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THE JURISDICTION OF THE SCOTTISH PRIVY COUNCIL

1532 - 1708

submitted by

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To

M F M

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LIST OF ABBREVIATIONS

ADC	Acta Dominorum Concilii
ADC (Public)	Acts of Lords of Council in Public Affairs
AJ	Act of Adjournal
APS	Acts of Parliament of Scotland
AS	Act of Sederunt
Balfour	Balfour, Sir James, Practicks
Bisset	Bisset, Habbakuk, Rolement of Courtis
BOEC	Book of Old Edinburgh Club
Botfield	Original Letters, Ed. Botfield
Breviate	Sibbald, A Breviate of the State of Scotland
Brunton	Brunton & Haig, Senators of the College of Justice
BS	Books of Sederunt
BUK	Book of Universall Kirk
Calderwood	Calderwood, History of the Kirk in Scotland
EHR	English Historical Review
ER	Exchequer Rolls
Erskine	Erskine, Institute of the Laws of Scotland
Hannay	Hannay, College of Justice
HMC	Historical Manuscripts Commission
Home MSS	David Milne Home Manuscripts
Hope	Sir Thomas Hope, Major Practicks
Hume Crimes	Hume, Commentaries respecting Crimes
JR	Juridical Review
Keith	Keith, Affairs of Church and State in Scotland
Knox	Knox, Works
Letters	Letters and State Papers of James VI

Mackenzie Criminal	Mackenzie, Laws and Customs of Scotland in Matters Criminal
Mackenzie Institutions	Mackenzie, Institutions of the Law of Scotland
McMillan	McMillan, Evolution of Scottish Judiciary
Mar & Kellie	Mar & Kellie Papers
Melrose Papers	Melrose Papers, Abbotsford Club
NLS	National Library of Scotland
OED	Oxford English Dictionary
Pitcairn	Criminal Trials, Ed. Pitcairn
Pitm	Pitmedden, Abridgment of Books of Sederunt
Regiam	Regiam Majestatem
Register	Register of Royal Letters
RH	H.M. General Register House, Edinburgh
RMS	Register of Great Seal
RPC	Register of Privy Council, First Series
2RPC	Register of Privy Council, Second Series
3RPC	Register of Privy Council, Third Series
RSS	Register of Secret Seal
TA	Treasurers Accounts
SHR	Scottish Historical Review
SHS	Scottish History Society
Skene De Verb	Skene, De Verborum Significatione
SLT	Scots Law Times
Spotswood	Spotswood, History of the Church of Scotland
Staggering State	Scot, Staggering State of Scottish Statesmen
Stair	Stair, Institutions
STS	Scottish Text Society
Sources	Sources and Literature of Scots Law

PREFACE

The main source of this thesis is the Register of the Privy Council, the greater part of which has been in print for almost seventy years during which time it has been the quarry of historians whose interests were primarily political and ecclesiastical. Such legal work as has been done on the council has been largely of a constitutional nature; and the legal interest of non-historians and antiquaries has had a bias towards trials for witchcraft and the persecution of the covenanters - topics which are not of great importance in themselves nor when compared with the huge mass of judicial business which the council transacted; and these topics tend to give a distorted picture of the volume and proportion of that business. The article in Sources and Literature of Scots Law (Stair Society), at page 82, is merely a starting point which, apart from reliance on Mackenzie, only touches on the original jurisdiction of the council before the Restoration. The much shorter paragraph in Introduction to Scottish Legal History, at page 28, is misleading.[2] The Edinburgh University PhD thesis of Mr William Taylor, "The Scottish Privy Council 1603-1625: Its Composition and Work", is chiefly concerned with politics and administration.

Apart from the Register, I have relied mostly on the Acts of Parliaments of Scotland, on the institutional and other writers, particularly Mackenzie, and on the various collections of royal and other letters which are preserved in the club books. Since the bulk of the sources used are in print the MS sources have

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1. The lack of legal interest is betrayed even in some of the earlier editors of the Register who use "plaintiff" and "defendant" instead of "pursuer" and "defender": RPC iii 443

2. Appendix I

been used mainly to supplement them and in the case of the Register to recover information which had been obscured in the process of calendaring.

Since the unknown factor has been the privy council rather than the court of session the thesis has in the course of writing developed a bias towards the council rather than the session and indeed some of the chapters have come rather close to being parts of "A Manual of Privy Council Procedure".

For reasons of sheer paucity of records the thesis must, especially in the earlier period, be regarded as somewhat tentative.

The thesis has assumed a more analytical form than might be expected. This has been necessitated by the nature of the subject which does not lend itself to the completely synthetic approach. It is only by analysis of the individual items of the council's work and by comparison with that and the jurisdiction of the ordinary courts that some estimate of the council's judicial function can be arrived at. At the same time, it is hoped, the analysis will go a little way to lightening part of the darkness of Scottish legal history.

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INTRODUCTION

1 The Problem

The period covered by this thesis is a fairly natural unit. It begins with the "foundation" of the court of session in 1532 when the judicial function of the "lords of council and session" was hived off into a separate court, thereby leaving (in theory at least) political matters to the privy council. The period ends with the abolition of the separate Scots council in 1708.

The occasion of this study is the search for the answer to one question. Broadly the pre 1532 council was a political body which had had an increasing judicial function with varying degrees of distinctness, for example, the disaster of Flodden appears to have set back the process of differentiation.[1] In 1532, after the judicial function had been canalized into the court of session, the council did not cease either then or during the next 170 years to exercise some judicial function. The aim of this essay is to ascertain the nature and ratio of this residual jurisdiction and, in particular, to assess how far this jurisdiction included matters which were appropriate to the ordinary courts including the court of session.

Much of the discussion about the essential nature of the council's jurisdiction is similar to that of the pre 1532 council and session but with one great difference: the lords of council and session were originally an extraordinary court of justice which by 1532 became an ordinary court of law; the post 1532 privy council never achieved that transformation.

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1. Hannay 27

It follows from the nature of this inquiry that much of the work of the council, particularly its legislative and executive functions, has been excluded except insofar as these matters - such as government policy towards the highlands and the church - impinge upon the judicial work of the council.

II THE COUNCIL AS A COURT

2 The Organization of the Court

The council was an undoubted court, and was universally recognized as one of the superior judicatories and of greater rank than the court of session.[1] Like parliament and the court of session the council was a civil court whose only criminal aspect was that it entertained penal actions.[2] It could assume jurisdiction in matters which parliament had accorded to the civil courts.[3] Procedure in penal actions was by signet letters, not indictment.[4] The court sat as a bench without a jury; and horning for failure to appear was reckoned to be civil.[5] Even after 1532, when the main judicial function of the council was canalized into the college of justice, the council remained as it had been since the 15 century a court of record hearing cases and receiving deeds for registration; and it had all the other attributes of a court.[6]

In organization the council was comparable (although on a less developed scale) with that of the court of session.[7] The council had a clerk who kept the sederunt-

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1. "A pryme and soverane judicatorie": 2RPC v 298; hearing "the complayntis of pairtys" and "causes and actiones betwixt subject and subject": 2RPC i 249-250; 3RPC xiii 379; Hope v 25; 'Sir John Scot "Trew Relation" SHR xi (1914) 169; "Manner of Holding Judicatories" SHR xix (1922) 265; Mackenzie Criminal ii 6 1; Mackenzie Institutions i 3 6; Stair iv i 58; iv 37 1; Erskine i 3 9; 2RPC i 248-252. Both the records and the writers give little assistance in drawing a full picture of the council and its jurisdiction; for most of them fail to describe an institution with which they were so familiar, and interest is more on the political than on the judicial aspect of the council.

2. A further point of similarity with the criminal courts was that diets of the council were peremptory.

3. 1661 c 246 (APS vii 231); 2RPC iii 341; x 116-7 etc; 1698 c 6 (APS x 149)

4. Infra, procedure

5. RPC vi 390; x 547; Hope vi 27 93

6. 1469 c 2 APS ii 94; eg RPC i 683; xii 414

7. Appendix D, E

book and minute book of process. The council also had times for judicial as well as public business; and, after the reign of Mary, tended to remain in Edinburgh along with the other organs of government. The council was composed of men who were as much lawyers as the lords of session; and indeed they were often the same men, sometimes to the extent of one half of their number.

Even in the more stable judicatories, the "ordinaries", the modern notions of a fixed constitution and the rigid division of the powers of government were not adhered to. The council was treated by contemporaries as being just one in the hierarchy of judicatories along with parliament, session, justice and the like; but the council was sui generis to the extent that it was the most immediate instrument of the royal authority. Accordingly its organization was, not unnaturally, different from that of other judicatories depending as it did on the nature of the royal authority, whether the king was a minor, or a prisoner in the hands of a noble clique, or abroad, or resident in England, or just depending on the whim of the monarch. By the 1590s the council had become much less amorphous[1] and this is reflected in the composition, function and meeting place; in the regulations of 1598[2] the form of oath was settled and a president appointed.[3] For the remainder of James VI's reign, and especially after 1603, this stability was maintained although no constant membership was ever laid down.[4] By 1626 regular appointments of the whole council were being made by commission,[5] which thereafter was the normal method of constitution.[6]

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1. RPC v 500
2. APS iv 177
3. RPC v 501; viii 815
4. Mackenzie Criminal ii 6 1
5. 2RPC i 248-252; cf 3RPC i 1-6; Mackenzie Criminal ii 6 1; Appendix A, B
6. Appendix A, B

Written constitutions

The written constitution of the council was variously an act of parliament or convention,[1] an act of council, a royal letter, either itself[2] or later transformed into a commission under the great seal.[3] The earlier parliamentary constitutions merely list the councillors usually by name[4] or appoint substitutes.[5] The conciliar documents of the 1560s[6] were essentially rules for regulating business. In the 17 century new constitutions were promulgated on the accession of a new monarch;[7] or on the occasion of some radical alteration in political fortunes:[8] such as the accession of James VI to the English throne, the ascendancy of the covenanters in 1641,[9] the assumption of power by Lauderdale in 1674,[10] or the ultra royalism of the 1680s.[11]

The original amorphous nature of the council reflected in its indefinite number and the lack of attendance of councillors was limited by the first major reorganization of 1598.[12] From then on the constitutions became fuller and more stereotyped, there being little distinction among the eleven issued between 1610 and 1689. Even at this highest state of development neither the order nor arrangement of its powers was particularly logical.[13]

Although many of the powers set forth in the later constitutions were not expressed in the earlier ones, it is clear from the records that the bulk of these powers always existed in the council, and that the later documents merely set down

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1. APS iii 96 118
2. RPC vi 558
3. 2RPC i 248; Appendix A, B
4. APS ii 414
5. APS ii 442
6. RPC i 158 217 511
7. 2RPC i 248; 3RPC i 1; xi 12; xiii 378
8. RPC vi 558
9. 2RPC vii 142
10. 3RPC iv 186
11. 3RPC ix 32 The only explanation for the new commission of 1631 (2RPC iv 188-190) is that Charles wanted to emphasis the dependence of the councillors on his royal favour.
12. APS iv 177
13. Appendix B

existing practice. Indeed these later constitutions specifically accorded to the council all the powers possessed by councils in the time of former monarchs[1] and those of 1626 and 1641 specifically refer to the practice of the reign of James VI.[2]

Vacation

The council normally met throughout the year, but there is mention of "ane harvest vaccance" in the later years of the 16 century.[3] This recess, which was in the Autumn, seems to have been rather ad hoc, without clear statutory authority, merely a licence to the councillors to retire to the country to look after their harvest depending on whether it was late or early.[4] In July a litigant speaks of approaching vacation.[5] There may also have been a shorter recess in January and March.[6] The council made provision for a "vacation court" on Thursdays;[7] and in one case appointed a commissioner to take the oath of office of a sheriff, normally received by the council, because of the vacation.[8] During the summer vacation the council usually met once a month, although Charles I tried to enforce meetings once every 20 days.[9] The court of session had on the other hand a vacation period of five months.[10]

Meetings: day, time, place

The conjunction of political and judicial work was one of the reasons why the council did not meet on any set day. Until the end of 1561 the record is so wanting or defective as to make any judgement on meeting days of little value.

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1. eg 3RPC i 1
2. 2RPC i 248; vii 142
3. RPC xi 417
4. Melrose Papers i 314; RPC xiii 44
5. RPC v 493
6. Melrose Papers ii 511; RPC vii 337
7. Melrose Papers ii 541; RPC vii 337
8. RPC xiii 44
9. 2RPC i 348-9
10. 1532 c 2 (APS ii 335); SHR xix (1922) 266; APS vii 193; AS (1790) 50; Spotswood Forms vi

The beginning of the continuous record in 1561 and the attempts throughout the 1560s to organize the council were probably the work of the Secretary, Maitland. Thereafter until the 1580s there appears to be no ratio in the frequency of sederunts on any particular day except that Sunday is not a popular day. Because of delay and slowness of justice there was throughout the 1560s a series of ordinances dealing with the meeting time of the council[1] but these did not differentiate days for judicial and political business; and they referred more to the hours of meeting. As far as they prescribed sederunt days they appeared, from the frequency in the register, not to have been adhered to with any regularity. The intervention of such events as the deaths of Rizzio and Darnley, the flight of Queen Mary or the Bonnie Earl of Murray causes suspension of judicial work[2] and during the proceedings against Mary at York in 1568, which the Regent Moray attended, the council ceased to meet for three months.[3] It may be that these regulations were purely temporary measures to deal with a particular excess of business because these troubled times engrossed the council's time with political meetings at which judicial affairs were dealt with as an appendage.

The ordinances, thereafter, assigned certain days for judicial work. That of 1567, which gave Tuesdays and Thursdays for the reading of bills,[4] did not seem to have been implemented at all, the council meeting on all days of the week, and conducting judicial business on most. Early in 1584, because of the "fascherie" to councillors caused by daily sittings these were cut down to Tuesday, Thursday

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1. RPC i 158 217 511
2. eg RPC i passim Similarly with the murder of Archbishop Sharpe: 3RPC iv passim
3. RPC i 643-4
4. RPC i 603

and Saturday, for complaints, with Wednesday for discussing matters where parties were warned.[1]

However, as the century progressed, council days came to be limited more and more to Tuesdays and Thursdays, and this was the policy of subsequent legislation - Tuesdays for public affairs, and Thursdays for judicial work.[2] These fixed days were upset by the extensive progress during the plague in Edinburgh. Throughout the years the hour of meeting varied.[3] By the time of James VI's death the council usually met on Tuesday mornings at 8, or in the afternoon, for public affairs; and on Thursday afternoons for actions.[4] This, of course, was subject to pressure of work; if there was no business the council did not meet;[5] if there was an excess or an unexpected development, the council met for longer each day, or on other days as well.[6] On one occasion for example the council hastily convened on a Sunday night[7] at the chancellor's house to deal with a crisis. The departure

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1. RPC iii 627
2. RPC iii 627; v 118 500; viii 815; APS iv 177; Spotswood iii 212; Melrose Papers i 22-3. Letters of charge of the 1600s cited defenders to compear "upoun the xix day of Junii instant being Thursday"(MS RPC 1589 - 1607[13]). In one case a party protested against his citation to appear on a day other than Thursday contrary to Act 1592 c 41 (RPC iv 760-1). Diets in the council were peremptory (RPC v 266 493) whereas before the court of session citations were to a certain lawful day or such subsequent lawful date.
3. First of all 8 - 10 (RPC i 158), then 8 - 11 (RPC i 217) and finally 8 - 12 (APS iii 562; RPC vii 337) and in the afternoons variously 1 - 3 (RPC i 158), 2 - 5 (RPC i 217), or 3 - 5, with a late night on Fridays till 9. According to the regulation of 1578 (APS iii 96) the mornings were to be devoted to public business and afternoons to judicial business, but this, if it was ever implemented, was abandoned in favour of a different day for each class of business usually in the afternoons. In 1610 the Tuesday afternoons were to be for public business and Thursday afternoons for judicial work (RPC viii 815) and during the vacation meetings were on Thursday mornings from 8 to 12 (RPC vii 337) or at 9 (RPC viii 123).
4. 3RPC xi 439
5. Melrose Papers i 128
6. Eg, Argyll's rebellion 1685 (3RPC xi 69). The activities of the irreconcilable covenanters caused a virtual cessation of the council's judicial work: "in respect of ... thair other imployments in name of his majesteis services thay had no time nor leasure to attend this business"(3RPC vi 422).
7. Melrose Papers i 265

in 1606 from the rule of having one day for public business was enforced again by the king.[1]

The council was wherever the king was: its peripatetic nature which was particularly a feature of the early years can be gauged from the sederunts. Besides its circuits or rather progresses outside Edinburgh to Jedburgh, Glasgow, Dumbarton, Stirling, Linlithgow, Perth, Aberdeen, Edzell, Elgin it would be found at Castlehill in exercitu, "apud Cannaby" in campis or castra prope Edinburgh.[2]

However with the more settled times of James's later years and after, military excursions became less frequent; and also the council tended to remain in Edinburgh which was becoming the seat of all government. When in Edinburgh the council normally met in either of the old Tolbooths,[3] and finally in the new chamber adjoining the Parliament House which was completed on the eve of the troubles.[4]

Councillors: qualification

It is difficult to speak of the qualification of a privy councillor in the sense which would apply to a lord of session. Apart from the difficulty that in 16 century administration specialization function was not carried to great lengths - for example, a large number of the lords of session were not professional lawyers - there was a further difficulty. The council was of two parts: the ordinar or working councillors who were officers of state and administrators; and the

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1. Melrose Papers i 20; RPC xiv 596. There are frequent continuations by the council and protestations by parties that there was no quorum present at the day to which they were cited (RPC ii 39 407-8); and on occasion the king himself or one or two other councillors were alone present (RPC iii 319 443); and on occasion not even the clerk was present (RPC v 266).
2. RPC i 379 (1565); ii 44 (1569); ii 84 (1571)
3. 2RPC i 430
4. BOEC xiii (1924) 1-3. The commissions prescribed Edinburgh or any other place where the councillors thought fit (RPC viii 815) or (in 1598 and 1626) Holyrood (APS iv 177; 2RPC i 248). Occasionally the meeting place was altered by order of the king from Edinburgh to Holyrood (RPC xi 571; xii 27). There are references from 1579 to a "counsale hous" at Holyrood (Master of Works Accounts i 306 324).

extraordinar councillors whose presence gave the council the appearance of a convention of estates or the king's (great) council as distinct from the privy or secret council. There was a qualification of rank for these extraordinar lords - an earl, lord of parliament, knight or senator of the college of justice.[1] In the reorganization of the Scottish administration which Charles carried through in 1626, the guiding rule was that the court of session should be composed of gentry (ie, lairds) and the council of the nobility as more befitting their rank.[2] In 1623 a definite act of precedence was promulgated.[3]

Appointment

The office of councillor was in the gift of the king, although the appointments were often declared to be done with the consent of the estates.[4] This was not a matter of democratic control (except in the 1640s) but rather the most formal method of ratification of a public act. It was the normal method of appointing a whole new council as was appropriate on some political upheaval such as the gaining of personal rule of James VI between 1577 and 1581[5] or the reconstruction of the council as with Charles I's radical reforms[6] or under the Covenanters.[7] During the rule of the restored Stuarts when English influence was increasing appointments of the council were in Latin commissions under the great seal;[8] but after the revolution they reverted to the vernacular.[9]

New councillors, appointed to fill vacancies, were nominated by royal letter of presentation under the signet. The new councillor presented his letter to the

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1. 1587 c 19 (APS iii 444)
2. SHR xi (1914) 169. Charles also removed all the lords of session from the council (JR ns iii (1958) 140-144); but the old confusion of membership reappeared later and frequently the lord president and other lords of session appeared as councillors (3RPC iii 3; Appendix E).
3. RPC xiii 175
4. eg APS iii 118
5. APS iii 96 118-119 150 228; RPC iii 522
6. 2RPC i 248
7. 2RPC vii 142-147
8. 3RPC i 2; xi 12; Mackenzie Institutions i 3 6
9. 3RPC xiii 378-381

council which administered the oath de fideli administratione.[1]

Tenure

Sometimes in the appointments of councillors their tenure was stated to be ad vitam;[2] but the very nature of the councillor's duties - to give advice to the king - could not infer a life tenure in one whose advice had become obnoxious to the king. And in pratice there was no security of tenure. The Act 1587 c 19, for example, speaks of death or deprivation;[3] and in 1612 Lord Balfour was dismissed by royal warrant.[4] The grounds of deprivation included absence from the council without licence for more than four days, being unrelaxed at the horn for 40 days, and refusal to give to the church or take communion once a year.[5]

Early in Charles' reign the whole question of the tenure of the judges and councillors was canvassed. There were bitter and acrimonious debates on the status of the lords of session;[6] but it was never suggested that a councillor, as distinct from a judge, had any permanent tenure. Indeed even at the revolution the king reserved the right to censure councillors for absence and to remove them or appoint others.[7]

Remuneration

The members of the council received no remuneration for their services. Most of the ordinar councillors were also officers of state or judges of the court of

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1. eg RPC v 90. To give good counsel without fear or favour, to observe the regulations of the council, to maintain secrecy, to advise or do nothing contrary to law or prejudicial to the king and to promote the true religion (RPC v 500; 2RPC vii 147). The procedure was similar to that of the admission of a new judge to the court of session except that the new councillor did not undergo trials as did the judge.
2. 2RPC vii 142
3. APS iii 44
4. RPC ix 504
5. APS iii 44; RPC viii 815-6
6. SHR xi (1914) 168 et seq; Register i 12-25; 2RPC i 154 166 209 37; Mar & Kellie Papers i 132 et seq; ii 238 et seq; Burnet History of My Own Time (1838) 11; "The Independence of the Scottish Judiciary" JR iii (1958) 140-144.
7. 3RPC xiii 380

session and as such received fees and pensions (salaries). Some of these were very considerable. Again those who were of the exchequer were also entitled to the fees of that office. In practice this state of affairs was not great hardship, for the lesser men who were in most constant attendance had their offices as a source of income; while the extraordinar lords were men of substance who required no remuneration for their occasional attendances which were more in the nature of social gatherings than of business meetings. All of the councillors could, and if the contemporary writers are truthful did, add to their means by using their position for their own ends,[1] by importuning the king for grants of escheats, offices and pensions, and even by accepting pensions from foreign princes.

Immunities

The council had power to punish those who injured them,[2] the punishment for invaders of the council being death.[3] Otherwise the mebers of the council per se had no particular immunities such as the freedom from taxation of the members of the college of justice. A single councillor, wherever he was, had power given under the various commissions to deal with "ony trubill or ryot" to order interim warding of the offender until the full council had dealt with the matter. This authority and the promise of assistance therein by the king and the estates is stated to be granted as "ane speciall favour and priviledge".[4]

Representation of parties

In most cases before the council parties appeared personally and in cases where the defender had to answer for riot[5] or where the pursuer might be called upon to give his oath of verity[6] personal compearance was insisted on. This sprang

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1. APS iv 177; RPC xii 604
2. RPC i 160
3. 1600 c 16 (APS iv 227); Hope v 2 4
4. APS iv 178
5. eg RPC vi 193
6. RPC xiv 614 615; Mackenzie Criminal ii 6 1

from the fact that as in criminal cases diets were peremptory.[1] Mackenzie states that advocates were not normally allowed to plead before the council;[2] and this view is expressed also by the council itself[3] but at the same time reserving power to admit advocates where there were difficult points of law, where the pursuers were poor ignorant men or where the party was aged.[4] The ratio of refusing audience to advocates was twofold: that it was not the custom and that they "were not members of that judgment".[5] However, representation by advocates and others was a regular occurence expecially after the restoration.[6] (Usually these were designed by name only, and called "procurators".)[7] Thus one of several pursuers or defenders might speak for the rest.[8] Appearance was made by an advocate,[9] macer (of session or of council), writer to the signet, messenger and even a lord of session;[10] and it was also competent for a councillor to represent

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1. Infra, peremptory diets
2. Institutions i 3 6
3. 2RPC viii 63; 3RPC ii 490
4. 2RPC ii 490 511; iii 489; Mackenzie Criminal ii 20 1
5. 2RPC ii 490, whereas advocates were members of the college of justice: eg 1594 c 26 APS iv 68
6. There was some doubt whether appearance by procurator excused personal appearance also: Mackenzie Criminal ii 20 1
7. The word procurator had at least three meanings: (1) An agent or factor. (2) Generic term for a forespeaker, or a person, friend, patron or man of law to whom a client commits the management of his litigation. This sense included laymen, solicitors (cf Procurators of Glasgow) and members of faculty. At one stage, the courts would not dispense with personal presence unless there had been produced a procuratory in favour of the representative (ADC ii preface xlvii-xlviii 473; Bisset i 162) or in the council "sufficientlie instructed be the warrand under the said defender his hand" (2RPC vii 211-3). An advocate was in a privileged position: "et Advocatus semper reputatur defensor and needs no mandat but his gown is his warrand, and yet in Criminals he must have a procuratory" (Mackenzie Criminal ii 20 pr.) (3) Procurator was also used as a synonym for an advocate (eg Bisset i 157-165), a meaning no doubt reinforced by the sole right of audience before the court of session accorded to the members of the faculty of advocates (ADC (Public) 375 422).
8. RPC iii 399; 2RPC iv 474; 3RPC ii 313-5
9. RPC vii 64; or his servitor: 2RPC ii 464
10. RPC vii 318; x 40; 2RPC ii 481; iii 90; 3RPC i 177-8

a defender or one of the other councillors or an officer of state.[1] In his many cases Lord Burleigh appeared by his factor.[2] To add to the confusion the council ordained that procurators were not to act also as prolocutors,[3] that is advocates appearing in a criminal cause.[4]

By statute the burghs and the ministers were allowed two representatives to have access to plead before the council.[5]

Where the king had an interest (as in prosecutions for wearing pistols or where pains, fines and escheats were involved) the king's advocate or treasurer (and occasionally the comptroller[6]) appeared either alone or with a subject pursuer.[7] Sometimes the treasurer depute or an advocate substitute or depute appeared.[8] In the 1680s it became common for his majesty's solicitor to pursue on behalf of the crown.[9]

As in other courts certain classes of pursuers appeared for their interest: husband with his wife, master with his servant, landlord with his tenant and curators with their wards.[10]

Clerk of council

Like other judicatories the council had its own clerk.[11] He was in constant attendance on the council[12] but never a member of it.[13] He performed a function

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1. Mackenzie Criminal ii 6 1
2. eg RPC vi 194
3. RPC v 335
4. Mackenzie Criminal ii 20 2, because of the requirements of peremptory diets. Generally, however, prolocutor means anyone who speaks before a court or speaks on behalf of a client (OED S V).
5. 1592 c 41 (APS iii 562)
6. RPC vi 61
7. 1579 c 16 (APS iii 144); 1567 c 54 (10) (APS iii 457)
8. RPC viii 24 66; ix 113 145; Mackenzie Criminal ii 20 2; Pitcairn iii(i) 98
9. eg 3RPC xii 233 236 256 et seq. However he required special warrant to appear before the criminal courts: 3RPC xii 541 554
10. eg 2RPC vi 51; ii 129 349 401 406
11. In 1689 the clerk was an advocate: 3RPC xiii 422
12. APS ii 598a; RPC i 25; xiii 175
13. APS iii 150

similar to that which the clerk register haddone for the lords auditors; he was of the same rank as the keeper of the court of session signet.[1] He was clerk of court, clerk of bills, extractor, auditor, keeper of the signet and custodian of the records.[2] His duties included the regulation of business: he put bills before the chancellor,[3] reminded him of matters outstanding from the previous council day, kept sederunts,[4] and, as scribe of the council, he kept the records.[5] He also gave the councillors on rota a ticket indicating when their next attendance was due.[6]

From the scale of fees exigible by his office it appears that he exped acts and letters, lawburrows and acts of caution, and gave out extracts.[7] He also prescribed the form and amount of acts of caution and lawburrows and sent out the appropriate assurances for subscription by parties and had them registered and acted in the books.[8] It was to him that warrants for the deletion of acts of caution were directed.[9] For these duties the clerk received a considerable income.[10]

Signets

The number and custody of the various signets in use in the royal courts and elsewhere is far from clear.[11] The justice court, the court of session and the

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1. RPC xiv 609
2. Even today the principal clerk of session is also keeper of the rolls and keeper of the seal.
3. RPC i 159
4. RPC i 160; APS iii 378
5. RPC i 441; ii 139
6. RPC i 218
7. RPC vii 164 et seq; APS iv 619
8. MS RPC 1589-1607[13]
9. RPC iv 832
10. His monthly wages were £12:10:-; but this was apart from the "very considerable" fees (Home MSS 271; RPC vii 164 et seq; APS iv 619). A special case is that of James Primrose, who was clerk from 1599: he had almost £2,000 of pensions and fees (Estaytt ff 2v 5r 6r 6v) plus a pension of 200M (MS RSS 4675 f 245v) and one sixth of concealed annual rents (CA 1620-21; Mar & Kellie i 181), as well as the profits of supplying parchment and wax. His name appears on the backing of complaints with his fee marked thereon.
11. Hannay, History of Writers to Signet passim

council[1] each had their signet in the custody of clerks who were the deputes of the secretary. Those of the session and justiciary are still extant: and they are identical with each other. The signet used by the council was called the "court signet" and was in the custody of the clerk of council.[2] The clerk was also a depute of the secretary and keeper of the signet.[3] The fees of the office went to the clerk. When the court went to England leaving the privy council in Scotland there ultimately arose a duplication of the offices of secretary,[4] clerk and keeper of the signet. Even in the 1620s there were in fact two clerks of council: one clerk proper (paid £150 by the treasurer) and a secretary-depute equal to the clerk with £40 from both the secretary and the treasurer plus £50 profit of the court signet.[5] And there were arrangements for these two serving month about.

Macer

The principal duties of the macer were to regulate the meetings of the council. It was laid down repeatedly that in their deliberations only the councillors and the clerk were to be present:[6] in this the council merely followed the practice of the court of session which only deliberated in the absence of all but the lords of session and the clerks. The macer's post was outside the door;[7] and if anyone other than the councillors wished to enter, the macer knocked on the door and the clerk of council came out to ascertain that person's business. If so permitted by

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1. Mackenzie Criminal ii 6 1
2. 3RPC x 138. On the death of Charles II all the seals (including the signet) were broken; and in the interim the subscription of the clerk of council was declared to be as effectual as the affixing of the signet.
3. The relationship of the secretary to the keepers of the signets is analagous to that of the chancellor to the keeper of the great seal.
4. In the persons of Earl of Melrose or Haddington, first secretary, and Sir William Alexander, master of Requests and de facto secretary and later (1626) second secretary.
5. Analecta Scotica ii 399 400
6. Commissions 1589 to 1689: Appendix B
7. RPC i 159; iii 627; xiii 175

the lords, the petitioner was admitted by the macer to propone his matter and then retire.[1]

The macer was also an executive officer of the court charging parties not to depart until they had obtempered a decree;[2] and he also charged parties personally to enter ward or compear before the council.[3] This was because he was part of the organization of heralds, pursuivants, and messengers who were admitted by the Lyon King with the advice of his brother heralds.[4]

Frequently the macer appears before the council on behalf of parties[5] to the annoyance of members of the Faculty of Advocates and was often a cautioner for litigants.[6]

As with the clerks (and other officers) the macer is termed "ane of the ordinar macers" - and given his post - "of the Council":[7] this does not import a plurality of conciliar macers but merely that he was one of all the macers but who was appropriated to the council. Towards the end of James' reign there were two council macers.[8]

Records

The privy council records were similar to but not so bulky or subdivided as those of the court of session.[9] Thus both courts had their acts and decreets, books of sederunt, minute books[10] and register of deeds. With the council, however,

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1. RPC i 158-9; 3RPC i 5; APS iii 229 562. There were also acts limiting the number of retainers that litigants might have: 2RPC i 401
2. RPC iii 388
3. RPC iii 314 388
4. RPC i 658
5. RPC iii 207; supra representation
6. RPC vi 60
7. RPC i 658
8. RPC xiii 388
9. Appendix F
10. The minute book of process which appeared later than the other books, was an index of actions before the council. The first volume (which covers the years

the development of separate books for each of these aspects of the council's work was much slower than that of court of session work and never reached the same completeness.

Registration

The council, like the ordinary courts, was a court of record accepting private deeds (as well as cautionary obligation) for registration both for preservation in futurum memoriam[1] and for execution. There are a few private deeds thus registered in the early years of the register for execution,[2] and for preservation;[3] but the development and differentiation of the books of council and session gave a more regular register; thus thereafter the council books only received contracts and the like in which the crown had an interest such as a lease of lead mines,[4] or a feu contract between the crown and a subject,[5] or royal letters ordering some change in government policy, such as the disbandment of the guard,[6] or, occasionally a composition which had been made voluntarily between creditor and debtor or a decree arbitral to which the lords had interponed authority.[7]

1604-1631) was not a contemporaneous record but was prepared from the acts and decrees for some official purpose after 1631 (RPC vi preface vi-vii).

1. RPC i 683
2. RPC i 264; xii 414
3. RPC iii 176
4. RPC i 375; iv 319
5. RPC ii 450; vi 495
6. RPC xii 582 4; 2RPC i 248
7. 2RPC i 368-370; v 216

3 Functioning of the Court

Composition

For the reasons already discussed it was natural that the size and composition of the council should vary from time to time. The full complement was about thirty,[1] although this figure tended to increase until in Charles I's reign there were 50.[2] in 1641 there were 52. In James' reign the exceeding great number of councillors was objected to because of the confusion[3] and lack of secrecy[4] and because some were appearing merely to further the interests of their friends.[5] The division of the council into ordinary and extraordinary members was analagous to the division between ordinary and extraordinary lords of session.

Ordinary councillors

The core of the council was the ordinary members or "continual members"[6] numbering about a dozen. They included the ordinary officers and a few others in the special confidence of the king. And normally only they were admitted to meetings of the council.[7] The list of 1587 is typical: chancellor, secretary, treasurer, comptroller, collector, privy seal, master of requests, justice clerk, advocate, treasurer depute and clerk register together with a few others.[8] When the secretary, treasurer, comptroller or collector was absent he was to provide a depute.[9] In later years there were also included such "household" officers as the almoner, keeper of wardrobe and captain of the guard.[10] The remaining non-officials members of

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1. APS iv 177
2. APS v 666
3. RPC viii 815
4. APS iv 177
5. RPC xii 604
6. RPC i 24-5
7. RPC i 441
8. 1587 c 19 (APS iii 444)
9. 1519 c 32 (APS iii 150)
10. 1593 c 4 6 (APS iv 34) In 1682 H.M. solicitor was given the privilege of being present at council debates: 3RPC vii 383

the ordinary council were usually lairds or those noblemen who were normally resident at court or were favourites of the king. In this category were the Earls of Mar, Lennox and Arran and Melvill of Halhill and laird of Spott who appeared regularly in the last years of the 16 century;[1] and in 1578 the powerful Earl of Morton who had been declared "first of His Majesties Privy Council".[2] However in the later years of James VI and afterwards there was a tendency for the laird class to rise up to the peerage so that by the time of the union the bulk of the councillors and officers of state were peers. The king or regent himself presided when he was present; in their absence the chancellor, president[3] or senior councillor.

The "ordinary and daylie Privie Counsell" was not a cabinet although referred to occasionally as the "cabinet council",[4] but rather a meeting of heads of departments; and as such it carried out the political administration of the country regardless of major changes in policy. It was a civil service element which generally survived the political upheavals of the time: typical of this bureaucratic quality were McGill and Bellenden who were respectively clerk register (1554-79) and justice clerk (1547-77) throughout a series of major political revolutions. Occasionally, however, when a councillor became too involved in the policies of a faction (as did McGill himself at the time of Rizzio's death) he was liable to be superseded.

Although the councillors, as appears from the commissions, were primarily

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1. APS iv 34; RPC v preface xix
2. APS iii 97a
3. In James VI's later reign and in 1626 there was appointed a lord president of the council (2RPC iii 396) and for a time the senior councillor presided in his absence (2RPC i 400). After the restoration president or preses was elected at each sederunt (eg 3RPC i 610; xi 192). At the revolution the Duke of Hamilton was appointed president (3RPC xiv 24) with an elected substitute in his absence (3RPC xiv 589).
4. Calderwood vii 491. In 1621 James instituted an inner council of six nobles who were to have the whole management of the affairs of state (RPC xii 604); and subsequent councillors were expressly admitted to this smaller council (RPC xiii 602) or merely to the larger council (RPC xiii 603).

administrators[1] they had considerable legal knowledge. The council had always been a judicatory: it included in its number the "law officers", king's advocate, justice clerk, clerk register and later solicitor general;[2] and until 1626 and again after the restoration from one third to one half of the ordinary councillors were ordinary members of the court of session, and a few were, from time to time, extraordinary lords of session. In 1592 those councillors who were officers of state and also senators were recognized as thereby being unable to attend daily on the privy council.[3] And many of the councillors were also members of the court of exchequer.

Extraordinary councillors

Unlike the bulk of the ordinary councillors, the extraordinary councillors were men of rank: noblemen, lords of parliament, knights and gentlemen,[4] such young noblemen as the King might bring with him[5] or specified noblemen[6] or members of the college of justice.[7] In 1598 it was prescribed that sixteen of the council were to be earls or lords.[8] In 1593 because the members of the council did not attend, it was provided that noblemen and lords of parliament should be of the privy council when present or summoned.[9] In James' later years many of the councillors, such as Melrose, had been elevated to the peerage. By 1626 the noble element had swollen to five times that of the commoners.[10] With the restoration of episcopacy the

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1. Eg APS iv 34
2. At least till 1616 x 1619 (MS Register of Signatures 1619-20)
3. APS iii 562
4. APS iii 562
5. APS iii 229a
6. APS iv 53-4
7. 1587 c 19 (APS iii 444)
8. APS iv 177
9. APS iv 34
10. 2RPC i 248-252. Charles sought to make the council the appropriate body for the nobility. The rise in status of the council is shown in the change from "the secretar" to "the Lord Secretary" (3RPC vii 233) and from "king's advocate" to "Lord Advocat" (Laing MSS ii 11).

bishops were re-admitted to the council; by 1604-7 there were six.[1] This was the same class, the constituents of the king's great council, from which the extraordinary lords of session were appointed. In the court of session membership of this class was an alternative qualification to legal ability:[2] usually two or three of these councillors were extraordinary lords of session. After the union of the crowns there were normally a few English supernumerary councillors.[3]

When the king was away from the seat of government it was normal for these lords to attend the king in a rota of a few months each[4] and were thus little more than gentlemen in waiting or ministers in attendance. Of such arrangements in 1562 Calderwood says "that order endured not long".[5] At other times they were to be available if sent for by the king.[6]

These greater men who were of the council were fairly representative of the country and thus a meeting of the whole privy council was a microcosm of the three estates; and indeed there is little to distinguish such a body from a general council or as it later came to be called, a convention of estates.[7]

This political element reflected in its composition the ascendancy of a particular faction;[8] and it had little permanence in time of upheaval unless a

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1. RPC vii preface xv et seq
2. AS 15 May 1605
3. APS v 388 406 666
4. RPC i 24-25 217-8; APS iii 96; RPC iv 425; vi 560
5. History ii 154
6. APS iii 119; iv 34; RPC iii 575
7. There are references to the presence of those of the king's nobility and privy council (RPC iii 626); in 1603 "a great nowmer of our nobilitie and counsall having convenit" the extirpation of Clangregour was determined upon (MS RPC 1589-1607) and in a meeting of "the haill nobilitie and counsaill" was appointed to discuss a contribution towards the defence of the Palatinate and the king's daughter's dowry (Melrose Papers ii 374; RPC xii 366 378). In 1578 "the nobilitie convened at Stirlinge to a Counsell" (Calderwood iii 409).
8. ib iii 409

political enemy such as the Earl of Gowrie was too powerful to be eliminated immediately.[1] The king on occasion resisted such imposed councillors.[2] Since the two prime officers, the chancellor and the treasurer were often peers they too altered with political fortunes. As the absolutist tendencies of the crown intensified under James VII the independence of the council diminished.

When the extraordinary lords were present their votes counted with the rest in the decisions of the council[3] with the qualification that certain decisions required a quorum of certain of the ordinary councillors. Often the presence of the extraordinary lords was objected to - just as that of the extraordinary lords of session was - because they often attended in order to influence a private matter rather than to promote the public weal.[4] And their personal disputes could cause, according to an English commentator, discords which burst out daily.[5] From time to time Haddington related that the great men swamped the others in judicial decisions; and in the prosecution of ministers in 1605 the council met between 6 and 7 in the morning to eschew the opposition of the nobility.[6] In one discussion the king's advocate "wes not permitted to reasoun nor vote".[7]

An undivided court

The council always sat as one body. The nearest approach to an outer house was the intermittent and ad hoc delegation to certain lords of the duty of hearing evidence;[8] or the appointment of a committee of account for the ransoms of Turkish

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1. APS iii 96. Morton was made chief of the council: Calderwood iii 409
2. ib iv 677
3. RPC vii 211; APS iv 53
4. RPC xii 604
5. Calendar of State Papers, Scottish x 315 322
6. Calderwood vi 286
7. RPC vii 188
8. In the early period this practice was intermittent; but by the 1660s had become the rule.

prisoners,[1] or a taxation of 10,000M[2] or to hear the consent of an invalid pursuer to raising an action[3] and generally in matters of judicial examination of criminals. Occasionally also a dispute between parties was remitted to the arbritration of named lords to proceed with the full authority of the council.[4] Some other bodies were not committees of council but separate entities such as the two tribunals set up under the Pacification of Perth to try matters arising out of the previous years' civil troubles; or the committee to deal with reduction of papal grants of church feus.[5] And in its inquisitorial function in taking precognitions with a view to criminal prosecutions the council deputed some of their number to act. (In the 1680s the creation of the special commissions - for pacifying the highlands, for public affairs and for dealing with the western and southern counties[6] - resulted in the complete dispersal of the council as a single body.[7])

Quorum

However, it was not necessary for the whole council to be present.[8] The extraordinar lords did not count in making a quorum and did not as a rule take part in the ordinary administrative and judicial business of the council. The quorum (which was of the ordinar councillors) varied from five to ten.[9] That was for general purposes but for particular functions a lesser quorum would suffice as in expeding letters (which included signatures of infeftments, remissions and other

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1. RPC iii 604
2. RPC v 534
3. RPC x 28 29
4. 2RPC vi 5 265
5. 1572 c 12 (APS iii 75*); RPC iv 460-461; Appendix K
6. 3RPC ix 154-160
7. 3RPC x preface v-vi
8. In 1608 the king demanded a note of which way each councillor voted so that his majesty may decern true sheep from the goats: RPC viii 97; Hope v 2 25
9. 2RPC i 435 487; ii 100-101; but throughout there were times when no quorum was present: 2RPC i 297; 3RPC i 201

grants) passing acts and decrees, and delivering bills; but when there was no quorum the council dealt only with matters of state and of order [ie procedure] but not "ony actionis of pairtyis".[1]

Declinature

A litigant could decline the judgment of a particular councillor on the ground of his relationship with one of the parties, but not on other grounds normally received in other courts, because the council was the "pryme and Soverane judicatorie intrusted be his Majestie with the government and managing of the weightiest and most important effaires of the state".[2]

Letters

Letters included all administrative orders emanating from the government; they were the normal vehicle of the royal will in diplomacy administration and justice[3] and corresponded to the English writ. They were normally authenticated by by signet with or without the royal subscription or by the subscription of other officers, depending on their importance. The acts of 1579[4] and 1585[5] distinguished four categories, each requiring different authentication. Foreign and Scots missives were the responsibility of the secretary. Letters of charge had to be passed by the advice of the council and subscribed by two councillors before it was presented to the king for subscription or to the keeper of the signet for affixing his seal. Apart from exchequer, diplomacy, postal service and writs of the ordinary courts (which by 1585 in the case of judicial letters of the session were distin-

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1. 2RPC i 437-8 439-40. In more important matters no action was taken "till a more frequent number of the Counsell be convenit": 2RPC i 518; 3RPC i 201
2. 2RPC v 298; 1594 c 22 (court of session) APS iii 67; 1581 c 79 (all courts) APS viii 350.
3. Hannay History of Writers to Signet passim
4. APS iii 150
5. APS iii 378

guished from other administrative letters by the use of the phrase "according to justice"[1]) there was a large variety which emanated from the council either directly or as a check on the king's unfettered will. It is not always clear what was the dividing line between a letter of charge to appear (which required the subscription of the king and another) and a letter of complaint concluding for horning, escheat, suspension etc.,[2] (which merely had the signet and the subscription of the clerk as keeper of the signet[3]). As in the court of session, the keeper of the signet had delegated to him the power of the court (derived from the crown) to give the court's authority to cite litigants and witnesses.[4] Certain letters of charge required special subscriptions: letters of charge super inquirendis (within the limited sphere in which they were still legal) required the subscription of four officers including the chancellor, treasurer or secretary.[5] Failure to have these requisites carried out - letters which were "inordourlie", "privilie", or "sinisterlie purchest" outwith the council - was a ground for suspending any warrant flowing therefrom.[6]

Signatures

Another branch of letters was that embodying royal grace or pardon, or alienation of royal patrimony.[7] These usually required a large quorum and signature of six councillors, including the chancellor[8] but later it was provided that remissions and respites could only be granted by a full sederunt of the council.[9] However, the most persistent restrictions were made on these letters whereby the king sought

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1. 1585 c 7 (APS iii 377)
2. eg RPC ix 702
3. MS RPC 1589-1607 [13]; RPC xiv 214
4. Without which the lieges could not be compelled to attend.
5. 1585 cc 7 10 (APS iii 377 378)
6. eg RPC iv 354 698 756
7. APS iii 150
8. APS iii 119a
9. RPC iv 422 695; Melrose Papers i 326

to alienate part of the royal patrimony as well as to exercise the royal clemency in the shape of a respite or remission. These letters, or signatures, were the warrant for the keepers of the various seals to expede the appropriate grant.[1] Normally the sanction of the revenue official testified by their signatures was required and the officer whose department was affected by the grant had to present the draft himself[2] and it had to be passed by the exchequer[3] and council[4] and presentations to benefices had to be presented to the king by the collector-general and five councillors.[5] The sanction of nullity was imposed on irregular signatures under the Octavians.[6] The frequency of legislation on these topics is testimony to the continued evasion of the regulations both by suitors and by the king.[7]

Warrants

The correspondence of the internal administration included warrants, authorizing officers to perform certain acts, to the clerk of council to receive the caution of a litigant which normally required only the signature of one officer,[8] or to delete an act of caution which required at least two.[9]

Judicial decisions

In the important matters of acts and decrees a number of councillors had to be present. In the earlier constitutions of the council a smaller quorum was established for complaints, wrongs and small actions.[10] At other times[11] and after

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1. Hope Minor Practicks viii 1
2. RPC i 40; iii 479 626; iv 138 180; v 119 552
3. RPC iv 551
4. APS iii 150 378; RPC ii 692; iii 284 687
5. RPC v 370
6. RPC v 256
7. eg RPC v 152
8. eg RPC v 768
9. eg RPC iv 817; v 764
10. RPC vi 558; 1587 c 19 (APS iii 444)
11. eg APS iii 150

1603 there was no distinction between the general and the particular quorum. In one case the council, while agreeing with a proposed act, delayed giving effect to it because its importance demanded a larger quorum.[1] Sometimes parties were deprived of a hearing because no sufficient quorum was present.[2] For the passing of bills a smaller quorum was necessary. Common bills were delivered by a single lord[3] others by two or three[4] and some few by the whole lords.[5] In the exceptional times of the 1680s a committee was "appointted to consider upon bills".[6]

Individual councillors as judges

Apart from ad hoc commissions to councillors to act as reporters, the various officers of state who were members of the council or other councillors did not have any judicial function ex officio such as the chancellor had in England. Many of the councillors were also lords of session, but apart from the special case of the master of requests,[7] had no jurisdiction in themselves except in so far as it was conferred on them from time to time by the council as a whole.

Consolidation of council

This judicial machine had, in the years from 1532 to 1708, developed considerably. While the crown was strengthening itself against the turbulent nobility and the theocratic, almost republican, church the council was the chosen instrument both in law and government. Originally it had been a rather ad hoc peripatetic body without great precision in constitution: ultimately it was one of the recognized judicatories and the effective government of the day. Such esprit de corps and notions of independence and permanent status which the councillors such as Haddington, Carnegie

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1. RPC vii 34-36; Melrose Papers ii 374
2. RPC ii 39
3. 2RPC viii 310, as in vacation when one or more councillors were deputed to pass bills: 2RPC vi 101. infra, supplications, Appendix G
4. 2RPC viii 324
5. 2RPC viii 259
6. 3RPC xi 252 385
7. Appendix G

and Lauderdale might have acquired by their long tenure of office were promptly and firmly suppressed by Charles I.[1] James VI's oft quoted remark to the English parliament was - like most of his sayings - very true: "By a Clerk of the Council I govern Scotland now - which others could not do by the sword". No small part of that government of Scotland was effected by the judicial power of the council.

This effective court continued until the act of union when its administrative functions were absorbed into the privy council of England; but no extant provision was made for any other court taking over its judicial functions - a distinct loss to the Scots litigant.

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1. JR iii (1958) 134-137

III JURISDICTION

4 General

Territorial

The council had, like the other superior courts, parliament, exchequer, chief commissaries and session, territorial jurisdiction coextensive with the kingdom of Scotland, that is, the mainland and islands to the flood mark of the sea.[1] The superior courts were, unlike the feudal courts, a direct delegation of the king's judicial power; and the council without apparent objection entertained complaints from parties who were otherwise subject to the jurisdiction of regalities. Occasionally the council heard complaints of which the locus delicti was outwith Scotland.[2]

Over persons

The jurisdiction of the council extended over all the king's lieges, irrespective of their subjection to the "personal" law of the barons, burghs or post-Reformation church.[3] The position of the pre-Reformation church was anomalous: the ecclesiastical courts had privity of jurisdiction over churchmen and there was a system of appeals within Scotland and then to the rota at Rome.[4] This state of affairs came to an end in 1560 when the ecclesiastical jurisdiction within Scotland and appeals to Rome were abolished,[5] thereby making all persons amenable to the

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1. Below the flood mark of the sea the admiral had jurisdiction: Mackenzie Criminal ii 9 1; Institutions i 3 11
2. 2RPC i 182 (London)
3. RPC vii (regality); 2RPC iii 612 (burgh); 2RPC iv 90 (A bishop (1630) being "ane ecclesiastick person" remitted for punishment to High Commission)
4. Thus in 1540 the court of session found itself not competent to deal with a case of deforcement by a chaplain and remitted the matter to the ordinary, the Archbishop of St Andrews: Pitm i 47 ; the justice court acted in a similar way: Pitcairn i *377-*378
5. 1560 c 2 (APS ii 534); 1567 c 3 (APS iii 14)

king's courts or to courts which owed their authority directly or indirectly to the crown. This royal supremacy was made express in later legislation.[1]

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1. 1584 c 2 (APS iii 292; iv 103a)

5 Tribunal of Conflicts

The council, apart from adjudicating between competing jurisdictions and remitting causes to the appropriate forum, also entertained many cases in the first instance only to "classify" them and remit them to a more competent forum. This function was a result of the king's position before and after 1532 as the fount of justice[1] and the director of criminal prosecutions. Basically the pre 1532 council and session had had no substantial criminal jurisdiction; and after 1532 the council was shorn of most of its judicial function, this being canalized into the college of justice.[2]

The remaining jurisdiction of the council was not extensive, and it only sprang from the nature of the king and council. The theory was that in the first instance parties must seek redress by the ordinary forms of law; and that, only on failure of the ordinary courts to give a remedy, could the council be approached. Thus in 1547 it was laid down that the council was not to decide any civil actions raised by parties but was to remit them to the session.[3] Twenty years later a declaratory article was proposed in parliament by the burghs and the ministers that causes were not to be heard before the council (or even the session) unless there was refusal of justice or manifest iniquity by the ordinar judge - except in those matters properly pertaining to them.[4] Similarly in the regulations relating to the general band, parties could not come to the council until they had failed to adjust their

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1. RPC ii 517
2. Balfour 417; Mackenzie Institutions i 3 7; SHR xix (1922) 265. The new court of session had a chain of authority through the lords of council and session, the session of James I and the auditors and thus to parliament; 1532 c 2 (APS ii 335) 1469 c 2 (APS ii 192) 1425 c 19 (APS ii 11)
3. ADC (Public) 584
4. APS iii 44; cf APS iii 445 et seq. For a time at least, even the right to pursue before the council in oppressions was regarded as a concession - because of the oversight of the justice ayres and the negligence of the ordinaries: RPC vi 233-4

differences before the ordinary courts.[1] Nevertheless, litigants persisted in raising actions before the council which went either wholly or partially far beyond its legitimate jurisdiction and which were obviously appropriate elsewhere. Thus in a dispute about teinds which had developed into convocation and riot, the council dealt with the breach of the peace and remitted the civil aspect of title to the ordinaries. Similarly the council had before it matters such as treason, which could by no stretch of the imagination be regarded as justiciable there. If the minister charged to compear before the council to answer for his treasonable sermons confessed his guilt, the king could go on to punishment;[2] but if he denied it, the council had no competence to try the matter but had to remit it for trial by assize before the justice general or his deputes.[3] In this respect the limitations of the council were analagous to those of the presbyterian courts dealing with charges of adultery: they had no power to take trial or judge of the fact of guilt if it were denied.[4]

The council then was essentially a clearing house for all sorts of actions, retaining for its own judgment competent cases and remitting the remainder to the ordinaries, either ex propio motu or on a plea of "no jurisdiction". This aspect of the council as a tribunal of conflicts came into sharp relief in the struggle between James and theocratic ministers.

Church and state

The conflict between church and state was between two distinct legal systems[5] whose premises did not coincide exactly. As a result the arguments of each side

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1. 1581 c 16 (APS iii 218); RPC viii 343-4
2. 2RPC i 376
3. infra, General Assembly of 1605
4. RPC xiv 619
5. "There were two kings in Scotland, two kingdoms and two jurisdictions, Christ's and [James VI's]" Calderwood v 378

were frequently at cross purposes and when the ultimate victory of the state came it was more a political than a legal victory.

The basis of the conflict arose from the evolution of the reformed church from Knox's original erastian polity (with calvinist ministers, superintendents and monarch replacing the catholic priest, bishop and pope) into Melville's full blown theocracy (with an autonomous hierarchy of assemblies). The later organization was regarded by the ministry as at least coordinate with the civil power and in the last resort superior to it. After a serious set back with the legislation of 1584 which established episcopacy and royal supremacy, the church achieved the bulk of its aims in the "golden acts" of 1592. The ensuing policy of James was directed to undoing these concessions: in the contest the church suffered from the ambiguity in the law which resulted from the failure of the legislation of 1592 to repeal that of 1584 expressly.

Andrew Melville

Whereas in 1561 John Knox and in 1570 Robert Hamilton had submitted to the jurisdiction of the council,[1] in 1584 Andrew Melville had courageously begun the practice of declining the jurisdiction of the council;[2] because he maintained the dispute was one which statute enjoined should be accused and tried before the provincial or general assembly as judges ordinar appointed for such matters: "neither the king nor the council *in prima instantia* meddle there with though the speeches were treasonable",

> For they that know anie thing of their forme used in the Secreit Counsell of that land, are not ignorant, that when anie man is cited before them, to answere in *causa alterius fori*, it is leasome to the defender to alledge the incompetencie of the

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1. Knox ii 398-412; Spotswood ii 24 136
2. *RPC* iii 631-2; *supra*, declinature

> judgement [ie jurisdiction] and so the mater is straight referred to the decision of the Judge Ordinar, as ather unto the Lords of Sessioun, sheriff of shires, stewarts of regalities or to some commissars or inferiour judges according to the nature and qualitie of the mater propounàd.[1]

This was a very just description of the council's function as a tribunal of conflicts; but it begged the question in asserting that the dispute was an ecclesiastical cause or at least that the nature of the cause should be classified by the church courts.

The crown also begged the question by the syllogism:

> whosoever in whatsoever caus, declynes the king and counsell's judicatour, incurres the guiltiness and pain of treasoun. But these upon the parnell have declyned the king and counsell's judicatorie: Ergo, they have incurred the guiltinesse and paine of treason.[2]

In 1596 David Black repeated the proposition which Melville had enunciated, that the quality of his sermons was a matter for the presbytery to assess before which court the king could, if so advised, appear as a subject complainer[3] but his ultimate warding put paid to that plea.

General Assembly of 1605

Nevertheless in 1605 and 1606 some of the participants in the proscribed Aberdeen Assembly adopted the same attitude, declining the judgment of the council simpliciter, "seeing we are most willing to submit ourselves to the tryell of the Generall Assemblie, onlie judges competent"; but the council again found itself competent in the matter.[4] When they were tried for treason before the justice

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1. Calderwood iv 252
2. ibid vi 378. The syllogism assumes that the denial of the king's judicial power (as against the jurisdiction of the papacy or other foreign monarch) was the same as in the course of an action taking a plea of no jurisdiction. The same fallacy is apparent in a later case of little importance: 2RPC v 491
3. RPC v 326; Calderwood 453-498
4. RPC vii 134-6; Calderwood vi 345-8; Spotswood iii 161-2

and an assize they maintained their stand, taking objection to the relevancy of the indictment. The basis of this objection was that the summoningof the Aberdeen Assembly was an ecclesiastical matter in terms of 1592 c 8[1] which limited the generality of the royal supremacy set forth in 1584 c 2 4.[2] But the court upheld the contrary view of the king's advocate and some of the ministers were convicted, not without some pressure on the court.[3]

The king had won the battle not on legal arguments but by political force: but henceforth the law was clear. The king was supreme in church and state; it was treason to deny the jurisdiction of the council: and the council was judge of the quality of the treason as it had so held since 1584.[4] In a word the legislation of 1584 was upheld in its royalist interpretation.[5]

The council continued, as it had always done in the past, to cite parties to appear in matters in which the council did not claim jurisdiction. At the same time council did in fact deal with the cases which were competent to its jurisdiction.

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1. APS iii 541-2
2. APS iii 292-3
3. Calderwood vi 374-391
4. RPC iii 631
5. There had been sufficient of a revolt in the council to prevent the king from going on to stronger measures (RPC vii 481 483): he had to be content with a new act of supremacy: 1606 c 1 (APS iv 281); and the chief partisan of the king, Sir Thomas Hamilton, king's advocate, produced a long tract justifying the ministers' conviction (Calderwood v 419-451). In 1651 James Guthrie declined the jurisdiction of the council and was executed in 1662. At the restoration the royal supremacy was re-enacted (1669 c 2 APS vii 554); and the confession of faith of 1690 cap xxiii acknowledged the civil magistrate (APS ix 127 133).

6 Subject Matter

The subject matter of the council's own jurisdiction was, apart from certain exceptional cases arising by statute or prorogation, rather limited. The council was not an ordinary court of law deciding civil actions nor a criminal tribunal: it was an extraordinary court of justice dispensing remedies where the ordinary process of law was defective, non-existent or inappropriate. The extent of this jurisdiction was determined by the essential nature of the council.

The council was a convenient instrument of the royal will:[2] it was the mainspring of executive action; the repository of the residual equitable jurisdiction of the crown;[1] and the guardian of the peace. These three functions were essentially aspects of the same thing, the royal authority; and to a certain extent were arbitrary divisions. An item such as imprisonment of a subject might partake of all these aspects: the council as the forum for complaints against officials, for the hearing of a complaint of oppression, or for entertaining a supplication for a royal pardon. The decisions themselves tended to be on the facts of each case without any suggestion of stare decisis.[3] Indeed some of the decisions mystified even the king's advocate.

These matters entertained by the council had in common the existence of a lis: they came to the council, not as a matter of executive action, but as a judicial process, either in the form of a complaint against a wrongdoer, or as a supplication for relief at the hands of the crown.

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1. "... our Councill being proper judges in whate relates to matters of state and public peace ..." Charles II to Council 13 July 1679: 3RPC vi 280-1

2. By 1632 the personal intervention of the king had so declined that a complainer who attempted to approach the king direct instead of the council was warded for "fasching" his majesty: 2RPC iv 470; in less extreme cases the king merely remitted such matters to the council: 2RPC v 161

3. RPC xiv 624

IV JURISDICTION: ADMINISTRATION

7 Civil Administration

The primary function of the council was not judicial work but administration:

> the support of his hienes in the administratioun and gouvernyng of the affairis of his croun, estate and commoun weill of his realme [1]

but this administration often took a judicial form as in the regulation of trade which was a part of the royal prerogative.

Trade regulation

Most of the trade regulations were enacted by the council;[2] but for the present purpose the important function was prosecution of those in breach of the regulations. This function which was occasionally apparent in the early years became a regular feature of the council's judicial work in the 17 century.[3] Thus there were frequent prosecutions of individuals and of batches of offenders by the king's advocate or treasurer for illegal export of tallow, grain and skins;[4] for illegal sale of tobacco;[5] or for the circulation of base coin.[6] Prosecutions were encouraged by awarding half the unlawis to informers.[7]

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1. APS iii 150; of 2RPC i 249-250; Mackenzie Criminal ii 6 1; Institutions i 3 6

2. The extent to which the economy of 17 century Scotland was planned can only be fully realized by considering the enormous number and variety of statutes and regulations dealing with every aspect of internal and external production, commerce and exchange; this regulated system intensified as the century progressed and lasted until effect was given to the laissez-faire principles of Adam Smith. The result was that the council had to deal with grants and disputes about such minute matters as enforcing a new method of tanning wherein the patentee had the privilege of prosecuting those who failed to apply it: 2RPC iii 107 359 etc

3. A public matter, therefore competent to the council: 3RPC vii 484-5

4. RPC x 356 444; xi 248 383 431; 2RPC ii 115 etc. Export of a commodity was regarded as inflationary: 2RPC viii 8 14

5. RPC xi 287

6. RPC vi 352

7. 2RPC ii 115-6; v 501 etc

The council also heard cases of evasion of customs duty[1] and pleas for exemption from duty on the grounds of law or contract with the king or as supplications for equitable relief.[2]

Where punishment was envisaged it took the form of escheat of the goods or their prices or fines to the crown and party pursuer.[3] Occasionally the penalty was escheat of movables[4] and, in the case of illegal export of linen, half the escheated movables went to the comptroller and half to the king together with the ship involved.[5]

In other matters of trade with which the council dealt, there was an attempt to balance the notion of a just price with the privileges of certain individuals and crafts.[6] Such legislation as there was on control of prices was enforced, such as that fixing the price of malt,[7] or imported English beer.[8] The council also entertained complaints against excessive prices at fairs,[9] against conventicles of coalmasters for raising the price of coal,[10] against extortionate freights between Scotland and Ireland[11] and even against increased imposts on goods entering Edinburgh.[12] Where a body had the duty of fixing prices and standard of work the council upheld its authority against those who disobeyed its bona fide decisions;[13] but where penalties had been imposed by these bodies, the council might cut them down on the ground of poverty.[14] Wages, also, could be regulated: in one case the

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1. RPC ii 141; vi 135
2. RPC ii 145 308; iii 303; vii 356
3. RPC x 444; xi 287
4. RPC xi 248
5. RPC viii 449; cf 1573 c 7 (APS iii 83); RPC iv 216
6. If there "is any designe of monopolie or oppression discovered ... the Councill will narrowly search therein and punish exemplarly therefor": 3RPC viii 171-2
7. RPC ii 577; xii 330; xiii 49
8. RPC xi 323; xii 7; 2RPC ii 261 etc
9. RPC xii 129
10. RPC xii 387-467 passim
11. RPC x 463-; ix 478
12. RPC vi 603
13. 2RPC ii 177; iii 345
14. 2RPC ii 261; iv 262 etc

coalmasters were granted a commission to draw up rules to rectify the enormities in the wages of colliers.[1]

Any unwarranted interference, even by magistrates, in the carrying on of a trade was dealt with.[2] The council also released fleshers who had been imprisoned by other fleshers for refusing to keep up prices.[3] And a restrictive covenant whereby the baxters of the West Port agreed to renounce the jurisdiction of the courts and submit their disputes to a "domestic tribunal" with the sanction of banishment was declared null on the ground that the band involved the usurpation of the jurisdiction of the king's courts and magistrates.[4] The less hurtful band of the Edinburgh bonnet makers was also declared null.[5] The council restored to the bailies of Edinburgh the right of testing, weighing and pricing bread bought in from the Canongate after they had averred that a former council decree depriving them of this function had resulted in them being insulted for allowing poor bread to be sold.[6]

Certain foreign clothmakers who came to Scotland on the promise of work or sustenance were, by an act of council, given reimbursement from the burghs until work was found;[7] and the privilege of Sutherland to import 100 Flemish clothmakers, who were to be free burgesses of the Canongate and have freedom from taxation, was vindicated against the bailies.[8]

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1. 3RPC i 258
2. RPC x 193; 1540 c 30 (APS ii 376); 3RPC iv 422-4
3. RPC viii 302
4. RPC xi 139 140-1
5. RPC viii 201; 3RPC vi 21 (combination of bodies)
6. RPC viii 345; the restrictive practices of the Stirling baxters in only making a few kinds of bread were stopped following a complaint of the gentlemen there: 2RPC 197-8
7. RPC vi 274
8. RPC viii 366

On occasion the council granted petitions for relaxation or delay in application of the acts regulating trade such as the navigation acts[1] where the parties could claim some special hardship or show some general benefit. Examples of this included the case of the coal-masters who required to export coal to cover the costs of production,[2] the websters who objected to the export of yarn,[3] the western burghs whose trade was disrupted by herring curing regulations.[4] The council gave warrant to a Frenchman to import goods which had been freighted before an embargo had taken effect.[5] There were also a few actions relating to the use of standard weights and measures.[6]

In matters of title, however, as in a dispute over the right to hold a fair, the council merely discharged both parties from acting until the matter was settled.[7] Similarly the council referred to the session the question of statutory title to unload goods at a free port,[8] a dispute over a craft charter[9] and a controversy about the heritable liberties and privileges of a burgh.[10] A dispute about the right to tax goods which merely passed through a burgh was sent to be determined by an assize.[11] When the council suspended one of its acts dealing with a trade dispute between Leith and Edinburgh because it was in part inconsistent with a

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1. 3RPC i 180 182 327
2. RPC xiii 207
3. RPC vi 520
4. RPC ix 427
5. 2RPC iii 283-4
6. RPC iii 151; vi 217; ix 187; x 118; 3RPC v 52 (coinage); 2RPC ii 192 (rate of exchange); 3RPC ii 32 (requisition by master of mint of scarce copper); 2RPC v 190 (acceptance of foreign money in payment)
7. RPC ii 13
8. RPC iii 246
9. RPC ii 577; iii 216; viii 439-440
10. RPC x 415-9
11. RPC v 6

decree of session, the part dealing with grinding of corn was regarded as a public matter appropriate to the council.[1]

Administrative law

Another undoubted part of the administrative power of the council was controlling the king's officials, both central and local.[2] The council included within its number the principal officers of state and heads of departments and accordingly it was appropriate that it should exercise the function of an administrative court. This aspect of the council was analagous to that of the present French conseil d'état; and indeed the origins of that body can be traced to the pre-revolutionary conseil du roi. The Scots council dispensed a rudimentary droit administratif by protecting officials from the disobedience of the lieges[3] in deciding disputes between officials over function and remuneration[4] and, most important, affording remedies to those aggrieved by the acts and omissions of officials. In effect,[5] the council acted as a sort of discipline committee of the civil service.

Disputes within the administration

Most of the rights and duties of officers of the civil service were adequately defined by their commissions; but on occasion some aspect was omitted or it clashed with the rights of another, or the officer wished to do something outwith his commission.[6] In these circumstances the council entertained supplications defining

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1. 2RPC iv 85
2. Since most of the ordinaries, such as sheriffs, burgh magistrates and justices of the peace had ministerial as well as judicial functions, many complaints against their executive functions appear before the council in a judicial guise.
3. 2RPC iv 5
4. RPC i 395; ii 94; iv 265 631; x 246 443-5; xi 233
5. Many of the remedies which the council afforded in these administrative matters are today achieved by executive action rather than judicial process; many however are not "justiciable" at all and have no remedy other than the doubtful one of a question in parliament.
6. Appendix H

the official duties, such as those of sheriff clerks or messengers,[1] or ordaining rival officers or their widows to give up the writs appertaining to the office.[2] Newly appointed officers could petition for admission and recognition by existing colleagues, or by their predecessors in office.[3] The notary who claimed to have been admitted by the former clerk register (after a new clerk register had been appointed) had his admission declared to be void.[4] Sometimes an officer shewed some initiative but wanted authority before embarking on a novel cause - such as the lord lyon who wished to print a correct list of messengers or the keeper of the wardrobe who sought a committee to make an inventory; or the keeper who wanted to remove public records.[5] An officer could require assistance - as to whether certain burghs were to be taxed with the burgh or with the county.[6] Other supplications - such as the lord lyon for a new crown at the coronation[7] were exceptional; others were merely for payment of fees or arrears.[8]

Complaints against the administration

Many of the grievances of subjects against officials were also matters of oppression;[9] others arose from administrative negligence.[10] A large class of these arose out of the liability of certain officers to apprehend and retain in custody debtors and criminals, on pain of becoming liable to creditor or party injured.[11] Apart from the ordinaries, this liability was also borne by the king's

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1. 3RPC iii 8; 2 RPC iv 156; v 423; 3RPC i 388
2. 2RPC ii 398; v 195; 3RPC vi 136
3. 2RPC ii 205; iii 516; v 145; 3RPC i 388 444. In one case the lord lyon was ordained to admit a new messenger on pain of an appointment ad vitam: 2RPC iv 17
4. 2RPC vii 238; infra suspensions
5. 2RPC iv 575; v 187; 3RPC viii 207-8
6. 3RPC iii 418
7. 2RPC iii 491
8. 2RPC i 84; iv 12; 3RPC i 14
9. Eg 2RPC iv 247 (seizure of popish vestments by tacksman of customs)
10. 2RPC i 406 634; 3RPC vii 113 144
11. Regiam i 19 2-3; Hope vi 29 2 16-18 20-21; 1597 c 44 (APS iv 141); RPC iv 153; vi 176; vii 59 64

guard.[1] Any dereliction from duty by the sheriffs or bailies might also result in their punishment by the council.[2]

The council enforced these obligations by ordering jailers to re-enter liberated or escaped prisoners.[3] Even where the bailies of Stirling justified the release of a highlander suspected of murder by averring that he had not been taken red handed, the council held that this rule did not apply in serious crimes.[4] Failure to re-enter made the officers or their cautioners liable for the debts.[5] If the creditor suspected the willingness of the magistrates to ward a rebel they could be ordained to produce him before the council on pain of horning[6] or the rebel might be transferred to a safer tolbooth.[7] Similarly a baron was ordained to cease the delay in bringing a prisoner to trial;[8] and the bailie who negligently failed to prosecute a thief was fined £10 to the victim;[9] or a messenger was denounced for not serving a charge timeously[10] and even the king's advocate could be proceeded against for bringing a charge during an amnesty.[11] Occasionally if there was an escape by connivance, or even negligence, of the jailer, the king's advocate or treasurer prosecuted.[12]

Another frequent complaint was charging fees in excess of those laid down,[13] the official could expect deprivation and punishment while the complainer would be discharged from paying the excess.[14] Thus the clerk of the coquet who executed

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1. RPC xi 59
2. 2RPC ii 97; iv 68. Similarly with JPs: eg 3RPC iii 98
3. RPC iv 539 594; vi 325; ix 445
4. RPC iv 153 159; Hope vi 29 2
5. RPC vi 6 486; 3RPC i 165; 2RPC v 170
6. RPC v 409
7. RPC viii 166
8. RPC vi 79
9. 2RPC iii 457
10. 2RPC ii 152
11. 2RPC ii 143
12. RPC vi 420
13. 2RPC iii 143
14. RPC ii 456; vi 573; vii 164-177; ix 323-4

his office negligently and charged excessive fees was deprived of office and committed to ward after the king heard that the original punishment was merely a fine of £200.[1] A frequent complaint against clerks of court was refusing or delaying to give out extracts of judicial proceedings or giving out incorrect or false extracts.[2] Taxpayers had the satisfaction of having the tacksmen of the customs convicted and fined 23,000M for attempting to bribe the treasurer and charging excessive duties.[3] The dean of guild who unreasonably refused to register an apprentice goldsmith or locksmith was ordained to do so;[4] the appointment of a customar whose activities injured the citizens of Edinburgh was revoked.[5] After the restoration there were frequent complaints against the military authorities.[6] The coucil also dealt with factious complaints against the administration, in one case, giving "the pursuers a publick reproofe for persueing and troubling of the defenders who are entrusted with publick affairs of the shire without ground."[7]

Burghs

One of the principal organs of local government was the burgh. Here the council exercised a variety of functions similar to that presently exercised by the secretary of state for Scotland and his departments. Apart from assisting the burgh authorities to keep order by punishing tumults[8] - and enjoining obedience to lawfully elected magistrates,[9] the council also intervened on occasion where a burgh official

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1. RPC ii 456
2. 2RPC ; 494; iii 430; vi 23. But a case involving delay in passing the seals was remitted to the session because the issue was the form of the parties' deed: 2RPC iii 587.
3. 3RPC vii 512-32
4. RPC iv 574; 2RPC ii 193
5. RPC ii 374
6. 3RPC xiv passim
7. 3RPC iv 474
8. RPC i 116 505; ii 84; iii 305; vi 39; x 630-33
9. RPC i 406; ii 314; ix 386

> has committit na fault in the execution of his office, bot onlie incurrit suspicion, as favorable, to ony partie not usand himselff as an neutrall and common Officiar, betwixt our soverane Lordis lieges[1]

- a function properly pertaining to the court of session.[2] But most of the complaints were by the crown or subjects against improper election[3] or perversion of office by maladministration[4] or by attempting to make elected offices hereditary;[5] and officers were ordained to take up their duties.[6] The rights and duties of freemen of the burgh were also enforced,[7] as were the electoral qualifications of burgh officers.[8]

Again, questions of title unless a patent nullity were remitted to the ordinary judges.[9] Thus, for example, the notary who claimed to have been admitted by a former clerk register after a new clerk register had been appointed had his admission declared to be void.[10]

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1. Balfour 43; 2RPC ii 205 (bailie acting "verie factiouslie"); 3RPC xii 91 (magistrates who had not "walked so circumspectly as became them")
2. RPC i 582
3. RPC i 406 505; ii 18 305 314 472; iii 44; iv 223; vi 34 39; vii 183; xii 152; xiii 152; 3RPC xi 577-583
4. RPC iv 523
5. RPC iv 42
6. RPC ii 537 (by consent)
7. RPC iv 326; vi 34 39; xii 152; xiii 152
8. 2RPC ii 213 233; 3RPC iii 344, cf 2RPC i 394-475. With the restoration and revolution there were frequent removals for lack of religious qualification, eg 3RPC i 549; xiv 419-20 433
9. RPC i 406; ii 601; iii 69; 3RPC i 388 600
10. 2RPC vii 238; infra suspensions

8 Administration of justice

The administration of justice in 16 and 17 century Scotland had changed little since the middle ages. Apart from the fairly recent college of justice and the commissaries, the judicial system consisted of the feudal courts of the medieval class structure.[1] Each estate had its own courts and its own "personal" law. The burgesses were amenable to the burgh courts; the clergy to the bishop and his official or commissary; the landowners to the court of their feudal superior, be it baron, lord of regality, steward, sheriff or parliament.[2]

This system of courts had defects. One segment of society which owned half the land was not subject to the crown but had as its fount of justice the papal monarchy.[3] But the chief defect lay in the corruption, inefficiency and ignorance of the law of local judges, most of those offices, including many of the sheriffs and great officers of state such as the admiral and justice general were hereditary.[4] Further the medieval processes were dilatory and thus in practice often failed to give a remedy to particular classes in society.[5] These defects had been part of the driving force behind the increasing appeal to the equitable power of the king and council which resulted in the creation of the college of justice. Even after 1532 the defects remained and redress continued to be sought at the hands of the

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1. W. Croft Dickinson "The Administration of Justice in Medieval Scotland" Aberdeen University Review xxxix (1952) 338

2. Parliament was merely the king's own baron court (McMillan 63 et passim; Mackenzie Institutions i 3 2). Each of these feudal courts bound together the unit of land over which it had jurisdiction; barony, regality, stewartry, sheriffdom and kingdom; and the landholders of each unit owed suit at the court. The church had its general council (general assembly after 1560); and the burghs their convention.

3. In the 15 century some inroads had been made on the unfettered power of the papacy to present to ecclesiastical benefices (Hannay Scottish Crown and the Papacy Historical Association of Scotland).

4. In 1681 the sheriff of Aberdeen petitioned the council for transfer to Edinburgh of a trial of child murder, because the local fiscal and procurators were unskilled in criminal law (3RPC vii 289); McMillan 5; but contrast Dickinson Sheriff Court Book of Fife

5. McMillan 37-39 of 1600 c 14 (APS iv 228)

privy council but the complaints were not so much of a legal nature as of oppression.

The king's reserved power of granting jurisdiction remained[1] as did his power of supervising the judiciary. One development arising from these powers had been the creation of a hybrid feudal-royal court of session which soon acquired concurrent and then privative jurisdiction in fee and heritage.[2] In the 1560s the crown assumed the place of the papacy in jurisdiction over the church; the new church assemblies and commissary courts owed their authority to the crown either alone or in parliament. Towards the end of the century the new justice of the peace courts were working despite the opposition of the nobility.[3] And throughout his reign James had managed to bring back into his hands many of the hereditary sheriffdoms.

Setting aside those limited interventions of the royal imperium the crown created the commissaries in order to fill a gap in the judicial structure. These changes were largely an alteration of emphasis rather than a fundamental shift of political thought. The essential feudal structure remained in justice, in legislation, in taxation and in land tenure; but there was overlaid on the feudal idea of consent of the community the Roman notion of imperium.[4]

The royal power was exercized not to bleed the feudal courts by taking power away from them but to make them function properly by assisting them, supplementing them and correcting them: in this respect "the king might do anything which the law and conscience did not forbid";[5] this corrective power was exercized by the council.[6]

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1. Erskine i 3 1; McMillan 65 73
2. ib 73; Sources 201-2; cf Bishop of Aberdeen v Ogilvie 1563 M 7324
3. Calderwood vii 178; RPC ix 387
4. McMillan introduction vii-x
5. ib 21
6. eg for the better administration of justice deciding disputes between the lieges and judges as to best location of holding courts: 2RPC iii 43; iv 194 195 306

Commissions

The king had a reserved power of supplementing the ordinary jurisdiction and was not bound by former grants of jurisdiction.[1] In the later constitutions of the council there was power of granting commissions of justiciary.[2] Many of these arose from reasons of judicial policy but others were granted for reasons of politics and favour.[3]

Some of the grants were of extensive commissions[4] of lieutenantry and justiciary particularly in the ungovernable parts such as Argyll. Others were the lesser commissions of justiciary. These were ad hoc grants on the supplication of a subject of power to justice against a particular criminal[5] or for his pursuit and apprehension.[6] Others, again, were in respect of a particular type of crime such as witchcraft or jesuitism.[7] The grant was sometimes restricted in time[8] or in place.[9] From time to time, because they were being used for private revenge, all commissions were discharged;[10] and by 1608 they were being granted sparingly.[11]

Incidental powers of commissioners, such as warrant to arrest or to open lockfast places came before the council;[12] as did complaints of abuse of powers by commissions.[13]

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1. Erskine i 3 1; RPC ii 515; 1487 c 17 (APS ii 183)
2. 2RPC i 251
3. In the 17 century there were frequent commissions to advocates to hold courts of justiciary (eg 2RPC ii 494); these were generalized and made permanent in 1672 when the high court of justiciary was set up : APS viii 87
4. RPC v 187
5. RPC iii 570; v 103; xiii 158; xiv 621
6. RPC iv 94; 2RPC v 332 350; vi 31
7. RPC iv 290; v 157
8. During the king's absence in Denmark (RPC iv 432)
9. The West March (RPC v 112); RPC v 49 50
10. RPC iv 552; v 130
11. Melrose Papers i 55. There were also lesser commissions - to a councillor to hear witnesses; to the king's advocate to examine accused persons or institute a prosecution: 2RPC ii 354 412 442; iii 143
12. 2RPC iii 605 619
13. 3RPC iii 507

Interference

As in commission so in other exercizes of the council's power of judicial administration the result was not always conducive to justice. Since the council was also director of prosecutions in public crimes and had the prerogative of mercy in all crimes it had considerable means of interference, many aspects of which were severely criticized by Hume,[1] especially before the institution of the high court of justiciary in 1672.[2] Some were merely executive acts such as deserting a criminal diet pro loco et tempore.[3] Desertion was ordained as a result of a supplication narrating that the kin of a slaughtered man and his slayer had agreed to submit their differences to arbitration.[4] Another administration act was recommending to the justice how to proceed and what sentence to inflict.[5] Similarly the council granted supplications for continuing of criminal diets and diets of the council to avoid interference with the harvest;[6] and for political reasons intervened to prevent the excommunication of persistent catholics such as Huntly.[7]

Some of these actions, such as ensuring that an accused person had an indictment served on him and had free access to his advocate,[8] were beneficial; others such as the appearance of councillors as assessors to the justice court[9] were of doubtful value.

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1. Crimes ii 28-29
2. 1672 c 40 (APS viii 87); Mackenzie Criminal ii 6 5
3. RPC viii 2; 2RPC iii 461
4. 2RPC iii 612
5. RPC xi 358; xiv 613 617. In a case which came from the justice for the opinion of the council, the king's advocate, seeing that the voting in the council would go against his views, deserted the diet before the justice and thereby brought the discussion to an end: RPC xiv 624; Appendix H
6. RPC x 131; xiv 621
7. RPC vii 123 467; Letters 64
8. 2RPC v 283
9. 3RPC ii 333

Precognition

Another device which, according to Hume, struck at the normal course of the law was the grant of precognitions "being an inquiry, if such it may be called, into the circumstances of the fact, set on foot at the instance of the party accused and at such diet as he made choice of: and of this proceeding, according to Mackenzie, so manifold were the abuses, that of all the many persons who applied to the Council for precognitions he had never known one who was brought to justice."[1] Contemporaries, however, were not so harsh in their condemnation of this device - especially where the objection to a regular trial was directed to the defects of the court rather than to the nature of the crime.[2] Its function was to take "previous trial or preliminary investigation"[3] of the way and manner of the slaughter. Most of the cases that are reported relate to justifiable slaughter, usually in the course of official duty,[4] or where there was penuria testium.[5] The council was able to hear witnesses and investigate the circumstances in a less formal way than by trial by assize[6] and thus decide whether the prosecution should proceed. Inevitably the grant of precognition resulted in delay by reason of continuation of criminal diets.[7] If the facts did not disclose a just cause for putting the suspect on trial the diet was discharged[8] but civil rights of parties were reserved.[9] If there was a prima facie case the trial for the crime was not prejudiced[10] - even by a conviction for riot in the court of the hearing.[11] In a word the council was acting like a judge who permitted the preliminary stages in a criminal prosecution: in fact it was

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1. Hume Crimes ii 28; cf Mackenzie Criminal ii 6 5
2. 2RPC v 167
3. 2RPC i 316-318; vi 44 266
4. eg 3RPC iii 293
5. 3RPC iv 517
6. 3RPC iii 293; v 84
7. 2RPC vi 266
8. 2RPC vi 44 282
9. 2RPC vi 344
10. 3RPC ii 255
11. 3RPC i 467

a safeguard of the individual from the hazards of private prosecution before incompetent courts.[1]

Super inquirendis

Letter of charge super inquirendis were issued under the signet by the executive authority of the king, charging a subject to appear on pain of horning before the council to answer not a specific charge but such things as might be asked of him;[2] and it was treason to refuse to answer.[3] This was not in essence a judicial process but was more akin to a criminal investigation[4] and in theory was limited to serious crimes against the state such as treason;[5] but in practice many other matters came before the council in this way.[6]

The process struck at the rule that no man should be compelled to incriminate himself.[7] The obvious dislike (which was to persist into Charles' reign[8]) which it engendered brought about legislation limiting its use to questions of treason and his majesty's person; penalties were set down for those officials who were party to such illegal letters;[9] and the protection afforded by the act could be invoked before the council.[10]

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1. The minute books of the council of the earlier 17 century abound in entries such as "Precognitione against Sir James Dundas and Samuell Cokburn" (RPC ix 399); but only occasionally is there any corresponding record of any discussion on the grant in the decreta (RPC ix 8 33-35); later however the number of full reports increased.
2. RPC iii 193; iv 610; 2RPC i 389
3. APS iii 292-293
4. Letters 199
5. RPC iv 610. They were used equally against the seditious ministers (RPC vi 243) and the Gowrie conspirators (RPC vi 156), or jesuitism: 2RPC i 389
6. RPC i 377; ii 40; iii 340; iv 718
7. RPC xiv 619; Mackenzie Criminal ii 25 1
8. Memorials of Montrose i 46-51
9. 1585 c 7 (APS iii 377)
10. RPC iv 756

However these were exceptional procedures which were a very small part of the work of the council. Normally the council acted with impartiality in its function of ensuring that the judicial administration worked effectively and according to law.[1]

Supervision

The conciliar power of supervision of the courts (including parliament and the session) included power to determine their time and place of meeting, sometimes ex proprio motu[2] on account of the plague or on the supplication of the judge or the litigant.[3] Where the justices of the peace of Linlithgow complained that the magistrates refused to convene a quarter session, the council ordered a meeting of the court.[4] Likewise for equitable reasons an accused could have his diet prorogated because he wanted to go on a voyage before the Baltic froze;[5] or the pursuer who wanted trial of a thief before the bailies of Stirling to whom he had confessed and then retracted, was granted his prayer by the constitution of the bailies as his majesty's justices to try the thief by assize.[6]

Petition and direction

Frequently in cases of difficulty - where there was doubt as to jurisdiction, procedure or sentence - inferior courts petitioned the council for directions as to how they should proceed.[7] The most common of these cases was on sentence: thus

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1. Judges were bound to execute their office by order of law, "non autem manu forti" (Hope v 1 7)
2. RPC vi 338
3. RPC vii 208; 2RPC iii 43; iv 194 195 306
4. RPC ix 387
5. RPC v 481
6. RPC x 110
7. 2RPC vi 385. In a modern stated case the questions for opinion refer to the past: "Was I entitled to convict?", "Was the sentence oppressive?"; whereas in the petitions to the council the questions referred to the future: "Will I be entitled to convict?", "What sentence (if any) shall I impose?"; Appendix H

for example the customary sentence for theft was death, but if there were mitigating circumstances (such as the youth of the offender,[1] absence of previous convictions or necessity[2]) the inferior court sought the authority of the council before mitigating the rigour of the law.

Assistance to inferior courts

Where an inferior court was suffering from contumacy of parties the council intervened to enforce their decrees, including those of the session and of arbitration.[3] Thus where a convicted wife failed to present herself for sentence, the king's advocate could seek an order for her arrest.[4]

One of the more serious forms of riot and oppression was the violent interference with the holding of a court,[5] as where a convocation of 400 prevented the king's bailie in Ross from constituting his court.[6] The party who used such intemperate language in the commissary court that the judge had to adjourn was summoned before the council[7] as was the party who refused to obey the kirk session of Ayr or failed to compear at a justice court on a charge of regrating[8] or was contemptuous of the justices of the peace.[9][10]

Redress

Parties who appealed to the council against the failure or delay[11] of the

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1. 2RPC iv 115
2. 2RPC iii 533
3. RPC i 447 620; ii 283 329; vi 530. One patentee was given power to cite contumacious infringers before the council: 2RPC iii 200
4. 3RPC iv 153
5. RPC ii 161
6. RPC iv 254. Special rules were devised for disorder near the council: RPC vi 596
7. RPC iv 271
8. RPC ii 60-61
9. RPC v 452
10. RPC ix 446
11. 2RPC v 200

ordinaries to do justice received redress in the form of orders to the judge to execute his duties[1] on pain of horning[2] or of liability to staisfy the pursuer for any loss he had sustained.[3] And council investigated complaints of unwarranted execution of two men,[4]

Disciplining judges

As to the judges themselves, the council enforced its supervisory power by orders to execute their functions,[5] by fines,[6] suspension[7] or deprivation[8] whether or not the office was hereditary.[9] Even where there was a dispute as to title of a heritable sheriffdom pending before the session, the council could discharge one or both parties from acting;[10] but questions of heritable title were remitted to the session.[11] Failure of four border sheriffs to execute a long list of common law and statutory duties resulted in their being summoned before the council.[12] The judge who remained at the horn[13] or executed a person without warrant was liable to deprivation.[14] Any illegal or oppressive conduct by the inferior judge was liable to review. A complainer whose silence had been held to amount to a confession had the record of the court deleted (by consent), but reserving liability for further citation.[15] The commissioners of the mid-shires were declared to be in

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1. 3RPC iv 463
2. RPC ii 417 564
3. RPC vii 57; x 27
4. RPC vi 472 481
5. 3RPC iv 463
6. RPC vi 68; xiv 623; 3RPC i 177
7. 3RPC i 187
8. RPC ii 172 357; vii 238; 3RPC ii 612
9. 1457 c 29 (APS ii 51); 1469 c 2 (APS ii 94); the act 1617 c 8(5) (APS iv 536) reaffirmed the council's jurisdiction over judges who negligently allowed guilty parties to be acquitted.
10. RPC ii 257; 3RPC iii 429
11. RPC iv 25
12. RPC vi 68
13. RPC xiv 602
14. RPC iv 625
15. 2RPC ii 219; iii 468

great error in proceeding against an innocent namesake of a suspect.[1] In one case of double conviction for the same offence the supplicant after failing to have redress from the session or justice court, came to the council which ordained the justice to grant warrant for the supplicant's letters against the inferior court and for citing parties to appear before the justice for "reponing" the conviction.[2] Elsewhere the council discharged the kirk session bailies from warding a woman on a charge of abandoning a child until "by lawful tryell and probatioun thay sall fasten the infant upoun the said persewar".[3]

Partial assize

Partial jurymen were also amenable to discipline by the act 1471 c 9[4] whereby a party aggrieved by a partial assize could complain to the council and have the assize reduced and the assizers could be asked how they gave their vote so that they might be punished.[5]

In one case in terms of the act where the panel secured a favourable jury before the sheriff, thereby forestalling the complainers action before the justice, the perverse jurors were themselves ordained to be put on assize.[6] In other cases the perverse majority were cited before the council: some were denounced for absence, those compearing confessed their fault and submitted themselves to the king's will;[7] and those refusing to say (whether on oath or not) how they had voted were put to the next assize,[8] or if the investigations warranted the justice was ordained to desert the diet.[9] In the case of those suspect de temerario iuramento,

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1. 2RPC iii 569
2. 2RPC v 183
3. 2RPC ii 119; but warding might be inflicted on the frivolous appellant: 2RPC iii 441
4. APS ii 100
5. 3RPC vii 135. There are only a few examples of this.
6. RPC iv 688
7. RPC vi 241
8. 3RPC vii 135
9. 2RPC vi 466

the accusation was by the king before the justice and the matter was put to the knowledge of a great assize of 25 nobles.[1]

A party, suspecting that a partial sheriff was delaying a trial for slaughter so as to ensure an assize favourable to the accused, could have the matter tried in Edinburgh before the justice.[2] A more frequent remedy was exemption of a complainer from the jurisdiction of the suspect court.

Exemption

The council had, by common law and under the later commissions, power to exempt a subject from a jurisdiction,[3] whether a regularly constituted court[4] or an *ad hoc* commission.[5] This was granted on a supplication on some ground personal to the party allowing exemption, such as custom, absence, old age, or relationship;[6] on a ground attaching to the court. These grounds included illegal acquisition of the jurisdiction and its exercize in a malicious, partial, corrupt manner or in conflict with an existing jurisdiction.[7] One complainer escaped the jurisdiction of the sheriff for several reasons including the simplicity of the assize and the ignorance and enmity of the sheriff.[8] In one case averments of malice on the part of some members of a commission were investigated by the others.[9] If the complaint was upheld, the limits of the court or commission could be restricted[10] or even discharged or suspended.[11] To take away any pretext of suspicion[12] the membership

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1. Hope viii 15 3-11. The council on occasion exempted parties from jury service on the grounds of age and infirmity: RPC ix 397
2. RPC x 523
3. 2RPC i 251
4. Many exemptions were sought from the steward depute of Kirkcudbright: 2RPC iii 420 625 etc
5. RPC i 315 408; iv 188 329 393; v 338
6. RPC ii 516; iv 188 329; v 144; 2RPC ii 142
7. RPC iii 97 144; iv 47 552 580 614 646; v 161 373; vi 5; 2RPC ii 518
8. RPC vii 238
9. 2RPC iii 542
10. RPC iv 580
11. RPC iv 96 614 646
12. 2RPC vii 349; 3RPC i 397

of a court could be altered[1] or the sheriff added to the number of commissioners.[2] More often the complainer was exempted from the jurisdiction, normally on finding caution for his appearance in another competent court.[3]

Once the council had dealt with the immediate administrative question of protecting the subject, other matters such as title to hold the court were reserved[3a] or remitted to the session.[4]

Jurisdictional disputes: competency

A more legalistic question about the power of a court to adjudicate was its competency in the dispute.[5] Thus courts which sought to try a person who had tholed his assize were discharged from doing so; or the court was continued to allow the party to produce testimonials of his former trial.[7] In the case where an Edinburgh woman had been cited before the justice court on the authority of a decree of assize in the court of the constable depute, the charge being one of having (accidentally) dropped a stone on another woman, the council found the rolement of the constable's court to be a "noveltie, strange and contrarious to the lawis of this realme".[8]

The council also dealt with any court which encroached on its own jurisdiction, as where the bailies of Haddington attempted to try a riot which was not between neighbour and neighbour;[9] and the presbytery of Arbroath, which attempted to decide

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1. 2RPC iii 420
2. 2RPC iii 556
3. RPC i 408; ii 57; iv 392 435
3a. 2RPC iii 625
4. RPC iii 144; vi 50
5. This question which was whether a court had jurisdiction differed from the question in exceptions which was whether a court should have jurisdiction.
6. RPC i 258; v 405; 2RPC ii 219; iv 254 (earlier conviction on different facts)
7. RPC xiv 598
8. RPC i 442-3. Despite the accidental nature of the injury the woman was ordained to pay £20 to the victim.
9. RPC xii 276-77

a question of patronage in the face of a decree of council, was held to have proceeded wrongly and in contempt of the council.[1]

The council heard objections not only to the competency of the court to deal with the matter but also with the competency of the court to try the accused.[2] Thus a widower petitioned successfully for trial of the soldier for murder of his wife before the justice rather than "ane council of warre"[court martial];[3] and where the commissary did justice on a person who resided within a regality the decree was discharged and the party absolved.[4] Thus the steward of Annandale was held to have done wrong in doing justice on suspected thieves when they had a fixed dwelling place and had not been taken in the fang: he was ordained to liberate the men and restore the cattle to their landlord.[5] The council liberated two burgesses who had been convicted under an act against buying flour for resale when their purpose had been buying for bread making.[6] The baron who attempted to adjudicate on debts in which he had no jurisdiction was warded for his offence,[7] or had to refund the fines imposed.[8]

If the inferior court had jurisdiction the council did not interfere;[9] if there was concurrent jurisdiction the council favoured the first attacher of the accused.[10] The lords were unwilling to retry a case which had been investigated twice by the bailies of Edinburgh in their capacities as sheriffs and justices of

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1. RPC vi 586
2. RPC v 509; vi 108 126; xii 277; xiv 618
3. 3RPC vii 241. The increase in the military establishment necessitated by the existence of the covenanters brought about a definition of civil and military jurisdictions: between soldier and soldier, military courts; and between soldier and subject, ordinary courts, unless the subject raised his action for rederss at a court martial: 3RPC vii 416
4. 3RPC i 405
5. RPC vii 273
6. RPC x 8-11
7. RPC vi 118
8. 3RPC i 585
9. RPC x 392
10. 3RPC viii 242-3

the peace;[1] and elsewhere the unsuccessful complainer was warded for troubling the inferior judges without cause.[2]

Church courts

The largest class of cases of intervention by the council in inferior courts was in the oppressive proceedings of presbyteries against adulterers and the like who were being vigorously prosecuted under renewed freedom of the kirk conferred by the "golden acts" of 1592. The law was stated in Haddington's report of one of these cases.[3] The presbytery of Dalkieth claimed jurisdiction to judge in questions of heresy, apostasy, witchcraft and idolatry. The council held that if a party was summoned before them and confessed to such crimes they might condemn him; but if he denied the crime the kirk had no power to take trial or judge of the fact of guilt: they had only powers with regard to crimes, not to try who was a criminal - which is only competent to the criminal judge. In another complaint against the jurisdiction of a presbytery the complainer failed to appear at the council. The council admitted the protest of the presbytery; but pointed out to them that it was unreasonable to force a party's oath or proceed without further probation which could only infer slander and not fact, because they were not judges of fact.[4]

The same rules were applied in other proceedings of the church assemblies against parties for adultery, fornication, papistry and the like. Whereas the council would denounce the contumacious[5] or enforce by denunciation the competent decrees of excommunication for such offences[6] or entertain actions in the first instance by kirk sessions[7] (in which they are variously stated to have and not to have concurrent

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1. RPC x 342
2. 2RPC iii 441
3. RPC xiv 612
4. RPC xiv 619
5. 2RPC ii 441
6. RPC iii 790
7. RPC iii 190; iv 558

jurisdiction with the justice court)[1] they would not allow them to try the matter and would not enforce any excommunication which proceeded on refusal of an accused to incriminate himself and upheld the right of such persons to trial by the justice and assize. Similarly the council, on complaint of spouses that the presbytery was about to annul their marriage and thus bastardize their children, discharged the presbytery from acting and remitted the matter to the ordinary judge.[3]

The council had no first instance jurisdiction in these matters of ecclesiastical discipline except where the offence was also a crime and jurisdiction had been conferred on the council by a penal statute.[4] The council had, in its own right, jurisdiction in some church matters which also involved riots and oppressions. Among these were unauthorized building or destruction of desks and lofts in

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1. RPC vii 7 16
2. RPC vi 108 272; vii 7 16 21; viii 66 82
3. RPC v 427
4. RPC iii 209 215; eg council dealt with papists who failed to satisfy the presbytery: 1594 c 4 (APS iv 62); 2RPC ii 315 343 etc. Each religious settlement from 1560 to 1689 brought its own conformity and suppression of non conformists. The worst regime was that of the restored Stuarts, because it, most of all, ran counter to the bias of the people. The close connection between ecclesiastical conformity and political obedience which characterized the period brought about a series of statutes designed to stamp out resistance, for example heritors were made responsible for the personal safety of the minister (3RPC iii 127 200 208 etc); and conventicles and unauthorized baptisms were forbidden. Enforcement was effected by prosecution in the privy council (1663 c 9 (APS vii 455)) at the instance of the king's advocate. As the intransigence of the covenanters intensified, the number of individual prosecutions increased; then batches of a hundred or so were dealt with; and finally the council dissolved into a number of roving commissions of justiciary conforming ministers (eg 3RPC xiii 465 525-5; preface xix xxi) and the disposal of their stipends (eg 3RPC I 43) - both of which matters were dealt with by the council.) Apart from maintaining the general principle of royal supremacy little can be deduced from this dreary catalogue to illustrate the true function of the council - except perhaps one case of a casus improvisus: whether by virtue of the acts against attendance at conventivles (which imposed only a personal obligation) husbands could be punished if their wives attended. This was remitted by the council to the king for his decision (3RPC vii i 276-8 342 366): the affirmative decision of the king was declared to be illegal by the claim of right : 1689 c 28 (APS ix 40).

churches,[1] maintenance of idolatrous tombs[2] and illegal exhumation.[3] Some of these cases came to the council by way of suspension of a charge or excommunication of the church court.

If the matter was essentially one of church discipline it was remitted to the church assemblies or the bishop. In a case of deprivation and imminent excommunication for alienation of teinds, the pursuer argued that title to teinds was civil, and the defender that deprivation of benefice was ecclesiastical. The council, because the matter was "thocht to be civile", discharged the church court from further procedure.[4]

When the court of high commission was set up the council was forbidden to "advocate" cases from the inferior church assemblies; but the council denounced heretics on the warrant of the high commission, and dealt with offenders to whom it appeared that the high commission had been too lenient.[5]

Patronage

Where the bishop could offer no defence to his refusal to collate he was ordained to do so[6] in terms of the act 1612 c 1[7] which empowered the council (there being no defence) to issue letters of horning. And in the 1640s similar directions were given to the presbytery to admit a presentee[8] but the council upheld the nominee of the Assembly which had overridden the presbytery.[9] For a short time

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1. RPC vii 239; viii 153 194; ix 69; xi 512
2. RPC vii 60 381
3. RPC vii 315-7
4. RPC iii 209 237
5. Calderwood vii 388
6. 2RPC iii 500
7. APS iv 469
8. 2RPC vii 278 306
9. 2RPC vii 322

after the Restoration the presbyteries retained this episcopal function[1] but it ended with the restoration of the bishops;[2] and the presbytery could be punished for usurping this function.[3] Thereafter the council continued to deal with collations. Where the facts were not in dispute the council acted in favour of the ostensible patron,[4] as where the bishop refused to collate because the archbishop was abroad.[5] Where there was a more radical dispute on the facts, such as competition between licensed preacher and collated minister,[6] the matter was remitted to the appropriate forum[7] and in the interim a substitute was to act.[8]

Conflicting jurisdictions

The council also dealt with disputes between competing jurisdictions, determining the nature of the cause and remitting them to the appropriate forum.[9] In the dispute between the magistrates of Edinburgh and the constable it assumed the jurisdiction itself;[10] and where there was a danger to the peace both courts were discharged from meeting.[11] The jurisdiction of the Argylls as justice general and tacksman of the assize of herring was discharged in so far as it infringed that of the admiral.[12] Likewise the bailies of Dunbar vindicated their rights over the admiral depute,[13] and the commissary of Edinburgh over the magistrates.[14]

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1. Eg 3RPC i 43
2. 3RPC i 119 130
3. 3RPC i 122 128
4. 3RPC xi 3-4
5. 3RPC i 506
6. 3RPC iii 128
7. The bishop (3RPC ii 29) or if it were a question of title of patron to the session (3RPC v 166 192; xi 3)
8. 3RPC vii 446
9. Most of the actions were at the instance of the judge whose jurisdiction was being infringed or of the party grieved by the exercise of the jurisdiction; one at least was a joint application: 3RPC iii 616.
10. Register ii 692
11. RPC i 3
12. RPC vi 177; ix 508
13. RPC vi 282
14. RPC viii 135. There were also disputes between regular courts and ad hoc commissions: 2RPC iv 426

There were frequent disputes between the regality of Broughton, the bailies of Canongate[1] and the bailies of Edinburgh[2] but when they came before the session the council continued their hearing until a decision had been given.[3] In the long feud between the bailies of Edinburgh and the constable the bailies were held to have done wrong in acting contrary to a decree of session in favour of the constable, no matter what the respective charters disclosed.[4] At a later stage where there was a choice of forum the council preferred the constable in respect that his was the principal office of the crown, but referred the question of heritable title to the session.[5] The persistent exercize of jurisdiction by Dundee in the face of a decree in favour of the constable there, resulted in the deprivation of the magistrates.[6] Sometimes the council referred the conflict of competing charters to a committee for their inspection and report;[7] but in the dispute between the regality of Glasgow and the barony of Gorbals the council discharged the baron from imposing capital punishment in that part of his jurisdiction which was still disputed.[8] Sometimes the council resolved disputes by remitting them to the sheriff or session,[9] unless by production of titles the rights of parties were instantly verifiable.[10]

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1. 2RPC iii 541
2. RPC vi 322
3. RPC ix 443
4. 2RPC v 206 etc
5. 2RPC v 298-300
6. 3RPC iv 528-535; v 65
7. 3RPC viii 292-3
8. 2RPC vi 492
9. RPC v 444; vi 563
10. 2RPC v 196. Arising out of the legislation dealing with attendance at church, question arose as to who was to receive the fines imposed: the council gave a judgement of Solomon - H.M. Cashkeeper was to have the fines of heritors who were not merchants; the bailies were to have the fines of merchants; and the fines of merchant-heritors were to be shared: 3RPC vi 280-1; viii 294-8.

Sometimes it was apparent that the council intervened so that parties would not be frustrated of justice, as in the claims of the justice general and constable to try assaults in time of parliament, where such assaults were remitted in the meantime to a commission of justiciary made up of councillors.[1] Later the claims were ordered to be tried by the council.[2]

Court of session

In that the council was closer to the equitable power of the king and was the instrument of the undistributed justice of the crown it was superior to the court of session. This ranking is accorded by most of the legal writers. The council's supremacy was affirmed by Charles as the basis for his reorganization of the session:[3] the council certainly determined the session's time and place of meeting.[4] later commentators speak of conflict between the council and the court of session but this is certainly not apparent in the records. Since the personnel of the two courts was (until the drastic measures of 1626) largely identical most potential disputes could be dealt with informally.[5] As is indicated throughout, the council did not deal with matters (apart from suspension) which encroached on the authority of the court of session: in fact the council consistently remitted appropriate matters to the session.[6]

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1. RPC vii 225
2. RPC vii 248
3. "Independence of the Scottish Judiciary" JR ns iii (1958) 140-144
4. Eg RPC vi 338; 2RPC vi 547
5. McMillan 53-54; cf Mackenzie Criminal ii 6 1 and Institutions i 3 6; Scottish Legal History 28; Appendix I
6. Up till the 1560s there had occasionally been "joint sessions" of the council and the court of session to deal with difficult cases - usually with some element of public policy: ADC (Public), preface xliv-xlv; RPC i 162-238 passim

9 Appeals

No appeals on merits

From the essentially administrative function of the council in relation to the inferior courts it is not possible to regard recourse of litigants to the council as a system of appeals on the merits. Whereas in the pre 1532 council, if a party could shew partiality or corruption real or notional in an inferior judge he could have the merits of his case discussed on appeal. The case could be advocated to the council, or, if decree had been given, suspension and reduction could be sued for;[1] the later privy council, having had these functions canalized into the court of session, retained only a supervisory and administrative function to correct abuses and to give a remedy where there was a fundamental and readily apparent defect, such as a decision by a pretended bailie,[2] or some wrong of the nature of riot and oppression.

Even in these cases the remedy of the council was not to take the case to its own jurisdiction except to order the ordinary to act properly or to remit the case to another ordinary court. In exercizing such a limited jurisdiction the council can in no way be regarded as a court of review far less a court of appeal.

Suspension

This view is borne but by the fact that of the three commonest modes of review, suspension, reduction and advocation, the council confined itself to the limited remedy of suspension. This was an interim order which did not settle rights of parties but which merely suspended and relaxed execution until a certain day.[3] Further, in the council, such suspensions were appropriate for invocation of the prerogative of mercy to modify the pains inflicted by other courts.[4]

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1. McMillan introduction xii-xiv
2. 3RPC vii 358
3. RPC xiv 499; Hope vi 26 5-7; Appendix N
4. infra suspension

Reduction

In the same way, in complaints against hornings the council consistently declared itself to be not competent to reduce a horning; but remitted that aspect to session or justice court.[1] The only exceptions are cases of royal grants and the like which for failure to observe statutory requirements were held to be null because inorderly purchased.[2] Similarly the act of an inferior court made without cause or authority, or the bond which had been granted undue duress were discharged.[3]

Advocation

A few of the cases mention "advocation"; this referred to the production of a rolement of an inferior court as in a plea of having tholed an assize.[4] In these cases the council relied on the rolement and did not in any sense re-try the case. Elsewhere "advocation" is used to describe the remit of a cause from an incompetent to a competent court.[5]

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1. RPC iv 680; vi 35 342; xi 278
2. 2RPC iii 8. Some declarations on "nullity" as in suspensions of hornings referred to their suspension not reduction; and in the case of "reduction" of an inventory and testament which had been exped irregularly and by oppression of the surviving widow the irregularity, which was the absence of witnesses, made the writs invalid per se and in no other way but nullity of them would the complainer have had an effective remedy: RPC ii 440.
3. 2RPC ii 217; 3RPC i 339; 2RPC v 186. Reduction of a deed could be considered by the council where there were averments of threats: 2RPC v 147; vi 113
4. RPC vii 217
5. RPC vii 7; 2RPC vi 135 299

V JURISDICTION: EQUITY

The second basis of the conciliar jurisdiction was the equitable power of the king which was appealed to where the distributed justice of the ordinaries for reasons of human imperfection failed to afford remedies. In all legal systems the regular procedures of justice do not cater for every situation. So much the more so in 16 and 17 century Scotland, where, as has been indicated, the ordinaries were far from being models of integrity or legal acumen. Further the very nature of the ordinaries, being courts of law dealing with questions of right, made them inappropriate to dispense remedies in matters of grace;[1] and some litigants, such as paupers and strangers, would in many cases be effectually deprived of remedy in the ordinary courts by virtue of their condition. The king as the fountain of justice and by virtue of his innate prerogative offered an equitable power "to provide such equitable remedy as his 'conscience' dictated and the common law did not forbid". This function flowed not from the common law but ex officio; it was to be exercized under God.[2] The origins of the court of session can be traced to this equitable power which in time was transformed from an extraordinary function into a superior court of law.

After 1532 the deficiencies in the feudal court structure had been supplemented by the foundation of the college of justice; but these deficiencies and the other elements, which impelled the lieges to seek remedy at the hands of the king, remained. The exercize of the equitable power of the king may be summed up in the brocard ubi ius ibi remedium; the council in exercizing the king's supplementary

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1. McMillan 17-20
2. McMillan 16 20-21

power did so to give a remedy where, either in fact or in practice, none was.[1]

The extent of this aspect of the council's jurisdiction can be gauged from the fact that it was invoked where the deficiencies even of the court of session deprived a party of remedy. Thus a party could come to the council on the plea that there was no quorum in the court of session;[2] and in the case of abduction of an heir the council did not repel the averment that during the vacation of the session (which was about five months in the year) the council was accustomed to take summary procedure.[3] Similar pleas were made on the ground of delay or the commonweal.[4]

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1. Kames Historical Law Tracts 212-5; Erskine i 3 9; i 3 24
2. RPC ii 220; ix 444
3. RPC iv 419
4. RPC iv 53; v 197; ix 443-5

10 Privileged Causes

In most of the cases, however, it was the status of the party rather than the nature of the action or the availability of another forum which made it appropriate to the council. There appears to be a rough equivalence of this type of action to privileged causes of the pre 1532 council and session for whom procedure was summary. Those actions, which were more limited than privileged actions of the court of session[1] - whose basis was not the status of the litigant but the nature of the action which required a shortened induciae - were those involving the king as representative of the commonwealth, foreigners "that may not abyde lang process"[2] and these persons who were in opes concilii: churchmen, widows, children and the poor.[3]

The privileged nature of these actions did not as a rule permit the council to hear actions otherwise incompetent but more often rather to give de facto or interim remedies reserving the rights of parties to sue in the civil courts. Sometimes the council would remit the matter to the session with the proviso that it be tried there summarily.[4]

King's causes[5]

Many matters which dealt with administration or the king's property were disposed of in the same way. In the few cases where the council took upon itself the interpretation of documents the interest of the king in some capacity is apparent, as in a treaty of peace[6] and a royal tack of mines;[7] or matters concerning the king's

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1. Bisset i 127; AS 21 June 1572
2. RPC v 195-7
3. Erskine i 3 9; McMillan 39; "Swa that now abydis na uther releif to thame bot to sute our saidis Soveranis, being the patronis and sauftie of the pover wedois and fadirles": RPC i 466
4. RPC v 195; the absence of the proviso made the remit "useless": 3RPC vii 345
5. Many matters which might be considered as affecting the crown are dealt with under the heading of administration.
6. RPC i 605
7. RPC i 553; iv 22

own lands[1] or actions for payment for services to the crown.[2] A few actions touched on titles of honour and precedence but were remitted for decision by the ordinary judge.[3] Thus, for example, the council adhered to its former act which had given the king's advocate precedence over the justice clerk until such time as the act was reduced; but the council also gave the justice clerk leave to raise an action of reduction.[4] It was argued, in a case which was ultimately remitted to the session, that the council were the "only judges competent in matters of honour _quoad_ the possessorie": the other side argued that there had to be injury or affront to a man's honour.[5] However if a patent was likely to infringe a royal title the king's advocate could intervene to prevent the conflict.[6]

A matter which touched on the council was the action by a macer of council against a writer to the signet for delivery of writs: he was permitted to sue in the council because his conciliar duties prevented him from attending an ordinary pursuit before the session.[7] Elsewhere the power arose by consent or by statute, as in the case of the pacification of Perth.[8] A statutory basis was apparent also in the jurisdiction to confirm ecclesiastical feus; but at the same time the tacit assumption by the crown of the powers - of jurisdiction and over church benefices - gave the king and council, almost by default of the papacy or the reformed church, jurisdiction in these matters.[9]

Revenue

Strictly the proper forum for the king's financial disputes was the exchequer

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1. RPC ii 492; iii 5 122 145 163 194
2. RPC iv 485 505
3. 3RPC vii 36
4. 2RPC ii 510-511
5. 3RPC vii 320
6. 2RPC ii 395
7. 2RPC iii 289
8. RPC ii 200 250 297 319
9. This was certainly the view of the king: RPC ix 569; Appendix K

or such other body as was for the time exercizing these functions.[1] However many matters were more matters of financial policy or appeals to the royal bounty than questions of liability to taxation. Thus a tax payer might petition to have his tax paid in a certain manner or the small burghs sought a decision as to whether they were to be taxed with the other burghs or along with the county in which they lay;[2] and a collector could seek the opinion of the council on whether (say) annualrents attracted taxation.[3] Often taxpayers sought to have their particular class of goods included within a group which was exempt from customs duty.[4] The tacksmen of the customs who found that their tack was profitless had to petition the council to be relieved of the burden.[5] Occasionally collectors invoked the authority of the council for letters charging parties to pay taxation;[6] and in the earlier period there were frequent suspensions of charges to pay taxes - usually by vindicating some exemption.[7]

For the rest the council limited itself to hearing appeals for remuneration, for relief from taxation and crown dues on equitable grounds[9] and for grants from the "vacant stipends".[10]

Churchmen

Although churchmen were one of the former privileged classes, the post

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1. Eg, the Octavians in 1598
2. 2RPC i 394-543 passim; ii 195-570 passim; iv 365
3. 2RPC iv 90 105. The council refused to be swayed by the arguments against paying a "voluntary" tax, that the taxpayer had not consented and that the tax was not general: RPC iv 634 678
4. 2RPC iv 182; vi 227; 3RPC i 164 181
5. 3RPC xiii 1
6. 3RPC xiv 8-9 95-96
7. Eg 2RPC ii 563; iv 288; v 152
8. RPC iv 338; vii 356; ix 531 etc
9. RPC i 418; 2RPC v 470; vi 20; destruction of lands; payments to the usurper 3RPC i 63 etc; plage RPC vi 510; leakage of dutiable wine RPC vi 514
10. The vacancies arose from the intolerant attitude of the government. Throughout the 1660s these supplications were legion.

reformation clergy failed (despite an act allowing two of their number to compear before the council with complaints[1]) to maintain any privileged position. The reformed church tended to act corporately through the general assembly; and many of its grievances were the subject of discussion between commissioners chosen by the assembly and those chosen by the crown. Depending on the relative weakness of church and state the church might have its supplications to the state or its acts of assembly enacted by the three estates.

Women and children

To some extent, however, both children and women (widowed or not) appeared in a favoured position before the council, which protected them from the oppressions of parents, uncles and husbands and the like. The favour afforded to these classes was far from being universal; and apart from a general indulgence to them was largely limited in the case of children to sequestration,[2] and in the case of women to protecting wives against their husbands and to fixing aliment.[3]

Sequestration of pupils

In the 16 and 17 centuries the normal forum for sequestration of pupils[4] was the court of session but the council also was resorted to[5] at least it was averred that

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1. 1592 c 41 (APS iii 562)
2. Also children who were without tutors or curators and were destitute of maintenance were by usage taken into the protection of the council and given some allowance suitable to the station of their predecessors: 3RPC vi 514
3. Mackenzie Institutions i 3 6
4. In certain circumstances the child at puberty was permitted to select curators himself by process of edict before the ordinary judge: 1555 c 8 (APS ii 493). It was recognized that such children would by virtue of their youth be open to the influence of interested parties, and accordingly the courts intervened to sequestrate the person of the minor in the hands of a neutral person for some time previous to his electing curators, thus keeping him free from the suspected and pernicious influence (Fraser, Parent & Child (1906) 466); and in the 19 century at least it was recognized that a similar procedure of sequestration was appropriate in a question of custody also (Harvey v Harvey (1860) 22 D 1198 at 1207-8).
5. Mackenzie Institutions i 3 6

the council (and the session when they sat) were accustomed to take summary order in such emergencies:[1] similarly with averments of riot[2] of wastage of the estate[3] or of imminent marriage to minor's disadvantage.[4] On the appearance of parties (usually the relatives or the child[5]) the council normally ordained the sequestration of the minor to a neutral and indifferent person, such as an Edinburgh burgess, clerk of council, lord president of the court of session, provost of Edinburgh, or a writer to the signet;[6] or the movements of the child were restricted.[7] If need be this temporary guardian was awarded some remuneration.[8]

The council did not generally act in the actual choice of curators but merely sequestrated until the child chose curators,[9] sometimes it was expressly stated that the choice was to be made in the session[10] where the minor was to be exhibited in a free condition without nomination of a tutor.[11] In these <u>custody</u> cases the council asked the child with whom he wanted to remain, and gave an order accordingly,[12] and the wishes of the girl in marriage were respected.[13] In an action of abduction the defender alleged that the girl came to the abductor of her own free will and that they were now married. The council sequestrated her with a third party so that her father could confer with her. When the "spouses" gave conflicting reports of the marriage ceremony the girl was sequestrated with her father (who was her curator until she had married) and the defender was ordained to produce proof

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1. <u>RPC</u> iv 418
2. <u>2RPC</u> v 147; <u>3RPC</u> ii 28
3. <u>RPC</u> vi 354
4. <u>RPC</u> iv 418; otherwise it was a matter for the session: <u>3RPC</u> vi 447
5. <u>2RPC</u> viii 49
6. <u>RPC</u> v 453; viii 282 299; xii 614; xiii 324
7. <u>RPC</u> i 233
8. <u>3RPC</u> ii 568; iii 79
9. <u>RPC</u> v 453; x 166; <u>3RPC</u> i 332; or until suitable arrangements for education had been made: <u>3RPC</u> ii 471
10. <u>RPC</u> iv 418
11. <u>RPC</u> vii 154
12. <u>RPC</u> vi 354; vii 398
13. <u>RPC</u> x 37. The girl who stated she was a free woman and wanted to marry was declared to be free: <u>2RPC</u> iii 94

of the marriage.[1] During the dependence of a divorce action custody of the wife was refused to both father and husband.[2] In another case which had previously been before the council, the lords, on the petition of the child appointed a diet for a choice of curators from among five nominated by the council.[3]

The council also heard petitions for resignation as curators, and appointed new ones.[4]

In competition for curatory the council preferred the regularly appointed party or the party who had the ward and marriage of the child,[5] but without prejudice to actions at law.[6] Thus a tutor's right might be vindicated reserving the right of reduction of his appointment;[7] but in one case a tutor was discharged from acting pending a process for his removal.[8]

The parents or tutors could sue for delivery of a child on pain of horning for refusal.[9] A minister, who as curator was held to have no title to sue for reparation in respect of abduction of a child, was successful in having the presbytery discharged from acting in the matter of the banns of the child and her abductor.[10] In one case, by a majority vote, the council allowed a tutory to persons without sequestrating the child until they procured relaxations from the horn.[11] If necessary, the council nullified a forced choice of curators in the commissary court, especially since none of the curators were kin of the child;[12]

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1. PPC xi 321
2. RPC viii 282; xi 23; xii 144
3. RPC x 353
4. 2RPC vi 61
5. RPC xi 103
6. RPC x 528
7. 3RPC vi 533
8. 3RPC iv 339
9. RPC i 594; ii 606; 2RPC vi 462; 3RPC i 195 147 163; but without apparent distinction such a case might be remitted to the session for summary procedure: 3RPC ii 4
10. RPC vi 389
11. RPC xiv 624
12. RPC xi 572

and the tutor who was also heir apparent of the child was found "suspect to haive the keiping of the said bairne but [without] prejudice of the tutorie in all uther things"[1]; keeping the child in restraint or even restrictions on the ward's social life could result in denunciation of the curator.[2]

Normally the council's orders were without prejudice to any claims against the child's estate for maintenance,[3] although the council did, with consent, fix an amount;[4] and the council could cut down excessive maintenance.[5]

By the act 1661 c 8 the council was given power to remove children from the control of parents or guardians who were papists.[6] The council also fixed aliment for pupils[7] and on occasion ordered it to be paid out of an elder brother's estate[8] and out of a deceased father's estate pending an action of accounting by the creditors.[9] These however were of an interim nature and permanent actions were remitted to the court of session.[10]

Other matters

When the child required protection in some other way the council intervened: ordaining a merchant to loose an arrestment on the goods of children who were in France;[11] entertaining an action by the king's advocate and curators against those who spulzied the deceased father's booth;[12] and ordering caution to the effect

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1. RPC vii 26
2. 2RPC iii 85; 89
3. RPC x 528; xi 284
4. RPC xi 105
5. 3RPC iii 65
6. APS vii 26; 3RPC iii 32; iv 184
7. Mackenzie Institutions i 3 6
8. 3RPC vi 514; cf Anderson v Grant (1899) IF 484
9. 3RPC x 194
10. 3RPC viii 284
11. RPC ii 433; 2RPC vi 480
12. RPC viii 783

that meantime no curators be appointed[1] or that no marriage should take place.[2] The council in one case wrote a missive to the tutors, curators, mother and grandmother of the laird of Johnstone to compear and state whether they intended to pursue the action anent the slaughter of the late laird: they appeared and insisted, the concurrance of one of the kin who was too ill to attend being heard by a councillor who visited her.[3] Likewise acceptance of an offer of assythment was held over until the child's majority.[4] This equitable bias of the council is illustrated by the finding that it is "ane hard mater that pupills who ar altogidder ignorant of thair parents debts sall be troubled by captiones".[5]

Insanity

The council also dealt in emergency with cases of incapacity arising not only from age but also from mental limitations. Order was taken with persons who by "ane havy disease of frenasie" were a danger to themselves or others[6] or were unable to manage their own affairs: in one case the magistrates of a burgh were ordained to put a violent person in irons and appoint someone, at the ward's expense, to prevent any violent deed; and in another case the magistrates were commissioned to deliver the ward to a near kinsman appointed to have his keeping.[7] Elsewhere the council put an insane child in the care of his aunt, interdicted him from dealing with his estate and remitted the question of maintenance to the session;[8] and granted the petition of an Englishman for warrant to arrest a ward who had been taken to Scotland.[9]

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1. RPC vii 154
2. RPC xiii 338
3. RPC x 28 29
4. RPC xi 171
5. 2RPC iv 16
6. 3RPC ii 617
7. RPC viii 12 ("ane frenacie") 280
8. RPC xi 629
9. 3RPC iv 595

Consistorial matters

Between 1560 and 1564 there was a jurisdictional lacuna. In 1560 the jurisdiction of the pope and bishops was abolished[1] and with them the jurisdiction of the officials; but their functions in consistorial and other matters was not taken up definitively until the erection of the commissary courts in 1564.[2]

In the few years before the setting up of the commissaries there were several contenders for this jurisdiction. Even before the reformation legislation - in February 1560 - the kirk session dealt with a divorce petition;[3] and there were also the remnants of the old officials, special ad hoc tribunals erected by the catholic hierarchy, the court of session[4] and the privy council.[5] In the event the church assemblies acquired jurisdiction in matters of church discipline and morals and the commissaries in consistorial matters, there being appeals to the court of session.[6]

The council's part in consistorial matters was both limited and temporary. Litigants approached the council because there was no other forum, and the council normally remitted the case for consideration by the local ecclesiastical community, the kirk session.[7] Occasionally the advice of the council was sought by the kirk session[8] but there appears to be no case of divorce a vinculo being decided by the council itself.

After the constitution of the commissary courts the main function of the council in consistorial matters (and it was not one which was invoked very frequent-

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1. 1560 c 2 (APS ii 534)
2. 1563 in the old style: BUK i 19; RPC 25 2; Bisset ii 57; Balfour 670; RSS v 1633
3. Register of Kirk Session of St Andrews i 18 20-3
4. Balfour 659
5. Baird Smith "The Reformers and Divorce" SHR ix (1912) 10; St Andrews Register i 289 n 2 et passim
6. 1609 c 8 (APS iv 430)
7. St Andrews Register i 50-59; SHR ix (1912) 17
8. St Andrews Register i 149

ly) was the beneficial interest of parties, the supervision of the competent consistorial courts and of church assemblies (which is dealt with elsewhere) and the protection of wives against husbands.[1] The council also had a statutory jurisdiction in prosecution of parties and others performing clandestine marriages.[2]

Aliment

Part of the jurisdiction consisted in enforcing decrees of other courts for adherence[3] and adherence and aliment[4] and in itself fixing aliment pendente lite,[5] giving decrees against church assemblies who sought to forbid or annul a marriage or order parties to live apart on pain of excommunication.[6] The pursuer could rely on an ex facie regular marriage and on the fact that the presbytery proceeded on an act of assembly against adultery which was not a general act or an act of assembly.[7] The usual order, apart from discharging the church from acting, was to remit the matter to the ordinary courts.[8]

At the beginning of the 17 century there were a few, and thereafter many, complaints by wives against husbands for "cruelty" "adultery and cruelty" and "desertion".[9] Most of these were also oppression for which the husband might be warded.[10] Normally proof was led but in one extreme case where there was such

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1. Mackenzie Institutions i 3 6
2. 1661 c 246 APS vii 231 (before the civil judge); 3RPC iii 341; x 116-7 (abduction); v 127 (minor)
3. RPC i 458; ii 530; iii 34 211
4. RPC xii 296
5. RPC iii 34 211; Hope vi 36 3; even in an action pending before the council: 2RPC vi 265; 3RPC ii 70
6. RPC ii 560; iii 130
7. RPC ii 560
8. RPC v 427
9. RPC vii 185; xi 2; xii 144; 2RPC iv 424; 3RPC i 301
10. 2RPC ii 261

"distraction" separation was granted for a year.[1] The criterion of separation was the unwillingness of parties to adhere[2] or the safety of the wife.[3] The council tried to reconcile parties;[4] and would investigate the genuineness of willingness to adhere.[5]

If the parties separated by decree of council or by consent the council could fix aliment,[6] (or in any case where the husband failed to support his wife[7]) and if necessary ordain delivery of the wife's clothes.[8] The amount was usually arrived by agreement or by assessment of the husband's means. It was normal to award aliment for a year at a time[9] or during pleasure of the council,[10] with an opportunity to either party to return for an extension, variation or cessation.[11] To ensure payment from a recalcitrant husband, part of his estate could be appropriated to the wife's aliment.[12] Sometimes the wife was sequestrated with a neutral person until further order was taken;[13] and if the parties were reconciled the sequestration was relaxed.[14]

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1. 2RPC vi 318: thereafter the pursuer would be obliged to bring witnesses and prove her complaint.
2. 2RPC iii 464
3. The pursuer is "not in safety to cohabite with the defender": 3RPC vii 455; x 147; or the lords found it "verie necessar and expedient" that they should separate: 2RPC ii 261; iii 342
4. 3RPC i 345; ii 569
5. 3RPC i 301 395
6. The council being in use to grant aliment to ill used wives: Mackenzie Institutions i 3 6; 2RPC vi 371; 3RPC iv 315; vii 455; parties submitted their separation agreement to the council who "being laith to wearie the saids pairteis with long and unnecessar attendance" modified a sum: 2RPC ii 29
7. 2RPC i 661-2 etc
8. RPC vii 159 482
9. 2RPC iii 342 469
10. 3RPC ii 316
11. 2RPC ii 261; iii 101;
12. 2RPC iv 95; 3RPC iii 142
13. RPC xi 23; xii 144
14. RPC xii 147

Occasionally spouses submitted their differences to the determination of the council or arbitrers;[1] a husband could be warded for unmannerly insolence towards his wife in the presence of the council;[2] and the council also dealt with other wrongs such as breach of promise[3] and enforced consent to marry.[4] A charge by a wife that her husband induced another to commit adultery with her by stealth with a view to divorce, was in respect of the adultery remitted to the kirk session.[5]

In all these cases the council went no further than was justified by its jurisdiction in oppression[6] and in granting aliment to wives,[7] particularly during the dependence of an action before the commissaries or the council.[8] In no case did the council impinge on the privative jurisdiction in divorce a vinculo. The appropriate forum for a permanent separation a mensa et thoro was also the commissary court. Thus, a wife holding a council decree of aliment failed to have the commissaries discharged from hearing the husband's action of adherence which she averred was merely a device to avoid paying aliment and a further item in his cruel conduct towards her. In this case the commissaries (who had been cited to the council action) were ordained to proceed by order of law.

Poor persons

It is not clear how far (if at all) the status of poverty, which had before 1532 given certain litigants a privileged position before the lords of council and

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1. RPC i 598; iii 54
2. Melrose Papers i 4
3. RPC iv 632
4. RPC vii 71; 2RPC ii 207
5. RPC v 378
6. If the action disclosed adultery the king's advocate could be ordained to prosecute before the criminal courts: 2RPC iv 424
7. Any award was without prejudice to the wife's claims to legal rights: 3RPC iv 297
8. RPC iii 154; 2RPC v 367; vi 265; 3RPC ii 70; vii 234; xi 70

session, was continued after 1532 in such a way as to permit the privy council to grant a remedy which it would not otherwise have been competent to grant. In the cases where the pursuer asked the council to decide according to "equitie and gude conscience", or "as appertenis of justice equitie and ressoun"[1] there is unfortunately no record of a decision. The case of a poor widow who had retained long possession of teinds and who was confirmed in a life rent to the exclusion of the titular is exceptional for although the king was "movit of pitie", the defenders had agreed beforehand to accept the determination of the council.[2] Sometimes poor persons further reduced in poverty by some oppression came to the council for summary remedy because they could not afford the expense of the "ordinar forme" of law and justice.[3] In all the cases where the poor were involved, the rights of parties were not altered contrary to law except by consent of parties.[4]

In oppressions the council went out of its way to assist the poor in complaining to the council;[5] and pursuers always emphasize their poverty or the hurt done to their poor tenants.[6] The attitude of the council however appears to have been merely one of emphasis, a bias in favour of the unfortunate. Thus, in certain oppressions, defenders were ordered to pay poor victims double damages[7] or to make heritable restitution - on account of the complainer's poverty.[8] If need be the council could when it suspected the denials of oppression against the poor put the defender and his witnesses to the torments and then have them tried and executed for perjury.[9]

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1. RPC i 590 591
2. RPC v 483
3. RPC iii 101
4. 2RPC iv 16
5. RPC vi 233-4
6. RPC iii 187 336 573
7. Infra, damages and fines
8. RPC i 469
9. Letters 68; RPC vii 30

Likewise the council frequently allowed juratory caution where the party was destitute. Old statutes were relied on to give the council power to aliment the indigent friar out of the life renter's estate;[1] and pending an action of reduction by the heir male the council awarded him interim aliment from the estate held by an heir of line.[2]

Kindly tenants

However, one topic which affected a class which was normally (although not always) poor was purely statutory. That was kindly tenancies.[3] Formerly these small improving cultivators, who had tenancies of church lands for a small rent and who enjoyed rights of succession, in some areas, for one or two lives, had been in special protection of their ecclesiastical landlords.[4] The reformation legislation put the crown in place of the papacy; and as "superior" of the church lands became protector of these tenants, preventing the grant of feus or leases over their heads and prohibiting their removal without royal licence,[5] and in any event without compensation.[6]

Undoubtedly some of the cases came before the council as oppressions[7] rather than as appeals to the protection of the acts: as where a third party dispossessed a tenant,[8] a landlord tried to concuss a tenant into renouncing his lease or threatened removing unless a larger grassum was paid,[9] or a tenant tried to force a landlord to admitting a kindly tenancy by squatting, by forging a rental or by

1. 1491 c 6 (APS ii 224); 1535 c 14 (APS ii 344); 3RPC iii 218 562
2. 3RPC iii 67 125
3. Appendix K
4. Romanes "Kindly Tenants" JR li (1939) 201; Lord Carmont "The King's Kindlie Tenants of Lochmaben" ibid xxi (1909-10) 325; Hannay "Church Lands" SHR xvi (1919) 66
5. RPC i 192 239; 1563 c 13 (APS ii 540); cf APS iii 45a. It appears that at least some varieties of these tenants did not have the benefit of the act 1449 c 6 (APS ii 35) which had in certain circumstances preserved to a tenant his lands even if there was a change of landlord during the currency of the lease: Rankine Leases 152-154.
6. RPC i 304 465; iii 396. It appears that kindly tenants could also seek remedy in parliament: APS iii 111-2, 165-167, a case affecting "ane thowsand of our soverane Lordis commonis and pure people" within the bishopric of Dunblane.
7. RPC ii 183; iii 585
8. RPC v 241 424
9. RPC ii 464; iv 502

violence.[1] Others were merely disputes between tenants.[2] As an interim measure parties were ordered to find caution not to molest one another.

But in the early period the council did deal with the merits of the action. It preferred one line of succession to the tenancy and instructed the landlord to accept the representatives of it;[3] sometimes, where it appeared that the tenants had renounced the lease before notaries or had received satisfaction there was a decision for the landlord.[4] The more usual procedure was to remit locally for investigation: thus the sheriff or the stewart was to take trial;[5] the warden of the marches was to fix a reasonable duty;[6] or the defender was ordained to hold a "court of kindness".[7]

If the question affected the granting of a royal confirmation of a feu over the heads of the kindly tenant inquiry was remitted to the commissioners appointed to the confirmations.[8] Pending the inquiry the confirmation was, if already exped, suspended[9] and, if not yet granted, delayed[10] - at least until the council was satisfied that there was no prejudice to the tenant.[11]

Later, when these customary leases were being converted into individual and multiple feus[12] the council heard complaints against delay by superiors in expeding a charter.[13]

In some cases, without apparent reason the council remitted questions of

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1. RPC iii 87; iv 206; v 19
2. RPC ii 336
3. RPC i 428
4. RPC i 467; vi 368
5. RPC iii 396 592; iv 175
6. RPC ii 541
7. RPC i 432
8. RPC i 320; APS iii 111-112 645; Appendix K
9. RPC i 320
10. RPC i 465
11. RPC iii 391 399; APS iii 111-112
12. RPC vi 495; JR li (1939) 201
13. RPC iii 399 642 649

kindly tenancy to the ordinary judges;[1] in others the tack was of teinds.[2]

By the end of the century this kind of case disappeared from the record, except for an isolated case in 1634 which was incidental to a riot. There, because there was miscontent between the parties, the tenant was ordained to find a new master, and the landlord had to pay damages which included an element in respect of satisfaction of the tenant's kindness.[3]

Strangers

The privilege accorded to strangers had two bases: they owed allegiance to another sovereign[4] and were not subject to the common law or courts of Scotland; and being only temporary residents they were unable to stay and prosecute an action.[5] For either reason they might be without justice: an obvious situation for the intervention of the equitable power of the crown, and the king (at least Charles I) wanted "to publishe and magnifie the justice of this land" to foreigners.[6]

Most of the cases of this nature involved foreigners directly, or concerned Scottish subjects who for reasons of trade or diplomacy were in effect foreigners. Other topics dealt with included wrongs against ships in port or at sea, and incidentally piracy and privateering; as well as matters with some element other than the part himself which was of foreign or international character.

Even in these cases (apart from the great cause of the merchants of Nantes) the council did not take trial in any matter not competent to its jurisdiction.

The case of the merchants of Nantes (which concerned spulzie at sea) engaged the

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1. RPC iii 396; vi 493 526
2. RPC ii 56; vi 285
3. 2RPC v 509
4. McMillan 39
5. RPC v 195. In one case an Englishman expressly averred reliance by a debtor on this disability: RPC iii 102
6. 2RPC vi 86

council intermittently from September 1561 to June 1563[1] and during it there were discussions on relevancy and the hearing of witnesses; but part at least of the decision was given by councillors together with some nine others including lords of session;[2] and towards the end of the case the question of criminal liability was referred to a committee of three councillors.[3]

No other case was dealt with so fully by the council. In other cases strangers could get only de facto remedies such as delivery or spulzied goods, and usually only those admitted to be in the hands of the defender.[4] Even when delivery of the disputed goods was granted the recipient normally had to find caution or consign the value as security for its redelivery should it be found to belong to another.[5]

The foreign element in this type of case which came before the council was normally the nationality of the pursuer which appeared from his designation: of Trondheim, of Magdeburg, or York, Ipswich, student in Louvain, stranger and burgess in Campvere, Frenchman, Englishman, Dutchman.[6] The privilege also extended to a Scots servant of the king of Denmark who had a claim against the ambassador there, to a servant of the English ambassador, to Scots soldiers in English pay who had returned from service in Denmark and to Scotsmen domiciled abroad.[7]

Most of these cases arose from obligations contracted abroad of which the council ordered discharge,[8] if necessary on condition of the other finding caution for a

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1. RPC i 162-238 passim
2. RPC i 188
3. RPC i 238; ii 308
4. For the rest the pursuer had to go to the court of session: 2RPC vi 86
5. RPC ii 308 404; iv 79-80 331; v 1 419
6. RPC i 351 679; ii 582; iii 102; iv 79 588; v 1; vi 7; 2RPC vi 86
7. RPC ii 169 412; v 175
8. RPC i 679; ii 169 412 582; iv 505 531; 2RPC ii 217

possible counter claim.[1] The council also settled a dispute as to the rate of exchange or measures to be adopted in settling a contract.[2]

The council also took action in cases of piracy by impounding suspect ships.[3] If there was some defence, such as a commission of the Huguenots to certain Englishmen to prey on Catholic shipping corroboration was sought in England or other foreign port[4] or the privateer found caution not to break the peace between Scotland and friendly states.[5] The council heard claims of the original owners and of others, Scots and foreign, against these impounded ships.[6]

An equally common case was where Scottish or other pirates returned with pirated ships and goods. As in all spulzies there was an obligation to restore which was enforced by the council interdicting molestation and deputing an official to take possession of the ships and cargos; where the local inhabitants had intromitted they were made liable for the value of the goods and had to find caution to underly the law at the justice court for reset.[7]

If there was a dispute as to the title to the ship the party receiving interim possession normally had to find caution for its re-delivery;[8] but in one case the council ordered the ship to be sold and the proceeds consigned until the proper claimant had been ascertained;[9] or if an arrestment was loosed the arrester was allowed to sue for his debt before the council.[10]

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1. RPC iv 79
2. RPC ii 454; v 398
3. RPC i 276 351 517
4. RPC i 308; ii 654
5. RPC i 276
6. RPC i 303 336-337 429 etc
7. RPC i 368 438; vi 14 etc
8. RPC iv 331
9. RPC ii 404
10. RPC ii 630

The civil aspect of the spulzie was normally remitted to the session for summary procedure;[1] but an action of shipwreck was remitted from the bailies to the admiral as the proper forum,[2] unless the admiral was a party as well as a judge - then the session dealt with it.[3] Occasionally there was a remit to the bailies of Edinburgh as in a defence that the contract was usurous or the matter required probation;[4] and one case brought before the bailies was remitted to the magistrates of "Milustrand" (Milstrand) because the cause was already pending there and because caution had been found.[5]

Although Scotland was seldom involved in war herself (until Cromwell's time), her nationals were not averse to taking service with other nations or to acquiring letters of marque,[6] which gave rise to prize claims.

The proper forum for disputes of this nature was the admiral's court[7] (or for a time after 1626 the commissioners delegate[8]). The council's intervention was of a supplementary or interim nature: where the office of admiral was vacant[9] or where all that was sought was delivery of the disputed ship or at least the finding of caution to ensure its delivery to those ultimately found to have right to the ship.[10] The council could in its control of foreign affairs entertain a petition of the magistrate of Hamburg for delay in execution of parliamentary letters of marque pending an accommodation with the holder.[11] Elsewhere (before the act of 1681) the council ordained the session to advocate a prize case to themselves for speedy justice;[12] or released a French ship on hearing that the original seizure

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1. RPC iv 331; v 214 754
2. RPC iii 242
3. RPC iv 331
4. RPC ii 329; iii 558
5. RPC v 175
6. The purpose of letters of marque was to give the holder the right of self help against the shipping of a nation of which a citizen had refused redress.
7. Acta Curiae Admirallatus Scotiae (Stair Soc.) i intro. xv-xvi
8. 2RPC i 441
9. 3RPC xiii 389 395
10. RPC i 102
11. 2RPC vii 263 331
12. 3RPC ii 278

of a Scots ship had been reversed.[1] Similarly the council intervened if there was some readily apparent defect in the capture of a ship such as taking a ship of the wrong nationality.[2] If need be the council ordained production of the court book and process whereby a ship was declared prize.[3]

The course of the case of Thomas Ogilvie is illustrative of the council's function. Ogilvie had letters of marque directed against the Holy League; the representatives of the Scottish burghs petitioned the council for the restriction of the letters so as to prevent preying on friendly shipping (such as a Florentine ship). Ogilvie was ordained to find caution in respect of his former depredations and also that in the future he would confine his activities to the goods of towns specifically mentioned in the letters; but the defender failed to find such caution and the letters were declared null. Ogilvie's ship was arrested but later the arrestment was loosed and Ogilvie found caution for goods with which he had intromitted. Eventually the king ordered the goods to be sold by the bailies, who did so; and they thereafter found themselves pursued by the alleged owners of the goods, the Duke of Tuscany, the magistrates of Danzig and Ogilvie. The action was remitted to the lords of session who remitted it back to the king and council as being a matter for his highness. The council ordained delivery of goods and payment of the prices due in respect of the goods sold belonging to Tuscany and Danzig less an amount for freight, exonerated the magistrates and denounced Ogilvie for not compearing.[4]

Conflict of laws

In cases involving the laws of different sovereign states either in questions of private or public right, the state had to intervene to bridge the gap between the

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1. 2RPC i 486
2. RPC iv 331
3. RPC i 162
4. RPC iv 615 627 665 707; v 1 10 214 251 666

different legal systems.[1] There an action impinged on the sovereignty of a foreign state the aggrieved party could petition the council to take diplomatic action through the king. Thus where evidence on commission from a foreign town was required the council gave authority for it to be taken.[2] Likewise there was requests to the king of Denmark to release goods erroneously impounded in Elsinore, to the king of France seeking equal privileges of Scotsmen with the English, to the king of Spain or lord deputy of Ireland in the case of ships and goods seized there, or to the king of England (James I) to prevent future citations of Scotsmen before the council for riots committed in the debateable lands.[3] As a result of petitions the council ordained the secretary to interpone with the king "as off before" for release of Scots cargoes from French ships captured by the English navy or to suggest an exchange of Scots prisoners in England.[4]

In 1622 as a result of the enmity between the crews of Spanish and Dutch ships in the Forth, disturbances occurred and some Dutchmen were held by the Spaniards. They appealed to the council for liberation according to the law of nations and also because they were ill; although the council regarded the matter as novel, they cited the two captains and sent physicians to visit the prisoners; but they refused to liberate on caution, as they wished to do, because it was a matter which concerned the subjects of a prince. Instead they sought the guidance of the king.[5] When certain Dutchmen took to fishing in Scottish territorial waters the council regarded it, not as a legal dispute, but as a matter of state concerning allies, and suggested an ambassadorial request to the Dutch to issue a proclamation

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1. 2RPC ii 103 195
2. RPC xi 174-8
3. Melrose Papers i 322; ii 368 406; RPC viii 34 494 579; Letters 165; 2RPC i 342; 3RPC xiii 555
4. 3RPC xiii 513 561
5. RPC xii 736 et seq; Melrose Papers i 468

against such fishing "conforme to the law of nations".[1] Where Scottish holders of an English admiralty decree were unable to arrest in England because the English assets had become the subject of a sequestration order of the English council, the Scottish council allowed the Scottish assets to be put at the disposal of the creditors.[2] And French privateers preying on English shipping were refused refuge because of the state of peace between England and Scotland.[3]

In the reverse direction the council entertained diplomatic requests by foreign sovereigns such as that in respect of two pieces of brass arrested in Aberdeen in security of a debt due in Dunkirk.[4]

The council also granted certificates that former Flemish ships which had been bought by Scotsmen were in fact Scottish so as to prevent their seizure in the renewed war between Holland and Spain.[5]

Nationality

Part of this "foreign" jurisdiction of the council, but also touching on royal prerogative and police functions, was the question of nationality and licences to go abroad.[6] This latter function was an explicit power in the commission of 1626. In the earlier years of the record there are some grants and revocations of licences to go or remain abroad; and one or two nationality questions, and in 1629 some soldiers of the Earl of Morton, who had returned from La Rochelle were given permission to settle in Scotland.[7][8] After the restoration there were frequent petitions by Scotsmen resident abroad for birth brieves under the great seal.[9]

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1. Melrose Papers i 306
2. RPC i 430
3. RPC vi 113
4. RPC viii 103 767
5. RPC xiii 62 65
6. 2RPC i 251
7. RPC i 563; ii 355 575; v 310 328
8. 2RPC iii 1-2
9. 2RPC ii 324 etc; This was one of the "petitions for powers": Appendix J

11 Equity

Nobile officium

The cases which have been considered were essentially ones where the status of the parties demanded the intervention of the king in order that they might not be without remedy. Other cases for royal intervention arose where the remedy that was sought was one which required the imprimatur of the king or which amounted to an appeal to the royal prerogative of mercy, or for an act of grace.

Much of the discretionary power of the crown, the nobile officium as opposed to the officium ordinarium had been assumed by the court of session. This is particularly the case today in questions of interponing authority to the actions of trustees and the like. But in the 16 and 17 century the council also dispensed equitable remedies of this nature: interponing authority, answering "petitions for directions" and "approving schemes".

Interponing authority

It often happened that a local authority or official or individual was for some reason prevented from executing a function because the recognized procedure was defective or because he was bound stricti iuris. A typical case of this was where a petitioner was fined by the justice while in tuto where the justice concurred in the remedy - deletion of the act of court - which he had no power in law to grant himself.[1] Similarly where the magistrates of Linlithgow refused to convene the justices of the peace in quarter sessions the council gave them authority to meet.[2]

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1. 3RPC i 101
2. RPC ix 387. Similar situations are dealt with today in the court of session by an appeal to the nobile officium, as where a statutory trust lapsed and the act provided no machinery for its revival (Campbells (1883) 10 R 819.) However, increasingly the court had tended to curb its equitable power by limiting the exercize of the nobile officium to cases where there is statutory authority or clear precedent: Coles 1951 SC 608

Likewise the royal authority was invoked to resolve a deadlock in a private partnership;[1] to allow the unloading and sale of wine in Leith because the port designated in the charter party was in the hands of the rebels;[2] or to liberate a prisoner so that an order for his deportation could be carried out.[3]

Approbation

Conciliar approval or approbation was also sought for past actings which might strictly be illegal but which equity demanded should not carry any civil or criminal liability. A colonel could petition for a general exoneration for the actings of his regiment at the end of their service.[4] A party acquitted of incest was granted an order prohibiting his further molestation.[5] Many cases involved death or injury while resisting arrest.[6] Where a death resulted, the kin of the deceased might be cited to hearing of the petition for indemnity.[7] Even councillors could be indemnified for acting in emergency without a quorum.[8] Similarly the king's power was also sought to indemnify the electors who elected a provost in absence[9] or by the presbytery for approbation of their efforts in amnestying a papist[10] or by the barons of Kincardine for an act to the effect that, having formerly fitted the lieges out with arms they should be exempt from any general act on armour.[11] And there are a large number of supplications by officers and holders of commissions for

1. RPC ii 362
2. RPC ii 128
3. RPC xi 381; 2RPC iii 511. The miscellaneous nature of the powers granted is illustrated in appendix J
4. 2RPC vii 201
5. 3RPC i 193
6. 2RPC iii 558; ix 70. This topic is also noted along with administration.
7. 2RPC iii 485
8. 2RPC i 485-6 583-4 where letters of approbation under the great seal were granted.
9. RPC iii 226
10. 2RPC i 407
11. 2RPC ii 228

discharge and approbation of their duties.[1]

Most of the reliefs afforded by the council amounted to the supplying of a defect in the law; and although some were clear suspensions of acts of council and acts of parliament their benefit was for private parties. Under James VII however the use of the suspending power was used as a political weapon.[2] This was struck at in a limited way by the claim of right[3] which declared that "Proclamationes asserting ane absolute power to cass annull and Dissable Lawes" were "Contrair to Law". Thus the limited suspending power, exercizes on an equitable basis, was unaffected.

Approval of schemes

The council frequently intervened on behalf of municipalities and others for approval of schemes which today would be effected by a private act of parliament, by an appeal to the nobile officium of the court of session or by executive action of the secretary of state. There were applications to the council by burgh magistrates, parishioners or inhabitants for approval of proposed works: to build a new tolbooth,[4] to widen a street,[5] to deal with overflow of a river,[6] to build or repair a bridge[7] or harbour.[8] Authority was also required to levy a toll on passengers or anchorages, to exact dock silver on ships or to appropriate the fines of a court.[9] These imposts were strictly construed.[10] After considering a report and after hearing objectors (if any[11]) the scheme was (if reasonable) approved with

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1. RPC iv 569; v 320
2. Eg Books of Sederunt 11 February 1687
3. 1689 c 28 (APS ix 39)
4. RPC ix 106; xiii 728
5. RPC viii 135 147
6. RPC vi 160; vii 431; 2RPC ii 466
7. RPC vi 340. This jurisdiction, certainly in relation to bridges, continued to the end.
8. RPC iii 196; vi 219; x 137 363; 3RPC iv 87 (ferry)
9. RPC iv 104; x 137; xiii 728
10. RPC ix 106 (councillors); 2RPC i 345 (local nobles); 2RPC ii 469 (master of works)
11. 2RPC i 345

or without such modification as the council thought expedient. A heritor could have his private bridge made into a public one by allowance of the council.[1] In another case because of the national benefit, the local laird was ordained to supply stone from his quarry for building a bridge at a reasonable price to be fixed by a commission including the master of works.[2] However, when a heritor objected that a wooden bridge (to be replaced by a stone) only existed on his land by licence, the council heard evidence and allowed the work to go forward subject to damages.[3]

Contributions or tolls for different classes of traffic were laid down; time limits were set for different stages of the work;[4] or the work was done under the supervision of the chief men of the parish.[5] Normally the promoters had to find caution for the completion of the work and for the uplifting and application of funds.[6] Occasionally account was made in the exchequer.[7] If voluntary payments were not forthcoming, compulsory tolls were enacted.[8]

If the work could not be accomplished as planned further application was made for extension of authority[9] which was often preceded by an audit and report on the work completed.[10] Those who delayed to execute works could be charged to appear and answer for the delay.[11]

In schemes affecting church property the council had a statutory jurisdiction[12] as, for example, where the kirk session wanted to demolish its church and rebuild it on the other side of the river,[13] where the magistrates wanted to salvage the

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1. 2RPC iv 79
2. RPC v 531
3. 3RPC i 217
4. RPC vi 207 339
5. RPC iv 622
6. RPC xiii 728
7. RPC iv 104; vi 160
8. 2RPC i 371; vi 318
9. 2RPC ii 466; v 367; vi 188
10. RPC viii 425; ix 340; xi 304
11. 2RPC i 281
12. 1563 c 12 (APS ii 539); 1572 c 15 (APS iii 76); RPC ix 725
13. RPC iv 622; or to use a private chapel (without prejudice to title) because the old church was ruinous: 2RPC iii 475

timbers of a derelict church[1] or to get church bells from the Abbot of Fern who possessed three.[2] The buruen of repairing a church was apportioned between the parson and parishioners or on the lay commendator of the church.[3] After the restoration the frequent petitions for rearrangement of church pews were remitted for investigation by commissioners.[4]

Other schemes for which approval was sought were for relief of the poor and for fixing prices of victual;[5] or for holding a weekly market in a remote village.[6]

The council also had a statutory jurisdiction to hear petitions for enclosure of lands and where necessary to stop up highways. These applications were often contested and the facts and the public utility of the proposed scheme were usually ascertained by commissioners who took evidence and reported back to the council.[7]

Some of the proposed schemes, such as the erection of Stornaway into a royal burgh affected a great many interests; and here the patent of the promoters was submitted to the other burghs for their answers to which the promoters gave further answers.[8]

The conciliar jurisdiction in these matters was limited to approving the original grant subject to modification in light of any objections;[9] but where the grant touched on heritable or other title that aspect was remitted to the court of session.[10]

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1. RPC ii 431
2. RPC iv 628
3. RPC i 248
4. 3RPC iii 498
5. RPC x 480; ix 246; 2RPC v 51
6. 2RPC ii 409
7. 3RPC ii 318 575; iii 331 382 etc
8. 2RPC ii 357-396 passim
9. 2RPC ii 409; v 216
10. 2RPC iii 599

The dividing line between these local and private acts of council and the personal grant of a privilege to an individual is often difficult to discern. There was really only a difference of degree between these and public acts of parliament and an individual grant of an office or title. All proceeded from the royal grace but were expressed with varying degrees of formality, in parliament, in council or by the king alone.

Thus the council granted, without much differentiation, an act following on a judicial decree, an act approving a scheme, an act granting an office, a warrant to the financial officers to pay a pension.[1]

Patents

The power to grant patents was (and still is) within the royal prerogative and therefore a fit subject for discussion before the council. The applicant presented a petition craving an act in his favour.[2] Some were life grants others for 10 or 20 years. Where there was doubt the patentee could come to the council for a ruling on the exact extent of his grant.[3]

The patentee (with or without the concurrence of the king's advocate) could always petition for protection of his right and for interdict of those infringing

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1. RPC iii 231; vi 244; ix 426 485; xi 102 232 233: Appendix F

2. The patents included the sole right to import and distribute armour (APS iv 168 190-1); to make "reid herring" (RPC x 436-9); to perfect and use an engine for transporting coal (RPC vii 278); to produce a book of weights and measures (RPC xiii 418); to have a grammar book used exclusively in schools (RPC ix 272 275 414); to prospect for iron (RPC x 160); to transport coal (RPC viii 517); patent medicines (3RPC iii 579); colliery machinery (3RPC vi 406); playing cards (3RPC vii 288) and a general monopoly of printing (3RPC iii 422 596). Among the books licenced were Mackenzie's works (3RPC viii 410; xii 143). Books touching on church matters were usually subjected to the approval of the ecclesiastical authorities (eg 2RPC i 12); and a military treatise went for approval by the council of war (2RPC iii 280). In Charles I's reign this aspect of the council's work contracted: the king took to himself the power of granting patents which he merely submitted to the council for their views on whether they were detrimental to the crown.

3. 3RPC i 118

it.[1] In one case of conflicting patents the council recalled both. Burleigh's monopoly of armour was productive of frequent complaints in which the lieges objected to purchasing equipment greater than was prescribed for persons of their rank[2] - so much so that on Burleigh's supplication an act was passed forbidding suspensions of his charges unless the suspender consigned the price of the armour.[3] Later Burleigh maintained an exemption of his armour imports from customs duty.[4]

The grantee often received additional protections for his monopoly such as the escheats of competitor's materials,[5] treasury assistance in impounding goods smuggled to the injury of the monopoly,[6] or extensive powers of prosecution of infringers[7] if need be in inferior courts.[8]

In Scotland, as in England, monopolies of this kind became something of a grievance and even a scandal.[9] There were frequent actions by parties who felt that their livelihood was threatened. The incorporation of weavers complained against an immigrant Dutchman being licensed to weave fustian as if he were a freeman.[10] The burghs objected to the grants relating to red herring and transporting coal[11] but the council deferred answer until the king's will was known:[12] they did however

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1. RPC ii 583; viii 358; x 160; xi 138; 3RPC vi 418 (damage)
2. RPC vi 180 et passim
3. RPC vi 365
4. RPC vi 515
5. RPC vi 36; ix 275; xiii 418
6. 3RPC i 625
7. 2RPC iii 200; v 398
8. 2RPC vi 69-71
9. RPC xi 613; 2RPC i 67-68
10. RPC vi 306
11. RPC viii 517. At the granting of a patent the claims of those who thought their interests might be affected by the grant could be heard. Thus the burghs petitioned for delay in granting a gift of general search until their objections had been heard: 2RPC v 398; vii 307
12. Letters 148

respectfully suggest to the king that the commonweal should be preferred to the interests of private parties.[1] In 1613 an act of council was passed making it a condition of such patents that the privilege was turned to bona fide use within three years;[2] and when the commission of grievances was set up in 1623[3] one of its most important tasks was the grievance, particularly of the burghs, against these privileges, particularly those relating to tanning.[4]

Acts of Grace

Petitions for the exercise of the royal bounty were not frequent in the council and almost all had some intimate connection with the crown or the royal service. Thus the vacant stipends which came into the hands of the crown with the expulsion of non conforming ministers constituted a large fund from which the council satisfied petitioners.[5] Also many of the petitioners were royal servants or their dependants, such as the Scottish and Dutch wives of Dutch soldiers killed at Killiecrankie. They received precepts for £5 to defray the cost of their repatriation.[6] Victims of famine, protestant refugees from Poland and others sought the royal grace but had to be satisfied with an act commending their cause to the bounty of local authorities and the lieges.[7]

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1. Melrose Papers i 262
2. RPC x 86
3. RPC xiii 219-223 292-3
4. RPC xiii 240 248 etc
5. 3RPC i passim
6. 3RPC xiv 225-6
7. 3RPC i passim

12 Prerogative of Mercy

Even more limited and personal in their effects were those acts of grace which mitigated pains and punishments, which amounted to an appeal to the prerogative of mercy, directly in the case of punishments and more formally in the case of suspensions and liberations.

Suspension

The king and council had power to suspend, for a certain space of time and on cause shewn, the decree of any jurisdiction inflicting pains and punishment both ecclesiastical and temporal.[1] The interim nature of suspension made it appropriate for the council to grant. Most charges which were suspended also included actual or imminent putting to the horn; and since rebellion was a matter of the peace in which the council had an interest, so suspension of hornings was also a matter of concern to the council. Further suspension gave an interim remedy *in facto* - a stay of diligence which did not give rise to a plea of *res iudicata*, until the judgment of the appropriate forum was obtained, as in the case where the original decree had been granted in absence. The court of session also had power to grant suspension but there also it was used as a method of reviewing the decrees of other courts. The council on the other hand reserved the right of criminal and civil actions of the parties and remitted questions of validity of hornings to the ordinary.[2]

Within these limits the council heard suspensions of decrees of the session[3] especially if the letters had been "privilie and sinisterlie purchast" in the session;[4] or had been got *tacita et suppressa veritate*, in the council.[5] In at least one case the council suspended one of its own acts after it had been ratified by

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1. APS iii 312a; this included excommunication by the church: 2RPC iii 511. The remitting of punishments is dealt with later.
2. RPC iii 615; v 470; vii 274
3. RPC ii 80; iv 696 735; v 421
4. RPC iv 66
5. RPC iv 215 354

parliament;[1] and it could suspend decrees of the inferior courts and hornings for non appearance before the council or justice court.[2] But sometimes as in the taxation of July 1606 lords commissioners were deputed to consider supplications for granting suspensions of charges to pay taxes to whom the council remitted such cases.[3]

In conformity with the principle that the equitable power of the king should be exercized only where the common law was deficient and in such a way as not to impinge on it, the rules with regard to suspension were designed to cause as little prejudice as possible to the charger executing lawful diligence. Thus the suspender not only had to have good and instantly verifiable reasons for suspension[4] but he had also to give earnest in the form of caution or consignation of his obedience should he fail in the suspension. Thus for example where the suspender objected to the amount of caution demanded in lawburrows he consigned in the hands of the clerk of court his estimate of the proper sum and found caution for the balance.[5] The council (as did other courts) exercized its discretion in the amount of caution required; and in cases of extreme poverty allowed juratory caution, whereby the party declared on oath that he was too poor to find caution but that he would perform the obligation on pain of perpetual imprisonment, scourging, banishment or death.[6] The successful suspender could still be liable for expenses.[7]

The effect of the supplication of the suspender was, after the deliverance,

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1. 1587 c 75 (APS iii 497); RPC iv 387
2. Balfour 560; 2RPC ii 277 487
3. RPC vii 311-2 327 331; APS iv 289 291
4. 1584 c 15 (APS iii 300); Hope vi 26 3; Stair iv 52 47; RPC i 311; v 419; vi 67; xi 111; eg, existence of a remission: 2RPC ii 487
5. RPC iv 343 380, cf AS 23 November 1613; Hope vi 26 8. In the case of vacant stipends the council permitted general charges and again insisted on consignation: 3RPC i 42
6. RPC ix 372; x 677; xi 251 388 509; xii 321; xiii 109; cf Hume Lectures vi 56
7. 2RPC ii 487

to suspend and relax until a certain day.[1] If on that day the charger failed to appear with the letters of charge, the suspension was granted simpliciter.[2] But when both parties appeared the council considered the suspension, or if the only defect was one of citation the council appears to have adopted the court of session procedure of turning the charge into a libel, that is, the original charge on the debtor was regarded as equivalent to his citation in a summons "so that the debtor or suspender must offer his defences against the debt tanquam in libello as if he had been cited in a common action".[3] The discussion thus in effect dealt with the suspension and the original complaint[4] which might be heard then or at a continued diet.[5] Similarly a decree declared to be void for irrelevancy was turned into a libel.[6]

Where parties were abusing the procedure further suspensions in the particular action were refused or hedged with greater restrictions[7] such as refusing further suspensions unless granted in praesentia.[8]

Supersedere

A more general protection which the council accorded most liberally[9] to debtors was letters of supersedere, giving freedom from diligence, which were granted for a period of weeks or years[10] to allow the debtor to clear up his accounts or to attend court without molestation.[11] The council entertained supplications for recall of these protections.[12]

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1. Appendix N (3)
2. Kames Elucidations 172; RPC ii 602; iv 108 etc
3. Erskine iv 3 22
4. RPC xii 332
5. RPC ii 341; vi 203; vii 209; viii 24; 3RPC viii 378-9
6. 3RPC x 129
7. RPC vi 332 365
8. 3RPC ii 508; iv 331
9. Except when the creditor was the fisc: 3RPC ii 474
10. RPC iv 11; vi 498; xiv 613
11. RPC vi 19 59; 2RPC i 314. There were many reasons for protections: military service (2RPC i 49 552); illness (2RPC i 312); education (2RPC iv 183)
12. RPC iv 11; 3RPC viii 363

Liberation

Another form of diligence into which the council inquired to protect the lieges, was imprisonment for debt and when awaiting trial. The power of the king in this respect was stated by the king's advocate:

> His Hienes hes that privilege, evir to seik exhibitioun of ony of his fre subjectis upoun ony caus moving his Majestie;[1]

and the lords of council found it

> not aggrieable to the course of justice that [a man] sould be perpetuallie detenit in waird and no pursute nor process intentit aganis him thairfoir.[2]

These quotations illustrate both the power of the council in relation to imprisonment and the kinds of imprisonment which might arise: imprisonment for debt, and imprisonment while awaiting a criminal trial. The council also dealt with completely unwarranted imprisonments - such as the oppressions of the over mighty subject against the lieges or the case of the bailie who exceeded his powers in warding a trader who refused to pay illegal dues[3] - and also imprisonment after sentence or for reasons of state.[4]

Anyone could apply to the council: two Dutch serving boys of a captain Lapness (who had been in rebellion) were liberated without caution, although they appear to have been 34 weeks in ignorance of their rights.[5] However, the common cases were civil or criminal imprisonment under a colourable warrant.

Civil imprisonment

In theory a creditor having failed to get satisfaction from the goods of a

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1. RPC ii 447; cf Register i 306 332
2. RPC xiii 104
3. 2RPC v 180. Where an action for liberation arose out of a matter (such as riot) in which the council had jurisdiction, the council might deal with the merits of the case also: 2RPC ii 349
4. The huge increase in prosecutions for non conformity is illustrated from one sederunt where six of the seven entries were supplications for liberation from sentences of imprisonment imposed: 3RPC x 187. Infra, punishment.
5. 3RPC xii 124 126-7

debtor was entitled to do diligence against his person in the form of letters of caption which were warrant to arrest and ward the debtor until the debt was paid.[1] A safeguard for the debtor was that he was entitled to liberation in certain circumstances: payment of the debt, caution for payment, accommodation with the creditor.[2]

The powers of the council here were solely directed to ensuring fairness to the parties. There was never any attempt to make the council a court for the constitution of debts: the council proceeded on the apparent regularity of documents of debt but if there was a dispute as to liability the matter was remitted to the ordinary court.[3] The council's function was merely to hear applications of a debtor that, although he had satisfied the conditions of liberation, the creditor refused to release him; or in a few cases that in any event it was equitable that the debtor should be released.

The debtor averred in his petition that there had been no constituted debt, that the debt had been paid, that an offer of caution had been refused, that the caution demanded was excessive or, generally, that the creditor was acting maliciously or oppressively by using the imprisonment more as a punishment than as a diligence. In these cases the debtor proceeded by way of complaint or often supplication praying for liberation, or alternatively appearance of the debtor and jailer to shew cause why an order for liberation should not be pronounced.[4] If there was no appearance for the respondent liberation was generally ordained.[5] If they did appear the council would not interfere if the warding was regular,[6] and might

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1. Sometimes such warding might extend to $3\frac{1}{2}$ years: 2RPC ii 214
2. Similarly if the debtor, such as a writer to the signet was immune from arrest: 2RPC iv 259
3. RPC ii 488 576; 2RPC iii 55
4. RPC ii 126; iii 24 136; iv 592 etc. The volume of these petitions gave the council the appearance of a habeas corpus court - especially in the 17 century.
5. 2RPC v 250; vii 187; viii 2
6. RPC i 303; 2RPC ii 361; 3RPC iii 584

go so far as to punish the frivolous or vexatious petitioner.[1] Similarly if the imprisonment was unjustified the creditor and jailer could be punished.[2] Where caution had been refused[3] or was excessive[4] the council would try to get parties to agree on an amount[5] or fix it themselves and ordered liberation when that caution had been found. The council also brought parties into agreement on the manner of satisfaction of the debt.[6] Thus the debtor might be released (with or without caution) so that he could apply his earnings towards liquidation of the debt[7] - sometimes for a year at a time or under promise to return to ward each evening or after a sufficient assignation of the debtor's estate to the creditor.[8] Again payment by instalments might be ordained[9] or public debts might be given preferment.[10] In all cases the creditors rights against the debtor were preserved if he failed in these obligations.[11]

In some cases the decision of the council can be explained only on the basis of equitable considerations. Thus the bailies of Anstruther (who had been imprisoned for debts occasioned by the depredations of the usurper) were liberated so that they could take office in the burgh.[12] The need of the crown for the services of an official of the mint was a reason for liberation.[13] In the case of illness, "free wardour" might be allowed;[14] and in the case of poverty, caution could be dispensed with.[15]

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1. RPC ix 249; xi 195; xiii 756; 2RPC iv 460
2. RPC xi 124; 2RPC v 176; 3RPC i 248 (expenses); 3RPC iii 352 (damages); 2RPC iii 347 (caution refused); 2RPC ii passim (suspension before caption)
3. RPC vii 356
4. RPC xi 71; 2RPC ii 214
5. 2RPC ii 222 350 etc
6. Or liberation might be ordained on condition that the debtor made some arrangement: 2RPC ii 460 461
7. 2RPC vi 451
8. 2RPC ii 480; iii 59 543
9. 2RPC ii 377 409
10. 2RPC vi 48
11. 2RPC ii 209
12. 2RPC i 48
13. 2RPC iii 280 (in absence)
14. 2RPC iii 338
15. 2RPC ii 377; v 419 etc

In all cases (except of state prisoners[1]) the person who was responsible for the imprisonment - creditor or prosecutor - was liable for the maintenance of the prisoner. Failure to aliment the prisoner was a ground for liberation.[2] If the imprisonment was to continue[3] the council could fix a per diem rate of aliment; and it was competent for the jailer to sue before the council for his jail fees, and for the prisoner to sure for aliment.[4]

Criminal imprisonment

In criminal imprisonments the basic issue was the same - continued imprisonment or liberation on caution. Here the council acted as a bail appeal court; and it was most concerned to safeguard the rights of accused persons. This function was of paramount importance when so many courts were amateurish and when so many prosecutions were at the instance of private accusers - such as the victim of assault or theft or the presbytery in a case of adultery or witchcraft. The aim of the council was to secure the release of the accused on reasonable caution for his re-appearance at the diet of trial[5] - unless the trial was imminent.[6] Reasonableness applied less in relation to the nature of the crime as in relation to the means of the accused. Thus poverty was a ground for allowing a small amount of caution or for permitting juratory caution.

If the council refused liberation or if the accused was unable to find caution, the basic rights of the accused were insisted on. The council, ex propio motu, or on complaint of party frequently ordered the prosecution to make early

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1. The crown might pay aliment for a prisoner in a private prosecution if liberation was refused: 2RPC iii 4; on the ground of poverty: 2RPC i 446 469
2. 2RPC v 172
3. 2RPC ii 316 348; v 246. The council also enforced a decree of session for jail fees: 2RPC v 346
4. 2RPC ii 206 519; v 163 420
5. 2RPC iv 307 310 311
6. Caution could also be demanded that satisfaction would be given for the injuries inflicted.

service of the indictment[1] on the accused, to allow access to legal advisers[2] and to bring the case into court quickly. The judge or the king's advocate could be instructed to fix an early trial[3] or a fixed time was given to the prosecution[4] for the completion of his investigations - the common time limit was 15 days. The council not infrequently imposed the sanction of liberation of the accused[5] or refusal of further opportunity to prosecute[6] or in the case of an acquittal or damages and expenses in favour of the accused. A false prosecution could result in warding and fining of those responsible. Where the accused was being subjected to what appeared to be a further prosecution the accuser had to find caution before proceeding;[7] and where the accuser had a pact not to sue the accused the justice was ordained to sist the action or desert the diet.[8] The council could also try the petitioner for the matter for which he was warded.[9]

In some cases where the ground of complaint was that no one was appearing to insist on the prosecution of the prisoner or that the judge was absent, the prisoner might still have to find caution before liberation.[10] Sometimes the council liberated an untried prisoner because he had already suffered enough for his offence;[11] but at the same time such a prisoner might be transported or banished even after letters of slains had been given.[12]

Where the cause of the supplicant's imprisonment was a regular conviction

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1. 2RPC v 222
2. 48 hours before the trial: 2RPC iii 278
3. 2RPC ii 96
4. The accused could also be granted continuation of the diet if he was ill or required further preparation of his case: 2RPC ii 481; iii 278 557; iv 152; v 176 196 252
5. RPC viii 148; 2RPC vi 389
6. 2RPC iii 383
7. 2RPC iii 390 391
8. 2RPC iii 555; iv 75
9. 2RPC i 181 349
10. 2RPC ii 362
11. 2RPC iv 51
12. 2RPC ii 226; v 456

in a criminal court the council did not interfere with the merits of the imprisonment; but if there was some fundamental nullity in the proceedings (such as a second conviction for the same offence) liberation would be ordained.[1] In hearing the cases of convicts the council could come to the conclusion that the portion of the sentence already served was adequate punishment for the crime.[2] These prisoners, having satisfied the cause of their imprisonment had to petition the council for their liberation.[3]

The council limited any order for liberation with the proviso that it was only to operate in so far as the prisoner was imprisoned for the cause discussed by the council.[4] One great advantage of the counciliar liberations was that all causes of imprisonment - whether by sheer force, by error for civil debt, while awaiting trial or after conviction - could be discussed there; whereas after the abolition of the council the litigant might be hard put to it to choose the proper forum.

For the rest the council did not interfere in the merits of the imprisonment which were reserved to the civil and criminal courts[5] with the sanction of the caution found by the prisoner. In one case a prisoner was detained in prison until the determination of his case which had been advocated to the session.[6] When there was some doubt in the minds of the councillors as to the royal policy, as in the case of the warded ministers, they referred the question to the king with or without a proposed decision;[7] in other cases the views of the bishops were first obtained.[8]

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1. The council would look at the rolement of the inferior court; 2RPC vi 19 79
2. RPC xii 321
3. Eg, 3RPC xii 359
4. 2RPC ii 481; v 168; cf, Wallace v HMA 1959 SLT (Notes) 51
5. RPC ii 576; 2RPC iii 55
6. RPC vii 269
7. Melrose Papers ii 340 431 565; RPC viii 385
8. 2RPC iv 43 85. Many religious detainees were released on promise of reformation: 2RPC ii 351; iii 258

VI JURISDICTION: PEACE

13 Maintenance of the peace

As the prime organ of law and order, the council was particularly interested in all matters affecting the public peace. One method of dealing with breach of the peace was to anticipate disorder by issuing general proclamations against it[1] or by interdicting individuals or making them find caution to keep the peace. The situation which frequently involved individual parties was the existence of ill feeling, hatred or feud.

Feud

From the earliest times the council charged parties at variance to keep the peace, to find caution to do so[2] or to submit their disputes and feuds to the arbitration of the council[3] or to arbiters appointed by them[4] or until the parties had settled their disputes civilly or criminally.[5] There were also acts against duelling and sending of challenges.[6] In 1598 a general act of convention against feuds ushered in a series of charges to batches of nobles to compear before the council and in the meantime to find assurances to the exclusion of the justice court.[7] And in 1609 parties were ordained to settle their differences at law within 40 days: if by then the pursuer with a grievance failed to pursue or obtain a conviction or failed in reconciliation with the other, the council was empowered to

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1. RPC ii 674; iv 548
2. RPC i 152-4 303 307
3. RPC i 64 68 78 126
4. RPC i 263 322 419
5. RPC i 163
6. RPC vi 65 97; ix 261
7. 1598 c 1 (APS iv 158-9); RPC v 523; vii 335; Letters 85; the nobles disliked these assurances and the rigour with which they were enforced: RPC vii 160

ward that person until he found caution to keep the peace and to fine without further criminal trial.[1]

Normally these proceedings were initiated by an executive charge of the council[2] but occasionally as the result of an action raised by the king's advocate.[3] A process of much the same effect of keeping the peace but of a more judicial nature in that it was between private parties was the finding of lawburrows.

Lawburrows

Procedure by lawburrows was an ancient remedy whereby a party who had been attacked[4] or feared bodily harm by another could have the court ordain him to find judicial security that that party should be skaithless.[5] Breach of the obligation resulted in forfeiture of the caution and other penalties[6] which were divided equally between the crown and party.[7] Later there was a statutory tariff depending on rank but with an increased penalty in flagrant cases.[8][9]

The council had, with other courts, jurisdiction to expede letters of lawburrows.[10] The aggrieved party proceeded by bill or supplication which was granted[11]

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1. RPC viii 343-344
2. RPC viii 363
3. RPC viii 435
4. RPC iii 148
5. 1449 c 2 (APS ii 35). Lawburrows are still competent in sheriff and JP courts only: Civil Imprisonment (Scotland) Act 1882 Sec.6; but procedure by interdict is the normal answer to an anticipated wrong.
6. 1491 c 8 (APS ii 225)
7. 1579 c 15 (APS iii 144); 1581 c 22 (APS iii 222)
8. 1593 c 13 (APS iv 18)
9. Stair iv 48. It is probable that the tariff only applied in the justice court where the arbitrary pains had been too lenient; an even higher penalty was exigible in the session and council: Hope vi 35 22
10. The council did not deal with contraventions except incidentally (RPC vi 37); and the suspensions of charges of lawburrows came to the council because they were suspensions, not because the charge was for lawburrows: RPC iv 329 408 626; vi 3
11. Appendix N (2)

on his ex parte averment of fear of bodily harm. The council also heard objections of the respondent to his liability to find lawburrows[1] or to the amount of caution demanded.[2] Questions of interpretation of lawburrows were remitted to the session.[3] The council did not hear actions of contravention of lawburrows unless there was an element of riot: the appropriate forum was the court of session.[4] Lawburrows were also ordained by the court ex propio motu as all or part of its decision in actions of oppression.

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1. RPC iii 212; vi 35 126; vii 267
2. RPC v 203; vi 110 242
3. RPC x 67
4. Hope vi 35

14. Civil and Criminal Liability

The chief judicial function however, in questions of the peace, and indeed altogether, consisted in hearing and deciding complaints of the riots and oppressions between parties.[1] In this the council had privative jurisdiction.[2] The extent of the council's jurisdiction under this head was very wide, largely because the extent of liability arose from both the personal and other capacities of the lieges.[3]

Personal liability

There was a general personal duty imposed by law on the lieges to keep good rule, not to commit crimes or disturb the peace or in any way oppress the king's subjects. Breach of that duty rendered the offender personally liable to punishment in person and goods at the hands of the king and liable to reparation to the injured person, "for here the publick is wounded, in breaking its Peace, and private persons are wronged, by the prejudice done".[4]

Vicarious liability: general band

In special cases this was a vicarious liability. For reasons of public policy the state imposed on the chiefs of the highlands and borders a liability for the

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1. Occasionally proceeding on its own information the council cited offenders although there was no pursuer: 3RPC i 534

2. Mackenzie Institutions i 3 6; Criminal ii 6 1; SHR xix (1922) 265

3. Some difficulty of treatment of riots and oppressions arises from the frequency of private prosecutions in serious crimes (against the person and against property, but not against the state)(Mackenzie Criminal ii 19 2; i 1 1; Institutions iv 4 1-4) which could be purged (in most cases) by composition with the victim: thus in a complaint of riot before the council, because the pursuer admitted that the defenders had come into his will and made a settlement, the defenders were discharged of riot:(2RPC iv 393); further complication arises from the contemporary classifications of public and private crimes and of crimes and delict (Mackenzie Institutions iv 4). A rough distinction of limited application is between actions inferring liability to punishment by the state and those giving rise to an obligation of reparation — although many of the cases partake of both aspects. Not the least difficulty in arriving at any definitive judgement on the extent of the council's jurisdiction arises from the fact that the overwhelming majority of these cases proceeded in absence.

4. Mackenzie Criminal ii 6 2

clansmen, retainers tenants and others of their dependers who had committed offences and who, not being "landit-men in the incuntrie" were generally amenable to give redress to the victims of their oppressions.[1] The liability of the chiefs (which took the form of the general band) was broadly, that at the request of a wronged party he would enter a wrongdoer before the competent court, which failing, expel him from his lands on pain of becoming "debthound to satisfy the pairtie skaithit".[2] For greater security the chiefs had not only to subscribe the general band to this effect but were to find substantial caution of lawland men.[3] Parties in breach of these obligations lost all protection of the law: they had no title to sue; invaders of their lands were indemnified in advance and they had no reparation for violence done to them.[4] The council took a particular interest in this aspect of enforcing the peace, compelling the chiefs to find caution and setting aside the first of the month for hearing complaints against them. By the 1590s a separate register, Liber Actorum penes Hiberniae Insularum ac Marciarum, was kept.[5] The most common actions of this kind were for exhibition of rebels or wrongdoers: in contested cases the usual issue was the existence of any liability on the defender.[6]

Other liabilities

Vicarious liability also arose out of other relationships, some of which might

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1. Because "the peace and quyet of the countrie necessarilie requires them", "as being the onelie men of power, freindship and authoirtie within the bounds to be burdenned for exhibitioun" of rebels: 2RPC iv 4
2. 1587 c 59(1)(2)(APS iii 461-2)
3. 1581 c 16 (APS iii 218); 1587 c 59(APS iii 461); RPC iv 789; vi 45 435
4. RPC vi 435
5. RPC iv 789. Possibly because of the success of James, his successors did not pursue his policies with the same persistent energy (2RPC iv 198; 3RPC ii 202). However, in 1669 a new band was formulated (3RPC ii 600-602) and there was an intensification of the drive against disorder in the highlands: 3RPC vi 34-51 etc)
6. 2RPC iii 582 (wadsetter); 3RPC ii 357 (landlord who had renounced his lands.

be present together: master and servant,[1] landlord and tenant,[2] the noble and his followers,[3] father and unforisfamiliated son,[4] resetter and rebel.[5] Reset was a crime in itself which the council remitted to assize;[6] or, if the resetter failed to compear at the council, he was denounced.[7] In the 1660s the heritors were made liable for the safety of ministers who might be molested by the covenanters;[8] and husbands might be liable if their wives attended conventicles.[9]

The council heard many disputes enforcing these liabilities,[10] fixing their extent and hearing complaints against the amount or forfeiture of caution which was exacted from those vicariously or personally liable as an alternative to entering the accused before the justice court or to the accused entering himself.[11]

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1. Eg: master to pay damages of £40 for assault committed by servant: (2RPC iii 473); master to pay £100 if servant failed to pay satisfaction of 100M (2RPC iv 233); master warded for not punishing servant: 2RPC ii 327
2. 1528 c 2 (APS ii 332); RPC iv 349 718; vi 113; vii 47; ix 702; 2RPC iv 201 etc
3. RPC i 302; 2RPC vi 424; 1594 c 37 (APS iv 71); Letters 70
4. RPC i 300; vi 259; vii 60; 2RPC ii 97
5. RPC iv 151 527; v 486 494; vi 75; 2RPC iii 154 441
6. RPC iii 198
7. RPC iv 151
8. 3RPC ii 313
9. supra church courts
10. 3RPC ii 329
11. These liabilities were, of course, for the whole range of crimes and delicts, not merely riots and oppressions. Usually where there was vicarious liability, as with magistrates for their negligent jailer, there was also a right of relief in respect of damages and fines against the actual wrongdoer: 3RPC v 139

15 Riot and Oppression: Criminal Aspect

These liabilities were pursued in a single prosecution for riot as an alternative to an action of spulzie before the session.[1] This was a penal action by a private pursuer (with or without the concurrence of the king's advocate). Penal actions quibus rem et poenam persequimur[2] had elements of both civil and criminal pursuit: the action was not only for restitution of the thing violently taken or for damages to indemnify the pursuer for the loss of the article but also for a penalty or fine which might be paid to the crown or shared by the pursuer.[3]

The essence of riot and oppression was violent, real or notional, "wronging His Majesteis Lieges by force and violence"[4] and is equated with breach of the peace.[5] The term covered any actual or attempted injury to the person and invasion of proprietory rights by awaytaking, reft or destruction of movables and ejection from, intrusion into, or obstruction of heritable rights.[6] It included such menaces as convocation,[7] abuse of process,[8] blackmail,[9] and a host of others.[10] Many actions which might in themselves be tolerable became wrongs when they were directed against special classes such as the poor,[11] the ministers,[12] judges and

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1. Criminal ii 6 4 infra: res iudicata
2. Gaius iv 6 et seq
3. "Some are called Penal Actions because we pursue not only for Repetition and real Damage, but for extraordinary Damages, and Reparations by Way of Penalty"; (Mackenzie Criminal ii 6 4); this is of course as far as the nature and punishments are concerned, but as noted elsewhere all actions before the council (whatever their nature) were civil actions.
4. "Whatever is done without proper warrant or authority is, by the law, accounted violence" (Erskine ii 6 54); Mackenzie Criminal ii 6 2
5. Mackenzie Institutions i 3 6
6. RPC iv 339; v 391; rape was also the riot of seduction: 3RPC i 139
7. RPC v 98
8. RPC ix 38; unwarranted prosecutions were not wrongs unless malicious: 2RPC iv 265
9. RPC ix 501
10. Eg malversation of office (3RPC iii 338 344); reproachful speeches (2RPC ii 335); closing up a neighbour's lights (3RPC i 47); using a cautioner and witness who were under 12 years (2RPC vii 268); colliers leaving their employment undutifully "within termes": 2RPC v 190
11. RPC vii 211
12. RPC ix 302

officials.[1] Some were rather odd, such as snowballing a messenger or forcing him to eat a summons,[2] cutting off the ears of a horse, driving cattle onto the growing crops of another,[3] selling bread underweight,[4] alarming a woman by means of a forged letter with a view to procuring her miscarriage[5] - indeed anything which was an oppression to the lieges such as perjury[6] or unjustified astriction to a mill or an "usurpation of his Majesties princelie authoritie".[8] Even where no harm was done, as where a messenger carried out a mock citation, the offence was inferred.[9]

The defenders in these actions could expect speedy justice without partiality whether they were nobles[10] or kindly tenants,[11] individuals or the riotous youth of Brechin,[12] or even the bailies of a burgh.[13] Indeed, the very natural disinclination of victims of oppression to remain silent for fear of reprisal or considerations of loyalty was met by proclamations allowing complainers to come secretly to the king or his domestics with their "valentines" against the certain named oppressors.[14]

Hagbutts and pistols

A statutory aggravation of these crimes of violence (and also a crime in itself)[15] was the carrying or use of pistols or other firearms.[16] At first this was regarded

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1. RPC vii 106 402; 2RPC iii 210
2. RPC vi 265
3. RPC iii 235; iv 601 609
4. Pitcairn i 360
5. RPC vii 207
6. Letters 68
7. RPC iv 517
8. RPC v 401
9. RPC vi 204. One form of contempt of the king's laws and authority in which the council took particular interest was remaining unrelaxed at the horn.
10. RPC ii 517
11. RPC iv 206
12. RPC xi 494
13. RPC i 604; ii 84; xiv 618; 3RPC xii 90
14. RPC vi 233-234 250
15. 2RPC i 129
16. 1567 c 23 (APS iii 29); RPC i 593; v 464; vi 585; 1600 c 14 (APS iv 228); Hope v 2 5

as a serious crime meriting public prosecution by the king's advocate or treasurer but only in the criminal courts under penalty of fine or escheat or loss of right hand. Even these trials failed to put the offence down, so in 1600 the council was made an alternative forum to the justice court.[1]

The avowed purpose of this change - and it must have been a consideration in the minds of complainers in ordinary riots - was because prisoners had been declining the assize which knew of the variety of the matter and because of their delays and subterfuges.[2] Not unnaturally private pursuers coloured their complaints of assault with averments of use of pistols in order to aggravate a minor assault or pursue an action of doubtful competency before the council.[3] In the 1610s and 1620s the king's advocate, not content with prosecuting individual offenders or concurring with private pursuers, began a course of prosecutions against large batches of offenders.[4] At the same time individual prosecutions by the king's advocate and private pursuers continued.[5] The acts against pistols were merely one branch of the penal statutes in which the council had jurisdiction to summon offenders.[6] They included such matters as haughing oxen,[7] papistry[8] and usury.[9] Stopping up of highways in burghs was a statutory oppression in which the council had privative jurisdiction.[10]

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1. RPC xiv 613. The council was precluded from inflicting the punishment of mutilation.
2. In 1626 the council asked local magistrates to inquire into and report on pistol wearing - with a promise of secrecy to informers: 2RPC i 381
3. RPC v 127 382 395
4. RPC xi 503 542; xii 132 etc. This policy was parallel with the multiple prosecutions of batches of rebels for remaining unrelaxed at the horn.
5. RPC xii 136
6. 1526 c 14 (APS ii 306); 2RPC i 248-252
7. 1585 c 57 (APS iii 460); RPC iv 634; viii 472
8. RPC v 540
9. 1587 c 35 (APS iii 451) etc; RPC xi 44; supra trade regulation
10. 1555 c 27 (APS ii 498); 1592 c 78 (APS iii 579); 3RPC iv 388

Deforcement eo nomine does not appear to have been prosecuted in the council; certainly not if the king's advocate did not concur.[1]

Defences

The council gave weight to legitimate defences to riots, such as claim of right (unless there was violence or refusal to use lawful procedure),[2] provocation,[3] self defence (in relation to life or property)[4] or a pardon[5] and, in rape, consent.[6] In the special case of carrying firearms there were defences of an innocent purpose (such as shooting crows)[7] or of royal authority[8] or being part of the equipment of a ship.[9] Equally competent as a defence was that the defender had tholed his assize which was proved by the act and rolement of the other competent court;[10] In one case "albeit the mater wes suspicious yet the Lords thocht they could not tak new tryall of that fact",[11] but the defender's oath denying the charge might be taken again.[12] The prior conviction only went to criminal liability (unless a fine had been awarded to the other party):[13] if it appeared that the decree had not dealt with civil satisfaction of the pursuer such payment was ordered,[14] or if the amount seemed inadequate it was increased.[15]

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1. RPC xiv 623
2. RPC vii 70; 2RPC ii 463 (resistance to commissioner acting outwith his authority)
3. RPC x 106; 3RPC vii 73
4. RPC ix 2; xi 237; 2RPC ii 120 129
5. RPC ix 301
6. RPC viii 190 202 205
7. RPC xi 501
8. RPC vii 366; 2RPC ii 543 (executing letters of caption)
9. 2RPC vi 12
10. RPC ix 516; x 72; except in so far as the inferior court cognosed on matters only competent to the council: 3RPC iii 363
11. RPC xiv 604
12. RPC vii 322
13. 2RPC vi 199
14. RPC x 427; ix 513; xiv 617
15. RPC x 397

The distinction between defence to riot and defence to the obligation to restore was always before the council. This appears from the unusual case of a father who sued the cautioner of a recruiting sergeant who had bound himself to return his son from the wars in Germany. Here the council found the defences relevant: that the son was dead before the time for exhibition; and accordingly a diet of proof was fixed - the manner of proof was to be by witnesses or by the certificate of the burgomaster of Glückstadt. Yet all this was without prejudice to the father's actions for the wrongful awaytaking of his son.[1] Similarly conviction or acquittal of a charge of unlawful seizure of goods did not absolve the defender from answering for the goods.[2]

The motives of an alleged wrongdoer were also considered, as where the defender who put up his armorial bearings in a church, thereby covering up those of the pursuer, escaped censure because his purpose was piety to his father not spite against the pursuer.[3]

Remit to the ordinary

It was often the case that the same facts disclosed both a riot and a crime nomen iuris; and it must have been a fine dividing line between the competence of the council and the criminal courts; it is more than likely that there was considerable overlapping.[4] Some cases for remit, either on plea of party or ex officio[5] such as suborning witnesses in a divorce action,[6] were clear. Likewise with a question of title arising out of a charge of abduction[7] or questions of rape "beand

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1. 2RPC iv 343
2. 2RPC vii 396; 2RPC vii 412 (remit); the council also assoilzied of riot in so far as it infers punishment capital or otherwise but imposed a fine in favour of the pursuers: 3RPC ii 150
3. 2RPC vi 391
4. Vide infra res iudicata
5. RPC xiv 623
6. Melrose Papers ii 474
7. RPC ix 300

criminall and capitall"[1] or that part of the libel from whose pursuit the pursuer passed.[2] In a case involving death the king told the council to investigate and

> Yf it be found a wilfull murthour, you ar to meddle no farther thairin, bot to remit it to the ordinarie course of justice accustomed in the lyke caises.[3]

Occasionally the case of a defender who was excused appearance on the ground of ill health was remitted to the justice court.[4] A more frequent basis of remit was where both parties were subject to the same competent court: regality, burgh, landlord or sheriff.[5] Sometimes remit for sentence only was made by the council.[6] But the council refused to remit a case of assault on a woman merely because it might prejudice the defender's pending criminal trial against the husband for mutilation.[7] Many of the remits - especially to arbiters - were made with consent of parties;[8] thereafter the council would interpone authority to the decree[9] or resume consideration on failure of accord by parties.[10]

In many cases the council could not come to a decision on the question of riot until the preliminary question of title had been remitted to, and decided by, the ordinary.[11] In such cases the council could continue its discussion or supersede punishment.[12]

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1. RPC xiv 605
2. RPC vi 268 360
3. RPC ix 623
4. RPC vi 381
5. RPC ii 248; vii 277; viii 89; x 136; xi 267 496 539; xiii 46 211; 2RPC iv 283 (craftsmen); vi 519 (master of two servants). The council might reserve the right to intervene in the event of the court remitted to not doing justice: 2RPC iii 612
6. RPC x 83
7. RPC vii 50
8. 2RPC ii 218; iv 331; v 321; vi 183; viii 45; supra feud
9. 2RPC v 215
10. 2RPC iii 612; vi 42; viii 3
11. 2RPC ii 17; iv 439; 3RPC i 344
12. 3RPC vi 19

Punishment

Having eliminated those offences which were outwith its jurisdiction the council, in cases where the defender was convicted,[1] proceeded to impose a penalty.[2] The council could not inflict penalties of life or limb;[3] and the limitation of its jurisdiction to common law riots and to certain offences under the penal statutes restricted its powers of punishment. Riots were usually punished arbitrarily;[4] and the penal statutes laid down pecunial penalties or gave a discretion to the court.[5] Apart from imposing fines the council could ward a defender;[6] but warding was used less as a punishment than a temporary measure: until the king's will be known,[7] until the offender had satisfied the treasurer for the offence by having a fine fixed,[8] or by making composition for his escheat or buying a respite or remission,[9] until payment of witness fees[10] or until pardon was given by the other party.[11] Escheat was a statutory penalty in certain offences such as using pistols,[12] and deforcement of officers;[13] and a result of remaining unrelaxed at the horn.[14]

At first fines were largely statutory;[15] but in the early 17 century this form of punishment became the most common.[16] Sometimes the fines were very small, sometimes

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1. Even in cases where the defender was assoilizied (because the pursuer failed in proof) the council, having an eye to the public peace could ordain the defender to find caution against hiswearing pistols or molesting the pursuer: 2RPC i 326-8; ii 339
2. Penalties might be imposed at a diet subsequent to the trial diet: 2RPC ii 251
3. This is deduced from the practice of the council and is consistent with Mackenzie (Criminal ii 30 4)
4. Ibid ii 62
5. A messenger was warded as "exemplar" punishment for allowing the debtor of an Englishman to escape: 2RPC ii 282; and a husband was put in irons for an assault on his wife: 2RPC iv 312
6. RPC viii 30 54
7. RPC v 198; vi 261
8. 2RPC vii 390
9. RPC xiii 91; 2RPC ii 339; iii 10
10. 3RPC xii 359
11. 2RPC iii 98
12. 1567 c 23 (APS iii 24)
13. RPC i 65 160
14. infra horning
15. The question whether the fine imposed should be paid to the crown or the pursuer is discussed later: infra damages and fines
16. RPC vii 34

up to 500M;[1] and, if need be, collective fines were imposed - as for example a fine of 2000M on the burgh of St Andrews for tumult.[2] Where the accused had a fiduciary capacity the council indicated whether they were to be personally liable or not.[3]

For certain classes of offenders, particularly office bearers there was deprivation[4] or future inability to hold office.[5] Occasionally banishment from an area or from the realm was ordained.[6] The vexatious litigant could be penalized by an award of expenses.[7] In one case a defender had further punishment remitted because he was a minister.[8]

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1. RPC x 791. There was no upper limit to the punishments which the council might impose, whereas in summary trials (ie without a jury) in other courts the magnitude of the penalty was a ground of appeal (Hume Crimes ii 147 et seq.) This state of affairs persisted until the 19 century when prosecutors were allowed to proceed summarily without fear of appeal if the sum sued for was restricted: AJ 17 March 1827; 9 Geo. Iv c 29 and subsequent summary jurisdiction Acts.
2. RPC xiv 623
3. Magistrates to have no relief from common good (3RPC v 65); to have relief from inhabitants only (3RPC vii 329 335). Plural defenders might be found liable in solidum (for 14,000M) (3RPC iii 515 32). Where parties were fined for entering an illegal bond of manrent they were ordained to pay the fine in the proportions specified in the bond (2RPC vi 63). Occasionally as in a case of brawling in a churchyard the fines were ordered to be paid to the poor of the parish (2RPC i 349). A fine of £40 to a pursuer was ordained to be paid by instalments of 2M per week (2RPC vi 118); and in another case a suspended fine was imposed: 2RPC vi 171
4. RPC vi 363; 2RPC v 366
5. RPC xi 421
6. RPC vi 363
7. RPC vi 475
8. RPC ii 440

16 Civil Aspect of Riot

Reparation: damages for personal injuries

Within the term riot and oppression the council dealt with a large tract of law which today would be regarded as reparation. Most of the cases before the council were of intentional wrongs, delicta[1] or the civil aspect of crime. In some cases liability arose out of unintentional wrong or negligence; and one or two cases where even negligence was absent.[2]

The council ordained satisfaction for all manner of personal injuries: wrongful imprisonment,[3] assault,[4] mutilation, slaughter and defamation.[5] Satisfaction took the form of a monetary payment to the victim:[6] inassaults not involving death the amounts varied from £10 to 200M[7] as well as expenses and surgeon's fees.[8] Where there was effusion of blood or peril of life the damages were higher;[9] and the surgeon's prognosis might be called for first. Sometimes the quantum of satisfaction was remitted to the ordinary.[10]

Other forms of satisfaction were apology and some form of public penance[11] and for the future the defender might be ordained to find lawburrows in favour of the pursuer.[12]

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1. Mackenzie Institutions iv 4 2
2. RPC i 442
3. A disgraceful contempt of his majesty's authority: 2RPC v 366
4. 2RPC v 280
5. And also as in abstraction of writs there was no obvious physical injury 2RPC i 140
6. Infra damages and fines
7. RPC xi 95 106 223
8. Infra expenses
9. RPC v 555; x 377
10. RPC iii 107
11. RPC xi 427
12. RPC xi 279

Slaughter: assythment: remission

Where death resulted from the act of a defender, the friends and kin[1] had the right of assythment; and in return they gave him a sufficient letter of slains[2] which together with a suitable composition to the treasurer was warrant for a royal remission from the penal consequences of the act.[3] The dividing line between unintentional slaughter which might easily be purged[4] and intentional murder where after conviction by assize would result in execution is not always clear: thus where the friends of a person convicted of slaughter offered the huge sum of £10,000 as satisfaction and where the prisoner and the deceased's relatives concurred in petitioning for a stay of execution until the king's pleasure was known, the council refused to take the matter upon themselves and the man was executed.[5]

Normally the settlement of terms with the relatives and the treasurer was an informal matter which did not come before the council. The council's activities were limited to hearing cases of violence which had resulted in death or complaints of the bereaved against offenders who escaped payment of assythment by refusal - by relying on a prior conviction - or a royal remission.[5a] In these cases the council ordered payment at a fixed sum or to the satisfaction of the kin.[6] The council[7]

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1. Since assythment was of a penal nature it was, unlike modern damages, not assessed according to the pursuer's loss, but according to the defender's rank and means; and it was available to a wider circle of relatives, such as brothers and sisters: T.B. Smith "Scotland" United Kingdom 1064-1135 quoting Stair i 9 7
2. RPC vii 64
3. RSS v 2709. A respite was to a similar effect but was valid for only a number of years: RSS v 2856 3135
4. Thus, although the magistrates of Inverness were assoilzied of riot, so far as that inferred punishment, capital or otherwise, they were obliged to pay the substantial sum of £400St for distribution among the relatives of those killed: 3RPC ii 150
5. RPC xiv 616
5a. 3RPC ii 150
6. Including Charles I's general pardon: 2RPC v passim
7. RPC ii 571; vii 111; xii 148; 2RPC v 243

also enforced the rule that a respite[1] or remission[2] or prior conviction did not per se bar a subsequent claim for assythment[3] or a larger assythment;[4] letters of slains were investigated[5] and if a respite was nullified for the lack of assythment, further criminal prosecution was ordained.[6] The council also heard complaints against the kin who refused to accept the offender's offer of assythment;[7] but they also allowed the kingtime to consider and take advice on any offer,[8] or to assess the wrongdoers means[9] and would not compel an incapax, such as a minor, to accept.[10] The council also entertained an action for satisfaction in respect of an assault committed eight years previously;[11] but in a dispute between the representatives of one of the kin and the others to whom assythment had been awarded by the council, the lords would not intervene.[12]

The council was not competent to deal with reduction of a respite and remitted such matters to the justice court even where there was breach of the statutory provisions prohibiting certain remissions for five years.[13]

Defamation

The council entertained actions for or investigated defamation[14] sometimes as a charge to appear and answer for words of infamy and dishonour spoken against an earl.[15] The party who disparaged a man's honour was ordained to recant in church.[16]

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1. RPC iv 177 260; ix 513; xii 692
2. RPC iv 346
3. RPC vii 111; Mackenzie Institutions iv 4 25
4. RPC x 397
5. RPC i 418; iv 130
6. RPC iv 177 260; 2RPC v 226
7. RPC xi 172 368; 2RPC v 204 270 288 (where the justice was ordained to desert the diet)
8. RPC i 407
9. 2RPC v 279 288
10. RPC x 526
11. RPC x 377. The civil action of spulzie prescribed in three years: 1579 c 19 (APS iii 145) but the action of riot did not (Mackenzie Criminal ii 6 4)
12. 2RPC vii 387
13. 1587 c 54(4)(APS iii 457); RPC iv 680 cf RPC i 472; iv 177 260
14. RPC i 303; Melrose Papers i 69
15. RPC i 470; 2RPC v 291
16. RPC ii 100; 2RPC iii 198

There are no clear examples of damages being awarded. Some of the cases come closer to sedition: the pulpit orations against the crown or the defamation of the late Darnley by posting up a painting.[1]

Abuse of process

Normally the pursuer who brought an action which in the event was unjustified was penalized by an award of expenses; but where a party perverted the course of justice, as by vexations and unjustified citation[2] by unwarranted or incompetent diligence[3] by using the name of the king's advocate without authority[4] or by giving erroneous information with a view to prosecution,[5] he had committed a wrong for which the council awarded a fine to the victim.[6] In other cases, as where a business rival cited a merchant to appear on the day he was due to sail, a continuation until his return was granted;[7] or further proceedings might be discharged.[8] The perpetrator of the abuse might also be punished by a fine to the crown;[9] or, if he was a messenger, remitted to the lord lyon and heralds for punishment.[10]

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1. RPC i 500
2. RPC vii 49 188 211 227; x 573
3. RPC vi 118; xii 735
4. RPC viii 134
5. RPC xi 38; xi 499
6. RPC xi 499; xii 422; xiii 161
7. RPC vii 211
8. RPC viii 134
9. RPC xii 735
10. RPC vii 227

17 Wrongs to Property

Wrongs to property were basically spulzie of movables and ejection from heritage, there being some element of violence or iniuria.[1] In these matters the true function of the council is apparent. Violent ejection could be pursued before the council as a riot or before the session as an action for violent profits.[2] In so far as there was disturbance of the peace in these actions the council had jurisdiction; but where questions of title arose the council reserved or remitted this civil aspect to the ordinaries or in the case of heritable title to the session.[3]

Heritage

The council's function (apart from punishing the violence) was limited to restitution:

> the Law did most reasonably, both for securing Property, and punishing Violence establish that great rule, that Spoliatus est ante omnia restituendus, and conform thereto, the Council (who are never Judges to Property but only to Possession, so that in effect, all their sentences, are interdicts) do still restore the possession to the person ejected.[4]

The records of the council shew an almost religious application of these principles.[5] The intruder was interdicted from interfering[6] or was ordained to compear and shew cause why certain houses should not be rendered[7] which failing he was denounced[8] and delivery was ordained within a few hours.[9] Sometimes the sheriff was ordained to enter the pursuer[10]

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1. RPC iv 65
2. Hope vi 15 10; Mackenzie Criminal ii 6 4
3. Mackenzie Institutions i 3 6
4. Mackenzie Criminal ii 6 2; 2RPC xiv 22-23
5. RPC iv 77; 1585 c 21 (APS iii 383)
6. 3RPC iii 448
7. RPC i 289; iii 39
8. RPC iii 193
9. RPC iii 50; iv 16 670 699; v 379; vi 235
10. RPC iv 339

Similarly the buildings which were demolished were to be rebuilt;[1] the interruption of rights of way[2] or mill lades[3] was to cease with or without an indemnity or interdiction for the future.[4]

If the case came into court the pursuer had to shew (unless it were admitted) the fact[5] and quality of his possession;[6] and in respect of that possession the pursuer was entitled to remain in the subjects until orderly removed by course of law;[7] if recently dispossessed he was entitled to be repossessed.[8] The obligation to restore could be enforced on pain of damages for delay;[9] and the defender's claims for loss by any order could be safeguarded by the pursuer finding caution.[10]

From the bulk of such cases dealing with heritage and benefices (which were a sort of quasi heritage) it might appear that the council had some jurisdiction here other than mere riot. Apart from questions of royal grants and their inorderly execution[11] the only other items of jurisdiction were the statutory ones dealing with kindly tenancies[12] and with the trying of papal confirmations of feus, a function which was in fact of limited duration and was delegated to a commission of councillors and lords of session.[13]

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1. RPC v 391; x 349
2. RPC x 349
3. RPC iv 327; 2RPC iii 487 (order to make good all damage to a loch or to allow its free flow)
4. RPC vii 47; x 146
5. 3RPC i 569
6. 3RPC xiv 32-3
7. 2RPC iv 280; vi 107
8. 2RPC vii 347
9. 2RPC vi 42
10. 2RPC iv 233 291; 3RPC i 94; cf caution for violent profits: Rankine Landownership 23
11. RPC ii 383; iii 228; v 133; Melrose Papers i 321; ii 550
12. Infra kindly tenants
13. Appendix K

Teinds

Similarly with the vexed question of teinds (which, in the early years of the reformation, bulk exceedingly large in the council). Here questions of title (which, after the reformation, had been often acquired by laymen) were appropriate to the commissary court[1] or the court of esssion;[2] but, by the very nature of teinds, there was a permanent danger to peace: from convocation of the lieges to enforce competing titles to the teinds,[3] against which there were almost annual proclamations;[4] also the titular (or party in right of the teinds) might delay teinding to such an extent that the crop rotted on the field.[5] The landowner could not teind himself or he would be guilty of spulzie.[6]

The primary interest of the council was to stop parties from intromitting with teinds and to refrain from the use of force on pain of horning,[7] warding[8] or finding caution.[9] At the same time the council protected the legitimate collection of teinds[10] and enforced the decrees of the commissary court as to title.[11]

Where dispute arose the council limited itself to having the sheaves arrested or teinded by a neutral person such as a herald, provost or sheriff[12] to be led to some neutral place[13] until the question of title was determined by the ordinary.[14]

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1. Those granted since Aug. 1560: 1567 c 36 (APS iii 33)
2. BUK i 254; Calderwood iii 229; Calendar of State Papers Scottish iv 423; Spotswood Practicks 187 190; 2RPC iv 361
3. RPC i 273 iv 99
4. RPC iv 513 660; v 229
5. RPC iii 224 ("are in point of tinsell")
6. Hope iii 18 7
7. RPC iv 126
8. RPC v 416
9. RPC iv 670
10. RPC i 571
11. RPC ii 13 327; iv 11 90
12. RPC i 479 561; ii 411
13. RPC iii 215
14. RPC iv 24 90. The same procedure was applied to other disputes such as the right to the dues of a fair (2RPC ii 300; viii 1) or to customing duties: 2RPC i 277

These orders inhibiting parties from altering the status quo could be renewed from time to time.[1] If the council awarded possession to one party it was under caution that the teinds should be furthcoming to the party ultimately shewn to have right.[2]

By the late 1570s, because of remedial legislation which permitted the landowner to requisition teinding which failing he could do himself without danger of spulzie,[3] this type of action receded and then disappeared. There was a small number of teind cases in Charles I's reign during the reorganization of the earlier arrangements.[4]

Movables

The same possessory remedies were available to the owner of movable subjects: the defender had to restore the object or its value[5] whether there was violence or not[6] or give a promise or caution to do so.[7] Occasionally a pursuer was granted a commission to pursue and retake his cattle,[8] or to cite havers to exhibit the suspect goods.[9] In the case of stolen property the title of the true owner was always preferred[10] no matter into whose hands the goods had come, but reserving to the purchaser the right of relief against the party who sold the goods[11] or to sue criminally.[12] In one case where there was a series of transactions the last

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1. RPC i 260
2. RPC i 316
3. 1579 c 11 (APS iii 139); 1587 c 32 (APS iii 450); 1606 c 7 (APS iv 286); 1612 c 5 (APS iv 471); 1617 c 9 (APS iv 541)
4. 2RPC ii 368-70; iv 34 37 etc
5. RPC vi 113 296 297 413-418; viii 165; 2RPC i 311; v 294; vii 314 (caution for re-delivery) 3RPC iii 10
6. 2RPC vi 109
7. RPC i 260; vi 18 310. This latter course was often adopted in shipping cases; the ostensible owner was given possession, finding caution for redelivery: RPC vii 47)
8. RPC vi 494
9. 2RPC v 257
10. RPC iv 443; xi 319
11. RPC vi 468
12. RPC xiii 251

purchaser in good faith was allowed to retain the horse on paying the price to the true owner.[1]

Other miscellaneous wrongs to property also received remedy. The granter of a deed who tore it up was ordained to subscribe another[2] which was declared to be as valid as the original.[3] In breach of trust, where it could be readily demonstrated, payment of the executry funds to those having right was ordained;[4] but conversion by an agent was remitted to the ordinaries.[5]

Remit to the ordinary

Where questions of title to movables or heritage were raised[6] or it was found "that the mater wes civile"[7] the cause was remitted to be tried by the ordinary judges or the session "as accordis of the law".[8] The council was

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1. RPC vi 564
2. At the defender's expense: 2RPC vii 108
3. RPC xi 483
4. RPC ii 440
5. RPC vi 265
6. RPC iv 327; vii 44; x 420
7. RPC iii 39; vii 156. Civil action in this context had a much more limited connotation than is presently understood: it extended to actions where there was a "pecuniary or patrimonial interest", including debts, land, goods or geir" (Balfour 417; Erskine i 3 18; Hume Lectures v 260). As a result the session refused to entertain an action by a freeholder of the shire to compel a meeting of the other freeholders "in order [not]to disappoint his claim to be enrolled" because there was no pecuniary interest (Kames, Historical Law Tracts 212. Compare this case which was decided in 1753 with the privy council action to ordain a meeting of the justices of the peace: RPC ix 387; JR ns iv (1959) 197). The practical result in some of these cases was that they were remitted to another forum where pecuniary interest was not necessary eg, lyon (armorial bearings), parliament (perrage), commissary (consistorial actions) with the privy council as the ultimate forum when no other was competent. The wider view of civil action which obtains today is in part due to the amalgamation of many of the specialized courts with the court of session or sheriff court - but with no ultimate court for the residue.
8. RPC xii 376; Mackenzie Institutions i 3 6. The matters which were remitted included spulzie (RPC i 561; vi 275; vii 153 156; 2RPC vi 362) and title to movables (RPC iii 202; iv 449); and in heritage, ejection (RPC v 9; viii 85), infeftments (RPC v 480), water courses and mill lades (RPC iv 327; x 99; xiii 122), corns and teinds (RPC vi 164 329; 2RPC iv 361), timber (RPC vi 192; x 481), peats (RPC v 472), coalheughs (RPC vi 236; vii 156; x 27; 2RPC viii 38), sand pits (RPC xii 479), right of way (RPC x 432; 2RPC iv 447), neighbourhood (RPC xiv 597), fishings (RPC iv 280),

> nawayes willing to prejudge the ordinar jurisdictionne and jugement or to hinder ony parteis rychtis or defenss bot onlie to provyd for the quietnes of the realme and forbid violent force[1]

This was particularly the case where the cause was already before the session;[2] and if need be, discussion or sentence in the trial of the riot was superseded until the question of title had been settled.[3] In one case the party whose action of title was remitted to the session sought repossession pendente lite and was refused - "whilk mony thocht ane great noveltie et causam antea inaudita".[4] But normally rights were confirmed[5] and the owner protected by discharge of actions of spulzie.[6] The criterion was that matters which could be dealt with on an interim or ex facie basis were dealt with by the council, whereas substantive questions of law were remitted to the ordinary.[7]

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heritable office (RPC i 273). The council had privative jurisdiction over persons accused of stopping up the public highway: 1592 c 78 (APS iii 579); RPC xiv 598, being a statutory oppression: cf, supra inclosures

1. RPC xiv 91; cf RPC ii 694
2. RPC i 321; viii 31
3. 3RPC i 342; vi 389
4. RPC vii 30
5. RPC v 480
6. RPC iv 494; vi 200
7. This is illustrated in a few of those cases where the council dealt with the interim or ex facie aspect of a dispute but remitted the substantive part to the ordinary. Fixing total amount of assythment: claim between surviving kin and widow of deceased relative (2RPC v 288; vii 387); reduction of deed where fraud averred: reduction of deed where no fraud or violence (2RPC v 147; vi 113); interim aliment or future aliment (usually for a year only): arrears of aliment (2RPC i 482; 3RPC iii 32; vi 514); separation for a year: permanent separation (2RPC vi 318); sequestration of pupils: choosing curators (RPC iv 418; v 453); restoration of child to apparent curators: title to curatory (RPC xi 103); decree on pain of future damages: past damages (2RPC vi 42); penalty for riot; other loss and damage (3RPC i 102)

18 Liability Ex Delicto

Delict

In the actions before the council the criminal aspect was more in evidence and the defender was liable for penalty. In respect that the council did not generally deal with civil actions, the complainer often had to be content with the finding of lawburrows (occasionally on condition of the pursuer passing from his pursuit)[1] in his favour and with restoration of spulzied goods - both rather rudimentary remedies which the council with its decrees in facto[2] and its jurisdiction in matters of the peace was eminently competent to dispense. Accordingly questions of delictual liability and damages arose only incidentally and, even in personal injuries arising out of different assaults, complainers were often wawarded the same "fine". In those offence such as deforcement inferring escheat there was no scope for damages.

Negligence

As for negligence, the law of 16 and 17 centuries was not very advanced in the civil courts and even less so in the council.[3] Where the element of penalty in any award to the pursuer was small or non-existent, the council often adopted the "broad axe" approach and erred on the side of favour for the less fortunate as its function as an equitable court might suggest: thus the council ordained a debtor who witheld money from a poor man to pay double[4] or after a series of reifs,[5] "the Kingis Majestie and the said lordis having a speciall cair and regaird to sie thir pure creaturis redressit" it was ordained that if satisfaction was not made in

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1. RPC vi 468
2. Mackenzie Institutions i 3 6
3. Hector McKechnie "Delict and Quasi Delict" Introduction to Scottish Legal History 265; T.B. Smith "Scotland", United Kingdom 1064-1135
4. RPC ii 529
5. RPC vi 446-448

a month the defenders should pay double.[1] In other cases the council approached the matter in a common sense way: negligent shooting whereby a messenger sustained powder burns cost the marksman £50;[2] the man who erroneously killed a stirk, believing it to be his own, was held to have acted recklessly and ordered to give the value;[3] or failure in <u>spondere peritiam artis</u>.[4] The Edinburgh magistrates who deposited pestilent persons on the lands of another thereby preventing him from labouring the ground were ordained to purge the land and make reparation;[5] but questions of liability for destruction of a house by fire during plague cleansing operations was remitted to the ordinary, possibly because it was a question of heritage.[6] On the administrative level sheriffs were charged to answer for negligence in the exercise of their official duties.[7]

Such rules of negligence as existed were not so much the product of a developed jurisprudence as of duties imposed by common law and statute for reasons of policy on judges and on those having custody of debtors. If the judge failed in his duties he became liable for the damage, interest and expense.[8][9] Also if the bailies[10] or a member of the guard[11] or other person entitled to retain the custody of a debtor released him by negligence he became liable for the debt unless the debtor were re-entered;[12] likewise with the person whose actions interfered with lawful diligence.[13]

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1. <u>RPC</u> vi 448-449. The council was content to allow a defender to submit himself to the pursuer's master for assessment of reparation (<u>RPC</u> vi 457) or to the ordinary courts (<u>RPC</u> xi 81); <u>infra</u>, damages and fines
2. <u>RPC</u> xi 421
3. <u>RPC</u> iii 60
4. <u>RPC</u> ii 307-8 440-442
5. <u>RPC</u> iv 45
6. <u>RPC</u> vi 52
7. <u>2RPC</u> i 406
8. 1555 c 12 (<u>APS</u> ii 494)
9. <u>RPC</u> vi 6 176 486
10. <u>RPC</u> xi 59
11. Hope vi 29 2; <u>RPC</u> ii 73
12. <u>RPC</u> ii 307; iv 594; vi 176; xi 445. Magistrates who admitted that they had known of a previous attempt at escape were held liable to satisfy a creditor when the imprisoned debtor did escape: <u>3RPC</u> vi 125
13. Hope vi 29 19; <u>RPC</u> ii 27; vi 104

Damnum sine iniuria

There was one clear case before the council of a party paying damages for injury caused without negligence. In an action for release from imprisonment for accidental damage arising out of heritable property the council ordered the complainer to be released but the complainer was found liable by consent to £20 damages in respect of the injured party's wages loss and medical expenses;[1] and, elsewhere, accidental slaughter did not save the perpetrator from banishment.[2]

Damages

Where damages were appropriate the council usually proceeded on the normal basis as in other courts: the same heads were allowed and the quantum of damages was arrived at by reference to the pursuer's oath in litem as modified by the lords,[3] or was fixed by the local judge or by examinators.[4] And in these cases it is only possible to see the aspect of pure damages when the element of riot is absent; as where the defender has been first convicted or assoilzied of riot.[5]

In these cases the council quantified damages strictly at the pursuer's loss. Thus, although in one case the council allowed £1,000 for a pair of horses.[6] For unlawful dentention of a ship the defender had not only to restore the ship and indemnify the pursuer for his injuries but he had also to pay the loss of voyage.[7] And when the postmaster of Canongait requisitioned the horse of a poor hirer and broke the horse's leg he was ordained to pay almost the full value of the horse together with the loss of profit in respect that the horse was now only fit for ploughing.[8]

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1. RPC i 442
2. RPC i 132 140
3. RPC vi 476 486; 3RPC v 87; vii 138; Hope vi 18 10; infra, probation
4. 2RPC iii 613; 3RPC v 87
5. 3RPC xiii, where a defender had been assoilzied of riot but the poor pursuer desired reparation for his damages kilns; 3RPC ii 150; xi 88
6. RPC vi 490. The normal value was about £40: RPC vi 476; or in 1669, £200: 3RPC iii 10
7. RPC xiii 93; 3RPC xi 88
8. RPC viii 27; 3RPC 261

Fines

The sums awarded by the council to successful pursuers are usually called fines and occasionally damages. Strictly an action for damages or reparation for a wrong was a civil matter outwith the jurisdiction of the council (and the council normally remitted such actions to the session).[1] Thus where a defender had been convicted at an earlier stage of a riot,[2] the injured pursuer raised a new action before the council for damages. He did not base his claim on any absolute right of the council to grant such a remedy but on the grounds of his poverty, the enormity of the defender's offence and the former practice of the council in relation to poor pursuers. Here the council limited its award to 500M in name not of damages but of expenses.[3] In most of the cases where the council did award damages eo nomine[4] there was some speciality: one of the parties was in reduced circumstances, an alien,[5] a crown official[6] or special cases such as damages for breach of a decree of council.[7] In other cases claims for damages were remitted to the session or the council merely asked the pursuer to give in an account of his damages and the defender to lodge his objections.[8]

With the more normal case of fines it is far from easy to say on what principle the council proceeded: there was great variation in the division of fines between the pursuer and the crown[9] (some of the pursuer's share might be the wages of the common informer rather than satisfaction for personal injury); sums themselves

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1. 3RPC vii 46 276; the council could award a fine for unlawful imprisonment and remit other loss and damage to the ordinary: 3RPC i 102
2. 3RPC x 189-194
3. 3RPC x 201
4. 2RPC vi 87; 3RPC xiii 49-50
5. RPC xiii 93; 3RPC xi 88
6. RPC viii 27; 3RPC vii 261
7. 3RPC vi 426 588; iii 352 (damages to debtor for unwarranted imprisonment)
8. 3RPC xiv 32-33
9. Eg 500M and 10,000M (3RPC v 118); 10M and £40 (2RPC vi 161)

varied enormously in amount, even for the same sort of offence;[1] and many appear to have been influenced by pursuit of an easy solution, as where, as a punishment for doing illegal diligence, a debtor was ordained to be satisfied with the sum which he had thus recovered (47M: 9: -) as full settlement of his debt (£40) - a loss of £7: 17: 8.[2]

Most of the fines imposed for riots were round figures, such as 9000M to a father for attempt to effect the clandestine marriage of his 12 year old daughter.[3] A common sort of fine for assault would be £10 to the crown and 10M to the party.[4] In other cases, miscellaneous items were included in a single round sum: 1000M to a kindly tenant in respect of damage to his corns and for satisfaction for his kindness;[5] or the sum might include a fine to the crown, a fine to party, expenses, witnesses' fees and medical expenses.[6] The round figures laid down by statute - such as £100 for each request for the return of each absconding collier[7] - were imposed to the full extent.[8]

Further indication of the broad axe approach appears from the sanctions which the council imposed for payment of fines - on pain of double or of an additional penalty.[9]

Liability of joint delinquents for these payments was variously in solidum and pro rata.[10]

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1. Eg £10, £20, @40, £100 for assaults: 2RPC vi 171, 339; v 366 374
2. RPC xiii 192. The cause of variation was probably the circumstances of the offence and of the parties. Similar kinds of remedy were granted in other cases. Assault on debtor: damages and expenses deducted from the debt: 2RPC vi 87. Infringement of monopoly of books: confiscation of illegal books to pursuer to account of damages: 3RPC vi 418; corrupt messenger; to repay double bribe that he received: 2RPC v 231.
3. 3RPC v 127
4. Eg 2RPC vi 171
5. 2RPC v 509
6. 2RPC vi 460
7. 1606 c 10 (APS iv 286-7)
8. 2RPC viii 22 24 25 389; 3RPC i 44
9. 2RPC v 398 509; vii 246
10. 3RPC vii 261; x 201

19 Res Iudicata[1]

Generally a plea of res iudicata arises where the same issue between the same parties had already been decided upon by a competent forum. The council was a competent forum to decide riots to administer equity and to afford emergency remedies. Whether the decision of the council operated as res iudicata in any subsequent proceedings depended largely on the stage which the action had reached.

Decree in absence

If the pursuer appeared in an action of riot and the defender was absent, the general rule was that there should be no process against absents.[2] This was true although it was essentially a rule of criminal law, and although the council was a civil court in which a pursuer was deemed to have forgone his criminal pursuit by pursuing before it.[3] The result of the defender's absence was that he was put to the horn;[4] but he had not tholed his assize. As soon as he was relaxed from the horn he was liable to further prosecution in the same matter. For reasons of public policy, this strict rule was modified to the extent of allowing the depositions against compearing defenders to lie in retentis to be used against absent defenders when they did ultimately appear.[5] Such a procedure did not amount to a decision on the guilt or innocence of these absent defenders. Later, the exception was extended to allow probation in absence against the defenders and to permit a decree against them which was as valid as a decree made in their presence.[6]

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1. Appendix F
2. Infra, probation in absence
3. 2RPC vi 199; 3RPC vii 14
4. In James VI's reign this was the result in about 80% of the actions.
5. Infra, probation in absence
6. 3RPC xi 34

Another general rule of criminal law was that mere silence or absence of the defender was not in the absence of proof indicative of guilt.[1] Again, in some offences, for reasons of public policy a defender who failed to appear or refused to answer was held as confessed;[2] and the decree following thereon was valid.

Where the defender appeared, but not the pursuer, no decree could be pronounced; but the defender remained liable to further citation by the same pursuer in the same matter.[3]

Both parties present

Where both pursuer and defender were present but where the pursuer did not insist in his pursuit, the effect was the same as deserting a criminal diet simpliciter:[4] the action was not merely dismissed: the defender was entitled to absolvitor.[5] If probation was led the council granted a decree absolving or condemning the defender.

Effect of decree

The effect of raising an action before the council was to abandon any criminal pursuit:[6] accordingly a defender, condemned or absolved by the council could never be tried again by that private pursuer for that offence.[7] (If the king's advocate had not concurred with the pursuer in the action, it was still open to the king's advocate to pursue criminally).[8] Decree of the council also precluded

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1. Criminal Evidence Act, 188 sec. 1(b)
2. 2RPC vi 62 (infringment of tobacco regulations)
3. Infra, citation
4. Desertion of the diet pro loco et tempore allows a prosecutor to raise a new action against the accused: that particular complaint falls but the liability to answer a future complaint remains.
5. 2RPC iv 345. Absolvitor (or refusal to sustain: 3RPC iv 570) was also granted where the pursuer's action was not competent before the council: 3RPC iv 303; or was not proved: 2RPC vi 645
6. 2RPC vi 199; 3RPC vii 14
7. Of course a defender might be punished for riot before the council but still be liable for prosecution in the justice court for a mutilation arising out of the same incident: 2RPC i 86
8. 2RPC ii 181-2

a further pursuit before the council "super eisdem deductis".[1] Probably ob maiorem cantelam, payment of satisfaction was declared to be a complete discharge of criminal liability.[2]

However, decree of council did not preclude a subsequent civil action.[3] Thus for example even an acquittal of a charge of riot did not absolve the defender from assything his victim.[4] But, an acquittal from a charge of riot in the council was a relevant defence to an action of spulzie in the court of session[5] - probably because in essence both were the same action, and because alternative, but not both, methods of pursuit had been allowed.[6] It was also incompetent to raise a further action if, in the action before the council, the pursuer consented to abandon his civil pursuits, or if satisfaction were ordained by the council or agreed with the defender.[7]

Where the decree of council ordained restitution of possession to the ostensible owner,[8] the other party was free to raise an action elsewhere to determine the entirely different question of ownership, which was not competent before the council. Similarly, where a defender sought to interrupt the pursuer's possession of heritable subjects (whereby the pursuer sought to acquire a prescriptive right to the subjects) and the council held that the defender's manner of interruption was riotous,[9] they restored possession to the pursuer, but without prejudice to the defender's "civil interruption".[10]

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1. 3RPC iv 552-570; vii 491
2. RPC iii 60
3. 2RPC vii 334 336
4. 3RPC ii 150
5. Guthrie v Lindsay 1611 M 14761; Hope vi 18 52, 67
6. Hope vi 18 9
7. RPC i 442; xiii 192
8. In one case septennial possession was taken as the criterion for restitution: 2RPC vi 52; cf Rankine, Landownership, 11-12
9. 2RPC ii 401; vii 367
10. 2RPC iii 574 601; 3RPC iv 239

This type of decree was in essence an interim interdict, and, as such, the state of affairs envisaged by the decree would subsist until the interdict was recalled; and an interim remedy - especially if it were granted by taking the pursuer's averments pro veritate - could not stand in the face of lawful trial and cognition to the contrary effect.[1] Similarly, an equitable remedy of the council, such as an interim award of aliment, never acted to the prejudice of a decision on the merits, such as arrears of aliment.[2] And the general run of liberations, sequestrations of pupils, lawburrows, suspensions and captions which proceeded on ex facie rights could never in themselves be decisive of the civil rights of parties.

20 Horning

Intimately connected with the public peace was the status of being at the horn or in rebellion against his majesty's authority. This was therefore a matter of concern to the council giving rise to the granting of letters of horning and matters connected with captions and escheats.[3]

Criminal and civil horning

Horning, or putting to the horn, was the normal legal sanction against the contumacious.[4] Horning might be criminal or civil depending on the court in which it arose. Criminal horning which in itself is of less importance for the present purpose, arose where an accused person failed to appear at a criminal diet and had

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1. 2RPC vi 371 411
2. 2RPC i 482; 3RPC iii 32; vi 514
3. Suspension of horning was part of the king's equitable power to mitigate ecclesiastical and temporal pains: APS iii 312a
4. SHR xix (1919) 268

sentence of fugitation pronounced against him, as in cases of treason;[1] or where he appeared at court with a larger number of retainers than was permitted by the act 1555 c 15.[2]

Civil horning arose out of failure to implement a decree of a civil court. In actions before the session or council warrant for horning was usually contained in the decree; but with regard to decrees of inferior courts these were only warrant for letters of horning. Such letters of horning were only given out by the council or session on decrees of the church courts;[3] but only by the session in other cases.[4] The letters of horning were got after presentation of a bill together with the decree or other warrant charging the debtor to pay within 15 days on pain of rebellion.[5] The letters were warrant for lawful execution such as poinding to the extent of the debt. The debtor could only escape denunciation as a rebel by payment or by suspension of the charge.

Horning in the council

The council did not as a rule pass letters of horning on refusal to implement a decree.[6] The exceptions existed mostly in the earlier period[7] and in cases where the cause was privileged, such as those concerning strangers,[8] the king's revenues or oppressions and spulzies.[9] Even an action raised by children for relief from rigorous enforcement of an obligation was remitted to the bailies of Edinburgh.[10]

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1. RPC iii 174; iv 389 711; v 11 13
2. APS ii 495
3. 1593 c 7 (APS iv 16)
4. Burghs: 1593 c 34 (APS iv 28); Admiral: 1609 c 22 (APS iv 440); Stewartries and regalities: 1606 c 9 (APS iv 286); commissary: 1612 c 7 (APS iv 472)
5. 1593 c 34 (APS iv 28)
6. Eg RPC i 573
7. RPC i 679
8. RPC ii 492; iii 122 145; there are occasional hornings for non payment of taxes in the 17 century eg 2RPC ii 481
9. RPC i 573
10. RPC ii 329

It was the other form of civil horning - for failure to appear in answer to a charge before a civil court which was the chief kind before the council. In this respect failure to appear before the council even in an action which would normally be regarded as criminal resulted in civil horning, the underlying theory being that by raising an action before the council the pursuer had passed from criminal pursuit the action thereby becoming civil.[1] Horning for failure to appear was the result in three quarters of the riots and oppression before the council. The only relief from the monotony of this decree was an occasional supersedere (i.e. delay) of horning on account of illness of the absentee[2] and those cases after the 1590s where the council, at the insistence of the king's advocate, allowed probation taken in absence to be used against non-compearing defenders.[3]

Effect of rebellion

The effect of denunciation, from whatever cause, was a kind of capitis diminutio:[4] it put the rebel outside the benefit and protection of the law. He had no title to sue;[5] he could not hold office[6] and the lieges were discharged from obedience to him;[7] and until the act 1612 c 3[8] even in civil horning the rebel could be injured or slain with impunity. The general band increased the disabilities of rebels and resettlers in the highlands and borders. Being in rebellion against the king's authority was an offence in itself for which the rebel could be ordained to ward himself.[9]

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1. RPC vi 390; x 547; Hope vi 27 93
2. RPC vi 522; supra supersedere
3. Infra, probation in absence
4. RPC ii 74-77
5. RPC ii 486; v 127; vi 270
6. Hope vi 27 92
7. RPC ii 62 353
8. APS iv 471
9. RPC ii 354 360; v 161

As for the rebel's property, he suffered immediately single escheat to his overlord[1] or the king in respect of movables, "goods, geir and actiouns".[2] Further, a year and a day after the first denunciation the rebel's liferent escheat (his life interest in lands) could be sued for.[3] In this respect the grant by the council of letters of caption for the apprehension of the rebel and ejection of his family from his houses transformed the council into a handy debt court for the benefit of king and creditor.

21 Caption

Contempt of the king's authority

The basis of the council's jurisdiction in granting letters of caption (which by 1607 amounted to about one fifth of its work) is quite clear. Whereas in the constitution of ordinary civil debts the appropriate forum was the ordinary court, in captions the criterion was not the existence of a debt but the persistent remaining at the horn for non-payment of that debt or for some other reason.

The rebel was in contempt of the king's laws and authority[4] which was in itself sufficient interest for the king to pursue;[5] but the king had a further interest in that the rebel's escheat was exigible. Thus both the crown and a creditor had title to sue, which was done by bill narrating the debt and continued

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1. RPC vi 67
2. Balfour 557 558
3. RPC iii 70; iv 451
4. RPC ii 305; iii 564
5. RPC iv 97

rebellion of the debtor and praying for letters to answer for his high contempt.[1] Further, complainers appealed to the council for remedy because the defenders were rebels and outlaws without residence.[2] Only occasionally did the rebel compear; accordingly the general decree was for the executive authorities to take the rebel into ward, occupy his houses and bring in his goods for his majesty's use.[3] The creditor was entitled to all or part of his debt out of the escheat at the discretion of the treasurer, less the expenses of inbringing.[4] The rebel remained in ward in criminal horning until justice was executed against him and in civil horning until he had procured himself relaxed from the horn.

Execution

The earlier machinery of enforcing captions underwent several reorganizations which suggest that its effectiveness was doubtful.[5] The greatest weakness was the reliance on the executive functions of local officers, sheriffs, provosts and bailies (who were sometimes at the horn themselves),[6] or on self help of the creditor.[7] Radical changes came in the early years of the 17 century in the form of a royal guard, quite independent of local loyalties, and by the institution of a system of burgh tolbooths.

The Guard

The guard consisted of a captain, lieutenant, coronet and 40 horsemen with substantial wages from the exchequer[8] as well as expenses from rebels' houses.[9]

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1. RPC xiv 435 497; 2RPC viii 262
2. RPC iv 504
3. RPC iii 70; xi 21
4. RPC ii 77
5. RPC ii 74-77; iv 70-71; v 234
6. RPC iv 71
7. RPC ii 349
8. RPC vi 581
9. RPC vii 26

Their purpose was to execute the will and directions of the lords of session and ofcouncil and to repress all disorderly and disobedient subjects.[1] These duties extended to apprehending rebels[2] as well as political and religious offenders[3] and enforcing the laws against firearms[4] and feuds[5]. In their operations the local officers were to assist them.[6]

The guard lasted almost twenty years but it proved to be an expensive instrument. The king sought to make the best use of it by sending guardsmen out to the four quarters during court vacations to assist the sheriffs in their duties.[7] An attempt at disbandment was made in 1611 but it was only possible to cut down the complement.[8] Final disbandment came in 1621 ostensibly because the country had been reduced to tranquillity but in reality because of financial considerations.[9] The ex-guardsmen were later employed in uplifting taxes.[10]

Tolbooths

Along with the creation of the guard was the enforcement of legislation dealing with tolbooths[11] in which the guard lodged the rebels it had apprehended. The council compelled the burghs to find substantial caution that they would provide

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1. RPC vi 581
2. RPC vi 584; viii 39
3. RPC x 580
4. RPC vi 585
5. RPC x 580
6. RPC vi 586. This guard is quite distinct from an earlier guard which had been financed by an English subsidy and formed both a royal body guard and the nucleus of an army against foreign and domestic enemies (William Taylor, "The Scottish Privy Council" Edinburgh PhD Thesis 1950, 63-68).
7. RPC vii 329
8. RPC ix 161 180 189-190 213
9. RPC xii 582-584
10. RPC xiii 119. After the restoration the government resorted to quartering troops on those who failed to pay taxation and the council heard some few disputes arising out of this practice: 3RPC i 181 352; ii 4 289
11. 1597 c 44 (APS iv 141)

adequate tolbooths.[1] So effective was the guard in these activities that some burghs complained about the overcrowding of their jails,[2] and about the cost of their upkeep.[3]

Private pursuers

Whereas formerly, use of the council by individual creditors (even with the concurrence of the treasurer) had been infrequent, now under the new system the council became a debt court.[4] Almost every court day there were half a dozen captions in absence: (since these were almost all for civil debt the king's officers did not concur;[5] although there were also a few actions by the advocate or treasurer either themselves or in concurrence with parties). These creditors were primarily interested in their debts which, together with expenses and any penalty as modified, were a preferable claim on the escheat[6] and the council would not grant supplications against the grant of escheats until the debt had been paid.[7]

Public interest

But as the new century went on the crown made a determined effort against the rebels for its own interest. in 1615 a supplication of the treasurer was granted whereby a committee was set up to correct the registers of hornings and to draw up a new catalogue of rebels.[8]

Thereafter there was a sharp increase in the prosecutions by the king's advocate and treasurer against batches of rebels for remaining unrelaxed at the

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1. RPC vi 59 64 et seq; RPC viii 346
2. RPC xi 458
3. 3RPC i 209. But even in 1630 a creditor petitioned for the removal of a debtor to the more secure tolbooth of Edinburgh: 2RPC iii 471
4. RPC vii 34
5. RPC xi 283-284
6. Hope vi 30 9-11; 1581 c 23 (APS iii 223); 1592 c 63 (APS iii 573)
7. RPC vi 244 248
8. RPC x 376-377

horn without satisfying their creditors.[1] As with private captions most defenders failed to appear and they were apprehended and warded till they had satisfied the cause of their horning.[2] Those who could appear and produce relaxations[3] or satisfaction for escheats[4] or who offered acceptable composition to the treasurer were assoilzied.[5]

Cessation of captions

After the final disbandment of the guard in 1621 captions before the council virtually disappeared. For some months such few captions as there were were addressed to the sheriff.[6] Some others noted in the minute book have no corresponding entry in the decreta.[7] A few persistent captions, such as the pursuit of the chamberlain of the prince for the dues of Ettrick Forest can only be regarded as king's causes and therefore privileged.[8] There is no extant legislation and nothing in the ordinance disbanding the guard to suggest that captions were no longer competent before the council. They remained as they had always been, competent before the session.[9] Perhaps the era of the guard had offered the king and private litigants a more effective remedy than the sheriffs and with the demise of the guard the special attraction of the council no longer existed.

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1. eg RPC x 425-427 511
2. RPC x 425-427
3. Loc. cit.
4. RPC xii 24
5. RPC xii 117
6. RPC xii 642
7. RPC xii 641
8. RPC xiii 641. The same is true of the last 70 years of the council: the few scattered examples chiefly concerned the revenue (2RPC i 392) and foreigners (2RPC ii 314). In the 1660s there were also a few petitions by creditors for warrant to remove debtors from the sanctuary of Holyrood: 3RPC i 277 etc.
9. Hope vi 29

22 Escheat

Escheat of goods resulted both from horning for any cause and from conviction for serious crimes as well as lesser crimes such as deforcement[1] and some customs offences;[2] and when the goods were inventoried and brought in the king could retain them for his own use or regrant the escheat like any other marketable asset.

Re-granting of escheats

Very often the offender got back his own escheat and acts provided that he had not only to satisfy his victim[3] or creditor but also to compound for his escheat with the treasurer or lords componiters who were from time to time appointed from among the council and exchequer.[4] But the frequency of the legislation on this topic suggests that the statutes were not well observed. The king promised that escheats of certain traitors should be retained for public purposes and not regranted at all;[5] or that he would not allow rebels to buy back their own escheats directly[6] or collusively[7] unless it advanced the profit of the crown,[8] especially when the composition might be less than the debt due.[9] It was common to reward the loyal with the escheats of the disloyal;[10] but there was also an attempt at greater justice to the party injured allowing him or his friends to have the escheat "if they will make suit and pay reasonable composition", or, if they had already intromitted with the goods, making reckoning.[11] The council was also empowered to intervene by examining escheats granted to ensure that they had been truly and

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1. 1581 c 23 (APS iii 223); RPC iii 19
2. RPC iii 136
3. RPC iii 594; iv 579
4. RPC iii 375; iv 29 387; v 177
5. RPC iii 375; v 43 180
6. RPC iii 219 235; v 451
7. RPC iii 691 720
8. RPC iii 375
9. RPC v 451
10. Eg RSS v 2725
11. RPC iv 422

sincerely obtained.[1]

Although the granting out of an escheat was, like any other disposition of property, essentially an act of grace of the king or a contract between the donator and the crown and therefore, insofar as justiciable was a matter for the exchequer componiters or session, the council did concern itself with matters connected with those grants. In one case (possibly involving illegitimacy) the donator or recipient of an escheat had to find caution that he would apply it to the "utilitie" (ie trust) of children.[2]

Incidental disputes

Apart from the mechanics of caption and granting of escheats the council also dealt with consequential disputes. The rights of the donator of the escheat were enforced against those who had the subjects, the guard or keepers against the old proprietor or his tenants and factors even where the tenants had an action pending in the court of session.[3] These actions may have avoided the safer method of eliding an action of spulzie which was to take an action of declaration that the goods intromitted with belonged to the rebel. In one case, for no apparent reason, a supplication by a donator for delivery of the escheat from the treasurer was remitted to the session.[4] These cases are not frequent and turn more on threatened violence than title to the escheat

Other cases were in effect privileged causes as in the claims of third parties against the escheated estate in one case where 590M was due out of the estate the donator was ordered to refund 400M over four years to the widow complainer, and turn the interest to the maintenance of her children and similarly with the legal rights of a wife and children.[5]

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1. RPC iii 720
2. RPC ii 185
3. RPC ii 99 320; iii 268; v 25 85
4. RPC xiv 78
5. RPC i 586 600; iv 375

In two other cases both beginning as oppressions, the parties submitted their disputes to the judgement of the council: in one the parties were discharged from other recourse to law[1] and in the other the council reserved the right to interpret any dispute as to their decree.[2]

The supplicatinn of a wife of a rebel that even although the escheat had been disproved she would retain her own life interest and the life rent of her son was granted not by any rule of law but because the council were "movit partlie of clemency and favour" and partly for "divers utheris considerationis".[3]

Remit

Where the title to the escheat was in dispute as for example where the defender brought forward a belated defence to the action which ultimately resulted in his escheat, the council normally remitted the matter to the ordinary courts,[4] as with the defence of payment of the debt,[5] or wrongful conviction.[6] However, the council declared itself competent to deal with cancellation of an escheat where it was a matter which proceeded "upoun the abuse of his majestie and of his officiaris in circumvention of thame in the purchassing of the said escheat", even where the lords of session had sisponed the gift,[7] and where the cause of horning and escheat arose from an erroneous entry by the sheriff clerk on his own confession,[8] the letters of caption were suspended. The first of these might be considered an oppression; the latter a matter of equitable relief.

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1. RPC iii 225
2. RPC ii 35
3. RPC iii 340 371 cf ibid iii 204
4. RPC i 603 637
5. RPC i 637
6. RPC ii 164
7. RPC v 152 154
8. RPC iii 338

Punishment

Once an accused person had been convicted and sentenced the criminal court was functus officii

> and the punishment irrogat by him can only be remitted by the Prince, though the council may moderat or delay it[1]

Normally remission or respite of a valid sentence was an administrative matter negotiated between the accused, his victim (or his kin) and the treasurer; but the council did hear appeals for delay in execution until the king's will was known.[2] In the 1660s and after such appeals were frequent: the council normally sent up the papers to London with a recommendation that a remission should be granted.[3]

The council's function in punishment was to hear appeals more for mitigation than for remitting of sentences altogether.[4] Thus in the council, because of the inability of the offender to pay, a fine could be reduced or remitted, sometimes during good behaviour.[5] Similarly, the council recalled the deprivation of a sheriff clerk because of mitigating circumstances.[6] Where sentences (other than fines) were imposed by the council the defender was usually warded till further order was taken or until his majesty's will might be known.[7]

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1. Mackenzie Criminal ii 28 pr
2. RPC xiv 616; 3RPC viii 200 203; where a person had been wrongly convicted the appropriate grant was a remission or pardon (2RPC iii 87) which was usually preceded by a reprieve (2RPC iii 77) so that witnesses might be heard for ascertaining the truth (2RPC i 267).
3. 3RPC viii 86. Sometimes the "consideration" of a remission was military or other service to the crown (2RPC vii 311; 3RPC xii 166). If a remission had been granted and the recipient sought the council to alter its terms the kin of the victim were called to the hearing (2RPC vii 280).
4. These appeals came by way of complaint against the judge or prosecutor or by way of suspension. In the exceptional period of the restoration when large numbers of otherwise lawabiding subjects were being sentenced for offences of non conformity there were a great many suspensions of the penalties imposed both by the council and other courts (eg, 3RPC xii 322-3) on the grounds of illness, former loyalty, ignorance or poverty (3RPC vii 445 442 535; viii 153). There were also petitions by ministers and others to have the area of their confinement enlarged or taken off - usually under promise not to engage in political or religious activity (2RPC i 100 305).
5. RPC i 306; xii 342-3; Register i 9
6. RPC xi 312 336. Similarly with a messenger who had been reduced to poverty as a result of his deprivation from office (2RPC ii 410).
7. Melrose Papers i 126

With regard to the sentences of other courts they might have to act on a remit from the justice court or other court[1] or by appeal by the accused. In this function the council acted with remarkable flexibility. Anything in the nature of an oppressive sentence was dealt with. Thus a fine in excess of the statute or disproportionate to the accused's means was cut down[2] or the king's share of the fine was remitted.[3] In a conviction for insolence to the bailies of Ayr the council upheld part of the sentence but remitted a fine of 1000M imposed for contempt of court; and when the bailies fined the man again in the same amount for failing to appear in court this also was remitted;[4] similarly, the judge who convicted a woman of petty theft and sentenced her to exile from the parish and confiscation of goods etc, was held to have acted unwarrantably "for so light a caus".[5] Where the magistrates of Aberdeen imprisoned a man for failure to pay a fine for assault, the council stated that the imprisonment already served was, together with penitence, adequate punishment and therefore remitted the fine.[6] The death penalty for theft was altered to banishment because of the thief's extreme youth.[7] Often poor prisoners were reprieved on condition of going into exile or taking service in the wars[8] unless they were physically unfit.[9] The council also heard appeals against collective fines imposed on certain burghs.[10] Where necessary the council, on appeal of a third party, allowed an accused who was likely to be executed to serve as a recruit in Flanders[11] or as a burgh hangman.[12]

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1. RPC v 54; xi 72; Appendix H
2. RPC x 147; 2RPC iv 298
3. 2RPC ii 361
4. RPC viii 222 250
5. 2RPC vii 246
6. RPC iv 524; xii 321
7. RPC ix 372
8. 2RPC iii 528
9. 2RPC vi 275
10. RPC ii 402 413
11. RPC xiii 146
12. RPC xi 603; xii 97. As has been noted under petitions for powers there were after the restoration frequent petitions by merchants and others for delivery of convicts gypsies and vagabonds for transportation to the Americas: this was usually allowed at the sight of an officer of state or a councillor: 3RPC iii 21-22; iii 98 etc.

VII PROCEDURE

The procedure of the council, even in matters which would have been competent before a criminal court, was more akin to that of a civil action in the court of session.[1] Indeed, by resorting to the council, the pursuer was deemed to have foregone his criminal pursuit; and any horning of the defender for non compearance was a civil horning.[2] However the conciliar procedure was more summary and speedy than that of the session or of trial by assize. There were no calling days and no table, and all diets were peremptory. Further, this speedy process was regarded as necessary in certain offences to avoid the delays and subterfuges which were available to an accused on assize.[3]

The procedure of the council was in two parts: those matters which were raised by supplication and those dealt with by complaint. While procedure by summons is based on the idea that there is some person, whether an individual, body corporate or incorporate or the lieges, against whom the pursuer desires to establish a right or seek a remedy, a petition is 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.[4]

23 Supplication

A supplication was the means of seeking relief at the hands of an authority capable of granting it.[5] Supplications were common form before parliament[6] and

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1. Bisset i 85-278; Hope vii 1-19; Hope Minor Practicks i 1-116; Mackenzie Criminal ii 19-26; Mackenzie Institutions IV 2 1-8
2. RPC vi 390; x 574; Hope vi 27 93
3. 1600 c 14 (APS iv 228)
4. MacLaren Court of Session Practice 825; the usual result of a summons or complaint was a decree, and of a supplication, an act: Appendix F
5. Supra, equity
6. eg APS iii 230

before the papal rota,[1] as well as before the council. After the petitioner or his agent had drafted the bill it was presented to the council for deliverance, which had the effect of granting the prayer of the petition. During term the simple bills, which were usually granted without hearing on the petitioner's ex parte averments (such as those praying for letters of complaint or for lawburrows), were passed by the whole lords: they were endorsed "fiat ut petitur" with or without certain variations.[2] The deliverance was authenticated by the signature of the lords present[3] or with one lord signing for the rest, for example, "Rothes Cancell. IPD."[4] During vacation or after council time, these simple bills could be delivered by a single lord[5] - unless the council wished to limit the activities of a vexatious litigant by refusing to pass his bills "bot in presence and heiring of the haill counsell".[6] In any event, deliverances by a single judge were subject to review by the whole lords.

Where there was a difficult or unusual bill, or one which affected the interests of the crown or private persons the council refused to pass the bill without some qualification or until parties had been heard. This situation arose in procedural matters where a supplicant petitioned to be allowed advocates, in matters of grace affecting royal officers and in liberations and citations affecting the rights of third parties. Similarly many matters which might otherwise be dealt with by summons were, because they concerned the commonwealth, dealt with summarily by bill.[7] From the records of the council it appears that supplications were used not only for letters summoning a party to appear but also for relief at the hands of the king and

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1. Scottish Supplications to Rome i ii passim
2. Appendix N
3. 2RPC ii 594
4. 3RPC ii 675
5. Appendix M
6. 2RPC vi 136
7. Balfour 270; Hope vii 1; McMillan introduction xii

council in respect of the administration, royal patrimony and all matters touching gift, grace, pension or precept[1] - indeed almost all of the judicial work of the council except riots and oppressions. Supplications were also the appropriate form of procedure in cases which the present court of session would deal with by motion: to hear parties' procurators and receive a report;[2] to modify expenses;[3] to correct an error in a decree;[4] to declare that the proof led inferred no crime;[5] to fix a place for service of processes;[6] to declare that the defender has performed a decree in a complaint and for relief from penalty;[7] to arrest defender meditatione fugae[8] pending raising of summons; to ordain the macer to cite the defender;[9] to allow protection while attending council as a witness;[10] to serve summons at head burgh because defender has no residence.[11] From the fuller records of the late 17 century it appears that the commonest qualification of the deliverance of a bill was intimation on the other party.[12] This was always necessary where the form of the petition was, as in liberation, to liberate or appear and shew cause why the prayer of the petition should not be granted.[13] If the respondent failed to appear the prayer was usually granted; but the respondent could refuse to answer if he was not properly warned.[14]

Orders for discussing bills by the whole lords were laid down[15] but the less important bills such as suspensions were delivered almost automatically by a

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1. RPC iii 349 411
2. 3RPC xii 366
3. 3RPC xii 296-98
4. 2RPC i 548
5. 2RPC i 468-9 496
6. 2RPC i 497
7. 3RPC i 578
8. 3RPC v 152
9. 2RPC ii 629
10. 2RPC iii 213
11. 2RPC v 347
12. "Ordain the same to be seen and answered by the other party". 3RPC xii 263 308
13. Supra, liberation; "Ordainis the partie interest to be summonit to heir the desyre of the supplicatioun granted": 2RPC i 666-7; 3RPC ii 98
14. 2RPC iii 283
15. RPC i 159; ii 80; v 240; 2RPC viii 258

single councillor who was deputed for two weeks at a time.[1]

After 1603 there was a shuttling of petitions between the king and council: those made to the king were usually remitted to the council to investigate:[2] and those made to the council, if they touched on some important matter, were remitted to the king with the views of the council.[3] The council tried to prevent parties circumventing the ordinary processes of law by such importuning of the king.[4]

24 Process

Letters

Unlike the court of session, the council did not have in contentious litigation procedure by summons.[5] The party wronged proceeded by bill of complaint praying for letters against the wrongdoer to compear and answer for his actions,[6] to find lawburrows,[7] to find caution to do someting[8] or to give redress or satisfaction.[9] This was the appropriate procedure in cases of riot and oppression and the like.[10]

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1. 2RPC viii 258-364 passim; Appendix M
2. Melrose Papers i 69; ii 571; RPC xiii 539
3. Melrose Papers i 321 406; ii 431; RPC viii 162
4. Melrose Papers ii 474; RPC xiii 44
5. A common summons in the court of session required no special authority for service other than the affixing of the signet which was done as a matter of course (Bisset i 127); signet letters, however, required the authority of a decree or of a delivered bill, this authority being expressed by the words per decretum and ex deliberatione concilii respectively. In the council, "judicial" letters proceeded on bill, ex deliberatione secreti concilii, and administrative letters on an act of council per actum secreti concilii (RPC xiv 211). After 1584 judicial writs of the court of session were distinguished from writs of the council which emanated from the royal authority and the words "according to justice" (secundum legem) were appended: 1585 c 7 (APS iii 377).
6. RPC xiii 747
7. RPC xiii 748
8. RPC xiii 743
9. RPC xiii 741 742. A complaint is defined as a statement of inquiry or grievance laid before the court or judicial authority (especially and properly a court of equity) for the purposes of prosecution or redress (Oxford English Dictionary ii 723). Appendix M; Appendix L; Appendix F
10. RPC xiii 766; Appendix N(1)

In cases where the concurrence of the king's advocate might be appropriate, the pursuer submitted the papers to see whether the king's advocate would concur in the action for his majesty's interest. This memorandum or information "for raising a lybell"[1] was thereafter sent by the secretary of the king's advocate to the depute clerk of council with a covering note.[2] When the private pursuer gave no information the king's advocate could not pursue; and in some cases, failure of the king's advocate to pursue was fatal to the cause, but the absence of a private pursuer merely restricted the libel to arbitrary punishment.[3]

Citation

The delivered bill was authority to the keeper of the signet to affix the signet to the letters; and the letters in turn were authority to cite the defender. Citation of the defender was, if possible, to be personal. Citation was equally valid if made at the defender's dwelling place and at the market cross of the head burgh of the shire in which he lived; but where the defender had no dwelling place the council could grant a petition for service at the head burgh only.[4][5]

In the later period, it became increasingly common for defenders to raise a libel of reconvention or a counter complaint;[6] then both actions were discussed together, but separate decrees were pronounced.[7] And those bills which proceeded to proof like a libel were dealt with as if a summons.[8] Sometimes the matters to be proved were contained in the original petition of the pursuer, his complaint and the answers or counter complaint of the defender.[9]

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1. Many of these papers preserved in the miscellaneous papers of the privy council are not really steps of a process in court, but merely "crown precognitions": 3RPC xii 44-67
2. "My Lord Advocat desyrs yow to raise a lybell at his instance and at the instance of the partie grieved": 3RPC xii 48-50; xiii 83-84; Fountainhall i 328; ii 546 757
3. 2RPC iv 345; 3RPC ii 18; v 329
4. RPC xiii 380-381
5. 2RPC v 347
6. 3RPC vii 56
7. Appendix O
8. 3RPC xii 248
9. 3RPC xiv 32-3

Peremptory diets

The diet of compearance or any continued diet was peremptory;[1] that is to say, as with a diet in a criminal court, parties were cited to appear at a particular diet at which they were to be prepared to lead proof.[2] The reason is twofold: a pursuer in a prosecution "ought to be finally resolved and fully prepared before he stir in such a matter of importance"[3] and the council (and the criminal courts) were not, like the court of session, in continuous session, but only met on certain days. If the diet was continued it was continued to another diet which was also peremptory; the act of court was a warning apud acta to parties, procurators and witnesses.[4]

In the early period the diet of proof was usually a continued one;[5] and it may be that then the council adopted the procedure of remitting the proof to a sort of outer house councillor or other commission to hear the witnesses and report back to the whole council.[6] Later, however, the diet of compearance was with some exceptions[7] the diet of proof[8] unless the nature of the case required investigation of the facts by a commissioner, as where the witnesses were in foreign parts or[9] where the witnesses were ill.[10] The commissioner need not have been a councillor.[11]

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1. RPC v 266 493; vi 54 192; 1592 c 41 (APS iii 562); Mackenzie Criminal ii 6 1; Institutions i 3 6

2. Stair iv 2 1; Hume Crimes 263 et seq. Since one of the methods of proof was by oath of an adversary (infra probation), the defender had to be present; and the appearance of one defender on behalf of the others suffered an exception where the pursuer wished to refer the dispute to the oaths of all: then a further diet was fixed: 2RPC vi 3

3. Hume Crimes 263

4. RPC ii 232 593; Hume Crimes 275; Trayner Maxims (1894) 51

5. RPC ii 205 229; iv 489-491

6. "Edinburgh, 3d. day of June 1868. His Majesties High Commissioner and the Lords of Councill having heard the above written bill doe herby remitt to the Earles of Erroll, Dunfermline, Lawderdale and Brad"albane or any tuo of them to consider thereof and report, with power to them if need bees to take all probation necessar by oath of party or witnesses as they shall find most fitt and legall in order to the expiscating of the truth and to report": 3RPC xii 248

7. RPC vi 59; x 155 161

8. Letters 69-70

9. RPC iii 163; ix 174-176

10. RPC x 387. Such certificates required to be given on soul and conscience: 3RPC xi 35

11. RPC ii 622

If the defender was absent at the diet he was normally put to the horn, unless the induciae[1] allowed had been too short. When the defender appeared, but not the pursuer, his protest that he need not answer again without a fresh citation was admitted.[2] Actions which were not pursued for a year and a day fell asleep; to revive the action it was necessary to re-cite the defender by means of letters of "walkning".[3]

Process

Process is the normal word used in the minute book to describe an action where litiscontestation was allowed or took place.[4] Normally no process would be allowed unless the pursuer appeared in person:[5] appearance by procurator or agent was not sufficient because the party might be called upon to give his oath.[6] Process was normally granted or refused (when both parties appeared) on matters of relevancy or competency; thus the pursuer at the horn could have no process;[7] nor could the pursuer who had enacted himself not to raise an action.[8] Both the libel and the defences (or counter-complaint) were subject to the lords decision on relevancy.[9] A pursuer could amend his libel in order to make it relevant.[10]

These preliminary matters having been dealt with the process went to proof. If so advised parties could agree at the bar to vary the normal course of an action.[11]

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1. RPC vii 209
2. RPC v 105; Mackenzie Criminal ii 6 1
3. 3RPC i 422
4. RPC ix 34
5. 2RPC v 418 (pursuer abroad)
6. RPC vi 195; xiv 614 615; Mackenzie Criminal ii 6 1; Hume Crimes 265
7. RPC vi 270. Other preliminary pleas which were entertained includes, all parties not called: 2 RPC vii 162; lis alibi pendens: 2 RPC iii 337; res iṅdicata: supra, res iṅdicata; no title to sue or defend: RPC ii 486.
8. 2RPC iii 189
9. Eg, 3RPC ii 329-332; xii 120
10. 3RPC v 87 (omission of dates)
11. 3RPC vi 447 (sist pending decision in court of session action)

Consent

As in cases of feud and disputes between husband and wife it was competent for parties to prorogate the jurisdiction of the council in a matter which was more appropriate to another forum. More common was for parties to agree to arbitration of councillors or other named persons[1] to decide such issues without appeal or to accept the council's determination of quantum of damages, or extent of punishment.[2] Similarly a party might be induced by the council to concede his legal rights on the grounds of equity[3] or reasons of state.[4] The effect was that criminal pursuits were abandoned[5] and the libels before the council were discharged.[6] If need be the council would interpone authority to any extraconciliar agreement or a composition of parties.[7]

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1. 2RPC vi 183 187 272. However the council refused to arbitrate where some of those interested (creditors) refused to concur in the submission: RPC xiii 575-6
2. 2RPC vii 42 63
3. 2RPC vi 254 (landlord agrees to tenant remaining)
4. 2RPC vi 452 (out of affection for HM peace). Matters dealt with in this way included damages arising from failure to maintain dykes (2RPC vi 42), manrent (2RPC vi 63), wastange of estate (2RPC vii 194), ejection from fishings (2RPC vi 272), harbour dues (2RPC vi 452).
5. 2RPC vi 63
6. 3RPC iv 431
7. 3RPC v 109

25 Probation

The mode of proof in council was the same as in other courts: by writ, oath or witnesses; and it was competent to refer different parts of the libel to different modes of proof.[1]

Writ

Production of a probative writ put an end to any dispute as to title[2] and no witnesses could be led in contradiction.[3] If the writ itself was questioned it had to be reduced in the court of session. The more common probation by writ in the council was proof of a defence having tholed an assize: this was done by production of the act and rolement of the appropriate court;[4] but it was not sufficient to produce a notarial instrument of the fact without leading witnesses.[5]

Oath: oath of calumny

Probation by oath was appropriate in three cases. The oath of calumny (which is still obligatory in consistorial actions) is "nocht propirlie ane forme or kynd of probatioun", but merely a method of stopping "the malice and wickednes of men to pley or to vex or trubill thair nychtbouris maliciouslie contrare equitie and law".[6] The effect of the oath was that the pursuer had just cause to pursue and the defender to defend. Failure to give the oath when required by an adversary was equivalent to confession and entitled the other to absolvitor.[7]

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1. 2RPC iii 586; 3RPC ii 612
2. RPC ii 696; iii 134; v 479
3. Bisset i 196
4. RPC vii 322; ix 516; x 72,
5. RPC xii 270
6. Bisset i 189 190
7. RPC vii 308; xi 259

Oath of verity

The oath of verity, or oath of party, or great oath[1] was appropriate where the pursuer perilled his case on the oath of his adversary: if the defender denied the truth of the libel he was absolved:

> the said persewair in stead of all ather probatioun, haveing referrit the said complaint to the said defendair his aith of veritie he, being personalie present and deiplie sworne thereupoun deponit and declairit that the same wes not of veritie[2]

Equally when a defender admitted the libel probation was at an end.[3] If he refused the oath he was held as confessed.[4] Normally in criminal trials the oath of the accused was regarded as suspect[5] and in this respect the counciliar procedure was more civil than criminal.

It was competent for the oath of a party far distant or absent by illness to be taken on commission.[6]

Oath de iuramento

The oath de iuramento[7] was of limited application, it being the method of quantifying damages in actions of spulzie and the like, where the liability of a culpable defender was fixed by reference to the pursuer's oath as to the value of the goods lost and the damage sustained.[8] In one case, the question whether witnesses would have come to Edinburgh whether there had been a trial or not was settled in the same way.[9]

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1. RPC vi 388
2. RPC x 106; 2RPC iii 499
3. 2RPC i 181 632
4. RPC v 555. The case of prosecution of nonconformists for attending conventicles was somewhat different. The parties were cited by the king's advocate not to answer a libel but almost super inquirendis (supra), "to give their oathes thereupon with certificatioun they shall be holden as confest" (3RPC iv 235). Although the crown offered as an inducement the promise that the giving of the oath or refusal would not be used per se in a criminal prosecution, the parties objected to the procedure. The chief difference was that this procedure was compulsory whereas the defender in a riot submitted voluntarily to the jurisdiction of the council.
5. Mackenzie Criminal ii 25 1
6. RPC x 387; 2RPC iv 296; 3RPC ii 69
7. 3RPC vii 140 (oath in litem); 3RPC xiii 49-50 (iuramentum in litem)
8. RPC vi 476 486 490; ix 38; Hope vi 18 10
9. RPC v 473

Witnesses

Probation by witnesses was the commonest mode of proof before the council. The only unusual feature was the admission of witnesses who in other courts would not have been competent. Thus a pensioner, a servant, a boy were admitted; and a pursuer who had passed from the pursuit of one defender was allowed to use him as a witness against the others,[1] and even where he did not pass from the pursuit "albeit againis all forme".[2]

Other categories of witnesses, competent and incompetent, were examined by the councillors ex officiis, that is per curiam, and not as a party to the cause. To that extent the nature of the conciliar procedure was inquisitiorial, trying to get to the truth of the matter not as an umpire between two adversaries. Thus in an action of oppression where the pursuer alleged verbally at the bar that since the raising of the summons the defender had pursued him with pistols, the chancellor examined witnesses in respect of the later assault although the defender had not been cited therefor.[3] This power was effectively used against prevaricating witnesses.[4] But at the same time evidence elicited this way was used for proof of the libel.[5]

If the pursuer's witnesses failed to appear he was normally refused process[6] and only occasionally was a fresh diet allowed[7] - even the king's advocate was granted only one continuation.[8]

It was also competent for certain councillors to be deputed to view the locus of a dispute.[9]

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1. RPC vii 105 314; xiv 601 609
2. RPC vii 111
3. RPC xiv 604
4. RPC vii 188
5. RPC xiv 619
6. RPC x 127
7. RPC xiv 617; 2RPC ii 431 (pursuer refused to peril his case on defender's oath)
8. RPC vii 17
9. 3RPC ii 371 429-432

Probation in absence

Normally the absence of the defender was ground for refusing process to the pursuer and for putting the defender to the horn, there thus being no decision in the matter. However, in the seventeenth century, at the request of the king's advocate, the council passed an act allowing a pursuer to lead his witnesses against non compearing defenders, the depositions to be valid against the absentees, at such diet as they compeared at. This power was part of the campaign against disorder which modified the normal rules of trial by assize. The avowed purpose was to end the situation whereby a defender put to the horn for non-compearance might have the horning suspended, during the dependence of which the pursuer could have no warrant to cite witnesses and the defender would tamper with them. The result of this procedure was that the defender could be found guilty in absence and ordained to ward himself. In the later period no rule can be deduced from the practice with absent defenders: many continued to be denounced for absence; some were held as confessed; and some defenders were convicted in absence after probation: even then the absentee might be ordained to ward himself or pay a fine.[1]

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1. RPC v 479; vii 34 158 162 178 252

26 Quality of Proof

It is clear that in the processes before the council the burden of proof was on the pursuer,[1] and that corroboration was necessary;[2] but the presumption of innocence appears to have been seriously eroded where the defender was "ane vitious leivar and ane committair and doair of sindrie oppresionis and wrongis".[3] It is not clear whether the standard was the criminal one of proof beyond reasonable doubt or the civil one of a balance of probabilities. Such evidence as there is suggests the latter. In some few cases the notoriety of the crime(which the defender could not deny) was sufficient;[4] elsewhere a libel had been found proved against one defender and so much of it was verified against another as inferred the crime;[5] it was "most probabill and evident" that the defender had assisted in a prison escape;[6] the pursuer had to shew the probable appearance of truth of his complaint[7] or evidence containing diverse presumptions of a purpose to rape.[8]

Sometimes the evidence could be eked out by a councillor's own knowledge of the matter.[9]

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1. RPC vi 163; 2RPC i 520-22; viii 19-20
2. RPC vi 211. There was a clear exception in a separation case where normal probation was remitted out of regard to the safety of a spouse: supra, consistorial matters
3. RPC xi 539-540
4. RPC vi 59 341; x 204; xiv 614
5. RPC viii 63; sometimes the common phrase of the court of session was used, quantum ad victoriam causae: 2RPC iii 12; iv 148
6. RPC xiii 670
7. RPC ix 40
8. RPC viii 190 202 205
9. RPC vii 211; 3RPC i 165

27 Expenses and Fees

Expenses

Following the practice of other courts, the council in its discretion awarded expenses. The general rule was that success in the action carried with it an award of expenses against the other side:[1] thus the cost of litigation fell on him who had caused it, either by pursuing an unjust cause or maintaining an unfounded defence.[2] This rule and some at least of its qualifications were restated in the act of council of 1610;[3] (this act had followed on similar legislation covering expenses in the ordinar courts where the former modification of expenses[4] had resulted in abuse of process.)[5] The act provided that witnesses should have their expenses instantly modified and paid by the producer;[6] that according to his success or failure the pursuer or defender was to have his expenses modified to him at the discretion of the lords[7] and inserted in the decree.[8] Where the pursuer's malice was that he took parties and witnesses from their homes and failed in proof or failed to give the probable appearance of the truth of his complaint he was to be liable for their expenses and also for a reasonable fine to the treasurer.[9]

From the records it appears that the council might use its discretion to award some sum different from the actual expenses because of the conduct or status

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1. Because (in an action of riot) the pursuer undertook to prove them guilty: 2RPC viii 19
2. Shepherd v Elliot (1896) 2R 695 at 696. As to the items included in the award, vide infra.
3. RPC ix 40
4. Modification is a technical term meaning both the fixing of expenses and restriction of expenses.
5. 1592 c 62 (APS iii 573)
6. ie the party or procurator conducting the litigation: 2RPC vi 275
7. eg 3RPC iii 338 386; 2RPC vi 275 (award of £200 against king's advocate who twice failed to appear as pursuer)
8. If the award was not inserted in the decree, the witnesses could raise a separate action: 3RPC iii 386; iv 653 (crown witness granted treasury warrant)
9. There were many malicious prosecutions: eg RPC vii 188

of the parties, such as the minority of a party or extensive absence from home necessitated by attendance at court.[1] When a pursuer's witnesses failed to appear, and the pursuer refused to limit his proof to the defender's oath, a new diet was allowed, but on pain of double expenses if he failed at the new diet.[2]

Similarly the council awarded penal expenses against an unsuccessful defender who was wealthy and vexatious.[3] The council might also refuse expenses to a successful party. This was done in a counter claim as being the customary course of the council;[4] but later that custom had apparently been superseded.[5] The same refusal was apparent where a pursuer was successful in a proof in absence of the defender.[6] In the rather special case of an assault on a messenger the council awarded expenses of £40 to the king's advocate but nothing to the private pursuer.[7]

There are no clear cases where expenses were awarded against a successful party because of his unreasonable or careless conduct;[8] but the party who had a justifiable case of assault (which in the event was remitted to the ordinary courts) was made liable in expenses because he suppressed his complaint when the council was sitting in the area in which he resided.[9] Expenses were usually reserved in cases which were remitted to the ordinary courts for their decision on some preliminary point - such as title in an action of riot. Thus the expenses of an incompetent action before the council were ordained to follow

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1. 2RPC vii 193; 3RPC v 212
2. 2RPC ii 431. Double expenses or additional expenses were also ordained as a sanction for non-timeous payment of the original award: 2RPC vii 86.
3. 3RPC v 212
4. RPC xiv 610
5. 3RPC ii 93
6. 2RPC v 181 267 280; although (in some cases at least) with a right of relief against the defender: 2RPC vii 386
7. RPC iii 210
8. MacLaren Expenses 19-34
9. RPC vi 475

success in the action before the competent court,[1] but the council could also leave the expenses of the conciliar action to the ordinary court.[2]

Despite the provisions of the act of 1610 many decrees continued to omit any reference to expenses; and in many of these cases where expenses were awarded no specific sum was appropriated to expenses or to any particular item of expense.[3] They might be included in a fine or in the proceeds of the action.[4] Where there was specification of expense this related to witness fees, which usually took the form of separate sums to each horseman and each footman.[5] The variation in these sums suggests that they were related to the distance they had had to travel and, as was later expressed, the number of days on which they attended.[6] It is clear however that the rule of 1610 was observed in respect that only those witnesses who were produced and examined were entitled to their expenses[7] although in one case the issue was whether the defender's witnesses attended specifically to give evidence or whether they would have come in any case, was referred to the oaths of these witnesses, as a result of which they received 10M.[8]

Expenses, apart from witness fees, before the 17 century council were not normally intended to be reimbursement to the successful party of the "judicial expenses" of modern practice - which includes fees of solicitor and counsel, outlays, court dues, etc. Although, on occasion, we find the use of the phrase expense of process,[9] the awards in the council tend to be payments by way of

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1. 2RPC iv 415; 3RPC i 116
2. 2RPC iv 262
3. 2RPC iv 436 (but including unspecified witness fees)
4. 2RPC iv 233; vi 460
5. eg £10 per footman and 10M per horseman: 2RPC iv 415 440. Many amounts were expressed in dollars (3RPC iii 325), the rate of exchange being roughly $3 = £1.
6. 2RPC v 267; 3RPC vi 509
7. RPC xiii 99; 3RPC iii 92 368
8. RPC v 473
9. 3RPC vi 93

penalty against the unreasonable litigant[1] - or payments to account for the losses and inconvenience caused to the successful party by attendance at court. Thus we have phrases such as loss of journey, time, horse hire, diversion away from business, to cover return journey to court. Elsewhere the award is for the "pursuer's expenses".[2] As with present practice the procurator actually conducting the case was primarily liable for expenses.[3]

Fees

The lists of fees which the holders of the various offices were allowed to exact for writs passing their office, particularly keepers of seals included a table for council business.[4] The council fees are parallel to those of the session but not so extensive or detailed.

Contraveners of the table of fees were liable to be deprived of office and fined, one half of the fine going to the complainer.[5]

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1. Many of these awards were called fines. In an unjustified supplication for liberation the petitioner was sentenced to further imprisonment for bringing the bailies a great distance without cause: RPC ix 249; xi 295; xiii 756. The same punishment was inflicted in other types of actions also: RPC vii 49; xi 64; 2RPC v 244.
2. 3RPC i 235; iv 345; vii 86
3. 2RPC iii 169; vi 275
4. Skene De Verb sv foedum; RPC vii 164; 1621 c 19 (APS iv 619)
5. RPC ix 323-324

VIII DEMISE OF THE COUNCIL

Act of 1707 and after

The abolition of the separate Scottish privy council had been envisaged in the act of union and the preceding negotiations.[1] Shortly after the union, an act of the United Kingdom parliament was passed amalgamating the privy councils of England and Scotland, as from 1 May 1708.[2] This measure was pushed through parliament by Godolphin in the face of considerable Scottish opposition and controversy.[3] Part of this feeling was patriotic; part was the fear of the church that the establishment and the ecclesiastical control of patronage were in danger. Lord Kames voiced the legal objections to the abolition of the council: he criticized the disappearance of old remedies and he made a plea for the assumption of the old conciliar jurisdiction by the court of session to deal with wrongs which "the legislature could not intend to leave without remedy".[4]

The basis of Lord Kames' objections can be seen in the terms of the unification: the new united privy council of Great Britain was accorded "the same powers and authorities as the Privy Council of England had ... at the Time of the Union and none other."[5] Now the English council had at one time exercized a jurisdiction

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1. Proclamation empowering the privy council to continue meeting as "our Privie Counsell in Scotland until we shall otherwise provide", in terms of the treaty of union, article 19 (MS RPC Acta (1703-7) f 254). Article 19 provides inter alia "That all other Courts now in being within the Kingdom of Scotland do remain but subject to Alterations by the Parliament of Great Britain." 1707 c 7 (APS xi 411).

2. 6 Anne c 6, section 1

3. Seafield Correspondence (1685-1708) 436 450; Mar & Kellie i 421 426-7; Burnet History of My Own Time (1838) 823-4; Somers Tracts (1814) xii 624-5

4. Historical Law Tracts 212-215; Equity ii 55-57; Erskine i 3 23; i 3 9

5. 6 Anne c 6, section 1. The power of appointing JPs was transferred to her majesty and until 1955 has been exercized by the English chancellor.

comparable to that of the Scottish council; but that came to an end in 1640 when the court of star chamber (which had been the judicial aspect of the council) had been abolished.[1] Thus the new British council had none of the extensive judicial powers of the old Scots council; and no statute, nor act of sederunt, nor act of adjournal was passed to transfer that jurisdiction to the ordinary civil or criminal courts.

Riots

Much of the work, such as riots and petty crimes (also liberation), would in any event have been tried before the justices of the peace or other inferior courts; and in one case at least the court of session unanimously decided that an offence declared to be privative to the council was cognizable by the court of session because the council had been abolished.[2] In the more orderly climate of the 18 century the ordinary courts were probably quite adequate for these purposes: the same is not true in relation to other aspects of the jurisdiction of the council.

Equity and administrative law

On the other hand the court of session (which was pre-eminently the court of civil actions) had always limited its jurisdiction to those matters where the pursuer had a pecuniary interest.[3] If there was an appropriate forum elsewhere - such as the commissaries or the lord lyon - so much the better for the pursuer;

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1. 16 Charles 1 c 10
2. Hamilton v Boyd 1741 M 7335: The act of parliament 1672 c 16 (APS viii 61), re-enacting an act of council of 1668, had given the council privative jurisdiction in actions for breach of certain trade regulations. The act 1703 c 10 (APS xi 109) gave the ordinary courts power to deal with offenders against the regulations who were beneath the rank of heritor and to punish by way of transportation. The court of session held that it had jurisdiction not only in the matters covered by the act of 1703 but also by virtue of the acts of 1668 and 1672.
3. Supra, civil action

but if the appropriate forum would (but for its abolition) have been the council, the court of session would not intervene to exercize its nobile officium and thereby give him a remedy. After 1708 the brocarde ubi ius, ibi remedium was no longer true.[1]

The loss to the lieges of these remedies - which were occasioned by the abolition of the privy council - was not felt greatly in the 18 century largely because this was the period between the waning paternalism of the renaissance monarchies and the collectivism of the later 19 century, during which time the intervention of the state in private relationships was at its least. However, with the advent of the collectivist legislation, brought about by the industrialization of Britain, the citizen had no effective remedy against the power of the executive, even when it acted in a manner contrary to the spirit of the law and in a manner which was morally unjustifiable or reprehensible. Most of the "legal injustices" of modern administrative law which today go without remedy would have had a remedy had the council remained in being.[2]

Theoretically, the crown cannot be made the subject of a jurisdiction which flows from itself.[3] This of course was never true in the sphere of "constitutional law in the private aspect" or in pure private law: the Scots litigant has always had a greater opportunity for redress (as of right) against the crown in cases of contract and delict than was ever available in England. But in

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1. In some cases a remedy might exist in theory but not in practice. While the council existed all liberations could be dealt with, no matter what was the cause of imprisonment: thereafter the supplicant might have practical difficulty in deciding whether to pursue in the court of session, justice court or exchequer: Moncrieff Review passim; supra, liberation.

2. Cf Smith v East Elloe Rural District Council ([1956] AC 736); Liversige v Anderson [1942] AC 206; Pollok School v Glasgow Town Clerk 1946 SC 373; Hayman v L A 1951 SC 621. The present law depends not on principle but on construction of the statute; but the whole position of the crown in litigation in Scotland even after the Crown Proceedings Act 1947 is far from clear: K W B Middleton Crown Proceedings Act 1947 Introduction to Part II Butterworth 1948

3. Erksine i 2 3

"constitutional law in the public aspect" the English notions of sovereignty have rather illogically dominated the British constitution;[1] and have thereby excluded from judicial review all the acts of the executive, including any exercize of administrative discretion which has been conferred on the executive by statute or otherwise - unless there is bad faith, and sometimes not even then.[2]

A far different position existed with the Scots privy council: there was no conflict with the executive because the council was the executive. Since the king and council constituted the executive, since the council included within its numbers the heads of the government departments, and since the remedies offered proceeded in form at least as acts of grace, no violence was done to the crown's theoretical immunity from its own law. The granting of a remedy was more in the nature of an exercize of the royal authority than of a judicial process as in private law.

The same distinction as had existed between the ordinary courts and the incipient session (and later between the college of justice and the privy council) exists between the ordinary courts of today and the privy council of the past. The ordinary courts were courts of law, the council had been a court of justice. Modern administrative law has little place within the ordinarium officium and there is no nobile officium into which it would properly fit. In modern France there are two legal systems: the judicial jurisdiction for disputes between private parties, and the administrative jurisdiction for disputes in which the state is a party. Each system has its own hierarchy of courts and its own law. Above the two systems is a tribunal of conflicts which first classifies cases and sends them

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1. MacCormack v L A 1953 SC 396 at 411
2. Smith v East Elloe Rural District Council [1956] AC 736

to the appropriate jurisdiction. Here the chief organ of the administrative jurisdiction is the conseil d'état which is in all respects analagous to the old council in composition and function: like the council, the conseil is a group of civil servants disciplining the civil service and also protecting it. The old Scots council, as we have seen, had been both the conseil d'état and a tribunal of conflicts.

IX CONCLUSION

In answer to the question which was the occasion of this investigation - what the ratio of the residual jurisdiction of the council was after 1532 - it can be said with substantial accuracy that the pre-eminent position of the college of justice as the appropriate court for civil actions was upheld; and that the jurisdiction of the council after 1532 did not extend in that direction. While the court of session was becoming a superior ordinary court of law, the residual legal business of the council in hearing "the complayntis of pairtys" and "causes and actiones betwixt subject and subject"[1] amounted to no more than an extraordinary equitable jurisdiction springing from the essential nature of the council as the prime organ of government, as the normal vehicle of the royal prerogative and as the guardian of the peace.

This thesis does little more than illustrate, amplify and confirm the highly condensed description of the privy council which has been given to us by Mackenzie.[2] In the first instance the lieges were enjoined to exhaust the ordinary processes of law before coming to the council; but if parties did come to the council, the remedies available to them were limited by the very nature of the council and were confined to meeting situations for which the law did not provide; and if any legal issue emerged it was straightway remitted to the ordinary courts.

Any exceptions to these general principles were, on closer examination, more apparent than real. Most of the decisions which appear to encroach on law were pure riots or penal actions, in which the council had undoubted jurisdiction or they were emergency or incidental decisions, or judgments proceeding by consent or by

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1. 2RPC i 249-50; 3RPC xiii 379
2. Appendix C

statutory arbitration of the council. And the king's position as the fount of justice was sufficient basis for the exercise by the council of power to adjudicate between conflicting jurisdictions.

In general, equitable remedies and possessory decisions merely gave the supplicant some new privilege or confirmed a pre-existing ex facie right. In no sense can they be equated with the effect of a decree in foro contradictorio. Even in riots and other penal actions the decision of the council was only decisive of the criminal aspect pro tanto, but left open the civil remedies of parties. In these circumstances it is not possible to regard the council as dispensing any particular corpus of law such as civil or canon law, but rather to look upon each decision as proceeding on its own particular facts towards a just result.

It can also be said with some confidence that, although clothed in the apparatus of a court of law, the council had as its residual jurisdiction the continuing equitable power of the crown to give relief to the lieges in default of legal remedies. In so doing the council was scrupulous in its refusal not to deal with matters which had an adequate remedy in the ordinary courts of law.

The defects of the council - which were largely limited to the cruel enforcement of the arbitrary policies of the restored Stuarts - were temporary blemishes which did not impair the essential worth of the council as an equitable court. On the whole it was a popular court and a court of integrity; and it possessed a legal acumen higher than that of most of the ordinaries. Almost as a byproduct of the policy whereby the crown, acting through the council, was strengthening its position in the state against lawlessness and antisocial elements, the council gave to all the lieges that justice which was so often deficient in the ordinary courts of law - substantial and expeditious justice.

APPENDICES

Appendix A

Constitutional Documents of the Privy Council 1532-1707

1542/3	APS ii 414	1592	APS iii 562
1543	APS ii 442	1593/4	APS iv 53
1545	APS ii 595	1598	APS iv 177; RPC v 500
1546	RPC i 24-25	1603	RPC vi 560
1561	RPC i 158	1610	RPC viii 815
1562	RPC i 217-218	1626	2RPC i 248-252
1567	RPC i 510	1631	2RPC iv 188-190
1571	APS iii 69	1641	2RPC vii 142-147; APS v 388
1577/8	APS iii 118-119	1661	3RPC i 1
1578	APS iii 96	1674	3RPC iv 186-189
1579	APS iii 150	1676	3RPC v 6-9
1581	APS iii 228	1684	3RPC ix 32-35
1583	RPC iii 575	1685	3RPC xi 12
1585	APS iii 378	1687	3RPC xiii 140
1587	APS iii 444	1689	3RPC xiii 378
1589	RPC iv 425		

Appendix B

Commission of Privy Council, 1626[1]

... His Majestie, out of his princelie and tender regaird to that his kingdome, haveing a speciall care to the weele thairof, and that his royall auctoritie may still be praeserved and advanced thairin, his subjectis retentit in good obedience, all insolencies and misdemeanouris praevented and supprest, and lykewayes that justice may haif ane upright course and progress and his subjects rassave laughfull expeditioun in thair affaires:

Thairfore his Majestie hathe electit and choisen the personis particularie underwritten, - thar are to say ..., - to be upoun his Privie Counsell in his said kingdome

[1] unto whiche personis of his Counsell now established and to suche as sall be nominat by him heirafter, his Majestie hathe committit and be the tennour heirof committis, the full administratioun, governament, and handling of all and sindrie the affaires of his estate in his said kingdome whiche heirtofore hathe bene usuallie handlit or treated in the Counsell of his said kingdome, with als ample libertie, priviledge auctoritie, preeminence and jurisdictioun as ever Counsell of his said kingdome bruiked or enjoyed in ony time heirtofore;

[2] with power to thame to this effect to appoynt tymes of thair meeting alsweele for

[a] consulting and concludeing upoun matteris concerning the estate and praeserving of his Majesties peace; as for

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1. 2RPC i 248-252. The reason for the granting of a new commission to the council can be traced to the accession of a new monarch as in 1661, 1685, 1689; to Charles' policy of enforcing the view that the councillors held office ad beneplacitum as in 1626 and 1631; to effect a change of personel as in 1674, 1676, 1684 and 1687; or to the revolutionary situation of 1641.

[b] heiring the complayntis of pairtyis and doing of justice thairunto;

[3] the place of meetting to be in his Majesties hous of Halryrud Hous, except some urgent occasioun draw the same to some other pairt in that kingdome for a space;

[4] and nane be praesent at thair meettingis but suche as ar of his Majesties Privie Counsell, with the Clerk of the said Counsell allanerlie, whome his Majestie continewis in his place as before.

[5] His Majestie hath lykewayis gevin and grantit and be the tennour heirof gevis and grantis his full power and commissioun to thame and everie one of those of his said Counsell, upoun ony intervening occasioun of trouble and disordour in suche pairtis of the countrey where they sall remayne for the tyme, to command and charge the persone or personis committaris of suche disordouris to observe and keepe his Majesties peace, and to charge the contravenaris thairof to enter thair personis in warde in suche pairt or place within such a short space as his said Counsellour sall think meitt, thair to remayne till ordour be taikin by the whole bodie of the Counsell in the matter whairin thay haif offended; provydeing always that thay be accomptable to his Majestie and the rest of his Counsell that no just caus of complaynt be hard againis thame. And if the persone or personis so charged to warde salhappen to dissobey and contemne the charge, it is his Majesties pleasure that, upoun report thairof to the Counsell, a pecuniall fyne be imposed upoun the defendair according to the qualitie of his persone and nature of his offence, and if the Counsell think meete to cause apprehend the offendairis and committ thame to warde to that effect.

[6] With power likewayes to his said Counsell to mak and sett downe Actis and Ordinanceis for governament of his said kingdome and suppressing disordouris within the same.

[7] With power to thame likewayes to convene befoir thame and censure beararis and weararis of hacquebuttis and pistolettis, adulterers, committaris of ryottis, and transgressouris of penall statues,[1] excepting suche as his Majestie by ane other Commissioun of the date heirof called the Commissioun of Grievances, hathe appoynted to be tryed and censured by the Commissionaris thairin mentioned.[2]

[8] And, of only opin and avowed rebellioun salhappin to be raised within his said kingdome whiche cannot be suppressed bot by force, with power to the said Counsell

[a] to gif commissioun of lieutennantcie and justiciarie for suppressioun of the said rebellioun; and

[b] to direct chargis to suche pairtis of the countrey as they sall think fitte for thair concurrence to be given in the executioun of his said commissioun; and

[c] to give ordour and directioun to furnishe and advance the soumes of money that salbe requisite in suche expenditionis.

[9] With power also to the Counsell

[a][3] to nominate assistants to the justices incaise of necessitie and

[b] to give warrand to the saidis justicis[4]

[i] for continewing or deserting of dayes of law, or

[ii] for doing justice or continewing of execution after conviction; or

[iii] for mitigatting of the punishment of the law in criminal caussis if the nature and qualitie of the cryme sall require; and

[c] to grant

[i] commissionis of justiciarie in matteris criminall; and

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1. In later commissions: "With power alsoe to give warrands to the Justice General Justice Clark and other commissioners [of Justiciary] for imposing of fynes or pecuniall soumes upon the crymes of adulterie, etc., and such other transgressiones of the Acts of Parliament wher the punishment by the law is inflicted upon the body or goods or left to the arbitrament of the judge": 3RPC xiv 380
2. Last three lines of this clause were omitted from later commissions.
3. Omitted after 1672.
4. After 1672 "Justice General, Justice Clark and Commissioners of Justiciary.

[ii] otheris commissionis in matteris concerning the weill of that kingdome; and

[d] lykewayes to grant exemptionis from osts or raides of [lege or] assyssis, and

[e] to grant licences of depairting and passing out of the said kingdome according to the conditionis contenit in the Act of Parliament.

[10] With power likewayes to the said Counsell

[a] to raise the Sessioun upoun interveneing occasioun or necessitie; and

[b] to appoynt tymes and places of thair dounsitting

[11] And generallie with power to the said Counsell to doe, use and exerce all and everie other thing whiche the Counsell of the said kingdome did or might haif done in the tyme of his Majesties said deare father ...

Appendix C

Privy Council in 17 century

1. The privy council is constituted by a special commission from the king, and regularly their power extends to matters of publick government; in order to which they punish all riots, for so we call breach of the peace. They sequestrate pupils, give aliment to them, and to wives who are severly used by their husbands, and many such things which require so summar procedure as cannot admit of the delays necessary before other courts: and yet if any of these dip upon matter of law (for they are only judges in facto) they remit the cognition of it to the session, and stop till they hear their report.

The council may also delay criminal executions, and sometimes change one punishment into another; but they cannot remit capital punishments. They may also adjourn the session or any other courts.

It has its own president, who presides in the chancellor's absence, and its own signet and seal. All who are cited to compear there must be personally present; because ordinarily the pursuer concludes that they ought to be personally punished. All diets are peremptor, all debate is in writ, no advocate being ordinarily allowed to plead before them because the council only judges in matters of fact.[1]

2. The Second Supream Court is the Privy Council

This court consists of the Chancellour, who presides the other Officers of State, the President of the Session, justice General and such others of the Nobility

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1. Mackenzie Institutions (1684) i 3 6; cf Criminal ii 6 1-8

and Gentry as the King pleases to Name, this Court was Originally appointed for the publick affairs, and are judges of Riots, and disturbances given to the peace of the Nation, but it arose to its highth only when King James came to England, who placed much of the power anent publick safety and peace of that Kingdom in the Privy Council: Yet till of late this Court did never decide in Civil or Criminal causes occasioning any debates but remitted the same unto the Judge Ordinary either via ordinaria by raising of formal processes, or summarily be remitts, and the parties application to the Judge, or Judicator competent: Many think this extraordinary power given to this Court was a ready way not only to introduce the dispensing power, but also an Arbitrary Goverrnment into that Kingdom, the Council having no bounds further than to obey whatever the King by Evil Ministers suggested to them by Letters, or other ways, and if there could be an Union happily concluded betwixt the Two Nations the deciding of Riots, etc. might be done by the Sheriffs of the several Shires, and if difficult, the Lords of Session by a distinct Sederunt from that of the Session, once or twice a week might decide all these affairs, competent to a Privy Council themselves, being made up of ordinar and extraordinar Lords, and this would be a great ease to the lieges, not to be obliged to attend Two Courts where one might serve. This being only Honourable they have neither Pensions nor Casualities.

Appendix D

Comparison between Privy Council and Court of Session: Organization and Function

	Privy Council	Court of Session
Constitution	Common law; commission	Statute
Composition		
Ordinary lords	30-50	15
Extraordinary lords		4
Total		15
Quorum	various	9
Form of Address	Lords of Secret council	Lords of council [and session]
Appointment	Letters under signet	Letters under signet
Tenure		
(a) Ordinary Lords	ad beneplacitum (except in 1641-1661)	(a) 1532-1625 ad vitam 1626-1641 ad beneplacitum 1641-1654 ad vitam 1661-1689 ad beneplacitum 1689 ad vitam
(b) Extraordinary lords		(b) ad beneplacitum
Chairman	King/Chancellor/President/ Senior Lord	King/Chancellor/President/ Senior Lord
Meeting Place	Edinburgh: tolbooth; parliament house (1641) Holyroodhouse circuit	Edinburgh: toolbooth; parliament house (1641) Elsewhere exceptionally - plague, tumult in Edinburgh
Days	By 1580s Tuesday, Thursday; other days if (i) pressure of business (ii) on circuit	Tuesday to Saturday - even if holiday or festival
Times	Afternoon	Mostly morning
Vacation	Few weeks in autumn	(i) April, May (ii) August, September, October
Clerk	Clerk of Council (later two)	(i) Three clerks of court (ii) Clerk of bills
Seals	"Court signet"	Signet

	Privy Council	Court of Session
Records		
Sederunts	Books of Sederunt (separate from 1598)	Books of Sederunt (includes Acts of Sederunt)
Procedural	Minute Book of Process (from 1610; kept contemporaneously 1631)	(i) General minute book (ii) Three particular minute books
Substantive	Acta et Decreta (includes legislation; separate 1610)	Acts and decrees (from 1554)
Registration	Acta; acta cautionis	Register of Deeds: Books of Council and Session
Special	Book of Fines Borders, Acta penes Hibernia, etc.	
Function		
Executive	Principal function	Indirectly in supervision of inferior courts
Judicial	Limited: Summary: Administration; riots; equity	Principal: civil actions ordinary and summary
Legislative	Subordinate legislation: public peace; administration; trade	Limited: Acts of sederunt regulating procedure
Writs (judicial)	(i) bill, supplication, request, petition (ii) Letters ex deliberatione, per actum	(i) bill (ii) summons (iii) letters per decretum, ex deliberatione

Appendix E

Comparison between Privy Council and Court of Session: Membership, March 1625

Privy Council	Court of Session
*John Erksine, Earl of Mar Treasurer	
John Spotswood, Archbishop of St Andrews	
*James Law, Archbishop of Glasgow	
*George Seton, Earl of Winton	
*John Drummond, Earl of Perth	
*Sir John Scot of Scotstarvet, Director of Chancery	
	*Sir George Hay of Kinfauns Chancellor
	*Sir Thomas Hamilton, Earl of Melrose Secretary, President of the Council, President of the Court of Session
	*John Maitland, Earl of Lauderdale
	*Sir Richard Cockburn of Clerkington Lord Privy Seal
	*Sir Archibald Napier of Merchiston Treasurer Depute
	*Sir William Oliphant of Newton King's Advocate
	Sir John Hamilton of Magdalens Clerk Register
	*Sir James Skene of Curriehill
	*Sir Andrew Hamilton of Redhouse
	*Sir Alexander Hay of Fosterseat
	Sir Andrew Fletcher of Innerpeffer
	Sir Thomas Henderson of Chesters

Privy Council	Court of Session
	Sir Alexander Gibson of Durie
	Sir George Erskine of Innerteil
	Sir William Livingstone of Kilsyth
	Sir Robert Spotswood of Newabbey, Extraordinary lord
	Alexander, Earl of Linlithgow Extraordinary lord
	*John, Lord Erskine, Extraordinary lord

* The names marked are from the sederunt of the last privy council of James VI's reign: all the lords of session were privy councillors, but most of those unmarked confined their activities to the court of session.[1] The list of councillors is not complete: there were almost 30[2] others (none of whom was lord of session) including a score of great nobles. Charles removed from the court of session all the judges who were nobles, officers of state or privy councillors. For a time the only members common to the session and the council were the chancellor and the four extraordinary lords; but after Charles' reign the lords of session reappeared on the council. Of the sederunt of 11 August 1685 there were five ordinary lords; and new council of 1 November 1689 included four lords of session with the subsequent addition of others.[3]

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1. RPC xiii 722; Brunton & Haig, Senators of the College of Justice passim ; SHR xi (1914) 167 et passim
2. RPC xiii preface vi-x
3. 3RPC xi 143 378-9

Appendix F

Acts and decrees

A decree was a decision between private parties in a matter raised before the council by way of complaint. The decree decerned against the party who failed in the action. The effect of a decree in a defended action was to raise a plea of res iudicata between those parties and that subject matter: it did not preclude further litigation between different parties. A decree proceeded on the basis of existing law and gave to the parties no more than what the law accorded to them. Depending on the facts of each case, the decree might enshrine a novel rule of law which would tend to be followed in similar cases in the future. Only to this extent could a decree be regarded as "making new law".

An act on the other hand was the manifestation of the authority of the council whereby, following a bill or supplication,[1] it granted to a party not something which the law already accorded to him, but some benefit or privilege which the law did not provide. Thus an act was the appropriate form of award to a supplicant who appealed to the nobile officium. (In parliament a statute or act is preceded by a bill; and in the Scots parliament and the general assembly there was an overture.) Whereas a decree merely decided the rights of the parties involved an act gave to the supplicant a "real right" effective against the whole world.

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1. The words "bill", "petition", "request" and "supplication" appear to be equivalents (Bisset i 124; RPC i 159; ix 184; APS iii 97 151) both for actions which never went beyond the petition stage (where the contradictor, if any, was a respondent) and for bills praying for signet letters (2RPC viii passim). In a single entry one such is referred to as bill, petition and supplication: 3RPC xii 263-64

The legislative effect of an act depended on the authority of the tribunal making it and on the generality of the application of the act itself: thus there might be an act of privy council, such as a protection, in favour of one harassed debtor,[1] as opposed to an act of parliament, such as 1612 c 13 which relaxed the effect of civil horning in favour of all debtors.

The acts of the privy council may be of several kinds:

(1) individual procedural act, eg,[2] an act allowing proof;

(2) "private act" eg, act settling scheme of tolls for repair of a bridge, or an act indemnifying a person in respect of an act otherwise unlawful;[3]

(3) general procedural acts, eg, act allowing probation in absence in certain prosecutions;[4]

(4) "public acts" or ordinances whereby the council, acting under statute or common law promulgated "inferior legislation" on matters such as coinage or trade regulation.[5] Similar acts were used to proclaim an old statute and thus intimate that it would be enforced.[6]

(5) In a special category is an act of caution. Here the bond of caution was acted and registered in the books of privy council. In effect the court converted the bond into an act.[7]

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1. APS iv 471
2. cf Erksine iv 1 69
3. RPC iv 405
4. RPC v 479; vii 34 158
5. eg RPC iv 365
6. Mackenzie
7. The party became "actit and obleist" as cautioner: RPC xii 414

Appendix G

Office of Master of Requests

Vide, "Office of Master of Requests" in Juridical Review iv (1959) 210

Appendix H

Petition and direction

The following table is indicative of the range of matters on which inferior courts sought the opinion of the council.

Inferior Court	Petition	Direction
Steward depute	Sentence: theft of lamb	(a) pardon (b) undertaking not to repeat[1]
Justice	Effect of a previous conviction in council	assize tholed[2]
Bailie of Carrick	Whether competent to prosecute gypsies, neither (a) in fang, nor (b) accused of crime	bailie to execute the statutes or exhibit before justice[3]
-do-	Sentence: theft of sheep, (a) first offence (b) motive poverty	(a) scourging (b) branding[4] (c) exile from Carrick
-do-	Sentence: bestiality where, (a) 4 jurors voted for conviction (b) 10 voted for intent	exile for intent[5]
Bailie of regality	Sentence: murder of a whole family by two accused	(1) principal: (a) mutilation (b) hanging (c) quartering[6] (2) accessory: hanging
Bailie depute	Sentence: theft by boy from mother	one month bread and water

1. 2RPC v 339
2. 2RPC ii 181-182
3. 2RPC ii 533
4. 2RPC iii 533
5. 2RPC v 216
6. 2RPC v 253
7. 2RPC iv 115

Inferior Court	Petition	Direction
Sheriff	Sentence: accused too ill to go to wars	(a) scourging (b) branding[1]
-do-	Sentence: theft	-do-[2]
-do-	Sentence: gypsies	-do-[3]
Steward	Sentence: demurrer at previous direction of death	banishment[4]
Commissioner	Sentence: reset of cows	-do-[5]
Sheriff	Sentence: minor theft	(a) to the wars (b) exile[6]
Commissioner	Sentence: theft	(a) exile (b) caution[7]
Justice	Sentence: robbery, first offence	exile[8]
Admiral	Whether king's advocate or procurator fiscal of admiral's court to prosecute	fiscal to pursue[9]
-do-	Sentence: torture of strangers	admiral to consult with HM[10]
Commissioner	Sentence: theft of 7 sheep	to be advised after conviction banishment[11]
Tacksmen of Orkney	Sentence: mutilation	(a) banishment (b) satisfaction[12]
-do-	Sentence: cutting off ears	cutting off ears[13]

1. 2RPC vi 275
2. 2RPC vi 313
3. 2RPC vi 333
4. 2RPC vi 385
5. 2RPC vi 428
6. 2RPC vi 522
7. 2RPC vii 3 etc
8. 2RPC i 17; ii 134
9. 2RPC i 525
10. 2RPC iii 464
11. 2RPC iv 111
12. 2RPC iv 120
13. 2RPC iv 140

Inferior Court	Petition	Direction
Justice	Sentence: bigamy with mitigating circumstances	exile[1]
Provost and bailies	Sentence: witchcraft	death[2]
Admiral	Whether he may receive probation post conculsum in causa	only if parties swear that matters are res noviter[3]

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1. 2RPC iv 159
2. 2RPC iv 334
3. 2RPC iv 112

Appendix I

Interference with Court of Session by Privy Council

As indicated in the text the proposition that the privy council interfered in any sinister sense in the work of the court of session is not borne out by the records: indeed all the indications are to the contrary; and the contemporary authorities are in agreement with this view; and of these Balfour, Hope, Stair and Mackenzie were all privy councillors and lords of session. The error appears to have been due to a misinterpretation of the position; and subsequent writers have merely repeated it. Mackenzie without mentioning the session says in 1678, "but now that Judicator doth under the notion of Riots, and breaches of the publick Peace hear to [sic] many causes Civil and Criminal";[1] but in 1684 he states: "yet if any of these dip upon matter of law (for they are only Judges in Facto) they remit the Cognition of it to the Session, and stop, till they hear their Report".[2]

The fullest account is in Hope.[3] Here the editor has grouped five paragraphs under the rubric "Interference with Court of Session and municipal administration". Examination of these paragraphs does not support the rubric:

8. Here the council (following on a complaint of a party who objected to the session allowing proof by witnesses of letters of horning) transferred the case not to themselves but to parliament[4] and parliament thereafter passed an act limiting such proof to writ

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1. Criminal ii 6 1
2. Institution i 3 6; it is quite clear that in suspensions each court had its own sphere (Balfour 267; 2RPC v 269); Stair and Erskine are silent
3. Major Practicks v 2
4. 1578 c 31 (APS iii 111)

only [1] - which statute was probably declaratory of the law.[2]

18. This paragraph is legislation - an act of council, regulating rights to church lands, necessitated by the reformation in the previous year. The act was to subsist till order was taken in parliament. Questions relating to these feus were dealt with not by the council but by the lords componitors.[3]

19. This was merely a declaration of nullity of a decree of an inferior court after the matter had been decided by the court of session.

20. This is an ordinance of the council regulating the meeting time of a court and was made under common law and statute.[4]

28. Choosing of curators was a matter in which the council had jurisdiction.[5]

McMillan postulates interference by the council; but no authority is given.[6] And in Scottish Legal History[7] the interpretation and emphasis is contrary to the evidence. The views expressed here are consistent with the undoubted policy that the council should only be resorted to as a last resort.[8]

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1. 1579 c 45 (APS iii 162)
2. APS iii 111 162; cf ADC i 224
3. RPC i 192; Appendix K
4. Cf Acts of Sederunt regulating procedure in sheriff court
5. Supra, children
6. Evolution 53-54
7. Page 28: "In practice no such limits [riots and oppressions] determined its intervention in the course of justice"; cf Scottish Privy Council" 1959 SLT (News) 137
8. Supra

Appendix J

Petitions for powers

Petitioner	Powers sought	Qualification
Clerk of session	to append great seal	chancellor absent[1]
Two of lieges	to hold courts,	sheriff absent[2]
Pursuers in letters of lawburrows	to serve writ at head burgh,	defenders being highlanders without dwelling place[3]
Bishop	to extend time for making	stent roll[4]
Commissary clerk	to take oath,	archbishop being dead[5]
Sheriff depute	to hold courts,	sheriff being dead[6]
Heritors	to extend time for revaluing	lands[7]
Sheriff clerk	to receive writs,	former clerk refusing to transfer[8]
	to substitute	cautioners[9]
Commissioners of excise	to fill up	commission[10]
Peer	to cease acting as a JP	having become a peer[11]
Inhabitants	to have appointed a new	sheriff there being a vacancy etc[12]

1. 3RPC xiv 533 552
2. 3RPC iv 15
3. 2RPC v 347
4. 2RPC v 340
5. 3RPC i 458
6. 3RPC i542
7. 3RPC ii 282
8. 3RPC iii 88
9. 2RPC ii 144
10. 3RPC ii 127
11. 2RPC iii 196
12. 2RPC viii 17

Petitioner	Powers sought	Qualification
	for gun licence, for game[1]	
Scotsman resident abroad	to have birth brieve[2]	
Shipowner	for delivering of disputed ship being necessary for livelihood	being no caution; enacted to re-deliver on pain of £4000 and infamy[3]
Shipmaster	to sell disputed cargo there being a rising marker[4]	
Nine poor families	for clean bill of health[5]	
Bailies	to resume markets after plague[6]	
Merchant	to uplift tackle formerly in quarantine[7]	
Skippers	to unload coal during quarantine	no men to be disembarked[8]
Merchant	for delivery of arrested goods	arrester consenting[9]
Shipper	to discharge arrested goods	great oath that he is owner[10]
Merchant	to loose arrested goods	on caution[11]
Goldsmith	to dispose of silver, being the subject of an illegal contract[12]	
Sheriff depute	to act during minority of sheriff principal[13]	
Oppressed people in Orkney	to revive lapsed commission[14]	
Sheriff	to revive prerogative of pronouncing doom it having lapsed by delay in sentencing[15]	

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1. 3RPC i 430
2. 2RPC 148 etc
3. 3RPC vii 399
4. 2RPC iv 20
5. 2RPC vi 168 etc.
6. 2RPC vi 355 etc
7. 2RPC vi 137
8. 3RPC i 541
9. 2RPC vi 7
10. 2RPC vi 7
11. 2RPC vii 244 etc
12. RPC v 511
13. 3RPC vi 89 etc
14. 3RPC iii 575
15. 2RPC iv 60

Petitioner	Powers sought	Qualification
Presbytery	to apply goods of witchcraft council to poor of parish[1]	
Shipmaster	to sell ship and to apply proceeds to wages[2]	
Landlady	to apply deceased soldiers effects to unpaid rent	bailies to roup and pay[3]
Merchant	to sequestrate goods, debtor being about to alienate[4]	
Merchant	to eject debtor from sanctuary[5]	
Merchant	to arrest a suspect meditatione fugae	periculo petentis: peril of damages and interest[6]
Master of Works	to acquire compulsorily a bog for use as a pond for king's horses	compensation fixed at £40[7]
Bailies	for approval of regulations against fire	authority interponed[8]
Burgesses	to elect new magistrates, old ones having fled, etc[9]	
Burgess	for relief from office, being ill and aged[10]	
Laird	for relief from assizes being aged[11]	
Minister	for relief from being JP, being large charge[12]	
Skipper	for delivery of guns abstracted by the usurper[13]	

1. 2RPC ii 469
2. 2RPC i 498
3. 3RPC xiv 271-2
4. 3RPC iii 303 etc
5. 3RPC ii 277
6. 2RPC iv 117
7. 2RPC iv 202
8. 3RPC iv 180
9. 3RPC ii 289 etc
10. 2RPC vi 268
11. 2RPC vi 156
12. 2RPC vi 278
13. 3RPC i 15 etc

Petitioner	Powers sought	Qualification
Landlord	to uplift rents of estate restored after usurpation	for one year[1]
Landlord	for payment of rents lands being occupied by crown[2]	
Bailies	to demolish dyke and re-open right of way[3]	
Baron	to demolish chief messuage of barony, being a refuge for outlaws[4]	
Duke of Buccleuch	to use paper for charter, writ being too large for any skin	safeguards in authentication[5]
Earl of Caithness	to delete entries in books of adjournal, being no pursuit against petitioner	warrant to justice depute[6]
Bailies	to employ thief as hangman and for indemnity for not putting him on trial[7]	
Lieutenant	to impress idle beggars[8]	
	to empty jails of whores and thieves for transportation	with advice of justice depute[9]
Presbytery	to use jails of nobles for imprisoning witches[10]	
-do-	to ward witches	depositions to be taken[11]

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1. 3RPC i 39
2. 2RPC vi 42
3. 2RPC vi 506
4. 2RPC iv 186
5. 3RPC ii 159 etc
6. 3RPC ii 155
7. RPC xi 604 etc
8. 2RPC vi 520 etc
9. 3RPC i 181 etc
10. 2RPC iii 142
11. 2RPC iii 575

Petitioner	Powers sought	Qualification
Landlord	for military assistance against highland thieves	six soldiers at petitioner's expense [1]
Colonel	to arrest deserters and conscript idle men	at sight of judges[2]
Laird	for delivery of enlisted soldiers warded by magistrates[3]	
Captain	to billet troops	on reasonable charges[4]
Shaw of Greenoch	to exchange prisoners with Irish[5]	
Sheriff	for relief from keeping a madman	madman to be sent to wars[6]
Brother	to manage affairs of insane brother	for one year[7]

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1. 3RPC vi 88
2. 2RPC iii 152
3. 2RPC iii 169
4. 2RPC iv 248
5. 2RPC vii 339
6. 2RPC vi 345
7. 2RPC vii 62

Appendix K

Church Lands after 1560

The reformation legislation of 1560 was somewhat meagre and largely negative in character.[1] The acts of 1560 merely prohibited the mass, abolished the jurisdiction of the bishops and prohibited appeals to Rome. On the positive side the doctrinal claims of the reformers received statutory recognition in the confession of faith;[2] and in 1564 the new commissary courts were created to take over the jurisdiction of the former episcopal officials.[3] No general settlement of the huge property rights of the church was attempted; and even the limited scheme set forth in the (first) book of discipline failed to gain acceptance.[4] This envisaged a hierarchical system of ministers, superintendents and the crown to replace the former priests, bishops and pope; it had also been hoped that the reformed clergy would take over the benefices of the catholic priests. With the failure of the catholic clergy to disgorge their lands, and in the absence (during the reign of Mary and the minority of James VI) of a "Godlie" prince, a confused situation arose in which there were at least three proprietary interests in the ecclesiastical lands.

(1) Benefice-holders: The benefices were made up of two parts: (i) the temporality, or lands; and (ii) the spirituality or teinds.

With a few exceptions[5] the holders of church benefices were confirmed by the crown in their life possession in 1561 but the crown took the thirds of benefices

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1. 1560 cc 2 3 (APS ii 534 535); ratified: 1567 cc 1 2 3 (APS iii 36).
2. 1560 c 1 (APS ii 526-534)
3. Balfour 670; RSS v 1633
4. Knox ii 128 182-258
5. Keith i 324-325; iii 4-12

(third of the revenues) for its own use and to assist the reformed ministry. For the rest "the entire structure of the old regime remained intact".[1] The title to a benefice was a matter for the session.[2] The holders of benefices were of several kinds. (a) The former catholic clergy had been deprived of all spiritual function of their offices but, nevertheless retained their benefices, for their lives. (b) Laymen of varying degrees of spirituality who as commendators and otherwise had got possession of benefices. This group increased as the benefices became vacant when the old clergy died off; and later again many of these benefices were secularized. They were erected into temporal lordships and thereby brought into the feudal system making them the same as other crown feus. (c) As the years progressed the minor benefices were filled by reformed ministers who had a spiritual function; and under James VI and Charles the crown rescued some part of the benefices from the possessors in order to support their new episcopacy. As is noted elsewhere the council dealt quite incidentally with teinds and with thirds of benefices.

(2) Feuars of church lands: Before and after the reformation laymen had taken feus of church lands from the benefice holder. Whereas a benefice gave to its holder a life interest in the lands a feu right was a perpetual alienation of the patrimony of the church. But such an alienation was only effective if the feu was granted by the chapter or other body and also if the feu had been confirmed by the appropriate authority. The effect of non confirmation was that the feuar had no real right to his land but only a personal right against his "superior". Before the reformation this confirming authority had been the papacy;[3] but at an

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1. RPC iv 24 90
2. RPC i 192-4; Keith iii 24; G.Donaldson Thirds of Benefices preface; "The Polity of the Scottish Church" Records of the Scottish Church History Society xi (1955) 212; "Scottish episcopate at the Reformation" EHR ix (1945) 349; "Sources for Study of Scottish Ecclesiastical Organization and Personel" Bulletin of Institute of Historical Research xix (1942-3) 188
3. The power could be exercized by a papal legate a latere (both Beaton and Hamilton were legates (St Andrews Formulare 468; Warrender Papers i 28) or by

early stage (before the Reformation) the crown had also taken to confirming these feus, so that sometimes, ob maiorem cautelam, the feuar took a double confirmation. After the reformation all contact with Rome was forbidden and the crown became the only confirming authority.[1] A series of stop gap measures were passed to this end and later also to meet the situation of double feus and double confirmations to different persons at different dates. At first the crown sought to nullify unconfirmed feus granted after 1559; but did not give confirmation as of right; and did not prevent double confirmation. Later legislation avoided double confirmations of feus before andafter 1559, gave title according to prior royal confirmation and finally extended the legislation so as to give the king's advocate a title to raise actions of reduction.[2]

The function of confirmation was executed first by commissioners then by the lords componitors or compositors[3] who fixed the amount of composition to be paid to the crown for confirmation. Several of these cases came to the council where there was some difficulty: then the council gave general directions on future policy (eg to allow double confirmations at the peril of the parties).[4]

(3) Tenants:

(a) The ordinary tenants of church lands shew no speciality.

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commissions of the metripolitan (Laing Charters 691 709; SHR vii (1910) 355-363

1. Recourse to Rome for confirmation was forbidden on pain of loss of benefice (RPC i 511 563 569; ii 254). The crown came into place of the church in at least three respects: (a) as supreme head of the church (1584 c 8 (APS iii 351); (b) as authority for providing to benefices: supra 203 n 2 and (c) as authority for confirming church feus: 2RPC ix 569 "for, seeing that in the tyme of poperie all contraversies of this natur were decydit by the Pope himselff and not by the sentence of ony civile judge, - whiche prerogative now doeth justlie belong to uss ..."

2. 1584 c 8 (APS iii 351)

3. TA 353 et seq; RPC i 465-6; 1564 c 2 (APS ii 545); 1578 c 4 (APS iii 97a)

4. APS iii 75-76 103 112a; Hannay "Church Lands" SHR xvi (1919) 52-72

(b) Kindly tenants were the descendants of serfs who had under the protection of the church gained certain advantages over ordinary tenants, in particular the right of succession. Apart from the fact of their physical weakness in the face of new landlords who had taken over church lands, there was a legal disadvantage which confronted them. The contract between the kindly tenant and his original landlord was personal to the parties but was not effective against a subsequent landlord to whom church lands had been feued.[1] To meet this situation the crown prohibited feuing or leasing over the heads of the kindly tenants - first as a temporary measure, renewed almost annually and finally (in 1564) as a permanent act.[2] As is noted elsewhere the crown, acting through the council took the place of the church as protector of the kindly tenant, preventing ejection - at least without compensation for disturbance.

(c) Leases of teinds were a convenient arrangement whereby the titular (or person having title to receive the teinds) was saved the bother of collecting produce from a variety of heritors by farming out his right to a tacksman in return for a fixed sum of money or meal. However, the system gave rise to complication in collection of the thirds of benefices, and to violent disputes as to ownership.

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1. Rankine Leases 152-154
2. 1563 c 8 (APS ii 539); RPC i 162-3 192 134; 1563 c 13 (APS ii 540); 1564 c 2 (APS ii 545)

Appendix L

Form of Supplication before the Council, 1606

My lords of Secreit Counsall unto your lordships humelie menis and schawis your lordships servitor AB that whereas upon the day of CD was ordourlie denuncit rebell and put to the horne for not payment to me of the sowme of conforme to ane decreit of the lordis of counsall of the dait the day of As the letters of horning and executions thereof dewlie registrat herewith produceit beiris All the proces whereof the said CD rebell forsaid remains as yet unrelaxit taking na regaird thereof haunts and repairs publictlie and allowablie in all pairtis in the cuntrey at his plesour as gif he war his Majesteis frie leige and subject to the high and proud contempt of his heines auctoritie and lawis therefoir I beseik your lordships that I may have letters charging the said CD rebell foirsaid to compeir conformallie befoir your lordships at ane certeine day to answer to his proud and contemptuous rebellion and disobedience and to heir and sie sic ordour tene therewith as appertenis With certificatioun command salbe gevin to the capitane of the gaird to pas and tak his houssis and apprehend his persone In communi forma and your lordships answer

Verso: Apud Edinburgi primo Januarii anno

1606 [sic] $j^{m}vj^{ct}$ sextimo

fiat ut petitur

"Jo. Prestoun"

"Ja: Primrois"

(MS RPC (1589-1607); cf RPC xiv 235

Appendix M

Analysis of Bills, July 1607

In the miscellaneous papers of the privy council there is a collection of over 150 bills delivered in the month of July 1607.[1] They are of interest both in form and content. Almost all were raised by private complainers; some ten had the concurrence of the king's advocate as where the offence complained of involved the use of pistols;[2] some have the concurrence of a financial officer of the crown, the comptroller alone in a case of feu farm[3] and the comptroller depute in a charge to obey a decree of payment due to the crown,[4] treasurer of new augmentations praying for a summons against a cautioner of a defaulting debtor.[5] In one case, of suspension of horning the king's advocate was respondent.[6]

Almost all of the bills were delivered by a single councillor, either the lord privy seal, Cockburne (61 deliverances), or Rollick (65), Cockburne acting during the first half of the month and Rollock the second. Hay acted on one day (7) and Lothian on two (4), Balmerino once.

Three fifths of the complaints arise out of assaults, oppressions and other wrongs, praying either for compearance before the council or for lawburrows in the proportion of two to one. The rough proportion of the prayers of these bills is

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1. RPC xiv 480-544. These bills are calendared in the printed Register as "petitions" but are in fact bills of complaint or supplications; but in the second series they are correctly described: 2RPC viii 258-365.
2. RPC xiv 484
3. RPC xiv 494
4. RPC xiv 527
5. RPC xiv 529
6. RPC xiv 576

Riots and other wrongs	%	%
(a) seeking compearance of defender	40	
(b) seeking lawburrows	20	60
Captions for non-payment of debt, non-satisfaction of decrees etc.		20
Suspensions of lawburrows, hornings etc.		18
Miscellaneous charges		2
		100

Appendix N

Forms of Deliverance of supplications

1. Craving letters charging defender to appear and answer for assault; charge for payment; to render a house; to produce rebels; caption

Apud Edinburgh xv Aprilis 1611. Fiat ut petitur. "S.R. Cockburne"[1]

2. Craving letters of lawburrows

Apud Edinburgh xvij Aprilis 1611. Fiat ut petitur, Mr Robert Gairdin of Blairtoun under the pain of j^m merkis, ilkane of his thrie brether within nameit under the pane of V^c merkis, and ilkane of the remanent personis within complenit upoym under the pane of iij^c merkis. "S.R. Cockburne".[2]

3. Craving suspension

Apud Edinburgh xxvj die mensis Februarij 1607. Fiat summonitio ut petitur to the xvj day of April nixtocome, and to suspend and discharge ut infra whill the last day of the samen moneth; becaus thir complenaris hes found cautioun to the effect within writtin; every ane of thame under the pane of j^c merkis, as ane act maid thairupoun beiris. "Peter Rollock"[3]

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1. 2RPC viii 312 290 289 261 271
2. 2RPC viii 313
3. 2RPC viii 291

Appendix 0

Steps in Process 1686

A rough time table of the course of cross actions before the council can be reconstructed from entries in the records.[1]

1686

Nov [9] [Pursuer's supplication delivered]

[10] Pursuer's summons [signeted]

12 Pursuer's summons served on defender

[15] [Defender's supplication delivered]

16 Defender's summons [signeted]

Defender's answers

[Defender's summons served on pursuer]

Pursuer's answers

19 etc Citation of pursuer's witnesses

24 etc Citation of defender's witnesses

Information of pursuer

Information of defender

25 Hearing on relevancy of "mutuall processes": both found relevant; remitted to commissioners to hear witnesses and report

30 Depositions of witnesses

Extracts of documents

Dec 2 Decision in pursuer's action: settlement of parties differences remitted to commissioners, which failing they to report back

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1. 3RPC xii 521 - xiii 34

Dec 9 Decision in defender's action: finding against pursuer, but before final determination, remit to committee to settle parties differences

There was no further decision of the council or the committee; and the defender was dead before 1689.[1]

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1. 3RPC xiv 548

Appendix P
Public and Private Prosecution

The development of prosecutions for private crimes and delicts[1] went through several stages: (1) In earlier times even the most serious crimes against the person and property could be pursued privately and satisfied by monetary payment. (2) There came a division between (a) civil actions by a private pursuer condluding for indemnification for crimes, delicts and negligence and (b) penal actions also by a private prusuer (with or without the concurrence of the king's advocate or fiscal) where the conclusion was for a penalty:[2] since many of the fines imposed were arbitrary it is difficult to see how far a penalty included the damages of indemnification or precluded a further action for such damages. (3) Later (a) private prosecutions became incompetent or at least very difficult without the concurrence of the public prosecutor and (b) the conclusions were for a fine to the prosecutor and damages to the "private complainer":[3] (4) Finally, the almost inflexible rule is that all crimes are prosecuted by the crown without the concurrence of any private complainer,[4] but there are a few survivals of penal actions as in the violent profits where the conclusion is not for the pursuer's actual loss but for the highest profits which the detained subjects could have produced.

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1. Supra personal liability
2. Supra fine
3. Eg Gray v Paxton 1773 M 10361; Hume Lectures (1786-1822) iii 120 et seq.
4. Rintoul v Scottish Insurance Commissioners 1913 SC(J) 120 J & P Coats Ltd v Brown 1909 SC(J) 20. Recent dicta (which may be obiter) tend to the view that only the criminal authorities can investigate crimes: Stirling v Associated Newspapers Ltd 1960 SLT 5 at 8. This is a rather alarming proposition if it means that an accused person or a victim cannot investigate the crime.

Appendix Q

The Last Years of the Council

1705	
Mar. 12	Last entry in *decreta*[1]
1707	
Jan. 16	Treaty of union ratified by Scots parliament[2]
Apr. 9	Proclamation continuing the council
13	Last entry in *acta*[3]
May 1	Union of parliaments: Scottish courts preserved
	Royal assent to union of councils
1708	
May 1	Union of councils
June	Paper of council[4]

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1. MS RPC Decreta (1700-5) f 374
2. APS xi 402
3. Breaks off in middle of entry. MS RPC Acta (1703-7) f 255
4. Privy Council: miscellaneous warrants and papers

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