

CCUNCIL OF EUROPE STUDY VISIT TO EDINBURGH - 1978

PAPER ON

PRE-TRIAL PROCEDURE

BY

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1 Subject Matter

The full title of my talk is 'Pre-Trial Procedure, particularly the quasi-inquisitorial examination of the evidence and the taking of precognitions.' It is possible for this procedure to take place upon the commission of a crime although no person has been arrested, but this is not usual and I shall speak mainly of the position where a crime has been committed and thereafter the police have arrested a person and charged him with the commission of that crime. I propose to deal with the case of an adult. Special arrangements are made to deal with children under the age of 16. The age of criminal responsibility is 8, below which no child may be considered to have committed a crime. Except for the most serious crimes, children are not prosecuted in the criminal courts, they are brought by an official known as the Reporter before a special Children's Panel, which has powers to deal with them by way of treatment for their needs. I shall speak mainly of the procedure in relation to serious crimes as these involve a greater degree of investigation by the prosecutor. At this stage the procedure is almost exclusively in the charge of the Procurator Fiscal.

2 Office of Procurator Fiscal

The office of the Procurator Fiscal is an ancient office. It originated in the times when the Sheriff was both judge and prosecutor in his own court. The office of the Sheriff is still more ancient. Scotland was divided into a number of Sheriffdoms and in each Sheriffdom a Sheriff was appointed by the King charged with the duty of maintaining law and order and investigating crime. There were no police forces in those days and the Sheriff probably performed his function of maintaining order in the community in a similar manner to the Sheriffs in the wild west films. In those days the Sheriff's powers depended upon his recruiting  
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a band of capable men to ride out with him and enforce his decisions. Indeed the earliest references to the Sheriff's posse are to be found not in the archives of Hollywood but in the old criminal records in the Justiciary Office in Parliament Square, Edinburgh.

Certain crimes were punished by fines or the forfeiture of estates and the Sheriff had an interest in the fines imposed and in forfeitures. This was no doubt an inducement to him to perform his duties, and may be regarded as an early example of payment by results, or piece-work, as it is known in modern industrial Britain. The Sheriff naturally considered that one of his most important functions was to secure the collection of the fines and forfeitures into his 'fisc' or treasury. The assistant whom he recruited charged with this particular important duty came to be known as the Procurator Fiscal. He became involved also in the Sheriff's function of investigator and prosecutor, and gradually the duty of prosecuting was delegated wholly by the Sheriff to the Procurator Fiscal.

The Lord Advocate or the King's Advocate as he was earlier called, was appointed by the King to prosecute the most serious crimes. After the failure of the rebellion by Prince Charles Edward Stuart in 1745 certain steps were taken by the central government to restrict local control, particularly in the Highlands of Scotland, and fines and forfeitures formerly received by the Sheriff were required to be paid to the Exchequer. The Procurator Fiscal then became responsible for the prosecution of offences and for accounting to the Exchequer for the fines imposed. He gradually assumed the other investigatory prosecuting functions of the Sheriff and came to be more under the control of the Lord Advocate. He now acts in criminal matters solely under the direction of the Lord Advocate. The Sheriff is now a judge and a magistrate rather than an investigator of crime.

### The Duty and Powers of Investigation

In Scotland almost all criminal prosecution is at the instance of a Public Prosecutor. A very few trivial offences may be prosecuted privately by the victim but it is possible where a Public Prosecutor refuses to prosecute, for the victim of a crime to obtain consent of the High Court of Justiciary to prosecute privately. This is a necessary constitutional safeguard but it was last invoked successfully in 1908 and is now of little practical value.

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ACQUISITION

The Public Prosecutors are the Lord Advocate, the Solicitor General, the Advocates Depute, and the Procurators Fiscal. The Procurator Fiscal in his district is the representative and chief executive officer in criminal matters of the Lord Advocate and it is his duty to investigate crime brought to his notice. The power is derived historically from the Sheriff but it is now exercised exclusively by the Procurator Fiscal.

The police in Scotland have the power at common law to arrest in certain circumstances persons accused of crime. They must then report immediately to the Procurator Fiscal and the constitutional position is that the Procurator Fiscal is then in charge of the investigation. There is specific power by statute for the Procurator Fiscal to instruct the police in relation to the investigation of crime and the police must obey the instructions. There is also case law to the same effect, based on the common law; this common law reflects the development of the system of investigation of crime originally by the Sheriff and in later times by the Procurator Fiscal. If therefore the police arrest a man and charge him with the commission of a crime, they will immediately report the arrest to the Procurator Fiscal. His duty then is to consider whether to prosecute.

#### 4 The Decision to Prosecute

A most important factor of the Scottish prosecution system is the exercise within the system of the discretion to prosecute. The Prosecutor must first decide whether a crime has been committed and whether there is evidence sufficient in law to establish essential facts of that crime. He will however take into consideration several other matters.

He will require to consider whether the offence is of sufficient importance to require criminal prosecution. He will consider whether there is reason to suppose that the evidence is unreliable. He will consider whether on all the facts available, the accused's conduct was excusable or at least sufficiently excusable to justify the decision not to prosecute. He may consider whether he should refer the matter to a social agency for attention. He will also consider whether the case is more suitable for trial in a civil court.

If the Procurator Fiscal decides to prosecute he must then decide what form the prosecution is to take. A large majority of crimes and offences reported are dealt with by prosecution in a summary court. This may be a District Court where the judge or judges are lay-magistrates. It may also be a Sheriff Summary Court where/

where the Sheriff, a professionally qualified judge, sits alone. If however the case is too serious for disposal in a summary court the Procurator Fiscal will proceed with a view to trial by judge and jury either in the High Court or in the Sheriff Court. Cases of murder, treason and rape can be tried only in the High Court. Certain other serious crimes such as armed robbery are almost always tried in the High Court. Most other common law crimes may be tried either in Sheriff and Jury Courts or Sheriff Summary Courts. Almost all crimes and serious offences in Scotland are crimes at common law, and do not depend upon any statute or Act of Parliament. The penalties which may be competently imposed for common law crimes depend not upon the nature of the crime, but upon the court before which the case proceeds.

In deciding which court to use the Procurator Fiscal will have regard to the gravity of the crime, its significance for the victim, and the previous record if any of the accused. It is a feature of the system that the decision as to which court to proceed in is taken solely by the prosecutor. The accused has no right to be consulted and he never is consulted. The court has no power in the matter, provided that the court is competent to try that particular crime.

#### Legal Aid for an Accused Person

When a person is arrested and accused of a crime he is entitled to have intimation sent immediately to a solicitor that his assistance is required. The solicitor is entitled to a private interview with the accused before he appears in court. If the Procurator Fiscal proposes to proceed against an accused under solemn procedure which is the description of the procedure with a view to trial by judge and jury, an accused person is entitled to free legal aid without enquiry into his financial resources up to a certain stage in the proceedings. This legal aid consists of the services of the duty solicitor in attendance at the time and place of the accused person's appearance for judicial examination.

#### Judicial Examination and Declaration

The first step in the court proceedings is the judicial examination and committal of an accused person. A cardinal rule of criminal proceedings is that an accused person must appear before a Sheriff or Magistrate on the first lawful day after his arrest. All days are lawful except Sundays and certain public holidays. The reason for the rule is that an accused person is in custody and he cannot be released upon bail until he has appeared before a Magistrate. The proceedings are/

are private. There are two main reasons for this. The first is that the prosecutor's intention is that the accused will eventually be tried by a judge and jury and it is thought wrong that there should be public disclosure in advance of the trial of the evidence against an accused person as this might influence potential jurors. A secondary reason is that the investigation is at a very early stage and it may be that the accused will not be brought to trial. In these circumstances it is thought that he has a right to privacy and the information leading to his arrest should not be disclosed to the public.

The proceedings are by way of a Petition. This is a document prepared by the Procurator Fiscal and presented to the Sheriff in the presence of the accused person and his solicitor. It is possible for judicial examination to take place before any Magistrate but in practice it is always done before the Sheriff. The Petition gives the accused person's designation, narrates the charge or charges against him, and asks for an order for his committal to prison and for warrants to the Procurator Fiscal to interview witnesses and secure productions. Productions are articles which are to be produced at a trial as evidence. Proceedings are formal. The Sheriff will satisfy himself that

- 1) The Petition is in proper order;
- 2) He has jurisdiction;
- 3) The crime specified is a crime according to the law in Scotland.

Normally he will take no further positive action. He must give an accused person the opportunity to make a declaration. In practice a declaration is now almost never made.

Until the end of the last century the proceedings on Petition were of a much more inquisitorial nature. The Criminal Evidence Act 1898 enabled an accused person for the first time to give evidence at his trial. Before that Act was passed the only means by which a person accused of a crime could bring his version of the circumstances before the trial court was to make a declaration before the Sheriff upon judicial examination. This declaration was normally accompanied by an examination of the accused person by the Procurator Fiscal. The significance of the procedure was that the accused's defence at his trial would be restricted by the line of explanation in his declaration and, more importantly from the point of view of the Crown, the Procurator Fiscal had an opportunity to examine him upon the circumstances of the crime charged shortly after his arrest. This procedure is now obsolescent for several reasons. It was decided in a case in 1887/

1887 that the examination was to be conducted by the Sheriff and not by the prosecutor. An Act passed the same year gave the accused the right to a private interview with his solicitor before examination and gave the solicitor the right to be present at the examination. The combined effect of these provisions was that judicial examination tended to become a formality. When the Criminal Evidence Act 1898 had been passed there was no need from the accused's point of view for him to make a declaration, and there was an obvious advantage in not doing so as he was then able to wait until he heard the Crown evidence at his trial before deciding whether to give evidence and, for that matter, deciding what evidence to give. Many persons involved with the administration of the criminal law think that the present position is unsatisfactory and a committee which in recent years reviewed the whole criminal procedure in Scotland, made positive recommendations for the re-introduction of judicial examination. The recommendations are for a restricted form of examination by the Procurator Fiscal under the control of the Sheriff.

### Committal

When an accused person has made a declaration or, as almost always happens, has indicated to the Sheriff that he does not wish to make a declaration the Procurator Fiscal then asks the Sheriff to commit the accused. The motion may be to commit him for further examination or it may be to commit him for trial. It must be kept in mind that at this stage the Procurator Fiscal may have little information, probably in the form of a summary report from the police who have arrested the accused the previous day. In these circumstances the motion usually is for committal for further examination. The object of this motion is to have the accused person committed to prison for a period which must not exceed eight days while the Procurator Fiscal conducts enquiries. Not later than the eighth day there must be a further motion to the Sheriff to commit the accused person for trial. In theory and in former times in practice, the Procurator Fiscal made enquiries during the eight day period and was obliged to satisfy the Sheriff at the end of that period that there was evidence justifying the committal of the accused person for trial. In practice this is not now done. It is an anomaly of our system that the prosecutor acts as judge and the Sheriff simply accepts the Procurator Fiscal's assertion that there is evidence that the accused has committed the crime with which he is charged on Petition and that that evidence is sufficient in law to justify his detention. The practical result of this is that despite the fact that there is no longer inquisitorial examination of an accused person, the/

the Procurator Fiscal in effect has usurped the function of the Sheriff as inquisitor and examining Magistrate. On the motion of the Procurator Fiscal the Sheriff will make an order committing the accused person to prison for trial. He will remain there until brought before the court for trial unless in the meantime he is admitted to bail. There is, however, further protection for him in that he may be kept in prison awaiting trial only for a limited period.

## 8 Bail and the 110 days rule

A person charged with any crime except murder or treason may be released from custody on bail. Even in cases of murder or treason bail may be allowed by the Lord Advocate or the High Court but in practice this is not done. An accused person may apply for bail when he appears before the Sheriff on Petition. The prosecutor is entitled to be heard against the application. The court will grant bail unless it is of the opinion that there is a good reason for refusing it in the public interest and to secure the ends of justice. Bail will be refused if there is a danger that the accused will abscond before trial. Bail will also be refused if for instance there is danger to the victim of a violent crime if his assailant is allowed to be at liberty, or if there is a danger that the accused will interfere with witnesses or destroy evidence. In addition to these considerations the court will have regard to the character of the offences charged, the accused person's previous criminal record, and the attitude of the Crown. If bail is allowed a sum of money is fixed and this sum must be deposited with the court before the accused person is released. The amount of bail fixed must therefore have regard to the accused's ability to find it, and it should be a sum which it is reasonably probable that the accused will find. There are provisions for review of bail from time to time and also for appeal to the High Court against refusal or allowance of bail.

### The 110 days rule

There is no rule of habeas corpus in Scotland. A vital feature of the system is the 110 day rule. This is now incorporated in a recent Criminal Procedure Act but the rule has been in force for a very long time. The rule operates so as to restrict the detention of an accused person before trial. After he has been committed for trial, if an accused is not released from custody his trial must be concluded within 110 days. The High Court has the power to extend the period of 110 days but the Crown seldom applies for an extension and the court very seldom grants such an application. If the trial is not concluded within 110 days or any extended period allowed by the court, the accused must be released and he is declared/

declared for ever free in respect of the crime with which he is charged. The Crown can avoid this by releasing an accused from custody without bail. This is acceptable because the purpose of the rule is to prevent undue detention of persons who have not been convicted and who are presumed innocent. The rule operates so as to force the prosecutor to prepare for trial with expedition. It also results in the most serious cases being heard by the court when witnesses can still recollect accurately their evidence. The rule is a most effective safeguard against detaining a man in custody unnecessarily and it prevents detention simply on the ground that the Crown is not ready to proceed to trial.

## 9 Precognition

It is the duty of the Procurator Fiscal to obtain precognitions of the witnesses. He may do this any time after the accused person first appears before the Sheriff for committal, but for practical reasons he will not normally begin to take precognitions until after an accused person is committed for trial usually seven or eight days after his first appearance on the day after his arrest.

The word 'precognition' has at least three meanings. It is used to describe the process of examining witnesses in order to find out what evidence they can give. The same word is used to describe the document prepared by the Procurator Fiscal in the form of a written account of the evidence which he understands that the witness can give. The same word is also used to describe the volume or volumes of material prepared by the Procurator Fiscal including all the statements of the witnesses and submitted by him to the Crown Office for Crown Counsel's consideration and instruction. The title of my talk I think makes it clear that the taking of precognitions means the examining of witnesses but I shall speak also of other kinds of examination of other persons and of articles and of the securing of productions in relation to the case.

### (a) Witnesses

It is the duty of the Procurator Fiscal to obtain precognitions from the witnesses, and in cases of serious crime he will see every witness except perhaps those whose evidence is formal. As these precognitions will form the material upon which a decision is taken in Crown Office on whether an accused person is to be tried, great care must be exercised in obtaining them. I do not propose to discuss the technique of examining witnesses; it is enough to say that this is acquired with experience but varies from witness to witness - and probably from Fiscal to Fiscal. In essence it consists of interviewing witnesses privately in/



in the Procurator Fiscal's office and examining them upon those aspects of the case to which it is thought that they can contribute. Each witness is examined separately and outwith the presence of the other witnesses. The accused person is not present nor is he represented. He is not entitled to see the precognitions but he may be allowed to see them later at the discretion of the Crown. The precognition is recorded in writing by the Procurator Fiscal. It is not signed and it is not seen by the witness. The investigation is not confined to the prosecution case. All relevant evidence for and against the accused person is obtained. The basic reason for this is that at this stage in the enquiry into a crime, the criminal authorities, and they alone, have the duty and the right to carry out the investigations; that is to say the enquiry is entrusted to the Procurator Fiscal, who acts under the control of the Lord Advocate. As the prosecutor has this exclusive right of enquiry it is his duty to secure all the evidence in relation to the crime and not only evidence tending to incriminate the accused person.

A precognition can never be evidence at the accused person's trial, The best evidence rule applies and the best evidence is the testimony of the witness under oath in the witness box at the trial. There are some limited exceptions to this rule and I think it proper to mention two of these exceptions. Where there is a risk of a witness dying before the trial his deposition may be taken so that it may be put in evidence at the trial if he dies earlier. This deposition is taken by a Sheriff or by the Procurator Fiscal in the presence of the Sheriff and subject to his control. It is recorded by the Sheriff Clerk, read to the witness and signed by him if he is able. If the witness recovers or is still alive when the trial takes place his deposition may not be admitted as evidence as it is not then the best evidence. The other general exception is the provision for a witness to be precognosed on oath before the Sheriff. This is a procedure which was seldom used during the present century until recent years when it has been revived. It consists of an examination of a witness by the Procurator Fiscal in the presence of the Sheriff who puts the witness on oath and controls the examination. This form of precognition is available for the purpose of testing the witness' evidence if at the trial his evidence differs materially from what he has said on precognition on oath. This does not have the effect of substituting his evidence on precognition for his evidence at the trial but it may be used for the limited purpose of allowing the jury at the trial to consider whether his evidence on oath should be accepted.

(b) Examinations/

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It is the duty of the Procurator Fiscal to secure evidence by arranging for the examination of persons, places and things where appropriate. For example, in a case of murder the Procurator Fiscal will attend at the locus of the crime and there, in conjunction with the police, decide on what examinations of the place and of articles recovered there should be instructed. He will arrange for the instruction of doctors to perform an autopsy and may attend the autopsy for the purpose of directing further examination for example of parts of the body. He will also arrange for examination of articles such as weapons used in the commission of a violent crime, motor vehicles, or substances such as drugs. He may require to obtain special warrants from the Sheriff, for instance to obtain samples of the accused person's blood, if this has not been done already with the accused's consent.

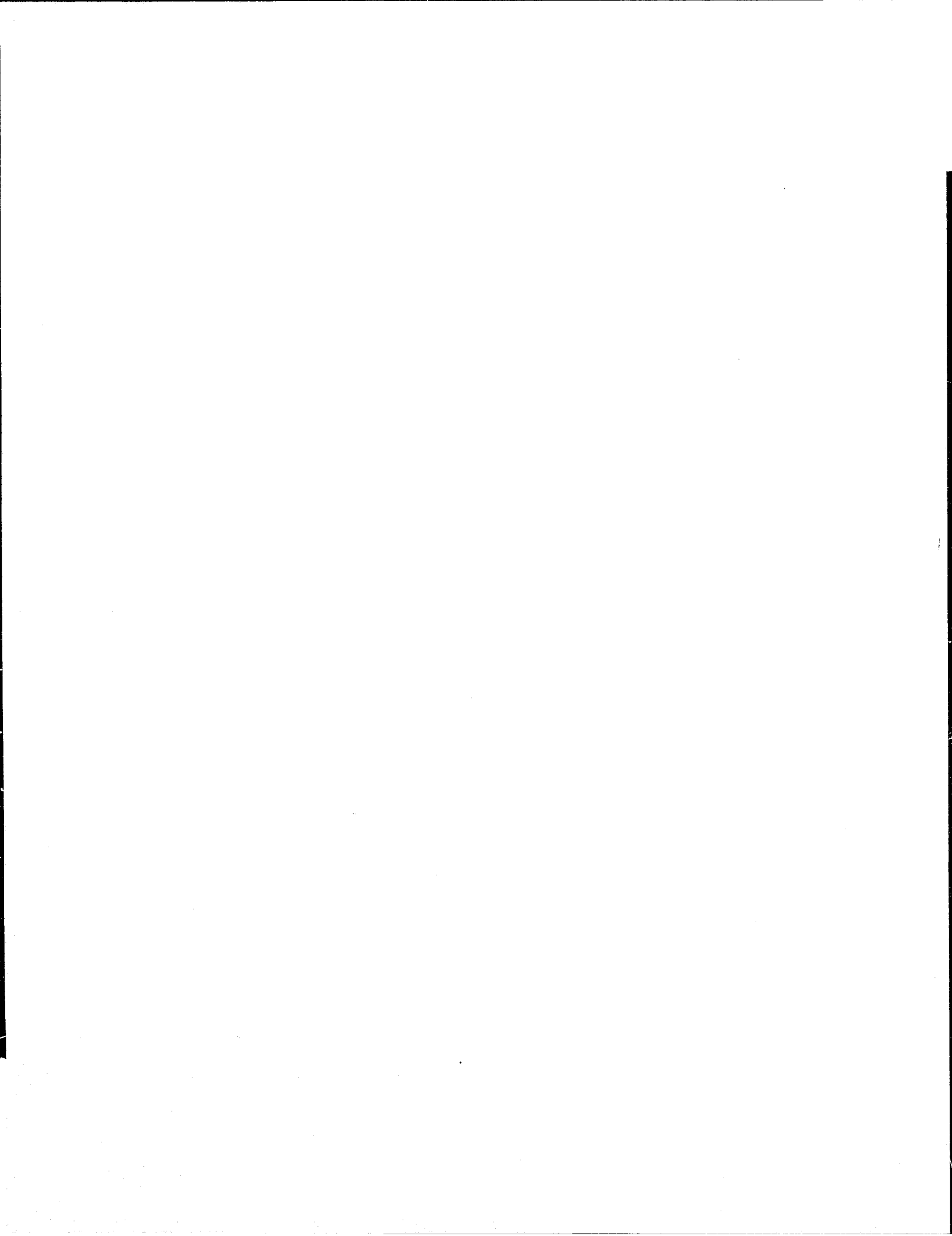
(c) Productions

The Procurator Fiscal has power at common law to seize articles which may be of value as evidence for a criminal trial. He also obtains a warrant for this purpose on the Petition which he presents to the Sheriff for the judicial examination of the accused. It is the Procurator Fiscal's duty to secure all evidence by way of productions for the defence as well as for the Crown. This follows from the circumstance that the Procurator Fiscal alone is in charge of the enquiry at that stage. There is no rule of law that the Procurator Fiscal will inform the defence of the enquiries he is making or the evidence obtained, and there are usually good reasons why he should not do so. The accused person will eventually have an opportunity to investigate all the evidence. When a decision is taken to proceed to trial an Indictment is served upon the accused. This is a document narrating the charges upon which he will be tried, and it includes lists of all the productions which the Crown proposes to produce at the trial and lists of all the witnesses whose evidence it is proposed to take. The accused will then be entitled to see and examine all the productions, and it is the duty of all the witnesses to give statements to the defence when asked. Further the Crown will make available if asked copies of all the reports by the experts instructed on behalf of the Crown, and these witnesses may also be examined by the accused.

When all this work has been done the result is combined in the volume or volumes referred to as the "Precognition" and everything is submitted by the Procurator Fiscal/

Fiscal to Crown Office where Crown Counsel, namely the Law Officers or Advocates Depute acting on behalf of the Lord Advocate, will decide whether there are to be further proceedings and if so what form these proceedings will take.

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