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## THE CROWN PRACTICE OF PRECOGNITION IN MID-VICTORIAN SCOTLAND

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### Abstract

The criminal procedure of precognition was and is the practice of taking of statements from witnesses by or on behalf of the local public prosecutor in place of or in addition to those statements provided by the police. That suggests strongly a different basis to practice from that in accusatorial systems. Precognitions constituted a preliminary sift of the evidence and the reporting of the results to independent lawyers for instructions was an unequivocal indication of decision-making within a hierarchical system. The administrative action of issuing written rules of practice to local public prosecutors in 1868 consolidated the existing procedure.

**Keywords:** Scotland, pre-trial procedure, witnesses, interview by local public prosecutor

### Introduction

A leading modern commentator has described Scots criminal procedure as: 'very much an indigenous growth, unaffected by English law'.<sup>2</sup> The practice of the local public prosecutor taking precognitions or statements at the stage of the investigation of serious crime was a crucial one. Precognitions may occasionally have been on oath but generally seem not to have been so taken. This was and remains a means of assessing the evidence of witnesses (the substance of that evidence and the likely credibility and reliability) prior to their appearance in court to give their evidence. The act of precognition is one of several procedural practices and it has been said that their subtleties require individual analysis to assess their efficiency.<sup>3</sup> James Moncreiff as Lord Advocate had advised the 1854-1855 Select Committee on Public Prosecutions of Scottish general policy:

The system proceeds upon the principle that it is the duty of the State to detect crime, apprehend offenders, and punish them, and that independently of the interest of a private party. The Scotch system acknowledges the right of a private party to prosecute, but the duty of the public prosecutor is altogether irrespective of that.<sup>4</sup>

The most modern textbook of the mid-Victorian era stated the theory in a different way:

At common law the right to prosecute offenders is limited to those officials who have authority to prosecute for the public interest, and to persons who are specially wronged by the offence committed. The subject of private prosecution does not

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<sup>2</sup> G.H. Gordon, 'Institution of Criminal Proceedings in Scotland,' (1968) 19 *Northern Ireland Law Quarterly* 249.

<sup>3</sup> E.g. C. Gane, 'Classifying Scottish Criminal Procedure,' in P. Duff and N. Hutton, *Criminal Justice in Scotland* (Aldershot, Ashgate, 1999) considers judicial examination, at pp.61-64.

<sup>4</sup> Quoted in D.G. Barrie and S. Broomhall, *Police Courts in Nineteenth-Century Scotland, Volume 1: Magistrates, Media and the Masses*, (Farnham: Ashgate, 2014) p.57.

require at the present day to be commented upon at length, as private prosecution, except in the most trifling summary complaints, is now wholly unknown in practice.<sup>5</sup>

From those two authorities alone, Moncreiff and Macdonald, it is easy to see the essence of the Scottish approach: the theoretical basis of a criminal trial was that of a public inquiry by public officials. There was no question of the resulting institutional framework being merely the result of an 'historical accident'.<sup>6</sup>

## 1 Precognition

As the local public prosecutor, the Procurator Fiscal in the Sheriff Court arranged for and took precognitions; a practice which has been said to correspond to the English proof of evidence.<sup>7</sup> The resulting written statement if not on oath was not binding. Such a procedure did not and still does not necessarily require the police to have taken a statement from the same witness prior to that taken by the Procurator Fiscal. The defence solicitor was also entitled to take precognitions from witnesses and there was a public duty on a witness to give their evidence to both sides.<sup>8</sup> The defence precognitions for reasons of professional confidentiality are seldom seen. The existence of precognitions in the Crown or prosecution papers, however, is well-known to historians of crime in Scotland and has been commented upon.<sup>9</sup> The value of precognitions lies in what was recorded:

The precognitions render the words of their subjects in the third person rather than direct speech, and they usually smoothe out dialect into lawyers' English, but quite often, in the haste of writing, they use the direct words or phrases of the witness.<sup>10</sup>

Given that precognitions were intended to record with a degree of precision the evidence of witnesses it is not certain what is meant by the suggestion that the precognitions were written at haste. Words spoken in the vernacular can carry parochial subtleties and these may be what direct quotation was intended to catch. The use of the precognitions by historians was advocated for the contents, because they are well indexed and also because they are relatively useful to consult for information about certain types of crime.<sup>11</sup> Precognitions as a primary source are filled with technical terms and were of course

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<sup>5</sup> J.H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, (Edinburgh, William Paterson, 1<sup>st</sup> ed. 1867) pp.309-10 and see fn.6 for older authorities.

<sup>6</sup> See the review article A. Stein, 'A Political Analysis of Procedural Law,' (1988) *Modern Law Review* 51, 659-675.

<sup>7</sup> D. M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press; 1980) p.980.

<sup>8</sup> *H.M. Advocate v. Monson*, (1893) 1 Adam 114, 134.

<sup>9</sup> M.A. Crowther, 'Criminal precognitions and their value for the historian' (1995) *Scottish Archives*, vol. 1, 75-84, esp. p.79.

<sup>10</sup> *Ibid*, p.78.

<sup>11</sup> *Ibid*, p.81.

completed in accordance with the few requirements that did exist in Scots law.<sup>12</sup> The precognitions were and are witting testimony of the crimes being investigated and unwitting testimony of the law and society of the time in which they were taken.<sup>13</sup>

The precognitions were not intended for the use of future historians but were the means by which the local public prosecutor investigated and thereafter reported serious crime to the Crown Office in Edinburgh. The requirement to make such reports emphasises in itself a degree of hierarchy and related only to intended or possible prosecutions of the most serious cases. A residual degree of discretion remained with the local public prosecutor. Crown Counsel established in the Crown Office determined the policy for prosecution and also took decisions in regard to individual cases. Perhaps overall with a sifting of the evidence and an assessment of the credibility and reliability of witnesses there was even at the national level a restricted discretion in practice: if correct that coincided with a suggested principle of mandatory prosecution.<sup>14</sup> In contrast with the decision-making role of the Procurators Fiscal in regard mainly to summary prosecutions where with a lower level of seriousness of crime or offence the local public prosecutor might end proceedings in the public interest and remain well within recognised discretion: this is consistent with the principle of expediency.<sup>15</sup>

These two principles are indicative of a hierarchical model of public prosecution. It is expedient then to consider the law and practices of the time in order to understand fully the purpose of the procedure and hence better assess the nature of the system of public prosecution whereby precognitions was the standard means of conducting investigations. Little research of the historic position of precognitions appears to have been undertaken and published. Accordingly, the precise cause of its coming into wide practice remains unclear. Precognition was essential in the committal proceedings before magistrates to discover in effect if there was a *prima facie* case against an accused. By the mid-Victorian era, however, the use of the practice of interviewing witnesses had become part of the overall investigation by the local public prosecutor:

It is scarcely too much, however, to say that, throughout a large portion of our criminal practice, the intervention of the magistrate in the initial proceedings is reduced to mere form, and that the release or imprisonment of the accused, until

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<sup>12</sup> A. Marwick, *The New Nature of History: Knowledge, Evidence, Language*, (London: Palgrave, 2001) p.xiii.

<sup>13</sup> *Ibid*, pp.172-7.

<sup>14</sup> M. Damaska, "Structure of Authority and Comparative Criminal Procedure" *Yale Law Journal*, (1975), 84, 480-544, 503.

<sup>15</sup> *Ibid*.

such times as the authorities [that is to say, Crown Counsel] shall decide as to his trial, is in the hands of the police and the Procurator Fiscal.<sup>16</sup>

The most enduring of legal textbooks on Scottish criminal procedure was first published in the Edwardian era.<sup>17</sup> Some explanation is given of the steps to be taken after committal proceedings for the most serious crimes: 'The statements of witnesses will have been reduced to writing in a regular precognition...The precognition, having been completed is reported in due course for consideration of Crown Counsel'.<sup>18</sup> Somewhat confusingly, in practice the term 'precognition' can be used either for an individual written statement or for the whole document of all the precognitions taken for a particular case. The important point is that the precognition individually or collectively constituted a *working document* which was used to take decisions on the available evidence that it contained. Latterly, the whole precognition came to have an index with a list of names of witnesses and copy reports, especially those from medical witnesses, and also required an inventory of the real evidence. Whether and if so to what extent, the Crown proceedings in the form of a completed precognition could reasonably be described as a 'dossier' in the continental/inquisitorial style is a matter for separate consideration.<sup>19</sup> The completed Crown precognition in effect constituted a brief for Crown Counsel to work from when prosecuting in court. The preparation extended to identifying and labelling real evidence likely to be produced in court.<sup>20</sup>

Professor Mirjan Damaska has examined conflicting claims about the purported differences between rules of evidence in the context of the adversarial-accusatorial systems and the non-adversarial civil law systems.<sup>21</sup> His study considers activities preliminary to proof-taking: he asserted that all continental jurisdictions, contrary to what has been suggested by supporters of the accusatorial systems, allow the judge the power to refuse the examination of some parts of the evidence.<sup>22</sup> One continental device exerting an exclusionary effect is the so-called 'principle of immediacy'.

[That principle] reflects a violent reaction against a much criticized feature of the medieval inquisitorial procedure. The examiner who conducted the secret "inquisitio" was required to put in the record every procedural step taken and all evidence heard.

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<sup>16</sup> R.C. [probably Robert Campbell, advocate] 'On the Investigation of Crime in Scotland' (1864) 8 *Journal of Jurisprudence* 473, p.481.

<sup>17</sup> R.W. Renton and H.H. Brown, *Criminal Procedure according to the Law of Scotland*, (Edinburgh: Wm. Green & Co, 1<sup>st</sup> edn 1909). Both authors had been publishing for some years and each was an experienced solicitor and Procurator Fiscal.

<sup>18</sup> *Ibid*, p.49.

<sup>19</sup> R.S Shiels, 'Inquisitorial Themes,' *Scots Law Times* (2005) (News) p.133.

<sup>20</sup> A. Alison, *Practice of the Criminal Law of Scotland*, (Edinburgh: W. Blackwood, 1833) pp.143-5.

<sup>21</sup> M. Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study', *University of Pennsylvania Law Review* (1973) vol.121, 506-589 p.517.

<sup>22</sup> *Ibid*. pp.513-6.

The official "dossier" (*acta inquisitionis*) thus contained minutes describing, among other things, the results of proof-taking. At the close of the investigation the file was, in all serious criminal cases, transmitted to a panel of judges who based their decision solely or primarily on evidentiary items contained in the dossier. The judges seldom, if ever, came into personal contact with the defendant or the witnesses.<sup>23</sup>

Damaska asserted that the reason for this procedure being adopted was the realization that 'original' evidence is more probative than evidence filtered through intermediary sources and that led to the adoption in modern continental procedures of the principle that evidentiary sources be examined by the decision-maker in their original rather than derivative form.<sup>24</sup>

The question of how far the principle of immediacy actually underlies the Scottish practice of precognition is a matter for another study but for the moment it suggests an explanation of a practice that was hardly new in 1868 and which seems to have continued to the modern era unchallenged. The authorities, it is argued, suggest a marked consistency between the generality of continental systems and long-established practice in Scots law.

## 2 Early Practice

There is evidence of the existence of early rules to be observed in taking precognitions. These can be dated to 1765 when drafts were revised and approved by Lord Hailes.<sup>25</sup> At that time precognitions were: 'not infrequently taken before the Supreme Judges themselves, who were afterwards to conduct the trial: but this practice, evidently objectionable, has now [1833] for a long time been abandoned'.<sup>26</sup> The rules generally encourage attention to detail in setting down in writing the details of the medical aspect of the case and related matters. In particular, Rule XIII set out a procedure that is maintained today:

That, as soon as a precognition is finished upon any crime proper to be tried before the Circuit Court, a full copy of the be transmitted to the Agent of the Crown at Edinburgh, in order that the King's Counsel may be timeously apprised of the case, and be prepared to draw the indictment [...] And, where matter of doubt occurs in the course of taking a precognition, that a copy of the precognition, so far as it is taken, with the matter of doubt, be likewise transmitted to the Agent of the Crown, in order to be advised by King's Counsel, if necessary.<sup>27</sup>

The centralised decision-making capacity of the system of public prosecution in Scotland stands in stark contrast to the latitude allowed in systems where there were private prosecutors. The dynamics of the former system were such that someone, the Procurators

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<sup>23</sup> Damaska, 'Evidentiary Barriers', p.517.

<sup>24</sup> Ibid.

<sup>25</sup> D. Hume, *Commentaries on the Law of Scotland Respecting Crimes*, (Edinburgh: Bell & Bradfute, 4<sup>th</sup> edn. 1844) vol.2, Appendix X, pp.535-7.

<sup>26</sup> Alison, *Practice of the Criminal Law* p.148.

<sup>27</sup> Hume, *Commentaries* vol.2, Appendix X, p.536.

Fiscal in the Sheriff Court assisted by such police as there were then, had responsibility for investigating serious crime by precognition under the general superintendence of a head office. That contrasted markedly with the adversarial procedure which presupposed that the truth would somehow emerge when no-one was in charge of seeking it.<sup>28</sup>

Immediately prior to the commencement of Victoria's reign Sir Archibald Alison asserted that there were in about 1833 'between 800 and 1000' cases transmitted every year for the opinion of 'the Crown Officers.'<sup>29</sup> Witnesses could be compelled to attend for precognition by citation and they might be put on oath if it was thought necessary to exert pressure on a witness to get the truth from them.<sup>30</sup> However, the nature of the procedure was clear:

The precognition being entirely an *ex parte* proceeding on the part of the prosecutor, the prisoner is not entitled to have a copy of the proceedings, nor to be present himself, or to have anyone attend on his part to put questions, nor to cite witnesses in exculpation [...].<sup>31</sup>

The reason for that approach in law was: the peculiar and delicate situation of witnesses, at the commencement of the precognition, and the great facility of corrupting or diverting the sources of evidence at the commencement of the investigating[...].<sup>32</sup> The witnesses were to be examined separately at precognition.<sup>33</sup> The precognition should always be reduced to writing, and signed by the witnesses, with their precise personal details. The same scrupulous attention was also to be paid to the description of the crime.<sup>34</sup>

### 3 Modernisation

Phillipson has argued that in about 1852 it had been recognised politically that the days of a decentralised Scotland were over with the tightening of bonds of the Union with England.<sup>35</sup> There were, nevertheless, still substantial areas of administrative activity that remained within the control of the government offices in Edinburgh. The Crown Office Book of Regulations of 1868 was the fundamental matrix for modern Scottish practice and in itself represented modernity.<sup>36</sup> It was issued, coincidentally or otherwise, during a period when English policy-makers and lawyers were considering the options for the future development

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<sup>28</sup> J.H. Langbein, *The Origins of Adversary Criminal Trial*, (Oxford: Oxford University Press, 2005) p.333.

<sup>29</sup> Alison, *Practice of the Criminal Law*, p. xvi.

<sup>30</sup> *Ibid*, p.38.

<sup>31</sup> *Ibid*, p.139, para.14.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*, p.141, para.15.

<sup>34</sup> *Ibid*, p.142, para.16.

<sup>35</sup> N. Phillipson, *The Scottish Whigs and the Reform of the Court of Session, 1785-1830*, (Edinburgh, The Stair Society. 1990) pp.172-73.

<sup>36</sup> Damaska, 'Evidentiary Barriers', p.563.

of their system of prosecutions.<sup>37</sup> In 1824 a series of directions to Procurators Fiscal was drawn up and circulated and in 1834 these directions were reprinted and distributed 'with such additions and alterations as subsequent changes and experience seemed to require.'<sup>38</sup> The Book of Regulations of 1868 was a consolidated and revised collection of earlier instructions which suggests that regulation had become a necessity, especially with the move towards an enhanced Parliamentary accountability of Procurators Fiscal.<sup>39</sup> The book was a codification at a point when that was to some degree a contemporary theme.<sup>40</sup> The Book of Regulations exhibits a systemic structure. Such an approach was, or was intended to be, productive of clear and principled thought as to the business of public prosecution, as well as eradicating inconsistencies.<sup>41</sup> The arrangement of the contents can very easily be seen as a form of codification as the style and structure of the contents is that of a systemic list of actions matched to elements of the post of local public prosecutor which commenced with an unequivocal exhortation to duty: The Lord Advocate...directs that these Regulations, now circulated to Procurators Fiscal, shall form the code of instructions to be observed by them in criminal and other investigations.'<sup>42</sup>

Precognitions form the third part of the Book of Regulations, and that part is itself divided into three titles commencing with general rules.<sup>43</sup> There are statements of general principle:

Rule 1 instructs:

no time should be lost in taking a precognition; in doing which care must be taken to give the statement of the witness as correctly as possible, and on no account to make the evidence appear stronger than can be fully supported in the event of a trial. The nature of the defence to which the accused may probably have recourse ought to be kept in view, and evidence calculated to bring out the truth should be carefully sought for.

Many of the rules are in effect exhortations to attention to detail during investigation such as exemplified in Rule 2: 'Great care must be taken, in the precognition to specify as nearly as possible the *mode* of the delict, the time when it was committed, and also the place where it

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<sup>37</sup> P.B. Kurland and D.W.M. Waters, 'Public Prosecutions in England, 1851-1879: An Essay in English Legislative History,' *Duke Law Journal*, (1959) 4, 493-562.

<sup>38</sup> National Archives of Scotland reference AD 5/11: Regulations to be observed in Criminal and Other Investigations Published by the Crown Office, Edinburgh (1868). The information and dates of earlier publications are from the foreword by TG Murray, Crown Agent, dated 1 July 1868.

<sup>39</sup> R.S. Shiels, 'The Structure of Authority and the Prosecution of Crime in the Sheriff Courts of Mid-Victorian Scotland', (2014) 4(3) *Law, Crime and History* 56-73.

<sup>40</sup> Anonymous, 'On Codification', (1873) 17 *Journal of Jurisprudence* 188, p.190; '...codification, rightly understood, is the arrangement of materials which are to hand, with the elimination of all that is superfluous or injurious'.

<sup>41</sup> N. Whitty, 'The *Stair Memorial Encyclopaedia* and the institutional Tradition' in S. Hetherington (ed.) *Halsbury's Laws of England Centenary Essays 2007* (London: Butterworths, 2007) 203-227, at 222.

<sup>42</sup> 1868 Regulations: Introduction dated 1 July 1868

<sup>43</sup> Each paragraph of the part is numbered but the pages are not numbered.

occurred, comprehending the parish and county, when in a rural district.<sup>44</sup> The style of the completed precognition was to conform to the requirement of arrangement of contents, prominence of certain crucial information and certain aspects of uniformity as well as an index.<sup>45</sup> The contents of the precognitions required brevity, and unnecessary and prolix statements were to be avoided.<sup>46</sup> Precognitions in a partially finished state were also to be avoided and only completed ones sent to the Crown Office. The strictly private and confidential nature of the communications amongst representatives of the Crown was emphasised and so to was the need not to communicate any aspect of a case under investigation with the public including the press.<sup>47</sup>

#### 4 The Implications of Precognition

By the end of the nineteenth century it could be said that every criminal prosecution began with an 'Information' which was simply the means by which the prosecutor was made aware of the existence of a criminal charge against an accused. The Information varied:

in formality, from written report of an officer of police, containing the names and statements of the witnesses, to the verbal narrative of an injured person; but in every case it gives information of facts, and names a person who is said to be responsible for any criminal consequence arising out of those facts.<sup>48</sup>

The questions to be asked by any prosecutor on receipt of such an Information included an answer amounting to a decision as to the court before which the charge is to be tried.<sup>49</sup> The more serious the charge the more likely a prosecutor would proceed to precognition as in Victorian times, and even now, it would only be used for the more serious type of crime because of the excessive time, effort and probably cost involved.

Precognition was restricted to those cases that would or might result in trial on indictment. For summary prosecutions the police would submit to the Procurator Fiscal for a decision as to prosecution a report with at best a few perfunctory sentences locating the basic circumstances and a crime or offence believed to have been committed. It cannot be said that the practice of private precognition was acceptable to everyone: while the trial of an

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<sup>44</sup> 1868 Regulations, Part Third, Title First- 1868 Rules: Rules 3 and 4 for similar points.

<sup>45</sup> Rules 7, 8, 9, 12 and 18.

<sup>46</sup> Rules 10 and 11.

<sup>47</sup> Rules 21 and 22.

<sup>48</sup> H.H. Brown, *The Principles of Summary Criminal Jurisdiction according to the Law of Scotland*, (Edinburgh: T & T Clark; 1895) p.11. The author, an experienced Procurator Fiscal, distinguished specifically the Scottish use of 'Information' from that used in England.

<sup>49</sup> Brown, *The Principles of Summary Criminal Jurisdiction*, pp.11-2.

accused was in public, the committal procedures and any precognitions were conducted in private, the latter: 'in the secrecy of the Procurator Fiscal's chambers'.<sup>50</sup>

The existence in law and in practice of precognition was a matter of political issue: Lord Minto regularly raised the subject and his concern turned on the private nature of precognition; in effect, 'behind the back of the public'.<sup>51</sup> He cited the view of a Scottish Judge who regarded the system then prevailing as one of secret investigation.<sup>52</sup> Lord Minto showed his concern for the extent of the practice by calling for Returns as to the numbers of precognitions carried out, a request that the Government agreed to.<sup>53</sup> It did not appear that the willingness to agree was matched by action on the point: Lord Minto returned to the issue of the uncertainty of the extent of investigations by precognition taking place.<sup>54</sup> The Government confirmed their agreement again but this time appear to have made the instructions to those who were to make the Returns far more explicit especially as they would now be open to public inspection.

As would be expected, the precognitions and their contents varied significantly. This carried with it further implications for the nature of the dispersal of power amongst what might now be regarded as the criminal justice system. Indeed, the importance of the power to obtain a precognition may be thought in context to be the mark of what is not an adversarial system. First, confidentiality was assured. Messrs Renton and Brown in 1909 in the first edition of their enduring work on Scots criminal procedure merely refer without comment to the confidentiality of precognitions.<sup>55</sup> By the fifth edition in 1983 the assertion, doubtless reflecting long practice, was that Crown precognitions were:

[...] very highly confidential. Where their production is refused by the Crown it will be ordered by the court only where it is necessary for the ends of justice in view of some great and overwhelming necessity. Confidentiality of Crown precognitions is, in general, necessary for the successful prosecution of crime. The Lord Advocate is head of the Criminal Department and his views carry great weight with the court. If he declines to produce a Crown precognition on the ground that such an act would be contrary to public policy then it will require very strong circumstances to induce the court to ordain him to do so, although that power is inherent in the court.<sup>56</sup>

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<sup>50</sup> Anonymous, 'Notanda on Criminal Procedure,' (1860) 2 *Scottish Law Journal* 82.

<sup>51</sup> HL Deb, June 13, 1881, vol.262, c.325.

<sup>52</sup> *Ibid*, c.328.

<sup>53</sup> HL Deb, July 8, 1881, vol.263, c.342-43.

<sup>54</sup> HL Deb, March 30, 1882, vol.268, c.277-8.

<sup>55</sup> Renton and Brown, *Criminal Procedure* (1909) p.97 where one reported case is cited.

<sup>56</sup> R.W. Renton and H.H. Brown, *Criminal Procedure according to the Law of Scotland*, (Edinburgh: W. Green and Sons, 5<sup>th</sup> 1983) p.70 at paras.5-93.

That statement of the law in regard to precognitions is supported by authorities, the earliest, in 1844, established the position that was preserved by later cases.<sup>57</sup> This meant that the police, such as existed in the Victorian era, had no control and often little knowledge of the state of a case once it was reported to the Procurator Fiscal. In fact, in the absence of any requirement that the police were to be involved it was entirely possible to envisage a prosecution by the public prosecutor without any police involvement. The Procurator Fiscal responsible for an investigation might - if the circumstances warranted it - act without prior consultation and without the police having immediate knowledge of subsequent developments.

Secondly, as precognitions were brought into existence irrespective of any police statements, the Crown thereby controlled the direction of a case and set the overall narrative. Moreover, while police investigations were almost certainly informed by the law, the Procurator Fiscal had no excuse. His involvement is with the application of the law, rather than, say, the immediate necessities of imposing public order as the dominant theme. The declaration was something generally taken from the accused before a precognition and was not, strictly speaking, a precognition but in that it constituted an admission by the defendant, even against his or her interest, it was something which could assist with investigations and proof in the criminal justice process.

Thirdly, the act of precognition need not be wholly voluntary. Various powers surrounding the act of taking a precognition, such as citation to compel attendance and precognition on oath, meant that the procedure was not to be merely confirmatory of any witness statement taken by the police. It may have been routine but it was a procedure that was underpinned by compulsion.

Fourthly, the syllogistic nature of the indictment in Scots law required bespoke drafting of indictments with the need to reflect in the libel, the precise wording, of the charges, the evidence as discovered on investigation was as a matter of demarcation for lawyers and not the police. The precognition was said in 1833 to serve:

the double and equally important purpose of furnishing the magistrate, committee, and Crown Counsel, with the means of considering whether there are grounds for proceeding against the accused, or detaining him in custody, and of furnishing to the prosecutors, if an indictment is to be raised, the means of drawing a correct libel [drafting an accurate charge].<sup>58</sup>

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<sup>57</sup> *Donald v. Hart*, (1844) 6 Dunlop 1255.

<sup>58</sup> Alison, *Practice of the Criminal Law*, p.142, para.16.

Finally, there was the question of control of the proceedings. Any decision to continue or to end a prosecution before a decision by a jury was required necessarily lay with the public prosecutors rather than with the aggrieved complainer. A precognition might be taken competently from witnesses before or during a trial and a Procurator Fiscal remained in a privileged position with, for example, access to prisoners for that purpose.<sup>59</sup>

## 5 Discussion

The practice of precognition is not to be seen as merely refreshing the memory of a witness nor only a check on the evidence for relevance, accuracy and completeness prior to testimony, a common purpose of interviewing witnesses in adversarial jurisdictions.<sup>60</sup> In the mid-Victorian era when the new Book of Regulations appeared there were comparatively few police forces in Scotland and improvements in strength, professionalism and efficiency had only followed from 1857 with the introduction of annual police inspections by Her Majesty's Inspectorate of Constabulary.<sup>61</sup> The interview of a witness by the Procurator Fiscal may have been the best and perhaps the only way of noting the intended evidence of a potential witness but it has to be seen as part of the process of investigation and preparation. It may, nevertheless, have been somewhat dispiriting for interested readers to see the vague advice that: 'The circumstances of each case differ so widely that it would serve no good purpose to enter into a statement of the methods of investigation which ought to be adopted.'<sup>62</sup>

Precognition did not necessarily mean that a final decision to commence a prosecution had been taken; a precognition of apparently crucial witnesses was generally the prior practice before such a decision considered. The Scottish approach was, as in an inquisitorial framework, that: 'both inculpatory and exculpatory evidence is gathered and led by an investigating judge who thoroughly interviews and questions witnesses prior to their testimony.'<sup>63</sup> It is easy enough to envisage the Procurator Fiscal in the Sheriff Court putting precognition into practice and so taking on some aspect of a role of an investigating judge. There were no restrictions in law on the evidence adduced at precognition as part of an investigation and then reduced to writing: there would seem at best to be only a requirement in the broadest sense that the evidence adduced is logically relevant.<sup>64</sup> The investigator

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<sup>59</sup>For example, The Prison and Young Offenders Institutions (Scotland) Rules 1994 (SI 1994 No. 193 (S.85)) rule 59(1): 'A procurator fiscal or any person authorised by him may, for the purpose of discharging his public duties, visit and examine a prisoner at any reasonable time'.

<sup>60</sup>H. Garry, 'Witness Proofing' in L. Carter and F. Pocar (eds) *International Criminal Procedure: the Interface of Civil Law and Common Law*, (Camberley: Edward Elgar, 2013) pp.70-71.

<sup>61</sup>Barrie and Broomhall, *Police Courts in Nineteenth Century Scotland*, p.400.

<sup>62</sup>Renton and Brown. *Criminal Procedure*, (1909) p.49.

<sup>63</sup>Garry, 'Witness Proofing' pp.72-73.

<sup>64</sup>Damaska, 'Evidentiary Barriers', p.513.

might ask the witnesses in the course of fact-finding direct questions in an attempt to get at the truth, and the investigators are not constrained by any evidential barriers about, for example, hearsay. Indeed, a degree of latitude may well have existed in that regard so that there might be less constrained adjudicative fact-finding activity which included weighing or evaluating evidence.<sup>65</sup>

Is the system which places a higher premium on the discovery of truth simply for that reason better equipped to achieve precision in its factual findings? Professor Damaska answers in this way:

While commitment to the discovery of truth in criminal cases and success in attaining it are related, they are obviously distinguishable. Motivation is surely important for the success of such an endeavour, but it is by no means a sufficient condition for it. As with all values, truth may be loved unwisely or too well. Thus, if the non-adversary this does not mean that its factual findings are *ipso facto* more reliable.<sup>66</sup>

Accordingly, it is not suggested now that the system in Scots law of precognition is a superior means of fact-finding and that somehow it lends itself to precision. Rather it is asserted that the whole procedure of precognition as codified in the Book of Regulations of 1868 is reminiscent of the general continental ideas of non-adversarial systems directed at attaining historic verity in order to enforce the substantive criminal law. The sifting and assessing of potential evidence in private by a public official assisted in narrowing the evidence to be adjudicated upon at the proof-taking itself. Moreover, without an obviously vested interest in the subject matter being examined the local public prosecutor at least presented as an objective investigator. This aspect of the work was more than alluded to with enthusiasm:

This peculiarity [the existence of a public prosecutor] in our criminal jurisprudence is based on the principle, that 'crimes are more effectually prevented by the certainty than by the severity of punishment.' The value of this official appointment consists in the fact that the prosecutor is one whom neither corruption nor intimidation can deter from the performance of his duty, who has no awkward stories or circumstances to conceal, and who is uninfluenced by any motive to hush up or exaggerate a criminal charge.<sup>67</sup>

## Conclusion

One Scots lawyer has commented: 'Although the role of the civilian tradition in Scots law can be more or less controversial depending on the context, very few Scots lawyers seem to

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<sup>65</sup> Damaska, 'Evidentiary Barriers', p.512.

<sup>66</sup> *Ibid.*, pp.587-8.

<sup>67</sup> A. Wood Renton, 'The Influences of France on Scottish Economical and Legal Ideas', (1883) 27 *Journal of Jurisprudence* 449 at p.450.

question the value and importance of the civilian Institutional tradition.<sup>68</sup> The Book of Regulations of 1868 may be seen in that context as a book of instruction that represented the aggregation of the knowledge of the management of the investigation of crime such as it was in that period. This structured approach for Procurators Fiscal in the Sheriff Court to follow to better fulfil investigatory duties probably brought cohesion in practice to the work of a number of key individuals who constituted the business of public prosecution. That was enhanced by the context of deference to generalised centralised legal direction and specific case supervision, the former from appeal decisions and the latter from instructions from Crown Counsel.

The objective management of the business of the investigation of crime and, separately, of trial preparation both carried out by the local public prosecutor as a matter of policy and in practice was substantially at odds with what has been described as the subjective and random nature of decision-making by self-selecting private prosecutors.<sup>69</sup> If the police have been reluctant to articulate specifically what it was that differed in policing in Scotland that made it peculiarly Scottish it may have been due to a tacit recognition that the role of the police was in matters of prosecutorial discretion somewhat subservient to the local public prosecutor.<sup>70</sup> These were perceived, by the lawyers especially, as separate roles and there was tension in the mid-Victorian era between the police and the lawyers surrounding the appointment of Superintendents of Police acting as Procurator Fiscal in the Police Courts.<sup>71</sup> Whatever those local disputes might amount to, the Lord Advocate of the mid-Victorian era, William Watson M.P., said as a matter of public policy in the gender-based language of the day that:

The function of a public prosecutor is to receive the best information which the police force can lay before him, whether by means of detectives or police officers; and it is his duty to form a calm and impartial judgement on that information which, as human nature is at present constituted, he could not well do if he were a party to the procuring of evidence in support of the charge. The duty of the public prosecutor is an inconsistent with the duty of procuring evidence as it is inconsistent with the office of judge.<sup>72</sup>

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<sup>68</sup> Whitty, 'The *Stair Memorial Encyclopaedia* and the Institutional Tradition', 204.

<sup>69</sup> Langbein, *The Origins of Adversary Criminal Trial*, p.325.

<sup>70</sup> D.G. Barrie, 'A typology of British police: locating the Scottish municipal police model in its British context, 1800-35' *British Journal of Criminology* (2010), 50(2), 259-277, 274.

<sup>71</sup> See correspondence at National Records of Scotland, AD56/250 covering the period August 1869 to May 1874 and the long letter reproduced at (1878) 22 *Journal of Jurisprudence* 207-209 and commentary at 210-211.

<sup>72</sup> 'Transactions of the National Association for the Promotion of Social Sciences: Aberdeen meeting, 1877' (London, Longmans, Green & Co: 1878) pp.331-332.

The terms 'adversarial' and 'inquisitorial' have been said to be labels that seem to cover characteristics of criminal procedure in shifting combinations.<sup>73</sup> The investigation of crime from mid-Victorian Scotland cannot be said to have been conducted at either end of the spectrum between purely 'adversarial' and 'inquisitorial' models but rather on a varying point on a spectrum between extremes. The authority within the Scottish system to precognosce witnesses was a crucial procedural power that constituted a sift of the potential evidence prior to a trial. Understanding that procedure assists in the evaluation of the institutional environment in which public prosecutors worked and is a means of assessing the efficacy of the system.<sup>74</sup> The precognition of serious cases brought shape and form to the actions of the local public prosecutor but with a limited discretion in that investigation with some associated investigative resources and tactics.<sup>75</sup>

Success in litigation usually depends to a great extent on trial preparation and the precognition process allowed the Procurator Fiscal and or his staff the opportunity to have witnesses shown and identify productions to be exhibited at trial and sign the labels attached accordingly.<sup>76</sup> This approach did not necessary always apply as there may not have been much in the way of real evidence for many cases at this period. However, it is arguably an indication of the increasing complexity of potential prosecutions that a statutory authority for precognition was extended around the turn of the century to summary cases. Without these new powers of precognition prosecutors had sometimes great difficulty in ascertaining the facts of certain cases.<sup>77</sup>

The practice of taking precognitions was by itself not really consistent with the idea of a contest between two equally matched participants. When the prosecutor in court had full precognitions to work from the precognition process had sifted and synthesised the evidence that constituted the Crown case. The result was, all things being equal, an efficient presentation of a settled narrative of criminality. The defence were entitled to and occasionally may have obtained their own precognitions from the witnesses, although that was improbable for accused without economic resources. It is clear, however, that with the emphasis on public prosecution by the time any trial commenced the Crown control of the management of the procedure had gained more than the upper hand. The new Book of Regulations when circulated in 1868 was not a reform as such but constituted a modern

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<sup>73</sup> Damaska, 'Evidentiary Barriers', p.554.

<sup>74</sup> N. Garoupa, 'The economics of prosecutors' in A. Harel and K.N. Hylton, *Research Handbook on the Economics of Criminal Law*, (Cheltenham, Edward Elgar, 2013)

<sup>75</sup> *Ibid*, pp.8 and 233.

<sup>76</sup> 1868 Regulations, Part Third, Title Second- Productions, and see Renton and Brown, *Criminal Procedure according to the Law of Scotland* (1909) p.49.

<sup>77</sup> Renton and Brown, *Criminal Procedure* (1909) p.216.

statement of an old practice in the investigation of crime. It may be seen as a possible point of departure given other contemporary developments in criminal matters not least of which were the development of summary procedure and the effects in practice of the reform a generation later by the Criminal Procedure (Scotland) Act 1887. These concepts of the Scottish system of public prosecution were indicative of a particular view of the direct responsibility of the State in regard to the suppression of crime.