A Guide to the Procedure of the Admiralty Court

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Three manuscript copies are known to have survived of a manual on the procedure followed in the admiralty courts of Scotland during the early modern period. This article begins by describing the three manuscripts and the manual they contain. It then seeks to identify the author of the manual, arguing from internal and external evidence that he was almost certainly not the lawyer to whom the manual has often been attributed but another prominent advocate and judge. Finally, an attempt is made to discover when the manual was written. It is found that the version of the manual copied in two of the manuscripts seems to have been revised around twenty years after it was originally written. Concluding comments are made about the use historians may wish to make of the manual, of which an edition is being prepared for publication.

A specialised admiralty court functioned in Scotland from the end of the Middle Ages until the start of the reign of William IV.[1] The office of admiral was in existence by the early fifteenth century, and was occupied for most of the next two centuries by a nobleman closely related to the crown.[2] Admiralty courts were sitting, both centrally and locally, by the end of the fifteenth century.[3] The admiral himself made occasional appearances, but business was generally conducted by deputies he appointed, two of whom – David Kintor and Alexander King – are known to have written treatises about maritime law in the latter half of the sixteenth century.[4] This article is concerned with

1 A. R. G. McMillan, 'The Scottish Court of Admiralty: A Retrospect', *Juridical Review*, 34 (1922), 38 and 164; W. C. Dickinson, 'Courts of Special Jurisdiction', in (ed.) G. C. H. Paton, *An Introduction to Scottish Legal History* (Edinburgh, 1958), 396, at 398–9; D. M. Walker, *A Legal History of Scotland* (Edinburgh, 1988–2004), II, 367 and III, 419 and 582–3.

2 A. R. G. McMillan, 'The Admiral of Scotland', *Scottish Historical Review*, 20 (1923), 11; Walker, *Legal History of Scotland*, II, 145, and III, 48 and 134; S. Murdoch, *The Terror of the Seas? Scottish Maritime Warfare, 1513–1713* (Leiden, 2010), 10–20.

3 *The Acts of the Lords of Council in Civil Causes, 1478–95*, ed. T. Thomson (Edinburgh, 1839), 274–5 and 290–1.

4 T. C. Wade, 'Introduction', in *Acta curiae admirallatus Scotiae, 1557–62* (Edinburgh, 1936), xi, at xv; A. R. G. McMillan, 'Admiralty and Maritime Law', in (ed.) H. McKechnie, *An Introductory Survey of the Sources and Literature of Scots Law* (Edinburgh, 1936), 325, at 331; J. D. Ford, 'The Law of the Sea and the Two Unions', *Proceedings of the British Academy*, 127 (2005), 127, at 128–9.

another treatise, which was not about the substantive law administered in the court but the procedural law governing the handling of cases.

Three copies are known to have survived of the treatise, all of which are now in the possession of the National Library of Scotland.[5] The first and most complete forms an appendix to a copy of the treatise composed by Alexander King around 1590, though the manuscript itself appears to have been written towards the end of the seventeenth century.[6] The second also forms an appendix to a copy of King's treatise, on the title page of which the date 3 August 1680 appears.[7] After the procedural manual, this manuscript also contains copies of several documents relating to shipping, one of which bears the date 1682 and the heading 'A Bill of Bottomerie, Translated out of Dutch by W. A.', and another of which bears the date 1680 and a marginal reference 'M. W. A. No. 1.1.e'.[8] Since a contemporary collection of legal materials contains an abridgement of legislation 'with additions by W. A.' and is inscribed 'Ex libris Gulielmi Aikman advocati', there is reason to suppose that the translator and collector of the documents reproduced after the procedural manual, or possibly even the writer of the manuscript, was Mr William Aikman of Cairnie, who had studied in Holland before entering legal practice in 1672, and who had become sufficiently respected as a book collector for his advice to be taken before manuscripts were purchased for the Advocates' Library in the 1690s.[9] After the procedural manual and shipping documents, the second manuscript

[5] For fuller descriptions of the manuscripts see G. Dolezalek, *Scotland under Ius Commune: Census of Manuscripts of Legal Literature in Scotland, Mainly between 1500 and 1660*, II (Edinburgh, 2010), 5, 353–4 and 387–8.

[6] National Library of Scotland (NLS), Adv. MS 28.4.7, ff. 51–5r. It is from this copy that quotations are usually taken below, with slight adjustments to punctuation and orthography.

[7] NLS, MS 1948, pp. 151–69. It is important to note that two other copies of King's treatise exist without the manual attached, the first of which is in Edinburgh University Library (EUL), La. III 741, the second in the National Records of Scotland (NRS), GD 45/26/50.

[8] NLS, MS 1948, pp. 169–87.

[9] *Album studiosorum academiae Lugduno-Batavae, 1575–1875* (The Hague, 1875), col. 567; *The Minute Book of the Faculty of Advocates, 1661–1712*, ed. J. M. Pinkerton, I (Edinburgh, 1976), 22 and 192–3; F. J. Grant, *The Faculty of Advocates in Scotland, 1532–1943* (Edinburgh, 1944), 3. For the contemporary collection see EUL, La. III 421, ff. 1r, 196r and 235r, for another collection made by Aikman see NLS, Adv. MSS 24.6.5, ff. 112–17, and 25.3.13, pp. 1–82, and for another collection owned by him see British Library (BL), Lansdowne MS 605, ff. 55v and 99v (full descriptions of all these manuscripts can be found in Dolezalek, *Scotland under Ius Commune*, II, 261–9 and 295–6, and III, 256–7 and 366–9). For Aikman's contribution to the collection of printed books for the Advocates' Library see B. Hillyard, 'The Formation of the Library, 1682–1728', in (ed.) P. Cadell and A. Matheson, *For the Encouragement of Learning: Scotland's National Library, 1689–1989* (Edinburgh, 1989), 23, at 34, and M. Townley, *The Best and Fynest Lawers and Other Raire Bookes* (Edinburgh, 1990), 67 and 99.

contains another abridgement of legislation, and although the second copy of the procedural manual is initially quite similar to the first, after a few pages it too contains an abridged version of the original text.[10] The third copy is similar to the first so far as it goes, but several pages before the end of the manual it breaks off abruptly.[11] Apparently written around the close of the seventeenth century, this third copy was bound between transcriptions of reports of decisions delivered by the commissioners for the valuation of teinds from 1629 to 1643, and the minor practicks of Sir Thomas Hope of Craighall, dating roughly from the same time.

In all three copies, subject to minor variations of spelling, the manual bears the title 'Admiralitie: The Forme and Maner of Holding of Courts of Admiralitie and Processe Led befoir Them'. The anonymous author began by commenting on the meaning of the word admiral, on the origins and extent of the admiral's jurisdiction, and on the steps the admiral or his depute had to take in establishing a court adjacent to the coast.[12] His account of the admiral's jurisdiction, which was less reminiscent of the treatise by King than of another treatise written around the same time by William Welwod, involved a distinction between civil and criminal cases that was used to structure the remainder of the book.[13] Under the subheading 'The Forme Used in Civill Causes befor the Admirall or his Depute', the author worked through the stages in which a civil action raised before the court would typically proceed, beginning with the summoning of the defender to hear and respond to the pursuer's complaint, moving on to the exchange of pleas and defences between the parties or their representatives, to the determination of legal issues by the judge, the proof of matters of fact by the parties, and the delivery of a final sentence by the judge, and then concluding with the means of enforcing a sentence delivered in the pursuer's favour against a recalcitrant defender.[14] The whole discussion is detailed and informative, but complicated by a willingness to investigate the

[10] NLS, MS 1948, pp. 189–319. The abridgement of legislation to which additions were made in EUL, La. III 421, was the widely copied work of Andrew Gilmour, dating from the 1660s, whereas the one in NLS, MS 1948, covered legislation passed between 1685 and 1696. The additions made to Gilmour's work do not seem to have been written in the same hand as the second copy of the procedural manual, but they were not necessarily written by Aikman himself. Parts of BL, Lansdowne MS 605, are in the the hand of Aikman's brother, Thomas Aikman of Brimbleton, a writer to the signet (*The Society of Writers to His Majesty's Signet* (Edinburgh, 1936), 57), but none of it seems to have been written by its later owner.

[11] NLS, Adv. MS 81.4.12, pp. 29–56.

[12] NLS, Adv. MS 28.4.7, ff. 51r–2r, MS 1948, pp. 151–4, and Adv. MS 81.4.12, pp. 29–31.

[13] W. Welwod, *The Sea Law of Scotland* (Edinburgh, 1690), sig. C6r, took the same line as the author in tracing the admiral's authority back to the jurisdiction granted to the burgh courts to deal with disputes involving foreign mariners. For evidence that he changed his mind about this, see J. D. Ford, 'William Welwod's Treatises on Maritime Law', *Journal of Legal History*, 34 (2013), 172–210.

[14] NLS, Adv. MS 28.4.7, ff. 52r–9r, MS 1948, pp. 154–61, and Adv. MS 81.4.12, pp. 32–56.

different directions in which particular cases might be taken, by a tendency to make comparisons with the procedure followed in other courts – which adds considerably to the historical value of the manual – and by a readiness to mention doubtful points of procedure, sometimes by raising questions to which firm answers are not provided. This final feature of the writing becomes especially prominent in the discussion of the means of enforcing sentences and remains prominent in the part of the manual headed 'The Forme Used in Criminall Causes'.[15] The copyist who abridged the manual omitted some of these speculative passages, and it may have been their increasing prominence from the end of the part on civil procedure onwards that led the third copyist to abandon his task before he reached the part on criminal procedure. The author started this final part of the manual by explaining how a defender was instructed to appear before the court, and presumably his plan was to work through the stages of a process again, but doubts about how a defender could be compelled to appear led into a series of other doubts from which the author never escaped. Indeed, after a few pages the treatment of criminal procedure gives way in the most complete copy of the manual to a series of loosely related notes, which among other things define various terms used in the shipping trade and summarise several cases decided in the courts.[16] These notes in turn give way to a couple of styles of a document commonly used in navigation.[17] In the abridged copy the notes are all omitted, but the styles are included, and at the end there are a few 'observations' which resemble the notes to some extent, though they are left out of the most complete copy.[18]

The notes at the end of the most complete copy and the observations at the end of the abridged copy shed some light at least on their own authorship, and possibly on that of the manual itself. The author of the notes commented on three cases decided in 1628 and 1629 by the lords of session, with whose practice he was apparently familiar.[19] In commenting on a decision made in the admiralty court in 1638, he also referred to an opinion expressed on the issue raised in

[15] NLS, Adv. MS 28.4.7, ff. 60r–2r, and MS 1948, pp. 162–7.

[16] NLS, Adv. MS 28.4.7, ff. 62–5r. Some of the definitions of terms can be found reproduced in W. Craigie, A. J. Aitken, J. A. C. Stevenson, H. D. Watson and M. G. Dareau (eds), *A Dictionary of the Older Scottish Tongue from the Twelfth Century to the End of the Seventeenth*, 12 vols (Chicago, London and Aberdeen, 1931–2002).

[17] NLS, Adv. MS 28.4.7, f. 65r.

[18] NLS, MS 1948, pp. 167–9. Similar notes appear at the end of the copy of King's treatise.

[19] NLS, Adv. MS 28.4.7, f. 63. Two of the decisions were reported by judges who had been involved in making them (Sir Robert Spotiswoode of Pentland, *The Practicks of the Laws of Scotland* (Edinburgh, 1706), 8, 70 and 306; Sir Alexander Gibson of Durie, *The Decisions of the Lords of Council and Session* (Edinburgh, 1690), 273, 277, 283 and 644; W. M. Morison, *The Decisions of the Court of Session, from Its First Institution to the Present Time*, 22 vols (Edinburgh, 1801–4), III, 2069, VI, 4497 and XIX, 16960–1 and 16963–4), but their reports do not seem to have been put into circulation before the late 1650s, nor does the author refer to them.

the case by 'Mr L. Mcg.', possibly meaning Lawrence McGill, the second son of David McGill of Cranston Riddell, who had entered practice at the bar in 1592, remained in practice until 1646, and made frequent appearances at the bar of the admiralty court.[20] Crucially, the author also mentioned 'the caus of ane Dutchman against the people of Aberdein', in which he had himself delivered a decision, directing his readers for further information to 'the register of the decreets of the admiralitie'.[21] No date is given, and the case has not been found in the only part of the register to have survived from the first half of the seventeenth century, running from 1627 to 1631, which may mean that it was decided before or after that period, or that it was for some other reason omitted from the register.[22] The author also advised his readers to 'sie the proces Samuell Wilson in the Ferrie against some of his mariners, wherin I took the advyce of ane number of merchands, masters and masters mates, in *anno* 1630', though this case has not been found in the surviving volumes of the register either.[23] A case that can be found there is alluded to when the author later recalls that 'in the Whythorn shippe, pertaining to ane Inglishman cled with a lettar of mark, *anno* 1629, Sir Henry M. said to me that Bennett did not offend against the law of nations' but only 'agaynst some circumstances of ther injunctions in Ingland, and ther court of admiralitie'.[24] The person who spoke (or perhaps wrote) to the author was presumably Sir Henry Marten, who sat as a judge in the English admiralty court between 1617 and 1641.[25] The person suspected of committing an offence was the Bristol merchant, Maurice Bennet, whose ship had been arrested by the Scottish admiral in December 1628, after it was driven by stormy weather into Whithorn.[26] The surviving volumes of the register of the Scottish admiralty court record that on 1 July 1629 Bennet

20 NLS, Adv. MS 28.4.7, f. 63v. Mr Lawrence McGill is the only 'Mr L. Mcg.' listed in Grant, *Faculty of Advocates in Scotland*, 132, and while it is not certain that the person referred to was an advocate, it is clear from NRS, AC 7/1, p. 68, AC 7/2, pp. 63, 67, 146, 174, 222, 255, 358, 380 and 408, and NLS, Adv. MS 6.2.1, ff. 32v–3r, that McGill was well known among admiralty practitioners. On the manuscripts just cited see below.

21 NLS, Adv. MS 28.4.7, f. 64v.

22 An invaluable guide to the records has been provided in S. Mowat and E. J. Graham, *High Court of Admiralty Scotland Records 1627–1750*, CD-ROM 2005. After NRS, AC 7/1–2, covering the period mentioned, there is a gap in the surviving register until 1672. To some extent this and the earlier gap can be filled by notes taken before the other volumes disappeared, which are preserved as NLS, Adv. MS 6.2.1, but no account of the case has been found there either.

23 NLS, Adv. MS 28.4.7, f. 62v.

24 Ibid., f. 64v.

25 B. P. Levack, *The Civil Lawyers in England, 1603–41: A Political Study* (Oxford, 1973), 252–3; G. D. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (Oxford, 1977), 166; H. C. G. Matthew and B. H. Harrison (eds), *Oxford Dictionary of National Biography*, XXXVI (Oxford, 2004), 906–7.

26 *The Register of the Privy Council of Scotland*, 2nd ser., 8 vols, ed. D. Masson and P. Hume Brown (Edinburgh, 1899–1908), III, 148 and 207.

presented a petition to 'Mr Williame Levingstoune, portioner of Saltoune, and Mr James Robertoune, advocat, commissar of Hamyltoune, deputtis of the said admiralitie'.[27] It would appear that the author of the notes included in the most complete copy of the procedural manual was one of these two judges, who between them dealt with most of the cases decided between 1627 and 1631, with the exception of a few heard by the admiral himself. The only other clue contained in the notes is that their author received information about a practice in Leith from someone called 'Greenlaw', presumably the notary Robert Greenlaw, who had been the clerk of the admiralty court in the 1620s and had become the town clerk of Leith by the end of that decade.[28] It may also be significant that one of the styles copied after the notes bears the date 1627, and that the observations attached to the abridged copy of the manual mention an alteration made to 'the custome of England' in 1628 (as well as two maritime cases heard by their author, neither of which is dated or has been found in the register).[29]

Personal recollections are also a recurring feature of the manual itself. Its author repeatedly acknowledged that some of his information had been received from 'Grinlay, admirall clerk att Leith', or 'R^{ot} Greinlaw, admirall clerk'.[30] Elsewhere the author wrote about what 'Sir Jerome Lindsay, *anno* 1638, told me', about what he understood to have been done by 'Sir Jerom, in Robert Stewarts tyme, who as I remember wes clerk before Greinlaw', and about what Greenlaw had told him about a case decided while 'Lord Midop' held office as 'admirall depute or vice admirall'.[31] Sir Jerome Lindsay of Annatland had been made 'conjunct depute' in the admiralty court in June 1613 by Sir Alexander Drummond of Medhope, 'one of the lords of session and admiral depute to Ludovick, duk of Lennox', after which Lindsay had served as a judge in the court until his appointment was found to have lapsed on Lennox's death in 1624.[32] At the time of his appointment, the clerk of the court had been John Young, but he had been replaced in the following year by Robert Stewart, 'one of the ordinary massers before the lords of sessione', who had remained in office until Robert Greenlaw took over in the next decade.[33] It was Sir Jerome

[27] NRS, AC 7/1, pp. 256–7.

[28] NLS, Adv. MS 28.4.7, f. 63r, and Adv. MS 6.2.1, f. 28r; NRS, AC 7/2, pp. 111 and 219–23.

[29] NLS, Adv. MS 28.4.7, f. 65r, and MS 1948, pp. 168–9.

[30] NLS, Adv. MS 28.4.7, ff. 60v and 61v, and MS 1948, p. 165.

[31] NLS, Adv. MS 28.4.7, f. 61v, and MS 1948, pp. 165–6 (quotations from the most complete copy are adjusted here in accordance with the more accurate details found in the abridged copy).

[32] NLS, Adv. MS 6.2.1, ff. 20r and 26v–7r; NRS, AC 7/2, pp. 147 and 219–23, and Erskine of Cardross Papers, GD 15/647; *Register of the Privy Council*, 2nd ser., I, 472 and 475. For background to these appointments see B. Seton, 'The Vice Admiral, and the Quest of the "Golden Penny"', *Scottish Historical Review*, 20 (1923), 122.

[33] NLS, Adv. MS 6.2.1, ff. 20–1r.

Lindsay and Sir Alexander Drummond from whom Mr William Livingston and Mr James Roberton took over as admiral deputes in the later 1620s – with John Kerr, 'wryter to the signet', as their clerk – after responsibility for the operation of the admiralty was conferred on Alexander Livingston, second earl of Linlithgow, during the minority of James Stewart, the new duke of Lennox.[34] The duke himself served as admiral after his powers were confirmed by parliament in 1633, and the earl then served as vice admiral until he died in 1648.[35] Although a document reproduced in the manual was issued in the duke's name, the author also mentioned the views of 'the earle of Linlithgow, lord admirall', or 'my noble old earle of Linlithgow'.[36] At some points the author indicated that he himself served as a judge in the central court of admiralty, as when he explained how 'wee admit' a libel submitted by a pursuer or 'wee repone' the defender to his peremptory exceptions, or recalled a case in which 'wee got order' to release an arrestment on a ship, and remarked on a requirement that foreign litigants in the court he was writing about 'designe ane domicill in Edinburgh or Leith'.[37] At other points the author indicated that he also practised as an advocate, observing in particular that he had 'opened causes' before the lords of session, and making it clear that he was on familiar terms with many of the leading practitioners at the bar in the first half of the seventeenth century.[38] '*Anno* 1637', he wrote, 'I remember old M. L. McG. told me of ane cause 24 yeirs befor that tyme', presumably again meaning Lawrence McGill, whose practice as a sheriff was mentioned in another passage.[39] 'I remember it wes resolved be Aitoun and the eldest lawiers', the author recalled elsewhere, presumably having in mind one of several advocates of that name who had practised during the early decades of the century.[40] He recalled further the views of Robert Nairn of Mukkersy and Strathurd, who was admitted to the bar in the first decade of the century, and opinions expressed to him directly by Sir Lewis Stewart of Kirkhill, admitted in the following decade, and by Robert Hepburn of Prentonan, admitted towards the end of the 1630s, along with a report he received from Sir James Learmonth of Balcomie, who never practised as an advocate but became a lord of session in

[34] Ibid., ff. 29–30.

[35] Records of the Parliaments of Scotland (www.rps.ac.uk), RPS 1633/6/48; *Register of the Privy Council*, 2nd ser., VI, 6 and 12–13.

[36] NLS, Adv. MS 28.4.7, ff. 51v, 58r and 59r, Adv. MS 81.4.12, pp. 31 and 54, and MS 1948, pp. 154 and 160–1.

[37] NLS, Adv. MS 28.4.7, ff. 52r, 53r, and 58r, Adv. MS 81.4.12, pp. 32–3 and 54, and MS 1948, p. 155.

[38] NLS, Adv. MS 28.4.7, ff. 51v, 54v and 56r, Adv. MS 81.4.12, pp. 30, 40 and 47, and MS 1948, pp. 152–3.

[39] NLS, Adv. MS 28.4.7, ff. 55v and 60v, Adv. MS 81.4.12, p. 44, and MS 1948, p. 164 (where '24' is misread as 'fourteein').

[40] NLS, Adv. MS 28.4.7, f. 53r, and Adv. MS 81.4.12, p. 35; Grant, *Faculty of Advocates*, 7–8.

the late 1620s.[41] According to one manuscript, the author commented that 'in my little comissariot, we summond twice', indicating that he also sat as a judge in a commissary court.[42]

The profile that thus emerges is of a writer who practised at the bar in the first half of the seventeenth century, who was familiar with the practice of several different courts, who sat as a judge in the central court of admiralty, and who may also have sat as a judge in one of the smaller commissary courts. As he was clearly not either Jerome Lindsay or Alexander Drummond, it would seem that, like the author of the notes attached to the manual in the most complete copy, he must have been either William Livingston or James Roberton.[43] The judge who sat most frequently in the admiralty court during the period covered by the surviving register was Mr William Livingston, portioner of Saltoun, but that could be not only because he was more experienced as a judge, having already served as a sheriff, justiciar and admiral depute of Orkney and Shetland in 1615 and 1616, but also because he had fewer professional commitments outside the court.[44] In the first two decades of the century, when he and his brother Patrick Livingston of Dalders were servitors to John, Lord Abernethie of Saltoun, William Livingston appeared on a number of occasions as a procurator before the privy council.[45] However, while he may perhaps have contemplated becoming an advocate at this stage in his career, there is no record of his ever having done so, and it is not in the register of the admiralty court alone that he is frequently designated 'portioner of Saltoun, admirall depute', but never 'advocate'.[46] In contrast, his colleague fits the profile of the author perfectly. The son of Archibald Roberton of Bedlay, third son of John Roberton of Earnock, and of Elizabeth Baillie, daughter of Robert Baillie of Jerviston, James Roberton was appointed 'philosophiae et rerum humaniorum professor' at the University of Glasgow in 1618.[47] A

41 NLS, Adv. MS 28.4.7, f. 58v–9r and 61r, Adv. MS 81.4.12, p. 56, and MS 1948, p. 164; Grant, *Faculty of Advocates*, 101, 162 and 201; G. Bruton and D. Haig, *An Historical Account of the Senators of the College of Justice* (Edinburgh, 1832), 277.

42 NLS, Adv. MS 81.4.12, p. 37.

43 This alone is enough to confirm the significance of the similarities of style and substance between the notes and the manual, and see further below.

44 *The Court Books of Orkney and Shetland, 1614–15*, ed. R. S. Barclay (Edinburgh, 1967), xxv, 11, 23, 25, 34, 40, 42, 44–5, 57, 61, 94, 97, 100, 106 and 118; *Court Book of Shetland, 1615–29*, ed. G. Donaldson (Lerwick, 1991), viii–ix, 1, 3, 13, 14, 18, 22, 23, 27, 32, 38, 43, 44 and 55; *The Register of the Privy Council of Scotland*, 1st ser., 14 vols, ed. J. H. Burton and D. Masson, X (Edinburgh, 1877–98), 842–3.

45 *The Register of the Great Seal of Scotland*, 11 vols, ed. J. Balfour Paul, J. M. Thomson, J. H. Stevenson and W. K. Dickson (Edinburgh, 1984), VI, 481, VII, 46, 60, 130–1, 202–3, 220, 253, 265, 298 and 327, and VIII, 23; *Register of the Privy Council*, 1st ser., V, 621 and 727, VII, 269 and 653–4, IX, 304, 309–10, 319 and 469, and X, 472.

46 *Register of the Great Seal*, VIII, 2 and 172; *Register of the Privy Council*, 2nd ser., II, 209, III, 32, 42, 52 and 59, and VI, 663 and 689–91.

47 *Munimenta alme universitatis Glasguensis*, ed. C. Innes, III (Glasgow, 1854), 377. Undoubtedly

cousin of one divinity professor at the university (Robert Baillie) and brother-in-law of another (David Dickson), he seems himself to have had more interest in the higher discipline of law, and in the legal practice of the commissary courts that sat nearby in the cathedral.[48] In 1622 he was appointed judge of the commissary court of Hamilton and Campsie, which met in the same place as the much busier commissary court of Glasgow.[49] By 1626, when he took up an appointment as a justice depute in Edinburgh, he had been admitted to the bar, unlike the other justice depute with whom he was to sit in the justiciary court for many years to come.[50] He took up his appointment as an admiral depute in Edinburgh on 31 March 1627, at about the time the surviving record of the court's business opens.[51] In that record he is often encountered presiding over disputes either on his own or, less frequently, in company with William Livingston or the earl of Linlithgow.[52] By 1647, when he was heavily involved in business elsewhere, he was apparently employing 'Mr David Heriot, advocate', as a substitute in the court, just as he was employing 'Johne Govane, notar in Glasgow', as a substitute in the Hamilton and Campsie court, but he continued to be designated 'admiral depute' or 'commissar' in documentation and he may still have presided over cases in the admiralty court from time to time.[53] After

a graduate of the same university, he either matriculated in 1605 and graduated in 1609, or else matriculated in 1610 and graduated in 1613 (III, 10–11, 66 and 68). Biographical notes are available in Brunton and Haig, *Historical Account of the Senators of the College of Justice*, 374–5, Grant, *Faculty of Advocates*, 180, and *The Old Minute Book of the Faculty of Procurators in Glasgow, 1668–1758*, ed. J. S. Muirhead (Glasgow, 1948), 219, while a more detailed account can be found in the *Oxford Dictionary of National Biography*, XLVII, 128–9.

48 H. M. B. Reid, *The Divinity Professors in the University of Glasgow, 1640–1903* (Glasgow, 1923), 77; F. N. McCoy, *Robert Baillie and the Second Scots Reformation* (Berkeley, 1974), 18; *Old Minute Book of the Faculty of Procurators in Glasgow*, 16 and 230–3. See too *The Letters and Journals of Robert Baillie*, ed. D. Laing, 3 vols (Edinburgh, 1841–2), II, 413–14 and III, 455–6 and 472.

49 A new act book, NRS, CC 10/1/6, was opened to mark his appointment. It is apparent from the records of this court – a 'little comissariot' if ever there was one – that it was indeed the practice there to summon defenders twice in the way the author of the manual described.

50 *Selected Justiciary Cases, 1624–50*, ed. S. A. Gillon and J. I. Smith, I (Edinburgh, 1953–74), 5–6 and 61.

51 NLS, Adv. MS 6.2.1, f. 30r.

52 NRS, AC 7/1, pp. 17, 27, 33, 35, 38, 149, 154, 214, 218, 251, 256, 259, 269 and 274, and AC 7/2, pp. 13, 15, 28, 32, 37, 56, 61, 64, 69, 75, 77, 81, 83, 85, 87, 89, 112, 115, 121, 131–2, 160, 182, 191–3, 196, 204, 207, 211–12, 217, 223, 229, 251, 268–9, 282, 285, 288, 334, 337, 343, 346, 353, 357, 359, 371, 376, 382–3, 386–7, 391, 394–5, 397, 405, 410, 413, 417 and 419. Roberton's name thus appears much more frequently in the second surviving volume of the register than the first. The division is thematic, with AC 7/1 being focused on prize litigation, while AC 7/2 covers more general business, mostly of a commercial nature.

53 *Munimenta alme universitatis Glasguensis*, I, 293 and 305, and III, xiii and 324; *Charters and*

the English conquest in 1651, Roberton lost his judicial offices and withdrew from practice as an advocate, but following the restoration of the monarchy he was reappointed as an admiral depute and commissary and became in addition a lord of session, remaining in office until his death in 1664.[54]

Two further pieces of evidence strengthen the impression that Mr James Roberton of Bedlay was the author of the procedural manual. The first is a passage in the manual in which the author writes: 'The lords upon ane tyme, having called for myself, fand be interloquitor that after they hade advocat ane cause to themselves, which hade been depending befor the admirall court, the cautioner stood bound'.[55] Sir Alexander Gibson of Durie, one of the lords of session referred to, included in a collection of case reports he compiled between 1621 and 1642 an account of a case heard in November 1636 in which precisely the finding described was made by his court.[56] The point was that in the admiralty court defenders from overseas were required to have someone guarantee not only that they would reappear before the court when called (caution *de iudicio sisti*) but also that they would be able to pay an award of damages made against them (caution *iudicatum solvi*), whereas in the session only a guarantee of the former type was required. So what was the position when a case was raised before the admiralty court, where caution both *de iudicio sisti* and *iudicatum solvi* was duly provided, but was afterwards transferred to the session, before a judgment had been given? The lords of session found in 1636 that the cautioner would remain obliged to pay any damages they awarded if the defender failed to pay, and they did so, according to Gibson, after enquiring into the practice of the court of admiralty, 'having called Mr. *James Robertson* before them, who was Admiral Deput'. While it is conceivable that there was a different case in which the lords of session reached a similar decision after taking advice from a different depute, this must be extremely unlikely. The second piece of evidence worth noting derives from the records of the burghs. In July 1659 the convention of the royal burghs, aware that 'Mr James Robertoun, late admirall deput, is not onlie ane man of singular learning, but especiallie most knowing in the maritime effairis', heard that 'he hes many paperis and collectionis of his owin which, if they were digestit in ane volume,

Other Documents Relating to the City of Glasgow, 1174–1649, ed. J. D. Marwick (Glasgow, 1897), 344; John Row, *The History of the Kirk of Scotland*, ed. D. Laing (Edinburgh, 1842), 383; *Register of the Privy Council*, 2nd ser., IV, 14, 20 and 376, and VI, 224–5; RPS 1641/8/228, A1641/8/147 and 1646/11/400; NRS, CC 10/1/6; NLS, Adv. MS 6.2.1, f. 44r.

54 *The Decisions of the English Judges* (Edinburgh, 1762), 30–1; *Scotland and the Protectorate*, ed. C. H. Firth (Edinburgh, 1899), 317–18 and 385–91; NRS, CC 10/1/10 (see especially the entry dated 1 November 1664), and Diet Book of the Admiralty Court, AC 2/1; NLS, Adv. MS 6.2.1, ff. 52r and 53v–4r.

55 NLS, Adv. MS 28.4.7, f. 54v, and Adv. MS 81.4.12, pp. 40–1.

56 Gibson, *Decisions of the Lords of Council and Session*, 821–2; Morison, *Decisions of the Court of Session*, III, 2033–4.

might be off great us to this natione in generall, and to the estait of burrowis in particular'.[57] In May 1660 the council of Edinburgh directed the local dean of guild, along with the water bailie of Leith, 'to deall with Mr James Robertsone to digest the maritime lawes in a booke', and two months later the convention of the royal burghs finally decided to forward its request to Roberton for a 'book containing the practicks of the maritime lawis'.[58] Whether Roberton ever did attempt to digest the materials he had gathered into the type of book known as a collection of practicks is doubtful – at least, no such book appears to have survived – but the procedural manual may have formed part of the 'many paperis and collectionis of his owin' to which attention was drawn. That two of the three surviving copies of the manual are appended to copies of the treatise on maritime law by Alexander King suggests that Roberton may also have owned a copy of that treatise, to which he had himself attached his manual.[59] In fact, the observations included at the end of the abridged copy of the manual are observations on King's treatise, though similar in style to the notes included at the end of the more complete copy.[60] The observations seem to have been written by the author of the manual, who may surely now be identified with some confidence as Roberton.[61]

A consequence of the association formed between the manual and King's treatise has been a tendency among modern historians to assume that both works were written by King.[62] The assumption is certainly mistaken, for although King was both an advocate and an admiral depute, he died in 1617, having lost his place in the admiralty court at the beginning of the 1590s, when Francis Stewart, fifth earl of Bothwell, was replaced as admiral by Ludovick Stewart, second duke of Lennox.[63] The procedural manual, it has been seen,

57 *Records of the Convention of the Royal Burghs of Scotland*, ed. J. D. Marwick and T. Hunter, III (Edinburgh, 1870–1918), 486–7 (punctuation adjusted).

58 *Extracts from the Records of the Burgh of Edinburgh*, ed. M. Wood and H. Armet, V (Edinburgh, 1927–67), 199; *Records of the Convention of the Royal Burghs*, III, 519–20.

59 These two copies of King's treatise are in many details similar to each other and different from the two copies of the treatise that survive without the manual attached, as will be demonstrated elsewhere.

60 The observations also make reference to a treatise on maritime law attached to the practicks of Sir James Balfour of Pittendreich, but it would have occasioned no surprise that Roberton had a copy of Balfour's work.

61 The copy of King's treatise in NLS, Adv. MS 28.4.7, ff. 48v–50r, actually ends with another run of notes similar in style to those at the end of the procedural manual and to the observations. Mention is made again of 'Robert Greinlaw', and also of several cases in which the author seems to have had some involvement. Three of these cases have been traced in NRS, AC 7/2, pp. 24–7, 97–101, 121–5, 219–23, 394–5 and 405–8. The only judge involved in all three was Roberton. Reference was also made in these notes to the version of Welwod's treatise published in 1613.

62 McMillan, 'Admiralty and Maritime Law', 331; Wade, 'Introduction', xxxii, xxxv and xxxvii; Dickinson, 'Courts of Special Jurisdiction', 399.

63 A full account of King's career will be published elsewhere.

was written by someone who practised as an advocate and served as a judge in the late 1620s and throughout the 1630s, and who heard about legal practice in the earlier years of the seventeenth century from older advocates and judges, as well as a former clerk of the admiralty court. That he made reference at two separate places to business conducted by parliament in 1644 indicates that must have been written after that date, and that he referred to what Lawrence McGill told him 'he hes decerned' (not 'had decerned') in a sheriff court suggests that he wrote before McGill died in 1646.[64] It is possible that he wrote the manual around 1645 for the particular benefit of the substitute he was then about to employ. A problem with this suggestion is raised by another passage in which the author referred in the past tense to an opinion held by the admiral during his time in office, apparently meaning an opinion he held continuously, but it was in this passage that the author talked about 'my noble old earle of Linlithgow', a surprising way to describe a current superior, and this statement, unlike the others mentioned, appears at the end of a paragraph to which it could easily have been added.[65] In another statement that looks like a later addition, and which is found only in the most complete copy of the manual, the author remarked: 'I doe not remember, only I beleive, the lettars for lousing of arreistment commands the pairtie arreister to be warned'.[66] In contrast to the bulk of the manual, this statement seems to have been made by someone who had not been actively involved in the practice of the court for many years, and there is further – and more conclusive – evidence that the most complete copy of the manual represents a version revised in the early 1660s.[67] Two procedural documents reproduced in that copy open with the phrase 'Charles, duk of Lennox', and one ends '166– years', whereas neither of these documents is dated in the only other copy in which they can be found, and both open there with the phrase 'L. D. of Lennox'.[68] It seems that styles of documents dating from the period when Ludovick Stewart, second duke of Lennox, was admiral, were updated after Charles Stewart, the fifth duke, became admiral in 1661 and reinstated Roberton as a depute.[69] At some stage between his reinstatement

[64] NLS, Adv. MS 28.4.7, ff. 55v and 61, Adv. MS 81.4.12, p. 44, and Adv. MS 81.4.12, pp. 44 and 165; cf. RPS 1644/6/205, 312 and 332.

[65] NLS, Adv. MS 28.4.7, f. 58r, Adv. MS 81.4.12, p. 54, and MS 1948, pp. 160–1.

[66] NLS, Adv. MS 28.4.7, f. 57v; cf. Adv. MS 81.4.12, p. 53.

[67] Another point worth mentioning is that the first of the notes at the end of the most complete copy refers to the 'pettie customes' or 'shoremeall' of Leith being 'sometyme fermed to 7,000, sometymes to 6,000, and now I think to fyve thousand merks' (NLS, Adv. MS 28.4.7, f. 62r). The right to collect the Leith duties had been let out for over 6,000 merks in the 1630s, and for over 7,000 merks in the 1640s, but had lost value considerably by the end of the 1650s (*Extracts from the Burgh Records of Edinburgh*, III, 80, IV, 93 and V, 41).

[68] NLS, Adv. MS 28.4.7, ff. 56v–7r, and Adv. MS 81.4.12, pp. 47–8 and 51–2.

[69] NLS, Adv. MS 6.2.1, f. 54r. James Stewart, the third duke of Lennox, had died in 1655 and been succeeded by his son, Esmé Stewart, then living in Paris; but he had died

and his death in 1664, Roberton appears to have revisited his manual and to have made some slight adjustments to it, perhaps in response to the request he had received from the burghs to assemble a collection of practicks from his papers.[70] He may have been prepared to contribute to the significant upsurge in legal writing that occurred in Scotland during the late 1650s and early 1660s in response to the English occupation.[71] Nevertheless, his manual is most safely read as a guide to the procedure followed in the admiralty court between the late 1620s and early 1640s, and as such offers assistance to readers of the court's register of acts and decreets surviving from that period. Misleadingly associated with King's treatise, it was in fact better associated in the third manuscript with a collection of decisions delivered between 1629 and 1643, and with another treatise dating from roughly the same time, even though neither the decisions collected, nor Hope's minor practicks, were concerned with maritime law.[72] In its observations on the procedure followed in other courts, particularly the session, the manual may also be usefully read as a supplement to the procedural guide with which Hope's minor practicks begins.

there five years later, when the dukedom had passed to his cousin, Charles Stewart (see J. Balfour Paul, *Scots Peerage*, V (Edinburgh, 1904–14), 356–61).

70 If this is correct, the revised version of the manual is found in a more complete form in NLS, Adv. MS 28.4.7, and in an abridged form in MS 1948. However, although Adv, MS 81.4.12 lacks most of the revisions and thus appears to reproduce the unrevised version, it does contain the passage talking about 'my noble old earle of Linlithgow'. As the earl had died in 1648, it may be that this particular revision had been made earlier.

71 J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007), 73–84.

72 The suggestion is that the manual was connected with King's treatise when it was revised by Roberton in the early 1660s. Whether Roberton had himself connected it with the decisions of the commissioners for the valuation of teinds and Hope's minor practicks is harder to tell.