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STATUTORY INSTRUMENTS

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**1988 No. 110**

**Act of Adjournal (Consolidation) 1988**

CHAPTER I

SOLEMN PROCEDURE

PART I

PROCEDURE PRIOR TO TRIAL

*Service*

**Proof of service outside Scotland**

**3.** Where any citation of an accused person is served in England, Wales or Northern Ireland by an officer effecting such service in accordance with the provisions of section 39(3) of the Criminal Law Act 1977(1), the evidence of either—

- (a) that officer on oath; or
- (b) written execution of service or citation signed by him,

shall be sufficient evidence of such service.

*Bail Order*

**Application to alter address in Bail Order**

**4.—(1)** An application in writing under section 2(2) of the Bail etc. (Scotland) Act 1980(2), to alter the address specified in the order granting bail shall—

- (a) include the following information:—
  - (i) identification of the proceedings in which the order was made;
  - (ii) details of the new address;
  - (iii) reasons for the proposed change of address; and
- (b) be sent to the clerk of the court which made the order.

(2) On receipt of the application, the clerk of court shall forthwith send a copy to the prosecutor.

(3) The prosecutor shall, within 7 days of receipt of the copy of the application, notify the clerk of court in writing whether or not he intends to oppose the application.

(4) Where the prosecutor notifies the clerk of court that he does not intend to oppose the application, the court shall proceed to dispose of the application and may do so in the absence of the applicant.

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(1) 1977 c. 45; section 39(3) was amended by the 1980 Act, Schedule 7, paragraph 79.

(2) 1980 c. 4

(5) Where the prosecutor notifies the clerk of court that he intends to oppose the application, the clerk of court shall arrange a hearing before the court in chambers at which the applicant and the prosecutor may appear or be represented.

(6) The clerk of court shall give notice in writing to the applicant and the prosecutor of the decision of the court on an application made under paragraph (1).

#### *Citation of Defence Witnesses for Precognition*

### **Application**

5.—(1) An application to the sheriff made by an accused under section 9(1) of the 1980 Act for warrant to cite any person to appear before the sheriff in chambers for precognition on oath by the accused or his solicitor shall be made—

- (a) to the sheriff in whose sheriffdom the proceedings in respect of which the accused seeks that person's precognition have been commenced;
  - (b) by way of petition in the form set out in Form 1 or 2, whichever is appropriate, of Schedule 1.
- (2) On an application being made to the sheriff under paragraph (1), he shall—
- (a) order intimation of the application to be made to the procurator fiscal;
  - (b) fix a diet for a hearing of the application.

### **Order for taking precognition**

6. If, after the hearing, the sheriff is satisfied that it is reasonable to require such precognition on oath in the circumstances, he shall—

- (a) order the precognition to be taken;
- (b) fix a diet for it to be taken;
- (c) grant warrant to cite the person from whom it is to be taken.

### **Citation**

7.—(1) Citation of that person to attend the diet fixed for taking his precognition on oath shall be made by way of personal service on him by an officer of law acting on the instructions of the accused or his solicitor, and relative execution of service shall be produced at the diet fixed under rule 6.

(2) If that person fails to appear at that diet and the sheriff issues a warrant for his apprehension under section 9(2) of the 1980 Act, execution of that warrant—

- (a) shall be executed by an officer of law, instructed by the accused or his solicitor;
- (b) may proceed on a copy of the petition and warrant duly signed by the sheriff clerk.

(3) The sheriff clerk shall immediately give notice of that person's failure to appear at the diet to the procurator fiscal.

### **Record of proceedings**

8.—(1) Where that person appears before the sheriff to have his precognition taken on oath, the proceedings shall be recorded in shorthand by an official shorthand writer instructed by the accused or his solicitor.

(2) The shorthand writer shall extend his shorthand notes recording the proceedings, sign the transcript, and lodge it with the sheriff clerk.

- (3) On the transcript being lodged, the sheriff clerk shall—
- (a) send a copy to the solicitor for the accused or, if he is not represented, to the accused;
  - (b) fix a diet for the person whose precognition has been taken on oath to attend before the sheriff clerk to sign the precognition.

### **Fees of shorthand writers**

**9.**—(1) The solicitor for the accused, or if he is unrepresented, the accused, shall be liable for payment of—

- (a) the fees of the shorthand writer;
- (b) the expenses of the person precognosced on oath,

and shall tender any such expenses in advance if required by that person to do so.

(2) If the accused is unrepresented, the sheriff may at the hearing of the application, or at any time before the precognition is taken, order the accused to consign in court such sum as he may be required to pay under paragraph (1) in respect of fees and expenses on or before such date as the sheriff may specify in the order.

(3) If the sheriff orders the accused to consign a sum in court under paragraph (2), and that sum is not consigned by the date specified in the order, the application shall be treated as abandoned.

### *Citation and List of Jurors*

### **Warrants for citation**

**10.**—(1) The forms specified in column 3 of the Table set out below and set out under those numbers in Schedule 1 are the forms prescribed for the purposes of the sections specified in column 1 of the Table relating respectively to the matters summarised in column 2 of the Table, and shall have effect for those purposes.

TABLE

(1) <i>No. of Section</i>	(2) <i>Content</i>	(3) <i>No. of Form</i>
69	Warrant to cite accused person, witnesses and jurors	3
69	Execution of service of indictment and of citation of accused	4
75(3)	Notice to accused to appear at diet	5.

- (2) In section 69 (warrants for citation)—
- (a) for the words “conform to Schedule B to the Criminal Procedure (Scotland) Act 1887” and also for the words “conform to Schedule C of that Act” substitute the words “in such form as may be prescribed by Act of Adjournal, or as nearly as may be in such form”;
  - (b) in the last paragraph, omit the words “The warrant and”, and for the words “B to E” substitute the words “D and E”.

(3) Section 75 was substituted by the 1980 Act, Schedule 4, paragraph 4.

## List of jurors

11. The clerk of the court before which the trial is to take place, in preparing a list of jurors for the trial diet under section 96(4), shall have regard in determining the number of jurors to be listed to the powers of postponing or adjourning any trial diet exercisable by the court under sections 76, 77, 77A(5) and 102(3)(6).

## *Plea of Guilty*

### Procedure

12.—(1) A notice to appear at a diet of the appropriate court served on an accused under section 102(1) shall—

- (a) if an indictment has not already been served, be in the form set out in Form 6 of Schedule 1;
- (b) if an indictment has already been served, be in the form set out in Form 7 of Schedule 1.

(2) In any case set down for trial in the High Court, any such diet under section 102(1) may be called before the High Court sitting in Edinburgh, whether or not the case has already been set down for trial at any sitting elsewhere and whether or not any notice has already been served on the accused under section 75.

(3) Notwithstanding the provisions of section 102(3), the court may postpone the trial diet under that section if, but only if—

- (a) all the accused have given intimation in accordance with the provisions of section 102(1); and
- (b) are present at the diet called under section 102(1); and
- (c) a motion in that behalf is made to the court at that diet.

(4) If the court grants that motion, the order granting it shall—

- (a) be endorsed on the record copy indictment;
- (b) be authenticated by the presiding judge subscribing his signature;
- (c) be entered in the record of proceedings;
- (d) have effect for the purposes of section 69 as a warrant of citation issued under that section by the Clerk of Justiciary or sheriff clerk, as the case may be, for the date to which the trial diet has, by virtue of that order, been postponed.

(5) A copy of the order shall be sent by the clerk of court to the governor of any institution in which any accused is detained.

(6) Any requirement to call the diet in any case where such an order has been made shall have effect only in relation to the postponed trial diet.

## *Identification Parades on Application of Accused*

### Application

13.—(1) An application to the sheriff made by an accused under section 10(1) of the 1980 Act for an order that the prosecutor shall hold an identification parade in which the accused shall be one of those constituting the parade shall be made—

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(4) Section 96 was amended by the 1980 Act, Schedule 4, paragraph 13.

(5) Sections 76, 77 and 77A were inserted by the 1980 Act, Schedule 4, paragraphs 5, 6 and 7.

(6) Section 102 was substituted by the 1980 Act, section 16.

- (a) to the sheriff in whose sheriffdom the proceedings in relation to which the order is sought have been commenced;
  - (b) by way of petition in the form set out in Form 8 or 9, whichever is appropriate, of Schedule 1.
- (2) On an application being made to the sheriff under paragraph (1), he shall—
- (a) order intimation of the application to be made to the prosecutor;
  - (b) fix a diet for a hearing of the application on the earliest practicable date;
  - (c) after giving the prosecutor an opportunity to be heard at the hearing and allowing such further procedure as he thinks fit, make an order granting or refusing the application.
- (3) If—
- (a) the prosecutor is not present at the hearing of the application; and
  - (b) the sheriff makes an order granting the application,
- the sheriff clerk shall issue a certified copy of the order to the applicant or his solicitor.
- (4) The sheriff clerk shall record the order made by the sheriff under paragraph (2)(c) in the minute of proceedings, and shall keep the petition and relative documents in his custody.

### *Judicial Examination*

#### **Introductory**

**14.** Subject to the following provisions of this Part relating to judicial examination, the procedure to be followed in relation to examination of the accused under sections 20, 20A and 20B(7) (judicial examination) on any charge shall be in accordance with existing law and practice.

#### **Record of proceedings**

**15.**—(1) The record of all proceedings under those sections shall be kept by the sheriff clerk in the form set out in Form 10 of Schedule 1, and shall be kept by him together with the petition containing the charge or charges in respect of which the accused is brought before the sheriff for examination.

(2) The sheriff clerk shall transmit to the prosecutor a certified copy of the petition and the record of proceedings—

- (a) in relation to proceedings at which the accused is liberated in due course of law, on the conclusion of those proceedings;
- (b) in relation to any further examination, on the conclusion of that examination.

#### **Verbatim record**

**16.**—(1) The prosecutor shall provide for a verbatim record to be made by a shorthand writer under section 20B(1) if he provides a shorthand writer who is either—

- (a) a person recognised by a court as a shorthand writer for the purposes of sections 274(8) and 276 of the 1975 Act or rule 73 of the First Schedule to the Sheriff Courts (Scotland) Act 1907(9); or
- (b) a person other than a person mentioned in sub-paragraph (a) skilled in the writing of shorthand (whether or not in the service of the prosecutor),

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(7) Section 20 was amended by, and sections 20A and 20B inserted by, the 1980 Act, section 6.

(8) Section 274 was amended by the 1980 Act, Schedule 8.

(9) 1907 c. 51; the First Schedule was substituted by S.I.1983/747

and in proceedings where *verbatim* record is made by a person mentioned in sub-paragraph (b), a tape-recorded record of the proceedings is also made by the sheriff clerk in accordance with the provisions of rule 17(1) and (2).

(2) The declaration *de fidei administratione officii* shall be administered to the shorthand writer at the commencement of the proceedings.

(3) The name and designation of the shorthand writer and the making of a declaration by him shall be recorded in the record of proceedings.

(4) The shorthand writer shall record the whole proceedings relating to—

- (a) the emitting by the accused of a declaration under section 20;
- (b) any questions the accused is asked and answers given including declining to answer, under section 20A,

and, subject to paragraph (5), make a transcript of those proceedings.

(5) The shorthand writer shall not include in the transcript he makes of the proceedings any questions disallowed by the sheriff and any answers to such questions.

(6) The shorthand writer shall, in addition to the transcript of proceedings he makes under paragraph (4), also make such further transcript of the record made by him as either the judge at a preliminary diet or the High Court of Justiciary on an appeal may direct for the purposes of considering an application under section 151(2)(10).

(7) The shorthand writer shall, as soon as possible after the conclusion of the proceedings, deliver to the prosecutor the transcript signed and certified by him in accordance with section 20B(2).

### **Use of tape recorders**

**17.—**(1) Any tape-recorded record of the proceedings made under rule 16(1), shall be made on two separate tapes simultaneously one of which shall be marked “tape A” and the other “tape B”.

(2) The sheriff clerk shall record on both tapes any proceedings mentioned in rule 16(5), and for the purposes of maintaining a continuous record of the proceedings on both tapes the proceedings may be interrupted at the instance of the sheriff clerk for such reasonable period as he may require.

(3) The sheriff clerk shall note in the record of proceedings the time of commencement and the time of termination of the tape-recording.

(4) On the conclusion of the proceedings in question the sheriff clerk shall—

- (a) deliver tape B to the prosecutor;
- (b) cause tape A to be sealed in an envelope or other similar container on which the following information shall be endorsed:—
  - (i) the name of the accused;
  - (ii) the date of examination;
  - (iii) the name of the presiding sheriff;
  - (iv) the name of the shorthand writer;
  - (v) the time of commencement and of termination of the tape;
  - (vi) the time and date of sealing.

(5) The sheriff clerk shall retain tape A until he is informed in writing by the prosecutor that the proceedings against the accused in respect of the charge or charges in relation to which he was examined have come to an end.

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(10) Section 151 was substituted by the 1980 Act, section 6(3).

(6) The sheriff clerk shall not permit the seal on the container to be broken while he retains it except on being authorised to do so by a judge.

(7) On being so authorised the sheriff clerk shall only permit such access to tape A for such period as may be required for the purposes of the authorisation and on the expiry of that period shall again comply with the requirements of paragraphs (4)(b) and (5).

(8) The sheriff clerk shall, on being informed in writing by the prosecutor, that the proceedings mentioned in paragraph (5) have come to an end, return tape A to the prosecutor.

(9) For the purposes of paragraph (8), the circumstances in which the proceedings have come to an end include—

- (a) a decision by the prosecutor to take no further action against the accused in respect of the charge or charges in question;
- (b) following conviction and sentence of the accused in respect of the charge or charges in question, the expiry of any statutory period of appeal without an appeal being taken;
- (c) the final disposal of any appeal which has been taken.

### **Questions by prosecutor**

**18.**—(1) The sheriff before whom the accused is brought for examination shall, if the prosecutor proposes to ask the accused questions regarding the alleged making by the accused of an extrajudicial confession to which section 20A(1)(b) (confession in the hearing of police officer) applies, be provided by the prosecutor before the commencement of the examination with a copy of the written record of the confession allegedly made.

(2) If the sheriff has not been so provided the prosecutor shall not ask the accused any such questions.

(3) The accused shall not be put on oath in the course of any proceedings on examination.

(4) The judge presiding at the trial of an accused who has declined to answer any question under section 20A(1) (prosecutor's questions as to matters in the charge or as to confession or declaration) may, in determining whether his having so declined may be commented upon by virtue of section 20A(5) (comments at trial), have regard to the terms of the charge to which the question related.

(5) The petition containing the terms of the charge to which the question referred to in paragraph (4) related, or a copy of the petition certified by the sheriff clerk as such, shall be sufficient evidence of the terms of that charge for the purposes of that paragraph; but the petition or certified copy petition in question shall—

- (a) not be included in any list of productions made available at the trial;
- (b) not be referred to in evidence by any witness at the trial.

(6) The prosecutor shall, if the presiding judge proposes to have regard to the terms of that charge for the purposes of paragraph (4), provide him with the petition or certified copy petition referred to in paragraph (5).

### **Rectification of errors in transcript**

**19.**—(1) A notice served under section 20B(4)(a) shall be in the form set out in Form 11 of Schedule 1.

(2) The prosecutor shall, on serving or on receiving such a notice, immediately lodge with the sheriff clerk the transcript, signed and certified by the shorthand writer under section 20B(2).

(3) An application to the sheriff for an error or incompleteness to be rectified under section 20B(4)(b) shall be in the form set out in Form 12 of Schedule 1.

(4) The application shall be lodged with the sheriff clerk together with—

- (a) a copy of the notice served under section 20B(4)(a), and
- (b) an execution of service of that notice.

(5) When the person upon whom notice is served under section 20B(4)(a) agrees with the opinion to which that notice relates, he may intimate his agreement to the person serving notice in the form set out in Form 13 of Schedule 1, and shall, at the same time as so intimating his agreement, send a copy to the sheriff clerk.

(6) On the lodging of an application under paragraph (3), the sheriff unless he dispenses with a hearing, shall by deliverance endorsed on the application—

- (a) fix a date for a hearing;
- (b) order intimation of the date of the hearing to be made by the sheriff clerk to the prosecutor and to the accused person to whose examination the transcript relates.

(7) If the sheriff authorises rectification of the transcript, he shall by deliverance endorsed on the application and signed by him specify the rectification authorised.

(8) The sheriff clerk shall give effect to any authorised rectification by amending the signed and certified transcript in accordance with the terms of the sheriff's deliverance and initialling any amendment.

(9) On making any such amendment, the sheriff clerk shall—

- (a) attach to the rectified transcript a copy of the deliverance certified by him;
- (b) return it to the prosecutor;
- (c) retain the application for rectification and the deliverance made in respect of the application;
- (d) attach them to the record of proceedings mentioned in rule 15.

#### **Alteration of time limits by sheriff**

**20.** Any direction made by the sheriff under section 20B(5)(a) with modifications as to time limits shall be entered in the record of proceedings mentioned in rule 15 and authenticated by the sheriff subscribing his signature.

#### **Postponement of trial diet by sheriff**

**21.**—(1) The sheriff shall not make an order under section 20B(5)(b) postponing the trial diet in respect of a case set down for trial in the High Court.

(2) Any order by a sheriff postponing the trial diet in a case not set down for trial in the High Court shall be—

- (a) endorsed on the record copy indictment;
- (b) authenticated by the signature of the sheriff;
- (c) intimated—
  - (i) by the prosecutor to any co-accused by serving on them an intimation of postponement in the form set out in Form 14 of Schedule 1;
  - (ii) by the sheriff clerk to the governor of any institution in which any co-accused is detained.



### **Postponement of trial diet by High Court**

**22.**—(1) If the sheriff considers that it may be appropriate to make an order under section 20B(5) (b) postponing a trial diet in respect of a case set down for trial in the High Court, he shall report the circumstances (including the making of any direction under section 20B(5)(a)) to the Clerk of Justiciary.

(2) The Clerk of Justiciary on receiving the sheriff's report shall—

- (a) fix a diet to which the trial diet shall be treated as being postponed for the determination by a single judge of the High Court of the diet to which the trial shall be postponed;
- (b) intimate that diet to the prosecutor and the accused and to the governor of any institution in which any of the accused is detained.

(3) The judge, in determining the diet to which the trial shall be postponed, shall have regard to the terms of the sheriff's report.

### **Alteration of time limits by High Court**

**23.**—(1) All applications to the High Court for a direction to extend a time limit mentioned in section 20B(6) shall be made by way of petition.

(2) A petition under paragraph (1) shall be intimated to the other party and lodged together with a certificate of intimation with the sheriff clerk.

(3) The sheriff clerk, on the lodging of a petition, shall transmit it to the Clerk of Justiciary together with a certified copy of the relative petition and record of proceedings.

(4) A petition under paragraph (1) may be disposed of by a single judge of the High Court.

(5) The Clerk of Justiciary shall, as soon as possible after he receives the petition, fix a diet for the hearing and intimate the diet to the prosecutor and the accused.

(6) The Clerk of Justiciary, on the disposal of the petition by the High Court, shall transmit a certified copy of the deliverance of the High Court to the sheriff clerk.

(7) The sheriff clerk on receiving the certified copy of the deliverance shall attach it to the record of proceedings.

### *Preliminary Diet*

### **Minute giving written notice**

**24.**—(1) Any written notice given under section 76(1) (preliminary diet) shall be in the form of a minute as set out in Form 15 of Schedule 1.

(2) Any such minute that relates to a case set down for trial in the High Court at a sitting outside Edinburgh shall specify any productions required for the preliminary diet.

(3) The minute shall be lodged—

- (a) if it relates to a case set down for trial in the High Court, with the Clerk of Justiciary,
- (b) if it relates to a case set down for trial in the sheriff court, with the sheriff clerk,

in accordance with the provisions of rules 25 and 26.

### **Intimation of minute**

**25.**—(1) A formal execution of prior intimation of the minute to all other parties shall be lodged at the same time as the minute.

(2) If it is not so lodged, the Clerk of Justiciary or the sheriff clerk, as the case may be, shall refuse to accept the minute for lodging.

### **Procedure on lodging**

**26.**—(1) On the lodging of the minute, the Clerk of Justiciary or the sheriff clerk, as the case may be, shall—

- (a) endorse on it the time and date on which it was received;
- (b) as soon as possible, place the minute before a judge.

(2) On considering the minute in the absence of parties or of any person acting on their behalf, or otherwise as he thinks fit, the judge—

- (a) if the minute raises a matter mentioned in paragraph (a) of section 76(1) (competency and relevancy, etc.), shall make an order for a preliminary diet specifying the date and time of the diet and the period (if any) for which the trial diet is postponed in terms of section 76(4);
- (b) if the minute raises a matter mentioned in either paragraphs (b) or (c) of section 76(1), may make or refuse to make such an order.

### **Order for preliminary diet**

**27.**—(1) An order made under rule 26(2) shall not be invalid by reason only of having been made in the absence of the parties or of any person acting on their behalf.

(2) Any such order shall be—

- (a) endorsed on the minute,
- (b) authenticated by the judge subscribing his signature,
- (c) attached together with the minute to the record copy indictment.

### **Intimation of order**

**28.**—(1) The Clerk of Justiciary or the sheriff clerk, as the case may be, shall as soon as possible after the making of any such order, intimate its terms to all parties and to the governor of any institution in which any of the accused is detained.

(2) Where, in relation to a case set down for trial in the sheriff court, the High Court makes an order under section 76(5) extending the period for which the trial diet has been postponed, the Clerk of Justiciary shall send a copy of the order to the appropriate sheriff clerk who shall, as soon as possible after receiving the order, intimate its terms to all parties and the governor of any institution in which any of the accused is detained.

### **Order to be warrant for citation**

**29.** Any order made under rule 26(2) specifying the period for which the trial diet is postponed, and any order made under section 76(5) extending that period shall, for the purposes of section 69 (warrants for citation), be treated as being a warrant issued by the Clerk of Justiciary or the sheriff clerk, as the case may be, to officers of law to cite accused persons, witnesses and jurors for the date to which the trial diet has by virtue of that order been postponed and shall have effect for those purposes.

### **Calling postponed diet**

**30.** If in relation to any case a trial diet has been postponed by virtue of an order mentioned in rule 29, any requirement to call that diet at any sitting of the court shall have effect only in relation to a sitting on the date to which the diet has been postponed.

### **Warrant for conveyance and transmission**

**31.** A copy of any order for a preliminary diet under rule 26(2) duly certified by the Clerk of Justiciary or the sheriff clerk, as the case may be, shall be warrant—

- (a) for the conveyance to the preliminary diet of any accused who is in custody,
- (b) in a case set down for trial by the High Court at a sitting outside Edinburgh in respect of which the preliminary diet has been ordered in Edinburgh, for the transmission to the Clerk of Justiciary of any productions specified in the minute.

### **Abandonment of matter to be raised at preliminary diet**

**32.—**(1) Where a diet has been fixed for a preliminary diet under section 76 and the party raising the matter decides not to proceed with it, he shall give written notice of abandonment of the minute giving written notice under that section previously lodged by him.

(2) The notice of abandonment shall be in the form set out in Form 16 of Schedule 1.

(3) The notice shall be intimated forthwith to the clerk of court and to all other parties and to the governor of any institution in which any of the accused is detained.

(4) Upon such intimation it shall not be necessary to convene the court for the preliminary diet unless another minute giving written notice under section 76(1) has been lodged between the lodging of the first notice and the notice of abandonment.

### **Procedure at preliminary diet**

**33.—**(1) A preliminary diet shall commence on the diet being called.

(2) For the purposes of the application of section 274 (shorthand notes of trial) to a preliminary diet the whole proceedings at the preliminary diet shall be proceedings at the trial for the purposes of that section.

(3) A record of those proceedings, including—

- (a) a note of the decision made by the court in respect of any notice placed before it,
- (b) any continuation or adjournment,
- (c) the plea or pleas stated at the conclusion of the diet in terms of section 76(6),

shall be kept in accordance with existing law and practice.

(4) At any time after the commencement of the diet, the judge may make an order continuing or adjourning the diet to another time or place, but he shall not require to make an order continuing it to the trial diet.

(5) A copy of an order continuing or adjourning the diet under paragraph (4) duly certified by the Clerk of Justiciary or the sheriff clerk, as the case may be, shall be warrant—

- (a) for the conveyance to the continued or adjourned diet of any accused who may be in custody,
- (b) for the citation to that diet of any witnesses.

### **Application for leave to appeal**

**34.**—(1) An application for leave to appeal to the High Court against a decision at a preliminary diet under section 76A(1)(11) (appeal against decision at preliminary diet) shall be made by way of motion to the judge at that diet immediately following the making of the decision in question, and shall be either granted or refused there and then.

(2) If leave to appeal is granted, the judge shall consider whether or not to postpone the diet of trial and if he decides that it is necessary or desirable to do so, he may discharge the trial diet and fix a new diet under section 77A (postponement of the trial diet).

(3) Rule 38 shall apply to an order postponing a trial diet under this rule as it applies to an order postponing the trial diet under that rule.

(4) Any order made under this rule shall be recorded in the record of proceedings.

### **Note of appeal**

**35.**—(1) An appeal taken under section 76A(1) (appeal against decision at preliminary diet) shall be made by way of note of appeal in the form set out in Form 17 of Schedule 1.

(2) The note of appeal shall be lodged—

- (a) in a case set down for trial in the High Court, with the Clerk of Justiciary,
- (b) in a case set down for trial in the sheriff court, with the sheriff clerk,

not later than two days after the making of the decision in question.

### **Procedure on lodging note of appeal**

**36.**—(1) On the lodging of a note of appeal with the sheriff clerk he shall endorse on it a certificate that leave to appeal has been granted and the date and time of lodging.

(2) On the lodging of a note of appeal against a decision of a sheriff, the sheriff clerk shall as soon as possible—

- (a) send a copy of the note of appeal to the other parties or their solicitors,
- (b) request a report on the circumstances relating to his decision from the sheriff,
- (c) transmit the note of appeal to the Clerk of Justiciary together with a certified copy of—
  - (i) the indictment,
  - (ii) the record of proceedings,
  - (iii) any relevant document.

### **Sheriff's report**

**37.**—(1) The sheriff on receiving a request for a report under rule 36(2) shall, as soon as possible, send his report to the Clerk of Justiciary.

(2) The Clerk of Justiciary shall, on receiving the sheriff's report—

- (a) send a copy of the report to the parties or their solicitors,
- (b) arrange for a hearing of the appeal as soon as possible,
- (c) cause to be copied any documents necessary for the appeal court.

### **Intimation of order postponing trial diet**

**38.**—(1) Where in relation to any appeal under section 76A(1) (appeal against decision at preliminary diet) in a case set down for hearing in the sheriff court, the High Court makes an order or order and direction under section 76A(2) postponing the trial diet, the Clerk of Justiciary shall send a copy of the order or order and direction, as the case may be, to the sheriff clerk and to all parties to the proceedings and to the governor of any institution in which any of the accused is detained.

(2) Rules 29 and 30 shall apply to an order or an order and direction mentioned in paragraph (1) as they apply to an order mentioned in rule 29.

### **Order of appeal court**

**39.**—(1) The Clerk of Justiciary shall intimate to the sheriff clerk the decision of the High Court disposing of an appeal under section 76A(1) (appeal against decision at preliminary diet).

(2) If the High Court in disposing of an appeal under section 76A(1) reverses a decision that dismisses the case against the accused, and makes a direction to the Court of first instance that it fix a trial diet, that direction shall be authority to the Clerk of Justiciary or the sheriff clerk, as the case may be, to issue a fresh warrant for citation under section 69 (warrant of citation).

### **Abandonment of appeal**

**40.**—(1) An appellant who has taken an appeal under section 76A(1) may abandon the appeal at any time before the hearing of the appeal.

(2) An appeal shall be abandoned by way of lodging a minute of abandonment with the Clerk of Justiciary in the form set out in Form 18 of Schedule 1.

(3) The Clerk of Justiciary, on receiving a minute of abandonment of an appeal in a case set down for trial in the sheriff court, shall inform the sheriff clerk and the other parties or their solicitors.

(4) The sheriff, on the sheriff clerk being so informed, may proceed as accords with the case.

### *Alteration and Postponement of Trial Diet*

### **Alteration of trial diet**

**41.**—(1) If circumstances arise in which the court may adjourn the trial diet to a subsequent sitting under section 77, and the prosecutor proposes such an adjournment, he may for that purpose require the trial diet to be called at the sitting for which it was originally fixed at such time as he thinks appropriate.

(2) If, on the trial being so called, the prosecutor—

(a) informs the court that a warrant for an appropriate subsequent sitting of the court has been issued, and

(b) moves the court to adjourn the trial diet to that subsequent sitting,

the court shall grant his motion.

(3) The presence of the accused in court when the trial diet was so called and adjourned, shall be sufficient intimation to him of the adjourned diet.

(4) If the trial diet was so called and adjourned in the absence of the accused, the prosecutor shall immediately serve on the accused an intimation of adjournment in the form set out in Form 19 of Schedule 1.

(5) The calling and the adjournment of the trial diet including a record as to the presence or absence of the accused, as the case may be, shall be endorsed by the clerk of court on the record copy indictment and entered in the record of proceedings in accordance with existing law and practice.

(6) A copy of an order of the court adjourning the trial diet to a subsequent sitting under section 77 shall be sent by the Clerk of Justiciary or the sheriff clerk, as the case may be, to the governor of any institution in which any of the accused is detained.

#### **Application for postponement of trial diet**

**42.**—(1) Subject to paragraph (2), an application for postponement of the trial diet under section 77A(1) shall be made by way of minute in the form set out in Form 20 of Schedule 1.

(2) Where all the parties join in the application it shall be made by way of joint minute in the form set out in Form 21 of Schedule 1.

(3) The minute shall be lodged—

- (a) in a case set down for trial in the High Court, with the Clerk of Justiciary,
- (b) in a case set down for trial in the sheriff court, with the appropriate sheriff clerk.

#### **Order fixing diet**

**43.** The minute shall be placed before the court and the court (if section 77A(3) does not apply) shall make an order endorsed on the minute—

- (a) fixing a diet for a hearing of the application.
- (b) for intimation of the minute and of the diet to all parties.

#### **Calling of diet**

**44.**—(1) The diet shall (if section 77A(3) and the proviso to section 77A(4) do not apply) be held in open court in the presence of all parties, and shall be commenced by the calling of the diet.

(2) On the calling of the diet the prosecutor shall inform the court—

- (a) whether any other cases have been set down for trial at the sitting in respect of which the application for postponement of the trial diet is made, and
- (b) whether a warrant has been issued under section 69 for a subsequent sitting of the court.

#### **Orders**

**45.**—(1) If the court is informed by the prosecutor that no other cases have been set down for trial at the sitting in respect of which the application for postponement of the trial diet is made and has granted the application under section 77A(2), the court shall make an order authorising—

- (a) if citations have been issued to jurors for the original diet, the issue to those jurors of intimations that they are not required to attend at the original diet, but are required to attend at the new diet;
- (b) if such citations have not been issued, the issue to the jurors shown on the original list of jurors of citations requiring them to attend at the new diet.

(2) If the court is informed by the prosecutor that other cases have been set down for trial at that sitting and has granted the application under section 77A(2), the court shall, in fixing a new trial diet, have regard to the time required to issue citations to such jurors on the list of jurors as have not been summoned under section 97 for the sitting in which the new diet is being fixed and are required to be summoned by reason of the granting of the application.

(3) If at the diet—

- (a) the court is of opinion that the original diet should not proceed, and
- (b) the court has been informed that a warrant has been issued under section 69 for a subsequent sitting of the court within the period mentioned in relation to that court in section 77,

the court may, notwithstanding the provisions of section 77A(2), make an order adjourning the trial diet to that subsequent sitting, and that order shall have effect as if it had been made under section 77.

### **Notice fixing new diet**

**46.**—(1) If the court gives leave to the prosecutor to serve a notice fixing a new trial diet under section 77A(2), the prosecutor shall consult with the Clerk of Justiciary or the sheriff clerk, as the case may be, as to an appropriate date before fixing that diet.

(2) Such a notice shall be in the form set out in Form 22 of Schedule 1, and shall be served by the prosecutor on all parties and on the governor of any institution in which any of the accused is detained, and a copy of the notice together with the relative execution of service shall be lodged by him as soon as possible with the clerk of court.

(3) A notice served in accordance with paragraph (2) shall, for the purposes of section 69, be treated as being a warrant issued by the Clerk of Justiciary or the sheriff clerk, as the case may be, to officers of law to cite accused persons, witnesses and jurors for the date specified in the notice for the new trial diet, and shall have effect for those purposes.

(4) The clerk of court shall, on receiving a copy of the notice, attach it to the record copy indictment.

### **Record**

**47.** The clerk of court shall record by endorsement on the record copy indictment—

- (a) the calling of the diet of the hearing under section 77A(2),
- (b) the proceedings at the hearing,
- (c) the decision of the court,

and that record shall be authenticated by the judge subscribing his signature, and entered in the record of proceedings in accordance with existing law and practice.

### **Joint application without hearing**

**48.**—(1) If in the case of a joint application the court proposes to proceed under section 77A(2) without hearing the parties, the Clerk of Justiciary or the sheriff clerk, as the case may be, shall on the lodging of the minute attach it to the record copy indictment and place it before a judge in chambers.

(2) The order made by the judge in chambers in respect of the joint application shall be—

- (a) recorded by endorsement on the record copy indictment,
- (b) authenticated by the judge subscribing his signature,
- (c) entered in the record of proceedings in accordance with the existing law and practice,
- (d) intimated by the clerk of court to the applicants or their solicitors.

(3) The clerk of court shall send to the governor of any institution in which any of the accused is detained a copy of the following orders of the court—

- (a) an order under rule 43 fixing a diet for hearing of the application,
- (b) an order under section 77A(2) discharging a trial diet and fixing a new trial diet,
- (c) an order under rule 45(3) adjourning a trial diet to a subsequent sitting.

### Calling of adjourned diet

49. If in relation to any case, a trial diet has been discharged or adjourned under rules 42 to 48, any requirement to call that diet at any sitting of the court shall have effect only in relation to the sitting at which the new trial diet has been fixed.

### *Appeals Against Extension of Time Limits*

#### Note of appeal

50.—(1) A note of appeal presented to the High Court under section 101(5)(12) shall be made in the appropriate form set out in Form 23, 24 or 25 of Schedule 1.

(2) A note of appeal under that section shall be served by the appellant on—

- (a) the respondent, and
- (b) the clerk of the court against whose decision the appeal is taken.

(3) The appellant in a note of appeal under that section shall lodge with the Clerk of Justiciary—

- (a) the note of appeal, and
- (b) the execution of service in respect of the persons mentioned in paragraph (2).

(4) The clerk of the court against whose decision the appeal is taken shall, as soon as practicable after being served with the note of appeal, transmit to the Clerk of Justiciary the original application and all the relative documents; and the Clerk of Justiciary shall on receiving them assign the appeal to the roll and intimate the date of the diet to the appellant and the respondent.

### *Letters of Request*

#### Application

51.—(1) An application to the court by the prosecutor or the defence under section 32(1)(a) of the 1980 Act for the issue of a letter of request shall be made by way of petition in the appropriate form set out in Form 26 of Schedule 1.

(2) An application so made shall be lodged—

- (a) where it relates to proceedings in the High Court or to proceedings in respect of which the court where the trial is to take place is not yet known, with the Clerk of Justiciary;
- (b) where it relates to proceedings in the sheriff court, with the sheriff clerk,

and shall be accompanied by a proposed letter of request including the matters set out in Form 27 of Schedule 1.

(3) An application made to the High Court may be disposed of by a single judge.

(4) The High Court or the sheriff shall on the application being placed before them—

- (a) order intimation on the other party or parties to the proceedings; and
- (b) subject to paragraph (5), allow such time for lodging answers as appears appropriate; and
- (c) fix a diet for hearing the application and answers (if any).

(5) The High Court or the sheriff may dispense with answers to an application under this rule on cause shown.



## **Powers of Court**

**52.**—(1) The High Court or the sheriff may, after considering the application and answers (if any), either grant the application with or without modification or refuse it.

(2) On granting an application under this rule the High Court or the sheriff, as the case may be, shall—

- (a) allow interrogatories to be adjusted summarily;
- (b) pronounce a deliverance approving the terms—
  - (i) of the letter of request to be sent;
  - (ii) of the interrogatories and cross-interrogatories (if any) to be sent;
- (c) if English is not an official language of the body to whom the letter of request is addressed, specify a period within which a translation of the letter and of the interrogatories and cross-interrogatories and of any productions is to be lodged.

## **Expenses**

**53.**—(1) The solicitor for the applicant, or if he is unrepresented, the applicant, shall be liable for the expenses of the application.

(2) The High Court or the sheriff, as the case may be, may order the solicitor for the applicant, or the applicant, to consign in court such sum in respect of those expenses as they may specify on or before such date as they may specify.

(3) In the event of the sum so specified not being consigned in court on or before the date so specified, the application shall be treated as having been abandoned.

## **Transmission**

**54.**—(1) On the High Court or the sheriff pronouncing a deliverance under rule 52(2), or in a case where a translation requires to be lodged, on the lodging of the translation, the Clerk of Justiciary or the sheriff clerk, as the case may be, shall send the letter of request and relative documents to the Secretary of State for Foreign and Commonwealth Affairs for onward transmission to the body to whom the letter of request is addressed.

(2) On sending the letter of request and relative documents to the Secretary of State, the Clerk of Justiciary or the sheriff clerk, as the case may be, shall note the documents sent, to whom they were sent, and the date on which they were sent, on the application or on the record copy indictment.

(3) On the relative documents being returned to him, the Clerk of Justiciary or the sheriff clerk, as the case may be, shall—

- (a) note the documents returned, by whom they were returned and the date on which they were returned, on the application or on the record copy indictment; and
- (b) intimate those facts to all parties concerned.

## **Custody of documents**

**55.**—(1) The Clerk of Justiciary or the sheriff clerk, as the case may be, shall, subject to paragraph (2), keep the documents mentioned in rule 54(3) in their custody.

(2) In any case where the application was made to the High Court on the ground that the court in which the trial was to take place was not then known the prosecutor shall, as soon as that court is known, inform the Clerk of Justiciary accordingly; and if that court is the sheriff court, the Clerk of Justiciary shall as soon as is practicable send to the sheriff clerk of the sheriff court in question the record of the evidence of the witness or witnesses in question.

(3) In any case where the record of the evidence of a witness is in the custody of the Clerk of Justiciary or a sheriff clerk under this rule and where intimation has been given to that effect to all the parties concerned in the proceedings under rule 54(3), the name and address of that witness and the record of his evidence shall be treated as being within the knowledge of those parties; and no party shall be required notwithstanding any enactment to the contrary—

- (a) to include the name of that witness in any list of witnesses;
- (b) to include the record of his evidence in any list of productions.

### **Prohibition of reference to evidence without leave**

**56.**—(1) No reference shall be made either directly or indirectly in any proceedings to the evidence, or any part of the evidence, of a witness whose evidence has been taken under rule 52 unless the party seeking to make such reference has made a motion to the court to that effect and that motion has been granted.

(2) The terms of any motion made under paragraph (1) and the grant or refusal of that motion by the court shall be noted by the clerk of court in the record of proceedings.

(3) On any such motion being granted—

- (a) the judge may direct copies of the evidence to which he has granted leave to make reference to be provided to the jury by the party making the motion;
- (b) the clerk of court shall read the record of that evidence to the jury and shall then record that fact in the record of proceedings.

### *Evidence on Commission*

### **Application**

**57.**—(1) An application to the court by the prosecutor or the defence under section 32(1)(b) of the 1980 Act<sup>(13)</sup> for the appointment of a commissioner to examine a witness to whom that section applies, shall be made by way of petition in the appropriate form set out in Form 28 of Schedule 1.

(2) An application so made shall be lodged—

- (a) where it relates to proceedings in the High Court or to proceedings in respect of which the court where the trial is to take place is not yet known, with the Clerk of Justiciary;
- (b) where it relates to proceedings in the sheriff court, with the sheriff clerk.

### **Appointment of Commissioner**

**58.**—(1) On making an order granting an application under rule 57 the High Court or the sheriff, as the case may be, shall appoint a commissioner to examine the witness or witnesses to whom the order applies, and a clerk to assist the commissioner in the carrying out of his duties, and shall dispense with interrogatories.

(2) On the court making an order under paragraph (1), the Clerk of Justiciary or the sheriff clerk, as the case may be, shall send the order to either the commissioner or his clerk together with the other relative documents.

(3) On the sending of the relative order and documents to the commissioner or his clerk under paragraph (2), the Clerk of Justiciary or the sheriff clerk, as the case may be, shall note the order and documents sent, to whom they were sent, and the date on which they were sent, on the application, or on the record copy indictment.

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<sup>(13)</sup> Section 32 was amended by the Criminal Justice (Scotland) Act 1987 (c. 41), section 61.

### **Commission**

**59.**—(1) The commissioner shall, on receiving the order and documents mentioned in rule 58(2), determine the place and the date of the diet or diets for the examination of the witness or witnesses to whom the order of the court relates, and shall give reasonable notice of those matters to all the parties concerned.

(2) The commissioner may vary or revoke his determination or adjourn the examination of any witness to such other place, at such other date and time, as he may determine.

(3) If in the course of the examination of a witness under this rule any question arises as to the admissibility of any evidence, the commissioner shall not determine any such question but shall allow the evidence subject to all questions of competency and relevancy.

### **Commissioner's report**

**60.** On the carrying out of his commission in accordance with the terms of the order appointing him, or otherwise on concluding his commission, the commissioner shall complete a written report of his commission, and he or his clerk shall return the report and relative documents to the Clerk of Justiciary or the sheriff clerk, as the case may be.

### **Application of other provisions**

**61.** The following rules shall apply to an application under rule 57 as they apply to an application under rule 51:—

- rule 51(3) to (5);
- rule 52(1);
- rule 53;
- rule 54(3);
- rule 55;
- rule 56.

### *Interim Hospital Order*

### **Application**

**62.**—(1) Where the court has made or renewed an interim hospital order under section 174A(14) and the responsible medical officer has intimated to the prosecutor either—

- (a) that he seeks a continuation of the order, or
- (b) that he seeks termination of the order before the date on which it would otherwise cease to have effect,

the prosecutor shall make an application in the form set out in Form 29 of Schedule 1, to the court which made the order, to renew or terminate the order, as the case may be.

(2) Where an application is made under paragraph (1)—

- (a) the court shall by interlocutor in the form set out in Form 30 of Schedule 1, appoint a diet for hearing the application and where appropriate, grant warrant to authorised officers of the hospital, or officers of law, for conveyance of the offender from the hospital to the court for that diet; and

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(14) Section 174A was inserted by the Mental Health (Amendment) (Scotland) Act 1983 (c. 39), section 34(a), and was amended by the Mental Health (Scotland) Act 1984 (c. 36), Schedule 3, paragraph 25.

(b) the clerk of court shall intimate the application and the diet to the offender or his solicitor.

(3) Where, in an application under paragraph (1)(a), the court renews an interim hospital order before the date on which the order would otherwise cease to have effect, the period of renewal shall commence from the date on which the order would otherwise cease to have effect.

(4) Where the court makes an order to renew or terminate an interim hospital order, before the date on which it would otherwise cease to have effect, the adjourned diet fixed when the previous order of the court was made shall be treated as being discharged.

### *Reference to European Court*

#### **Preliminary**

**63.** In this rule and in rules 64 to 67 unless the context otherwise requires—

“the European Court” means the Court of Justice of the European Communities;

“question” means a question within the meaning of Article 177 of the Treaty establishing the European Economic Community, Article 150 of the Treaty establishing the European Atomic Energy Community or Article 41 of the Treaty establishing the European Coal and Steel Community;

“reference” means a request to the European Court for a preliminary ruling on a question.

#### **Notice**

**64.**—(1) If a question is to be raised in any proceedings on indictment (other than proceedings on appeal) notice of intention to do so shall be given to the court before which the trial is to take place and to the other parties not later than 15 days after service of the indictment.

(2) The notice shall be recorded on the record copy of the indictment or in the record of proceedings, as the case may be, and the court, in chambers, shall reserve consideration of the question to the trial diet.

(3) The court may order that witnesses and jurors are not cited to attend at the trial diet.

(4) At the trial diet the court, after hearing parties, may determine the question or may decide that a preliminary ruling should be sought.

(5) If the court determines the question the accused shall then (if appropriate) be called upon to plead to the indictment, and without prejudice to any other power available to it, the court—

(a) may prorogate the time for lodging any special defence;

(b) may continue the diet to a specified time and place;

(c) in a case where witnesses and jurors have not been cited to attend at the trial diet, shall continue the diet and order the citation of witnesses and jurors to attend the continued diet.

(6) No period during which the diet is continued under paragraph (5) shall—

(a) subject to paragraph (7), be longer than 21 days;

(b) be taken into account for the purposes of determining whether any time limit has expired.

(7) The court may on the application of the prosecutor or the defence extend any period during which the diet is continued for such longer period than 21 days as it thinks fit, on special cause shown.

#### **Reference**

**65.**—(1) If the court decides that a preliminary ruling should be sought the court shall—

(a) give its reasons and cause those reasons to be recorded in the record of proceedings;

- (b) continue the proceedings from time to time as necessary for the purposes of the reference.
- (2) The reference—
  - (a) shall be in the form set out in Form 31 of Schedule 1, and the court may give directions to the parties as to the manner in which and by whom the case is to be drafted and adjusted;
  - (b) shall thereafter be adjusted at the sight of the court in such manner as may be so directed;
  - (c) after approval and the making of an appropriate order by the court, shall (after the expiry of the period of appeal) be transmitted by the clerk of the court to the Registrar of the European Court, along with a certified copy of the relative record of proceedings and, where applicable, a certified copy of the relative indictment.

### **Preliminary ruling**

**66.** When a preliminary ruling has been given by the European Court on a question referred to it and the ruling has been received by the clerk of court which made the reference, it shall be laid by the clerk before the court, and the court shall then give directions as to further procedure, which directions shall be intimated by the clerk along with a copy of the ruling to each of the parties to the proceedings.

### **Appeal against reference**

**67.—**(1) Where an order making a reference is made under rule 65, any party to the proceedings who is aggrieved by the order may within 14 days thereafter appeal against the order to the High Court sitting as a court of appeal, but this rule does not apply to such an order made in proceedings in the High Court sitting as a court of appeal and proceedings on petitions to that Court for the exercise of its nobile officium.

(2) Any appeal under this rule shall be made by lodging with the clerk of the court that made the order a note of appeal in the form set out in Form 32 of Schedule 1 and signed by the appellant or his solicitor; and a copy of the note shall be served by the appellant on each other party to the proceedings.

(3) If the clerk of the court that made the order is not the Clerk of Justiciary, he shall record the lodging of the note in the record of proceedings and shall forthwith transmit the note to the Clerk of Justiciary, together with the record and a certified copy of the relative indictment.

(4) In disposing of an appeal under this section the High Court (sitting as a court of appeal) may—

- (a) if the appeal is against an order made in proceedings on indictment in which the accused has been indicted for trial in the High Court, either sustain or dismiss the appeal and in the latter case itself cause the reference to be transmitted to the Registrar of the European Court;
- (b) if the appeal is against an order made in any other proceedings, either sustain or dismiss the appeal and in either case remit the proceedings to the court of first instance with instructions to proceed as accords;
- (c) in any case, give such directions for other procedure as it thinks fit.

(5) Unless the court making the order otherwise directs, a reference shall not be transmitted to the Registrar of the European Court before the time allowed by this rule for appealing against the order has expired or before the appeal has been disposed of or withdrawn.

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**Status:** This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

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*Notice of Special Defence*

**Written notice**

**68.** Written notice of a special defence or of an intention to lead evidence calculated to exculpate an accused by incriminating a co-accused, lodged under section 82(1) shall be lodged with the clerk of the court before which the trial is to take place, and at the same time a copy of the notice shall be sent to the Crown and to any co-accused or to the solicitor of the co-accused.