

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 113

DECEMBER 1964

No. 2

OTHER ANSWERS: SEARCH AND SEIZURE, COERCED CONFESSION, AND CRIMINAL TRIAL IN SCOTLAND *

PAUL HARDIN, III †

Despite a common indebtedness to Anglo-Saxon legal tradition, significant contrasts appear in the administration of criminal justice in Scotland and the United States. While American rules of procedure and evidence have now had a long period of independent development, Scotland, with its rugged indigenous institutions and its historical and continuing flirtation with Roman law,¹ has resisted slavish adherence to English legal procedure more successfully perhaps than any other nation having close ties with England.²

Accordingly, at this time of perhaps unprecedented soul-searching by the American legal profession concerning the administration of

* This Article was prepared, partly in Edinburgh, for the Comparative Study of the Administration of Justice, established under the terms of a grant from the Ford Foundation to Loyola University School of Law (Chicago). It is published here with the consent of the Study, which reserves all rights.

† Professor of Law, Duke University. A.B. 1952, LL.B. 1954, Duke University. Member, Alabama Bar.

The author is indebted to Mr. Ian Murray, Advocate, of Edinburgh, for valuable assistance in the documentation of this article and to Mr. William Prosser, Advocate, of Edinburgh, for useful services rendered during the period of preliminary research.

¹ SMITH, SCOTLAND (11 THE BRITISH COMMONWEALTH—THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION) 3-24, 117-19 (1962) [hereinafter cited as SMITH]; STAIR SOCIETY, SOURCES AND LITERATURE OF SCOTS LAW (1936). *Sugden v. H.M.A.*, [1934] Just. Cas. 103 (Scot.), is an interesting twentieth-century case illustrating the continuing influence of Roman law.

² See de Funiak, *The Legal System of Scotland*, 38 TUL. L. REV. 91 (1963); Sullivan, *A Comparative Survey of Problems in Criminal Procedure*, 6 ST. LOUIS U.L.J. 380 (1961). "The divergence between Scottish and English law is probably more pronounced in the field of criminal procedure than in any other." SMITH 207.

criminal justice,³ I intend in this Article to examine certain evidence rules and practices in Scottish criminal cases which should be of interest to American lawyers.⁴

I. THE BASIC MACHINERY AND A WORD ABOUT PROSECUTORS

There are two forms of criminal procedure in Scotland, solemn procedure followed in trials for serious crimes and summary procedure resorted to when lesser offenses are charged.⁵ Our principal concern will be solemn criminal procedure, in which action is commenced by indictment, and trial is before judge and jury.

Two courts have jurisdiction in solemn procedure. The High Court of Justiciary, which is both a trial court and the highest appellate court in Scottish criminal cases, has jurisdiction to try all indictable offenses. Although these same High Court judges (constituted as the Court of Session) hear civil cases solely in Edinburgh, they try criminal cases on circuit throughout Scotland.

The sheriff courts, which sit in every shire of Scotland, have concurrent jurisdiction with the High Court over most, but not all, indictable offenses. When jurisdiction is concurrent, the High Court is likely to try more serious cases, as a sheriff has no authority to impose any prison sentence longer than two years.

Although private prosecution is theoretically possible in Scotland, practically every case is prosecuted by a public official.⁶ The Lord Advocate, appointed by the Crown, has virtually unlimited power to initiate and control criminal prosecutions throughout Scotland. In the High Court he appears personally or operates through assistants known as advocates depute. His representatives in the sheriff courts

³ In addition to the recent pioneering United States Supreme Court activity, see, for example, the recently published COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SECOND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (1964), and the recently launched ABA study "looking toward the formulation of a code of minimum standards of criminal justice in the United States." American Bus. News, March 15, 1964, p. 4.

⁴ For an excellent treatise which contains an inclusive exposition of Scottish criminal procedure, see RENTON & BROWN, CRIMINAL PROCEDURE ACCORDING TO THE LAW OF SCOTLAND (3d ed. 1956). Unfortunately, the book is out of print, and personal copies are hard to acquire, even in Scotland.

⁵ The principal controlling statutes are the Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c. 35, in solemn procedure, and the Summary Jurisdiction (Scotland) Act, 1954, 2 & 3 Eliz. 2, c. 48, in summary proceedings. For general background on the two types of criminal procedure and on the courts and officials of Scottish criminal justice, see RENTON & BROWN, *op. cit. supra* note 4, at 1-13; SMITH 98-103, 207-08; Smith, *A Scottish Survey*, 1956 CRIM. L. REV. (Eng.) 104. This brief discussion on the basic machinery of Scottish criminal justice is drawn from these sources, and specific citations are omitted.

⁶ SMITH 207. A most interesting recent case in which the High Court refused to authorize a private prosecution is *McBain v. Crichton*, [1961] Just. Cas. 25 (Scot.).

are called, undescriptively, procurators fiscal.⁷ Even summary prosecutions for minor infractions in the inferior courts are conducted by public prosecutors, never by police officers, and the Scots pridefully suggest that their system provides prosecution less highly partisan than those systems that widely utilize either private or police prosecution.

Of course, Scotland has no monopoly on the ideal of prosecutors bound primarily to see that justice is done and only secondarily interested in procuring convictions. Yet the author, after observing criminal trials in the United States and in Scotland, reluctantly concludes that the tradition is better implemented in practice by the Scots.⁸

II. THE CROWN'S QUEST FOR EVIDENCE

If criminal justice is to be administered at all, the prosecution must have reasonably efficacious machinery for gathering evidence, but this evidence should be gathered with some respect for individual dignity and freedom. Nothing is simpler than to elicit agreement on that general statement and nothing more baffling than to apply it in particular fact situations. In the areas of search and seizure and of police interrogation, the Scottish experience is similar enough to the American to be highly relevant and different enough to be informative.

A. Searches and Seizures

The early attitude of Scottish courts toward the admissibility of illegally obtained evidence accorded with the American common-law view. For example, in a 1933 case, Lord Morison said: "I think it is quite immaterial whether the [evidence was] . . . obtained by the regular procedure or not. . . . I do not see that the interest of justice should be prejudiced because a police officer, through either ignorance or negligence, failed to comply with the regulation."⁹ In the United States, of course, this traditional view that official abuses in obtaining evidence have no bearing on admissibility has given way, laboriously but now almost completely, to a constitutional rule excluding evidence illegally obtained by federal or state officers.¹⁰ The Scottish experience has been quite different.

⁷ The derivation of the name is set out in Sullivan, *supra* note 2, at 383 n.4.

⁸ The statesmanship of Scottish prosecutors is related, I feel sure, to an overall tradition of forensic moderation in Scotland, which I have commented upon in an earlier article. Hardin, *An American Lawyer Looks at Civil Jury Trial in Scotland*, 111 U. PA. L. REV. 739, 750-56 (1963).

⁹ *Adair v. M'Garry*, [1933] Just. Cas. 72, 91 (Scot.). See also LEWIS, EVIDENCE IN SCOTLAND § 292 (1925).

¹⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961).

Two-and-a-half years after Lord Morison felt it was "immaterial"¹¹ how evidence came to be gathered, Lord Justice-Clerk Aitchison, in admitting certain evidence over the objection that the police had acted irregularly in gathering it, said: "An irregularity in the obtaining of evidence does not *necessarily* make that evidence inadmissible."¹² That one italicized word, fourteen years later, grew into a new and important doctrine. In the case of *Lawrie v. Muir*,¹³ the keeper of a dairy was convicted of using bottles belonging to other persons, a statutory offense. The evidence against her came from two "inspectors" of a corporation formed for the purpose of restoring milk bottles to their rightful owners. These inspectors had obtained entry into the accused's premises by misrepresentation. The High Court quashed the conviction. Lord Justice-General Cooper, writing for the full bench, reviewed the earlier texts and cases holding that it was no pertinent objection that an article or document had been illegally seized, but then adopted "as a first approximation to the true rule the statement of Lord Justice-Clerk Aitchison," quoted above. Said Lord Cooper:

It remains to consider the implications of the word "necessarily" . . . Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused.¹⁴

Most significantly, since the American rule of exclusion penalizes only *official* misconduct, Lord Cooper found "sufficient to tilt the balance against the prosecution" the circumstance that the "inspectors" who found the milk bottles "were not police officers enjoying a large residuum of common law discretionary powers, but the employees of a limited company . . . whose only powers are derived from contracts between the Board and certain milk producers and distributors, of whom the appellant is not one."¹⁵ So the Scottish test of fairness to the accused, in its very first application to a search and seizure case, provided protection that the American rule of exclusion omits, protection against unreasonable searches by one's fellow private citizens.¹⁶

¹¹ Quotation accompanying note 9 *supra*.

¹² *H.M.A. v. M'Guigan*, [1936] Just. Cas. 16, 18 (Scot. 1935). (Emphasis added.)

¹³ [1950] Just. Cas. 19 (Scot.).

¹⁴ *Id.* at 27.

¹⁵ *Id.* at 28.

¹⁶ *But see* *Fairley v. Fishmongers of London*, [1951] Just. Cas. 14 (Scot.), where the court did not deem the conduct of private investigators sufficient to require exclusion of evidence seized by them.

Of course, by its very terms the Scottish rule offers somewhat less protection against official misconduct than the American exclusionary rule. Still the High Court has excluded evidence often enough¹⁷ to alarm at least one respected writer.¹⁸

Scottish prosecutors may get a few "breaks" in the definition as well as the consequences of illegal searches and seizures. The starting point is the same: searches should be conducted pursuant to warrant or as an incident of a lawful arrest. But several apparent laxities exist in Scotland. In the first place, although arrest without warrant is theoretically regarded as requiring explanation,¹⁹ in practice arrest with warrant is exceptional.²⁰ Thus "lawful" arrest may be a broader practical concept in Scotland than in at least some American states. Second, there is some indication in the Scottish cases that the scope of search incident to arrest is broader than in the United States, extending occasionally beyond the actual premises where the arrest occurs.²¹ Finally, without any apparent authority in law, police constables in Scotland are taught that in cases of great *urgency* they may search premises without warrant and without an accompanying lawful arrest.²² There is some feeling on the part of police officials that the courts would sustain as lawful a search conducted in such circumstances. More likely, perhaps, the courts would characterize the search as unlawful, but hold under the flexible fairness test that the evidence could nonetheless be admitted. "Urgency" clearly is an important factor in applying the fairness test.²³

B. Coerced Confessions and Police Interrogation

Let us suppose a confession is taken under circumstances concededly coercive and is obviously inadmissible. Suppose, further, that

¹⁷ *E.g.*, H.M.A. v. Turnbull, [1951] Just. Cas. 96 (Scot.); McGovern v. H.M.A., [1950] Just. Cas. 33 (Scot.).

¹⁸ Gibb, *Fair Play for the Criminal*, 66 JURID. REV. 199 (1954).

¹⁹ Shields v. Shearer, [1914] Sess. Cas. 33 (Scot. H.L.); RENTON & BROWN, *op. cit. supra* note 4, at 31.

²⁰ I was so informed by members of the instructional staff at Tulliallan Police College in Scotland.

²¹ See RENTON & BROWN, *op. cit. supra* note 4, at 33; SMITH 217. The leading case is H.M.A. v. M'Guigan, [1936] Just. Cas. 16, 18 (Scot. 1935), in which the accused was arrested away from his dwelling place and the court held that the police were entitled approximately an hour later to search the dwelling, without a warrant.

²² Conversation with members of instructional staff at Tulliallan Police College.

²³ [T]here may be circumstances when the urgency of the situation is such that recovery of the documents outwith the terms of the warrant may be justified, since otherwise the documents might be lost or deliberately destroyed. Again, it is a question of facts and circumstances in each case. It therefore seems to me that, even if one were to accept Mr. Leslie's argument that there was irregularity here, the *two tests of fairness and urgency* fall to be applied.

H.M.A. v. M'Kay, [1961] Just. Cas. 47, 50 (Scot.).

the police learn from the illegal confession the identity of an eye-witness to the crime or the location of certain real or documentary evidence. Is such evidence admissible though the confession itself is not? The traditional view in the United States holds the evidence admissible.²⁴ In fact under Dean Wigmore's theory of "confirmation by subsequent facts," discovery of such evidence by means of the tainted confession can remove the taint with the result that all²⁵ or part²⁶ of the confession will be received along with the discovered facts themselves, or at the very minimum the evidence can be identified to the jury as having been found as a consequence of the accused's information.²⁷ It was Wigmore's view that, "The principle upon which a confession is treated as sometimes inadmissible is that *under certain conditions it becomes untrustworthy as testimony.*"²⁸ However, in America today this theory has been largely repudiated. Involuntary confessions are excluded

not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.²⁹

Although the supreme court of California has, in dictum, recognized that the admission of real evidence traced through leads from an extorted confession offends this federal constitutional standard no less than admission of the confession itself,³⁰ the present status of the "fruits of the poisonous tree" remains uncertain,³¹ and one still searches in vain for an authoritative holding absolutely excluding such evidence.

In the leading Scottish case of *Chalmers v. H.M.A.*,³² a youth of sixteen, under suspicion of having committed a murder, made a state-

²⁴ 3 WIGMORE, EVIDENCE § 859 (3d ed. 1940).

²⁵ *Id.* § 856.

²⁶ *Id.* § 857.

²⁷ *Id.* § 858.

²⁸ *Id.* § 822.

²⁹ *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

³⁰ *People v. Ditson*, 57 Cal. 2d 415, 439-40, 369 P.2d 714, 727, 20 Cal. Rptr. 165, 178 (1962); see 36 U. Colo. L. Rev. 275 (1964).

³¹ See, e.g., *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963); *Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962). It should be noted that these cases deal with confessions obtained in violation of the *McNabb* rule rather than in violation of a due process clause. Surely the Supreme Court will eventually hold that the "fruit of the poisonous tree" doctrine does apply in the case of confessions extracted in violation of the Constitution.

³² [1954] Just. Cas. 66 (Scot.).

ment at the police station under circumstances which would have called for exclusion of the statement if offered at the trial. He then was taken by the police to a cornfield where he showed them a purse belonging to the murdered man. These latter facts were admitted in evidence. The High Court, however, quashed the ensuing conviction, holding that the actions of the accused in leading the police to the purse should be regarded as the same transaction as the earlier improper interrogation and that, just as the statement was inadmissible, so was the evidence of these subsequent actions. Although there is at least an argument in another Scottish case that, where a confession is rejected, "the facts which came to light in consequence of it must be rejected also,"³³ the court in *Chalmers* did not hold that the purse itself was inadmissible. It did, however, squarely disapprove linking the accused to the purse by proof that he knew where it was and led the officers to it. This suggests a possible middle ground between the Wigmore orthodoxy and the outright exclusion of evidence discovered because of coerced confessions. It would be possible to admit the evidence but exclude the fact that it was discovered in consequence of a statement made by the accused. Thus, if, for example, police find the body of a murdered man as the result of a coerced confession, the corpse will not have to be suppressed, but the state will have to connect the corpse with the defendant by some means other than by proof via his confession that he knew the location of the body. This course obviously does not remove all incentive to abusive questioning by the police, but even suppression of the corpse, despite its high "cost" to the police process, might not have that effect.³⁴

In separating the voluntary from the involuntary confession, the pervasive problem is how the law should regard interrogation of suspects and prisoners by police officials. Here there is unquestionably a great divergence in Scottish and American theory. American courts have accepted such questioning as "often indispensable to crime detection"³⁵ and as "a necessary and ethical procedure provided there is no undue pressure and no deceit or overreaching."³⁶ The Scottish courts seem absolutely to forbid police questioning of prisoners or even of

³³ *Manuel v. H.M.A.*, [1958] Just. Cas. 41, 47 (Scot.).

³⁴ The penalty of outright suppression would be especially harsh in light of the fact that police "abuses" in confession cases can be "innocent" so long as the *McNabb-Mallory* rule is imprecise, and so long as some police interrogation of suspects is considered an indispensable and legitimate part of the investigation of crime. *Culombe v. Connecticut*, 367 U.S. 568, 571 (1961).

³⁵ *Id.* at 571.

³⁶ *McCORMICK*, EVIDENCE § 116, at 239 (1954). *Escobedo v. Illinois*, 378 U.S. 478 (1964), however, may seriously impair the future effectiveness of police interrogation through its ruling that a person is entitled to counsel from the moment when the investigation has begun to focus on him as a particular suspect.

those on whom suspicion has fallen,³⁷ a doctrine apparently even stricter than the Judges' Rules in England.³⁸

We must now determine whether the practical divergence is as great as the theoretical one in the two countries. This involves exploring the Scottish theory in greater detail while attempting to discover the actual Scottish police routine.

At the stage of initial investigation, the Scottish police may question whomever they please. Of course, they have no power to force answers, but, if the person who ultimately comes under suspicion makes an incriminating statement at this time, there is no ground for excluding it from evidence.³⁹ A problem lurks here. During this preliminary questioning of several persons, suspicion may begin to focus on a particular individual. This will probably occur long before the police could justify an arrest. When this time comes, may the police continue to interrogate? Theoretically there can be no interrogation of a person on whom suspicion has centered; but when does one pass from the status of an ordinary citizen cooperating with police officials to that of a suspect immune from further interrogation? Police officials in Edinburgh and at the Tulliallan Police College readily admit that they question people beyond mere awakening suspicion—to a point at which they are prepared to make arrests on specific charges and to issue caution. If this is "dangerous from the viewpoint of admissibility of evidence,"⁴⁰ it is nevertheless considered legitimate police practice, so long, at least, as the persons under interrogation are acting voluntarily.

This brings us to the next step in investigation by questioning. There seems to be in Scotland a fairly well established practice of "inviting" persons to come to and remain at the police station while under suspicion, although there has been no charge or arrest. Although there is serious question of the legality of such detention,⁴¹ and consequently of the admissibility of statements made even without interrogation under such circumstances,⁴² in every case rejecting statements made under this "voluntary detention," the courts have been able to point to such factors as the youth of the suspects, their extreme nervousness, if not illness, and an overall atmosphere of tension.⁴³

³⁷ *Manuel v. H.M.A.*, [1958] Just. Cas. 41 (Scot.); *Chalmers v. H.M.A.*, [1954] Just. Cas. 66 (Scot.); *Stark v. H.M.A.*, [1938] Just. Cas. 170, 175 (Scot.).

³⁸ SMITH 211. The Judges' Rules are set out and discussed in McCORMICK, EVIDENCE § 116 (1954).

³⁹ *Bell v. H.M.A.*, [1945] Just. Cas. 61 (Scot.); SMITH 213.

⁴⁰ *Id.* at 214.

⁴¹ *Chalmers v. H.M.A.*, [1954] Just. Cas. 66, 78 (Scot.).

⁴² SMITH 213.

⁴³ *H.M.A. v. Rigg*, [1946] Just. Cas. 1 (Scot. 1945); *H.M.A. v. Aitken*, [1926] Just. Cas. 83 (Scot.).

Thus, at the two early stages of interrogating persons wherever they are found and of "inviting" them down to the station for a chat, the practical gulf between Scottish and American procedure may be much smaller than the theoretical one.⁴⁴

Once a suspect is finally arrested on a criminal charge, however, the Scottish courts really crack down on police interrogation, and the difference between Scottish and American practice is quite marked. An arresting officer in Scotland is necessarily bound to inform the prisoner of the charge against him and to caution him that anything which he may say in answer to the charge will be taken down in writing and may be used in evidence.⁴⁵ After caution is given, it is quite clear that any statement resulting from police interrogation, no matter how mild, will be inadmissible.⁴⁶ In one case, for example, one police officer (constable) asked another officer in the hearing of the accused, "Was there a razor among his possessions?" The prisoner then made an incriminating statement. In holding that the statement could not be admitted in evidence, the court suggested that the prisoner might possibly have thought the policeman was addressing the question to him.⁴⁷ Even an invitation to speak without any ensuing questioning whatever has been held to vitiate a confession.⁴⁸

Obviously, no matter how strict courts are, police officials can on occasion successfully utilize improper practices. For example, I received a hint or two that "smart" officers interrogate prisoners but never turn over to the prosecutor resulting statements, relying instead on guilty pleas or on real evidence discovered as a result of the questioning. However, candid discussions in Scotland with several constables and advocates indicate that the Scottish police do issue caution with nearly every arrest and in general eschew the sort of interrogation of prisoners accepted as normal in the United States.

Thus, Scottish criminal justice seems to function smoothly without postarrest interrogation. On the other hand, the divergence in Scotland between theory and practice with respect to prearrest interrogation of suspects seems to lend some support to the argument often made in the United States that prearrest interrogation is a vital and

⁴⁴ The commandant of the police college expressed the view that this is an area in which police officers necessarily exercise discretion, and he added that the only solution is to recruit good men for police work so that they will use sound judgment in exercising this discretion in the light of the general judicial disfavor of police interrogation.

⁴⁵ SMITH 210. Of course, this still is not required in this country. See *Culombe v. Connecticut*, 367 U.S. 568, 601 (1961). *But see Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁴⁶ *Stark v. H.M.A.*, [1938] Just. Cas. 170 (Scot.); *Wade v. Robertson*, [1948] Just. Cas. 117 (Scot.) (dictum).

⁴⁷ *H.M.A. v. Lieser*, [1926] Just. Cas. 88 (Scot.).

⁴⁸ *Wade v. Robertson*, [1948] Just. Cas. 117 (Scot.).

occasionally the only practicable means of investigating crimes. To shield even known criminals from orderly and noncoercive police interrogation may be a too-squeamish preference of individual freedom to the legitimate needs of the administration of criminal justice. Perhaps this is the lesson of Scottish practice in which well trained and generally decorous police constables, in the face of a general prohibition against interrogation of suspects, do go out and talk to known burglars, for example, and justify their actions, if necessary, by explaining with straight faces that these persons are not suspects, but are merely ordinary citizens being invited to assist in the investigation of crime.

III. DISCOVERY BEFORE TRIAL

Very probably, of all the countries in the world that fall more or less within the English legal tradition, the United States has done most to take the gamesmanship and surprise out of civil cases and least to accomplish the same end in criminal practice. Distrust and conservatism toward pretrial discovery in criminal cases linger here despite persuasive argument that the dilemmas usually cited in justification are more apparent than real.⁴⁹ In Scotland discovery in civil cases lags well behind American practice, especially our practice under the Federal Rules of Civil Procedure.⁵⁰ But in a Scottish criminal case, the accused can know what to expect when he enters the dock and is immeasurably better off, at least in that respect, than his counterpart in the American federal courts and in most state courts.

In solemn procedure the Crown must give advance notice of all witnesses whom it expects to call and of all real and documentary evidence which it expects to "lead" at the trial.⁵¹ In practice this is done by attaching a list of witnesses and a list of "productions" to the record copy of the indictment which is lodged in the court of trial.⁵² If the accused wishes to see the documents and objects so listed, they must be made conveniently available for his inspection. Furthermore, the accused has the privilege of "precognosing" (interviewing) all

⁴⁹ Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961). The helpful literature here is abundant. See, e.g., Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1051-63 (1961). See also an excellent new article, Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 476 (1964).

⁵⁰ Hardin, *An American Lawyer Looks at Civil Jury Trial in Scotland*, 111 U. PA. L. REV. 739, 742 (1963).

⁵¹ Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict. c. 35, §§ 27, 35.

⁵² The statute cited in note 51 *supra* did not state a time for the giving of the required notice. The old practice was "due time." The invariable practice now is as stated in the text. Letter From Mr. Ian Murray, Advocate, Edinburgh, to the Author, Nov. 17, 1963.

witnesses on the Crown list.⁵³ No witness or production that is not so listed can be produced by the Crown at the trial unless leave of the court is obtained and supplementary written notice is given to the accused not less than two days before trial.⁵⁴

This is a bilateral discovery mechanism. If the accused wishes to examine any witnesses or to put in any productions not included in the Crown's lists, he must give written notice to the prosecutor at least three days before the date on which the jury is sworn to try the case against him.⁵⁵ The Crown may then inspect the accused's productions and take precognitions of his witnesses. If the accused fails to give this notice, but satisfies the court before a jury is sworn that this failure stemmed from legitimate inability, or even reasonable mistake,⁵⁶ the court may allow the evidence, giving such remedy to the prosecutor by adjournment or postponement as shall seem just.⁵⁷ The accused may make use of the witnesses and productions on the Crown lists without notice of intent to do so.

The precognition device has one serious deficiency. A general rule of Scottish law is that one may not prove extrinsically facts relevant only to the issue of credibility.⁵⁸ Cross-examination to discredit is wide enough, but the cross-examiner must take the answer of the witness. By early Scottish law this was even true with respect to attack by prior inconsistent statements. Since 1852, however, on proper foundation laid, a prior inconsistent statement may be proved by extrinsic evidence.⁵⁹ There is nothing in the relevant statute that would suggest any exception for precognitions, and there is authority, at least in civil cases, for the use of precognitions to prove prior inconsistent statements.⁶⁰ But a practice has grown up in modern times of not using precognitions for this purpose.⁶¹ Thus, one of the greatest values of pretrial discovery, the use of pretrial statements to measure the credibility of testimony at trial, is lost. If a witness testifies directly

⁵³ See *H.M.A. v. Monson*, 31 Sc. L.R. 289, 294 (Scot. High Ct. of Justiciary 1893).

⁵⁴ Criminal Procedure (Scotland) Act, 1921, 11 & 12 Geo. 5, c. 50, § 1.

⁵⁵ Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict. c. 35, § 36.

⁵⁶ *Lowson v. H.M.A.*, [1943] Just. Cas. 141 (Scot.).

⁵⁷ I saw a very harsh ruling on this point in one case. The accused sought permission to call to the stand a witness who had been a co-accused until he "copped a plea" at the trial. The judge would not permit the accused to call the man because he had not been listed as a prospective witness before trial.

⁵⁸ II DICKSON, *EVIDENCE IN SCOTLAND* § 1619 (1887). See also LEWIS, *EVIDENCE IN SCOTLAND* 134 (1925), discussing the exception to this rule for *de recenti* statements.

⁵⁹ Evidence (Scotland) Act, 1852, 15 & 16 Vict. c. 27, § 3.

⁶⁰ *Gilmour v. Hansen*, [1920] Sess. Cas. 598 (Scot. 1st Div.); *Shearer v. M'Laren*, [1922] Scots L.T.R. 158 (Scot. Outer House) (dictum).

⁶¹ *M'Neilie v. H.M.A.*, [1929] Just. Cas. 50 (Scot. 1928); *Binnie v. Black*, [1923] Scots L.T.R. 98 (Scot. Outer House).

contrary to his precognition and stubbornly persists through cross-examination, the cross-examiner, with the precognition in his hands, is helpless.

The arguments advanced in justification of this prohibition of extrinsic impeachment by precognition are not convincing. It begs the question entirely to say that such statements are made under "confidential circumstances."⁶² The argument that the length of precognitions is apt to prevent a witness from accurately recalling what he said previously⁶³ is applicable equally to all longer statements in any form and should not be invoked only against precognitions. If the real objection to precognitions is that they are not verbatim sworn statements, but are rather the interviewer's narrative impressions of what the witness said and therefore are not sufficiently reliable for fair use in impeachment,⁶⁴ then the Scots need a statute providing for sworn or at least verbatim statements at precognition, and further providing for their introduction into evidence, on proper foundation laid, for impeachment purposes. The same statute might also provide for the pretrial discovery of presently nondiscoverable precognitions taken by the other side.⁶⁵

If the accused seeks to ground his defense on documents or other items in the possession of the Crown or third parties, the courts are likely to order production.⁶⁶ This matter, however, is apparently not well settled, and such an order for production would probably be made only if the accused showed specifically "for what purpose and to what end production of the . . . documents is required."⁶⁷ It is, then, highly doubtful that accused persons can use this device for a general "fishing" search through the Crown files.

At the instance of either party to a Scottish criminal case, the trial judge will take the deposition of anyone who has information relevant to the case and who appears to be dying. If the person dies, this deposition may be introduced in evidence at the trial.⁶⁸

Under the Scottish Criminal Procedure Act⁶⁹ the accused must serve notice in advance of trial if he expects to assert a special defense.

⁶² *M'Neilie v. H.M.A.*, *supra* note 61, at 53.

⁶³ Conversations with judges and lawyers in Edinburgh and Glasgow.

⁶⁴ *Binnie v. Black*, [1923] Scots L.T.R. 98, 101 (Scot. Outer House).

⁶⁵ *Cf. Sheridan v. Peel*, [1907] Sess. Cas. 577, 44 Sc. L.R. 407 (Scot. 1st Div.).

⁶⁶ *Downie v. H.M.A.*, [1952] Just. Cas. 37 (Scot.) (dictum).

⁶⁷ *Id.* at 40.

⁶⁸ *H.M.A. v. Bell*, [1834] Sess. Cas. 1179 (Scot. High Ct. of Justiciary); *H.M.A. v. Petersen*, [1871] Just. Cas. 557 (Scot. 1874).

⁶⁹ Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict. c. 35, § 36. The special defenses were identified to me by advocates in Edinburgh as "well known." See Note, *Three Steps Backward*, 1963 Scots L.T. 166, for suggestion that the list of special defenses is now "closed," limited to the five specified in the text accompanying this note.

The statute does not specify the defenses but is applied in practice to: (1) alibi; (2) insanity at the time of the commission of the act; (3) self-defense; (4) "impeachment"—that the crime was committed by another named person; and (5) that the accused was *asleep* at the time that the act was committed. While the statute is absolute in its terms, leniency apparently is quite common, certainly where the defendant is not represented by counsel.

Finally, if the prosecutor desires the court to consider (for purposes of sentencing) any previous convictions of the accused, he must serve with the indictment a description of any such convictions.⁷⁰ These will not be seen by the trial judge until after the jury verdict.⁷¹ Then, if the accused expects to object to proof of any such conviction as not applying to him, or on any other ground, he must give prior written notice of such intention to the Crown. These reciprocal provisions probably save some quibbling in court.

The Scots hallow, as we do, the principle that no man is bound to incriminate himself. In fact that is the underlying basis of the Scottish rule excluding confessions unfairly obtained.⁷² This principle has not been felt, however, to stand in the way of requiring accused persons in criminal cases to serve advance notice of special defenses which they expect to assert, witnesses whom they expect to call, and documents and objects which they expect to offer in evidence. Hopefully, this view may someday prevail in the United States.⁷³ Since prosecutors presently enjoy a large advantage in investigative resources and techniques, defendants surely have more to gain than to lose by liberalized bilateral discovery provisions. Besides, to say that one is being forced to incriminate himself when he is required to disclose in advance of trial theories and evidence which he has decided to offer at trial in his own exoneration seems to make of the self-incrimination privilege a fetish rather than a sensible humanitarian doctrine.

IV. TRIAL

A. Selecting the Jury

The sacred American voir dire examination of prospective jurors is unknown to the Scots.⁷⁴ Although such matters as insanity, relation-

⁷⁰ Criminal Justice (Scotland) Act, 1949, 12, 13 & 14 Geo. 6, c. 94, § 39(b).

⁷¹ Criminal Justice (Scotland) Act, 1949, 12, 13 & 14 Geo. 6, c. 94, § 39(e).

⁷² *Manuel v. H.M.A.*, [1958] Just. Cas. 41, 48 (Scot.).

⁷³ *Louisell, Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 87-90 (1961).

⁷⁴ *Hardin, supra* note 50, at 745.

ship to a party, or enmity constitute cause for challenge,⁷⁵ the jury list must somehow be investigated for these things before balloting of the jury begins.⁷⁶ As a consequence, in practically every case only peremptory challenges are exercised,⁷⁷ and, usually, the Crown foregoes challenges altogether.⁷⁸

B. Evidence

Since all cases tried in solemn procedure are tried to a jury, the rules of evidence play an important role in Scottish criminal practice. However, more important perhaps than any difference in American and Scottish rules is a striking difference in practice. My observation of both civil and criminal trials in Scotland convinced me that Scottish advocates have a tradition of unusual restraint in objecting to evidence led by their opponents. I have dealt with that tradition at some length previously in this *Review*,⁷⁹ and I merely mention it again here to serve notice that evidence practice in Scotland is oftentimes a great deal more liberal than evidence rules.

But some of the Scottish rules of evidence do differ importantly from American law. I have previously commented, for example, on the Scottish exception to the hearsay rule for all relevant statements of deceased persons, on the wide scope of cross-examination in Scottish trials, on the rule (important in criminal cases) admitting *de recenti* statements, and on the free admissibility in negligence cases of evidence of postaccident safety measures.⁸⁰ I should like here to present some other striking Scottish rules of evidence, the first hopefully of general interest, the other four very important in criminal cases.

1. Best Evidence Rule

Evidence teachers who year after year try to disabuse their students of the notion that there is in America a rule of general application requiring litigants to use the best evidence available,⁸¹ will be

⁷⁵ RENTON & BROWN, *CRIMINAL PROCEDURE ACCORDING TO THE LAW OF SCOTLAND* 116 (3d ed. 1956). This is mainly a matter of unreported practice.

⁷⁶ A list of prospective jurors is available to the accused from the date on which the indictment is served. Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c. 35, § 38.

⁷⁷ The Crown has five challenges, and *each* accused has five.

⁷⁸ RENTON & BROWN, *op. cit. supra* note 75, at 116. This is largely a matter of unreported practice.

⁷⁹ Hardin, *supra* note 50, at 750-55.

⁸⁰ *Id.* at 746-50.

⁸¹ McCormick has an excellent brief discussion of the history of the best evidence principle, concluding with the consensus of modern scholars that the only rule that properly goes by that name today is the rule requiring the production of original writings in order to prove their contents. MCCORMICK, *EVIDENCE* § 195 (1954).

interested to learn that such a rule is well recognized in Scotland.⁸² There one must adduce, if possible, eyewitnesses of the accidents and crimes, persons who made statements sought to be proved at trial, the original of documents to which reference is made, and the very chattels and objects when some quality about them is in dispute. Only if these items of "best evidence" are shown to be unavailable can a party offer secondary evidence. It follows that the hearsay rule in Scotland is but an application of the best evidence rule, and such an interpretation would seem to augur admissibility of items which American courts would exclude. If hearsay evidence is excluded because it is not usually the best evidence, surely it ought to be admitted when it is shown to be better than anything else at hand. Thus the Scots not surprisingly admit all relevant statements of deceased persons in Scottish trials.

I cannot tell just how much difference the Scottish best evidence rule makes in other respects. Possibly not much. American lawyers, as a matter of trial tactics, try to produce the best (most persuasive) evidence and very probably resort to secondary material only under circumstances which would lead Scottish courts to permit secondary evidence on the theory that the best evidence cannot practicably be adduced. For example, in civil cases Scottish courts do not carry the best evidence principle so far as to require one who sues for damage to his auto to postpone repairs and bring the damaged vehicle before the jury.⁸³

2. Impeachment of Witnesses⁸⁴

The most important difference between Scottish and American rules governing attacks on the credibility of witnesses is the Scots'

⁸² The rule has been exemplified by stating that, "where facts may competently be proved in different ways the means most likely to carry conviction is to be preferred." LEWIS, EVIDENCE IN SCOTLAND 256 (1925). And cases actually fail on evidential grounds when a party, having the "best" evidence available, fails to bring it. *E.g.*, *Gamage v. Charlesworth's Trustees*, [1910] Sess. Cas. 257, [1910] Scots L.T.R. 11 (Scot. 1st Div. 1909).

⁸³ This seems to be the practice, and authority is difficult. But since in such a civil action one is required to minimize loss, the defender cannot object very easily to a car being repaired as early as possible. Generally photographs or plans will be accepted.

In criminal cases the matter is a little different. Corpses are not brought in for murder trials, but on the whole the courts are much more punctilious to see that productions, rather than evidence of these, are brought. Thus in a poaching case I had, 40-odd salmon were kept in deep freeze for three months to be produced at the trial. See *Paterson v. H.M.A.*, [1901] Sess. Cas. 7 (Scot. High Ct. of Judiciary), which suggests that failure to let the jury see an important production may be a ground for quashing a conviction.

Letter From Mr. Ian Murray, Advocate, Edinburgh, to the Author, Nov. 17, 1963.

⁸⁴ This term is not used by the Scots to describe attacks on the credibility of witnesses. "Impeachment" to them is a special defense under which the accused in a criminal case suggests that another named person committed the crime. See text accompanying note 69 *supra*.

aforementioned prohibition⁸⁵ of impeachment by extrinsic evidence. To illustrate how far this rule goes, suppose that defense counsel asks a Crown witness on cross-examination whether or not he has ever been convicted of perjury. The witness is required to answer, but, if he denies such a previous conviction, the matter is at an end, even if counsel has official records available showing the conviction.⁸⁶ Surely this is giving too much importance to trial efficiency and too little importance to weighing the credibility of witnesses.

Another aspect of Scottish practice relating to credibility is more sensible. The *accused* in a criminal case may not be asked about prior convictions of crimes solely because he takes the stand to testify in his own behalf.⁸⁷ This salutary rule has found favor, of course, with the draftsmen of the Uniform Rules of Evidence in this country.⁸⁸

3. Character Evidence

In common with the United Kingdom and other British Commonwealth countries, Scotland has a character evidence rule which does not appear in American law. The accused "opens the door" to a showing by the Crown that he is a person of bad character if "the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."⁸⁹ In Scotland the rule is interpreted more narrowly in favor of the accused than in England. The accused is permitted to attack Crown witnesses' character to the extent that this bears reasonable relationship to his defense, without opening the door to having his own character impugned. For example, one case involved the appearance of a police constable as a witness for the Crown in an assault case. The accused entered a plea of self-defense and was permitted to introduce evidence that the constable was intoxicated at the time in question. This did not open the door to attack on the accused's character, although the case would have been different if, for example, the attack on the constable had taken the more general form of an accusation that he was a drunkard.⁹⁰

Another interesting feature of character evidence in Scotland is the manner of proving it. The Scots do not share our rather un-

⁸⁵ See text accompanying notes 58-65 *supra*.

⁸⁶ II DICKSON, EVIDENCE IN SCOTLAND § 1619 (1887).

⁸⁷ Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, § 1 (f).

⁸⁸ UNIFORM RULE OF EVIDENCE 21.

⁸⁹ Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1 (f) (ii).

⁹⁰ *O'Hara v. H.M.A.*, [1948] Just. Cas. 90 (Scot.). See also *H.M.A. v. Deigham*, [1961] Scots L.T.R. 38 (Sheriff Ct.). That an attack such as was made in the *O'Hara* case would open the door in the English courts is a fair inference from the case of *R. v. Jenkins*, 31 Crim. App. R. 1 (Eng. 1945), and authorities cited therein.

accountable preference for reputation evidence, but seem to accept rather freely the opinions of persons who know the character trait under inquiry.⁹¹

4. Self-Incrimination Privilege

The privilege against self-incrimination in Scottish law is directed against testimonial compulsion.⁹² When the courts are dealing with such matters as having the accused speak for voice identification, having him reenact a crime, extracting body fluids, or anything else "physical," the tendency is to think in terms of fair play and, if the evidence is excluded, to say simply that the evidence was "improperly" obtained.⁹³ Limitation of the self-incrimination privilege to prohibiting testimonial compulsion has been a popular American view, although broader applications of the privilege have been made from time to time.⁹⁴

The accused's failure to give evidence in his own behalf must not be made the subject of comment by the prosecutor in Scotland, and violation of this rule probably would vitiate a jury conviction.⁹⁵ On the other hand the judge is entitled to draw the attention of the jury to this failure to testify,⁹⁶ although such comment should be made with restraint and should in no case be emphasized or reiterated.⁹⁷ Perhaps this judicial power to suggest the unfavorable inference of a consciousness of guilt is not too harsh in a country where the accused may not be cross-examined about prior convictions merely because he takes the witness stand.⁹⁸ As a matter of practice, Scottish judges apparently do not usually call attention to the accused's failure to testify except to caution the jury not to draw any unfavorable inference from that failure.

⁹¹ I observed this in several trials and was told by Scottish lawyers that this is the accepted means of proving character.

⁹² "Testimonial compulsion" is Dean Wigmore's phrase. 8 WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961).

⁹³ *E.g.*, in *M'Govern v. H.M.A.*, [1950] Just. Cas. 33 (Scot.), the owner of a bicycle, which had been found by police near the scene of a "safe-cracking," stated to the police that the bicycle had been stolen from him and agreed to visit the station in order to identify it. The police began to suspect that he was concerned in the crime and, without his permission, took scrapings from his fingernails. Later he was charged and arrested, and at his subsequent trial evidence was led that the scrapings from his nails showed traces of an explosive like that which had been used to blow open the safe. He was convicted, but the High Court quashed, holding merely that the evidence "was improperly obtained," and never mentioning the privilege against self-incrimination.

⁹⁴ McCORMICK, EVIDENCE § 126 (1954).

⁹⁵ Two summary procedure nonjury cases stand for the proposition that violation will not automatically result in reversal. *Ross v. Boyd*, [1903] Sess. Cas. 64 (Scot. High Ct. of Judiciary); *M'Attee v. Hogg*, [1903] Sess. Cas. 67 (Scot. High Ct. of Judiciary). But the consensus among advocates with whom I spoke was that the Crown could not expect the same leniency on appeal from a jury verdict.

⁹⁶ *Brown v. MacPherson*, [1918] Just. Cas. 3 (Scot.).

⁹⁷ *Scott v. H.M.A.*, [1946] Just. Cas. 90 (Scot.).

⁹⁸ See text accompanying note 87 *supra*.

5. Corroboration

Traffic wardens in Edinburgh work in pairs. This seems to be essential if convictions are to be had for such serious offenses as overtime parking, because of the important and unique Scottish doctrine of corroboration. In the leading case of *Morton v. H.M.A.*,⁹⁹ the High Court stated that, "[B]y the law of Scotland, no person can be convicted of a crime or a statutory offence, except where the Legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged."¹⁰⁰

The fair import of that language seems to be that the doctrine's central application is to the identification of the accused as the perpetrator of the offense. Yet Lord Justice-General Cooper seems to have had a different impression in the later case of *Bisset v. Anderson*.¹⁰¹ The charge in that case was that the accused was the owner of a private motor vehicle which had commercial petrol in its tank. A single analyst spoke to the fact that the petrol taken from the tank was commercial petrol. In his opinion, holding that the testimony of two analysts was necessary, Lord Cooper set out the above quotation from the *Morton* case and added: "[I]n other words the evidence of a single witness, however credible, is insufficient at common law to establish the truth of *any essential fact* required for a criminal conviction."¹⁰² Because of the great influence of Lord Cooper's opinion, the requirement of corroboration in Scottish criminal cases seemed for a time to apply not only to proof that the accused perpetrated the crime, but also to proof of every element of the crime.

The recent case of *Gillespie v. Macmillan*¹⁰³ may have altered the interpretation. There, the driver of an automobile was convicted of speeding. Proof of the speed of the car depended on the evidence of two police constables who had been stationed with stop watches, one at either end of a measured distance. The constable at the entrance started his watch as the car entered the measured distance, and the constable at the exit started his watch as the car emerged. The accused was stopped farther along the road by a third constable. The watches were stopped simultaneously in the presence of the accused, and the difference in time was noted. From this it was calculated that the

⁹⁹ [1938] Just. Cas. 50 (Scot.).

¹⁰⁰ *Id.* at 55.

¹⁰¹ *Bisset v. Anderson*, [1949] Just. Cas. 106 (Scot.).

¹⁰² *Id.* at 110. (Emphasis added.)

¹⁰³ [1957] Just. Cas. 31 (Scot.).

speed limit had been exceeded. Sustaining the conviction, the High Court held that, although two witnesses were required to identify the accused, the evidence of a single credible witness to each fact in a chain of circumstantial evidence was sufficient in law to establish the offense. Thus, it was competent for the one constable to time the entrance into the measured distance and for the second to time the exit therefrom, although neither could corroborate the other's testimony, except with respect to the identity of the driver of the car.

The *Gillespie* case has been vigorously criticized as stating a "new theory"¹⁰⁴ of corroboration and as being "contrary to the genius of the criminal law of Scotland."¹⁰⁵ However, the leading authority on Scots Law seems unruffled by the case and appears to have accommodated his definition of corroboration to it. Perhaps all that is left of the doctrine is the rule, as he states it, "that the material elements in the prosecutor's case which identify the accused with the commission of the crime must be established by the testimony of two credible witnesses."¹⁰⁶

The corroboration rule is relaxed even as to identification in cases where a series of similar crimes, "interrelated by character, circumstance, and time,"¹⁰⁷ justifies the inference that the accused pursued a set pattern of criminal conduct. In such cases the testimony of single credible witnesses to each crime in the series may be accepted as mutual corroboration. The leading early cases involved similar sexual assaults on young girls,¹⁰⁸ but the rule has been applied in more recent cases to razor slashings (six separate assaults)¹⁰⁹ and attempts to bribe football players (two bribery attempts set a sufficient pattern to invoke the rule).¹¹⁰

Even as partially eroded by these "pattern" cases, the Scottish rule requiring testimony of two witnesses to identify persons accused of crime is an important one. It seems salutary that no person should be convicted of serious crime on the testimony of a single witness. And the onus on the prosecution is not as great as one might at first suppose. In a stabbing case, for example, the Crown need not produce two eyewitnesses to the occurrence itself. The corroboration requirement is met if two or more witnesses testify to incriminating circumstances such as the accused's flight from the scene, blood on his

¹⁰⁴ Wilson, *The Logic of Corroboration*, 76 *SCOT. L. REV.* 101 (1960).

¹⁰⁵ *Corroboration of Evidence in Scottish Criminal Law*, 1958 *SCOTS L.T.* 137, 141.

¹⁰⁶ SMITH 235.

¹⁰⁷ *Id.* at 237.

¹⁰⁸ *Burgh v. H.M.A.*, [1944] *Just. Cas.* 77 (Scot.); *Moorov v. H.M.A.*, [1930] *Just. Cas.* 68 (Scot.).

¹⁰⁹ *H.M.A. v. M'Quade*, [1951] *Just. Cas.* 143 (Scot.).

¹¹⁰ *M'Cudden v. H.M.A.*, [1952] *Just. Cas.* 86 (Scot.).

clothes, bloody knife in his possession, or perhaps his incriminating statements.¹¹¹ On the other hand, the corroboration requirement seems inefficient when applied to minor statutory offenses. Poaching acts dispense with corroboration, since "gamekeepers are not normally escorted by credible witnesses."¹¹² Perhaps an outsider may suggest that a similar dispensing with the corroboration requirement in traffic offenses could reduce the public payroll without too great a sacrifice of justice.

C. *Instructions and Verdict*

1. Burden of Proof

The presumption of innocence and the burden on the prosecution to prove each element of a case beyond a reasonable doubt are keystones of Scottish criminal justice, as they are of English and American.¹¹³ On the other hand, under Scots law the burden rests upon the accused to prove so-called affirmative defenses "on a balance of probabilities."¹¹⁴ This latter rule seems to me an unfortunate one, and yet, apparently, more and more American jurisdictions are embracing it.¹¹⁵ In its every application it is likely to confuse the jury, and in many cases, if not most, it requires the jury to perform a feat logically impossible. It is utter nonsense to instruct a jury that the prosecution has to prove beyond a reasonable doubt that the accused assaulted the complaining witness, and then to say that the accused, having alleged that he was elsewhere at the time, has to prove his absence by a preponderance of the evidence in order to escape conviction. If the first half of the instruction means anything at all, it means that the accused need only raise a reasonable doubt as to his whereabouts, a far different requirement from persuading the tribunal that he was more probably elsewhere than at the scene of the alleged crime. The Scottish courts, while never admitting that these rules are incompatible, do seem to add tortuous instructions that enable juries to use the accused's evidence

¹¹¹ See *Morton v. H.M.A.*, [1938] Just. Cas. 50, 52 (Scot.).

¹¹² SMITH 235 n.19.

¹¹³ *H.M.A. v. Mitchell*, [1951] Just. Cas. 53 (Scot.).

¹¹⁴ *Ibid.*; *Dickson v. H.M.A.*, [1950] Just. Cas. 1 (Scot.); *H.M.A. v. Braithwaite*, [1945] Just. Cas. 55 (Scot.).

¹¹⁵ By what has been said to be the majority American view, defendants have no burden of persuasion with respect to "affirmative" defenses, although they well might have the burden of going forward with some evidence of, say, alibi or self-defense, in order to force the prosecution specifically to negative these allegations. Yet one wonders whether this can truly be said to be the majority view today. See 9 WIGMORE, EVIDENCE §§ 2501, 2512 (3d ed. 1940), and compare the materials in the hard-bound volume with the recent cases cited in the pocket supplements. See also 49 IOWA L. REV. 590 (1964); 24 MD. L. REV. 78 (1964).

to find a reasonable doubt, even though it is too flimsy to persuade on a balance of probabilities.¹¹⁶

2. Comment

The Scots have not taken from the trial judge his privilege of commenting upon the evidence and upon the credibility of witnesses. Although a conviction may be quashed if the judge does not "fairly put the defence case to the jury,"¹¹⁷ or if he fails to caution the jury that they are masters of the facts,¹¹⁸ the judges do not hesitate to express their opinions and to suggest inferences to the jury. In one case which I observed, eight co-defendants were charged on a complicated, multiple-count indictment. The jury had to deal separately with each accused person as to each count—a difficult task. The court dealt at length in its charge with the case against one man, whom we shall call *E*. He said two or three times that he thought it "singular" that the testimony of the four constables was not well supported by civilian witnesses with respect to *E*'s participation in the crime. At least twice he said, "I expect, ladies and gentlemen, that the case of the accused, *E*, will cause you some anxiety." "Some anxiety" seemed to me and to the jury, who acquitted,¹¹⁹ to equate pretty well with reasonable doubt. When the trial judge later saw the record of *E*'s prior convictions, he stated to me that he was afraid that he had led the jury to the wrong verdict in *E*'s case, indicating that he shared my view that his comment had been decisive. Another matter disturbed me about this case. This particular judge was one who customarily was careful to use his comment power to favor rather than condemn accused persons. But his favorable comment about the accuseds, *A*, *C*, and *E*, omitted in the cases of the other five accuseds, pretty well damned the latter, or so it seemed to me.

3. Verdict

Two features about jury verdict in Scottish criminal cases present sharp contrasts to American practice. First, a simple majority verdict is sufficient to convict or acquit in Scotland.¹²⁰ There are fifteen

¹¹⁶ *Dickson v. H.M.A.*, [1950] Just. Cas. 1 (Scot.); *Lennie v. H.M.A.*, [1946] Just. Cas. 79 (Scot.).

¹¹⁷ *Scott v. H.M.A.*, [1946] Just. Cas. 90, 96 (Scot.).

¹¹⁸ *RENTON & BROWN*, *op. cit. supra* note 75, at 152.

¹¹⁹ The verdict, actually, was "not proven." See discussion of that verdict form, p. 186 *infra*.

¹²⁰ *RENTON & BROWN*, *op. cit. supra* note 75, at 123.

jurors,¹²¹ and eight votes will convict of even the most serious crime.¹²² Couple that fact with the practice of free judicial comment on the evidence, and the jury appears far less important in Scotland than in the United States.

The second contrast is that Scottish juries choose between three possible verdicts: guilty, not guilty, and *not proven* (pronounced *prō' ven*). The retention of the not proven verdict is a matter of continuing debate.¹²³ Its legal effect is clear enough—the accused is acquitted. What it means, however, in terms of the jury's attitude is less clear. Whether because they feel that juries understand the matter, or because they do not know how to help them understand it, trial judges in Scotland do not instruct juries on any distinction between the not guilty and not proven verdicts.¹²⁴ Left, thus, to their own ingenuity, who knows what state of mind prompts juries to return verdicts of not proven? Perhaps the most logical inference from such a verdict is that the jury suspects that the accused might be guilty, but feels that the Crown has not proven its case by the requisite doubt-free standard. If, but for that form, some of these persons would be found guilty, the form provides a valuable safeguard against the ignoring of the reasonable doubt standard and should be retained in Scotland and perhaps adopted elsewhere. If, however, all or practically all of the not proven cases would become not guilty cases if the not proven form were abolished, then it should be. For, if it is a mere redundancy, it is far from a harmless one. An accused person whose presumption of innocence theoretically has not been overcome is stigmatized to a certain extent, even as he is set free. Furthermore, while this may not provoke as much sympathy, the not proven verdict also stigmatizes the prosecution by implying a certain lack of assiduousness. On the whole it seems to me undesirable to attempt to erect in criminal cases any sort of middle ground between guilty beyond a reasonable doubt and not guilty.

¹²¹ Provision is made for the continuation of trial despite illness or other incapacity of as many as three.

¹²² It still takes eight votes, even if illness or other cause removes one, two, or three jurors from the original panel. Administration of Justice (Scotland) Act, 1933, 23 & 24 Geo. 5, c. 41, § 19.

¹²³ MacLean, *Not Proven Verdicts*, 75 Scot. L. Rev. 21 (1959); Letter From Ian Murray, Advocate, Edinburgh, to the Author, Nov. 17, 1963.

¹²⁴ A fair example of a complete charge on the matter is the following: "That leaves me nothing more to do, members of the jury, than just to tell you what the possible verdicts are. Your first question is: Has the Crown proved beyond reasonable doubt that the accused killed the deceased? If you do not think the Crown has done so, then your verdict is not guilty or not proven." *H.M.A. v. Mitchell*, [1951] Just. Cas. 53, 55 (Scot.).