Different Assumptions —
Different Methods

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The Lecturer was introduced by the President of the Society, Mr James J. Jack, M.A., LL.B., S.S.C., Paisley.
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Almost 85 years ago the American Bar Association met in St Paul, Minnesota. A delegate describes the scene:

It was a pleasant summer evening. . . . In the morning the clans of the respectable Bar had assembled for a business meeting, and had later taken a recess until 8 in the evening. At the evening session there were to be two addresses — the first by "Mr Roscoe Pound, of Lincoln, Nebraska", and the second by John J. Jenkins of Wisconsin. . . .

Roscoe Pound, of Lincoln, Nebraska, had taken a Ph.D. in botany, and had published "The Phytogeography of Nebraska" the year before his appointment as a Professor at Nebraska Law School. The title of his address was "The Causes of Popular Dissatisfaction with the Administration of Justice". The description continues:

Now you must understand that the typical Bar Association address of that period was a sober, solid exposition of some sober, static subject — "American Institutions and the Law", "The Civil Law and Codification", "Alexander Hamilton", "The Alaska Boundary Case", and so on. And the speaker was by tradition a lawyer of national eminence . . . whose name and repute alone was sufficient attraction. The members attended as a matter of duty and respect, to be cheered by the speaker's well-turned eulogium on our institutions or by his smooth exposition of a familiar principle of law.

But now it was something different. The first speaker was a youngish lawyer in his early thirties, a local light in Nebraska — brought on this national stage simply because the

Association's president had recently heard him speak at a meeting of the Nebraska Bar Association. And what was his topic? "Popular Dissatisfaction with the Administration of Justice"! Are the people dissatisfied? What can they be dissatisfied about? Do we not give them a good enough justice? Whose idea can it be that things are wrong? Well, we are here; so we might as well stay and listen politely; the president’s reception doesn’t begin till 9.30... 

But the strong legal minds were sniffing like faithful sheep-dogs who smell the wolf approaching down the wind; the lesser minds were nervously huddling like the sheep of the sheepfold; for a vague instinct told them that there was danger ahead in this speech by a lawyer who was, to all seeming, merely a law professor and a commissioner of the supreme court of Nebraska, but who was talking like a reform wolf in sheep’s clothing.

Roscoe Pound later became Dean of Harvard Law School, and one of the great figures of the American legal scene. His address, a classic of legal literature, was nothing less than a root-and-branch attack on the workings of the American legal system, which a scandalised delegate from New York defended as "the most refined and scientific system ever devised by the mind of man". A Mr Spoon of Texas averred that Pound was attempting "to destroy that which the wisdom of the centuries has built up". In order to prove it, he declaimed four whole verses of poetry from Edgar Allan Poe.

I have no intention of causing you any such discomfort tonight — for three reasons. First, because the Scots have rarely made such grandiose claims for the refinement or scientific perfection of their legal system, so we are less scandalised when others find fault with it. Second, because, being Scots, we have been finding fault with it ourselves for well over 200 years. As Lord Swinton wrote in the fateful year of 1789: "It is the happy constitution of this kingdom . . . to permit, and even encourage, the free discussion of subjects of every kind". 

My third reason is that calls for law reform tend to have wholly unexpected results. Pound attacked what he called the "doctrine of contentious procedure" or "sporting theory of justice". In response to his attack, the opportunities for tactical surprise were removed. Rigorous 

2. Swinton, Considerations concerning a Proposal for dividing the Court of Session into Classes or Chambers, etc., Edinburgh, 1789, p. 44.
procedures of pre-trial disclosure through discovery and interrogatories were introduced, so that the justice game would be played with all the cards face up on the table.

The intention may have been sound. The result is a pre-trial procedure so elaborate, intrusive, time-consuming and costly that no sane person would dream of litigating in the United States. The simplest case will take three years to be tried in the court of first instance; the IBM case was settled after ten years and the trial was still not finished.

Such are sometimes the unexpected results of calls for reform. But my purpose tonight is not to decry law reform. I want rather to insist upon an essential precondition of successful law reform — particularly reform of procedure. That precondition is that we should understand clearly why our system is as it is, and why it differs from other systems from which it is suggested we should borrow.

Too often, law reformers behave like the Caledonian tribes at the time of the Roman Empire with whom, according to Tacitus, *omne ignotum pro magnifico est* — everything unknown is wonderful.

The legal methods we adopt reflect the assumptions we make when choosing them; and they are often unspoken and barely recognised. Legal systems differ, not just because they belong to the Common Law family or the Civil Law family, but because each of them is the product of the history, culture and traditions of the people it sets out to serve. The ways in which an English and a French lawyer will look at a legal problem are different not least because one is an Englishman and the other a Frenchman.

Walter Scott, a man of great common sense when it came to the law if not to his own finances, disliked the Whigs’ Bill for reform of the Court of Session. He thought it was founded . . . on what he should venture to call Anglomania — a rage of imitating English forms and practices, similar to what prevailed in France about the time of the Revolution, respecting manners and dress. We may very effectually destroy our own integrity of judicial system; but we can no more make it the English law, than a Frenchman could make

3. Tacitus, Agricola, 30.4.
his feelings those of an Englishman, by wearing boots, a drab
great coat, and a round hat instead of a cocked one.4

That is not to say that one legal system should not look to another for
a solution to a problem. On the contrary, a great part of our own system
consists of borrowings. But we must know what we are borrowing, and
that means that we must first understand it in its native context. As a
distinguished German lawyer5 once remarked to me, “The good lawyer
is the one who can make the good comparisons”.

What I will try to do tonight is to identify one of the more important
underlying assumptions we make about our own legal system. What do
we think we are doing and why? And how does this differ from the way
lawyers from other countries look at what they are doing? Or, to put the
matter another way, how do the choices we have made differ from those
made by others?

One of the commonest, but most misleading, generalisations about the
difference between the legal systems of the English-speaking world and
those of the so-called “civil law” or “continental” countries is that “the
common law system is accusatorial or adversarial; the civil law system
is inquisitorial”.

What do we mean when we say that our system is accusatorial or
adversarial? Those who try to answer that question usually resort to
sporting metaphors taken, in the southern part of this island at least,
from the game of cricket. In the United States, the metaphor is more
likely to be taken from what is there humorously described as football.

Roscoe Pound was disposed to mix the metaphors:6

The sporting theory of justice, the “instinct of giving the
game fair play”, . . . is so rooted in the profession in America
that most of us take it for a fundamental legal tenet. But it
was probably only a survival of the days when a lawsuit
was a fight between two clans. . . . So far from being a

4. Substance of the Speeches delivered by some Members of the Faculty of Advocates at
the meetings on 28 February, 2 and 9 March 1807 to consider the Bill “for better
regulating the Courts of Justice in Scotland and the Administration of Justice therein”
5. Dr Claus-Dieter Ehlermann, formerly Director General of the Legal Service, now
Director General for Competition, Commission of the E.C.
fundamental fact of jurisprudence, it is peculiar to Anglo-
American law; and it has been strongly curbed in modern
English practice. With us, it is not merely in full acceptance,
it has been developed and its collateral possibilities have been
cultivated to the furthest extent. Hence in America we take it
as a matter of course that a judge should be a mere umpire,
to pass upon objections and hold counsel to the rules of the
game, and that the parties should fight out their own game in
their own way without judicial interference. We resent such
interference as unfair, even when in the interests of justice.
The idea that procedure must be wholly contentious dis-
figures our judicial administration at every point. It leads the
most conscientious judge to feel that he is merely to decide the
contest, as counsel present it, according to the rules of
the game, not to search independently for truth and
justice. . . .

The inquiry is not, What do substantive law and justice
require? Instead, the inquiry is, Have the rules of the game
been carried out strictly? If any material infraction is
discovered, just as the football rules put back the offending
team five or ten or fifteen yards, as the case may be, our
sporting theory of justice awards new trials or reverses
judgements . . . in the interest of regular play.

50 years later, in England where the sporting instinct had (according
to Roscoe Pound) been curbed, but still faithful to cricketing metaphor,
Lord Denning (then Denning L.J.) put it rather differently. The case
was one in which the judge of first instance, the notorious Mr Justice
Hallett, had persistently interrupted counsel and effectively taken over
conduct of the trial:

In the system of trial which we have evolved in this country,
the judge sits to hear and determine the issues raised by the
parties, not to conduct an investigation or examination on
behalf of society at large, as happens, we believe, in some
foreign countries. Even in England, however, a judge is not
a mere umpire to answer the question “How’s that?” His
object, above all, is to find out the truth, and do justice
according to law; and in the daily pursuit of it the advocate
plays an honourable and necessary role. Was it not Lord
Chancellor Eldon who said in a notable passage that “truth

is best discovered by powerful statements on both sides of the question”? And Lord Greene who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disquisitions? If a judge, said Lord Greene, should himself conduct the examination of witnesses, “he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict” . . .

. . . The judge’s part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemingly and keep to the rules laid down by law to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate.

A more down-to-earth Scottish statement is to be found in a characteristic passage from one of our greatest and most under-valued judges, Lord Justice-Clerk Thomson.8 The context was, need I say, a motion for late amendment:

Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arm’s length, selects its own evidence. Each side’s selection of its own evidence may, for various reasons, be partial in every sense of the term. Much may depend on the diligence of the original investigators, or on the luck of finding witnesses or on the skill and judgment of those preparing the case. At the proof itself whom to call, what to ask, when to stop and so forth are matters of judgment. A witness of great value on one point may have to be left out because he is dangerous on another. Even during the progress of the proof values change, treasured material is scrapped and fresh avenues feverishly explored. It is on the basis of two carefully selected versions that the Judge is finally called upon to adjudicate. He cannot

make investigations on his own behalf; he cannot call
witnesses; his undoubted right to question witnesses who are
put in the box has to be exercised with caution. He is at the
mercy of contending sides whose whole object is not to
discover truth but to get his judgment. That judgment must
be based only on what he is allowed to hear. He may suspect
that witnesses who know the “truth” have never left the
witness-room for the witness-box because neither side dares
risk them, but the most that he can do is to comment on their
absence.

A litigation is in essence a trial of skill between opposing
parties conducted under recognised rules, and the prize is the
Judge’s decision. We have rejected inquisitorial methods and
prefer to regard our Judges as entirely independent. Like
referees at boxing contests, they see that the rules are kept and
count the points.

I would ask you particularly to note that both Lord Denning and Lord
Thomson say that we have rejected the inquisitorial approach, and both
say it in relation to civil litigation.

But if you were to ask a French lawyer to define the most important
principle of his system of civil procedure, he would probably say that it
is “le principe du contradictoire” — the very principle enunciated by
Lord Eldon, that “truth is best discovered by powerful statements on
both sides of the question”. Most continental civil judges would be
astonished to hear themselves characterised as inquisitors or to be told
that persistent interruption is a vice of their system from which the
English system, or indeed the Scottish, is free.9

But they would equally be scandalised to be told that they flatter
themselves if they think their function is the ascertainment of truth.

There are in fact very few continental countries where civil procedure
is inquisitorial. In some, but by no means all of them, criminal
procedure is inquisitorial. The reason, in the latter case, is not simply
that the purpose of the procedure is to ascertain the truth in the interests
of society, but also that, as the French put it, “we are judging the man,

9. The day after delivering this lecture, I was told by a French judge that he would not,
as a matter of principle, put questions to counsel, except perhaps in the most abstract
and general terms, lest he be thought to have prejudged the issue.
not the facts’. Not only the method, but the whole underlying assumption as to what one is trying to do, is different.

However, as I say, that applies only to criminal procedure. Civil procedure is not “inquisitorial” in that sense at all. There is, none the less, a difference of approach between us. Why?

If a foreign visitor walked into a British court, he might take some time to work out whether he was listening to civil or criminal proceedings. In the Sheriff Court, the only observable difference would probably be the presence of the accused in the dock. In Parliament House, to continue the sporting metaphor, the umpire would be wearing a different colour of strip. But not all visitors to our courts have done their sartorial homework.

Whether in civil or in criminal proceedings, the order of events in our courts is essentially the same: first, the taking of evidence by the examination and cross-examination of witnesses in public before the judge (or judges) of fact; then the oral submissions and arguments on the law. Taken together, these events constitute the proof or trial.

Why do we do things in this way? The underlying reason is, I suggest, that both in civil and in criminal proceedings, our system presupposes that the case will be “tried” by a jury even if, in fact, we have largely abandoned civil juries and the vast majority of criminal cases are tried, in Scotland at any rate, by a single judge sitting alone.

In procedural terms, the judge sitting alone at first instance is treated as a surrogate jury, with all that that implies. His role is essentially passive. The material for judgment must be laid before him orally by the parties in the course of a single, continuous event, called a trial or proof. He is presumed to enter the court in almost total ignorance of what the case is about, and his range of knowledge in other respects is presumed to be no greater than that of a rather ill-informed tourist on a Guide Friday bus. On appeal, the factual findings of this one-man jury are, in theory at least, sacrosanct.

Whether the case is tried by a 15-, 12- or one-man jury, it is self-evident that the material for judgment must be presented orally at a single defined stage of the proceedings. We no longer take that idea to its logical conclusion, though we used to do so. At the trial of Deacon Brodie, the Dean of Faculty rose to address the jury at 3 o’clock and Lord Braxfield started his charge at 4.30 a.m.
But the trial remains the pivotal event. Everything that goes before is preparatory to the trial, or incidental to it. Appeal procedure is concerned with what happened at the trial or the conclusion to be drawn from it.

In the days of Deacon Brodie our civil procedure was quite different. It followed the same model as the rest of Europe, apart from England and Ireland. A Scots lawyer, familiar with the history of his own system, need find no difficulty in coming to terms with the procedure of the European Courts in Luxembourg or of most continental civil courts. Indeed, so close are the connections that traditional Scots terminology can encapsulate the precise meaning of words in common usage in other languages while purely English terminology cannot do so.

The introduction of jury trial in civil causes became almost an article of faith with what might be called the liberal — or perhaps, nowadays, the wet — wing of the Faculty of Advocates at the beginning of the last century. Francis Horner, one of the co-founders of the Edinburgh Academy, declared it to be “the greatest improvement of which the administration of justice in Scotland was susceptible”.

David Hume (of *Hume on Crimes*), on the other hand, declared that, “in new modelling our plan of judicial proceedings after the English standard, we are preparing our necks, and those of our posterity, for the yoke of servitude to the law of England”. Walter Scott, for his part:

> had heard that the French owed some part of their naval inferiority to a large oven, placed in the midst of the vessel to bake hot rolls for the ship’s company, and which impeded the working of the guns. As great events turned on such trifling causes, he was often tempted to suspect that the English owed the unanimity of their juries to what, according to their great moralist Johnson, made the principal object of their thoughts during the day, their respect for their dinner.

According to Lord President Ilay Campbell, “the plain original meaning of a jury, both in England and here, [was] merely to ascertain the fact, and give evidence of it to the Court; for which reason they are sworn as witnesses only, and give no oath de fidei as judges”. Hence,

10. See Hallard, *Thoughts on some points in our system of judicial procedure*, 1858 (Advocates' Library, Law Tracts, IX. 20), p. 16.
11. *Substance of the Speeches*, see note 4 above, p. 25.
incidentally, the words of the jury oath, that "you will truth say, and no truth conceal, so far as you are to pass on this assize".

The advantages of introducing civil jury trial had been analysed twenty years earlier by Lord Swinton. There is a striking portrait of him in Edinburgh's New Club, and I was rather disappointed to read in Cockburn\(^\text{14}\) that he was "dull, mild, solid and plodding. . . . It is only a subsequent age that has discovered his having possessed a degree of sagacity for which he did not get credit while he lived."

Swinton's thesis can be shortly stated:

The law depends on the facts. The sole object of taking evidence in any suit, civil or criminal, is to find out the truth of fact. And the best way of finding out truth must be the best manner of taking evidence.\(^\text{15}\)

He then considers the various ways in which evidence can be taken and concludes that jury trial, with public examination and cross-examination of witnesses, is the best.

I don't wish, this evening, to go into the merits or otherwise of civil jury trial, though it seems that a less rosy view of its advantages was already current by the middle of the last century. In \textit{Thoughts on some points in our system of judicial procedure},\(^\text{16}\) published in 1858, an advocate called Frederick Hallard wrote:

\begin{quote}
Do we, the litigants and lawyers of Scotland . . . believe that, for the satisfactory adjudication of questions of fact in a civil cause, a jury is the most reliable tribunal, and that jury trial is the best means of eliciting the truth out of conflicting evidence? I think it may safely be said that the common opinion decidedly leans the other way. In the preliminary stages of most litigations, the possible jury trial is the rock ahead against which too much precaution cannot be taken. An unscrupulous litigant will hold it up \textit{in terrorem} to drive his timid adversary into compromise.
\end{quote}

\textit{Plus ça change . . . , as we say on the Continent!} Personally, I'm rather inclined to agree with Justice Oliver Wendell Holmes of the U.S.

Supreme Court that “the use of [jury trial] is to let a little popular prejudice into the administration of the law — (in violation of their oath)”\textsuperscript{17} But I remember a stout defence of the Scottish jury by Lord Cameron in the first of this Society’s biennial Lectures. So I must walk in his footsteps with care, particularly, if I may take this opportunity to say so in public, because I owe so much to his inspiration, encouragement and friendship.

The significant point for this evening’s discussion is not whether jury trial is a good thing, but the identification of its original purpose, which was to supply the factual basis for the eventual judgment on the law. The concept of the trial as a single continuous event, and all the procedural consequences that follow from that, is a corollary of opting for jury trial as the best method of providing that factual basis.

But that, in turn, presupposes, as Swinton said, that “the law depends on the facts” and that there is a clear distinction between questions of law and questions of fact. In truth, as Ilay Campbell pointed out, “instances more frequently occur, where the law and fact are so combined, that they cannot well be separated”\textsuperscript{18} Justice Holmes deprecated the attempt by legislation to sharpen the line between the functions of judge and jury, and Sir Frederick Pollock said of the situation in England that:\textsuperscript{19}

As law and practice here go, there is not and never has been any hard rule either that juries are the judges of all questions of fact, or that they are judges of nothing else.

None the less, the idea has become engrained in our system that there are two, and only two, mutually exclusive categories of question coming before the courts, the one being the province of the jury, the other that of the judge.

So strong is this belief that we carry it to a conclusion that most lawyers from other systems find bizarre to the point of absurdity. Because the judge is assumed to know only the law of his only country, foreign law is a matter of fact, to which the judge’s own capacity for legal research can contribute nothing at all. Indeed, in civil cases, though

\textsuperscript{18} Hints upon the Question of Jury Trial, note 13 above.
\textsuperscript{19} Holmes-Pollock letters, Pollock to Holmes, 15 March 1899 (Harvard edition, p. 92).
not in criminal, the judge is not even assumed to know the law of his own country but must wait to be told what it is and where to find it.

A further consequence of the assumption that jury trial is the best route to the facts, is the highly specialised definitions we give to the words evidence and proof. It is significant that neither word can be translated directly, with all its overtones, into any other European language.

According to our system, the only factual material that can form the basis of judgment is material brought to the notice of the jury or judge in accordance with the rules applicable to the type of material in question — witness evidence, documentary evidence, real evidence, et cetera. Only material brought forward in that way is to be regarded as evidence. The reason for these rules is to define what may be put before the jury and so place some legal limits on their inclination to “let a little popular prejudice into the administration of the law”.

But even if there is legal evidence, that does not necessarily amount to proof. Again there are distinctions to be drawn between primary facts and the inferences to be drawn from primary facts, between direct evidence and circumstantial evidence, between prima facie presumptions and conclusive proof, and so on. And, again, the reason for these rules is to define what, for legal purposes, may be taken to be true, and to draw the dividing line between the functions of the judge of fact and those of the judge of law.

Lord Justice-Clerk Thomson remarked that “It is a recurrent feature in legal systems that the rules have come to be too strict and have had to be relaxed”.

But even if there is legal evidence, that does not necessarily amount to proof. Again there are distinctions to be drawn between primary facts and the inferences to be drawn from primary facts, between direct evidence and circumstantial evidence, between prima facie presumptions and conclusive proof, and so on. And, again, the reason for these rules is to define what, for legal purposes, may be taken to be true, and to draw the dividing line between the functions of the judge of fact and those of the judge of law.

Relaxation of the rules relating to written pleading was brought about through what amounted to judicial legislation by the House of Lords during the 1960s and early 1970s. The result, combined with the malign influence of the copying machine, is that complex civil cases now seem to take several years longer than they did when I was called to the Bar in 1962.

The *Harris Tweed* case\(^{21}\) — at the time, the longest case in Scottish legal history — started in my second year of apprenticeship; a debate on a preliminary plea and the appeal on that point took place in my devilling year; and the proof lasting six months ended before I had been a year at the Bar. By contrast, I was interested to read not much more than a week ago that the House of Lords had just decided the appeal in a case in which I was engaged, and in which the Record had closed, before I took up my Chair at the University in January 1985.\(^{22}\)

The problem, as I see it, is not so much that the baby has been thrown out with the bath water, as that the baby has been left howling in an empty bath. Even if the possibility of civil jury trial has still been retained for a tiny minority of cases, successive reforms — judicial and legislative — have emptied of content a system whose structure presupposes that all cases will be tried by jury. We have not, I think, fully appreciated the consequences of pulling out the plug.

In the meanwhile, new forms of judicial procedure have been introduced to which none, or almost none, of the traditional rules apply. In Scotland today, many times more cases, frequently of greater value or at least greater importance to the individual, are dealt with each year in the social security and other tribunals than are resolved in the civil courts.

You may question my use of the expression “judicial procedure” to describe what these tribunals do. But most of them would be classified as “courts” in other European countries. In Germany, there are five parallel court systems. Three of them (the labour courts, the social courts and the tax courts) are engaged in work that would be done by tribunals in this country. Another (the administrative courts) is engaged partly in tribunal work and partly in judicial review. Only one would qualify as a “court system” in traditional British terms.

Judicial review itself is an attempt — and, as far as I can gather, a successful attempt — to escape the time-consuming and expensive shackles of the jury-oriented system in dealing with challenges to administrative acts. And yet we do not seem to have appreciated the implications of abandoning the old procedures. When British lawyers tell me that the workings of the European Courts are “inquisitorial”, and therefore mysterious and different, I reply that most of the work in

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Luxembourg, apart from Article 177 references, is no more and no less than judicial review with whose principles the Bench and Bar of this country are, or ought by now to be, perfectly familiar.

The reason why European Court procedures appear to be foreign, mysterious and different is that discussion of them starts from the wrong place. We have accepted new procedures for judicial review and for the work of tribunals. We have thrown over Dicey and the theory that "administrative law" belongs firmly on the other side of the Channel. But we have failed to realise that, in accepting these new procedures, we have implicitly discarded many of the assumptions on which our traditional system is based.

We have accepted, without noticing, that our world is more complex and varied than the world of 1789 when lawyers could maintain that there are two, and only two, mutually exclusive categories of question — questions of law and questions of fact — and could say, with Swinton, that the law depends on the facts; that the sole object of taking evidence is to find out the truth of fact; and that the best way of finding out truth must be the best manner of taking evidence.

So far I have been talking mainly about our own system. What of the others?

One problem we face when we come to look at other systems is that, for historical reasons, we have tried to accommodate all our court procedures within the conceptual straitjacket of trial by jury. So we assume, in relation to others, that there must be a similar all-embracing explanation of their systems. This is simply a false premise. The "civil law" systems are truly "inquisitorial" only in relation to criminal procedure, and then only in some countries. Indeed, the Scandinavian systems are probably far more like ours than those of the rest of continental Europe.

Nevertheless, there is a sense in which the underlying idea expressed by the word "inquisitorial" is valid for other systems in general. Because of the way in which our system has developed, our judges have only a limited opportunity to exercise control over the way in which a case develops. Their role is, perhaps, not so much "passive" as "reactive". It is for the parties to take the initiative or, in the modern jargon, to be "proactive".

The judge in other countries does not see his role in that way. For him, the parties in civil proceedings have submitted the issue between them to
the court — that is to say, to the judge — to resolve. The procedure leading to judgment is subject throughout to judicial control, through the judge’s control of the court file or dossier.

The parties must, of course, define what the issue is, and in most countries, as in ours, they must do so in written pleadings. The pleadings will identify, as ours are supposed to do, the issues of fact on which the parties cannot agree. But unlike ours, their pleadings will suggest the most appropriate way of resolving those points of disagreement — by hearing witnesses, by calling for production of documents, or by reference to a man of skill. It is not assumed, as our jury-based system is bound to assume, that all the material for judgment must be put before the court orally at the trial.

Throughout, the judge is assumed to know the law and be capable of applying it. So it is ultimately for the judge, and not for the parties, to decide whether it is necessary to hear a particular witness, to ask a particular question or to call for a particular document. Having heard the evidence of the witness or received the document, it is for the judge to decide what value he attaches to it.

The point, in short, is that, the parties having submitted their difference to the judgment of a trained professional judge, it is for him, and not the parties, to decide how that judgment is to be exercised.²³

In criminal proceedings the difference of approach is brought out very clearly if one compares the English and French texts of article 6 (2) of the European Convention on Human Rights. The English text reads: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. The French text — in translation — reads “Everyone charged with a criminal offence is presumed innocent until his guilt has been established”.

The English text (read by a British lawyer) assumes that the presumption of innocence is rebutted by proof of guilt — “proof” in this context meaning proof by “evidence” in the strict legal sense of the

²³. After the lecture, I was asked what reforms I would in fact propose for Scottish civil procedure. I believe that we could, on the basis of our experience of judicial review, move towards a greater degree of judicial control of civil procedure, reflecting the “continental” approach (from which, after all, we started), though not necessarily in all respects. Perhaps the two most important steps would be, first, to dispel the illusion that the parties have a right to conduct civil proceedings as they think best, and second, to shake off the presumption that the issues in all civil cases must be resolved by the same methods.
word. The French text assumes that the presumption of innocence is rebutted when guilt has been "established". The process by which guilt is "established" is a continuous process subject throughout to judicial control. Thus, for example, the French juge d'instruction, so beloved of Lord Scarman and Ludovic Kennedy, is only the first of a series of judicial officers with responsibility for controlling the process of investigation, indictment, trial and punishment. The last of them is le juge de l'application de la peine — the judge in charge of the penalty — for my money, a better bet than the juge d'instruction if we are looking for someone to borrow.

According to this system, the material for judgment is built up in the dossier. The case is sent for "trial" when the dossier shows that there is a prima facie case against the accused. The purpose of the "trial", with public oral examination of the accused as well as of the other witnesses, is to determine whether that prima facie case has truly been established. For the same reason, the appeal court need not, and indeed may not, regard any part of the proceedings at the trial as sacrosanct and immune from review.

As in our system, legal limits are placed on the material that can be used as the basis of judgment. But the issue then becomes one of deciding whether a particular item of evidence (in the loose sense) should be admitted to the dossier, rather than whether it constitutes "evidence" in the strict "common law" sense.

As you see, the underlying assumptions of such a system are quite different from our own. You can't just choose to have juges d'instruction as if they were a dish on a juridical à la carte menu. You must plan the meal. It is true that the Scottish system retains the vestiges of the juge d'instruction, though he is not, as is often said, the Procurator Fiscal. He is the Sheriff. But the context is now so different that, if we wanted to make him a real juge d'instruction, we would need to go back to first principles and start again.

24. That is why some people say — wrongly — that the continental systems presume the accused to be guilty until his innocence is proved. But this is simply a misunderstanding of the purpose and context of the "trial" for the reasons I have tried to explain.

25. See the third Report of the commissioners on the Courts of Justice in Scotland, 1818, pp. 51-52:

The duty now performed by [the Procurator Fiscal] was, in earlier times, executed partly by the Sheriff himself, and partly by the Crowner, an officer of great antiquity in the Scottish law. These duties consisted either in
So can we learn anything from these other systems, or are they too different? I have already mentioned the area in which I believe that the systems are beginning to grow together — judicial review of administrative action. But I believe that there is one quite specific field in which we can learn something and should, indeed, do so fast.

Most of the other countries of Europe have had first-hand experience of arbitrary government. To protect themselves, they have developed ways of protecting the rights of the individual, and in particular the right of privacy, which we, glorying in our jury-based system, have neglected.

To take an example of concern to the members of this Society: the need to protect the confidentiality of lawyer-client communications is recognised in all the Community countries. Our system operates on the assumption that such communications are sufficiently protected if they cannot be made "evidence" and cannot, for that reason, be used against the client in court. Our system does not, as others do, protect lawyer-client communications outside the context of formal judicial proceedings, though legislation may, but does not always, provide for protection. There is no general principle, backed up by effective sanctions, to protect them against the police, the taxman and other emanations of executive power. Other countries have the principle and the sanctions.

following out the necessary measures previous to trial, in criminal matters, or in conducting prosecutions which took place before the Sheriff.

[By] Act 1436, ch 140, the Sheriff was expressly required to arrest criminal offenders, and pursue them to justice in the King's name. . . . It is probable that after the duty of carrying on prosecutions for the public interest in the Justiciary Court. . . . had been fully devolved on [the King's Advocate], the Sheriff and other subordinate Judges had been led to imitate this procedure by authorizing a particular Clerk or agent belonging to the Courts to appear in a similar character. . . .

In these capacities the Procurator Fiscal now officiates. Under direction of the Sheriff, he prepares and transmits to the Lord Advocate all informations and precognitions respecting crimes which do not fall under the exclusive or customary jurisdiction of the inferior Court; and under the same direction he appears as prosecutor in cases tried before the Sheriff. . . .

The Procurator Fiscal is named by the Sheriff, and holds his appointment during pleasure.

I am grateful to Lord Cameron for reminding me that Scott's Guy Mannering (chapter 56) describes Counsellor Pleydell, as Sheriff, conducting the judicial examination of Dirk Hatteraick in the manner of a juge d'instruction.

We have recognised the need for an effective system of judicial control of executive action. We have introduced new procedures and are beginning to develop the language of a developed system of administrative law. Yet the power of the executive continues to grow. It is not healthy that it should grow unrestrained.

Perhaps recent changes in Westminster and Whitehall will allow us to be less vain-glory about the capacity of our system to cope on its own. If we are ready to make good comparisons, we need not be too late.
PROFESSOR DAVID EDWARD

David Alexander Ogilvy Edward (b. 1934) was appointed a judge of the Court of First Instance of the European Communities in 1989.

He was educated at Sedbergh School, University College, Oxford, and Edinburgh University. During National Service he served as a Sub-Lieutenant RNVR in motor torpedo boats. He was admitted as an Advocate at the Scottish Bar in 1962. From 1967 to 1970 he was Clerk, and from 1970 to 1977 Treasurer, of the Faculty of Advocates. He took silk in 1974.

From 1978 to 1980 he was President of the Consultative Committee (now the Council) of the Bars and Law Societies of the EEC. In 1985 he became Salvesen Professor of European Institutions at the University of Edinburgh and Director of the Centre of European Governmental Studies, now the Europa Institute.

Since 1966 he has served as a Trustee of the National Library of Scotland. He was a member of the Law Advisory Committee of the British Council and acted on three occasions as specialist adviser to the House of Lords Select Committee on the European Communities between 1985 and 1987. From 1981 to 1989 he was a member of the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes. Prior to his appointment to the bench he also held a number of company directorships. He is President of the Scottish Council on Arbitration and Chairman of the Hopetoun House Preservation Trust.

In 1976 he published “The Professional Secret — Confidentiality and Legal Professional Privilege in the EEC” and has published numerous articles and papers concerned with the legal profession, Scots and Community law.

In 1981 he was appointed a Companion of the Order of St Michael and St George. In 1979 he was awarded the Distinguished Cross, First Class, of the Order of St Raymond of Penafort, Spain. He is a Fellow of the Royal Society of Edinburgh.