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C O U N C I L O F E U R O P E

STUDY VISIT

EDINBURGH

12 - 14 JULY 1978

WEDNESDAY 12 JULY

TALK BY THE HONOURABLE LORD HUNTER VRD LLD
CHAIRMAN OF THE SCOTTISH LAW COMMISSION

"HISTORICAL DEVELOPMENT OF CRIMINAL LAW IN SCOTLAND"

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My subject this afternoon is The Historical Development of Criminal Law in Scotland. I propose to devote perhaps 40 minutes to this preliminary talk in order that you may have a little time for questions, which I hope I will be able to answer, perhaps with some assistance from others present.

Before embarking on my subject, I should perhaps give you some idea of my own background and experience in the field which you are to consider during this study visit. It is quite important for you to know this, as you will hear at later stages of this visit from others whose experience has been of a more specialised character and in parts of the field with which they are likely to be more familiar than I am. My own experience between 1937 and 1961, with a break for the war, was typical of that of a busy Advocate, for which the English term is Barrister, my professional body being called the Faculty of Advocates. In Scotland we have, as in England, a legal profession divided between Advocates and Solicitors. The latter are by far the more numerous, and are scattered across the country, usually being based locally, unlike

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the Advocates who have traditionally had their centre of operations in Edinburgh, the capital city, although they very frequently appear in courts in other parts of Scotland.

It should be explained that specialisation by Advocates in particular kinds of work is relatively rare, even at the present day, and amongst Solicitors, specialisation, although it is now taking place, particularly in the larger offices and in the Public and Local Authority fields, is a relatively recent development. Our Judiciary also tends, and has always tended, to be non-specialist. The main cause of this is that our legal profession and our courts operate in a small jurisdiction, with a small population, and that, in consequence, the volume of work tends to be rather limited, although the variety is considerable.

As an Advocate, I frequently conducted the defence in criminal trials before courts of every tier in our criminal court structure, and between 1954 and 1957, while holding the office of Advocate Depute, about which you will be hearing more, I did the normal work which attaches to that office, including the prosecution of serious crimes before the High Court of Justiciary, Scotland's highest criminal court.

During the period 1957 to 1961 I held the office of Sheriff Principal, at that time a part-time appointment, in an area in the West of Scotland, and in that capacity presided at criminal trials of a more or less serious character as well as dealing with some appeals in civil cases and carrying out administrative work.

Between 1961 and 1971, as a judge of the High Court of Justiciary, I presided at numerous criminal trials, mostly of a fairly serious character, including murder, culpable homicide, rape, robbery, thefts of various types, of which one of the most common is theft by housebreaking, reset of theft (of which the English analogue is receiving), serious assault, fire raising, incest, crimes connected with the illegal possession and use of firearms and explosives, and so on..

Since 1971 I have been seconded to a law reform body called the Scottish Law Commission and am consequently at present a little out of touch with the day-to-day practical work of the criminal courts, which may do something to explain any evident difficulty I may experience in attempting to answer your questions. However, during the last few years my Commission has done some work in the field of criminal law, both substantive and procedural, and I have also had

the valuable experience of acting as Chairman, during the period 1972 to 1975, of an advisory body set up by the Secretary of State for Scotland called the Scottish Council on Crime.

With that introduction, let me return to my subject which, both historically and in its operation at the present day, falls readily into three compartments, which nevertheless overlap at many points and which have constantly interacted upon one another. These three sub-divisions, as you might expect, are:

1. the substantive criminal law
2. criminal procedure and practice

and 3. the administration of criminal justice.

The broad historical background to all three sub-divisions is much the same, and it is necessary to have some understanding of that historical background and of what may be called the philosophy and politics of the development of the law of Scotland in order fully to appreciate how matters stand at the present day. Perhaps the most striking historical feature of Scottish legal development -

and it is a constitutional feature which is highly unusual, if not unique - is that since the early 18th century, 1707 to be precise, when England and Scotland, which had been dynastically united, with some interruptions, for less than a century, agreed to a union of their separate national Parliaments into a single, new Parliament for Great Britain at Westminster, Scotland has had its own legal system, its own system of courts, its own system for the administration of criminal justice and its own system of law, public and private, criminal and civil, but has lacked its own legislature. One thus surveys a legal system which, for $2\frac{3}{4}$ centuries, has for legislative purposes been served only by the legislature of a larger unit of which Scotland has formed a relatively small part - namely during some periods Great Britain and during others the United Kingdom - a legislature which for long periods has had little interest in the law of Scotland, little care for its quality, and a lack of insight into and sensitivity towards its distinctive character. This has led during some quite lengthy periods to what has been called "benign neglect", and at other periods to intentional or blundering attempts to force into Scots Law the doctrines and rules of a system, that of England, which had different roots, a different history and

philosophy, widely different procedures and practices, and, what is perhaps even more important, a very different population to serve, in numbers, in background, in customs and in social, moral and religious attitudes. Legislative and other influences from England since 1707 have been very strong but, fortunately, as some may think, two of the areas which, with a few exceptions, enjoyed the advantages of "benign legislative neglect" were that part of the substantive criminal law of Scotland which relates to the most serious crimes, and the Scottish system of administration of criminal justice. To a lesser, but still important extent, the same is true of criminal procedure and practice in the Scottish Criminal Courts and the Scots Law of Evidence which, as you will naturally appreciate, lie at the centre of many criminal trials.

A distinguished Committee which recently examined the subject of "Identification Procedure Under Scottish Criminal Law" summarised some of the differences between the law of Scotland and the law of England in the field which they were examining in a way which may be revealing to those who come afresh to these unusual constitutional features.

"We considered that some of the most relevant differences between English and Scottish procedures in this area were:

a. the Scottish system of public prosecution, involving a quasi-judicial investigation, by independent officials under the direction of the Lord Advocate, of all the relevant evidence, including evidence of identification, before charges are finally framed;

b. the absence, in most cases, of the requirement of corroboration in England" (The opposite is true of the criminal law of Scotland.)

"c. the not proven verdict available under Scots law, which (whether or not it is used in any particular case) focuses attention on the fact that the function of the court is always to scrutinise the reliability and weight of the evidence adduced to determine what has been proved - not only to decide between the alternatives of guilt and innocence;

d. the fact that Scottish judges are not obliged to rehearse all the evidence in their charge, as English judges are;

e. the greater emphasis on statute law in England."

The committee could probably have added a number of other features, possibly of less importance, to this list, including the fact that there are no opening speeches in Scottish criminal trials.

Now you may ask how did it come about that this curious and unusual state of affairs emerged at the time of the Union of the Scottish and English Parliaments into the new Great Britain Parliament in 1707, and how is it that this state of affairs has, in considerable measure, persisted ever since? For an explanation one must go much further back into history, although the actual mechanics employed were to provide in the Union agreement of 1707 that certain Scottish institutions, including our private law and our superior courts, should be preserved "for ever", or "in all time coming". As you will know, such statements in international agreements, even if they are of a constitutional character, may sometimes tend to be

dishonoured and in this the sequels to the Union agreement have been in no way exceptional. Nevertheless, many of our national institutions have survived, sometimes with considerable adaptation, no doubt because these institutions had deep roots in the history of Scotland.

It must be borne in mind that for many centuries Scotland was a proud and independent nation within frontiers which, after the formative years, altered little. The country was usually economically and militarily weak as compared particularly with its much more populous, powerful and wealthy southern neighbour, and its population was small. It is even now only about 5,000,000. The population of Scotland seems always to have had a predisposition to violence and warlike activities, and it is undoubted that the country was at most times difficult to organise and to govern. For centuries a state of war with England was a very normal situation and, when hostilities developed, Scotland more often than not came off second best. Armed raids and general uproar on the border between Solway and Tweed were endemic for long periods, and disturbances in the Highlands were a way of life. Until well on in the 16th century central

government was, except for relatively brief periods, usually weak and inefficient, with the result that it was difficult for the forces of law and order to penetrate important areas, particularly those in the Highlands, in which Celtic parts of the population were concentrated and where local autocrats and clan chieftains with private armies, and usually with courts and jurisdictions of their own, often held sway.

As with many other European countries, the ethnic groups from which the present population of Scotland is mainly descended were invaders and immigrants. The early invaders and immigrants, whose roots were Scots and Saxon, penetrated large parts of the country and squeezed a proportion of the existing populations into peripheral areas, usually beyond the mountains, and sometimes beyond the seas. As often happens, the newcomers brought with them and introduced into the country some of their own customs, laws and institutions.

In addition to invasion and immigration, other great historical influences were, as one might expect, religion and education. For many centuries, up to the Reformation, Scotland looked to Rome

for international culture, moral and religious leadership and, on occasion, support. Those who are familiar with the Declaration of Arbroath will find in it a striking illustration of this last feature. The church courts and those who manned them occupied an important place amongst the country's institutions, and vestiges of their existence and influence survived into the 19th century and find places in our legal terminology even to-day.

Educational influences, particularly from the law schools of Continental Europe, proved even more durable. For three centuries or more, up to what we call the Napoleonic Wars, Scots lawyers in large numbers went to Europe for their legal education, and particularly for their advanced legal education. During the 16th and 17th centuries many Scottish law students attended the great universities of France; and during the 18th century a similar tradition and similar reasons took them to some of the leading law schools of Holland, where many of them absorbed from teachers and writers of great eminence the doctrines of the advanced Civil Law of that era. With the 19th century the road to English legal educational influences became much more open and, from that time onwards, English teaching and writing, coupled with powerful legislative and judicial pressures

from the south, exerted increasing influence on the law and the legal system of Scotland.

Thus the historical picture is of slow internal development of our law and legal institutions throughout the Middle Ages, during what has been called the "Dark Age" of the law of Scotland, when law and order advanced slowly and with many setbacks. This was followed, particularly from the 17th century onwards, by a period of active development and of judicious borrowing from a number of different foreign legal systems, many of which had by that time reached an advanced stage of development. It must however be emphasised that this borrowing was done with considerable skill and discretion, from a great variety of sources, and Scotland was fortunate in that its law during this great period of development was served not only by a Judiciary which produced individuals of high talent but also by a succession of legal thinkers and writers who were the authors of systematic treatises on the law of Scotland, the most outstanding of which, known as the Institutional Works, are still highly authoritative to-day. In the field of criminal law and procedure the greatest names are Hume, whose great "Commentaries on the Law of

Scotland concerning Crimes" were first published at the turn of the 18th and 19th centuries, Mackenzie, who, like his great contemporary Stair, experienced both eminence and exile during the latter part of the 17th century, and Alison, who lived and worked in less turbulent times.

It is, I think, true that the old Scots lawyers exhibited some genius for adapting importations from foreign legal systems to their own purposes. In doing this they sometimes altered them out of all recognition. The result of these influences has been the evolution of a legal system which, although serving a very small population, is in a number of respects unique. No serious attempt has been made to export our system or any part of it in the way that the Anglo-American and, to a lesser extent, the Civil Law systems have been spread over substantial portions of the world. Nevertheless it is thought that we may have something to offer and it is undoubted that, to take one example, the Scottish system of public prosecution has been attracting increased attention during recent

years. You will hear and see something of its operation during this study visit. It has its faults. Human error and inefficiency are not absent. How could they be? But it also has great advantages.

Having painted with a very broad brush some of the historical background, let me try to sketch in as briefly as I can the ways in which our criminal law and procedure, and particularly the institutions through which these are operated, have developed against that background.

The modern structure of the criminal courts of Scotland and of our system of public prosecution remains for the most part deeply rooted in the country's history. Despite a good deal of borrowing from other social and legal systems, the process of adaptation to the needs of the Scottish public, which has been sometimes a steady and rather slow process of evolution and sometimes a sudden leap forward, has greatly altered many of the imported ideas and the same is true also of many of our native institutions.

The structure of the Scottish system of criminal courts is simple and it has to be seen within the context of our court structure as a whole, since, as I have said, specialisation tends to be absent amongst our judiciary. There are three main criminal courts in Scotland:

1. The High Court of Justiciary

This is the supreme criminal court of Scotland, members of which, sitting with a jury of 15 (the reason for which number is lost in the mists of antiquity), preside over the most serious criminal trials both in Edinburgh and, when on circuit, in other centres in various parts of Scotland.

The High Court of Justiciary, usually composed for this purpose of three or more judges, is also the final, and indeed the only, Appeal Court in criminal matters. In criminal cases there is no further appeal to the House of Lords as there is in civil cases from the Court of Session, which is Scotland's superior civil court.

The judges of the High Court of Justiciary are known as

Lords Commissioners of Justiciary, and all of them are also judges of the Court of Session, which is a collegiate court. This is further evidence of the absence of specialisation, to which I have referred. The faces are the same and only the robes and some of the titles are different. The head of the High Court of Justiciary is the Lord Justice-General, who, in his civil capacity as head of the Court of Session, is known as the Lord President. The next judge in order of seniority is called the Lord Justice-Clerk. Most of the judges of the High Court of Justiciary have during their professional careers had wide experience of criminal as well as of civil work. They are all members of the Faculty of Advocates and, before ascending the Bench, were in practice as Advocates. The Faculty of Advocates is an ancient body, which has at times played an important part in Scottish history, and particularly in Scottish legal and political history. The High Court of Justiciary has roots deep in history and its judges can, I suppose, claim descent from the Justiciars sent out by Scottish kings - English kings did the same - to deal with

the most serious and brutal crimes - particularly the four Pleas of the Crown, murder, rape, robbery and fire raising, which were reserved to the Justiciar. This they did in a sometimes uncomfortable alliance with the feudal courts of the great vassals, who, in Scotland, tended at times to be over-powerful and difficult for central Government to control. The Sheriff or other local officials acted as investigators and accusers. The peers of the accused, as a rudimentary assize or jury, gave verdicts on questions of fact, sometimes almost in the capacity of witnesses, and justice tended to be condign and the execution of the sentence swift. Thus the supreme criminal court of Scotland may trace its history back to feudal and Norman origins. This is not surprising since, in mediaeval times, some of Scotland's most powerful kings and many of their vassals sprang from Norman stock. In this respect some Scottish institutions emerged from similar sources to those from which some existing English institutions also originated.

The Court of Justiciary in its present form was founded in 1672, more than 100 years after the Court of Session, but it was only by a gradual process which ended less than 100 years ago that the membership of the two courts, criminal and civil, became totally interchangeable.

Criminal proceedings in the High Court of Justiciary are governed by what is known as Solemn Procedure, the contrast being with Summary Procedure, which is the procedure used for prosecution of the great mass of less serious crimes and offences, including most of those offences which have proliferated and continue to proliferate in the great mass of offence-creating legislation, such as that relating to road traffic, which has been disgorged by our Government Departments and legislature during the last half century and more.

The centre of Solemn Procedure is the Indictment, a succinct statement of the charges against the person accused.

This document, which had tended over the centuries to become lengthy, complicated and technical, was much simplified by the considerable reforms of our Solemn Criminal Procedure which were effected during the latter part of the 19th century.

The Indictment proceeds at the instance of the Lord Advocate, who is Scotland's Public Prosecutor, the senior of the two Scottish law officers, (the other is the Solicitor-General for Scotland) and who has for a long period usually combined with these duties membership of the House of Commons and Ministerial responsibility. In the days before the Union of the English and Scottish Parliaments in 1707 he was one of Scotland's Great Officers of State, and during a later period, until the creation of a Secretary for Scotland (later a Secretary of State) towards the end of the 19th century, he was the senior, and indeed in a sense the sole, Scottish Government Minister and exercised great influence. In what might be called the Scottish legal hierarchy the Lord Advocate takes precedence before all the judges, except the Lord Justice-General, and he is entitled to, and does, sit within the Bar of our superior courts. He is by tradition a member of the Faculty of Advocates, which gives him the right of audience before the superior criminal and civil courts of Scotland, which has long been exclusive to members of Faculty. You may be interested

to know that, so far as can be ascertained from our records, the King's Advocate, who was soon to be called the Lord Advocate, first appeared in court on behalf of the Scottish King almost exactly 500 years ago.

2. The Sheriff Court

The Sheriff Court, which has wide civil as well as criminal jurisdiction, is the main local court of Scotland and you will find Sheriff Courts in all populous places throughout the country, the largest, which serves about one-fifth of the Scottish population, being in Glasgow. The judges of these courts are all professional lawyers, being either Advocates or Solicitors of appropriate experience, and they are now called Sheriffs. Each of the six Sheriffdoms into which Scotland is now divided is presided over by a full-time Sheriff-Principal, who exercises wide administrative functions as well as doing his share of both civil and criminal judicial work and hearing some appeals in civil cases.

The development of the Sheriff as a judicial officer who still also exercises a number of well defined administrative powers, is an interesting example of a process of constant adaptation and delegation over the centuries of the functions of a particular official. The functions of the Sheriff in Scotland, although the origins are similar, bear no relation either to those of the local grandee who goes by that name in England, or to those of a certain type of law enforcement officer who figures in so many American "Westerns".

So far as Scotland is concerned, the name "Sheriff" comes from Saxon, or perhaps I should say Scoto-Saxon, origins.

As a local royal official, the Sheriff was gradually invested with powers and influence which constantly increased in scope until eventually he was exercising a great number of different functions, which to-day would be regarded as wholly inconsistent and incompatible with one another. He became at once an administrator, an investigator of crimes and deaths, an officer who arrested criminals, accuser, prosecutor, local judge, enforcer of decrees and collector of fines and forfeitures,

which were an important source of revenue to the Crown and some of its vassals, as well as performing many governmental duties. As was inevitable, the Sheriff gradually delegated or otherwise shed many of these responsibilities, and it is as a judicial officer that the modern Sheriff has reached his eventual destination wholly inside the Scottish court structure.

The Sheriffs at first tended to be powerful laymen but in due course began, or were required, to delegate their duties to other officials. At a relatively early stage delegation of judicial duties to professional lawyers, who came to be known as Sheriffs-Depute (said to be the linear ancestors of the Sheriffs-Principal), became relatively common, and this became the rule after the Jacobite rebellions in the 18th century. As a result, the lay sheriffs withered away. In due course the Sheriffs-Depute began to appoint Sheriffs-Substitute, who were also lawyers and who, by the third quarter of the 19th century, had come to be both salaried and appointed by the Crown. The Sheriffs-Substitute were the linear ancestors of our

present day Sheriffs, the change of name having occurred only very recently.

During the 16th century the civil jurisdiction of the Sheriff was to some extent restricted, although it is still very considerable, but the Sheriff Court has continued to exercise a wide criminal jurisdiction, which is limited only by the fact that certain crimes regarded as very serious are reserved to the High Court of Justiciary and, in a practical way, by limits which have been set to the Sheriff's sentencing powers and by the exercise of discretion by the Lord Advocate as Public Prosecutor and by his representatives in selecting the court in which to prosecute and the procedure to be adopted, whether Solemn or Summary. Solemn Procedure on indictment may be followed out in the Sheriff Court, the Sheriff or Sheriff-Principal sitting with a jury of 15, but the great mass of minor crimes and offences have for long been tried under Summary Procedure, where a Complaint takes the place of the Indictment in Solemn Procedure.

The Sheriff has been called "a judicial maid-of-all-work" - a true description - but this officer came largely to shed his roles as investigator of crimes and deaths and as prosecutor. This development, which was in some respects gradual, was very important in the evolution of the system of public prosecution in Scotland, and occurred at a surprisingly late stage of that development. It will be convenient to deal with this aspect of the shedding by the Sheriff of some important functions when I deal, as I will in a moment, with the origins and development in Scotland of the official known as the Procurator Fiscal. For the present it may be said that this particular change, which was of central importance in its effects on our system of public prosecution, began to take effect apparently quite suddenly during the latter half of the 16th century, probably because the conflict between the Sheriff's judicial duties and his functions as prosecutor had become embarrassing and unacceptable. But for a long period this did not prevent the Procurator Fiscal collecting fines as the servant of the Sheriff, carrying out criminal investigations on the Sheriff's

behalf and submitting Precognitions to the Sheriff, who would in turn submit a report to the Lord Advocate if he considered there was a case to try. The emergence of the Sheriff's Procurator Fiscal was also roughly contemporaneous with the Reformation.

3. The District Courts

The third tier of the modern Scottish criminal court system is to be found in the District Courts, with lay judges largely drawn from elected local authority representatives and a few stipendiaries. These courts deal with minor crimes and offences, and were one of the products of very recent local government reforms in Scotland. In contrast with the former Police and Justice of the Peace Courts, prosecutions in the District Courts are conducted by the Procurator Fiscal.

Mention should perhaps also be made of our system of Children's Hearings, introduced as recently as 1968 to deal with juveniles under the age of 16. The accepted doctrine is that these

procedures are an aspect of social work rather than of criminal justice, although the attitudes and behaviour of some of those who come before the Hearings might suggest some criminal undertones. It is considered by some authorities that the system also has educational aspects.

You will not have failed to notice that I have approached the system of public prosecution which came to be used in Scotland by tracing historically the development of certain institutions and of certain offices, particularly those of the Lord Advocate and the Sheriff. The Lord Advocate at the present day is the head of the Scottish system of public prosecution and, in the exercise of that responsibility, is expected to stand aside from his governmental and political, particularly party political, activities. At his right hand stands the Solicitor-General for Scotland, who, as I have said, is the junior of Scotland's two law officers, and at his left hand the Advocates Depute (so-called because they hold a deputation from the Lord Advocate), who are all members of the Faculty of Advocates and whose numbers

have now, I believe, risen to 10. The two law officers and the Advocates-Depute between them carry the load of prosecuting criminal cases before the High Court of Justiciary, and it has also at times been relatively common for Crown Counsel to appear in the Sheriff Court, particularly in Sheriff and Jury cases. Amongst their other duties the Advocates-Depute consider confidential papers submitted in connection with sudden and suspicious deaths, including cases of suicide.

The department which serves the Lord Advocate in his capacity as public prosecutor is the Crown Office, which is situated in Edinburgh. It is a department of respectable antiquity, which we find as early as 1765 issuing (to Sheriffs as it happens) detailed instructions on the taking and reporting of Precognitions. At its head is the Crown Agent, the present holder of which office will be speaking to you later this afternoon. He is a civil servant, with considerable experience as a Procurator Fiscal. In my own early days at the Bar (which are nearly historical) the Crown Agent was a solicitor, appointed part-time to the office by the Lord Advocate

of the day, and the Crown Agent, in company with the Lord Advocate, went in and out with changes of government. The Crown Office was then a very small department and must, from the point of view of the tax-payer, have been one of the most economical of all Government institutions. The enormous increase of crime in Scotland during the last quarter of a century has changed all that.

Scattered throughout the country and housed in or near the local Sheriff and District Courts are the local representatives of the public prosecutor, who are known as the Procurators Fiscal. They and their Deputes prosecute in the local courts and they prepare cases for prosecution in the High Court of Justiciary under the general supervision of the Crown Office. They take what are known as Precognitions - that is, statements from witnesses both for their own use and for the use of Crown Counsel in the more serious cases. Precognitions can, if necessary, in an extreme case be taken on oath before the Sheriff. The Procurators Fiscal have important functions in the investigation of crimes and deaths within their areas,

and, as local representatives of the Lord Advocate, have power to give directions to the police in matters of criminal investigation.

How did this official come to have these very important powers and functions? As has been indicated, the Sheriff's Procurator Fiscal, as he was for long called, emerged as an important local official in Scotland during the later part of the 16th century. Some authorities have suggested that the name "Procurator Fiscal" may originally have been imported from France, and it suggests, quite correctly looking to its origins, a combination of a legal representative or delegate and a collector of fines and forfeitures. In our ecclesiastical courts the bishop had an officer who went by this name and performed functions of this nature. The same is said to have been true of certain burghs, whose trading communities had close ties with Europe.

The most important function of the Sheriff's Procurator Fiscal very rapidly became the investigation and prosecution of crimes, but it is of central importance that to this function he has

traditionally, as befits one who has usually been a qualified lawyer holding public office, brought to his duties an objective and judicial attitude. As has already been pointed out, the Procurator Fiscal remained the Sheriff's Fiscal for a very long period. Even after the Procurator Fiscal had become directly responsible to the Lord Advocate as public prosecutor, which seems to have been the position by at least the second quarter of the 19th century, he still remained in name and in fact the Sheriff's Fiscal. In 1907, the power to appoint Procurators Fiscal at last passed formally to the Lord Advocate, and for the last half century the Procurators Fiscal and their Deputes have, with a very few exceptions, been full-time civil servants with Scottish professional legal qualifications. In the 20th century the Procurator Fiscal has completely replaced the Sheriff as the investigator of crimes and deaths, and acts under the supervision of the Lord Advocate, and subject to detailed instructions issued on his behalf by the Crown Office.

Meanwhile, the development of police forces and the emergence inside these forces of specialised criminal investigation

departments, resulted in the Sheriffs, and subsequently the Procurators Fiscal, having readily available an increasingly efficient agency to carry out much of the practical investigations. The police are still obliged to obey all lawful orders of the Sheriff and it was eventually provided expressly by statute, although it had long been recognised in practice that, in relation to the investigation of offences, a Chief Constable of a police force should comply with such instructions as he might receive from the appropriate prosecutor.

Thus, in the investigation of crimes and of deaths, the Procurator Fiscal has come to occupy a central position, while in his capacity as public prosecutor in the local courts, both Sheriff Courts and District Courts, and in his function of preparing Precognitions and obtaining information for submission to the Crown Office, he is indispensable to the machinery for the administration of criminal justice in Scotland. In an article written in 1938 by one of Scotland's outstanding judges of a generation earlier than mine who had a short time previously held the office of Lord Advocate, the following

description is given of the functions and duties of the Procurator Fiscal.

"Much depends on the swiftness and exactness of the original investigations in criminal cases, and the procurator fiscal's responsibilities are heavy. All serious crimes are reported to him by the police or by persons complaining of injury. He can and ought to make use of the local police force and of local experts, and he can in cases of suspected homicide order a post mortem examination; but if these investigations are not immediately conclusive it is his duty to report to the Crown Office. His report should be accompanied by written statements, termed precognitions in Scotland, taken from the available witnesses, and these statements should be taken by himself or his depute, not by the police. It is, of course, his duty to ensure that precognitions are not only as full as possible, but that they faithfully represent the evidence of the witnesses. Any attempt to put words into the mouth of a witness is an unpardonable breach of a procurator

fiscal's duty. No person who is himself under suspicion and is likely to be charged with the crime under investigation should be subjected to precognition. The procurator fiscal must never allow himself to forget that, though he is a prosecutor, his functions are essentially judicial."

These observations are no less true to-day, although, since they were made, the public prosecution service has become much larger and probably somewhat more bureaucratic and centralized than it was 40 years ago.

As a result of the historical developments which I have sketched - necessarily rather superficially in a talk of this length - three features which contributed to the distinctive character of Scottish criminal law and practice have emerged. The first is that, with a few relatively minor statutory exceptions, prosecutions, both under Solemn and Summary Procedure, are at the instance of a public prosecutor. Private prosecutions are almost unknown, and, to put it mildly, present formidable

difficulties to those attempting them. Second, preliminary inquiries into criminal charges are made confidentially by the public prosecutor and those who act on his behalf, with the result that, in practice, the evidence on which an accused person is charged does not as a general rule come to public notice until the trial. In particular, there are no public committal proceedings. Third, unless there are criminal proceedings or a fatal accident inquiry, the same degree of confidentiality applies to the investigation of sudden, suspicious, or accidental deaths. This is thought to be efficient and to prevent much human distress. There is no Coroner's Inquest in Scotland.

Some vestiges or traces of inquisitorial procedure survive, probably from the days when the Sheriff performed many functions in addition to those of a judge. Precognition of witnesses is perhaps an aspect of such procedure, although in Scotland the Defence also have access to all witnesses for precognition, provided the witnesses are willing to give such information about the matters within their knowledge. Reference to

"examination" of the accused in the opening stages of Scottish Solemn Criminal Procedure, although of historical interest, is of little practical importance at the present day.

A declaration before the Magistrate, by which is usually meant the Sheriff, depends and depended on the willingness of the accused to emit such a declaration. Technically, such a declaration, when made, is only available as evidence against the accused, although in practice the Crown has usually allowed a declaration favourable to the accused to be used if the Defence so wished, unless, for example, a declaration was intended to be used by the Defence for tactical purposes, such as casting blame on a co-accused. Since it became possible near the end of the 19th century for accused persons to give evidence on their own behalf, the declaration has in effect almost died away. There are indications that in previous eras, when declarations by persons accused of crime were common and were often made with the object of persuading the Sheriff that the accusation was unfounded, the procedure of examination was sometimes abused by the authorities. Instances of such abuse

occurred even as late as the 19th century. However, in the event no procedure developed in Scotland analogous to the French system of repeated examination of an accused person by the Juge d'Instruction.

Many fulsome praises have been sung about the Scottish system of criminal procedure, particularly by Scottish judges of the Victorian era. I forbear to quote any of them. They tend, perhaps, to make one blush! Moreover, certain parts of the system, particularly at the pre-trial and also the appeal stages, are capable of improvement. Indeed two recent and very distinguished committees have identified areas which are in some need of reform. It must also be emphasised that the Scottish system operates in an atmosphere in which very considerable discretion is exercised, not only by the public prosecutor and his representatives, but also in modern times by the police. There are many instructions and rules, written and unwritten, of which little is known except by those who have been involved in the public prosecution service. There are many traditions and practices, recognised particularly inside

the legal profession, which tend to protect accused persons and to assist their legal advisers. One example was the informal access to Crown Precognitions which Defence Counsel frequently enjoyed in serious cases before the days of criminal legal aid. It is very common, and one hopes it will remain so, for the public prosecutor in appropriate circumstances to give positive assistance to the Defence. All these unwritten rules and practices contribute to the general success of the Scottish system. It is undoubted that mistakes and miscarriages of justice have occurred in the past, though very seldom. Show me any human institution that has not on occasion fallen into error! At least it can be said that in a system of public prosecution it is extremely difficult to conceal or bury such mistakes and miscarriages. With the long experience I have, I consider it justifiable to quote one further sentence from the article by the distinguished Scottish judge to which I have already referred.

"There are indeed three tests of any system of administering the criminal law; does it lead to the detection and punishment of crime, is it expeditious, and is it fair to the accused? The history of public prosecution in Scotland entitles it to a favourable verdict on each of these test questions."

Finally let me say a few words about the substantive criminal law, almost by way of postscript. Apart from the great mass of modern statutory offences, about which I will say nothing, the substantive criminal law of Scotland is simple, and the product of a robust commonsense. The Scottish public and Scottish judges and legal writers have not in the past hesitated to make value judgments on moral and social questions, including questions of right and wrong. Most of our very serious crimes are, fortunately, the creations of custom, common law and judicial decision, and not, as has so often happened in England, of statute. Treason, mainly as a result of a statute passed by the Great Britain Parliament in the year following the Union of 1707, is a startling exception to this rule. So is

incest, where Old Testament principles were adopted by the Scottish legislature. But the principles and requirements underlying most other serious crimes, for example, murder, rape, robbery, theft and fraud, are simple and sensible, and in consequence susceptible of ready explanation to juries, even of modest intelligence. Strong traces of influence from the developed Civil Law are sometimes to be found in these areas of Scots criminal law; for example, in theft, with principles often derived from furtum; and fraud, with a basis in the crimen falsi. The evolution in the criminal law of Scotland of these generic crimes of theft and fraud on broad and simple principles has had very great advantages. It has enabled us to avoid the highly technical and in some respects unsatisfactory consequences of the English legislation in the fields of larceny and theft. We have also by this means escaped the complicated rules, existing and proposed, which seem to be found necessary in English criminal law to cover specific aspects of dishonest and fraudulent conduct. There is, in my humble opinion, no question that the Scots law relating to serious crimes has, on the whole, derived great benefit from an absence of legislative interference in the past, and from the fact that it has been little influenced by arid intellectual

disputation amongst academic lawyers. The substantive criminal law of Scotland in relation to serious crimes has largely been developed by practical lawyers who have understood that, if a jury system is used, the criminal law and its procedures must be readily comprehended by laymen with commonsense. I am therefore in this particular context opting strongly for a continuation of the history of benign legislative neglect, except on the rare occasions when well-considered changes are proposed after ample consultation of expert and public opinion in Scotland.