The petition in the Court of Session in early modern Scotland

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SUMMARY

Petitions to Scotland's central civil court, the Court of Session, contained common features of style despite being presented for a wide range of purposes. As well as being employed in the course of procedure in a number of litigated cases, the petition was used to obtain entry to an office, or in seeking an equitable remedy which might relieve imminent suffering. In many cases they offer detailed narratives about everyday life, commerce, politics and religion which preserve a great deal that may be of value to the legal and social historian. Some petitioners, such as the poor and vulnerable, enjoyed a privileged status entitling them to have their claims heard summarily. A number of petitions, written by lawyers in order to persuade, contain ideas about liberty, justice and reason reflecting the fact that they were addressed to a court of both law and equity. This contribution identifies the features of such petitions, attempts to classify them, and considers their wider historical significance.

This article discusses eighteenth-century petitions in the Court of Session, Scotland's central civil court. The court comprised 15 judges: 14 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 [whole] fifteen’ sat collectively in the Inner House of the court to determine points reported to them for decision. They enjoyed an extensive jurisdiction as a court of first instance, and also in review of judgments made in local courts or interlocutors [decrees] made by their own lords ordinary.

The number of petitions entering the court has never been systematically quantified. While Scots generally enjoyed a reputation for litigiousness, there is evidence across the eighteenth century of a rise and fall in court business, with the nadir being reached in the 1740s.[1] Research has produced some figures for the number of actions and petitions in the year 1600 which indicate that only 11 petitions were presented, although some 56 ‘supplications’ and eight pleas for release from the tolbooth [burgh jail] were made.[2] 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

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1 J. Finlay, *The Community of the College of Justice* (Edinburgh, 2012), pp. 22, 139.

2 W. Coutts, *The Business of the Court of Session in 1600* (Edinburgh, 2003), pp. 23, 51.

asking the lords to replace arbiters or to order the production of evidence.[3] In the seventeenth century, petitioners in the court 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 petitions.[4]

A judicial petition differed from some other types of petition. It was always addressed to the court; it always followed a particular legal style, and it 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 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

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3 Finlay, *Community of the College of Justice*, pp. 66, 75.

4 For example, National Records of Scotland [NRS], Court of Session, Books of Sederunt, CS1/7, fo. 16r; CS1/9, fo. 44v.

by the Claim of Right', a constitutionalist statement of rights produced in the Anglo-Scottish Revolution of 1688–89.[5]

Petitions have a particular value for social and other historians in that they often preserve detailed information – concerning commercial activities, electioneering or relationships for example – which might not be found elsewhere. Glimpses of unique fact situations and everyday life appear in petitions in a way that often casts light on human interaction and contemporary social mores.

The petition

The classic definition of a petition in Scots law is that given by James MacLaren in his 1916 book on Court of Session practice:

[5] Advocates' Library Session Papers [ALSP], Miscellaneous collection, vol. 16 (1709–51), *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 1689 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'. See K. Bowie's contribution in this Special Issue for a discussion of the right to petition in Scotland.

> 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.[6]

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 in the monarch's name 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 summarized in a minute or referred to in another source. Judges sometimes explicitly preferred to receive a written paper rather than an oral motion. As the advocate Andrew Crosbie noted to one client in 1764, even in the routine matter of setting a date for the advising of his cause, 'the

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

President would not do it on a motion but ordered a Petition which goes in tomorrow'.[7]

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 Scotland's highest criminal court, 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, a contentious murder case, despite being exempt from such service.[8] An example of misconduct is the petition and complaint brought in 1741 by the advocate Michael Menzies, in order to vindicate himself from what he

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[7] National Library of Scotland [NLS], Sharpe of Hoddam papers, Acc. 13218/3, fo. 38.

[8] NLS, Saltoun papers, MS 17539, fo. 134.

referred to as ‘violent Reflections’ made against him by counsel for his opponents.[9] 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 parties, sometimes quite vulnerable people, using petitions and complaints to vindicate their character.[10]

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’.[11] Until a

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[9] ALSP, Hamilton Gordon collection, 2nd series (Ma–Mo), *The Petition and Complaint of Mr Michael Menzies Advocate*, 12 February 1741.

[10] For example, 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 November 1758.

[11] 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 February 1705.

legislative change in 1857, petitions were always addressed to the Inner House, not to a lord ordinary sitting in the court's Outer House.[12] After the creation of 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.[13] 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 (Sir James Dalrymple of Stair) noted in the seventeenth century, was to 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.[14]

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 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

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[12] Court of Session Act, 1857 (20 & 21 Vict., c.56), s.4.

[13] R. Bell, *Bell's Dictionary and Digest of the Law of Scotland*, ed. G. Watson (Edinburgh, 1890), sub nom. 'petition'.

[14] D.M. Walker (ed.), J. Dalrymple (Viscount Stair), *The Institutions of the Law of Scotland: deduced from its originals, and collated with the civil, canon and feudal laws, and with the customs of neighbouring nations* (Edinburgh, 1981), IV.2.12.

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', 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' 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'.[15] Printed petitions in later Court of Session practice, at least from the second decade of the eighteenth century, always bore a date, but, frustratingly for historians, that was not necessarily true of earlier handwritten petitions, although the dates of hearings can usually be traced in the Outer House rolls.

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.

[15] An example is John Spottiswoode's (undated) petition to parliament seeking the barony of New Abbey which had belonged to his grandfather: ALSP, Forbes collection, vol. 6, p. 6203.

1. Petitions relative to offices

In the first place, it was necessary to petition for authority to hold some public office, that of lawyer being the most obvious example. Anyone desirous of becoming an advocate had first to petition the lords of session; any member of the Society of Writers to the Signet (with exclusive rights to draft certain documents used before the Court of Session) seeking to take on an apprentice would petition the keeper and commissioners of the signet for permission to enter an indenture.[16] In the sheriff court, procurators were likewise required to petition the judge for admission. 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 the candidate 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.[17] Presumably this was necessary because notaries, at least from the sixteenth century, were an exclusively royal appointment and

[16] For example, NRS, Leith-Buchanan of Ross and Drummakil papers, GD47/418 (Archibald Tod's petition in 1782 to take on an apprentice W.S.).

[17] *Royal Commission to inquire into the Courts of Law in Scotland, Fifth Report, Appendix, 1871*, vol. XX.257, C 260, p. 47.

constitutionally the direct involvement of the crown was necessary, however formal and limited that may have been.[18] In the sixteenth and early seventeenth centuries, a petition for a letter from the king was necessary.[19]

The type of office for which a petition was necessary included that of curator bonis [a person appointed by the Court of Session to manage the property of another party temporarily] and judicial factor [a similar function, but in a more permanent capacity]. Such petitions were generally straightforward, but complications could easily arise. An example is the 1739 petition of Lilias Mackenzie, the wife of Murdoch Morison, a merchant in Stornoway on the western isle of Lewis.[20] Initially, Lilias petitioned for the appointment of a factor on the basis that her husband was 'in a State of Furiosity', requiring a factor to look after his affairs while the disease lasted. That petition was remitted to Lord Kilkerran, the lord

[18] 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.

[19] Examples of royal letters can be found in NRS, Warrants of admissions of notaries, NP3/3.

[20] ALSP, Hamilton Gordon collection, 2nd series (Mck–McM), *The Petition of Lilias Mackenzie, spouse to Murdoch Morison Merchant in Stornoway in the Island of Lewis*, 23 July 1739.

ordinary, to take evidence, but he reported to the Inner House, and the judges decided, that there was insufficient evidence of mental illness. Lilias therefore 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 ground that bringing witnesses to Edinburgh was prohibitively expensive. Indeed, given that there was no messenger-at-arms within 50 miles of Lewis, even citing witnesses was difficult.

As well as petitioning for appointment to offices, there were 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.[21] A few examples such as this demonstrate that in certain instances there 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.

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,

[21] NRS, Court of Session, Books of Sederunt, CS1/11, fo. 215v.

specified should be heard in a summary fashion.[22] In the sixteenth century, there is regular mention of such privileged summonses being heard summarily due to the status of the person bringing them: 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. One 1743 petition began with the following note: 'It is intreated by both Parties, that the Lords would be pleased to advise this Cause, the Aliment [maintenance] of Four Fatherless Children depending on the Decision thereof.'[23]

For College of Justice members, the privilege of having cases heard in Edinburgh was a matter of convenience, both personally and for their clients. Having 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

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[22] J. Finlay, *Men of Law in Pre-Reformation Scotland* (East Linton, 2000), pp. 72–3, 83, 101.

[23] 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.*

raise cases directly in Edinburgh. A quick hearing also ensured that any threats against them from unhappy litigants would be dealt with speedily.[24] In the High Court of Justiciary, petitions from prisoners were common. The 1701 Act concerning criminal procedure imposed deadlines for criminal prosecutions to commence and, if these were not met, a prisoner might be expected to petition for release. An alleged forger, John Ross, did so in 1731 having languished in the Tolbooth of Edinburgh for over six months.[25]

3. Petitions for mercy/grace

Petitions brought before various courts by vulnerable individuals often narrate rather tragic tales. Margaret Mitchelson, for example, petitioned the barons of Exchequer seeking supply from the crown.[26] Her state of health was so poor she was 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 district of Edinburgh rent-free. The building where the room was located, however, had burned down and she had lost all her possessions, leaving her completely indigent. Similar

[24] NRS, Court of Session, Books of Sederunt, CS1/14, fo. 14r.

[25] NLS, Saltoun papers, MS 17539, fo. 49.

[26] NRS, Papers of Clerk family of Penicuik, Midlothian, GD18/2798.

petitions, of course, were made to other potential benefactors, including town councils, guilds and even 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 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.[27] He sought the benefit of a 1696 Act anent the Aliment of Poor Prisoners.[28] The bailies sought *Answers* (formal replies) to be lodged by White's creditor-incarcerator, David Murray, a writer to the signet. 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 made any fraudulent conveyance of his property. Murray was ordered to pay 1s 6d per day to White for his maintenance, so long as he remained in the tolbooth. Almost two weeks later, no payment having been made, White was freed 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 court papers. As a result, he sought the caption

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[27] Scottish Borders Archive [SBA], Hawick, D/47/80/3.

[28] K.M. Brown *et al* (eds), *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007–18), 1696/9/151. Date accessed: 5 September 2017.

[arrest] of the law agent. The process is interesting because of a letter from the prisoner in question, Peter Campbell, to William Wilberforce, a leading figure in the contemporary anti-slavery movement, 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'.[29]

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* Suttlery, bad in quality, and exorbitant in Price'. 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.[30]

In some cases, the petitioner sought 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

[29] NRS, Miscellaneous papers, RH15/76/9/8.

[30] ALSP, Miscellaneous collection, ser. 1, *Replies for Thomas Davidson Prisoner in the Tolbooth of Edinburgh, and William Blair late Prisoner there*, 23 January 1738.

six months.[31] Because the Court of Session was a court of law and equity, it was within the scope of the judges to reduce such a penalty if they were satisfied that there was sufficient cause to do so. This was not universally true in all courts. The Court of Exchequer, for example, proceeded by strict rules of law and had no power to mitigate any penalties.[32] 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.[33]

An appeal to equity sometimes required a particularly emotive argument, and anyone skilled in the drafting of petitions knew the importance of gaining the sympathy and attention of the judges from their opening paragraphs. Robert Logan, imprisoned 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

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[31] 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.

[32] NRS, Papers of the Society of Writers to the Signet, GD495/48/1/39.

[33] NLS, Saltoun papers, MS 16574, fo. 73.

too unhappy by the judgment pronounced against him, not to be the object of pity, and of your Lordships commiseration?'[34]

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 to reduce a decreet arbitral [final outcome in a process of arbitration, with legal effect] on the basis of iniquity.[35] Arbitration was common and the regulations were not intended to diminish its popularity. Therefore the grounds of reduction were expressed narrowly, encompassing 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. Litigants commonly claimed to have attempted to resolve their dispute by arbitration. Sometimes they even offered to have the matter arbitrated by the adverse party's counsel. Intransigence, so they narrated, had ultimately rendered necessary their petition to the court.

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[34] ALSP, Arniston collection, vol. 90.

[35] J. Finlay, 'Arbitration in eighteenth-century Scotland', *Juridical Review* (2011), pp. 277–91.

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*). Sometimes a document presented as a petition might quite easily have been described as something else. In 1778, for instance, a petition by James Marshall W.S. was effectively an action of interdict, by which he sought to prevent the new keeper of the register of hornings, John Flockhart, from charging, contrary to custom, as much for copying half a page as a full page.[36] In some cases, a petition was presented whose object might have been achieved by means of another process, such as a bill of advocation, by which a case from a lower court was removed to the Court of Session, often on the grounds of alleged defective procedure.[37]

It is reclaiming petitions, however, that are probably the most prevalent type of petition to appear amongst the surviving session papers.[38]

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[36] ALSP, Miscellaneous Collection, vol. 3 (1773-1777), *The Petition of James Marshall, Writer to the Signet*, 20 November 1778.

[37] ALSP, Arniston collection, vol. 40, no. 14, *The Petition of Alexander Graham, and others, Inhabitants of the Village of Stromness in Orkney, Suspenders*, 20 December 1755.

[38] N.T. Philipson, *The Scottish Whigs and the Reform of the Court of Session* (Edinburgh, 1990), p. 45; J. Finlay, 'The history of delay in civil procedure: Scotland

Any interlocutor pronounced by a judge could be reclaimed against, because Scottish procedure always favoured substantive justice over speed or finality of result. It was possible to petition a lord ordinary to review any interlocutor, provided the petition was brought within a defined period known as the 'reclaiming days'. This practice was a constant source of delay in the court, despite acts of sederunt [secondary legislation] which limited the number of opportunities for bringing such 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 *Replies* by the petitioner. Reclaiming petitions are notable for various ways in which petitioners verbalize their pretended unwillingness to trouble the judges further with a case with which they were already quite familiar.

Election cases concerning inappropriate procedure or error as to voter qualification, largely emanating from Michaelmas head courts, were brought by means of a petition and complaint. The procedure was subject to a Court of Session act of sederunt in November 1760, and it remained relevant until the old electoral law was swept away by the Scottish Reform

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1600–1808', in C.H. van Rhee (ed.), *Within a Reasonable Time: The History of Delay in Civil Procedure* (Berlin, 2010), pp. 145–6.

Act 1832.[39] Disagreement with the judgment of a court of freeholders was often the premise for craving a warrant to serve the petition on whoever had objected to a petitioner's qualification to vote. The Advocates' Library contains whole boxes of petitions in election cases, and town council minutes record the reactions of newly elected councillors to the raising of such petitions. In December 1781, for instance, several members of Jedburgh council refused to have any concern in pursuing or defending a petition which had arisen from the Michaelmas election.[40] The provost noted the necessity of providing proper defences in the Court of Session and appointing law agents in Edinburgh to do so. The council, by majority, then approved a motion authorizing 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.[41]

Judicial petitions clearly involved power relationships, as litigants sought some form of relief from the judges in the court. Outside of election

[39] Bell, *Dictionary*, p. 803. For discussion, see W. Ferguson, 'Electoral law and procedure in eighteenth and early nineteenth century Scotland' (University of Edinburgh, PhD thesis, 1957).

[40] SBA, Jedburgh Town Council minutes, BJ/1/9, fo. 72.

[41] SBA, BJ/1/9, fo. 106.

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 sympathetic to their client or their cause. In the case of reclaiming petitions, lawyers often strategized on the basis of the composition 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 voted at earlier stages of the action.[42]

As well as petitions brought directly before the court, petitions made to the crown and other parties are often referred to in legal records. 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 appear 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

[42] Finlay, ‘The history of delay in civil procedure’, p. 145.

> one of our subjectis against another befoir our interest do appeare, bot ar willing to leave thame both indifferentlie to the ordinarie course of justice.[43]

Once the crown's interest was evident, 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 crown's interests.

The petition as historical 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

[43] NRS, Books of Sederunt, CS1/5, fo. 20v.

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 summarizing judicial opinions, sometimes with direct quotation. This can be very interesting evidence because judgments, until the nineteenth century and the development of a more modern style of law reporting, did not contain the reasoning of the individual judges in support of an interlocutor.[44] 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. An example is the concept of 'Medicine money' which every private soldier in service had deducted from his wages at the rate of 2d per month. The meaning of this 'immemorial Practice' was discussed in a petition brought in 1753 by William Park, a physician in Ayr, who was responsible for the garrison in Edinburgh Castle.[45] 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

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[44] Such notes are mentioned in Finlay, *Community of the College of Justice*, p. 111; J. Finlay, '*Ratio decidendi* in Scotland 1650–1800', in W.H. Bryson and S. Dauchy (eds), *Ratio Decidendi: The Guiding Principles of Judicial Decisions* (Berlin, 2006), p. 126.

[45] ALSP, Miscellaneous collection, vol. 17 (1749–60), no. 138, *The Petition of Doctor William Park Physician in Air* (sic), 10 December 1753.

blood-letting within the confines of the town, it was asserted on Calder's behalf that 'most gardners, whose residence is fixed, have practised blooding, mostly to the poorer sort of people'.[46]

Authorship and style

Lawyers, usually advocates, typically wrote petitions, and sometimes more than one was involved as a draft might be revised by another hand. The advocate who subscribed the petition, however, was not necessarily involved in either drafting or revising it. Writers to the signet and other agents also occasionally drafted Court of Session petitions but it was very rare for a party litigant to do so.

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 (1766–1845) 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,

[46] ALSP, Meadowbank collection, vol. 20, *The Petition of James Calder, Gardener in Glasgow*, 1 December 1761.

> 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.[47]

Sometimes petitions written by younger counsel were deliberately circulated within the profession in order to gain attention and help establish a reputation.

Occasionally it was alleged that a petition had been brought without the authority or consent of the supposed petitioner. According to one petitioner, for a respectable lawyer to venture to present a petition from someone who had already disclaimed it, would be 'extremely dangerous, and indeed would reflect Dishonour upon the Profession'.[48]

In terms of length, some writers were more prolix than others although petitions in summary matters were generally very short, typically one or two pages. In litigated cases, petitions could run to inordinate length, in some cases two hundred pages or more. Lawyers, in their drafting of

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[47] H. Cockburn, *Memorials of His Time* (Edinburgh, 1856; repr. 1988), pp. 153–4.

[48] 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 August 1760.

legal arguments, were quite willing to add bulk by making analogies and drawing examples from their reading into history and philosophy. The advocate Hugh Murray-Kynnynmound in 1739, for example, expounded on the history 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'.[49]

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. Specific claims in law, however, were often lost in a welter of

[49] ALSP, Miscellaneous collection, vol. 17 (1739–42), no. 30, *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 June 1739, p. 3.

facts, as both law and fact were often in dispute. It took nineteenth-century reforms to the nature of written pleading to separate pleas-in-law from disputed matters of fact.[50]

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 means of subtle wit, and thus belittle the case put forward by the adverse party.

As might be expected, there are many interesting philosophical tropes in the reasoning put forward in litigated cases. The law of nature was often referenced to justify a desired outcome, sometimes in conformity with a rule drawn from Roman law or, more rarely, in contrast to one.[51] The reasonableness of civilian principles was presented in such a way that it was deemed dangerous to depart from them. As one advocate put it, so far was his case supported by Roman law, with 'great Justice and Reason',

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[50] See D.R. Parratt, *The Development and Use of Written Pleadings in Scots Civil Procedure* (Edinburgh, 2006).

[51] E.g. ALSP, Forbes collection, vol. 3, fo. 2264; Arniston collection, vol. 142, no. 34, pp. 18–19.

that the judges would not 'willingly deviate from that law, which is justly deemed the Parent of our Systems of Jurisprudence'.[52]

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'.[53] 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. 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 fame, was justified in one case by reference to the French writer Antoine Favre (1557–1624) and the Dutch jurist Antonius

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[52] ALSP, Arniston collection, vol. 41, *Answers for Alexander Grant writer in Edinburgh*, 24 July 1756, p. 7.

[53] ALSP, Arniston collection, vol. 50, *Answers for James Brands, Merchant in Aberdeen, Charger; To the Petition of Patrick Souper, Merchant in Aberdeen, Suspender*, 21 February 1760, p. 8.

Matthaeus (1601–54).[54] The Scots particularly favoured Dutch, French and German legal commentators, but they were happy to quote wider literature in support of their arguments. In particular, reference to English commentators, sources and statutes became more common as the century wore on.[55] Direct citation of Roman law continued, but was much less prevalent by 1800 than it had been in 1700 with many Roman rules having by then been absorbed into reported cases which might as easily be cited instead.

Publication and the public sphere

A petition to the court was a public document and some petitions were clearly written for public consumption. In one case, it was claimed that a litigant, in order to hurt the petitioner's character and livelihood, had drafted a printed petition and 'most industriously dispersed Copies of it over the whole Country, and particularly in those Places from whence the

[54] 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 November 1741.

[55] For citation of English works, see J. Finlay, 'Jurisdictional complexity in post-Union Scotland', in S.P. Donlan and D. Heirbaut (eds), *The Law's Many Bodies, c.1600–1900* (Berlin, 2015), pp. 245–7.

Petitioner's chief Business as a Merchant arises'.[56] It was not uncommon to find allegedly defamatory material in petitions, with an eye to influencing judicial (and perhaps wider) opinion.

Anyone who signed a petition was responsible for its contents. Law agents and advocates were summoned to answer for abusive phrases and judges occasionally ordered such phrases to be scored out.[57] In 1741, Hugh Murray-Kynnynmound complained of injurious language in a petition brought against him personally, noting that the advocate who signed the petition had assured him that 'some of the most offensive Parts of it were Interpolations upon the Draught after it came out of his Hands'.[58]

There is nothing in Scottish practice to mirror the political significance of *mémoires judiciaires* [printed legal briefs] in later eighteenth-century France.[59] Scots petitions were usually, though by no means always, rather too technical to be of much interest beyond the courts.

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[56] ALSP, Meadowbank collection, vol. 20, *Petition and Complaint of Andrew Rannie Merchant in Edinburgh*, 30 June 1760, p. 3.

[57] For example, NRS, Montrose correspondence, GD220/5/1737/15, 16.

[58] ALSP, Elchies collection, vol. 14, *Answers for Mr. Hugh Murray-Kynnynmound Advocate To The Petition of Dame Mary and Mrs Elizabeth Rocheads*, 23 November 1741, p. 1.

[59] S. Maza, *Private Lives and Public Affairs: The Causes Célèbres of Prerevolutionary France* (Berkeley, 1993).

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 legal actions were intensely political, leading to allegations of collusion and political motivation in bringing them. A petition brought by a political friend, who was then dilatory in prosecuting it, might, through the defence of *lis alibi pendens*, shield a party from a petition being brought by a political rival arising on the same facts.[60]

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.[61] He

[60] ALSP, Arniston collection, vol. 41, no. 1, *The Petition of James Farquharson of Coldroch*, 13 July 1757.

[61] NLS, Saltoun papers, MS 16563, fo. 147.

would retain his vote at Milton's disposal, despite the fact that one of the judges was his friend and the other his relation.

It was clearly recognized that adverse petitions in the Court of Session were simply a hazard of political manoeuvring. An election, in a country as litigious as Scotland, was often simply the prelude to litigation and thus petitions were a normalized concomitant of politics. Such petitions, however, depended on narrow points of law and were not intended for the wider public sphere or motivated by any desire to influence public opinion such as might be found in some of the contemporary French *mémoires*.

Conclusion

Petitioners to the Court of Session all sought an interlocutor of the court. Sometimes their 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 situations which prompted the petition might be infinite, the ends to be achieved were not, although they might be categorized 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, especially the Act of Union which might be cited in cases which were by no means ‘constitutional’ in nature.

While petitions were often about individuals, they could have consequences for the public more generally. Large principles, concerning liberty or public rights, might be imported into cases involving matters of apparently trivial value which were enthusiastically and expensively litigated. 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.

Notes on Contributor

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