HEINONLINE

Citation: 6 Utrecht L. Rev. 119 2010

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Tue Jun 5 04:18:46 2012

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1871-515X

Utrecht Law Review published by

# Inquisitorial or adversarial?
# The role of the Scottish prosecutor and special defences

**Allard Ringnalda***

## 1. Introduction

When accused of a crime, it is reasonable to expect that one may lead exculpatory evidence and arguments at trial. A suspect of, say, an assault would be allowed to prove that he was elsewhere at the time of the offence, thus pleading a defence of alibi. However, the rules of Scottish criminal procedure are more complicated than that. They require that a defendant give prior notice of a number of defences to the prosecution. If the accused (the Scottish term[1] for a defendant) neglects to do so, he cannot argue the defence or adduce any evidence in favour of that defence at trial. This is the rule of special defences. The process of the defence disclosing its case to the prosecution before trial is also known as defence disclosure.[2]

The rule of special defences is in itself odd, as one may wonder what its purpose is. It is even stranger, to the foreign observer at least, to find this rule in the predominantly adversarial Scottish criminal procedure.[3] Its presence does not correspond to our theoretical understanding of the models of inquisitorial and adversarial styles of procedure: while the rule of special

* The author is a Research Student in the Master's Programme in Legal Research at Utrecht University School of Law, Utrecht (the Netherlands). This paper is based on a research project conducted together with Dirk van Leeuwen, Benedicta de Fretes and Tim van der Torn, students at Utrecht University, whom the author would like to thank for their input and comments. The author would also like to thank Prof. Dr E.H. Hondius and Dr J.M. Milo (Molengraaff Institute of Private Law, Utrecht University School of Law) for their valuable comments on an earlier version of this article. The author is most grateful to Prof. Dr C.H. Brants (Willem Pompe Institute of Criminal Law and Criminology, Utrecht University School of Law) for supervising the research and her assistance in writing this article. The author would also like to thank the anonymous referee for kindly suggesting some important points of improvement. Please address any correspondence to a.ringnalda@uu.nl

1 Scottish law uses some other unfamiliar terms. A glossary of these can be found at the end of this article.

2 Mandatory defence disclosure was introduced for Crown Court cases in England by s. 5 of the Criminal Procedure and Investigations Act 1996, but merely serves the purpose to allow the prosecution to determine which unused material in its possession is relevant and should be disclosed to the defence. A currently pending proposal in Scottish Parliament on prosecution disclosure seeks to introduce defence statements: s. 94(2) of the Criminal Justice and Licensing (Scotland) bill (as introduced), which would introduce a new s. 70A to the Criminal Procedure (Scotland) Act 1995. This proposal has been criticized, as it would add nothing to the law on special defences: the Rt. Hon. Lord Coulsfield, *Review of the Law and Practice of Disclosure; in criminal proceedings in Scotland*, 2007, p. 37.

3 C. Gane, 'Classifying Scottish Criminal Procedure', in: P. Duff *et al.*, *Criminal Justice in Scotland*, 1993, pp. 56-73. It is of note that Scottish law in general, including criminal law, is influenced by continental law and legal philosophy (*e.g.* J. Cairns, 'Historical Introduction', in: K. Reid & R. Zimmermann, *A History of Private Law in Scotland*, 2000 (discussing historical influences on Scottish law generally); J. Cairns, 'Hamesucken and the Major Premiss in the Libel, 1672-1770: Criminal Law in the Age of Enlightenment', in: R. Hunter (ed.), *Justice and Crime: Essays in Honour of The Right Honourable The Lord Emslie*, 1993, pp. 138-179 (discussing the influence of the work by the Dutch scholar Mattheus on substantive criminal law). This influence could account for certain inquisitorial elements in the otherwise adversarial procedure.

CC BY



HeinOnline -- 6 Utrecht L. Rev. 119 2010

defences fits within an inquisitorial procedure, in which the prosecutor is the dominant actor, it seems to be at odds with the basic adversarial assumption of party equality.[4]

The rule of special defences is interesting from a comparative theoretical perspective. One may wonder whether rules which require the defence to furnish the prosecutor with information about its strategy and argument have any bearing on the role of the prosecutor and his relation to the defence. As Scottish criminal procedure can be characterised as a hybrid, it provides an interesting setting for such an analysis. The research question of this article is accordingly: can a rule that requires the defence to notify the prosecution about aspects of its strategy, legal defences in particular, put the prosecutor in a more inquisitorial role, and, if so, in which manner and under what circumstances? Answering this question increases our understanding of the potential relevance of the relationship between prosecution and defence for the fairness of the trial, and potential threats to this coherency.

This question is answered by taking a comparative approach to the Scottish rule of special defences. By asking whether it places a burden on the prosecution to investigate a defence of which notice has been given, and whether the prosecution is expected to act impartially in this regard, we can indicate whether the rule fits best within the inquisitorial or adversarial model as described in Section 2. In essence, we purport to give an interpretation of the rule of special defences. What is intended here is not to give an 'internal' view on the legally correct interpretation and application of the rule according to Scottish law, but rather to interpret its purpose from a theoretical perspective, and to relate this to the models of criminal procedure. This 'external' interpretation will not be a purely legal one. It takes account of the context of the rule in the history, philosophy and theory of criminal procedure, and the culture of legal practice in which the rule is presently applied. Section 3 gives a description of the rule of special defences. Its history is discussed in Section 4. Based on this information, four possible interpretations of the rule are given in Section 5, completed by a discussion of informal cooperation in Section 6. Section 7 concludes the paper and answers the research question.

## 2. Theoretical framework: Inquisitorial and adversarial procedure[5]

In inquisitorial procedure, during the pre-trial stage, the suspect is predominantly dependent on the prosecutor for truth finding and for receiving a fair trial. The defence often has little or no power to conduct its own investigations. It is therefore usually the prosecutor who is in charge of the investigation of evidence and witnesses, and he has to act impartially in order to be able to investigate both incriminating and exculpating evidence, and to make objective judgements. The prosecutor does not act in a partisan interest, but combines the need for convicting criminals with guaranteeing a fair trial. The defence is dependent on the prosecutor and his impartiality and will have to cooperate with the prosecution in order to have witnesses and evidence examined. The rule of special defences seems to fit well within an inquisitorial system: it enables the

4 M. Damaška, 'Evidentiary barriers to conviction and two models of criminal procedure: a comparative study', 1972-1973 *University of Pennsylvania Law Review* 121, pp. 506-589, at p. 563, explains that adversarial systems are reluctant to allow one party to use its adversary as a source of evidence, as this would disturb the balance and theoretical equality between the parties. Even though the rule of special defences is not directly related to evidence, its effects are somewhat similar as it enables the prosecution to become aware of defence information and strategy. See Section 2, *infra*, for a more elaborate discussion.

5 See generally: M. Damaška, *The Faces of Justice and State Authority*, 1986; Damaška, *supra* note 4, pp. 561-565; Ch. Harding *et al.* (eds.), *Criminal Justice in Europe: a comparative study*, 1995; C. Brants, 'Strafrechtsvergelijking', 2008 *Delikt & Delinkwent*, pp. 214-242; J. McEwan, 'Ritual, Fairness and Truth: The adversarial and Inquisitorial Models of Criminal Trial', in: A. Duff *et al.* (eds.), *The Trial on Trial: Truth and Due Process,* Vol. 1, 2004, pp. 51-69; Gane, *supra* note 3.



HeinOnline -- 6 Utrecht L. Rev. 120 2010

prosecution to be fully informed before the trial and to take that information into account in assessing the case and preparing the dossier on which the judicial investigation at trial is based.

In adversarial systems, to the contrary, the state and its officials are mistrusted. Impartiality on the part of the state is not thought possible. A fair criminal trial demands that prosecution and defence are equal parties with equal powers and rights to investigate and present the case. This equality allows for a battle at trial, in which the charge and the evidence and witnesses are discussed and investigated in the open, in front of a judge or jury. It is thought that the truth can arise only by means of such a battle. The adversarial concept of truth is therefore a consensual one: the truth needs to be acceptable to both parties. This is in stark contrast to the inquisitorial concept of truth, which is more objective: truth is something that can be found if one has enough means to that end, and the state is thought to be best equipped. The rule of special defences does not seem to fit in an adversarial system. It breaches the desired equality of parties, as it requires the defence to make its strategy known beforehand. This places the prosecutor in a stronger position. The rule seems to hint at cooperation between prosecution and defence, a concept which is in theory unknown to an adversarial procedure.

These descriptions present ideal-types of both systems, and they underline the theoretical and ideological differences. Although one will not find these ideal-types in practice, they are very helpful in comparative analysis. Indeed, this theoretical framework also illuminates the research question. What needs to be answered in this paper is whether the rule of special defences is actually based on inquisitorial ideas: does the rule, in theory, put the prosecutor in a more beneficial position, and does it do so because it is thought that the prosecutor acts impartially due to his being, in part, an official with a magisterial role, who is not a party to the criminal dispute?[6]

This question is also of general theoretical significance. It increases our understanding of so-called 'mixed' or 'hybrid' systems that combine elements of inquisitorial and adversarial procedure despite the theoretical conflicts between both styles. Various legal systems are termed to be hybrids as they purposefully combine strong inquisitorial pre-trial investigative powers with an adversarial debate during the trial. Such hybrids are often created for the purpose of increasing the effectiveness of prosecutions whilst maintaining the perceived fairness of the trial.[7]

## 3. Current law on special defences

The rule of special defences requires the defence to give prior notice of defences to the prosecution (in Scotland sometimes referred to as the Crown) at some point before the trial. The details of the rule are set forth in s. 78 of the Criminal Procedure (Scotland) Act 1995, but the rule is originally Scottish common law. It applies only to solemn procedure – *i.e.* a jury trial – although it has recently, for reasons of efficiency, been partially extended to summary procedure (in which a Sheriff sits without a jury).[8] Generally, the notice needs to be given well in advance of the actual trial,[9] unless the defence can show cause for its late tendering or the Crown consents.[10]

---

6 On this description of the inquisitorial prosecutor, *cf.* H. van de Bunt, *Officieren van Justitie,* 1985, pp. 49-52.

7 See T. Weigend, 'Is the Criminal Process About Truth? A German Perspective', 2003 *Harvard Journal of Law and Public Policy,* pp. 157-173, at pp. 162 *et seq.*

8 S. 149B of the 1995 Act, which was introduced under the 2007 procedural reforms; see further Section 5.1 below (on efficiency). The non-application of the rule on special defences to summary proceedings was decided in *Adam* v. *MacNeil,* 1972 JC 1.

9 The time of the notice depends on the type of trial concerned. If the solemn procedure takes place before the High Court, the notice needs to be given seven clear days before the preliminary hearing. If the solemn procedure takes place before the Sheriff Court, the notice can be submitted later, ultimately on the first diet (which is the same as a preliminary hearing at the High Court): s. 78(3) of the 1995 Act.

10 If a defence is tendered at a later point in time, the Crown can move for adjournment or desertion *pro loco et tempore* in order to adapt its preparation to the special defence. This gives the prosecution ample time to prepare a new line of argumentation, and thus to strengthen its position at trial: A. Sheehan *et al., Criminal Procedure,* §§ 182 and 251.



HeinOnline -- 6 Utrecht L. Rev. 121 2010

### *3.1. Consequences of giving no notice*

If the defence has not given any notice of a special defence, it cannot rely on that defence at trial. This means that it cannot make any remarks or references relating to the (alleged) existence of the defence, lead any evidence or examine any witnesses to substantiate the defence, examine or cross-examine witnesses with regard to the defence, or mention it in its closing speech. It is also not competent for the defence advocate to ask the accused questions related to the defence and any remarks he makes should be disregarded by the jury; the judge must instruct them accordingly.[11]

Lodging a special defence and subsequently withdrawing it or refraining from relying on it may have negative consequences for the defence. If notice of a special defence has been given, but the defence later decides not to rely on it (for example, due to a change in strategy), the accused can be questioned by the prosecutor on this point. The judge may then point to the resulting possible lack of credibility in his instruction to the jury when he explains the applicable law and summarises the evidence.[12] It is thus bad strategy to give notice of all possible special defences in order to keep possible future strategies open or to frustrate Crown preparations.

The consequences of not giving notice of a special defence are thus grave and may seriously harm the defence. The accused and his lawyer will have to make a good assessment of the case against him in order properly to decide about any special defences.[13] As notice has to be given at a rather late stage, the defence will have a fairly clear picture of the prosecution case. Disclosure of prosecution evidence should have taken place.

### *3.2. Details of the provision*

The obligation to give notice of special defences is strictly limited to notification only. The accused is under no obligation to explain the defence or to cite any evidence to support it, although he may do so.[14] It is also not prohibited to give notice of two or more (perhaps mutually exclusive) defences. It should be noted that, for practical purposes, the defence is required to give advance notice of evidence and witnesses that it wants to lead or cite at trial under the same terms of s.78. This includes any evidence or witnesses relating to a special defence. The prosecutor could perhaps deduce information from such notice about the accused's special defences. However, there is no requirement for the defence to explain the list of evidence and witnesses, or its relation to the special defence intimated.

The rule of special defences does not apply to all defences imaginable, but it does include the most important.[15] Four defences have always been considered to be special defences at common law: alibi, self-defence, insanity at the time of the commission of the crime, and incrimination.[16] Statute expands this list with four others: incrimination of a co-accused,[17]

---

11 Sheehan *et al.*, *supra* note 10, § 182, and the case law referenced below.

12 See Sheehan *et al.*, *supra* note 10, § 185; see also *Williamson* v. *HMA [HM Advocate]*, 1980 SLT 38 and *Wilkinson* v. *HMA,* 1992 SLT 816. The prosecutor is allowed to ask questions about the withdrawal of a special defence, and the judge can subsequently refer to this in his instruction to the jury; however, the court decided in Wilkinson that the judge can refer to the withdrawal of a special defence even if the matter was not raised by the parties at trial.

13 Failure to do so could be considered defective representation: *Winter* v. *HMA*, 2002 SCCR 720 at p. 732.

14 It is so required when pleading insanity, which thereby takes a somewhat different position from other defences: s.78 of the 1995 Act. (It is of note that a defence of insanity may require the prosecutor to start psychological investigations before the trial, which would explain this stronger requirement.) Interestingly enough, the new provision regarding summary proceedings does require that, when a special defence of alibi is lodged, notice must be given as to the time and place of the whereabouts of the accused.

15 Sheehan *et al.*, *supra* note 10, § 183.

16 J. MacDonald, *Practical Treatise on the Criminal Law of Scotland,* 1948. p. 265; R. Renton & H. Brown, *Criminal Procedure according to the Law of Scotland*, 1996 (looseleaf as updated per 1 November 2008; electronic version), § 14-26.

17 Scottish law distinguished between incrimination of a party not (yet) implicated, and the incrimination of a co-accused; see Renton & Brown, *supra* note 16, § 14-26 under 3.



HeinOnline -- 6 Utrecht L. Rev. 122 2010

automatism, coercion, and consent in certain sexual offences.[18] Other defences do not require prior notice (which mainly applies to a defence against specific elements of the charge).[19] Special defences differ from such other defences in that they necessarily lead to acquittal if accepted.[20]

According to current law, special defences should be treated merely as a procedural category of defences of which prior notice is required. In their legal effect, special defences are not different from any other defences. If notice of the special defence is given according to the rules set out below, the special defence is read to the jury at the commencement of the trial, together with the charge. It appears that the jury have to be informed about both the charge and the special defence so that they can keep this in mind when assessing the evidence: they are informed about the substance of the dispute, *i.e.* the prosecutor's claim and the accused's reply. Afterwards, the prosecutor can no longer object to the formulation of the special defence: once the defence has been read to the jury, it has become fixed.[21] The prosecutor does have a right to object to the formulation of the defence,[22] but only at the first diet or preliminary hearing. This illustrates the need for an early intimation of a special defence.

## 4. Historical origin and history of ideas

This section sketches the context of special defences and explores the ideas that lay behind this rule. It should be noted that a historical inquiry into Scottish criminal law is far from easy. Because criminal law, including procedural law, was mainly common law until 1887, it is difficult to give a comprehensive account of its history before that time. Practice often appears to have been diffuse. There is also a lack of modern research regarding special defences, and one frequently has to resort to original sources, being mainly textbooks that are today regarded as authoritative statements of law.[23] This justifies a somewhat more elaborate discussion of history.

### *4.1. Inquisitorial background*

Before 1887,[24] criminal trials consisted of two stages. Both parties would first debate the relevancy of the charge (then called 'libel') before the court.[25] Upon this debate the court would issue an interlocutor, a question to the jury ('assizers'), who were to decide whether the charge

---

18 Technically, only the common law defences are termed 'special defences'; those added by statute are merely 'regarded as special defences for the intents and purposes of s. 78', but there is no difference between them in practice: Renton & Brown, *supra* note 16, § 14-26. It is common to refer to all defences mentioned in s. 78 as special defences, and I will pursue this practice here. It is of note that the Scottish Law Commission, in its *Report on Rape and Other Sexual Offences* (September 2007), advised that the notice of the defence of consent in sexual offences be removed because the absence of consent is for the Crown to prove (§ 2.87 and 2.88).

19 A true systematic or dogmatic theory of defences is absent in Scottish law, probably due to the distaste for such theoretisation that is often found in common law jurisdictions. This has led to some unfortunate and unclear terminology, which has changed throughout history and is still not always used consistently. The term 'defence' in Scottish law and legal writing is rather open and undefined. It can refer to any argument that purports to cast reasonable doubt on the defendant's guilt of the crime as charged or simply to deny guilt in general: C. Gane *et al.*, *A Casebook on Scottish Criminal Law*, 2001, p. 202. The first sort is called specific defences: F. Riatt, *Evidence*, 2001, p. 30; Renton & Brown, *supra* note 16, § 24-01. There is a current debate on whether general defences that are not special defences, such as provocation, mental weakness, or diminished responsibility, are in fact recognised as defences at all under Scottish law: *HMA* v. *Tracey*, 2008 SCCR 93. If they are not, they are not admissible at trial; their role is then reduced to pleas of mitigation at sentencing.

20 Adam v. *MacNeil*, 1972 JC 1, *per* Lord Walker: 'Generally speaking, a special defence is one which puts in issue a fact (1) which is not referred to in the libel, and (2) which, if established, necessarily results in acquittal of the accused'. See also Gane *et al.*, *supra* note 19, p. 203.

21 Renton & Brown, *supra* note 16, Para. 14-27.

22 *E.g. Balsillie* v. *HMA*, 1994 SLT 1116. In this case, the defence lodged a special defence of self-defence, but only to the extent that the facts charged were found to be proven. The prosecutor objected successfully at the first diet, because a plea of self-defence can only be maintained when the accused admits to the relevant facts.

23 Under Scottish law, certain legal treatises are considered a (subsidiary) source of law. These treatises are termed 'Institutional works', and their authors are considered to be 'Institutional authors'.

24 In 1887 the first code of criminal procedure was introduced, replacing most of the pre-existing common law and statutes.

25 Cairns 2000, *supra* note 3, p. 148. Also in Cairns 1993, *supra* note 3; J. Irvine Smith, 'Criminal Procedure', in: Paton (ed.), *Introduction to Scottish Legal History* (The Stair Society, XVIII), 1958, pp. 426-448.



HeinOnline -- 6 Utrecht L. Rev. 123 2010

was proven. The probation of the charge was the second stage of the trial, in which the truth was assessed. The preceding debate on the relevancy of the charge was a legal debate, not involving the jury, on whether the facts mentioned in the charge constituted a crime, which evidence could legally be led to support the charge, and whether this evidence was *prima facie* sufficient for a conviction.[26]

Interestingly enough, the defence[27] was not allowed to introduce any proof contrary to the charge during the probation.[28] There could thus be no true discussion of the veracity of the charge before the jury. Evidence, it was thought, should only be led by the prosecuting party – which, even in those days, was almost always the state.[29] It was thought that the prosecution was either able to prove the charge – in which case the charge had to be true and no evidence contrary to it could possibly exist – or not to prove it because it was false – in which case there was no point in leading contrary evidence.[30] As Hume explains:

> 'Of old, the pannel [*i.e.* the accused] was confined to a very narrow and disadvantageous field, by the received maxim of law against admitting any defence that was contrary to the averment of the libel. (...)[31] By the same rule, as little could the pannel allege a casual rencounter, or self defence, or great and sudden provocation, if the libel set forth that the slaughter was done by lying in wait, or on challenge to fight a single combat. (...) The sort of argument, so far as I can collect it, by which our lawyers justified so strange a restriction of the pannel's proof, was to this purpose: that the accuser had set forth certain facts and qualities in his libel, and must establish these with evidence, to succeed in his prosecution: that if he failed to prove them, the pannel must be acquitted of course for that reason only, though there were no evidence on his part at all: and that, on the other hand, if the prosecutor proved his libel, it could serve no purpose, but to occasion perjury, to admit a contrary proof on the part of the pannel; these witnesses, if they contradicted what had already been proved by those for the prosecution, must be swearing falsely; which it was the business of the court to deny them an opportunity doing. (...)
> In short, the notion of a conjunct probation of the libel and defences before the assizes, was thought too dangerous to be admitted: the prerogative of proving, and the choice of witnesses, were to be given to one of the parties only; and on the evidence taken by that party, the issue was entirely to depend.'[32]

This description and argumentation – here criticised by Hume – is very characteristic of an inquisitorial procedure.[33] Only the prosecution is allowed to give evidence on the case; the accused has to sit back and wait, being fully dependent on the prosecution. The prosecution bears full responsibility for investigating the case and leading evidence, and henceforth for finding the

---

26 D. Hume, *Commentaries on the law of Scotland, respecting trial for crimes,* Vol. 2, 1800, p. 80; Cairns 1993, *supra* note 3.

27 The accused, as of old, has a right to a defence advocate, even if he cannot afford one: Hume, *supra* note 26, Chapter X.

28 See Hume, *supra* note 26, chapter X (p. 33); see also Irvine Smith, *supra* note 25, pp. 439-440.

29 Public prosecution became the rule after the office of the Lord Advocate was introduced by statute in 1587: Irvine Smith, *supra* note 25, pp. 434-435. See also Cairns 2000, *supra* note 3.

30 It was generally thought that allowing the defence to lead evidence contrary to the evidence led by the prosecution would cause witnesses to commit perjury: if a defence witness said something that was contrary to what was declared by a prosecution witness, one must be lying, and it would probably be the defence witness. See G. Mackenzie, *The laws of Scotland in Matters Criminal,* in: *The works of that eminent and learned lawyer, Sir George Mackenzie,* [1678] 1722, vol. 2, Title XXII, at pp. 235 *et seq.*; see also the quote from Hume below.

31 Hume here refers to similar practices in continental (*i.e.* inquisitorial) criminal procedure, mainly in France.

32 Hume, *supra* note 26, pp. 69 *et seq.* A similar account is given by Mackenzie, *supra* note 30, writing in 1678 (title XXII).

33 *Cf. e.g.* (on Scotland) F. Pollock, *Essays in the Law*, 2008, pp. 205-206. It is also of note that the Scottish procedure used to employ some sort of investigative judge (the Sheriff), who gradually delegated his investigative tasks and powers to the procurator fiscal: G. Gordon, 'Institution of Criminal Proceedings in Scotland', 1968 *Northern Ireland Legal Quarterly*, pp. 249-277, at p. 253.



HeinOnline -- 6 Utrecht L. Rev. 124 2010

truth, in cooperation with the jurors. Allowing evidence to be brought by both sides would lead to contradictions in evidence, and it would urge witnesses to lie.[34] It was considered a task for the court to prevent this from happening and to ensure the veracity of witness testimony. This is not typical of adversarial systems, where the determination of the truthfulness of witness testimony is thought to be best assessed by the jurors by observing the witness's demeanour in open court and under (cross-)examination.[35] There is no sign of a concept of battle between the parties, or an (adversarial) ideal of reaching a truth that is acceptable to both parties, as the defence is left out to a large extent. This also implies that the (public) prosecutor was considered able to deal with a case and find the truth in an objective and neutral manner, a description that fits most with an inquisitorial approach.

It can be seen that Scottish procedure differs historically from its English counterpart. English prosecutions have traditionally been private, and there has therefore never been any concept of an impartial investigation before the trial.[36] There were no limitations on the accused to present evidence during the trial.[37] Counsel was originally forbidden to participate in trial proceedings. Before this rule was abandoned, during the 18th century, judges took to the task of observing the interests of the accused.[38] Contrary to Scottish procedure, in which the public prosecutor has taken a leading role in investigating and prosecuting, English adversarial procedure traditionally adhered to the equality of parties.

### *4.2. Pleading defences*

Only later, through the efforts of both the judiciary and the Crown, did it become a general rule to accept defence evidence at trial and to allow the defence to cite witnesses. Increasingly judges had begun to allow this, provided that the evidence was not *contrary* to the charge (*i.e.* a direct negation of it) but merely *elided* it.[39] After all, a defence that elides the charge does not contest it directly, and therefore does not require the presentation of evidence that is contrary to the prosecution case; the dangers thought present in 'conjunct probation' do not, then, apply.[40] Because of the two-stage structure of the trial, these defences had to be pled during the debate on the relevancy. The judges could then decide whether the defence was admissible to the probation (for being eliding), whether it was *prima facie* supported by evidence, and whether it could therefore be included in the interlocutor that was sent for probation (or they could dismiss the charge completely because of the special defence, or dismiss the special defence if it was unfounded).[41] By the same token, a list of witnesses who were cited in favour of the defence had

---

34 As two witnesses could not possibly contradict each other and tell the truth at the same time. Mackenzie, *supra* note 30, pp. 235-236, writes (and criticises) that prosecution witnesses were thought to know all relevant facts in a case; by implication, defence witnesses could have nothing to add but lies. Hume, referring to Mackenzie, writes that prosecution witnesses were thought to be able to give a full account of an event, both the charge and the defences, as these would have been observable simultaneously; if a prosecution witness persisted in proving the charge under cross-examination, the truth was considered to have been established; Hume, *supra* note 26, p. 72.

35 Such ideas are certainly prevalent in Scottish criminal procedure: *e.g.* Hume, *supra* note 26, p. 221.

36 See J. Langbein, 'The Origins of Public Prosecution at Common Law', 1973 *American Journal of Legal History,* pp. 313-335. There was some role for justices of the peace (magistrates who were involved in the pre-trial preparations) in assisting prosecutions, but this extended only to assisting the case for the prosecution by forcing witnesses to testify etc.

37 J. Langbein, *The origins of adversary criminal trial*, 2003.

38 Langbein, *supra* note 37; A. Duff et al., *The Trial on Trial: Towards a Normative Theory of the Criminal Trial*, Oxford 2007, p. 31-32.

39 The distinction is made by Mackenzie, *supra* note 30, pp. 236 *et seq.*, but it is uncertain whether he was arguing for it, or merely stating an existing judicial practice; by Hume's time (a century later) it clearly was practice. See also the wording of the interlocutor quoted in note 41 *infra*.

40 This is admittedly a problem for a defence of alibi, as claiming that one was elsewhere is necessarily contrary to the charge; see on this problem: Mackenzie, *supra* note 30, title XXII, s. 3 (p. 237).

41 J. Louthian, *The Form of Process before the Courts of Justiciary in Scotland: In Two Books*, 1758, explains what such an interlocutor could look like: 'The Lords Justice-General, Justice-Clerk and Commissioners of Justiciary, having considered the Libel pursued at the Instance of W.G. his Majesty's Advocate, for his Highness's Interest, against C.D. Pannel, with the foregoing Debate thereupon; They Find, That the Pannel, at the Time and Place libelled, having, by Premeditation and forethought Felony, with a Poynard or other mortal Weapon, wounded



HeinOnline -- 6 Utrecht L. Rev. 125 2010

to be handed over to the prosecutor, to allow him to investigate their reliability (and possibly to take statements to find out more about the defence at issue).[42]

The two-phase trial put the prosecution in a strong position, not only awarding it the benefit of information, but also requiring it to act upon being informed of a defence to assist truth finding. Again, Hume explains:

> '(...)[The accused] at this period of the process [*i.e.* the debate on relevancy], by himself or his counsel, has to open up the particulars of his case, and lay before the prosecutor and the judge, the outline of the story on his part. In the common case, this is what he will naturally be disposed to do, on his own account. But even if he should incline to be reserved in that respect, in the hope perhaps of gaining some undue advantage; this is what the prosecutor is not obliged, and the court will not be disposed, to allow. Because, for want of acquaintance with the plan of the defence, the prosecutor may lose some material part of his own evidence; not knowing how to interrogate his witnesses, nor on what points chiefly to strengthen or guard the proof in support of his charge.'[43]

This quote shows that, as late as 1800, the prosecution was perceived to be the central actor in a criminal trial, and that the role of the defence was of subsidiary importance. If the defendant is contemplating to 'maintain some special defence,' he is required to 'open up the particulars of his case,' in other words, to explain to the prosecutor what the special defence consists of, seemingly in greater detail than is required today. The rationale behind this requirement, one may conjecture, is to allow the prosecutor to adapt his case according to the arguments put forward by the defence.

However, it appears from the text that the prosecutor is not enabled to do so merely in order to strengthen the prosecution case. Quite to the contrary, the prosecutor will examine the evidence and witnesses in order to find support for the account given by the defence, and in doing so he will act in the interests of the accused. Indeed, according to Hume, the accused will be 'naturally disposed' to share his argument with the prosecution, thereby apparently relying on the prosecutor to investigate it to the benefit of the accused. This hints at some sort of cooperation between both parties. The text also explains that the prosecution should be allowed to strengthen its case against the accused: apparently it was assumed that the prosecution needs to be in a stronger position, being better informed and prepared. The reason for this may be that the prosecution acts in the public interest, and should try to prove a case and obtain a conviction by the best possible means. A case should not be lost and the culprit liberated, so it was thought, as a consequence of the jury having been persuaded by a fabricated special defence, the veracity of which could not have been verified and debated by the prosecution, as it had not been informed beforehand.[44]

---

the deceas'd G.B. of which Wound he soon thereafter died, or that the Pannel was Art and Part thereof, *relevant* to infer the Pains of Law; And sustain the Defence proponed for the Pannel, of his being *alibi* the Time libelled, *relevant* to elide the Libel: And repel the haill other Defences proponed for the Pannel; and remit the Libel and Defence as found relevant, to the Knowledge of an Assize' (pp. 103-104, emphasis in original).

42 This was a statutory requirement stemming from 1672; Hume, *supra* note 26, p. 213.

43 Hume, *supra* note 26, p. 39.

44 It should be noted that the trial – the actual probation (the second stage) – had to be finished in one uninterrupted session ('under the same sun'), not allowing for any breaks or postponements. The court would sit unadjourned for as many hours as it took to come to a decision. There was thus no chance for the prosecution to ask for an adjournment in order to investigate a defence that was intimated during the trial.



HeinOnline -- 6 Utrecht L. Rev. 126 2010

From about 1740, the defence was allowed to lead any evidence during the probation.[45] This would have caused the prosecution to lose its stronger position, were it not for a statute of 1747 which required the defence to give notice of its arguments before the commencement of the trial.[46] This provision was thought to be to the benefit of the prosecutor, thus re-establishing his strong position.[47] As the Glasgow court, ruling in 1814, explains:

> '[I]t was certainly most irregular [and contrary to the 1747 statute] to bring forward evidence in exculpation, without having previously apprized the prosecutor of the facts proposed to be proved by lodging irregular defences along with the exculpation and a list of witnesses.'[48]

The 1747 statute codified the longstanding practice of the prosecutor being informed in advance of the trial of the defence plan.[49] It is therefore considered to be the forerunner of the current regulation on special defences.[50]

In conclusion, history shows that the adversarial concept of equality of parties and a trial as a battle was alien to Scottish criminal procedure for a long time. The prosecutor, being put in a leading position that required objectivity and impartiality, was always informed beforehand of the defence strategy, since the defence had to give away this information during the debate on the relevancy. Such a strong position of the prosecution, being put in a far better position than the defence (which is not informed about the 'new' prosecution plan after it has disclosed its defence arguments), is only fair if the prosecution is expected to act in the interest of the accused as well. There is enough historical evidence to conclude that such a duty existed.

More importantly, our historical inquiry has shown that that Scottish criminal procedure has an inquisitorial background. The rule of special defences developed against that background: truth finding was considered a task for the prosecutor, on whom the accused was dependent and with whom the accused was supposed to cooperate. The prosecutor thus became an impartial, inquisitorial official who in certain respects had a magisterial position, and the rule on special defences served the fulfilment of this role.

## 5. An interpretation of the rule of special defences

It is now time to turn our attention to the interpretation of the rule of special defences in the current system of Scottish criminal procedure, and to deliberate on the significance of the rule for the adversarial or inquisitorial position of the prosecutor. We shall do so by discussing four plausible interpretations of special defences, which are to be found in literature and case law. We

---

45 Hume, *supra* note 26, p. 78.

46 20 Geo. II. c. 43 (Heritable Jurisdictions Act), s. 41; the relevant passage reads: 'the Pannel [*i.e.* the accused] shall give in to the Clerk of Court the Day before the Trial, in writing, subscribed by the Pannel, or One of his Procurators, such Account of the Facts, relating to the Matters charged upon him in the Libel or Indictment, and thereto briefly subjoin the Heads of such Objections or Defences, as he shall think fit or be advised to make at his Trial,' retrieved from <http://toto.lib.unca.edu/> (facsimile).

47 A. Alison, *Principles of the Criminal Law of Scotland,* 1833, pp. 369-370; Hume, *supra* note 26, p. 40.

48 Case of Alexander Brown, Glasgow, 1814; quoted in Alison, *supra* note 47, pp. 369-370.

49 I note that Scottish procedure features other rules that have a similar effect. The most noteworthy of those is the arrangement of judicial examination, under which an accused is brought before a judge and prosecutor at an early stage of the proceedings in order to make voluntary declarations and to be questioned on these statements by the judge. Statements made during this judicial examination could merely be used as incriminating evidence, thus serving the benefit of the Crown: Gordon, *supra* note 33, p. 258. The judicial examination is presently rarely applied: Sheehan *et al.*, *supra* note 10.

50 J. Irvine Smith *et al.*, 'Criminal Law', in: Paton (ed.), *Introduction to Scottish Legal History* (The Stair Society, XVIII), 1958, pp. 280-301, p. 295; G. Gordon, 'Burden of proof on the accused', 1968 *SLT,* p. 29; referred to in 'Two recent Scottish Decisions', 1970 *Journal of Criminal Law*, pp. 192-199.



HeinOnline -- 6 Utrecht L. Rev. 127 2010

first discuss the possibility of special defences being installed for efficiency reasons only. Secondly, we discuss the relation to the reliability of defence statements. Thirdly, we deal with the possibility that advance notice is in the interest of the accused. Lastly, we discuss the idea that the defence is under an obligation to give 'fair notice' to the prosecutor.

These interpretations are not intended to be mutually exclusive. Each of them tells us something about the meaning of the rule of special defences.

### *5.1. Efficiency*

Adversarial trials are costly: they take a long time, all the evidence having to be examined in court, and consume staff time and facilities. Among the most significant problems with which adversarial trials must deal in an effort to become more efficient are 'cracked' trials and last-minute changes and surprises. The element of surprise (which follows from the very structure of adversarial procedures, as no cooperation between parties is generally required) creates confusion once the trial has commenced, and may often require a postponement, and thus delay the procedure. Ambush defences in particular cause delay, as they are intended to surprise the prosecution and weaken its argument – a strategy accepted in principle – and require it to ask for more time to change strategy or strengthen the evidence. Cracked trials can occur for many reasons, one of which is a 'doorstep confession': the courtroom has been booked, staff arranged for and a jury empanelled, but the defendant pleads guilty as soon as he enters the courtroom, rendering all trial-related efforts and expenses pointless.[51]

Scottish legislation on special defences can be interpreted as a way of increasing efficiency, and foreign observers have indeed argued for such an interpretation.[52] By informing the prosecutor beforehand of the defence strategy to be pursued, he can prepare his case more adequately. He can, for example, conclude that the defence is well founded and therefore decide not to continue proceedings against the accused, because it is very likely that he will be found not guilty. The prosecutor may also adjust the charge or enter into a plea negotiation with the accused. Alternatively, the prosecutor can try to find strong evidence against the special defence, in order to ensure a conviction. All of these measures prevent wasting valuable resources.

Efficiency reasons were clearly behind the 2007 reform, under which the rule of special defences was made applicable to summary procedure.[53] The McInnes Report, drafted in preparation of these reforms, considers that equality of information before the trial is important, because the Crown has to make a well-informed decision whether to continue proceedings or not (*e.g.* at the intermediate diet). Only if both parties are well informed, the report argues, can valuable resources be allocated effectively. Here we see clearly that a bilateral duty of information (*i.e.* the disclosure of both prosecution and defence material) can be intended for efficiency purposes.

If special defences are indeed a measure to make trials more efficient, their presence has no direct bearing on the inquisitorial or adversarial nature of the prosecution. Most adversarial systems try to be more efficient by disallowing surprise elements at trial, thus requiring advance notice of several matters, most especially a plea of guilty or not guilty.[54] Furthermore, the

---

51 In Scotland, the issue of efficiency was addressed by the Scottish Office Review Group in *The 1993 Review of Criminal Evidence and Criminal Procedure*, 1993. The recommendations led to the introduction of a duty to agree uncontroversial evidence and pre-trial hearings to verify the stage of preparation of the parties. See also P. Duff, 'Disclosure in Scottish criminal procedure: another step in an inquisitorial direction', 2007 *International Journal of Evidence and Proof*, pp. 153-180. Early confessions are countenanced by a mandatory reduction of the sentence.

52 R. Fleming, 'The Scottish Jury', 1906-1907 *Michigan Law Review* 5, pp. 520-544.; see for an argument on the unfairness of such a requirement: Editors, 'Pre-trial Disclosure in Criminal Cases', 1951 *Yale Law Journal*, pp. 626 *et seq.*

53 See the Summary Justice Review Committee, *Report to Ministers* [McInnes Report], 2004, Paras 20.18-20.21.

54 See *e.g.* the 'plea and directions hearing' that has been recently introduced in England & Wales for precisely that purpose.



HeinOnline -- 6 Utrecht L. Rev. 128 2010

prosecutor in either an inquisitorial or an adversarial system will be interested in finding the person guilty of committing the crime. Any prosecutor, therefore, starts investigations in an unpartisan manner. The partisan attitude of the prosecution in adversarial systems comes into being only at the end of the investigative stage, and is only fully reached at the trial stage. In earlier stages, the prosecution is interested in finding the 'actual' truth (as opposed to the 'consensual' type of truth reached prior to or at trial). Thus, the attitude of adversarial prosecutors is perhaps not so different from their inquisitorial counterparts, at least in the earlier stages of the proceedings.

The idea of efficiency may have a normative dimension too. Under Scottish procedural law, the prosecutor cannot lead evidence or witnesses at trial that were not on the list that is to be annexed to the indictment.[55] This is an adversarial setting: both parties should have their version of the truth prepared before the commencement of the trial, and they cannot, in theory, add new evidence as the trial proceeds. Then, in order to ensure a good possibility of conviction and to guard the public interest of fighting crime, the prosecutor should have an adequate opportunity to gather and lead evidence that might refute the defence. The rule of special defences ensures, in this adversarial context, that the prosecutor is informed about the argument he is to counter.

However, it is contended that special defences should not be interpreted merely as an efficiency measure – although they certainly appear to operate to that effect in a majority of cases. Their impact is much more profound: giving the prosecutor the opportunity to strengthen his evidence in order to disprove the special defence disturbs the equality of arms. It assumes that the prosecutor is entitled to a better possibility of obtaining a conviction, because he balances the public interest in convicting culprits with the accused's interest in a fair trial. It is thought to be too dangerous to allow the introduction of a special defence without the prosecutor verifying it in advance (which is perhaps a sign of some mistrust towards the jury as well). The rule therefore also pertains to a more inquisitorial concept of truth as being found by the prosecutor, and not reached through equal debate. History also shows that the rule of special defences, including the requirement of giving advance notice, has a very peculiar and indeed ideologically inspired background. It has become clear that the discussion of special defences prior to trial was to serve the benefit of the prosecutor, who would be able to alter his case on the basis of the information he received about the defence strategy. Efficiency was clearly not the historical rationale behind the requirement. And even though the effect of the requirement of prior notice may today be limited to making the trial more efficient in the bulk of cases, the superior knowledge of the prosecution does put it in a different position, which may be thought to be more inquisitorial.

### *5.2. Reliability*

We find historical evidence that prior notice was required to warrant the reliability of statements by the accused, particularly those pertaining to special defences.[56] It was thought that a defence statement made at a later stage was more likely to be fabricated. After all, the argument goes, if an accused has a special defence, he would be 'naturally inclined' to make it known as early as possible.[57] We have also seen that it was thought to be the duty of the courts to prevent witnesses from giving false testimony, which demonstrates that the prevention of fabrication was considered an issue for the judge and procedural law, and not exclusively for the parties to debate in

55 Sheehan *et al.*, *supra* note 10, § 173.
56 This goes back mainly to MacKenzie, *supra* note 30, chapter X.
57 *Cf.* the quote taken from Hume, in Section 4, *supra*.



HeinOnline -- 6 Utrecht L. Rev. 129 2010

court. Such rules are perhaps more familiar to adversarial than inquisitorial procedure, as the example of hearsay rules shows.[58]

Indeed, we find modern case law in which the unreliability of statements made at a later stage of the proceedings is stressed. For example, if an accused does not make any statements during judicial examination – often the earliest possibility to make declarations directly to the prosecutor – but later relies on a special defence, the judge can instruct the jury to consider the reliability of the later statement in the light of the preceding silence.[59] In the same way, a jury can be instructed on the possible unreliability of a special defence that was tendered at a very late stage (at trial, on cause shown or with the consent of the prosecutor) or when a special defence was intimated at first but later withdrawn and changed to a general denial of the charge.[60]

Even though reliability may be one of the reasons for requiring advance notice of special defences, it cannot be its sole explanation or interpretation. First of all, there are many other types of statements of which no prior notice is required that might equally be untruthful or unreliable. Second, the notice of a special defence is required only at a relatively late stage, while the need for reliability would demand the notification of such statements at the earliest stage possible, *e.g.* during police interrogation. Reliability can therefore not be the most significant reason behind the requirement of prior notice. History, again, supports this conclusion, for we now know that the rule of special defences also pertains to the position of the prosecutor.

### *5.3. The interest of the accused*

One of the most interesting interpretations for the requirement of an advance notice of special defences is that it is in the best interest of the accused to do so – as argued by Hume. His argument appears to have been that prior notice was required because the prosecutor would take the special defence into consideration, review his evidence or investigate new evidence, and either amend, drop or pursue the charge. This implies a more inquisitorial position, a magisterial attitude, on the part of the prosecutor: he is expected to investigate exculpating circumstances, and thus to act impartially as he has to take the interests of the accused into account. At the same time, the rights and possibilities of the accused (to lead his own evidence) were limited, so that he was forced to rely on cooperation with the prosecution for conducting his defence.

The crucial question is whether this dependency still exists under current law.[61] After all, the defence is now able to lead its own evidence and is no longer *required* to rely on cooperation with the prosecutor. And since criminal procedure in general has become more adversarial with the introduction of the 1887 Criminal Procedure (Scotland) Act, it may well be that the old function of the requirement of prior notice of special defences has disappeared to be replaced by a new, more adversarial one – most likely efficiency.

In order to answer this question, we should establish whether there is any (legal) duty on the prosecutor to investigate a special defence of which prior notice has been given. If this is indeed the case, this is strong evidence that the requirement of prior notice does still put the prosecutor in an inquisitorial position, by enabling and requiring him to investigate exculpating

---

58 See Damaška, *supra* note 4, pp. 514-521.

59 *McGee* v. *HMA,* 1992 SLT 2. The legality of such adverse inferences was subjected to strict criteria by the ECtHR in the Irish case of *Murray* v. *United Kingdom* of 25 January 1996. This has led to a change in the cautioning of suspects in England, Wales and Northern Ireland, though not in Scotland.

60 Do note that the judge cannot address such issues *propriu motu*, but only if the prosecutor has referred to them in his interrogation or speech: *Wilkinson* v. *HMA*, 1992 SLT 816, distinguishing *Williamson* v. *HMA* 1980 JC 22 (in which it was decided that the prosecutor can examine a defendant on a withdrawn special defence).

61 P. Harding, 'Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland', 1963 *University of Pennsylvania Law Review,* pp. 165-186, does interpret the arrangement on special defences as being in the best interest of the defence.



HeinOnline -- 6 Utrecht L. Rev. 130 2010

circumstances. However, case law shows that there is not a clear legal duty to do so. As the High Court decided in *Smith:*

> 'But the practice [*i.e.* of disclosure of exculpating evidence] has not been pressed so far as to mean that the Crown is under any obligation to discover a line of defence. If, in a stabbing affray, the information before the Crown showed that both assailant and victim had knives in their hands, it would be the duty of the Crown to include in the indictment the knife which was in the victim's hand and the witnesses who can speak to it. But if there is nothing in the material before the Crown to suggest a possible defence of self-defence it would appear unnecessary for the Crown to include something in the indictment [*i.e.* the list of relevant evidence] just because it might have a possible bearing on such a defence if taken. It is a question of degree.'[62]

This important and complicated decision shows that there is no clear rule on what the prosecution has to do with the notice of a special defence. There is, according to the court, no obligation to 'discover a line of defence.' In the *Smith* case, the accused was charged with stabbing and wounding the victim. The defence lodged a plea of self-defence, but only during the trial with the consent of the prosecution. It subsequently appeared that there was evidence that the victim had also carried a knife, but this evidence had not been disclosed to the defence. According to the court, there is no obligation on the Crown to discover a possible defence of self-defence. In other words: it was not for the prosecutor to decide that the fact that the victim carried a knife might point to a situation of self-defence. Consequently, the prosecution was not under a duty to disclose the evidence, let alone to raise the defence *proprio motu.* This would have been different if a notice of special defence had been lodged, in which case the prosecution would have been required to disclose the evidence as it then would have known that it was relevant to the defence.[63] On the other hand, the wording chosen by the court seems to imply that this duty is not restricted to situations in which a notice of a special defence has been given. The duty exists if there is anything in the material to suggest the existence of a defence, and there need not be a prior notice. It appears that there is some room for requiring the Crown to come up with a special defence of its own accord.[64]

In the recent case of *McDonald*, which, like *Smith,* dealt with disclosure, Lord Rodger stated the principle more generally:

> 'The Crown's job is to prosecute, not to defend (...) The success of our adversarial system of trial depends on both sides duly performing their respective roles. Of course, a prosecutor must always act as a "minister of justice" and this means that, when carrying out his duty of prosecuting, the prosecutor must do his best to ensure that the accused receives a fair trial. So the prosecutor must be alert to examine and re-examine the Crown case in the light of known and emerging lines of defence and must disclose any disclosable material of which he is aware or becomes aware while carrying out that duty. (...). By contrast, a

62 *Smith* v. *HMA*, 1952 SLT 286, at 289 (*per* Thomson, LJ-C); compare, however, the recent developments of the duty on the Crown to disclose evidence to the defence: Duff, *supra* note 51. See on the concept of the Crown as officers of justice: Renton & Brown *supra* note 16, § 3-07.

63 See the Crown Office and Procurator Fiscal's *Disclosure Manual,* April 2008 (<www.copfs.gov.uk>), p. 9 (point 9) and p. 64 (§ 16.7.5).

64 In case of a judicial examination – which, in practice, almost only occurs in cases of murder – the Crown is required to investigate a defence argued by the accused: Criminal Procedure (Scotland) Act 1995, s. 36(10). The procedure of judicial examination – which originated in the common law – is, however, itself a remnant of the inquisitorial tradition in Scottish criminal procedure: A. Gibb *et al., Criminal Justice Systems in Europe and North America*, 2002, p. 27.



HeinOnline -- 6 Utrecht L. Rev. 131 2010

> duty on the prosecutor to set about investigating all the possible lines of defence to the case would be quite different and would go much further -- really into defence territory.'[65]

This statement shows that, while the relationship between prosecution and defence is thought to be adversarial, there is at least some idea of the Crown having a duty to ensure that the accused receives a fair trial. But this duty does not, according to Lord Rodger, go so far as to require the Crown to discover and suggest possible lines of defences. That is a matter for the defence.

It is reiterated that there is no legal obligation for the Crown to investigate new evidence once notice of a special defence has been intimated; the duty is restricted to reviewing the existing evidence and disclosing all material that is germane to the special defence. We should also mention that it would be very difficult for the Crown to investigate new evidence, because the defence is required to give notice of a special defence only, not to explain it (contrary to what used to be the case prior to 1887 when the defence was actually discussed substantially in court during the debate on the relevancy). As a result, the Crown will often have no lead on where to start looking for evidence in support of the defence.

This is not to say that the Crown does not, in practice, find evidence in favour of a special defence lodged by the accused. Given the abundance of informal arrangements and the exchange of information and, indeed, sometimes cooperation between the prosecution and the defence,[66] it is possible that informal agreements are concluded regarding the investigation of evidence and further disclosure.

### *5.4. Fair notice*

The concept of a bilateral requirement of giving *fair notice* goes back to Hume, as described above. This concept is accepted in literature and case law, but not frequently relied upon in practice. This seems to suggest that this open norm relates primarily to the informal relation between the Crown and defence. However, it has been ruled that the requirement of fair notice on the Crown is the ground for the duty to disclose evidence to the defence.[67] It is also accepted, both in case law and literature,[68] that the purpose (or rather: one of the purposes) of the requirement of prior notice of special defences is to give fair notice of the defence case to the Crown.[69] As the High Court explained in *Lambie:*

> 'The only[70] purpose of the special defence is to give fair notice to the Crown and once such notice has been given the only issue for a jury is to decide, upon the whole evidence before them, whether the Crown has established the accused's guilt beyond reasonable doubt.'[71]

---

65 Privy Council (Scotland), *McDonald* v. *HMA,* 2008 SLT 993, at p. 1004.

66 See Section 6 *infra*; *cf.* also Gordon, *supra* note 33, pp. 249 *et seq.*

67 Smith v. *HMA,* 1952 SLT 286.

68 See Sheehan *et al.*, *supra* note 10, § 184; J. Wilson, 'Pre-Trial Criminal Procedure in Scotland: A Comparative Study', 1965 *South African Law Journal*, pp. 69-84 and pp. 192-209.

69 *E.g.* Sheehan *et al.*, *supra* note 10, § 184.

70 By using the word 'only' here, the court merely means to say that the only *legal function* of special defences is what is explained, and that, therefore, special defences are not procedurally different in any other respect (and that, consequently, there is no burden of proof on the defence for special defences). We are interested here in the general *interpretation* or *meaning* of the arrangement of special defences, which is wider than its legal function. Therefore, I contend that there may be other interpretations of special defences besides the concept of fair notice.

71 *Lambie* v. *HMA,* 1973 JC 53, at 58-59 (*per* Emslie LJ-G).



HeinOnline -- 6 Utrecht L. Rev. 132 2010

The mentioning of fair notice shows that the explanation by Hume on the position of the prosecution is, at least to some extent, still valid today. According to Hume, the prosecution must be informed about special defences in advance, to allow it to consider the evidence, adapt its strategy or strengthen its case. This puts the prosecutor in an inquisitorial position. The prosecution is considered to be the party that has to be best informed and given the means to prepare its case to the best. By implication, the prosecutor is expected to use this advantaged position not only for his own benefit; or more accurately, the prosecution does not act merely to obtain a conviction (*i.e.* in a partisan manner) but also protects the interest of the accused and the general public (*i.e.* impartially). After all, the prosecutor is not expected to obtain a conviction of an innocent, but ill-prepared, accused. As Lord Hamilton stated:

> 'The Crown does not in the investigation or prosecution of crime adopt a partisan attitude. It has an interest and a responsibility to secure, insofar as within its power, as much the acquittal of the innocent as the conviction of the guilty.'[72]

The prosecutor is expected to obtain a conviction of one who is guilty, and is therefore given information about the defence strategy in order for him to verify the special defences that will be pled. This decreases the possibility that the prosecution is unprepared for a special defence that is false, but nonetheless capable of persuading the jury to acquit. It is important to recall that special defences, if accepted, always lead to the acquittal of the accused (see Section 3.2 *supra*). Therefore the stakes for the prosecution are high.

The strong position of the prosecutor – balanced by a general unwritten duty to act impartially – puts him in an inquisitorial role. There is no true concept of an equal fight between parties, as the prosecutor is given the best chances to prepare his case. There is also no concept of truth as the acceptable truth for both parties, reached by debating and contesting evidence at trial. Quite to the contrary, the truth is thought best found by the prosecutor – who is given the best means to do so – whereas the role of the defence is rather limited. By requiring prior notice of special defences, the prosecutor is put in a position that makes him the ultimate arbiter of the course of the proceedings, at least to a large extent.[73] This position also implies that he can be relied upon to verify special defences even though he has no legal duty to do so. This means that truth finding takes place not only at trial, in an adversarial manner, but already in the pre-trial stage, by the prosecutor, in a much more inquisitorial fashion.[74]

## 6. Informal cooperation in Scottish criminal procedure

The preceding discussion leads to a somewhat paradoxical conclusion. On the one hand, there is clear evidence of an ideology that places the prosecutor in a leading and impartial position, more akin to inquisitorial than adversarial procedure. On the other hand, this ideology does not result in any straightforward legal obligations for the Crown to investigate and prosecute impartially, *i.e.* to investigate exculpatory evidence regarding special defences. This contradiction

---

72 *McLeod* v. *HMA*, 1998 SLT 233, at 246 (referring to *Smith*, *supra* note 67). See also Duff, *supra* note 51, stating: '(...) the Scottish public prosecution service has always been seen as "exercising the role of the "Minister of Justice" rather than as a lawyer acting for a client" and, consequently, as having no interest in winning cases at all costs or convicting the innocent. Given the long-standing nature of the service and the fact that the Scottish prosecutor could be relied upon to lay before the court any information in his or her possession, not known by the defence, which was favourable to the accused.' (Footnotes omitted; for the quote, Duff refers in his note 26 to Lord McCluskey, quoted in S. Moody *et al.*, *Prosecution in the Public Interest*, 1982, p. 29.).

73 In general, the prosecutor is considered to be the 'master of the instance': Renton & Brown *supra* note 16, § 3-06.

74 *Cf.* note 80 *infra*.



HeinOnline -- 6 Utrecht L. Rev. 133 2010

may be reconciled if we pay attention to the abundance of informal relationships and cooperation between prosecution and defence that are present in current Scottish practice.

Visiting Scottish courts and the prosecution service, and interviewing judges and prosecutors, I found that informal practice is both very important in the administration of criminal justice and quite different from the positive law – the law in the books is by no means always the law in action. This impression is supported by Gordon, one of the most eminent modern scholars of Scottish criminal law, who writes that '(...) the oral law of Crown Office practice is more important than the written law of statute or judicial decision'.[75] That is not to say that practice is *contra legem*, but rather that it adds rules and obligations to the framework of positive law. Therefore, knowledge of informal practice is significant for the interpretation of positive law. The difficulty here is that informal practice has never been the object of study,[76] and I can only base myself on my rather limited experience of it, which adds some of the required knowledge of the 'Oral law of Crown Office practice' to our inquiry.[77] The descriptions given in the present section should therefore not be read as verified and knowledgeable statements but as impressions and observations from which, read in conjunction with the analysis of positive law and history given above, some tentative conclusions and suggestions can be drawn.

### *6.1. Impressions of a day in court*

My visits to the Scottish criminal courts and prosecution demonstrate several interesting examples of informal contacts between prosecution and defence. Prosecutors and advocates frequently engage in brief and informal meetings about particular cases. These meetings may involve exchanges of information, making agreements about evidence and witnesses, informing one another about strategies, et cetera. By no means do these meetings seem to be hostile or to take place between diametrically opposed parties. Rather, they appear to be open and frank, displaying a belief that both parties work toward a mutual interest or goal. They may take place in the courtroom after a preliminary hearing or outside the courtroom in the hallway, or on the initiative of either party by phone or email. I have, for example, become aware of the fact that prosecutors at times contact a defence advocate or solicitor informally in order to discuss certain evidence that may be of importance for the defence, otherwise than by means of disclosure. These exchanges are often based on personal acquaintance and trust between both parties.

The existence of informal relations between prosecutors and defence lawyers, and the underlying assumptions of mutual trust and respect, may be partially explained by the specific culture of Scottish lawyers in criminal law. This group of lawyers is and has always been rather small.[78] Most defence lawyers have specialised in criminal law, and the majority of prosecutors (the procurators fiscal) are in a career position. One should also recall that the society of Scottish lawyers in general is both small and close. Lawyers, both for the prosecution and defence, are

---

75 Gordon, *supra* note 33, p. 249 and pp. 271 *et seq.*

76 The work by Moody *et al.*, *supra* note 73, is a notable exception, albeit one that is concerned with the decision to prosecute, and the choice of forum.

77 I visited Scottish practitioners on two separate occasions in 2008. At both occasions, I spoke to members of the judiciary (sheriffs) at the Edinburgh and Glasgow Sheriff Courts. I also spoke to prosecutors at the COPFS in Edinburgh and to members of the Lothian and Borders police force based in Edinburgh. None of the interviews were conducted in a structured manner and they should therefore be treated as impressions only. Future research should be conducted so as to verify whether my impressions are correct.

78 We recall that Scottish law is very different from other laws of the United Kingdom. In order to practice law in the Scottish courts, one has to be admitted to the Scottish bar. Criminal defence lawyers from other parts of the United Kingdom cannot therefore operate in Scottish cases. The number of Scottish defence advocates and solicitors is thus rather small. The Faculty of Advocates lists 96 advocates with an interest in criminal trials (<www.advocates .org.uk>, verified 4 May 2009). The website of the Law Society of Scotland lists 130 solicitors who are active in the field of criminal law, including those who are employed by the COPFS as procurators fiscal or advocates depute (<www.lawscot.org.uk>, verified 4 May 2009). For a general history: Cairns 2000, *supra* note 3, with further references.



HeinOnline -- 6 Utrecht L. Rev. 134 2010

members of a number of ancient bar societies through which they are acquainted with each other.[79] Lawyers also adhere to traditional values and ethics, which could explain the ground for mutual trust.

Cooperation between prosecution and defence has also been made into a legal duty, to some extent, by legislation on agreeing uncontroversial evidence. Under this legislation, both parties must meet out of court and discuss their evidence. They should then find evidence which neither of them contests, and accept such evidence in writing to avoid it having to be introduced at trial. This legislation is mainly an efficiency measure aimed at preventing the unnecessary calling of witnesses, but it does presuppose that both parties can contact each other in an atmosphere of cooperation and mutual acceptance and respect.[80]

Furthermore, informal arrangements between prosecution and defence have always been present and important in Scottish criminal procedure. Most notably, the arrangement of disclosure – of great importance to the position of the defence – was not laid down in law until very recently. Disclosure did take place before, but was based on informal out-of-court arrangements between prosecutor and defence. Only after the coming into force of the Human Rights Act has it become a matter of legal obligation.[81]

### *6.2. The significance of informal arrangements*

It is not surprising to find some degree of informality in an adversarial system. Quite to the contrary: adversarial systems are usually characterised by a high degree of informality within the prosecutorial institutions, whereas inquisitorial systems have a more hierarchical organisation. And whereas the hierarchical and rule-oriented organisation of inquisitorial prosecution services often precludes informal arrangements taking place (as the possibilities for the prosecutor to engage in such arrangements are often very limited, for he has to abide by a large set of internal rules), the adversarial prosecutor has more leeway to engage in informal exchanges and agreements with the adversary.[82]

The most notable example of such informal arrangements is plea bargaining or plea negotiation. However, this type of informal contact between prosecutor and defence is of a different nature than the informal arrangements in Scotland. Plea bargaining is by no true means a matter of cooperation: both parties act in their own interests and try to find some sort of common ground (*i.e.* a plea that is acceptable to both).[83] Furthermore, both parties are in more or less equally strong positions (at least in theory) to defend their own interests. The defence does not need to rely on the prosecution but has its own means to investigate evidence. It is under no obligation to disclose information or strategy to the prosecution. In that way, the adversarial structure of the trial phase, including its concept of a battle between equal parties and the absence of any concept of cooperation, foreshadows the informal pre-trial contacts between prosecutor and defence.

In Scotland, informal pre-trial contacts between prosecution and defence appear to be much more a relationship of cooperation. Historically, the defence is dependent on the prosecution for the investigation of evidence. The prosecutor on his part is expected to assist the defence in a

79 Moody *et al.*, *supra* note 72, p. 5.

80 P. Duff, 'Changing Conceptions of the Scottish Criminal Trial: The Duty to Agree Uncontroversial Evidence' in Duff *et al.*, *supra* note 5, p. 29, argues that the duty to agree uncontroversial evidence is a step in an inquisitorial direction. According to his argument, the agreeing of evidence shifts part of the truth-finding process to the pre-trial phase, which is of a more inquisitorial nature.

81 Duff, *supra* note 51.

82 See generally M. Damaška, 'Structures of Authority and Comparative Criminal Procedure', 1975 *Yale Law Journal*, pp. 480 *et seq.*

83 See, *e.g.*, C. Brants *et al.*, *Plea Bargaining in de Verenigde Staten en in Engeland en Wales*, 2003, pp. 17-19 and p. 34.



HeinOnline -- 6 Utrecht L. Rev. 135 2010

cooperative manner. Even though there is no clear legal obligation to do so, – save for the concept of 'fair notice' – the culture of informal cooperation certainly provides for possibilities for a far-reaching exchange of information, such as knowledge of evidence. Furthermore, the concept of cooperation, I would argue, implies some sort of middle ground cause. One cannot cooperate towards a one-sided goal; there has to be some sort of mutual, shared interest. This perhaps implies that both the defence and the prosecutor – the latter in particular, given that he is in a stronger position – have to act somewhat impartially towards a general or public interest goal. Speculating on what this shared goal is, I suggest that it involves the finding of the truth and the fair administration of justice. This goal implies that neither the prosecution nor the defence can act in their own interest alone, disregarding the general interest at stake. For the defence, this means opening up the case to the prosecution at an early stage in order to give the prosecution a full chance to prepare the case and to avoid the acquittal of a guilty defendant due to a lack of prosecutorial preparation. For the prosecutor, this shared objective could mean that he is under a 'moral obligation' to assist the defence by investigating a special defence intimated, or by sharing evidence or other information on his own initiative. In that way, special defences may very well put the prosecutor in a somewhat inquisitorial position, at least in practice. Cooperating towards finding the truth also implies a more objective concept of truth than is customary to adversarial procedure (where truth is found by contest). We have seen before in Section 3 that the existence of such an objective concept is supported by history.

In short, the fact that informal cooperation between prosecution and defence exists, is in itself at odds with adversarial principles – which exclude any duty to cooperate.[84] Informal cooperation, taking place in an atmosphere of mutual trust and respect, changes the position of parties vis-à-vis each other. The defence has to rely on the prosecution to conduct investigations. The prosecutor, in turn, has to act somewhat more impartially in his relation to the defence. It may well be that in this informal relationship a customary rule exists that the prosecution, at least in certain cases, assists the defence in investigating a special defence of which prior notice has been given.

## 7. Concluding observations

This article asks whether a rule that requires the defence to notify the prosecution about aspects of its strategy, such as the rule of special defences, puts the prosecutor in a more inquisitorial role. To answer this question, I aimed to give an interpretation of the Scottish rule of special defences by questioning if the rule imposes a duty on the prosecutor to investigate such a defence. If he were under such an obligation, it could be concluded that the prosecutor is in an inquisitorial position, as he is required to act impartially in order to observe the interests of the defence.

No such legal duty has been found. Once notice of a special defence has been received, there is no law obliging the prosecutor to investigate it, and therefore there is no evidence in law that the defence is dependent on the prosecutor. This conclusion, however, tells us little about the meaning of the rule on special defences, for it would then be no more than an efficiency measure, aimed at preventing unnecessary trials.

The context of the rule paints a different picture. History shows that Scottish criminal procedure is based in part on inquisitorial ideas. These ideas have also laid the groundwork for

84 Duff, *supra* note 51.



HeinOnline -- 6 Utrecht L. Rev. 136 2010

the rule of special defences. This rule originates in the two-phased trial and the idea that the defence was dependent on the public prosecutor, who acted impartially and in its interest. The rule of special defences can therefore very well be interpreted as assuming an inquisitorial and impartial position of prosecution and defence. The paradox here is that this plausible interpretation is not accompanied by any clear legal rule in statute or case law. However, a rule can have a meaning, an interpretation, without there being a specific legal effect of that meaning, such as a legal obligation. In Scotland, the rule of special defences can acquire its inquisitorial meaning though informal cooperation rather than through procedural law.[85] This tentative conclusion is supported by law, history and our impressions of criminal practice.

Our analysis shows that a rule that requires the defence to give notice of its strategy and argument to the prosecution does not necessarily change the role of the prosecution into a more adversarial one, although, as the Scottish example shows, it might do so. A rule like the one on special defences certainly makes the prosecution better informed than one would expect on the basis of the adversarial principle of equality of arms. But this does not necessarily make the prosecutor's role more inquisitorial; there need not be any requirement that he use the information to the benefit of the defence. Reasons of efficiency and the need to fight crime can justify a rule of special defences while respecting the adversarial context.

In Scotland, however, the rule of special defences may very well have a bearing on the inquisitorial role of the Crown. Such a role is possible within an otherwise adversarial setting by means of informal cooperation. Scottish criminal procedure can accordingly be considered a 'hybrid' in combining both inquisitorial and adversarial ideas, albeit one that has been shaped gradually throughout history due to a presence of both inquisitorial and adversarial ideology. The Scottish prosecutor can, to some extent, be considered an impartial official, who, acting in the general interest, is to take account of the accused's interests. Although his duties are not clear from law, the leeway to engage in informal cooperation with the defence allows him to act in an impartial manner. Furthermore, the ideology behind Scottish criminal procedure expects him to do so. The informal cooperation also influences the position of the defence: it becomes more dependent on the prosecutor and, by implication, his magisterial attitude. It is this combination of discretion and ideology that give the procedure inquisitorial features in a predominantly adversarial setting, thus creating a special type of hybrid.

In this way, the Scottish prosecutor closely resembles his Dutch counterpart. Dutch prosecutors used to have considerable discretion to engage in contacts and agreements with suspects and their lawyers for the purpose of balancing different interests impartially. This discretion fits with the concept of the prosecutor as having an inquisitorial magisterial position, being an independent official who employs his discretion to balance interests and act in the public interest (for these reasons, Dutch prosecutors are considered to be part of the judiciary).[86] Dutch experience has shown that discretion is of crucial importance for prosecutors being able to take a magisterial stance. The introduction of internal guidelines has limited the prosecutorial discretion considerably, and the magisterial role has decreased concomitantly.[87] Case-by-case decision making and balancing of the particular interests at stake have been replaced by general rules on how to deal with cases in a similar manner.

---

85 In this regard, the Scottish law on defence disclosure differs from the English referred to *supra*, note 2, which was introduced specifically for the purpose of prosecution disclosure, although it may, in the long run, have the effect of reducing trial by ambush and creating a similar role for the prosecutor.

86 Van de Bunt, *supra* note 6, pp. 123 *et seq.*

87 Van de Bunt, *supra* note 6, p. 164.



HeinOnline -- 6 Utrecht L. Rev. 137 2010

Similar tendencies are visible in Scotland. Due to its hierarchical organisation, the Scottish prosecution service is prone to working with internal guidelines and directives. These have already been developed, for instance, in the field of disclosure.[88] Should this trend continue, it may well be that the room for informal cooperation will decrease. As a result, Scottish prosecutors could lose much of their impartial role. The meaning of the rule on special defences would accordingly be reduced to one of efficiency only. That may not be altogether bad. But it should be stressed that the system of Scottish procedural law, as it currently stands, may very well operate on the presumption that prosecutors act impartially. This assumption implies that the prosecutor balances the interests of the public with those of the accused in an unpartisan, magisterial manner, *i.a.* by investigating evidence impartially. This assumption is accompanied by, and legitimises, a limited role for the defence: it needs only few powers for investigating evidence and preparing a defence, for the impartiality of the prosecutor gives him a leading role in this regard. Cooperation between prosecution and defence is thus required.

A rule that requires the defence to inform the prosecution about strategy and arguments can be related to the inquisitorial role of the prosecution, even if the procedural system in which the rule operates is predominantly adversarial. This inquisitorial role then requires the prosecution to use the information to the benefit of the defence, for instance by investigating the arguments and searching for evidence in their support. This also requires the prosecution to take an impartial or magisterial stance. Within an adversarial setting, informal cooperation with the defence may allow the prosecutor to do so. The defence, in turn, may become dependent on the impartiality of the prosecutor and his assistance in investigating lines of defence. If so, the fulfilment of the prosecutor's inquisitorial role becomes a precondition for the fairness of the trial. However, if internal guidelines were to decrease the possibilities of informal cooperation, the system would change. The impartial and magisterial stance of the prosecutor would be taken away. This is to the detriment of the defence, which has to rely on cooperation with the prosecution for a fair trial. A stronger position for the defence may well be required to compensate for the lack of cooperation with the prosecution.

## Glossary[89]

***Diet:***
The date fixed by the court for hearing a case for any one of a variety of purposes.

***Disclosure:***
A process whereby the prosecution discloses all evidence to the defence and must make available to the defence large quantities of material related to the case.

***District Court:***
The lowest court in criminal cases, dealing with minor offences; it is presided over by a lay judge (a justice of the peace) without a jury. District Courts are currently being reformed into Justice

88 See the *Disclosure Manual*, *supra* note 63. On the organisation of the COPFS, see Sheehan *et al.*, *supra* note 10, § 75 *et seq.*; generally speaking the procurators fiscal are bound by instructions issued by the Lord Advocate.

89 This glossary explains a selection of terms used in this article. A more elaborate glossary (on which the present is based) is available from the Scottish Court Service's website at <http://www.scotcourts.gov.uk/library/publications/docs/glossary.pdf>. An explanation of terms can also be found in Sheehan *et al.*, *supra* note 10, and Renton & Brown, *supra* note 16.



HeinOnline -- 6 Utrecht L. Rev. 138 2010

of the Peace Courts. Their sentencing power is generally limited to a maximum of 60 days imprisonment or a fine of £ 2,500.

***First diet:***
Mandatory pre-trial procedure in criminal proceedings held in the sheriff court, which has the same purpose as a preliminary hearing at the High Court of Justiciary.

***High Court of Justiciary:***
The Scottish supreme criminal court, that deals with the most serious crimes. It has mandatory jurisdiction for 'Pleas of the Crown:' treason, murder and rape. Its sentencing powers are unlimited. All proceedings are solemn, *i.e.* with a jury as a tribunal of fact.

***Indictment:***
An accusation of a crime running in the name of the Lord Advocate, tried by a jury, in serious cases in the High Court, or in a sheriff court. The document sets out the charge(s) against the accused in more serious crimes.

***Intermediate diet:***
Mandatory step in criminal proceedings which allows the court to check whether the case is likely to proceed on the date assigned for trial, thereby minimising inconvenience to witnesses et cetera.

***Judicial examination:***
A non-mandatory part of the pre-trial solemn procedure, the purpose of which is to allow the accused an early opportunity to state his defence to the charge that is likely to form the basis of an indictment, to give notice to the Crown of that defence, and to allow the investigation thereof. Judicial examinations are currently very rare and take place only in serious cases such as murder.

***Pleading diet:***
The date assigned for a case to be called and for a plea to be given, *i.e.* guilty, not guilty, not proven.

***Preliminary hearing:***
High Court hearing at which the judge decides *not* whether the accused is 'guilty' or 'not guilty,' but whether there is enough evidence to force the accused to stand trial. In making this determination, the judge uses the 'probable cause' legal standard, deciding whether the Crown has produced enough evidence to convince a reasonable jury that the accused committed the crime(s) charged. More generally, its purpose is to ensure that parties are ready for trial in order to avoid inefficiencies later.

***Prosecution:***
In Scotland, prosecution in criminal cases is the prerogative of the Crown Office and Procurator Fiscal Service (COPFS). This is a hierarchical organisation headed by the Lord Advocate, who is assisted by a number of Advocates Depute. The Deputes prosecute in the High Court. Procurators Fiscal prosecute less serious crimes in District or Sheriff Courts.



HeinOnline -- 6 Utrecht L. Rev. 139 2010

***Procurator Fiscal:***
Member of Scottish prosecution service with wide discretionary powers, such as supervising and directing the police investigation; calling in experts; 'master of the instance' with regard to the charge, charge bargaining, plea-adjustment, form of proceedings; takes any decision on alternatives to prosecution.

***Sheriff Court:***
Court dealing with the bulk of criminal cases presided over by a qualified judge called the Sheriff. The court may sit with a jury as the tribunal of fact (solemn procedure), or with a Sheriff only (summary procedure). The sentencing power of the court is generally limited to a maximum of 5 years imprisonment in solemn cases, and 3 months or a fine of £ 5000 in summary cases. The choice for the type of procedure rests with the prosecution.

***Solemn Proceedings:***
Proceedings under which a person charged on indictment is tried by a judge of the High Court of Justiciary, or a Sheriff with a jury of 15 (a simple majority vote being sufficient for a conviction).

***Summary Proceedings:***
Proceedings for less serious criminal offence(s), instigated by way of a 'complaint'. Maximum penalties: 3 months imprisonment or fine not exceeding £ 5000; statutory regulation may direct a higher penalty. In summary proceedings, a person charged on indictment is tried by a Sheriff in the Sheriff Court without a jury.



HeinOnline -- 6 Utrecht L. Rev. 140 2010