

**John Finlay**

## **The petition in the Court of Session in Eighteenth-century Scotland**

### *Abstract*

*Legal petitions arose in different contexts: petitioners might seek authority to enter into an office, or they might seek some equitable remedy or relief from oppressive circumstances, or they might, in the course of litigation, seek to reclaim from an interlocutor. Petitions in the context of litigation were almost always written by professional lawyers and couched in the language of the law, but in a procedure where facts were as disputable as law, they were often lengthy and contained a great deal of incidental information.*

*Petitions provide evidence of a range of social practices, some of which may not readily be evidenced in other sources. Depending upon their purpose, they might be brief and stereotyped in form, or they might extend to hundreds of pages of legal argument. Presenting a petition required respect for procedural norms and the use of abusive and inappropriate language would be punished by the judges. At the same time, wherever a petition was written in a litigated cause, the aim of counsel was to gain a sympathetic hearing for a client and the text was written accordingly.*

*Petitions in Scotland did sometimes circulate publicly and were written with an eye to public consumption, either at the desire of the lawyer or the client. Generally, however, they concern private causes although even these might contain rhetorical flourishes and arguments based on fundamental ideas of political liberty. Many petitions did arise out of the public sphere, particularly in the arena of local or parliamentary electoral politics. Underlying them we can see contemporary political machinations at play and this is a reminder that behind every petition, political or not, there lay a story and a legal strategy.*

This contribution discusses petitions in the Court of Session, Scotland's central civil court, primarily in the eighteenth century. The court was composed of fifteen judges: fourteen lords ordinary and a lord president. While individual lords ordinary heard cases at first instance in the Outer House, and dealt with summary bills and evidential matters, the 'hail fifteen' sat collectively in the Inner House of the court to determine points reported to them for decision. Their jurisdiction was extensive, both as a court of review in relation to judgements made in local courts and by a lord ordinary, and also as a court of first instance.

Few attempts have been made systematically to quantify the number of actions or petitions that were heard in the Court of Session during the eighteenth century. While Scots generally enjoyed a reputation for litigiousness, there is considerable evidence across the century of the rise and fall in the level of litigation before the court, with the nadir being reached in the 1740s.<sup>1</sup>

Research by Dr Winifred Coutts in the records of the court in the year 1600 did quantify the number of actions and petitions that were heard. In that year, there were only 11 petitions, although there were also some 56 'supplications'

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<sup>1</sup> J. Finlay, *The Community of the College of Justice* (Edinburgh, 2012), p. 22,139.

and 8 pleas for release from the tolbooth.<sup>2</sup> A ‘supplication’, a term not generally found used in the court by the eighteenth century, does not appear to have been substantively different from a petition, examples being supplications asking the lords to replace arbiters or to order the production of evidence.<sup>3</sup> Petitioners in the court of the seventeenth century sometimes used the word ‘supplicants’ in their petition to describe themselves, therefore it is not unreasonable to regard supplications as functionally the same thing as a petition.<sup>4</sup>

A judicial petition differed from some other types of petition. It was always addressed to the court; always followed a particular legal style and sought a relatively narrow and defined outcome which, if the petition were competently brought, would have been within the jurisdiction of the court to provide. Such petitions were generally, although not always, drafted by a practising lawyer and submitted to one of the clerks of court according to a recognised and regulated procedure.

A petition might be brought in the name of an individual or a corporate body. As Robert Bennet, the dean of the Faculty of Advocates, understood it, the right to bring a petition was shared by every subject in the realm. According to him,

the Right of Petitioning is a Natural Right, competent to every Subject in particular, and declared to be their Priviledge by the Claim of Right. And why a Collective Body, has not as good Right of Petitioning as every Individual, cannot be understood.<sup>5</sup>

All of human life lay behind petitions to the lords of session and this makes them particularly valuable as a source for social and other historians. Behind every petition there lies a story. Sometimes, the story is about public affairs. The machinations of the great and the good, in their attempts to influence the outcome of a local or parliamentary election, are laid bare. Sometimes the story concerns a personal relationship, between spouses, parents and children, or unmarried sexual partners, and details are preserved, occasionally in the form of letters engrossed as evidence in the petition. Other stories concern commercial, employment or property relationships. Very often, however, details appear which offer glimpses of unique facts situations and everyday life that, but for parties going to law, might have been lost forever.

### *The petition*

The classic definition of a petition in Scots law is that given by James MacLaren in his book on Court of Session practice. He described it as:

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<sup>2</sup> W. Coutts, *The Business of the Court of Session in 1600* (Stair Society, 2003), 23, 51.

<sup>3</sup> *Ibid.*, pp. 66, 75.

<sup>4</sup> E.g. National Records of Scotland [NRS], Court of Session, books of sederunt, CS1/7, fo. 16r; CS1/9, fo. 44v.

<sup>5</sup> Advocates Library Session Papers [ALSP], Miscellaneous Collection, vol. 16 (1709-1751), *Information for Mr. Robert Bennet Dean of Faculty and The other Advocates Complained upon at the instance of Her Majesty's Advocate* (n.d.), p. 9. According to the Claim of Right: ‘it is the right of the subjects to petition the king and that all imprisonments and prosecutions for such petitioning are contrary to law.’

‘an *ex parte* application craving the authority of the Court for the petitioner, or seeking the Court to ordain another person, to do an act or acts which otherwise the petitioner would be unable to do, or cause to be done’.<sup>6</sup>

A petition differed from a summons because it did not run in the name of the sovereign and it was never dealt with by means of solemn procedure. Technically, a summons could pass under the signet but a petition had no authority to do that because it emanated not from the crown but from a private party. Therefore a petition could not usually be served on another party without the prior authority of the court.

By definition, a petition was a written application. Oral motions were also made in court and, quite naturally, their terms have not survived unless they were summarised in a minute or referred to in another source. Judges sometimes explicitly preferred to receive a written paper than an oral motion. As the advocate Andrew Crosbie noted to one client, even in the routine matter of setting a date for the advising of his cause, ‘the President would not do it on a motion but ordered a Petition which goes in tomorrow’.<sup>7</sup>

### *The petition and complaint*

A petition differed from a complaint because a complaint invoked the criminal, or, in the case of the Court of Session, the quasi-criminal jurisdiction of the court. There was, however, the possibility of raising a procedure known as a petition and complaint. This might be raised against anyone accused of malversation of a public office, such as a magistrate or a Court of Session judge, or for a contempt of court or another type of misconduct which was subject to the jurisdiction of the Court of Session or the Court of Justiciary.

The Faculty of Advocates brought a petition and complaint before the commissioners of justiciary in 1736 when three of their members were named to serve as jurors in the prosecution of Captain Porteous, despite being exempt from such service.<sup>8</sup> An example of misconduct is the petition and complaint in 1741 brought by the advocate, Michael Menzies, in order to vindicate himself from what he referred to as ‘violent Reflections’ made against him by counsel for his opponents.<sup>9</sup> In respect of the ‘false, injurious and malicious’ reflections made upon his conduct, Menzies craved ‘such redress, and ... Reparation ... as to your Lordships shall seem just.’ Given the tendency of those writing petitions, sometimes at the behest of angry and frustrated clients, to insert text containing personal attacks on their opponent, it is not particularly difficult to find petitions and complaints in which a party responded in order to vindicate his character.<sup>10</sup>

A different object can be seen in the short petition and complaint of Hugh Somervell W.S. which he brought against the clerks of session in 1734, accusing them of wrongfully refusing to return to him some writs which he had delivered to their custody for registration.<sup>11</sup> Somervell would have been liable to his client for the return

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<sup>6</sup> J.A. MacLaren, *Court of Session Practice* (Edinburgh, 1916), p. 825.

<sup>7</sup> National Library of Scotland [NLS], Sharpe of Hoddam papers, Acc. 13218/3, fo. 38 (16 Feb. 1764, Crosbie to George Muir).

<sup>8</sup> NLS, Saltoun papers, MS 17539, fo. 134.

<sup>9</sup> ALSP, Hamilton Gordon, 2<sup>nd</sup> series (Ma-Mo). *The Petition and Complaint of Mr Michael Menzies Advocate*, 12 Feb. 1741.

<sup>10</sup> E.g. ALSP, Arniston collection, vol. 42, no. 14. *The Petition and Complaint of David Forbes, late serjeant in the second Regiment of Guards, called the Coldstream Regiment*, 28 Nov. 1758.

<sup>11</sup> ALSP, Elchies collection, vol. 6, fo. 552.

of the writs, and wilful or undue delay by the clerks would have amounted to misconduct on their part. In the books of sederunt of the Court of Session there is the narrative of a petition and complaint against the messenger and notary Robert Drummond. This was a particularly egregious case. Drummond had taken advantage of the illness of the late Sir Alexander Hope, who resided in the debtors' sanctuary at Holyrood, in order to carry him to prison from the Infirmary where his friends had taken him to receive medical treatment to 'remove his distemper'. Drummond had forced the poor man into a chair and carried him off, then given him liquor, made him turn out his pockets and finally abandoned him in the streets late at night. The petition and complaint sought reparation and punishment and, the matter being proved, Drummond was deprived of the offices of messenger and notary public.<sup>12</sup> This is a very clear example of the law coming to the aid of the vulnerable, and complaints against messengers-at-arms were a common phenomenon.

### *Elements of a petition*

All petitions consisted of the same familiar elements. First, there was the address. In the Court of Session, the phrase primarily used in the eighteenth century was 'Unto the Right Honourable, the Lords of Council and Session'. An earlier version ran: 'My Lords of Council and Session, Unto your Lordships humbly means and shews Your Servitrix'.<sup>13</sup> Until a legislative change in 1857, petitions were always addressed to the Inner House, not to a lord ordinary in the Outer House.<sup>14</sup> After the creation of the two divisions in 1808, it was competent to present some kinds of petition to either division of the Inner House, rather than to provide copies to all the judges.<sup>15</sup> Traditionally, the lords of session had boxes in the waiting room of the Inner House into which petitions were to be placed. The reason for this, as Lord Stair noted in the seventeenth century, was relieve petitioners of the need to go to the various dwelling places of the judges and also to prevent 'the occasion of solicitation', or private lobbying.<sup>16</sup>

Following the address of the petition came the name and designation of the petitioner. There then followed, after the phrase 'Humbly Sheweth' which was a clear indication of respect for the court and the supplicant and inferior status of the petitioner, the narrative setting out the facts which gave rise to the petition. Finally, there was the prayer, setting out the request or complaint of the petitioner. In the Court of Session, this ended with the phrase: 'May it please your Lordships, to 'consider the premisses' and authorize an act or make an order or, in the most common type of petition, alter an interlocutor under review, with the final phrase 'According to justice, and your Lordships Answer' which was later abbreviated to 'According to justice, &c.'

The style of such petitions differed little from other types of formal petition in a legal context, such as petitions to parliament. Of course, the addressee differed, with the king or his high commissioner 'and the Honourable Estates of Parliament'

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<sup>12</sup> NRS, Court of Session, books of sederunt, CS1/13, fos 126v-127r.

<sup>13</sup> ALSP, Forbes collection, vol. 2, p. 1427, *The Petition for Janet Pitcairn, spouse to George Home Town Clerk of Edinburgh and him for his interest*, 28 Feb. 1705.

<sup>14</sup> 20 & 21 Vict., c.56, s.4.

<sup>15</sup> Bell, *Dict.* sub nom. 'petition'.

<sup>16</sup> Stair, *Inst.* IV.2.12.

replacing the judges. So also did the closing prayer, with some phrase being used such as ‘And your Grace and Lordships Petitioner shall ever pray’.<sup>17</sup>

Printed petitions in later Court of Session practice, at least from the second decade of the eighteenth century, always bore a date, but that was not necessarily true of earlier petitions. The absence of a date, of course, can sometimes be a source of frustration for the historian although the dates upon which a petition was heard can usually be traced in the Outer House roll.

### *Purposes of petitions*

Petitions were the appropriate form of procedure in a number of circumstances and it is useful to place those circumstances into categories, working from specific types to the more general.

#### 1. Petitions relative to offices

In the first place, it was necessary to petition for authority to hold some public office. Anyone desirous of becoming an advocate, for example, had first to petition the lords of session; any writer to the signet seeking to take on an apprentice, would petition the keeper and commissioners of the signet. For permission to enter an indenture<sup>18</sup> In the sheriff court, procurators were likewise required to petition the judge for admission. Writers to the signet, on the other hand, petitioned the keeper and commissioners of the signet for admission, rather than the judges. Where an office holder, such as a local sheriff depute or sheriff clerk died or demitted office, then it was normal for a petition to be presented craving that the court would appoint an interim office-holder until a new commission from London was sent up.

In the case of those seeking admission as a notary public, the first step was slightly different in that it consisted of the clerk to the admission of notaries issuing them with a formal writ (known as a presentation), in the name of the sovereign, which informed the lords of session that the candidate had been admitted a notary provided they found him to be qualified.<sup>19</sup> Presumably this was necessary because notaries, at least from the sixteenth century, were an exclusively royal appointment and constitutionally the direct involvement of the crown was necessary, however formal and limited that may have been.<sup>20</sup> In the sixteenth and early seventeenth centuries, a petition for a letter from the king was necessary.<sup>21</sup>

The type of office for which a petition was necessary included that of curator bonis and judicial factor. Such petitions were generally straightforward, but complications could easily arise. An example is the petition of Lilius Mackenzie, the wife of the Murdoch Morison, a merchant in Stornoway.<sup>22</sup> Initially, Lilius petitioned for the appointment of a factor on the basis that her husband was ‘in a State of Furiosity’,

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<sup>17</sup> An example is John Spottiswoode’s petition to parliament, seeking the barony of Newabbey which had belonged to his grandfather: ALSP, Forbes collection, vol. 2, p. 6203.

<sup>18</sup> E.g. NRS, Leith-Buchanan of Ross and Drummakil papers, GD47/418 (Archibald Tod’s petition to take on an apprentice W.S.).

<sup>19</sup> *Royal Commission on the Courts of Law in Scotland*, 5<sup>th</sup> Report (1871), p. 47.

<sup>20</sup> The clerk to the admission of notaries public, a member of the College of Justice, was appointed by the crown under the great seal. The lords of session only had authority to appoint interim holders of the office.

<sup>21</sup> Examples of royal letters can be found in NP3/3.

<sup>22</sup> ALSP, *The Petition of Lilius Mackenzie, spouse to Murdoch Morison Merchant in Stornoway in the Island of the Lewis*, 23 July 1739. [Ph. 3123].

requiring a factor to look after his affairs while the disease lasted. That petition was remitted to Lord Kilkerran, the lord ordinary, to take evidence but he reported to the Inner House, and the judges decided, that there was insufficient evidence of Morison's mental illness. As a result, Lilian had to petition again, this time for a commission to be granted to 'any person of credit' on Lewis to take evidence from witnesses, on the basis that the expence of bringing witnesses to Edinburgh was prohibitive. Indeed, given that there was no messenger-at-arms within 50 miles of Lewis, even citing witnesses would have been difficult.

As well as petitioning for appointment to offices, there are also, in special circumstances, petitions for authority to demit or continue in office. In 1731 Sir Hew Dalrymple petitioned, after 54 years as an advocate and judge, for the privilege of being excused constant attendance on the bench as lord president under an Act of parliament of 1597 in favour of aged and infirm judges. It was not until the nineteenth century that a lord of session acquired the statutory right to a pension, although a number had managed to arrange the grant of a pension from the Crown upon their retirement.

In 1685 the advocate John Smith petitioned the court because, having been prevented by 'his uther affaires' from attending Parliament House to practise his profession for a number of years, he had been informed that he could not again take up the office of advocate until he swore an oath under the Test Act.<sup>23</sup> The judges, in granting the crave of the petition, nominated one of their number before whom he could take the oath. These cases are rare examples, but they demonstrate that in certain instances was no alternative mechanism other than a petition that could be used to obtain the authority of the court for a particular course of action. The advocates who returned the court, after withdrawing in 1674 in a dispute concerning appeals to parliament, all had to petition to be re-admitted, according to the king, 'as fully' as Sir George Mackenzie had done.<sup>24</sup>

## 2. Privileged petitions

Some groups enjoyed a privileged status as petitioners. This was in line with the privileged summonses which the Court of Session, from 1532, specified should be heard in a summary fashion.<sup>25</sup> In the sixteenth century, there is regular mention of a table of privileged summonses which were heard on a summary basis due to the status of the person bringing an action or petition: this included the poor, widows, orphans and members of the College of Justice.

For the poor and vulnerable, having an action heard quickly was very important and some petitions reveal tragic tales of bereavement, ill health and lack of opportunity, made worse by the circumstances giving rise to litigation. On petition in 1743 began with the following note:

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<sup>23</sup> NRS, Court of Session, books of sederunt, CS1/8, fo. 92r.

<sup>24</sup> NRS, Court of Session, books of sederunt, CS1/7, fo. 13v. See, recently, C. Jackson and P. Glennie, 'Restoration Politics and the Advocates' Seccession, 1674-1676' (2012) *Scottish Historical Review*, 76-105.

<sup>25</sup> Finlay, *Men of Law in Pre-Reformation Scotland* (East Linton, 2000), 72-3, 83, 101.

*It is intreated by both Parties, that the Lords would be pleased to advise this Cause, the Aliment of Four Fatherless Children depending on the Decision thereof.*<sup>26</sup>

In the case of members of the College of Justice, the privilege of having cases heard in Edinburgh was a matter of convenience, both for them and their clients. For them, to have to attend if summoned to a local court during the sitting of the Court of Session, would cause unnecessary delay. At the same time lawyers were themselves often litigious and it suited them to be able to raise cases directly in Edinburgh. A quick hearing was also useful in the event of threats against them for carrying on their profession. An example was a petition and complaint brought by the advocate Alexander Lockhart in 1754, seeking the apprehension of James Small, a witness in a criminal action against Lockhart's clients. Small, allegedly, had uttered threats against Lockhart and had begun wearing a sword in public.<sup>27</sup>

In the court of justiciary, petitions by prisoners were also not uncommon. The requirements of the 1701 act concerning criminal procedure imposed deadlines for criminal prosecutions to be brought and, if these were not fulfilled, a prisoner might be expected to petition for release. The alleged forger, John Ross, wrote such a petition in 1731, having languished in the tolbooth of Edinburgh for over six months.<sup>28</sup>

### 3. Petitions for mercy/grace

In a number of courts, petitions brought by vulnerable individuals often narrate a tragic tale of bereavement, ill health and lack of opportunity. Margaret Mitchelson, for example, petitioned the barons of Exchequer setting out her circumstances and seeking supply from the crown.<sup>29</sup> Her state of health was poor and such as to make her unable to work. Her father was dead and she had received support from an aunt who was now also dead but who had left her the use of a room in the Canongate free of rent. The tenement in which the room was located, however, had burned down and she had lost all her possessions, leaving her completely indigent. Such petitions were made to other potential benefactors, of course, including town councils, guilds and societies of lawyers.

Poor prisoners, press-ganged apprentices, and runaway slaves all had circumstances worthy of judicial time and attention. Few were more vulnerable than those imprisoned for debt who lacked the means to support themselves. In Selkirk, in August 1810, a petition was presented to the magistrates on behalf of George White, a prisoner in the tolbooth.<sup>30</sup> He sought the benefit of the 1696 Act anent the Aliment of Poor Prisoners.<sup>31</sup> The bailies sought *Answers* to be lodged by White's creditor-incarcerator, David Murray W.S. White deponed on oath that he had no means to aliment himself in prison and that, since the date of his imprisonment, he had not many any fraudulent conveyance of his property. Murray was ordered to pay 1s 6d per day to White, so long as he remained in the tolbooth. Almost two weeks later, no

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<sup>26</sup> ALSP, Elchies paper, vol. 14, *Answers for Elizabeth Maccombie, Relict of then deceas'd John Middleton Merchant in Aberdeen To the PETITION of John Robertson of Pitmillen, and others, Executors of the Will of the deceas'd James Maccombie Merchant in Aberdeen.*

<sup>27</sup> NRS, Court of Session, books of sederunt, CS1/14, fo 14r

<sup>28</sup> NLS, Saltoun papers, MS 17539, fo. 49.

<sup>29</sup> NRS, Papers of Clerk family of Penicuik, Midlothian, GD18/2798.

<sup>30</sup> Scottish Borders Archive, Hawick, D/47/80/3.

<sup>31</sup> *K.M. Brown et al., ed., Records of the Parliament of Scotland, 1696/9/151.*

payment having been made, White was set at liberty in conformity with the legislation. In a similar case in Inverness in 1808, the petitioner was ‘famishing in Jail for want’ for several days while the agent for his creditor allegedly held on to the process. As a result, he sought the caption (or arrest) of the law agent. The process is interesting for a letter from the prisoner in question, Peter Campbell, to William Wilberforce, asking for his assistance and memorably stating that ‘as you have listened to the cry of the negroe, I trust you will not give a deaf ear to the moan of the prisoner’.<sup>32</sup>

In a complaint brought against James Robb, principal keeper of the Tolbooth in Edinburgh, two prisoners claimed that Robb prevented their friends from bringing them food. He allegedly insisted that they ‘buy Bread and Drink from *James Rob’s* Suttlerly, bad in quality, and exorbitant in Price’.<sup>33</sup> Their argument, which was ‘humbly submitted to the Humanity and Justice of the Court’ by their counsel, David Dalrymple, contains details of the prices they were charged and the equivalent charged outside of the Tolbooth. Robb, however, made a spirited defence.

In some cases, the petitioner was seeking some mitigation of a penalty imposed by the court. Sebastian Henderson, for example, petitioned in 1763 to have his disbarment as a procurator in Linlithgow mitigated to a suspension for six months.<sup>34</sup> As a court of law and equity, it was within the scope of the judges in the Court of Session to mitigate such a penalty if satisfied that there was sufficient cause to do so. This was not universally true in all courts. The Court of Exchequer, for example, had to proceed by strict rules of law and had no power to mitigate any penalties.<sup>35</sup> In the criminal court, approaches for mercy might be made first by seeking informal advice from one of the judges. In 1738 Brigadier Guest wrote to the lord justice clerk, on behalf of a grenadier who had shot and wounded a man he had mistaken for another, seeking advice on how to petition to have the sentence of public whipping stopped.<sup>36</sup>

An appeal to equity sometimes required a particularly emotive argument and anyone skilled in the drafting of petitions know the importance of gaining the sympathy and attention of the judges from opening paragraphs. Robert Logan, imprisoned in the tolbooth for a breach of trust against his master, the town clerk of Fortrose, began his petition for mercy as follows:

Will your Lordships vouchsafe to hear with patience for a little, a miserable man? perhaps too undeserving to be listened to; but rendered too unhappy by the judgment pronounced against him, not to be the object of pity, and of your Lordships commiseration?<sup>37</sup>

Of course, petitions to judges were often much more mundane. In 1733, the macers in the justiciary court petitioned the earl of Ilay, as lord justice general, in order to ensure that they received the liveries at public expense to which by their commissions they were entitled and the judges in the Court of Session collectively faced a high number of straightforward, and often uninteresting, debt actions.<sup>38</sup>

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<sup>32</sup> NRS, Miscellaneous papers, RH15/76/9/8.

<sup>33</sup> ALSP, *Replies for Thomas Davidson Prisoner in the Tolbooth of Edinburgh, and William Blair late Prisoner there*, 23 Jan. 1738, Miscellaneous Collection, ser. 1.

<sup>34</sup> NRS, Court of Session, books of sederunt, CS1/14, fo. 181v. ALSP, Arniston collection, vol. 90, no. 16. Another example of mitigation appears at CS1/15, fo. 37r.

<sup>35</sup> NRS, Papers of the Society of Writers to the Signet, GD495/48/1/39

<sup>36</sup> NLS, Saltoun papers, MS 16574, fo. 73.

<sup>37</sup> ALSP, Arniston collection, vol. 90.

<sup>38</sup> NLS, Saltoun papers, MS 17539, fo. 70.

A variation on an appeal to the court's equitable jurisdiction were petitions which arose after attempts at compromise, particularly through arbitration, had failed. Under regulations introduced in 1695, there were grounds upon which a petition might be brought in order to reduce a decreet arbitral on the basis of iniquity.<sup>39</sup> Arbitration was common and the regulations were not intended to diminish its popularity. Therefore the grounds of reduction were expressed narrowly and encompassed only the corruption, bribery or falsehood of the arbiters. Despite this, a number of cases made their way to the court seeking, on the basis of a variety of facts— including the alleged drunkenness of arbiters – reduction of decreets arbitral. It was also common for litigants to indicate to the judges that they had attempted to resolve their dispute by arbitration, even on generous terms such as by making the offer to have the matter arbitrated by the adverse party's counsel, but that intransigence had rendered the reference to the court necessary.

#### 4. Petitions in litigated cases

A petition was also a means of initiating litigation. It put a case to the judges which naturally invited them to appoint some other party to lodge a reply (technically known as *Answers*). An example is a petition in 1764 concerning the office of principal clerks in the Bill Chamber of the Court of Session.<sup>40</sup> The new holders of the office sought to clarify their relationship with the depute clerk who had been appointed for life by their predecessors and who was disputing their right to take custody of the books and records associated with the office. This particular petition has the look of a declaratory action with an additional possessory conclusion. Its title and form, however, suggested a petition but it was clearly set out in the form of a petition. Another petition, in 1778, by James Marshall WS, was effectively an action of interdict against the new keeper of the register of hornings, John Flockhart, who was, contrary to the custom, attempting to charge as much for copying half a page as a full page.<sup>41</sup> In some cases, therefore, a document was described as a petition when, in fact, it might easily have been described in other terms, or its object might have been met via another form of action, such as a bill of advocation.<sup>42</sup>

Reclaiming petitions are probably the most prevalent type of petition to appear in the surviving collections of session papers.<sup>43</sup> Any interlocutor could be reclaimed against because the nature of Scots procedure favoured substantive justice over speed or finality of result. In other words, it was possible to bring a petition to ask a lord ordinary to review any interlocutor, provided the petition was brought within a defined period known as the 'reclaiming days'. This was a constant source of delay in the court, despite acts of sederunt which limited the number of opportunities for bringing such reclaiming petitions. A reclaiming petition would recite the interlocutor which the petitioner was asking the court to alter and it would be followed by *Answers* from the party favoured by that interlocutor. Typically, the *Answers* would be followed by further argument in the form of a *Condescendence* or

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<sup>39</sup> J. Finlay, 'Arbitration in Eighteenth-century Scotland' (2011) *Juridical Review*, 277 at 282-87.

<sup>40</sup> ALSP, *The Petition of Sir Robert Anstruther, Baronet, and Robert Waddell, conjunct principal clerks to the bills*, 16 June 1764.

<sup>41</sup> ALSP, *The Petition of James Marshall, Writer to the Signet*, 20 Nov 1778. Ph 4754.

<sup>42</sup> ALSP, Arniston collection, vol. 40, no. 14. *The Petition of Alexander Graham, and others, Inhabitants of the Village of Stromness in Orkney, Suspenders*, 20 Dec. 1755.

<sup>43</sup> N.T. Phillipson, *The Scottish Whigs and the Reform of the Court of Session* (Stair Society, 1990), 45; Finlay, 'History of delay in civil procedure: Scotland 1600-1808', in C.H. van Rhee, ed., *Within a Reasonable Time: The History of Delay in Civil Procedure* (Berlin, 2010), 121 at 145-46.

Replies by the petitioner. Reclaiming petitions are notable primarily for the different ways petitioners verbalise their pretended unwillingness to trouble the judges further with a case with which they were already quite familiar.

Election cases, of which there were very many emanating from Michaelmas head courts, were brought by means of a petition and complaint. The procedure was subject to an act of sederunt in November 1760, and it remained relevant until the old electoral law was swept away by the Scottish Reform Act 1832.<sup>44</sup>

Disagreement with the judgement of a court of freeholders was often the premise for craving a warrant to serve the petition on whoever had objected to the petitioner's qualification to vote. The Advocates' Library contains boxes of petitions in election cases, as the decision to include, or exclude, the right of an individual to vote was always politically charged. Town council minutes record the reactions of newly elected councillors to the raising of such petitions. In December 1781, for instance, the several members of Jedburgh council refused to have any concern in pursuing or defending a petition which had arisen from the Michaelmas election.<sup>45</sup> The provost noted the necessity of giving in proper defences in the Court of Session and appointing law agents in Edinburgh to do so. The council, by majority, then approved a motion authorising the provost and magistrates to employ counsel for presenting their defences. The complaint was still depending before the court the following November although by then, a former councillor who was one of the complainants, had disclaimed the petition.<sup>46</sup>

One illustration is a petition and complaint put forward on behalf of Sir James Mackenzie of Royston and John Mackenzie of Highfield, in June 1743, against supporters of Sir John Gordon of Invergordon who had made their way on to the roll of freeholders in Cromarty.<sup>47</sup> This was generated by the common practice of multiplying freehold qualifications by the expedient of subfeuing plots of land to provide the grantee with the minimum valuation to qualify as a voter. The Parliamentary Elections Act 1742 had introduced procedural changes relating to the holding of head courts at Michaelmas and other election meetings, but what is interesting about the petition is how it is written.<sup>48</sup> As William Ferguson put it in his study of electoral law, the petition was

an interesting document mainly because its brevity and general inadequacy were typical of the earliest petitions brought in terms of the new act. The politicians and their legal advisers were apparently feeling their way and for some time did not understand the Act and the possibilities it opened up.<sup>49</sup>

Judicial petitions clearly involved power relationships, as litigants sought some form of relief from the judges in the court. Outside of election cases, they were generally not overtly 'political', but lawyers might suspect a judge of being partial, for political or personal reasons, and sometimes manoeuvred to have actions heard by a lord ordinary whom they deemed to be more potentially sympathetic to their client or his or her cause. In the case of reclaiming petitions, lawyers often strategised on the basis

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<sup>44</sup> Bell, *Dict.* p. 803.

<sup>45</sup> Scottish Borders Archives, Hawick, BJ/1/9, Jedburgh Town council minutes, fo. 72.

<sup>46</sup> *Ibid.*, fo. 106.

<sup>47</sup> Signet Library, Session Papers, 15:159.

<sup>48</sup> 16 Geo. II, c. 11.

<sup>49</sup> W. Ferguson., 'Electoral law and procedure in Eighteenth and early nineteenth Scotland', PhD Thesis, University of Edinburgh, 1957, p. 165.

of the make up of the court, taking into account illness and other factors affecting the bench. Thus they might present their petition at a point when they calculated that the majority of judges present might favour their arguments based on how they were known to have voted at differing stages previously when the action was being heard.<sup>50</sup>

As well as petitions directly brought before the court, the records of the Court of Session mention a range of petitions that were made to the crown and other parties. These typically sought steps to be taken in relation to legal actions which the judges themselves lacked jurisdiction to grant. In 1629 the king wrote to the judges noting that he had often been petitioned by the vassals of Mar and Garioch who wanted him to appoint an advocate to compare with them for the crown's interest in defence of an action brought against them by the earl of Mar. The king, although he expressed himself to be

loth to neglect that which may concerne our owne interest, so on the other part we ar not willing to schew our selff ane partie with one of our subjectis against another befor our interest do appeare, bot ar willing to leave thame both indifferentlie to the ordinarie course of justice....<sup>51</sup>

Once the crown's interest was evident, then the expectation would be that the lord advocate would enter appearance to ensure that it was defended. In the meantime, the king through his letter to the judges sought a declaration that the outcome of this particular dispute should not harm the interests of the crown.

### *The petition as evidence*

Surviving petitions sometimes bear endorsements by the clerk of court recording forms of judicial deliverance and indicating the various steps of procedure that had been undertaken. In this sense, they are evidence not only of the legal argument they contain but also of the procedure undertaken as the matter made its way through the court. The clerk of session, in recording these stages of procedure, also noted very briefly the nature of the action in the minute book. Other sources, such as private correspondence, may provide details of the circumstances leading to the presentation of a petition. It is important to remember that behind every petition is a story, and a legal strategy, neither of which may be fully evident in the wording of the petition itself or other surviving sources.

Some printed petitions contain handwritten notes in which the views of the judges are summarised, occasionally with what appears to be direct quotation. This can be very interesting evidence because judgements, until the nineteenth century and the development of a more modern style of law reporting, were not motivated, that is, did not contain the reasoning of the individual judges in support of the interlocutor.<sup>52</sup>

The petition can also provide evidence of local and customary practices and social mores which are not always apparent in the pages of history books. One example is the concept of 'Medicine money' which every private soldier in had taken from his wages at the rate of two pence per month. The meaning of this 'immemorial Practice'

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<sup>50</sup> Finlay, 'The history of delay in civil procedure', 145.

<sup>51</sup> NRS, Books of Sederunt, CS1/5 fo. 20v.

<sup>52</sup> Such notes are mentioned in Finlay, *Community of the College of Justice*, 111; *ibid.*, 'Ratio decidendi in Scotland 1650-1800' in ed. W. H. Bryson and S. Dauchy, *Ratio Decidendi: The Guiding Principles of Judicial Decisions* (Berlin, 2006), 117 at 126.

was discussed in a petition brought in 1753 by William Park, a physician in Ayr, who was responsible for the garrison in Edinburgh Castle.<sup>53</sup>

Having chosen to practise his profession in Ayr, Park naturally employed a substitute to look after the hundred men of the Edinburgh garrison, and it was his assertion that this depute was entitled to no more than the 'medicine money' which amounted to about £10 per annum. Through an intermediary, in 1750 Park employed the surgeon Alexander Bruce to attend to the garrison but, a year later, Park and Bruce had very different ideas about the payment of his account. Park was adamant that his depute was entitled only to the customary medicine money. This covered the cost of treatment and medicine for the private soldiers (corporals and sergeants fell into a different category). Bruce argued that surgeons in all regiments were paid a daily rate of about 4s 6d over and above the medicine money, and that it was unreasonable, and not consistent with custom, for him to be paid so small a sum. This was particularly the case given that

scarce a single Day passed that the Respondent [Bruce] had no Occasion to visit some Person belonging to [the garrison], not only in the Castle, but likeways in all the different Corners and Suburbs of the City, where they are permitted to reside with their Families.<sup>54</sup>

The case originated through a disagreement, between educated men, over the meaning of a custom that seems to have gained currently throughout a number of regiments and garrisons in the army. Not only does it evidence the custom, but it provides interesting incidental detail about the provision of medical services within the ranks of the army. The petition was Park's attempt to reclaim, having already had his defence to payment of Bruce's account repelled in February 1753 and then in July the same year by the lord ordinary, reflecting the fact that for him considerable future income was at stake.

In another petition, brought by the gardener James Calder against the Faculty of Surgeons and Physicians in Glasgow, who were desperate to retain their exclusive right to practise blood-letting within the confines of the town, it was asserted on Calder's behalf that 'most gardners, whose residence is fixed, have practised bleeding, mostly to the poorer sort of people'.<sup>55</sup> Such practices, and indeed social mores, were everywhere discussed in the courts, sometimes with a particularly lawyerly slant. The act of men eating and drinking together after a quarrel, it was asserted in another case, is normally a sign of reconciliation. But, it was added, under the authority of the German lawyer Benedikt Carpzov, that was only true if they ate together by design and 'not by Accident or from Necessity'.<sup>56</sup>

### *Authorship*

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<sup>53</sup> ALSP, Miscellaneous Collection, vol. 17 (1749-60), no. 138, *The Petition of Doctor William Park Physician in Air* (sic), 10 Dec. 1753.

<sup>54</sup> *Ibid.*, no. 138. *Answers for Alexander Bruce, Surgeon-Apothecary in Edinburgh, to the Petition of Doctor William Park, Physician in Ayr*, 26 Dec. 1753, p. 3.

<sup>55</sup> ALSP, Meadowbank collection, vol. 20, *The Petition of James Calder, Gardener in Glasgow*, 1 Dec 1761.

<sup>56</sup> ALSP, Dreghorn collection, vol. 2, *Memorial for James Gilkie and the Procurator Fiscal of Court, Pursuers; Against William Wallace Writer in Edinburgh, Defender*, 7 Mar. 1759, p.4. The text cited was B. Carpzov, *Practica novae imperialis Saxonicae rerum criminalium* (Wittenberg, 1670), II.497.50,1.

Petitions were typically written by lawyers. Usually they were written by advocates, sometimes by more than one as a draft might be revised by another hand. The advocate who subscribed the petition, however, was not necessarily involved in drafting or even revising it.

Some advocates enjoyed a particular reputation for drafting written pleadings, and might be called upon to compose, or redraft, a pleading without his name being mentioned in any court paper. Henry Cockburn picked out Robert Forsyth as an example of a particularly industrious advocate commonly employed in this way.

No modern can comprehend the lives of the well-employed ‘writing counsel’ of the last generation. When every statement, every argument, every application, every motion was made in writing, and every party was always entitled to give in a written answer; eight out of every twelve hours of the lives of these men were spent over inkstands.<sup>57</sup>

Sometimes petitions written by younger counsel were deliberately circulated within the profession in order to gain the attention of other lawyers and to help make, or polish, a reputation.

A few petitions in the Court of Session were drafted by law agents, typically writers to the signet. In rare cases, a petition was written personally by a party litigant and, unlike lawyers, such litigants generally used the first person.

Sometimes, though very rarely, it was alleged that a petition had been brought without the authority or consent of the supposed petitioner. There is an example of this in an action allegedly brought by John Coustoun, formerly tenant at the mill of Pitreavie, in an action brought against tenants within the local barony concerning his right to collection the multure of wheat still growing on the lands which they farmed. In fact, it was brought by Robert Blackwood of Pitreavie, the local landowner and himself an advocate before the Court of Session.

Coustoun expressly disclaimed the petition, claiming that a memorial appended to it, which bore to have been signed by him, was being mis-used. It was alleged that Coustoun had been led to sign a paper at Carnock Fair at Whitsunday, 1760, by means of a pretence by which ‘Pitreavie ventured to obtain his Subscription to this Memorial, without letting him know its real Contents’. As Coustoun wrote to the town clerk of Inverkeithing, he had sent his agent specifically to disclaim it by telling the agent for the landowner, who was behind the action, that wanted nothing to do with it.

Whether it is justifiable, or ought to be past over without a high Censure, that a Person bearing the respectable character of an Advocate, at your Lordships Bar, should venture to present a Petition in name of a Party who has previously disclaimed the Process, deserves to be well considered by the Court. Such Examples are extremely dangerous, and indeed would reflect Dishonour upon the Profession.<sup>58</sup>

There was a general presumption, where an action was raised by a party who had died while the action was depending before the court, that the action was properly

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<sup>57</sup> Henry Cockburn, *Memorials of His Time* (Edinburgh, 1856; repr. 1988), 153-4.

<sup>58</sup> ALSP, Arniston collection, vol. 46, *Answers for James Niven et al., Tenants in the Ground of the Barony of Pitreavie and for John Flockhart Writer in Edinburgh to the Petition of John Coustoun, late Tenant in the Mill of Pitreavie*, 4 Aug. 1760.

raised with the deceased's consent. Agents relied on this presumption to recover their fees from the heir on the basis of the extract decret alone, rather than a written mandate, because actions were often carried on by means of verbal orders despite the strict requirement for a law agent to have a written mandate.<sup>59</sup>

In terms of length, some writers were more prolix than others although petitions were generally very short when they were summary, typically one or two pages. In litigated cases, petitions could run to inordinate length, in some cases two hundred pages or more. In 1760 David Rae 'flattered himself, that he had reduced the substance of a long cause into a pretty narrow compass in the petition' as he commenced his twelve pages of replies to the answers to that petition.<sup>60</sup>

Lawyers, in their drafting of legal arguments, were quite willing make analogies and draw examples from their reading into history and philosophy. Hugh Murray-Kynnymond in 1739, for example, expounded on the history of the importation of the wine trade as part of his discussion of the question of whether Portuguese and Madeira wines should attract the customs duty applicable to Spanish wines. In the course of his discussion of the history of the kingdoms of Spain and Portugal, he noted how quickly Scots had become known in Europe 'under the name of English' since the Union, speculating that if, 'by any humane Vicissitude, the Two Kingdoms should be disunited again, the Name of *Scots Men* would not immediately revive, but would come gradually into Fashion'.<sup>61</sup>

### *Style*

Legal petitions were intended to persuade those holding public office to exercise their judicial authority to grant specific relief to the petitioner. Where the petition was written in the context of litigation with another party, then it was written to persuade the judges to accept or reject a specific claim in law and the rhetorical arts might be employed to achieve this end. In the eighteenth century, however, specific claims in law were often lost in a welter of facts, as both were often in dispute. It took reforms to the nature of written pleading in the course of the nineteenth century to separate pleas in law from disputed matters of fact: eighteenth-century pleadings had no such neat separation.<sup>62</sup>

Petitions seeking specific relief or admission to a particular office were generally short and often formal or, in the latter case, followed a stereotype. In litigated actions, there was much more scope in a petition for the free use of language in order to arouse the sympathy of the court, to attract and maintain the attention of the judges, and, sometimes, to entertain by belittling the case put forward on behalf of the adverse party. Drafters of petitions could exhibit a dry wit which was much more subtle than some of the abuse and invective on which, at times, they might use ink.

As might be expected, are many interesting philosophical tropes that are encountered in some of the reasoning that is put forward. The law of nature was often referenced as justification for a desired outcome, sometimes this was in conformity

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<sup>59</sup> NRS, B30/102/31, Papers of George Muirhead, fo. 6.

<sup>60</sup> ALSP, Arniston Collection, vol. 50, *Replies for John Gibson of Durie, Esq to the Answers for William Robertson at Saw-mill, to the said John Gibson's Petition*, 11 Feb. 1760.

<sup>61</sup> ALSP, Miscellaneous collection, vol. 17 (1739-42), *Information for Thomas Shand Merchant and present Collector of the Town of Aberdeens Impost, Charger; Against John Middleton junior merchant in Aberdeen, and others, Suspenders*, 15 Jun. 1739, no. 30, p. 3.

<sup>62</sup> On reforms, see D.R. Parratt, *The Development and Use of Written Pleadings in Scots Civil Procedure* (Edinburgh: Stair Society, 2006).

with a rule drawn from Roman law or, more rarely, it was contrasted to one.<sup>63</sup> Presenting the judges with what was couched as a self-evidently just outcome in a previous case, despite the fact that there was no strong rule of precedent and the rule was to decide *legibus quam exemplis*, permitted one advocate to state that ‘the very Nature of the Thing demonstrates the Justice of the Decision’ which, in his submission, should be followed.<sup>64</sup> Another, Walter Stewart, in a case concerning the sale of an allegedly unsound horse, stressed how reasonable the civilian principles in the law of sale were upon which he based his case, so reasonable that the judges could not think of turning away from them.

So far the Roman Law carries this Matter; and the Respondent apprehends with great Justice and Reason; and your Lordships will not willingly deviate from that law, which is justly deemed the Parent of our Systems of Jurisprudence.<sup>65</sup>

Public utility, the liberty of the subject, good government, principles of equity and right reason were regularly appealed to as a basis for decision. According to the advocate John Craigie, in the right circumstances, ‘the Principle of Law is just, that a few Instances of private Wrong should yield to publick Utility’.<sup>66</sup> In the context of that case, this meant that fairly adhering to the correct procedure, even if it occasionally resulted in excluding a just but incompetent claim, was morally and legally the right thing to do.

Lawyers had a wealth of law upon which to draw and in which to find appropriate principles, particularly in regard to natural law and the *ius gentium* (the law of all peoples). They freely quoted the extensive *ius commune* literature to which they had access. The privilege against self-incrimination, for example, and the idea that a man need not swear against his own life, limb or good fame, was justified in one case by reference to the French writer Antoine Favre (1557-1624) and the Dutch jurist Antonius Matthaeus (1601-54).<sup>67</sup> Many other legal principles were found in the works of continental legal scholars going back, in some cases, centuries.

This allowed displays of erudition in which lawyers cited an array of sources, many of which would be cited in courts following the civilian tradition across northern Europe. The Scots particularly favoured Dutch, French and German legal commentators, but they were happy to quote wider literature in support of their arguments.<sup>68</sup> A case in 1727 concerning the right of actors to put on plays in a public hall, leased from the incorporation of skinnners in Edinburgh, involves a discussion of

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<sup>63</sup> E.g. ALSP, Forbes collection, vol. 3, fo. 2264; Arniston collection vol. 142, no. 34, pp. 18-19.

<sup>64</sup> E.g. ALSP, Elchies collection, vol. 15, *Answers for William Christie, Cordiner in Glasgow to The Petition of Thomas Dunsmuir Merchant in Glasgow, and Robert Finlay Tanner there*, 19 Jul. 1745, pp. 3.

<sup>65</sup> ALSP, Arniston collection, vol. 41, *Answers for Alexander Grant writer in Edinburgh*, 24 Jul. 1756, p.7.

<sup>66</sup> ALSP, Arniston collection, vol 50, *Answers for James Brands, Merchant in Aberdeen, Charger; To the Petition of Patrick Souper, Merchant in Aberdeen, Suspende*, 21 Feb. 1760, p. 8.

<sup>67</sup> ALSP, Elchies collection, vol. 14 (F-Y), *Petition and Answers for Robert Boyd, Skippers in Irvine, To the Petition of William Hamilton of Ladyland*, 17 Nov. 1741.

<sup>68</sup> For citation of English works, see J. Finlay, ‘Jurisdictional complexity in post-Union Scotland’ in S.P. Donlan & D. Heirbaut, ed., *The Law’s Many Bodies, c.1600-1900* (Berlin, 2015), 223 at 245-7.

the usefulness of plays to society which includes the views of classical authors such as Cicero and Pliny.<sup>69</sup>

### *Publication and the public sphere*

A petition to the court was a public document and some petitions were written with the specific aim of having copies of them publicly distributed in order to embarrass a litigant. An example occurred in an action between William Cosh and Andrew Rannie in 1760. Cosh had purchased a brewery from Rannie in a public roup in the belief that the sale included the 'brewing copper' or brew kettle, a large copper tank used for brewing work and hops. The seller, Mr Rannie, succeeded in proving before Lord Coalston in the Outer House of the Court of Session that the copper was not included in the sale. The court's interlocutor became final but there was a dispute over expenses which proceeded to the Inner House. A paper, subscribed by one of Cosh's counsel, was submitted in response to a reclaiming petition by the other side seeking wider expenses than had been granted. At the same time, however, Cosh submitted a petition of his own, containing a number of statements defamatory of Rannie. Not only that, but according to Rannie, Cosh

with an Intention to hurt the Petitioner's Character, and his Business as a Merchant, most industriously dispersed Copies of it over the whole Country, and particularly in those Places from whence the Petitioner's chief Business as a Merchant arises.<sup>70</sup>

Cosh denied this, asserting that he refused to give copies 'to numbers who wanted to see them', although he did distribute copies to three of his near neighbours who were anxious to see the state of his case.<sup>71</sup>

This kind of exchange is not uncommon. It reflects attempts to insert defamatory material into court papers. A party alleging defamation would sometimes assert that that the libel had been published far and wide in order to reinforce the seriousness of the alleged misconduct.

Anyone who drafted a petition was held responsible for its contents. Law agents and advocates were sometimes summoned to answer for abusive phrases and lords ordinary occasionally ordered such phrases in petitions to be scored out.<sup>72</sup> In one case in 1737, Andrew Spreull was imprisoned for placing a printed paper in the judges' boxes which included a letter from his client to her adversary containing 'several abusive insinuations' against her.<sup>73</sup> In 1741, the advocate Hugh Murray-Kynnynmound complained of injurious language in a petition brought against him personally, and rather than try to find the 'pettifogger' responsible for the language, noted that his fellow advocate who signed the petition had assured him that 'some of

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<sup>69</sup> ALSP, Hamilton-Gordon collection, vol. 15, no. 9, *Information for Charles Earl of Lauderdale, James Lord Somerville (sic), John Lord Belhaven, and Anthony Aston their Servant, and the Master of Revels; against The Magistrates of Edinburgh*, 14 Dec. 1727.

<sup>70</sup> ALSP, Meadowbank vol 20, *Petition and Complaint of Andrew Rannie Merchant in Edinburgh*, 30 Jun. 1760, p. 3.

<sup>71</sup> *Ibid.*, *Answers for William Cosh of Moorebarns to the Petition and Complaint of Andrew Rannie*, 5 Jull 1760, p. 5.

<sup>72</sup> E.g. NRS, Montrose correspondence, GD220/5/1737/15, 16.

<sup>73</sup> NRS, Court of Session, books of sederunt, CS1/12, fo. 71r.

the most offensive Parts of it were Interpolations upon the Draught after it came out of his Hands'.<sup>74</sup>

There is nothing in Scottish practice to mirror the political significance of *memoires judiciaires* in later eighteenth-century France.<sup>75</sup> Scots petitions were often, though by no means always, rather too technical to be of much interest beyond the courts. That is not to say, however, that petitions brought before the Court of Session were not political in nature or that they failed to attract public attention or controversy. Indeed some actions were intensely political, reflecting the partisan motives which inspired them.

Political quarrels arising from individual elections featured heavily in the Court of Session. It was alleged in one case that a complaint brought following an election was nothing more than a sham. The action was brought before the local sheriff depute by an alleged political associate of men who had voted without being entitled to do so. The aim was collusive, to raise the action but to be dilatory in proceeding with it in order to screen the defenders from effective punishment. Simply by raising the action, it provided the defenders with the defence of *lis alibi pendens* and so prevented a petition being brought in earnest by genuine political opponents.<sup>76</sup>

Judges themselves, of course, had political interests of their own and were stakeholders in a system of political patronage. The best-known political agent in the first half of the eighteenth century was Lord Milton whose network of political intelligence, in the service of the earl of Ilay, was formidable. Milton and his friends could protect and offer rewards and offices to those who would further their political ends. In 1735 Charles Straton in Montrose wrote to Milton undertaking not to promise his vote to either of the young men who sought election 'on the interest of two senators of the College of Justice' who favoured rival political sides.<sup>77</sup> He would retain his vote at Milton's disposal, despite the fact that one of the judges was one of his best friends and the other was his relation.

It was clearly recognised that petitions to the Court of Session were simply a hazard of political manoeuvring. In an earlier election another man under Milton's influence and protection, James Nasmyth, gained his election but, as he wrote, 'I am told my antagonist designs to lodge a petition against me which I am hopefull will be to verry little purpose....'<sup>78</sup> An election, in a country as litigious as Scotland, was often simply the prelude to litigation and this was a normalised concomitant of politics.

### *Conclusion*

Petitions to the Court of Session all sought an interlocutor of the court. Sometimes the petition initiated a process that was uncontested; sometimes it was the first blow in a disputed action or, as in a reclaiming petition, it might revive or prolong such an action. Every petition was an instrument to achieve a particular end and, while the

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<sup>74</sup> ALSP, Elchies collection, vol. 14. *Answers for Mr. Hugh Murray-Kynnymound Advocate To The Petition of Dame Mary and Mrs Elizabeth Rocheads* 23 Nov. 1741, p. 1.

<sup>75</sup> S. Maza, *Private Lives and Public Affairs: the causes célèbres of prerevolutionary France* (Berkeley, 1993).

<sup>76</sup> ALSP, Arniston collection, vol. 41, no. 1. *The Petition of James Farquahrson of Coldroch*, 13 Jul. 1757.

<sup>77</sup> NLS, Saltoun papers, MS 16563, fo. 147.

<sup>78</sup> *Ibid.*, MS 16551, fo. 7.

fact situations which prompted the petition might be infinite, the ends to be achieved were not, although they might be categorised in a variety of ways.

Most petitions concerned the circumstances of private individuals and had little or no impact on the wider public. Some petitions did invoke matters of public policy, particularly matters arising from the interpretation of statutes. The status and reach of the legislation which led to the parliamentary Union of 1707, for example, was questioned a number of times in subsequent legal actions, often in cases that could by no means be deemed ‘constitutional’ in nature. One example concerned the case of a bookseller in Glasgow in 1734, includes the statement that

The Laws of *England* touching the publick Policy, whereof Trade is a material Part, reach over the whole united Kingdom, by the Articles of *Union*, except where a Difference is introduced by special Statute.<sup>79</sup>

An action concerning whether a contract of partnership prevented a bookseller from selling books in Glasgow, and thus constituted the creation of an illegal monopoly, quickly spiralled into an argument about personal liberty and whether restraint of trade could be anything other than prejudicial to the state. The principle *pacta conventa servanda esse* (agreements must be honoured) came face to face with another principle, *quia pactis privatorum juri publico derogari non potest* (private agreements cannot derogate from public law), both of which were drawn from the civilian tradition. The petitioner sought to tip the balance between these ideas by reference to English law. The passage quoted was preceded by reference to works by Edward Coke (1552-1634) and Thomas Wood (1661-1722), two English lawyers, in support of the proposition that any deed barring someone from setting up in trade was void ‘as being against the Liberty and Freedom of the Subject’.

Petitions were drafted by professional lawyers and used the specialist language of the law to argue a case, but as the eighteenth century progressed they reveal changes in emphasis and approach in relation to how the law was discussed and what law was discussed. Reference to English commentators, sources and statutes became more common. Direct citation of Roman law continued, but was less common by 1800 than it had been in 1700, many Roman rules having by then been absorbed into a reported case which might as easily be cited instead.

Petitions in litigated causes which came before the court were subject to technical requirements which an opponent was always ready to exploit. One requirement related to timing, for actions might prescribe or under statute be subject to a short limitation period. Another requirement concerned the need to identify accurately a party against whom a petition was raised. An example where both elements came into play is a case brought by two freeholders in Tweeddale against George Gibson of Boreland in 1745.<sup>80</sup> The petition questioned Gibson’s right to vote in the parliamentary election. It followed, however, an earlier petition wrongly raised against Thomas Gibson of Boreland, the defender’s son, whose name was not on the electoral roll. The petition against George fell outwith the statutory time limit within which freeholders could raise such objections, but the pursuers argued that the misnomer should not preclude them from raising it because this was a constitutional

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<sup>79</sup> ALSP, Miscellaneous collection, vol. 17, no. 44, *The Petition of Andrew Stalker, Bookseller in Glasgow*, 2 Jan. 1735, p. 4.

<sup>80</sup> ALSP, Kilkerran collection, vol. 10, no. 167, *The Petition of William Dickson of Kilbucho, and Mr John Dickson Advocate, Freeholders standing upon the Roll of Election for the Shire of Tweeddale, Against George Gibson of Boreland*, 24 Jan. 1745.

case, 'a Matter of publick Concern' affecting *jura publica*.<sup>81</sup> Arguments were presented, based on Roman law and English law, to illustrate, variously, that an error in name was and was not of vital importance in the circumstances.

While petitions were often about individuals, they could have wider consequences for the public more generally. As we have seen, large principles might be imported into small cases. What is of particular interest beyond their legal aspects, and is worth further study, are the unwritten assumptions which petitions hint at about politics, religion and social attitudes. As they concern all aspects of life, they have much to tell us about contemporary social mores.

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<sup>81</sup> Ibid., p.4.