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Shiels, Robert S

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THE SCOTTISH CRIMINAL TRIAL AND JUDICIAL INTERVENTION IN A PUBLIC CONTROVERSY: A DISCUSSION PAPER

Robert S. Shiels*

Abstract:

A published article by a senior Scottish Judge, Lord Kingsburgh (Sir John Macdonald), in 1898, reveals the tensions around reform in the United Kingdom of the law concerning the competence of an accused giving evidence for the defence. The change in law also provides some insight into the perception of the practitioners of the Victorian period as to the system they worked in.

Keywords: Scotland, evidence, procedural competence; radical change; accused appearing for defence.

Introduction

The lawyers in late-Victorian Scotland probably felt keenly the effects of contemporary legal change especially the Criminal Procedure (Scotland) Act 1887 (c.35) that changed radically long-established practices.¹ In addition, the Criminal Evidence Act 1898 (c.36) was of importance in allowing an accused to give evidence on oath for the defence. The policy of allowing an accused to give parole evidence was preceded by a long debate.² The 1898 Act made no provision for context, particularly the practical differences in criminal procedure then existing in Scots law: the legislature intended that the Act would be implemented uniformly throughout the United Kingdom.³

One modern lawyer has commented that Scottish criminal law had enjoyed immunity from interference after the Union because: 'the Establishment of those days' was not greatly interested in how the criminal classes were suppressed, provided the means were effective.⁴

* Solicitor in the Supreme Courts of Scotland: robertshiels@hotmail.com

¹ Robert S. Shiels, 'Judicial Dissent and the 1887 Reform of Criminal Procedure', *Scottish Criminal Law* (2009) 769.

² Graham Parker, 'The Prisoner in the Box-The Making of the Criminal Evidence Act 1898' in J.A. Guy and H.G. Beale (eds), *Law and Social Change in British History* (London: Royal Historical Society, 1984) refers to 16 bills over 20 years prior to 1898; p.162.

³ R.L.C. Hunter, 'Imputations on the Character of Prosecution Witnesses', *Juridical Review* (1968) pp.238-253

⁴ T.B. Smith, *British Justice: The Scottish Contribution*, (London: Stevens & Sons Limited, 1961) pp.195-6.

If that is correct then Scots lawyers doubtless learnt to operate effectively in a system with little Parliamentary intervention.

However, a basic underlying distinction may be discerned easily between the Criminal Procedure (Scotland) Act 1887 and the Criminal Evidence Act 1898. The source of the former Act was a perceived need by a Scots lawyer, Lord Kingsburgh, for the modernisation of Scots criminal procedure which constitutionally had to pass through the Imperial Parliament whereas the source of the latter Act was the British Government through the Imperial Parliament. The difference was not a matter of law but rather a point of political legitimacy.

Scots lawyers in the mid to late-Victorian era seem in general to have been aware of contemporary developments in English law and some were not averse to accepting, or at least the citing of, the decisions from the neighbouring jurisdiction to deal with problems common to both.⁵ They had not always been so receptive to such a direct influence but the change has been dated on a contemporary assessment to changes in judicial office-holders in 1858.⁶

Scots lawyers were also alert in particular to the long-running debate amongst English lawyers as to an accused giving evidence in his own defence.⁷ Not a few Judges engaged in the controversy, with many who participated in the dispute arguing for the protection of the accused.⁸ In Scotland, Lord Kingsburgh, Sir John Macdonald, also participated in the public debate of a matter described by him as being of 'incalculable importance'. In 1885 Macdonald was elected as a Conservative Member of Parliament for the constituency of Edinburgh and St. Andrews Universities. Three years later, in 1888, on the resignation of Lord Moncreiff, Sir John was appointed Lord Justice Clerk (with the judicial title of Lord Kingsburgh) and he remained in office until 1915.⁹ His influence was exceptional as: 'he was thoroughly familiar with the subject, and he is entitled to the highest credit for piloting it [the

⁵ Lord Rodger of Earlsferry, 'Thinking About Scots Law', 1 *Edinburgh Law Review* (1996) 3, p.16.

⁶ Lord Watson of Thankerton, 'Recent Legal Reform', *Juridical Review* (1901) 1, p.12.

⁷ E.g. Anon, 'Should Accused Persons Be Competent Witnesses?' 2 *Scottish Legal Review* (1886) p.248; R. Brown, 'The Evidence Bill', 7 *Scottish Law Review* (1891) p.233; (1897-1898) 5 *Scots Law Times* pp. 63 and 126; (1898-1899) 6 *Scots Law Times* p.8.

⁸ Keith Smith, 'The Trial: Adversarial Characteristics and Responsibilities; Pre-trial and Trial Procedures' in *The Oxford History of the Laws of England: Volume XIII; 1820-1914; Fields of Development*, (Oxford University Press, 2010) p.104.

⁹ Sir John Macdonald was in some way unhappy about his being required to use a judicial title, or the one he selected, but taking a judicial title was the traditional Scottish practice: N. Macdonald, *Sir John Macdonald: Lord Kingsburgh*, (Bridgend: Lumphanan Press, 2010) p.158.

Criminal Procedure (Scotland) 1887 Act] through the House of Commons in a session during which party feelings ran unusually high'.¹⁰

His intervention after almost a decade on the Bench took the form of an extended article entitled 'Prisoners as Witnesses' published in two parts in 1898 in the *Juridical Review* discussing the Criminal Evidence Bill.¹¹ There were, at the end of the nineteenth century, rules of a normative sort as to what activities were compatible with occupation of the Bench.¹² The article demonstrates a protective enthusiasm for his main area of interest, criminal law, evidence and procedure. The publication appeared under the name of 'J.H.A. Macdonald' rather than the judicial title of Lord Kingsburgh.

1 The Old Law and the Declaration

WG Dickson, in the contemporary textbook on the Scots law of evidence, wrote:

The spirit of the old Scotch law was to exclude every person whose character, whose connection with the parties, or whose interest in the case, raised a doubt as to the trustworthiness of his evidence. It was then more difficult to discover who were admissible, than who were incompetent, witnesses.¹³

More particularly it had been declared expressly that nothing in section 3 of the Criminal Evidence Act 1853 (c.20) which made changes to the competence and compellability of witnesses:

shall render any person, or the husband or wife of any person, who in any criminal proceedings is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence either for or against himself or herself.¹⁴

In short, an accused could not give evidence on his own behalf in his own trial: the whole case against him had to be proved by the Crown but he was not permitted to challenge or rebut any of the evidence presented through his own testimony.

The judicial examination, however, was one competent means of the evidence of the accused being received in court: that was possible by making a declaration.¹⁵ It was the

¹⁰ Obituary, *The Scotsman*, 10 May 1919, p.8.

¹¹ J.H.A. Macdonald, 'Prisoners as Witnesses', 10 *Juridical Review* (1898) 129-144 (Part 1); and 257-271 (Part 2).

¹² See e.g., Amicus Curiae, 'Judges Avocations', *Juridical Review* (1917) 257 who deals with an admittedly later suggested infraction of a financial sort by another Judge.

¹³ William Gillespie Dickson, *A Treatise on the Law of Evidence in Scotland* (Edinburgh: T & T Clark, 1887) vol.2 para.1542.

¹⁴ The modern law is that the spouse or civil partner of the accused is both a competent and compellable witness: s. 264 Criminal Procedure (Scotland) Act 1995 (c. 46).

¹⁵ David B. Griffiths, *Confessions* (Edinburgh: Butterworths, 1994) pp.23-25.

practice in Scotland whenever a person was charged with a criminal offence, except in petty cases, to take the prisoner before a Magistrate, in order to obtain his account of the matter. That statement of the law was supplemented with a gloss of the reality:

By these means innocent persons sometimes succeed in explaining circumstances which seem to throw suspicion; but far more frequently declarations support the case of the Crown, by containing express or implied admissions of guilt, or at least of circumstances prejudicial to the prisoner.¹⁶

Extensive rules had developed through the common law to limit the extent of the whole procedure and impose some sense of fairness as then understood and, from 1867, the textbook written by John Macdonald encompassed the law.¹⁷ The production of the declaration itself in court was by parole evidence of the judicial officer who had overseen the procedure: thus in the trial of the Directors of the City of Glasgow Bank for crimes of dishonesty it was said by Francis Clark, Sheriff of Lanarkshire in open court:

I have always regarded it to be the duty of the magistrate to give accused persons the earliest possible opportunity of making any statement they desire to make, because if they make a statement such as may warrant the magistrate in releasing them, which may sometimes be the case, the sooner it is made in their interest the better.¹⁸

Moreover, for the Procurator Fiscal as local public prosecutor in the Sheriff Court who had to implement the procedure there was also the Book of Regulations produced by the Crown Office and issued in 1868 which contained relevant instructions.¹⁹ Not least of the Rules was this:

Before beginning to take the declaration, the accused must be informed that it may, and probably will, be used against him, and that he may either answer or refuse to do so. Great care should be taken, in wording the declaration, to convey correctly the meaning of the accused, without any exaggeration; and nothing he may state favourable to his own case must be omitted, any more than statements of an opposite description. No temptation of any kind (such as hinting that it may be for his advantage to be candid) ought on any account to be held out to induce him to declare or confess.²⁰

The supervisory role of the Crown Office in the overall hierarchical scheme of public prosecution was restated:

¹⁶ Dickson, *A Treatise on the Law of Evidence in Scotland*, para.314.

¹⁷ J.H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (Edinburgh: Wm. Paterson, 1st edn.1867) pp.289-296.

¹⁸ C.T. Couper, *Report of the Trial of the Directors of the City of Glasgow Bank* (Edinburgh: Edinburgh Publishing Company; 1879) p.87.

¹⁹ National Records of Scotland (NRS) AD 5/11: Crown Office, 'Regulations to be Observed in Criminal and Other Investigations'.

²⁰ Crown Office, 'Regulations to be Observed', Part Second, Title Fourth, Rule 2.

When a delinquent is disposed to confess, apparently in expectation as a witness for the Crown, it must be kept in view that neither the magistrate nor the Procurator Fiscal has authority to give assurances which may fetter Crown Counsel in afterwards determining whether it be proper to bring the person to trial.²¹

It was imperative that the declaration emitted by an accused was done so 'freely and voluntarily'.²² However, declarations were almost always made in response to answering questions put by the Procurator Fiscal in the presence of the Magistrate: 'in order to direct the prisoner's attention to matters on which his statement is required [sic]'.²³ The prisoner might decline to answer certain questions (as he was entitled to do) and that fact would then be recorded and later the prosecutor could competently place the document before a jury. It was said that a general refusal to answer did not raise any adverse inferences but to refuse to answer individual questions might do so especially when connected to the charge as it showed the prisoner knew the importance of the question.²⁴ Dickson referred to the considerable difference of opinion that existed as to whether these proceedings at a judicial examination were fair to the prisoner.

It is certainly most oppressive to subject accused persons to the inquisitorial and harassing examinations practised in some foreign courts...No doubt it [the Scottish procedure] admits of being abused in the hands of an over-zealous prosecutor and a weak or biased Magistrate, with the connivance of witnesses equally unscrupulous. But the times when such improper practices could be successfully resorted to have gone by, and the risk of them in modern procedure, although it may alarm the theorist, will not have any weight with persons acquainted practically with the administration of criminal law in this country.²⁵

The formal view was that as an accused had the liberty to decline to answer questions and there was judicial protection from cross-examination by the prosecutor there seemed to some practitioners to be no good reason to discontinue the practice. Arguably it was more likely to assist than prejudice an accused and: '[...] it often completes a defective proof for the Crown, and so prevents the guilty from escaping.'²⁶

There were contrary views expressed, for example, an experienced Glasgow practitioner in a paper read at a conference noted that in England a person accused of a crime was then not subject to any private examination.²⁷ In Scotland, the examination resulting in a

²¹ Ibid, Rule 8.

²² Dickson, *A Treatise on the Law of Evidence in Scotland*, vol. 1, para.317.

²³ Ibid, para.320.

²⁴ Ibid, para.326.

²⁵ Ibid, para.342.

²⁶ Ibid, para.342.

²⁷ W. Burns, 'Examination of Accused Persons preliminary to Commitment for Trial', in C.W. Ryallis, *Transactions of the National Association for the Promotion of Social Science: Glasgow Meeting, 1874* (London: Longmans, Green and Co., 1875) pp.311-320 at p.311.

declaration could be fair but there was a suggestion that it might not always be so, much depending on the sense of fairness of the lawyers participating.²⁸ Further, if the declaration was not evidence for the prisoner it could not be put before a jury unless the prosecutor consented. If the declaration served the prosecutor's purpose it was used as evidence and presented to the jury but if not it was withheld: 'in other words, disguise it as we may, the accused is made a competent witness for the prosecution, but not for himself'.²⁹ In practice, the accused at a declaration was probably in a not dissimilar position to that of 'a continental defendant' and thus was:

not free to decide whether to take the stand and submit to the interrogation process. Questions can always be asked of him. He only has the right to refuse to answer at all, or refuse to respond to particular questions. Although, as a matter of formal doctrine, the trier of fact is usually not permitted to draw unfavourable inferences from his silence, the defendant's quite realistic concern that such inferences will, consciously or unconsciously, in fact be drawn, acts in a typical case as a psychological pressure to speak and respond to questions. Thus, it should occasion no surprise that almost all continental defendants choose to testify.³⁰

As an indication of matters in practice it was written earlier at the turn of the nineteenth century that the Circuit Court could dispose of 15 cases in eight hours. Further, without any criticism of the prosecutor who had no need of addressing the jury, counsel for the accused also declined to address the jury in the great majority of cases.³¹ The declaration was a means of reducing the legal issue in dispute in any criminal activity being prosecuted to the narrowest possible point of contention.

An example of a useful declaration may be that of James Robb before the Circuit Court in Aberdeen in September 1849.³² The proof of the presence of the accused at the scene of a death and associated rape of an old woman in a lonely house in the country turned on real evidence which was novel in its time.³³ However, in regard to his presence at the locus of the crime: 'his declaration admitted the fact'.³⁴ In the whole circumstances it would have been clear to counsel and no doubt the jury hearing the witnesses that to admit presence was by irresistible inference to admit criminal activity.

²⁸ Ibid, p312.

²⁹ Ibid, p312.

³⁰ M. Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', *Pennsylvania Law Review* (1973) 12, 506-589, 527.

³¹ H. Cockburn, *Memorials of His Time* (Edinburgh: The Mercat Press; 1856, reprinted 1971) pp.343-4.

³² Lord Cockburn, *Circuit Journeys* (Edinburgh: David Douglas, 1889) pp.358-360: the original prosecution papers are at the NRS AD/14/49/245.

³³ Marks on the breeches of the accused were consistent with conditions at the locus. A part of a button was found there and the accused had a jacket which was deficient in a button identical to that found.

³⁴ Lord Cockburn, *Circuit Journeys*, p.359.

Not least of the reforms introduced by the Criminal Procedure (Scotland) Act 1887 was the entitlement, by section 17, for an accused about to be judicially examined to have intimation sent to 'any properly qualified' solicitor that his professional assistance was required at a specified place and that a private interview with a solicitor would be allowed prior to examination on declaration. The solicitor was also allowed to be present at the examination which might competently be delayed for up to 48 hours to allow the solicitor time to attend. The solicitor was only permitted to be present at the declaration and could not participate: in the words of the main writers on the subject; the solicitor 'did not interfere'.³⁵

The decline of the general utility of the declaration to the Crown as prosecutor was signalled by section 10 of the 1887 Act in that the declaration which had previously had to be listed as a production³⁶ at the trial need no longer be so specified. The declaration as a fulcrum of prosecutorial decision-making had lost its importance. These changes had the effect of: 'rendering our mode of obtaining a prisoner's statement less medieval and unfair.'³⁷ Prosecutors thereafter had to proceed without knowing formally what explanation an accused had to offer of the known facts.

2 The Controversy and Part 1 of Lord Kingsburgh's Article

There was a long history to the Parliamentary attempts to change the law on the competency of accused persons and also their spouses.³⁸ Lord Kingsburgh had earlier published on the topic when the matter had arisen although he was not then on the bench.³⁹ His view then was that the bench could best form an opinion on the competency of the accused as a witness.⁴⁰ Moreover, it was argued that it was those subject to the smaller and less serious charges and summary offences that would most greatly benefit by a change in the law. A person charged with murder would automatically have counsel provided to make the best of his defence:

But in the case of ordinary crime, possibly bad enough in itself, but not remarkable or unusual, there are many thousands of cases in which the prisoner is left to himself. We do not think offences against Police Acts should be regarded in this as too trivial to be taken as illustrations. The ordinary offenders of the police courts are not

³⁵ R.W Renton and H.H. Brown, *Criminal Procedure According to the Law of Scotland* (Edinburgh: W Green 1909) p.38.

³⁶ An 'exhibit' in English practice.

³⁷ W.G.S. Moncrieff, 'Some Reminiscences of an ex-Sheriff-Substitute', 33 *Juridical Review* (1921) p.188.

³⁸ Christopher J.W. Allen, *The Law of Evidence in Victorian England* (Cambridge University Press, 1997) especially pp.132-144; David Bentley, *English Criminal Justice in the Nineteenth Century* (London: The Hambledon Press, 1998) especially chs.15-18.

³⁹ J.H.A. Macdonald, 'Should Accused Persons Be Competent Witnesses?' 11 *Scottish Law Review* (1886) pp.249-254.

⁴⁰ *Ibid*, p.252.

criminals; in the majority of cases they belong to that unhappy class which fluctuates with every ebb and flow of national prosperity. Their faults are largely those of their civilisation, of the modes of life and of their unfortunate environment. But none the less is a first conviction a serious thing to a man of this class; henceforth to the police, to his neighbours and to those who saw him at the bar or heard his case through newspapers reports, he is a marked man.⁴¹

In many cases it was quite unimportant whether the accused was a competent witness or not. In some cases the evidence would be worthless, in many cases the accused would be tempted to lie.⁴² The latter example, however, was regarded as no argument against the competence of an accused's evidence generally. It served only as an excellent illustration of the necessary principle that the evidence of the accused can only be taken for what it is worth. The value, not the competency, of the evidence of the accused should be the question.

Prior to reform, Henry Brown published a note in which he explained the principal modes by which in Scotland an accused person could provide evidence in his trial.⁴³ He discussed, for example, the indirect evidence of anything said in a declaration.⁴⁴ Brown knew when he wrote in January 1898 that matters would change and reform was in the air as he expressed the view that 'ere long there will be a statutory general relaxation of the rule against an accused person charged in criminal proceedings not being interrogated on oath'.⁴⁵

In March 1898 the Bill began its Parliamentary procession and correspondingly it was then that Lord Kingsburgh's views were published.⁴⁶ The article commences with references to conflicting views but Lord Kingsburgh by reference to his time as a Law Officer in 1887 when the matter arose opined that: 'he has always held unhesitatingly the opinion that the proposed change in law was one which ought not to be made and that chiefly in the interest of persons accused, and above all in the interest of innocent person'.⁴⁷ His reason for writing his commentary was that when others asserted confidently that 'opinion was practically unanimously in favour of the proposed change in law, he felt it to be 'almost a duty' to respond to a request that he put his views in writing.⁴⁸ Further, no-one connected with the workings of the criminal law had intervened in the debate except for the Lord Advocate (Attorney General Murray QC) who was politically required to support a Government Bill.

⁴¹ *Ibid*, p.250.

⁴² *Ibid*, p.252

⁴³ Brown, 'The Evidence of the Accused in Criminal Procedure', p.182.

⁴⁴ *Ibid*, p.184.

⁴⁵ *Ibid*, pp.186-7.

⁴⁶ Macdonald, 'Prisoners as Witnesses', pp.129 and 257.

⁴⁷ *Ibid*, p.130.

⁴⁸ *Ibid* p.131.

Lord Kingsburgh explained the procedural differences between Scotland and England with emphasis on the system of public prosecution which avoided an 'injured party' having control of a case and the requirement that someone accused of a serious crime was brought before a magistrate upon arrest, the charge stated and the accused given the freedom before any investigation was made to make a statement. Further, there was the availability in Scotland of advice from the 'agent [solicitor] for the poor' and the competence of emitting a declaration, made at the request of the prisoner.⁴⁹ A rhetorical question was put:

Can anyone doubt that the Scottish mode of procedure, which has proved thoroughly efficient in the prosecution and conviction of criminals, is the more just and fair? And seeing that an innocent prisoner can at any time make a statement of his case, of which it cannot be said that is concocted to meet the evidence adduced against him, is it not obvious that such an explanation of his position by an innocent person must be more effectual than anything he might swear as counter to the evidence for the prosecution?⁵⁰

As a consequence of all this, Lord Kingsburgh felt sure that the Scottish public were completely satisfied that justice was being done, not least because the State system of prosecution was so effective in superseding all individual assertions of rights in the criminal courts and there was no suggestion of unfairness to the accused, therefore there was no requirement for a revolution.⁵¹

Lord Kingsburgh argued that there was no need to change the law to secure convictions, a point made at the time by supporters of the change.⁵² He opined that to decline to enter the witness box would be a weight in the balance *against* the accused. The Attorney General for England (Sir Richard Webster QC) had asserted that opinion was almost universal that it was absolutely necessary for the acquittal of innocent persons and the conviction of the guilty that the accused should be allowed to give evidence. Lord Kingsburgh thought that it would be interesting to know whether the Attorney General would tell the public whether he had ascertained that more guilty persons escape and more innocent persons are convicted on this side of the English Channel than elsewhere.⁵³

As regards Scotland, Lord Kingsburgh examined the statistics of the previous 30 years:

I find from these that 71,657 trials resulted in 88.34 per cent of the persons tried being convicted. The six years in which there was the largest percentage of acquittals give an average of 11.23 and the six years in which there were fewest

⁴⁹ Ibid, p.132.

⁵⁰ Ibid, p.134.

⁵¹ Ibid.

⁵² Ibid, p.135.

⁵³ Ibid, p137.

acquittals give an average of 9.25. This surely is all that can reasonably be expected.⁵⁴

These figures seem to refer to jury and summary trials. He thought that the most striking fact in these statistics is that if the 10 years was taken prior to the passing of what he called the Criminal Law Amendment Act but was in fact the Criminal Procedure (Scotland) Act 1887 (c 35). under which almost all cases in which an accused can be examined as witnesses are tried, and compared with the 10 years subsequent to that Act, the percentage of acquittals had not increased but had actually diminished:

| | <i>Trials</i> | <i>Acquittals</i> |
|--------------|---------------|-------------------|
| 1877 to 1886 | 22,625 | 2413 |
| 1887 to 1896 | 20,361 | 2111 |

He explained: 'It will be seen that while there were 2264 trials less, the diminution in acquittals was 302, so that in proportion there have been more conviction to the number of cases tried than was the case before the Act was passed'.⁵⁵

Lord Kingsburgh concluded Part I of his article with the concession that if it could be shown that the proposed change would in any real degree affect the number of cases in which innocent persons were convicted, the argument would be a strong one in favour of the change.⁵⁶ There was no evidence of any such miscarriages of justice, he argued, and it was strange that if there was a necessity for such legislation no members of the public had come forward with instances of unjust convictions.⁵⁷

3 The Controversy and Part II of the Article

Lord Kingsburgh further deprecated the tendency then to view the criminal trial as a suit between parties and for this argument he relied on the views expressed by various well-established figures in the English legal profession, though unfortunately he does not provide a written citation for their source.⁵⁸ In an extensive and somewhat laboured comparison between civil and criminal cases he refuted any supposed analogy with civil proceedings.⁵⁹ If anything, it seems likely that the real interest of this passage of the article lies in the then judicial conception of the State that is invoked so often.

⁵⁴ Macdonald 'Prisoners as Witnesses', p137 but no source is given.

⁵⁵ Ibid, p138.

⁵⁶ Ibid.

⁵⁷ Ibid, pp. 39-144, especially p.142.

⁵⁸ It is not suggested that the quotations are contrived. Lord Kingsburgh refers to some of those lawyers quoted as his friends: ibid, p.257.

⁵⁹ Ibid, pp.257-261.

The State does not take up a disputed matter of private right where a person is accused of crime. On the contrary, the whole enquiry from first to last is directly a State proceeding. It is whether private rights shall be put aside, forcibly put aside, and the accused dealt with as one whose individual privileges are to be taken away. The State claims the power in criminal proceedings to deprive a citizen of his rights, to forcibly confine him, to forcibly bring him to trial, and, if the case be proved, to have him forcibly treated as a malefactor, as one who has no rights for the time being. [...] What the State does to him-from the moment of his apprehension until the conclusion of his trial-is an outrage in itself, justifiable only by there being probable cause at first for assuming his guilt, and in the later stage certainty that his guilt has been established by his accuser.⁶⁰

No doubt with the Scottish system of public prosecution in mind constantly, Lord Kingsburgh referred to the question of slander:

If anyone accuses another to the authorities as being guilty of a crime against the law, he is protected from an accusation of slander, even though the proof of what he alleged may fail, provided that he had probable cause for what he did. He is presumed to be acting, not for personal ends, but in fulfilment of duty to the State, and is not liable in damages unless he acted without having probable cause. No matter how malicious he may have been, if he had probable cause, he cannot be held liable for slander, although the proof may be insufficient to establish the truth of the accusation.⁶¹

The personal character of the proceedings emphasised the differences between a civil action and a prosecution.⁶² The latter resulted in a penalty being inflicted on an accused, contrary to his natural rights. Lord Kingsburgh cited the terms of the old Scots form of indictment: All which being found proven...you ought to suffer the pains of law. This, he pointed out, was not language suitable to a civil litigation, which has nothing to do with punishment.

Lord Kingsburgh then dealt with another 'triumphant demonstration point: 'It may be called the 'get-at-the-truth argument'.⁶³ He thought that, whatever might be said from that philosophic view which relied on Jeremy Bentham, the point was a much more complex one than was generally supposed. It could not be settled by appeals to general doctrines, they were something to flourish in a debate, and could not afford anything of the nature of a touchstone.

⁶⁰ Ibid, pp.258-259.

⁶¹ Ibid, pp. 259-260.

⁶² Ibid, pp. 260-261.

⁶³ Ibid, p 261.

Lord Kingsburgh argued further that:

The “discovery of truth” must mean, as applied to judicial proceedings, the obtaining of a just result, in so far as fallible human wisdom can secure it, by the means found to be most fair, and least likely to lead to the scandal of persons, whether innocent or guilty, being convicted of offence which they are not proved to have committed. If a mode of endeavouring to ascertain truth may lead to convictions which are not just, and, therefore, are not “of the truth”, it is only in name a mode of ascertaining truth. Trying to get at the truth is one thing, ascertaining it with certainty is another. After all it is the final result that must be looked to, not in each individual case, but in the aggregate of cases.⁶⁴

This passage of the argument concluded with a question: ‘Has the State, has Society any interest, as regards the suppression of crime to desire additional means of ‘ascertaining the truth’?⁶⁵ But, this whole argument of ‘ascertaining the truth’ had been given up. Lord Kingsburgh noted, apparently matters were changing as he wrote his article, that the promoters of the Bill had definitely abandoned their plea that the change was necessary for the ‘conviction of guilty persons’ as the Attorney General had disavowed it expressly in a recent debate.⁶⁶

The question then became limited to whether the Bill ought to be passed in the interests of those persons accused who are not guilty. The matter was no less important:

For while it is not proposed by the Bill that the prisoner should be a compellable witness, it is certain as anything can be in human affairs that in ninety-nine cases out of a hundred the failure of an accused person to tender his evidence will absolutely seal his fate, whether the evidence for the prosecution be conclusive or not. That would be, of course, a result indefensible in strict logic, but the fallacy would not present itself to the average mind of a common jury.⁶⁷

Lord Kingsburgh saw the ‘mockery of the option’ as tending to touch on a matter of principle, in effect requiring an accused to give evidence, and thus being substantially more than merely relating to a detail of procedure. The law of evidence was to be altered and then in order to make the altered law work, an accused was to be placed in a worse position as regards legal presumption than he was before.⁶⁸ The added fear was that this change would lead to the abolition of the ‘prove your case’ attitude of mind and that a criminal trial would become a conflict of wits between counsel for the prosecution and the accused. With the latter in particular personal considerations would come into the trial and there would be an

⁶⁴ *Ibid*, pp.261-262.

⁶⁵ *Ibid*, p 262.

⁶⁶ Lord Kingsburgh, again, does not cite sources for these events.

⁶⁷ *Ibid*, p.262.

⁶⁸ *Ibid*, pp.263 and 264.

element of combat.⁶⁹ Associated with that concern was the possibility that a Judge might be tempted to 'press the accused' in such a way as to amount to interrogation.⁷⁰

One matter 'of great magnitude' was what the Judges (in courts at all levels) would do with keen prosecutors whose questions may be legally competent, but which are thought of as amounting to hard pressure, there being no statable or legal ground for interfering.⁷¹ A court that disallowed such a competent but difficult question might find that the jury resented this to the prejudice of the accused. This scenario carried with it very serious dangers to innocent persons who were in the position of giving evidence as accused persons.⁷²

Lord Kingsburgh took issue with the promoters of the Bill in so far as there was: 'no agreement among them, and that the grounds shifted very freely'.⁷³ His public attack on the Attorney General of England and others risked some general condemnation but it proceeded anyway. The final point of the article was that the change proposed would in the view of Lord Kingsburgh: 'tend materially to bring about the conviction of innocent prisoners'.⁷⁴

4 The New Law in Context

Experienced writers on Scots Law had thought it: 'one of the most marked peculiarities of criminal procedure' that it was incompetent to compel the accused person, or the husband or wife of the accused person to give evidence.⁷⁵ However, the Criminal Evidence Act 1898 amended the long-established rule of evidence. Thus, by section 1(1)(a) every person charged with an offence, and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person provided that a person so charged shall not be called as a witness in pursuance of this Act except on his own application.

Just over a year after the Act came into effect there was trenchant criticism of it.⁷⁶ A writer noted that, according to the practice observed prior to the passing of the statute, it was commonly argued that through the non-admissibility of the evidence of an accused person his case was inhibited, particularly where the prosecution depended largely on circumstantial

⁶⁹ Ibid, pp.264 and 265-266.

⁷⁰ Ibid, pp.266-267.

⁷¹ Ibid, p.267.

⁷² Ibid, pp.268 and 269.

⁷³ Ibid, p.269.

⁷⁴ Ibid, p.271.

⁷⁵ Renton and Brown, *Criminal Procedure According to the Law of Scotland*, p.84.

⁷⁶ Anonymous, 'The Working of the Criminal Evidence Act 1898', 16 *Scottish Law Review* (1900) 305.

evidence and where the accused lacked the evidence of witnesses. It was also considered then that a statement not on oath made by an accused in his declaration carried little or no weight with it.

The writer argued that with the 1898 Act in operation it was clearly discernible that the earlier argument had proved to be fallacious.⁷⁷ What was described as a careful study of the results of criminal prosecutions after 1898 suggested that the opinion that the statement made by the accused, either by declaration or in exculpation, formerly listened to by the bench and duly taken into account was, as a general rule, of more value than the new provision that allowed evidence on oath. Whereas an accused giving evidence on oath was then liable to cross-examination (to respond to which he must answer all questions tending to incriminate himself) the former practice of allowing him or his representative counsel to make an exculpatory statement was a great deal safer in the interests of the defence.

Further, it was argued that by the doctrine that an accused was 'not bound to answer any questions whereby he may incriminate himself', was by the 1898 Act exploded and one of the bulwarks of criminal defence had been removed.⁷⁸ It was of course a decision for the accused whether he gave evidence: but members of a jury were 'unquestionably influenced' by the fact that the right to give evidence under the 1898 Act was not exercised, and their judgement of the case affected accordingly. The writer concluded: 'It does not seem wise to tinker at our criminal procedure with enactments which are inadequate and unworkable in their provisions, particularly when these provisions are at variance with traditional practice'.⁷⁹

Lord Kingsburgh was strongly opposed to the change on this evidential and procedural point:

For two centuries we have held the honour in all the world of having the fairest system of criminal procedure that has ever been known. It has been the rule for nearly two hundred years that the prosecutor must prove his case, and that the accused cannot be called upon to testify against himself.⁸⁰

He wrote further that in studying the arguments of the promoters of the Bill it was clear that there was no agreement among them, that the grounds shifted very freely, and that what was put forward as the views of the promoters was 'crude and ill-considered'.⁸¹

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, pp.305-6.

⁷⁹ *Ibid.*, p. 308.

⁸⁰ Macdonald), 'Prisoners as Witnesses' p.267.

⁸¹ *Ibid.*, pp.269 and 270.

The view of some English lawyers was that the 1898 Act put pressure on the accused to give evidence and: 'created a great temptation to them, in most cases, to perjure themselves'.⁸² In a public lecture on November 7, 1898 Lord Kincairney agreed with the assessment of Lord Kingsburgh that the 1898 Act was not needed in Scots law.⁸³ Moreover, given the recent experience of the operation of the Act there were even doubts about the retention of the oath.⁸⁴ Scots lawyers were accumulating the experience of practice:

Accused persons are now going into the witness-box and, in many cases, *denying everything* [emphasis in the original], even facts conclusively proved. It is not a pleasant spectacle, and it must do harm.⁸⁵

In addition, the prohibition in the 1898 Act of prosecutors commenting on a failure of an accused to offer himself as a witness was ridiculed by Lord Kincairney as: 'A very frail precaution and, I think, practically, and even obviously, futile.'⁸⁶

Concluding Remarks

Before 1898 only the declaration was the competent means of putting an explanation before the jury. After 1898 the accused who gave evidence as a witness was subject to cross-examination just as other witnesses were, and in a position where being: 'isolated, detached and not too comfortable' was conventionally then more likely to tell the truth.⁸⁷ Moreover, in an important sense there was a real risk that the behaviour of the accused at the trial could become evidence of the capacity to commit the crime charged.⁸⁸

What might now be suggested as the strategic and tactical changes in a criminal trial following the 1898 legislation? On the basis of traditional roles and practices the question is best answered from the professional perspective and latitudes of the various participants. First, the competence of the public prosecutor, the Procurator Fiscal for the public interest, in being able to examine an accused in private before a Magistrate, in practice usually a legally-qualified Sheriff, on his or her declaration meant at the very least that concessions might be made then that either assisted in discovering necessary corroboration or in narrowing the issue for proof. The judicial supervision of the taking a declaration rendered its

⁸² 'The Incorporated Law Society at Swansea', (1898-1899) 6 *Scots Law Times* 79.

⁸³ 'Lord Kincairney and the Law of Evidence', (1898-1899) 6 *Scots Law Times* 118-121. The report of the lecture was republished as an article by Lord Kincairney: 'The History of the Law of Evidence' 11 *Juridical Review* (1899) 1-25.

⁸⁴ 'Note: Evidence of Accused Persons', (1898-1899) 6 *Scots Law Times* 126.

⁸⁵ *Ibid*, p.126.

⁸⁶ Lord Kincairney: 'The History of the Law of Evidence', p.19.

⁸⁷ Lord MacDermott, 'Some Requirements of Justice', *Juridical Review* (1964) 103-127, p.118.

⁸⁸ Lindsay Farmer, 'Criminality and the Proof of Guilt', in M.D. Dubber and L. Farmer (eds.), *Modern Histories of Crime and Punishment* (Stanford University Press, 2007) p.57.

subsequent reception at trial all the more acceptable, that is to say credible and reliable even though against interest.⁸⁹

The competence of an accused to give evidence meant that the defence would generally choose to keep anything to be said on the matter charged as a crime for the trial: why would any lawyer reveal the best points of a case until necessary or in front of the real decision-takers? The conduct of the prosecution in the High Court of Justiciary was entirely a matter for Crown Counsel who might of course agree evidence with the defence counsel. In accordance with the usual practice agreement would be put in writing as a minute of agreement to be read to the Jury. It is highly unlikely however, that agreement would be reached easily when the Crown case did not have the necessary sufficiency of evidence by way of corroboration of the *facta probanda*.

Secondly, the utility of a declaration as assessed by any defence solicitor changed in 1898. The focus of professional attention moved from the declaration in the privacy of judicial chambers to parole or oral evidence in a public forum: with a client out of the dock and in the witness box a defence solicitor had on one view lost control of the client. Answering or declining to answer questions in the privacy of judicial chambers induced different tactical responses to a client standing up to the rigours of cross-examination in public.

By *Batchelor v. Pattison and Mackersy*⁹⁰ full professional discretion for the conduct of the defence throughout the whole case was vested in the hands of counsel. There was no requirement in law to discuss strategy or tactics with the client. The evidence as set out in the written declaration and any defence precognitions⁹¹ determined the approach to the allegations to be taken by defence counsel. It is to be recalled that defence counsel in High Court of Justiciary trials in particular were generally unpaid their appearance being regarded as a professional duty to the poor.⁹² In 1898 with the need to know what the client wanted to do by way of giving or not evidence in support of the defence: to that limited extent the discretion of defence counsel was restricted.

⁸⁹ Proof of the making of a declaration was made easier by Criminal Procedure (Scotland) Act 1887 (c.35), s.69 in that the completed document could competently be received in evidence without parole proof by the lawyers who had been present at its making.

⁹⁰ (1876) 3 Rettie 914.

⁹¹ Probably the equivalent in English practice to 'proofs of evidence'.

⁹² Anon. 'On the Conduct of Criminal cases at Circuit', 8 *Journal of Jurisprudence* (1864) 503.

Finally, by the late nineteenth century there was no formal dossier to be studied by the Scottish bench.⁹³ The declaration was a Crown production lodged with the clerk of the court as a production in the trial and it is to be presumed that the Judge as supervisor of the fact-finding activities could prepare for the task at least by having sight of the declaration and thus from the outset the proposed line to be taken by the defence.⁹⁴ Supervision of a criminal trial in an age of great social deference to status might be difficult now to assess accurately. However, in a public forensic forum the right of the subject of the trial to decide *at the last minute* whether or not to give evidence must surely have added to the tension.

Procedurally, the declaration as a meaningful stage in prosecution subsequently declined absolutely. By section 77 of the Summary Jurisdiction (Scotland) Act 1908 (c.65) the procedure of judicial examination was changed from a peremptory one to that of a choice for the accused. The practice then became one for the defence solicitor to decide if his client should emit a declaration at all.⁹⁵ Thus the practice was thought likely to be after 1908 that a solicitor:

will probably advise a declaration only when the accused has *something to say* [emphasis in the original]. This course will adopted when the agent [solicitor] perceives that the prisoner is able at once to clear himself from the charge or when he wishes to found upon the statement in his formal defence.⁹⁶

Within a generation the Crown had lost the inexpensive and practical means of narrowing well in advance of a trial the issue for proof to specific points. The defence solicitor had been put on the spot of deciding at short notice and with little knowledge of the detail of the case whether to make a declaration and the line of least resistance traditionally was to say nothing. The more difficult tactical decision was that of an accused giving evidence: if an accused could not competently in law give evidence at his trial and the jury were told that then logically no inference, consciously or unconsciously, would be drawn and there would be separately no psychological pressure to speak and also respond to questions.⁹⁷

Messrs Renton and Brown, whose long professional experience preceded the reforms of 1898 and extended long after it, noted the changes in law and practice following the reform of 1908:

The declaration is now a document of very little importance, and in view of recent legislation will gradually become of even less value. In the old practice the prisoner in

⁹³ Earlier procedure resulted in effect in a dossier, a subject that is still awaiting full analysis.

⁹⁴ M.R. Damaska, *Evidence Law Adrift* (New Haven: Yale University Press; 1997) p.70.

⁹⁵ Renton and Brown, 'Criminal Procedure According to the Law of Scotland', p38.

⁹⁶ *Ibid.*

⁹⁷ M. Damaska, 'Evidentiary Barriers', p.527.

his declaration generally committed himself by the falsehoods which he told, and, in order to extricate him from the difficulty in which he had placed himself, his counsel raised numerous objections to the declaration, and frequently succeeded in having it set aside. Nowadays, the declaration is of little use, and is very unlikely to be an object of serious attack.⁹⁸

Doubtless in the hands of the experienced and determined practitioners of the art of public prosecution there was a directness that may have suggested a continental inquisition. That was not necessarily inherently a bad thing as crime had to be suppressed but in the privacy of a confrontation of State and a citizen it is probable that there could be only one domineering force. However, it seems, in England it was thought that the new legislation of 1898 could introduce a person such as a *juge d'instruction*.⁹⁹ Such a novel procedure might have been in practice not dissimilar to what Lord Kingsburgh was regretting the loss of.

The decline of the procedure of taking of a declaration and *also* the new competence of the accused as a witness meant that up to the point at which the jury returned a verdict complete control of the trial procedure was being lost by the lawyers collectively. Thus the issues for proof became somewhat less certain: even the most fastidious advice to an attentive client could not guarantee what might be said thereafter by the same client in the witness box.

Three points may be made: first, no lawyer wanted to control the decision of the jury as that outcome of a trial was surely accepted as the essence of the fairness of a trial. Yet, the management of a trial up to the very cusp of the delivery of the crucial decision of guilt or innocence was probably seen as fair game. The new conditions of a less revelatory declaration and an exposed client in the witness box suggested that Lord Kingsburgh was in truth concerned at the increasing uncertainty in criminal proofs that was then in prospect for lawyers and Judges.

Secondly, the controlled, almost paternal, supervision of the accused through the criminal process was displaced with a few but crucial choices required to be made by an accused, or by lawyers on his or her behalf: the political changes tending to democracy in late Victorian and Edwardian life were seeping into, but only just into, Scottish criminal procedure. New tactical decisions by their nature and novelty impacted on broad traditional forensic strategies.

⁹⁸ Ibid, p 40.

⁹⁹ Parker, 'The Prisoner in the Box', p.157.

Finally, it is not irrelevant in the pursuit of an understanding of where forensic power lay and how it changed then, that the lawyers still dominated the narrative of a crime but after 1898 not to the same extent. It has been written that: 'the real, central theme of History is not what happened, but what people felt about it when it was happening'.¹⁰⁰ The growing antipathy to the private examination of an accused and the statutory competence of an accused as a witness by his or her own decision had eroded a strong inquisitorial emphasis.

There was having regard to the literature no antipathy in this matter by Scots lawyers towards English law as the difficulties inherent in the change required as a result of the 1898 Act had been brought about by the Imperial Parliament and affected both systems materially. The probable and general approach to the larger, more dominant legal system had been set down half a century or so earlier:

The English practice in criminal matters is in many respects different from the Scotch. We find no fault with any part of that practice, and make no attempt to recommend any part of our institutions for their imitation. The principle, that each nation is the best judge of the legal establishments which are adapted to its own circumstances, is too obvious to permit any such attempt. But when the institutions of England are not only theoretically proposed for our admiration, but frequently suggested for practical imitation in this country, we should seriously consider the comparative merits of the system we are invited to adopt, and that which we are urged to abandon.¹⁰¹

Amongst Scottish practitioners the real concern with the 1898 Act was probably that the traditional criminal law, procedures and practices were to be altered, and the locus of the initiative or the driver of the policy lay elsewhere and was not that of Scots lawyers. Occasionally, Scots lawyers suggested reform but it is to be assumed that they wished any change to be consistent with or at least an improvement on the history and traditions.¹⁰²

The difference between English law and Scots law in criminal matters in the Victorian era and even now is beyond brief explanation. As a mere example, however, it may be said that the Offences Against the Person Act 1861 (c.100), by section 78, did not apply in Scotland and the explanation of the Scots law of assault in Lord Kingsburgh's textbook of 1867 took up ten modest pages without once referring to any statutory authority from the Imperial

¹⁰⁰ G.M. Young, *Victorian England: Portrait of an Age* (Oxford University Press, 2nd edn., 1936), Introduction p.vi.

¹⁰¹ Sir Archibald Alison, *Practice of the Criminal Law of Scotland* (Edinburgh: Wm. Blackwood, 1832) p.xxxi.

¹⁰² 'The state of civilisation demanded new legislation...': Dr J.J. Gordon of Banff at Newcastle in 1870: *Transactions of the National Association for the Promotion of Social Science* (London: Longmans, Green, Reader & Dyer, 1871) pp.295-6.

Parliament.¹⁰³ Similarly, William Dickson's treatment in 1887 of 'Prisoners' Declarations' took up 15 pages with an absence of any reference to post-Union law.¹⁰⁴

It was probably unusual for a Judge in Scotland while still on the bench to take such a public stance on a matter of general legal controversy but Lord Kingsburgh was pre-eminent in the then restricted area of expertise of criminal law. Yet, he had his critics and when he sat with a jury to try an incest case he had the court closed for the duration of the trial but someone who was present observed that the judge was: 'an authority on criminal law, and has minute familiarity with criminal procedure, but he seemed to those present at the trial in question to be familiar with neither the rules of evidence nor their application.'¹⁰⁵ That, and his foray into print, may demonstrate what was said of him in a different context; namely, how it seemed that he: 'sometimes ... harped too much upon what was past praying for'.¹⁰⁶

¹⁰³ Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, pp.167-185.

¹⁰⁴ Dickson, *A Treatise on the Law of Evidence in Scotland* vol. 1, ch.5.

¹⁰⁵ Anon, 'HM Advocate v. The Mansons' 33 *Journal of Jurisprudence* (1889) 393 at p.394.

¹⁰⁶ Lord Sands, 'Lord Justice Clerk Macdonald and his Edinburgh' 35 *Juridical Review* (1923) 107.p. 117.