flowers—I say "alleged" because it was founded solely[29] on two childish pranks committed at the age of five or six. Still less do I see why psychiatric evidence that Cooke had an inordinate desire for attention should have been brought in to support the theory that he was telling lies to attract attention; and here I note that Virtue J. asked the Crown Prosecutor to let the Court have additional evidence to this effect, in the shape of the transcript of psychiatric evidence given at Cooke's trial for a different crime. I cannot say whether this was eventually put in, but from the Chief Justice's reference to Cooke's hare-lip and cleft palate I would guess that it was.

Little need be said about the medical evidence concerning the girl's ability to speak during the attack. Payne appears to agree that it should have been disclosed. But he thinks my suggestion that the High Court might allow a rehearing of the application for leave to appeal is absurd.[30] Why? In *Craig*,[31] the dissenting justices (the only ones to deal with the point) founded their decision to grant a new trial on the fact of non-disclosure of a witness whom, they conceded, the defence would probably not have called; the point being that the Crown cannot be permitted to decide what material shall be put in by the defence. I realise there is no precedent for a rehearing, but I decline to assume that the High Court would regard this as decisive.

Perhaps Payne's view on this is an expansion of his statement that the medical evidence had no bearing.[32] But the facts are against him. His long extract of Cooke's evidence shows that Cooke never abandoned his claim that the girl spoke after he had hit her on the head. Two of the judges expressly referred to this claim as being incredible. They founded their view in part on the belief that a severed windpipe would necessarily render speech impossible. Insofar as they did, the undisclosed evidence contradicts them. Insofar as they rested on an assumption that the girl must have remained unconscious throughout the attack, they were making an assumption of continuing unconsciousness which does not appear from the transcript, and which, I believe, does not accord with expert medical opinion.[33] Indeed, presumably

29 Solely, that is, so far as I know. If there is any evidence of these tendencies at a later age, no one has yet made it public.

30 Payne 603.

31 (1933) 49 C.L.R. 429.

32 Payne 603.

33 See TAYLOR, PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE (Vol. 1) 230 seq., especially 243 (12th ed. 1965); BOWDEN, FORENSIC MEDICINE 197

the question of the girl's consciousness was taken into account by the doctors who formed the view that speech by her was possible; they would, one supposes, not have been asked to give an opinion without seeing a full description of the injuries she had received.

Payne takes me to task for making three criticisms which he considers trivial.[34] These are, firstly, that the Chief Justice nowhere attaches any importance to the delay by the police of two months (during which nothing happened) in charging Beamish. His mistake as to the date of Beamish's arrest on the murder charge clearly shows that the delay was not present to his mind. Yet surely a delay of two months in which nothing was done by the police and nothing discovered by them to implicate Beamish suggests that they had little confidence in the worth of his confessions. Secondly, Payne sees nothing odd in the failure of the police to have Beamish's printed "confession" on the floor of the exercise yard photographed until it had disapeared. Likewise, and thirdly, he sees nothing odd in the failure of Sgt Leitch to preserve Beamish's sketch of the girl and the injuries to her head.

Let me state quite clearly the oddities. It is normal police practice to preserve carefully every scrap of documentation that is relevant. I cannot understand why this practice was not followed in these two instances, or, for that matter, in respect of the document in which Beamish denied the printed confession. Leitch explained that at the time he did not consider these sketches or writings important, or of any value; then why give evidence about them?

As for the Chief Justice's explanations of these two matters—which Payne is content to repeat—I do not see why traffic in the exercise yard, and possible swilling-down, should have left the printing completely untouched for three consecutive days but suddenly obliterated it on the fourth day. Nor do I think the phrase 'Beamish did not suggest that Leitch had misrepresented its [the sketch's] contents'[35] is a meaningful description of Beamish's evidence, though I concede it is literally accurate; what Beamish said was that Leitch told him what to draw and he then drew it.

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seq., especially 214 (2nd ed. 1965).

These works suggest that the head wounds inflicted on Miss Brewer would not necessarily have rendered her immediately unconscious; and that a person who has been rendered unconscious by such wounds may recover consciousness very rapidly. Notice here that the doctor did not suggest, either in his post-mortem report or in his evidence, that the brain tissue was injured.

34 Payne 591.

35 Ibid.

We now come to the different methods used by the Court for evaluating the two confessions. Payne says that of course there should be a double standard, because there is a 'natural tendency' to believe Beamish and a 'natural disposition' to disbelieve Cooke.[36] That there was such a disposition and tendency I readily agree—just as I agree that from the inception of the hearing the Court devoted most of its attention to 'exploring the weaknesses'[37] of Cooke's confession. Indeed, on this point we can have no better witness than the Chief Justice, who 'justified' the Court's proceedings as 'exposing to the public the perjurous machinations of Cooke, and the falsity of his claim'.

But are these dispositions and tendencies "natural"? Yes, says Payne, urging that Beamish's confession was against interest and Cooke's was self-serving. So let us test this. Plainly, Beamish's confession was against his interest, but that had not deterred him from confessing, on police investigations before these events, to crimes which he could not have committed; the Chief Justice mentions this fact, but apparently attaches no weight to it. To my mind it shows that Beamish was not always deterred from confessing to crimes that he had not committed by the knowledge that unpleasant consequences could follow.

And was Cooke's confession "self-serving"? When he first confessed, there were several murder charges pending against him, but none had been tried. True, he could not be hanged more than once; but I do not see how he could serve his interests by confessing to additional murders. It might be said that he could use them to bolster up his plea (at his trial) of compulsive insanity. Unfortunately for this theory, he did not attempt to use them in this way, or indeed at all. The trial over, he made his long statement. It was suggested during the hearing that this might be for the purpose of bolstering up a plea for mercy on the ground of compulsive insanity. But in fact he made no such plea.[38] But, says Payne, he was really playing for time—creating confusion by putting in varying details in the hope of delaying his execution.[39] Certainly this motivation was present; but it is plain that he expected his hanging to follow his giving evidence in the second appeal.

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36 Payne 588.

37 Id. at 587.

38 The Crown Law Department has informed the Leader of the Opposition that there is no record in their files of any petition by Cooke for mercy.

39 This is implicit from Payne 587, 596-7.

The two theories which seem to have won acceptance by the judges are the "playing for time" (by creating confusion) theory and the view that he wanted to go down as the greatest multiple-murderer in the history of Western Australia. The former theory was rendered untenable by the fact that he repeated his claim to have killed Miss Brewer at the foot of the scaffold. It could faintly be urged, though without cogency or plausibility, that this fact was consistent with the latter theory; and certainly no one could blame the Court for failing to foresee that this fact would later eventuate. Both theories, in my view, cannot stand with his insistence, during his cross-examination,[40] that he had not committed two other unsolved murders about which the police had questioned him.

Thus I do not think that self-interest, when examined, is as clear a motive as Payne clearly believes. An equally plausible explanation of his conduct, which was never seriously considered by the Court, is that, faced with the knowledge that the game was up and he would be hanged or spend the rest of his life in custody, he was ready to right the wrong he had done to an innocent man. He accordingly told his story briefly to the police; and when he found that they refused to believe him because he had left out many details, he sought to overcome their incredulity by putting the details in.

While I have canvassed these matters, I remain of opinion that they should have been left for evaluation by a jury best of all, but at the very least by a Court of judges who were approaching the whole matter without previous knowledge.

Since I made no claim about 'the complete and utter weakness' of the case against Beamish at his trial,[41] a reply to Payne's comments on that case would perhaps be unnecessary. But lest it be said I am avoiding the point, I make a brief comment.

Payne first disputes my statement that Beamish's confessions were led out of him by the police, and then says that insofar as the questions were leading, they were not significant.[42] I do not propose to debate what is a leading question or what is meant by "significant";

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40 And, of course, much earlier, when the police questioned him. See also Payne 592.

41 The full sentence in my pamphlet (at p. 47) reads: 'Enough has been said to show the complete and utter weakness of the case against Beamish *when subjected to the same kind of analysis as the case which the Chief Justice built up against Cooke for the purpose of demonstrating that the latter's confession was worthless.*' The italicised words show clearly that I was making a totally different claim from that attributed to me by Payne.

42 Payne 588-591.

we are not dealing with theoretical debating points, but with serious problems.

I could have no better—or less likely—supporter of my view than the Crown Prosecutor. Arguing to the Court, he said: "It appears to emerge quite readily from the transcript—a mere reading of the transcript—'Goodness me, this isn't a confession at all. Look how they don't stop until they get the right answer'." He then went on to suggest that this "going on" process was necessary with a person like Beamish. *But I am not discussing whether it was necessary; I am simply saying that it occurred.* And the Crown Prosecutor, it seems, agrees, or did agree at the hearing.

This could dispose of the matter. But I add this. It is totally misleading for Payne to set out a dialogue between Leitch and Beamish, *for no such dialogue ever occurred.* What happened was that Leitch uttered a question; the interpreter converted it into gestures and finger-spelling; Beamish made gestures and finger-spelling in reply; the interpreter then converted these gestures and finger-spelling into a verbal answer. In such a process, inevitably, tenses disappear, personal pronouns can become mixed, abstractions such as "what" and "why" have to be rendered concrete as far as possible. In such circumstances it cannot be argued that the possibility, or even the probability, of an answer being suggested is ruled out.

The police investigators cannot be censured on this account. The interpreter cannot be censured. It is not, indeed, a matter for censure. *It is simply that it occurred.*

And the fact that it occurred is enough to dispose of the claim Payne makes, founded on one incident only, that Beamish correctly pointed out the spot on the divider where the blood-stained scissors were found.[43] We do not know where the party was standing when the question was asked; though we do know that the police witnesses did not say, as they did elsewhere, that Beamish led them to the divider. We do not know what gestures were used to ask the question; but perhaps we can reasonably suppose that they included pointing, and probably not to the ceiling.

And we do know that the following day, when he was asked the same question, in writing, he wrote: "I put sizzors on the table". (Let it pass that, even then, the interpreting of the written questions was continuing.) In fact there was a table—I think there were two—in the room in question. But maybe when Beamish wrote "table", he

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[43] Id. at 590.

meant "divider". Just as when he wrote "banket" he meant "sheet" (he later corrected it, in the "going on" process, to "pillow"), when he wrote "my scooter", he meant "Brian Jacobs's scooter", when he said "back door" he may have meant "front door", and when he wrote that he killed the girl "Sunday night" he meant "Saturday night". The Chief Justice explained the last mistake as being a 'terminological inexactitude',[44] and probably the same explanation will apply to the other mistakes.

Let me finish this point by saying that there is one thing that no one has ever attempted to explain; and that is how Beamish did everything in the flat that he is said to have done without leaving any fingerprint. We do know that Cooke could well have done this. He habitually wore gloves on his expeditions, and was wearing a pair when he was arrested.

Turning to Cooke's story, I have never suggested that he did not tell his version of the murder in varying ways at different times. And, of course, the Chief Justice's analysis highlighted many of the variations. On the basis of them, he concluded that Cooke's story was so obviously fabricated that it was not fit to be placed before a jury. Let us assume that he was right in this. Then we must observe that exactly the same destructive analytical process can be carried out with Beamish's versions of the murder. So, then, surely the Chief Justice ought to have concluded, at Beamish's trial, that *his* accounts of the matter were unfit to be placed before the jury.

The only way in which this point can be met is to say that Beamish's story was in fact heard by a jury, who accepted it. Such an answer produces the absurd result that Beamish is to stand convicted solely because he was charged and tried before Cooke's latest murders were solved by the police. Surely it cannot be argued that an accident of time can produce a satisfactory basis for a murder conviction.

But perhaps Payne would argue that Cooke could have fabricated his account from reading about or attending Beamish's trial.[45] One obvious answer to this is that a man with a fantastic memory—which Cooke unquestionably had—would surely have done a far better job.

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44 A curious explanation of the fact that a man, who, once only in his lifetime, supposedly butchered to death a girl whom he did not know, had forgotten what day of the week it occurred on. The notion of a 'terminological inexactitude' was perhaps an afterthought; it was not in the Chief Justice's mind when at the hearing he queried Cooke's statement that he had hit the girl 'in the vagina' by pointing out that she was hit in the pubis.

45 As, indeed, he implies: Payne 597.

Furthermore, Beamish's account might likewise have been fabricated from reading newspaper accounts of the murder and the inquest, and from information gained from the questions put to him (and the manner in which they were put) during the questioning. On any showing, I should think his accounts of his silencing of the dog and of his sexual treatment of the girl were fabricated, as they cannot be reconciled with the things seen in the flat following the murder. So, also, his account of wiping the scissors on the sheet- which the Chief Justice regarded as of great significance —was, on Leitch's own admission, suggested to him. At the inquest, Leitch said he had found no material on which the scissors could have been wiped. On cross-examination during the hearing of the second appeal, he explained that by 'no material' he had meant 'no material, such as a towel or handkerchief, other than the sheet'.

One thing is clear. There was quite a lot of positive detail which Cooke gave that may well have been accurate. Certainly, no one produced evidence to contradict him on it.[46] But, as we have seen, the Chief Justice thought at the outset that Cooke's assertions would be valueless unless supported by positive evidence. While I question the propriety of that attitude, there remains the fact that in some aspects his story was supported by uncontradicted evidence. These were the story of seeing a particular driver on the bus which he boarded (this placed him in the area of the flat on the murder night); and his recollections of seeing the electric frypan and the milk bottle (these placed him in the flat on that night).

Apart from trying to dismiss these as 'inconsequential embellishments',[47] Payne follows the answers given in the judgments of the Chief Justice and Jackson J. (the latter, unlike Payne, accepted Cooke's statement about the frypan as substantially accurate). These were, in summary, that all these things could have been observed on some other occasion when Cooke was in the neighbourhood, or (as

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46 I have in mind his claim to have examined a zip purse lying on the divider, and to have seen a tailoress's dummy and sewing machine in the spare room. On one of the photographs of the divider a handbag appeared, but whether it was Miss Brewer's I cannot say. We do know that the scissors used for stabbing her were kept by her for dressmaking purposes. Although her mother and her fiance, and Sgt Leitch, swore affidavits which were read out to the Court to contradict Cooke on other matters, none of these deponents suggested that these articles were not in the flat. Nor did Sgt Leitch produce any inventory of its contents. I would think that it is now too late to carry these matters any farther.

47 Payne 598.

regards the frypan) in the flat itself. Cooke persisted throughout in saying that he had never been in the flat before that night, but the Chief Justice regarded this as an almost perverse insistence that he had avoided entering the flat, for which avoidance Cooke could provide no explanation (a curiously inverted approach to the matter).[48]

In order to maintain the "explanation" of these three matters, the Court had to assume (though they did not articulate the assumptions):

(1) that the bus driver happened to be driving on that route on some other night at the same time as Cooke was prowling in the area;

(2) that the electric frypan was usually kept on the draining-board, and (more specifically) that it was in that position on the other night (whenever it was) that Cooke entered the flat;

(3) that the milkman always delivered a one-third pint bottle of milk to the flat, and no more;

(4) that Cooke had either (a) been able to see from outside the flat exactly what was being delivered into it (whatever it was) on some other night or (b) had been in the flat and seen the bottle from inside between 4 a.m. and 5 a.m.

There was no evidence at all before the Court on which it could base a finding of any one of these facts or a finding that Cooke had ever been in the flat before that night. Moreover, it is conceded on all hands that Cooke had a remarkable memory for detail; and if he had seen the milkman after 4 a.m. on some other occasion, his memory surely let him down when his story accounted for the milk bottle at a considerably earlier hour.

Apart from other questions of detail where Cooke was in all probability correct, I think that these three matters cannot be explained. No amount of contradiction on other matters will banish them from existence—and in saying this I observe that the proper constitutional tribunal to decide on these alleged contradictions was a jury, not the Court. On the evidence before the Court, the conclusion is inescapable that Cooke was first in the vicinity, and later in the flat, on that night. Indeed, the judges, by assuming "facts" not based on evidence, virtually concede this conclusion.

And thus we come to the problem of the coincidence. Could any reasonable jury, hearing both Beamish's confession and Cooke's, hear-

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48 The Brewer flat was the end one of three. Cooke said he burgled the mother's (in the centre), but did not bother about either of the flats flanking it.

ing the evidence placing Cooke both in the area and the flat on that night, and hearing the evidence of Cooke's willingness to murder for the joy of killing—*all of which they could have heard at a retrial in March or April 1964*—have been satisfied, beyond a reasonable doubt, that Beamish was guilty?

In his Report[49] on the case of Timothy Evans, issued in October 1966, Mr Justice Brabin faced a similar question and answered it with a firm "No". Thereupon the English Government issued a free pardon (posthumously) to Evans.

Let us hope that Beamish will not have to wait until seventeen years after his conviction for a free pardon.

PETER BRETT*

A COMMENT ON PROFESSOR BRETT'S REJOINDER

Professor Brett's so-called "Rejoinder" is more a restatement or refurbishment of the arguments put forward in his pamphlet than a reply to my review of it.

There is no obscurity in my suggestion that he is disqualified by "interest" from discussing the Beamish case objectively. It is well established that a disqualifying interest need not be pecuniary and that professional association or other identification with one of the parties to a dispute may constitute bias.[1] The tea-party details we are now supplied with do not alter the fact that Brett was professionally involved in the case in the Beamish interest. Those familiar with the circumstances in which one lawyer signs an opinion commissioned from another may suspect that Brett's "some notes towards" the opinion he signed is a modest description of his contribution to it. His attempt to minimize his part in it shows that he in fact recognizes the meaning and force of my criticism. The irony remains that he is guilty of the very offence he charges the judges with.

It is difficult, moreover, to accept his statement that he has not attempted to conceal his association with the case. His pamphlet is an appeal to the Government and people of Western Australia to

49 Cmnd. 3101 (1966).

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1 DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 151-156 (1959).