Public Interest and Safeguards for the Suspect

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With the Province of Quebec Scotland shares a common heritage in the field of Civil or Private law, the jurisprudence of our two systems owing its inspiration to Rome and to France. In the realm of Criminal Law and Procedure, however, the Canadian Criminal Code, largely of English inspiration, applies throughout the Dominion. Paradoxically — but by special dispensation of Providence — in the United Kingdom Scottish criminal law has been permitted to develop free from direct influences of English law.[1] Indeed today the force of comparative law in Britain is largely from North to South, so that the solutions of Scottish criminal law and procedure are invoked by legislator and judge to ameliorate the English system [2] — which, of course, through the influence of precedent had become more rigid and anachronistic than Canadian criminal law, for which the Code provided opportunity for second thoughts. Since on some of the matters which I shall discuss Canadian practice is not yet finally settled by decision, might I even venture to suggest that there could be advantages — when scope for comparative references permits, especially in matters of procedure — to look less to London and more to Edinburgh in considering the contribution of British criminal justice. Here in Quebec you perhaps need no persuasion that the final revelation of legal wisdom was not vouchsafed to the English common lawyers alone — and, as we in Scotland have much to learn from you in matters of private law, so also we may with advantage share our thoughts regarding criminal law and procedure. As regards public interest and safeguards for the suspect, the attitude of the North American systems is in many respects closer to English practice than to that of Scotland.

In most countries Criminal Law and its practitioners enjoy a higher reputation among laymen than among professional lawyers. Many laymen — after looking at the *Perry Mason* Series, *The De-*

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[1] See T. B. Smith, *British Justice: The Scottish Constitution*, p. 95 et seq.

[2] The most significant recent examples concern the law of murder and culpable homicide or manslaughter and, in procedural matters, the granting to the defence of the right to make the final address to the jury.

fenders and so forth, think that the average lawyer spends his life outwitting opponents in criminal trials. Many lawyers, on the other hand, think that corporation, tax and property law or the devising of trusts or commercial contracts is 'respectable', and that only the dregs of the profession engage in the sordid practice of the criminal law. Both types of layman and lawyer are misled or blind themselves. The object of criminal justice is not to set the stage for a game in which swift wits and sharp practice may frustrate society's obvious interest in curbing the wrongdoer — nor on the other hand is the prosecutor's value to be judged by the number of convictions which he can secure. Again, unless the leading lawyers in a community are prepared to interest themselves in criminal justice and indeed to participate in defending unpopular suspects, neither the public interest nor those of the accused will be set in their proper perspective.[3] Significantly, where political questions or those of civil rights emerge in the context of criminal law, leaders of the profession may defend without disapprobation of the Brahmins even in the Anglo-American systems.

Public Responsibility for Prosecution

One of the most important factors in the proper administration of criminal justice is to secure a system of prosecution which will have regard to the public interest uninfluenced by ulterior considerations such as popularity or unpopularity, discrimination or revenge. This demands the development of high professional standards involving mutual trust and respect between prosecuting and defending counsel. Though it may be desirable to make the chief law officer answerable in the last resort to the Legislature for the proper discharge of his duties, I hold that prosecution is best kept free from politics. In England, private prosecution is still used extensively, and police prosecution for lesser offences is still, in theory, private rather than official.

The real pivot of criminal justice in Scotland is the Crown Office.[4] Ultimately — subject to one exception — all criminal prosecution in Scotland is now under the control of the Lord Advocate, the senior Law Officer of the Crown, assisted by a small number of Advocates-Depute, appointed by him from the Scottish Bar, and by the perma-

[3] This point was made with particular force and clarity by Justice Brennan of the U.S. Supreme Court when he addressed the Harvard Legal Aid Bureau on February 13, 1963, on the occasion of its "Golden Anniversary".

[4] See Lord Normand, *The Public Prosecutor in Scotland,* (1938) 54 L.Q.R. 345; also *The Scottish Judicature and Legal Procedure,* Holdsworth Club, 1941.

nent officials of the Crown Office in Edinburgh. In the sheriffdoms [5] the public interest is represented by Procurators Fiscal (comparable perhaps — except that they are not political appointments — with District Attornies in the U.S. or in certain respects with the *Juge d'Instruction* in France). These Procurators Fiscal are responsible to the Lord Advocate for prosecution, preliminary investigation of crime, and enquiries into sudden death (there are no Coroner's inquests in Scotland and I believe that much unnecessary harassing of feelings through undesirable premature publicity is thus avoided). Though considerable discretion is delegated to Procurators Fiscal in handling the prosecution of offences, all matters of difficulty or importance are reported by them to the Crown Office in Edinburgh for decision and advice. Private prosecution in Scotland is virtually unknown. It is theoretically possible for a private citizen to prosecute an indictable crime if he has suffered injury in his private capacity as distinct from the harm suffered by members of the general public, but, unless the Lord Advocate concurs, a bill for criminal letters must be granted by the High Court of Justiciary, which can grant the request despite the Lord Advocate's objection.[6] To succeed, however, the complainer must show some substantial and peculiar personal interest which, notwithstanding the Lord Advocate's refusal in the public interest to concur, would justify the Court in allowing proceedings. Moreover, the Court declines to review the reasons for the exercise of the Lord Advocate's discretion not to prosecute in the public interest. The only modern attempt to obtain "criminal letters" was in Feburary 1961, when a private citizen presented a bill for criminal letters to the High Court of Justiciary seeking to prosecute a book seller for exposing for sale and selling the book *Lady Chatterley's Lover*. This attempt failed.[7] Having considered the public interest, the Lord Advocate refused concurrence — and, since the complainer could show no special personal interest in the matter beyond that of other members of the public (presumably because he was no more corrupted than other citizens) the High Court of Justiciary refused to grant criminal letters.

It seems most desirable that the functions of public prosecution should be kept quite separate from those of law enforcement. In Scotland the police have a duty to assist a Procurator Fiscal in his investigations as he requires, but they have no control over the decision whether or not to prosecute. The decision whether to prosecute is a

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[5] Scotland is divided for judicial and some administrative purposes into "sheriffdoms".

[6] *J. P. Coats Ltd.* v. *Brown* (1909) 6 Adam 19.

[7] *McBain* v. *Crichton* [1961] J.C. 25.

matter for those alone who are concerned with the public interest. Private prosecution has been defended by some as one of the valued and traditional rights of Englishmen. I do not share this enthusiasm, and observe that in other systems based on English law, the modern trend is to entrust prosecution to a responsible public prosecutor. A Memorandum of Evidence submitted in 1961 by the Inns of Court Conservative and Unionist Society to the Royal Commission on the Police expressly recommends for England (Recommendation 13) "that consideration be given to the possibility of introducing a system similar to the Scottish system of the procurator-fiscal for the conduct of prosecutions". The Law Society of England in its Memorandum also expressed dissatisfaction with the present practice of police prosecution for lesser offences in England. In particular they considered that police officers should not discuss with the accused what plea should be made. They recommended that all prosecutions should be brought in the name of the Crown, and conducted by solicitors. England is a country much larger in size and population than Scotland, and it may well be that the close links which exist between Procurators-Fiscal and the Crown Office in Scotland could not be reproduced exactly in English practice. Some form of decentralisation might be necessary or a substantial increase in the staff of the Director of Public Prosecutions.

Arrest to trial

As I understand the *Mallory Rule*, which applies in the District of Columbia, a suspect must be brought before a magistrate speedily if any statement obtained is to be used in evidence — a safeguard designed to deter 'investigative arrest'. A similar practice is followed in Scotland. An accused — normally no later than the morning following his arrest — is brought formally before a judge (the sheriff).[8] In modern times this appearance is for practical purposes largely a formality, since the suspect is not in fact examined, nor is any declaration taken unless (which happens rarely) he insists on emitting one. Nevertheless, the procedure does ensure judicial supervision of pretrial procedure at an early stage. This seems highly desirable in the interests both of the public and of the suspect. Even though on this occasion the court may order the accused to be kept in custody, or liberate him on bail, in modern times the Court does not decide whether

[8] The civil and criminal jurisdiction of the Sheriff in Scotland is very extensive. In general, there is no monetary limit in civil causes and, though his powers of punishment are restricted, he may deal with all crimes and offenses except murder, rape, incest, and a few others.

or not a *prima facie* case has been disclosed by the prosecution.[9] The public prosecutor is entrusted with the duty to satisfy himself as to the sufficiency of the case to such an extent that one of our Scottish Judges, Lord Kilbrandon, considers that justice fails if an innocent man is put on trial. This may be a somewhat exaggerated view, but is in large measure justified.

The Scottish attitude to bail is liberal, but wider considerations are taken into account than in English or American practice.[10] There is a general assessment of the public interest, and considerable weight is given to the attitude of the prosecutor, who alone is adequately informed of the various factors involved — such as the danger of witnesses being intimidated or further crimes committed. Inadequacy of means will not prevent the grant of bail in a proper case, but, on the other hand, a suspect who can lay down a high price cannot compel release. Release on bail no longer depends in Scotland on the so-called "presumption of innocence" — a presumption which, in my submission, is really an aspect of the law of evidence relevant only for the trial court and applies to all accused persons. It seems to mean no more than that the prosecution has the burden of establishing guilt beyond reasonable doubt. The current Scottish view is that the courts have a general discretion to grant bail in all cases unless satisfied that this would be contrary to the public interest and the ends of justice. Supervision of detention in custody and bail procedure in Scotland as in other Romanistic jurisdictions does not involve invocation of *habeas corpus*, though other remedies are available. Any person in custody who has not been committed for trial may petition the High Court of Justiciary for release; while there are statutory provisions to expedite the trial of persons committed to custody. The limit of incarceration without trials is 110 days from commitment, unless factors outside the control of the prosecution — such as illness of the accused — justify extension of the period.

Pre-trial Procedure and Publicity

The Inns of Court Memorandum referred to earlier further observed that "if a system of prosecution similar to that which operates in Scotland were to be introduced in England, the cost of the reform might be offset by making preliminary hearings before magistrates more economical". I would go further, and suggest that, if England introduced a system of prosecution comparable to that of

[9] See this more fully discussed by the author in *Bail Before Trial: Studies Critical and Comparative*, (1962) p. 252.

[10] *Ibid.*, p. 268.

Scotland, the same officials, responsible to a higher authority, could carry out the preliminary inquiry, as is done in Scotland, without the need for a pre-trial hearing at all. The one advantage to the accused which clearly attaches to the Anglo-American procedure of pre-trial hearing before magistrates is that the accused is thereby informed of the evidence to be adduced against him. This end is achieved in Scotland by supplying the defence before trial, not only with the indictment, but with a full list of the Crown's witnesses and productions, and in appropriate circumstances — including all cases of murder — by disclosing to the defence the Crown's precognitions (anglicé depositions) of witnesses taken by the Crown. In England for the privilege of hearing what case he has to meet, the accused must usually pay the high price of exposing himself to prejudicial publicity at a stage when the defence is not as a rule in a position to offset by evidence the impact of the prosecutor's allegations. In Scotland, as in certain other countries, pre-trial procedure is quasi-inquisitorial — in no pejorative sense. The accused himself is not a participant in the Procurator Fiscal's investigation — except, as I have mentioned — for the formal appearance before a judge; there is no confrontation of the accused by prosecution witnesses nor questioning of them in public procedure by the defence at the pre-trial stage. Evidence from other sources is sifted by the Procurator Fiscal and a dossier on the case is prepared. Only if the public authorities are satisfied that a prosecution should very probably — not merely possibly — succeed will an accused be brought to trial. This is more exacting a test than showing a *prima facie* case as in England. The public authorities, of course, may be wrong; a frightened witness to a gang murder, for example, may go back on evidence which he gave on precognition. The problem of deciding whether the public should pay the expenses of the defence in criminal proceedings when the accused is acquitted is not of the same magnitude in Scotland as in England. So far as graver crime is concerned, few are tried in Scotland unless there is an objective assessment of a strong probability of guilt. It may be a legitimate criticism of Scottish procedure that too many guilty persons escape trial, and it must not be overlooked that the public interest in the protection of society and in the rehabilitation or restraint of wrongdoers is very obvious.

The main objection, from an outside observer's point of view, to the English system of pre-trial hearing before magistrates is their publicity. Originally, the fact that the public had access to such proceedings was a protection to the accused against abuse of power to his prejudice. Today, publicity is more likely to be a curse than a blessing to him. If a suspect is socially prominent or notorious, or if the crime alleged against him is of a type which excites public interest

or indignation, the evidence adduced at the pre-trial hearing will, nevertheless, as a rule in England and in America be made accessible through the press to members of the public, including those who will sit on the trial jury, long before the time of trial. The right to publish such evidence in the United States is defended on constitutional grounds. Similarly in England it is regarded as one of the immemorial privileges of Englishmen to repudiate "justice behind closed doors". A Scotsman may consider that justice will be better served if the *pre-trial* inquiry *is* behind closed doors, and if the accused, when he appears before the judge in Chambers, so that judicial cognizance may be taken of his arrest, is safeguarded by the presence of his legal adviser. In Scotland as in England, once an accused has been apprehended, the function of the press in commenting upon the guilt of a suspected person or the nature of the charge against him is suspended under severe sanction of law.[11] This in Scotland is not a right solely of the accused, nor is infringement necessarily an aspect of contempt of court. Interference with the administration of justice can take many forms.[12] Thus no comment is permitted which might influence the mind of the public *in favour* of an accused awaiting trial — as by attacking the merits of the prosecution. Scottish protection against injurious publicity goes further. Publication of statements by prospective witnesses before they testify at the trial is absolutely forbidden, as is publication of photographs of persons under suspicion especially after arrest, since this might influence the reliability of evidence of identification.[13] The over-riding purpose is to secure that the accused should be tried by a jury which comes to its duty without any preconceptions whatsoever regarding guilt or innocence. After arrest — in one view, as soon as the official investigation has started — and before trial of an accused, the press in Scotland is permitted to publish only the bare facts that a named person has been charged with a particular crime and that he has been committed for trial. This contrasts sharply with the sitnation in other parts of the United Kingdom and with practice on this side of the Atlantic. Dean Griswold of Harvard in his Maccabean Lecture [14] delivered in October 1962 before the British Academy, has compared English and American practice with regard to pre-trial publicity, and in my opinion — though his strictures on the American system are justified — has taken much

[11] The leading case is *Smith* v. *Ritchie* (1892) 20 R.(J.C.) 52; see also *Stirling* v. *Associated Newspapers* [1960] J.C. 5.

[12] Hume, *Commentaries on the Law of Scotland concerning Crimes*, vol. 1, p. 366 et seq.

[13] See *Stirling*, op. cit.

[14] *Two Branches of the Same Stream*, Proceedings of the British Academy, (1962), p. 235.

too charitable a view of the position in England, a position which, especially since the report of the Tucker Committee, many English lawyers would wish to see reformed in closer accord with Scottish practice.

So far as I can ascertain from the perusal of such Canadian cases as *Regina v. Buller & Glazer*,[15] *Regina v. Thibodeau*[16] *and Regina v. Bryan*,[17] problems of pre-trial publicity in Canada have only quite recently required judicial solution, and the tendency is to adopt the English approach — namely, that factual reporting of damaging evidence (such as alleged confessions) disclosed at a Coroner's inquest or at a pre-trial hearing is permissible, but that actual comment on a pending criminal prosecution is condemned and punished. May I venture the suggestion that *either* type of publicity may be calculated to influence the minds of members of the public including the jury which has to reach a verdict at the trial.

It seems to me that American practice with regard to pre-trial publicity has permitted a licence which may impair the possibility of fair trial and yet be beyond judicial control. Contempt procedure seems to be limited to acts "in or near" the courtroom or to such as create a "clear and present danger" in a phrase which has been narrowly construed. The Constitution at present seems to lag behind the realities and the development of mass media of publicity. Certainly I have myself seen in the United States some astonishing press reporting before and after arrest of a suspect and also before and during trial — for example, prejudicial matter affecting his private life, grounds for suspecting his guilt, his behaviour when interrogated with the lie detector, prosecuting or defence counsel's proposed conduct of the case and so forth.

In October 1962 a Miss Suzanne Cliff, who was socially prominent and daughter of a well-known film actor, fell under the suspicion of having killed a young man — whose nude and mutilated body was found by the lady's grandmother on returning to her apartment in Boston. This must have been a disagreeable homecoming indeed for the older lady. Miss Cliff also returned of her own accord to Boston from South America and underwent treatment in a hospital for mental and nervous diseases. Almost as disagreeable as the grandmother's experience was the type of press publicity which resulted. Before Miss Cliff had been tried for any crime such press coverage was given as seemed calculated to ensure that there could not be found in the

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[15] (1954) 108 C.C.C. 352.

[16] (1955) 23 C.R. 285.

[17] (1954) 108 C.C.C. 209.

Republic twelve jurors who had not already had their minds influenced by blaring headlines branding Miss Cliff as killer of her lover. Whole page portrait photographs were published of the suspect as a debutante, and flash bulb photographs were taken of a wretched and frightened girl returning to the protection of her country's laws. One paper at this pre-trial stage of proceedings was good enough to let the public know that her legal advisers intended to plead self-defence. (In fact, she was eventually disposed of as a mentally deranged person). I am at a loss to understand why the public should be deemed to have a legitimate interest in matters of this kind at the pre-trial stage. Both the public interest and that of the accused require a fair and impartial trial on the evidence alone — not trial by newspaper.

In Scotland, of course, as in all civilised countries the cooperation of the press in reporting fully and fairly the vindication of justice at the actual trial of a suspect is encouraged both in the interest of the individual and the public. Experienced reporters, who have specialised in court work, have made a much greater contribution to the administration of justice than has ever been recognised. It may be added that trial publicity cannot in Scotland, as in England, prejudice an accused if the jury fail to agree. In England, retrial must follow: in Scotland conviction or acquittal is decided by the majority vote of a jury of fifteen. The problem of the "hung jury", to use the American expression, does not arise. I may be permitted a passing reference to publicity given to the trial itself. Recently a determined — but I am glad to say unsuccessful effort — was made in the United States to vary Judicial Canon 35 which (by contrast with the Colorado Rule) condemns the taking of photographs in the Court Room and the broadcasting of Court proceedings. Perhaps strict logic might not discriminate between media of publicity but anyone who has had the responsibility of appearing in a serious criminal trial would surely agree that to allow television cameras and broadcasting would add enormously to the strain involved for accused, counsel and witnesses. The idea of turning the administration of justice into a movie show seems to me altogether repugnant.

Trial

Before trial on indictment both Crown and defence in Scotland must have exchanged information regarding the witnesses and productions on which they intend to rely, and, moreover, the defence must have given advance notice of certain "special defences" such as alibi, self-defence, insanity or an allegation that another specified person

has committed the crime. This may deprive a Scottish criminal trial of some of the dramatic interest of the *Perry Mason* series, where the prosecution is often taken by surprise, but our methods assist in the ascertainment of truth. In the United States, I gather that several states by statute require the defence to give notice of intention to rely on alibi, and in my submission, this imposes no hardship. Indeed I would advocate statutory rules compelling the giving of notice of those categories of defence which we have accepted in Scotland, but would not require the accused to disclose before trial all matters relevant to his line of defence. I was rather surprised by a recent Californian case in which the majority of the Court required the defendant to make preliminary disclosure to the prosecution of the names of doctors who had examined him and of medical reports when he had indicated his intention of relying on a defence of impotence in answer to an indictment for rape.

My personal view on verdicts is that it is useful to have three — which is the number in Scotland, though I think their scope should not be identical with ours. Perhaps verdicts of "Proven" and "Not Proven" (rather than "Guilty" and "Not Guilty") would cover most cases — with a third verdict ("Not Guilty") reserved for the type of case in which the suspect positively establishes his innocence.

In a Scottish criminal trial, there is no "opening" by prosecution or defence as in England, so that the jury hear the evidence as given, not as counsel hope that it will be given. There is often a material difference. As in most countries outside the English tradition, counsel for the defence in Scotland always has the right to make the closing address. In 1964 [18] England adopted a similar rule.

Evidence from the Accused at First and Second Hand

I may be permitted to add some observations on the admissibility of evidence elicited from the accused himself — a topic of special interest while the English "Judges Rules" regarding confessions are (in 1963) under review [19] and also in the context of the American Fifth Amendment.

In determining whether a statement made by an accused and prejudicial to his interests should be admitted as evidence, the overriding principle laid down in a long series of Scottish Justiciary cases is "fairness to the accused". Because an accused is not compelled to give

[18] *Criminal Procedure (Right of Reply) Act*, 1964.

[19] The revised Judges Rules were issued in Home Office Circular No. 31/1964 in January, 1964.

evidence at his trial,[20] it is considered contrary to principle that he should be compelled or induced to supply such evidence at second-hand as a result of police interrogation. When a crime has been committed, the police will, as a rule, be the first official investigators seeking to trace the culprit. It is expected of responsible citizens that they will assist in the detection of criminals, and the police may question whom they please in the course of their initial investigations. If, before anyone has been detained or charged, the person who ultimately comes under suspicion (even as a result of his own disclosures) incriminates himself by answers to police questioning, there is no reason in law to exclude the statement from evidence at his trial. A statement elicited by police interrogation from an actual suspect before arrest would not be admitted.[21]

A suspect in Scotland who has actually been arrested is entitled by law to certain safeguards made specially for the protection of his interests. He cannot be interrogated, and must be told that he is entitled to the services of a law agent before appearing before the sheriff for the formal "judicial examination". An anomalous category has also been suggested — those who, though not actually arrested, have been "invited" to remain at the police station while under suspicion to assist the police in their enquiries. In such cases, it has been said judicially that the courts should be more jealous to safeguard the rights of the reluctant "guest" than in cases where a charge has actually been made. Strictly, however, it is suggested, no person who has not been arrested and charged can lawfully be detained "on suspicion" in Scotland.[22] Once an accused has been taken into custody and has been cautioned and charged, and his answer (if any) to the caution and charge noted, the police are regarded as having completed their official function. They are not allowed to testify as to what an accused said in answer to questioning after arrest, and even an invitation to speak without actual interrogation will exclude from evidence a statement made to the police by an accused while in custody.[23] If, while in custody the accused wishes to volunteer a statement, there is authority for the view — which is perhaps a minority view — that he should be taken before a judge or magistrate for this purpose.[24]

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[20] *Chalmers* [1954] J.C. 66, esp. per L. J. Cooper at p. 79.

[21] *Chalmers, op. cit.*

[22] *Ibid.*, p. 78.

[23] E.g. *Wade* v. *Robertson* [1948] J.C. 117.

[24] *Christie*, H. C. J., Nov. 3, 1961 (unreported); discussed D. B. Smith, [1961] S.L.T. (News) 179.

Though my views are probably not shared by most of the profession in Scotland and would horrify the authors of the American Fifth Amendment, I think that there was much to be said in favour of the 19th Century Scottish practice of *compulsory* pre-trial judicial examination of the accused before a judge (the sheriff), subject to the suspect's right to refuse to answer incriminating questions. It is not self-evident that justice is best served if a suspect is permitted to remain altogether silent throughout the pre-trial and trial stages of investigation into his guilt or innocence. The accused's statement might well be made competent evidence, especially if he declined to testify at his trial. If this precedure were restored, it is suggested that the main inducement to the police to secure "voluntary statements" of doubtful spontaneity would be removed.

In conclusion I would stress that I have mentioned only a few of the considerations which seem to me relevant when weighing the public interest and the interests of the suspect or accused in the criminal process. Political offences are calculated to attract the talents of any free country's most distinguished lawyers, and to command the close attention of the thinking and influential section of the community. The principles established in the trials of those charged with political offences — where the accused may well be men of high, though unpopular, principles, in time come to influence the criminal process as a whole. In your jurisdiction as in that of my native Scotland great constitutional issues may, through criminal prosecutions, be fought out in the courts. Those who hold the balance of public and private interest are entrusted with a most weighty responsibility. Perhaps no less weighty is the responsibility of the law teachers of Quebec and Scotland, whose privilege it is to prepare them for their task.