

**The Development and Use of Written Pleadings
in Scots Civil Procedure.**

by

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**A Thesis Presented for the Degree of
Doctor of Philosophy
in the School of Law, The University of Edinburgh.**

2004

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ABSTRACT OF THESIS

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In modern times, written pleadings, in Scots Civil Procedure, are the documents drafted by the parties to an action in the Court of Session or the sheriff court which specify each party's position in law and fact.

Pleading in writing has a long history. For centuries, in Scotland, the initiating deed or document was in writing. Thereafter, in court, the procedure was oral. In the later period, parties attempted to 'inform' and 'solicit' judges prior to the oral hearing. This practice developed to the point that parties to litigation would arrange for advocates or solicitors to draft written 'informations' which were delivered to a judge's home prior to the date appointed for the hearing of the case. In time, the judges themselves sanctioned this practice but formalised it. This was the commencement of pleading in writing. By the eighteenth century, pleading in writing had all but replaced oral argument before the court. Reforms to civil procedure from the start of the nineteenth century radically delimited the scope for pleading in writing and specified how pleadings were to be composed and what they were to contain.

In the first part, this thesis analyses this development of pleading in writing in civil procedure to the modern day. It investigates how the system of written pleading arose and blossomed, how it operated and explores the creation of rules by the Court for regulating its form and content.

In the second part of the thesis, the 'rules' of written pleading are defined, and thereafter the strengths and weaknesses of the modern operation of written pleadings are examined. Arguments for and against the continued use of the system as part of a modern Scots civil procedure are reviewed and recent reforms to the system of written pleadings used in both the sheriff court and Court of Session are analysed, drawing on empirical research.

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Chapter Titles and Head Notes

Title Page.	
Declaration.	i
Acknowledgements.	ii
Abstract.	
Chapter Titles and Head Notes.	iii
Introduction.	1
(i) Three Primary Questions.	1
(ii) A General Definition of Written Pleadings.	1
(iii) What is Meant by 'Civil Procedure'?	2
(iv) Lessons From the History of the Development of Written Pleadings.	4
(v) National Sensitivities and the Reform of Written Pleadings.	8
(vi) Written Pleadings and Scots Law.	10
(vii) Written Pleadings From an External Viewpoint.	11
(viii) Scheme of the Thesis.	15
Chapter One.	18
Procedure and Pleading in the 17th and 18th Centuries The Start and Development of Written Pleadings.	
(i) Introduction.	18
(ii) The Form of Process and Manner of Proceeding Before the Supreme Court from the Time of Its Institution.	21
(iii) The Inner House and The Outer House.	22
(iv) The Theory, Mechanics and Dynamics of Litigation Before the Court: The Bicameral Administration of Justice.	29
(v) The Initial Stages of a Litigation.	33
(vi) The 'Dispute' and the Rôle of the Concept of Relevancy.	37
(vii) Relevancy, Syllogistic Argument and Practice.	40
(viii) The Advocates' Pleading at the Disputing.	47
(ix) Tactics Employed by the Advocates.	49
(x) The First Steps Towards Written Pleadings - The Report, Solicitations and the Written Information.	53
(xi) The Ordinary's Report and the New Rôle for Informations.	61
(xii) Reclaiming Petitions.	62

(xiii)	The Developing Practice of Pleading by Written Documents.	63
(xiv)	More Pleading in Writing.	66
(xv)	The Court's Difficulties With Informations, Bills and Pleadings in Writing.	67
(xvi)	Pressures on the Court : The Development of Rules of Pleading in Writing	71
(xvii)	Ongoing Reforms.	75
(xviii)	The Changing Nature of the Advocates' Function and the Effect of Written Pleading.	76
(xix)	Further Pressures on the Court.	78
(xx)	Conclusion.	81

Chapter Two. 84

An Era of Change: Re-defining the Theory of Written Pleadings and the Development of Civil Procedure, 1800 – 1825.

(i)	Introduction.	84
(ii)	Early Attempts at Change.	88
(iii)	Governmental Intervention and Scottish Sensitivities.	90
(iv)	A Different Approach: Swinton's Pamphlet and Re - Organisation of the Court. Tackling the Problems from Within.	97
(v)	The Early Nineteenth Century Form of Process and the Rôle Therein of Written Pleading.	105
(vi)	The Continued Prevalence of the Act before Answer.	111
(vii)	The Three R's: Representation, Reports and Reclaiming Petitions.	119
(viii)	The New Tory Government, the Court of Session Act 1808 and the Reorganisation of the Court of Session.	121
(ix)	The Work of the 1808 Commission Appointed to Inquire into the Forms of Process in the Court of Session.	125
(x)	AS 7 February 1810 - More of the Same.	128
(xi)	The Commissioners' Second Report.	130
(xii)	Outstanding Business - The Introduction of Civil Jury Trial.	130
(xiii)	The Effect of the Jury Court on Written Pleading in the Court of Session.	133
(xiv)	The Work of the 1823 Commission.	136
(xv)	The Written Evidence to the Commission.	138
(xvi)	The 1824 Commissioners' Report: A New Scheme for Written Pleadings.	145
(xvii)	The 1824 Bill.	148
(xviii)	Conclusion.	152

Chapter Three.

153

The Development of the 'Form of Process', and the Rôle and Rules of Written Pleadings.

(i)	Introduction.	153
(ii)	The Scheme of the 1825 Act and the New Judicial Duties.	161
(iii)	Strictness and Discipline Under the Judicature Act 1825 - Charles Hope's New Broom.	169
(iv)	The New Strictness and the Development of 'Rules' of Written Pleading.	180
(v)	Summonses.	181
(vi)	Defences.	188
(vii)	The Condescendence and Answers.	190
(viii)	The 'Practice and Experience' of the Judicature Act 1825 (and the Deviations).	193
(ix)	The Profession's Desire for More Superintendence in the Preparation of Records and Striking Out Irrelevant Material.	208
(x)	The Commission's Report 1834.	212
(xi)	The Start of the Development of 'Fair Notice'?	214
(xii)	Ongoing Problems with Written Pleadings and Further Proposals for Change.	218
(xiii)	The Court of Session Act 1850.	224
(xiv)	Continuing Reform 1850 - 1875.	225
(xv)	Continuing Difficulties with Pleas-in-Law.	227
(xvi)	Jury Trial, Proof on Commission and the Procedure for Proof before the Ordinary Sitting Without a Jury.	232
(xvii)	The Falling Out of Favour of the Jury Trial and the Taking of Evidence on Commission.	234
(xviii)	Moncrieff's Bill of 1863 and the Court of Session Act 1868.	238
(xix)	The 1868 Act in Practice.	244
(xx)	Conclusion.	248

Chapter Four.

250

The Rules, Form and Language of Written Pleadings in Modern Civil Procedure.

(i)	Introduction.	250
(ii)	A Definition of Written Pleadings.	251
(iii)	The Functions of Written Pleadings.	251
(iv)	Care Required in Drafting Pleadings.	254

The Rules, Form and Language of Written Pleadings

(v)	The Summons and the Initial Writ.	257
-----	-----------------------------------	-----

(vi)	The Conclusions.	257
(vii)	The Condescendence.	258
(viii)	Quotations in Averments, Reference to Statutes and the Incorporation of Documents <i>Brevitatis Causa</i> .	266
(ix)	The Pursuer's Pleas-in-Law.	272
(x)	The Defences.	274
(xi)	Admissions.	276
(xii)	Averments 'Believed to be True.'	279
(xiii)	Averments 'Not Known and Not Admitted.'	280
(xiv)	Notices to Admit and Notices of Non-Admission.	280
(xv)	Denials.	281
(xvi)	The Defender's Positive Averments in Defence.	285
(xvii)	Skeletal Defences and Summary Decree.	287
(xviii)	The Defender's Pleas-in-law.	294
(xix)	Preliminary Pleas.	296
(xx)	Pleas against the Action itself.	296
	a. Incompetency	296
	b. Relevancy	298
	c. Specification	305
(xxi)	Peremptory Pleas or Pleas on the Merits.	316
(xxii)	Adjustment.	316
(xxiii)	Procedure on Closure of the Record.	319
(xxiv)	Notes of Argument.	320
(xxv)	Debate, Proof before Answer and Proof.	322
(xxvi)	Amendment in Defended Actions.	323

Chapter Five. 326

The Use of Written Pleadings in the 20th Century.

(i)	Introduction.	326
(ii)	The Historical 'Civilian Stock' in Scottish Civil Procedure.	326
(iii)	The Adversarial Culture and the Rôle of the Judge.	329
(iv)	Civilian and Common Law Elements in the Development in Scots Civil Procedure From 1800 Onwards.	335
(v)	Modern Scots Procedural Law and 'Adversarialism'.	342
(vi)	Notions of Judicial Function in Scotland: The Adversarial System, the Preparation of Pleadings and the Rôle of the Judge at Proof.	344
(vii)	The House of Lords and the Plea to the Relevancy.	349
(viii)	Pleading Practices, Reparation and Jury Trials in the 1960s and 1970s. The Development of the 'Procedure Industry'.	353
(ix)	The House of Lords and the Development of Pleading Practices in the 1950s, 1960s and 1970s.	363
(x)	Drafting and Standards of Written Pleadings.	317
(xi)	Some Thoughts on Written Pleading.	387
(xii)	Themes in the Historical Development of Written Pleadings and Civil Procedure.	388

(xiii)	Four Problem Points of Practice?	394
(xiv)	Conclusion.	398

Chapter Six. 400

The Future for Written Pleadings? A Conclusion.

(i)	Introduction.	400
(ii)	The Need For Reviewing The System of Written Pleadings: The Rationale.	400
(iii)	Recent Criticisms of Scottish Civil Procedure and Traditional Written Pleadings.	402
(iv)	Changes to Civil Procedure in the 1980s and 1990s.	404
(v)	Changing Cultures. The Experiment of the Sheriff Court Ordinary Cause Rules 1993.	406
(vi)	Changing Cultures in the Court of Session: The 1994 Commercial Cause Rules.	410
(vii)	Further Inroads into the Theory of Written Pleadings: The Cullen Report 1995.	415
(viii)	The Debate 'Post- Cullen' and the Continued Criticism of Written Pleadings.	418
(ix)	The Coulsfield Proposals and the New Personal Injury Rules in the Court of Session.	422
(x)	A Disparate Approach to Pleading in Writing.	425
(xi)	Conclusion. The Future for Traditional Written Pleadings.	426

Bibliography.

Appendices.

1. *The Heritors of Kingsbarns against Rev James Beatson. An Example of Eighteenth Century Pleading*
2. **Illustrative Examples of Written Pleadings in the Faculty of Advocates' Session Papers in the Period 1843 - 1863**
 1. First Period 1843
 2. Second Period 1853
 3. Third Period 1863
 4. Fourth Period 1873
 5. Conclusions
- 3(a). **Sheriff Court Survey.**
Pro Forma Questionnaire sent to solicitors' firms.
- 3(b). **Sheriff Court Survey.**

Results Collated from all Responses.

- 4(a).** Sheriff Court Survey.
Pro Forma Questionnaire sent to all full time sheriffs.
- 4(b).** Sheriff Court Survey.
Results Collated for all Sheriffdoms.
- 5(a).** Questionnaire for Students Completing Diploma's Civil Practice Section.
- 5(b).** Responses to Questionnaire for Students Completing Diploma's Civil Practice Section.
- 6.** Publication. 'Access to Justice : Lessons from the Sheriff Court?'

The Development and Use of Written Pleadings in Scots Civil Procedure

An Introduction

(i) Three Primary Questions.

At the start of researching this thesis, the writer wanted to answer three questions. First, what was and is meant by 'written pleadings' in Scots law? Secondly, how was it that written pleadings and the rules of written pleadings arose? Thirdly, and probably influenced by the *zeitgeist* of the late 1990s, the writer wanted to explore whether modern Scottish civil procedure was in need of reform, and whether the system of written pleadings as traditionally practised would continue to play a part.

(ii) A General Definition of Written Pleadings.

At the outset, a very general definition of 'written pleadings' might be attempted *viz.* the formulation in writing of litigants' positions in law and fact for determination by a court. But for the present this is as far as the definition can go. The word 'pleadings' has changed in its meaning from the seventeenth century to the present and this should be borne in mind when considering the literature of different periods.

In the early period, from the time of Viscount Stair,¹ to about the mid 1700s, 'pleading' was a term of art, meaning the oral presentation of a case to the court. This pleading had as its goal verbal articulacy and fluency of expression and was 'syllogistic' or 'enthememic' in construction. Sir George Mackenzie of Rosehaugh, in

¹ i.e. 1680s onwards.

'*What Eloquence is fit for the Bar. An Essay*,² gives us an early idea of what was considered 'eloquent'. This pleading was said to be *viva voce*, i.e. oral.

'Written pleading' as a technical term is seen from about the 1820s onwards, and is used to differentiate pleading in writing from 'pleading *viva voce*', following reforms in the procedure of the Court of Session which aimed to limit the practice of the former.

Confusingly, in the earlier period of the mid to late 1700s, the use of the word 'pleading' could have been understood in both senses. Boswell captured the idea when he said,

'Ours is a court of *papers*. We are never seriously engaged but when we write. We may be compared to the Highlanders in 1745. Our pleading³ is like their firing their musketry, which did little execution. We do not fall heartily to work till we take to our pens, as they do their broadswords.'⁴

When those lawyers did take to their pens, the pleading in writing was sometimes termed 'written pleading.' The resulting documents incorporated not just the law and the facts but also arguments to persuade the court. They were often voluminous, hence Boswell's reference to a 'court of papers.'

(iii) What is Meant by 'Civil Procedure'?

The title of this thesis also refers to Scots 'Civil Procedure.' This is the modern term.

As the name suggests, it is the manner of proceeding in civil causes before the

² contained in his: *Pleadings in some remarkable Cases Before the Supreme Courts of Scotland Since the Year 1661. To which, the Decisions are subjoyn'd* (Edinburgh, 1673).

³ i.e. oral.

courts.⁵ When used generically, it encompasses the rules, directions, acts of sederunt⁶ and practice notes created by civil courts regulating the manner of civil proceedings before them, and subsumes the case law and conventions which have developed from the implementation of these regulations. If someone interrupted two perambulating advocates on the floor of Parliament House and asked them 'Where can I find out about Scottish civil procedure?', they might perhaps point to specialised texts or Volume 2 of the Parliament House Book⁷ which contains the Rules of the Court of Session 1994 as amended, interspersed with annotations.

From the seventeenth century there have been texts and treatises and annotated prints of the 'manner of proceeding' in the courts. Stair appended to his *Institutions of the Law of Scotland*⁸ his *Modus Litigandi or Forms of Process Observed Before the Lords of Council and Session in Scotland* which became Book IV of the second edition of his *Institutions*. From this example, there followed texts on what became known as 'The Form of Process',⁹ and later 'The Practice of the Court of Session'¹⁰ or sometimes 'The

⁴ Boswell: *the Ominous years 1774-1776*, ed. C. Ryskamp and F.A. Pottle, (London, 1963) p. 228.

⁵ W.A. Wilson, in his *Introductory Essays on Scots Law* (2nd ed., Edinburgh, 1984) opens the chapter on 'Civil Procedure' thus: 'This essay outlines the procedure in an ordinary action in the Court of Session.' p. 63.

⁶ In the thesis this will be reduced to 'A.S.' In the plural 'acts of sederunt' will be employed.

⁷ Green's Annotated Rules of the Court of Session 1994 as amended, (2003) Parliament House Book, Volume 2, Division C (Court of Session Practice).

⁸ (Edinburgh, 1681).

⁹ John Spotiswood, *The Form of Process, before the Lords of Council and Session, (etc.)* (Edinburgh, 1711); (2nd ed., Edinburgh, 1718), J. Russell, *The Form of Process in the Court of Session (etc.)* (Edinburgh, 1768), J. Watson, *New Form of Process before the Court of Session (etc.)* (Edinburgh, 1791), Thomas Beveridge, *A Practical Treatise on the Forms of Process before the Court of Session (etc.)* (2 vols.), (Edinburgh, 1826).

¹⁰ J. J. Darling, *The Practice of the Court of Session*, (2 vols.) (Edinburgh, 1833), C.F. Shand, *The Practice of the Court of Session* (2 vols.) (Edinburgh, 1848), Æ. J. G. Mackay, *The Practice of the Court of Session*, (2 vols.) (Edinburgh, 1877 - 79); D. Balfour, *A Handbook of Court of Session Practice*, (Edinburgh, 1891), Æ. J. G. Mackay, *Manual of Practice in the Court of Session*, (Edinburgh, 1893); J.A. Maclaren, *Court of Session Practice*, (Edinburgh, 1916)

Procedure in the Court of Session.’¹¹ In essence the terms have the same meaning and in modern practice are encompassed in the words ‘Civil Procedure.’¹²

(iv) Lessons From the History of the Development of Written Pleading.

The reason for positing the second question *viz.* how was it that written pleadings and the associated rules arose is that, in the literature, the *magna opera* of Æneas Mackay and James Anderson Maclaren¹³ and the modern treatises and textbooks, there is nowhere a detailed account of the development of written pleadings. There are historical references to the main events and statutory changes are noted, but they are glossed and do not actually tell us much about what caused changes in civil procedure and why such changes were considered necessary. This thesis attempts to do so, but not merely as historicism. Historical developments in civil procedure and in the creation of the system of written pleadings can be instructive as suggesting solutions to modern day problems. The recent Coulsfield Report observed:

‘This Report is not an appropriate place to examine in detail the role of written pleadings in court procedure in Scotland in the past. However, some historical background may be useful, since it may indicate what are the tendencies inherent in a system in which there is extensive reliance on written pleadings, and how the resulting problems might possibly be avoided.’¹⁴

¹¹ J.P. Coldstream, *Procedure in the Court of Session*, (Edinburgh, 1878).

¹² The terms ‘Procedural law’ or ‘Adjectival law’ are sometimes seen in analyses of the branches of Scots Law. The terms are merely classificatory meaning the law which has developed under the form of process or practice.

¹³ *op. cit. supra*.

¹⁴ Report of the Working Party on Court of Session Procedure (Chairman: Lord Coulsfield, 2000) Ch. 6.

In tracing the development, it will be seen that there is a continuity, and an evident tradition. Some of the terminology and conventions still used in modern pleadings will be explained. Most practitioners could explain why a summons was entitled a summons, and a defence was called a defence, but what of condescence, answer, litiscontestation, proof before answer, and pleading devices such as '*quoad ultra*', '*brevitatis causa*', and 'believed and averred' to name but a few?

It is sometimes insinuated that modern written pleadings in Scots Law developed from the starting point of the Court of Session Act 1825 (also known as the Judicature Act).¹⁵ The Act dictated the form in which the pleadings were to be presented and instigated the 'closed record' but as will be seen, much from previous practice was incorporated or reformulated.

The Coulsfield Working Party appreciated that historical solutions to some of the historical problems of a system which uses written pleadings can be useful. But all the problems which may arise from changes cannot be anticipated. As one astute early nineteenth century commentator appreciated,

'In regard to the forms, and regulations of judicial proceedings, it is obvious that the minutiae cannot be anticipated in detail by a code of rules, but are to be fixed by experience, and must be fixed by constant amendments as they are liable to constant evasions'.¹⁶

¹⁵ For example, 'The current system of written pleadings was first set out in the Court of Session Act 1825.', A. Murray, 'Fair Notice - The Role of Written Pleadings in the Scottish Justice System' in H.L. MacQueen and B.G.M. Main (eds.), *The Reform of Civil Justice* (1997) 5 Hume Papers on Public Policy 49 at 51.

¹⁶ James Glassford, *Remarks on the Constitution and Procedure of the Scottish Courts of Law* (Edinburgh, 1812), p. 150.

The quotation highlights two important points. Firstly, courts have always attempted to specify in the form of process, or in modern parlance, civil procedure, the rules which the proceedings must follow. Secondly, changes to the rules must be continually monitored and further altered, as their implementation is affected by practice.

A grasp of the historical origins and the developments in civil procedure demonstrates that often, ideas or innovations which may appear to be novel are often actually 'second-hand.'

Let us consider three brief examples. First, as touched upon above, and as will be discussed in more depth in chapter 1 of this thesis, pleading in the period leading up to the start of the nineteenth century was in writing. The facts and the law were pled, but in rhetorical and argumentative style. The procedural reforms thereafter forced parties to state the 'material' or 'essential' facts and to state the law together with the authorities relied upon in a separate note, which came to be attached to the main pleadings. Written pleadings based in rhetoric and argument coupled with detailed authority finally died out with the abolition of the 'written cases' procedure before the Lord Ordinary in the 1850 Court of Session Act. Yet, in a Court of Session commercial action at the present day, where a cause is appointed to debate, the Commercial judge may order that 'written arguments on any question of law should be submitted'¹⁷ or may direct the action to be determined on the basis of written submissions...without any oral hearing.'¹⁸ Notes of Argument may also be ordered¹⁹

¹⁷ RCS 47.12 (2)(b).

¹⁸ RCS 47.12(2)(h).

¹⁹ RCS 22.4.

in 'ordinary actions' stating the grounds of law to be advanced by a party at the debate.

Consider this second example. In the 1860s there were calls for the introduction of a Note to Admit or Note of Admissions procedure akin to an English common law rule. *The Second Report of the Commissioners Appointed to Inquire into the Courts of Law in Scotland* recommended its adoption²⁰ but the idea fell away. The same concept recrudesced in the twentieth century, and Notices to Admit were introduced into patent cases in 1991 and extended to ordinary actions in 1994.²¹

Thirdly, of actions before the Court in the mid-nineteenth century, those concluding for payment of money were the most frequent. Lord Advocate Moncrieff's aborted Bill of 1863 recommended a simplified and streamlined procedure for these common types of cause, requiring in the initiating writ simply the amount claimed and very briefly, the cause of the action.²² In the twentieth century, actions for damages for personal injuries became the most common type of cause before the court. In making provision for these types of cases, the Court introduced in 1985 a simplified Optional Procedure²³ which in 2003 has been superseded for all actions of damages for 'personal injuries' by a new 'personal injuries procedure'. This new procedure commences with a 'statement of claim' consisting of numbered paragraphs relating only to those facts necessary to establish the claim and without a condescence or pleas-in-law.²⁴

²⁰ (P.P., Edinburgh, 1868).

²¹ Now regulated by RCS Chapter 28A.

²² with no requirement for conclusions.

²³ which was regulated by RCS Chapter 34.

Thus, ideas in civil procedure do often have a historical pedigree. If proposals for reforming civil procedure and the system of written pleadings in the modern era have such a pedigree, knowledge of how previous rules were usurped or altered or derogated from must be of interest in assessing the likely chances of successful reform.

But equally, it should be appreciated that in the constant search for improvement, it is unlikely that there is a utopian ideal. Reminiscent of Glassford in 1812, Angus Stewart, Q.C. has noted:

‘There is no such thing as a system of procedure perfect for all time. As time passes, all procedures tend to over-elaboration, all forms tend to ossification and all rules tend to be displaced by their derogations. Every now and again reform is imperative.’²⁵

(v) National Sensitivities and the Reform of Written Pleadings.

This leads to the third question *viz.* whether the modern Scottish system of written pleadings is in need of reform. Answering this is more difficult. Proposals for changes to civil procedure in Scots Law frequently raise passionate debate and this is particularly so with written pleadings. In earlier periods, schemes with an English content offended national and cultural sensitivities as an attack on the integrity of the system of Scots Law as a whole. England has never imposed changes to the Scots system of pleading. There has never been a wholesale incorporation of an English system of pleading nor assimilation of the two systems, even though this has been

²⁴ See RCS new Chapter 43.

²⁵ Angus Stewart, Q.C. : Book Review of ‘The Reform of Civil Justice’, [Hume Papers on Public Policy (Edinburgh, 1997)] in (1999) 3 Edinburgh Law Review 265 at p. 266.

periodically advocated. English procedure, though, has cast a long shadow over Scots civil procedure.

Changes modelled on English practice have frequently been incorporated into the Scottish system, sometimes with beneficial effect. The first proposals for the incorporation of English civil jury trial caused great indignation among large sections of Scottish society in the 1780s, yet jury trial was a competent method of proof by 1815, and its incorporation was thereafter justified (erroneously) by reference to prior practice of the Court of Session. Its success continued because lawyers realised that this 'bulwark of English common law' was advantageous to their clients. It became the lawyers' favoured method of proof up to the 1860s. The beneficial effect was that it educated the profession that it was possible to make averments of fact without admixing those averments with propositions in law. Thereafter, the Court of Session made strenuous attempts to force parties to separate law and fact in all actions, which attempts were reflected in the rules regulating written pleadings.

It has always been the boast of the Scottish system that a cause might be disposed of without the necessity of enquiry into the facts pertaining to the case, saving expense for the litigant and conserving the resources of the court. Through the concept of relevancy, a party's case may be examined to test if, taking the facts stated in the hypothetical, the orders sought from the court are justified when the law is applied to those facts.

The concept was an inheritance from the early Canon law and still forms a cornerstone of Scottish civil procedure. As will be discussed in the thesis, it is

sometimes a difficult concept. It has not always been understood, nor its benefits appreciated, in the House of Lords, which on occasion has raised the hackles of practitioners north of the border. Scots lawyers have always been a little sensitive to criticism of their national form of process or civil procedure.

Why is this? Across the course of reform of civil procedure, from changes to the 'form of process', from the time of Stair to the present, Scots lawyers have demonstrated pride in their system of pleading. As Lord Gill told a conference in 1998,

'As for pleading, to the enthusiasts it has great strengths. Those who speak of pleadings often do so with lyrical excitement and pleasure, but when the system is exposed to outside review, there are comments such as those of Lord Diplock in *Gibson v. BICC*.'²⁶

The enthusiasts, defenders and even champions of the Scottish system of written pleadings often see it as a system which is inherently Scottish and part of Scots law, better than that in England and historically envied by those in other jurisdictions.

(vi) Written Pleadings and Scots Law

Moreover, it is often maintained that the Scottish system of written pleading is instrumental in preserving Scots law as a system which 'founds on principle' and is not 'precedent led' and that Scots Law is a 'rights based, remedy subordinated'

²⁶ 'Future Directions', Paper presented to Conference 'The Reform of Civil Justice' DHI/Faculty of Advocates, 1 June 1998. The case is reported at 1973 S.C. (H.L.) 15 and for further comment see *infra*.

system of law²⁷ as compared to England which places emphasis on the remedy. This is perhaps now questionable. Historically, changes to Scottish civil procedure in the nineteenth century had the practical effect of bringing to an end references to classical texts and foreign works of learning which were cited as examples of principle.

Still, some writers point to other strengths in the Scottish system of written pleadings and for justification often refer to what outsiders have said about it. Here is one such example.

(vii) Written Pleadings from an External Viewpoint

In 1911, in the United States, a Federal Committee under the chairmanship of Mr. Justice Lurton, was involved in drafting procedural rules for use in equity cases in the federal courts of the United States. In the vacation of that year, the chairman visited England to study the modern procedure in actual operation there. In the course of the visit, he submitted to Lord Chancellor Loreburn twelve questions relating to equity procedure in England. His first was 'What is the practical benefit resulting from the adoption of a single form of action in law and equity cases?' Loreburn, struggling to discharge the functions of Speaker of the House of Lords, Lord of Appeal in Ordinary and member of the Cabinet and shortly to fall seriously ill from the pressures of these positions, still managed to write answers to all the questions. In answer to this first, he explained the historical minefield of English civil

²⁷ See N. Whitty, 'From Rules to Discretion: Changes in the Fabric of Scots Private Law' (2003) 7 *Edinburgh Law Review* 281 at 304 and 307-8.

procedure up to the Judicature Act 1873 which fused equity and law in the High Court and resulted in new rules for pleadings. He explained these new rules in brief:

'Each party must state in writing as shortly as he can what his claim is and how it arises, or in the same way what his defence is and his reply. He must not enter upon any evidence, and must not state his case in an embarrassing way.²⁸ What is required is clearness, brevity and simplicity, though in fact these virtues are not always present in the pleadings. Either party may be ordered to give further particulars in order to make things plain. (It may be worth while for Mr. Justice Lurton and his coadjutors to consider the Scottish method of pleading, which, in my opinion, is the best. Upon that I am quite sure that the Lord President of the Court of Session would willingly give information. He is at the head of the Scottish Judiciary, and speaks with the highest authority.)'²⁹

We do not know if Mr. Justice Lurton contacted the Lord President but the passage was eminent praise indeed from the Woolsack.³⁰ Scots lawyers have since used and re-used the quotation, as in its essence there is something remarkable about the highest judge in Britain considering that the Scottish system of written pleading was the best example Mr. Justice Lurton could emulate and moreover, for the creation of a system of pleading in equity, that bedrock of the English law. The passage seems to have been originally quoted by another American, Wyness Millar in 1932,³¹ and was

²⁸ i.e. by concealing facts which would lead to embarrassment at trial.

²⁹ Printed in *The New Federal Equity Rules Promulgated by The United States Supreme Court at the October Term, 1912, as revised to July 1, 1925: together with the cognate statutory provisions and a reproduction with annotations, of all former Federal Equity Rules. With an Introduction, Annotations and Forms by James Love Hopkins of the Bar of the United States Supreme Court.* (Cincinnati, Ohio, 1925) p. 28.

³⁰ See also the reported comments on the Scottish system of pleadings of Lord Chancellor Halsburgh in *J. & G. Paton v. Clydesdale Bank, Ltd, and Anr.* 1896 SLT 7 at 8.

³¹ R. Wyness Millar, 'Civil Pleading in Scotland' (1932) 30 *Michigan Law Review*, (2 Parts) No. 4, 545 - 581; No. 5 582 - 746 at 545.

then used by Lord President Cooper in his *Selected Papers* as the basis for an assertion that Scots lawyers are not unreasonably prejudiced in favour of their native methods.³² It was used by Lord Kilbrandon in his *obiter dicta apologia* on the Scottish system of written pleadings in *Gibson v. BICC*³³ in counterpoint to Lord Diplock's biting criticisms of Scottish practice.³⁴ The quotation has had various outings since.³⁵

But if one looks behind the above facts, one sees that Loreburn was a product of a Scottish legal family, his grandfather³⁶ and his father³⁷ both being members of the Scottish Bar. Perhaps some of that rubbed off on him. Moreover, although he was an English lawyer by training, unlike his fellow members of the Appellate Committee, Loreburn had a predilection for separating, and keeping separate, fact and law in legal issues before the court,³⁸ and he was no slave to *stare decisis*, viewing previous cases as merely illustrative of principle.³⁹ These were two traits which a Scottish lawyer of the time would have been proud of. Even in his judicial writing he appreciated the requirements of written pleading which permitted fact of 'sufficient particularity' but not evidence to be pled.⁴⁰

³² Cooper, T., (The Rt. Hon. Lord, of Culross), 'The Scottish Legal Tradition' in *Selected Papers 1922-1954*, (1st collected ed.) (Edinburgh, 1957) 172 at 193.

³³ 1973 S.C. (H.L.) 15 at 32.

³⁴ *ibid.* at pp. 27-30.

³⁵ R. Black, *An Introduction to Written Pleading* (Edinburgh, 1982) p. 1; S. Woolman, 'Pleadings', in H.L. MacQueen (ed.) *Scots Law into the 21st Century. Essays in Honour of W.A. Wilson* (Edinburgh, 1996) 277 at 279; R. Aird and N. Jameson, *The Scots Dimension to Cross-Border Litigation*. (Edinburgh, 1996) p. 106.

³⁶ R.F.V. Heuston, *Lives of the Lord Chancellors 1885 - 1940* (OUP, 1964) (Reissue 1987) p. 133

³⁷ Obituary, 'The Right Hon. Lord Loreburn, Lord Chancellor', (1906) 14 SLT 1. His father was later Chief Justice of the Ionian Islands, *ibid.*

³⁸ Heuston, *op. cit.* p. 182, citing *McCartan v. Belfast Harbour Commissioners* [1911] 2 I.R. 143 and *Shrimpton v. Herts C.C.* (1911) 104 L.T. 145.

³⁹ Heuston, *op. cit.* Appendix, citing *West Ham Union v. Edmonton Union* [1908] A.C. 1, 4.

⁴⁰ 'I suppose that in the Scotch Law the object is to make people state clearly what it is that they mean to prove, not to require them to state evidence, but so to aver that there is sufficient particularity and that there will not be embarrassment or surprise to their adversaries. I presume that is the general object' *Caledonian Railway Company v. Symington* 1912 S.C. (H.L.) 9 at p. 11. (The case was decided 16th November 1911).

So, perhaps the English Lord Chancellor's admiration for Scottish pleading and his recommendation to Mr. Justice Lurton should be seen in this light.

Another more recent example of English admiration, which has not often been quoted, can be found in the Winn Report of the Committee on Personal Injuries Litigation.⁴¹ There the committee considered that

'Scottish pleadings of which we cite an example below, merit study. Whilst it can fairly be said that they tend to loquacity and that the highly significant Latin terms employed would not trip easily for Temple pens or tape-recorders, it must be respectfully recognised that they are so framed as clearly to highlight, in isolation and in logical relevance and significance, the issues to be determined. Their timber is sound. By contrast in English pleadings there is far too often foliage serving no purpose other than that of a screen.'⁴²

These remarks were made towards the end of a period in which the House of Lords had been called upon to decide a number of Scottish appeals on points of pleading, which decisions moved practice away from strict interpretations of written pleading and altered the notions of both bench and bar on the inter-relationship between averment and proof. Pleadings of the time obscured rather than highlighted the issues to be decided. These cases culminated in the decision of the House of Lords in *Gibson v. BICC*⁴³ and the infamous *dicta* of Lord Diplock when he exclaimed,

⁴¹ Cmnd. 3691 (London, 1968) Chairman: The Rt. Hon. Lord Justice Winn.

⁴² *ibid.* at para. 244.

⁴³ *cit. sup.*

'My Lords, when I first became a member of your Lordships' House I was unacquainted with the niceties of the Scots system of pleading. Since then my acquaintance has grown; so has my disenchantment.'⁴⁴

The decision is examined later in the thesis.⁴⁵

Whilst there are some in Scotland who see only the strengths in the Scottish system of written pleading and whilst Scottish lawyers have been traditionally sensitive to comments from outsiders, perhaps comments such as those of Lord Diplock or indeed any visiting outsider⁴⁶ should occasionally jolt us from any complacency regarding the need of our system periodically to be reviewed and reformed.

(viii) Scheme of the Thesis

Chapter One traces the development of written pleading from the time of Stair to the end of the eighteenth century and examines the form of process immortalised by Walter Scott in 'Redgauntlet'⁴⁷ and caricatured by Maidment in his 'Court of Session Garland.'⁴⁸ In this, it is suggested that pleading in writing actually arose from an unlikely source, but thereafter developed quickly. In Chapter Two, the continued development of pleading in writing is followed through the turbulent times of attempted governmental and parliamentary interference in Scotland's national legal institutions, to the point of the ultimate adoption of the civil jury trial and the new forms of procedure arising from the work of the 1824 Commissioners. Chapter Three

⁴⁴ at 27.

⁴⁵ see Chapter 5 *infra*.

⁴⁶ See R. Wyness Millar, 'Civil Pleading in Scotland' 1932 (30) Michigan Law Review, (2 Parts) (No. 4), 545- 581; (No. 5) 582 - 746, Elizabeth G. Thornburg, Professor of Law, Southern Methodist University of Dallas, Texas, 'The tyranny of fact pleadings' (2003) 48 JLSS 19 - 24.

⁴⁷ W. Scott, *Redgauntlet*, (ed. G.A.M. Wood and D. Hewitt) Edinburgh Edition of the Waverley Novels (Edinburgh UP, 1997).

commences with an inspection of the terms of the important Court of Session Act 1825 and the struggle which followed in its implementation between the Court and the profession. The chapter reviews and examines the ensuing procedural developments, the Court of Session Act 1850, the aborted 1863 Bill and finally the Court of Session Act 1868 which completed less than a century of radical change and which had by then defined the operation of written pleadings in the Court of Session, to which practice it has remained faithful up to the present day. Chapter Four attempts an up-to-date statement of the modern rules of written pleading. Having traced their development in the earlier chapters, it will be apparent that there is little which is not based in previous practice. Most of the modern rules have a historical pedigree and have arisen through the incremental changes scrutinised in the earlier chapters. Chapter Five looks at the operation of written pleadings in the modern adversarial context, drawing conclusions from some of the issues raised above. Chapter Six concludes the thesis by speculating on the future for written pleadings and attempting to answer the question whether traditional or conventional written pleadings will or should have a continued role in Scots civil procedure, which question, of course, concerned the writer at the very outset.

There are a number of appendices at the end of the thesis. Appendix 1 is an examination of an actual case from the period covered in Chapter One. Appendix 2 is a brief survey of actual written pleadings from the period 1843-73 taken from the Session Papers of the Faculty of Advocates looking at how the advocates in the Court employed written pleadings in the period. It may be read in conjunction with Chapter Three. Appendices 3, 4 and 5 are the results of empirical research undertaken by the writer at a formative stage in the research for this thesis. Some of

⁴⁸ *The Court of Session Garland*, (Edinburgh, 1839).

the results are referred to *in gremio* of Chapter Five, but much has not been used. Whilst only a portion of it has been used in this thesis, as I have no intention to publish it separately I appreciate that others may wish to have recourse to it at a future date. Thus I have included all of the material. Finally, Appendix 6 is a reproduction of an article by the writer which was printed in a collection of essays published by Edinburgh University Press in 1997. As the writer draws upon and uses the article in the thesis, it is reproduced here in compliance with the terms of the University of Edinburgh Higher Degree Regulations, and with the kind permission of Edinburgh University Press.

Chapter One

Procedure and Pleading in the 17th and 18th Centuries. The Start and Development of Written Pleadings.

(i) Introduction

In 1714, William Forbes,¹ reflecting upon the development of the form of process² before the Supreme Court in Scotland commented,

‘The State of our Form of Process hath, by the long Experience of near 200 Years, been from Time to Time improv’d and so refin’d from all Matter of fancied Inconveniency as much as is possible; that it is at present more easy, accurate, distinct, safe and desirable, than the Rules and Orders of any other Supreme Court that hath fallen within the Compass of my Observation or Reading.’³

Although we are not told which other Supreme Courts he had observed or read about, his ‘close Attendance every Session-day in the Inner-house, for the space of

¹ At the time when he was writing, he was the newly installed incumbent of the first Chair of Civil Law in the University of Glasgow. See further Cairns, ‘The Origins of the Glasgow Law School: The Professors of Civil Law, 1714-61’, in P.B.H. Birks, (ed.), *The Life of the Law: Proceedings of the Tenth British Legal History Conference*, Oxford, 1991, London, 1993, 151, at pp. 177-9; Cairns, ‘The Civil Law Tradition in Scottish Legal Thought’, in D.L. Carey Miller and R. Zimmermann, (eds.), *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays* (Berlin, 1997), 191 at p. 217; and for his biography and, in particular, his life as an advocate and collector of decisions, see D. Walker, *The Scottish Jurists*, (Edinburgh, 1985) at pp. 185-93.

² What now might be termed Civil Procedure. What was meant by the phrase was literally the manner of proceeding in the Court. Thus, there are a number of textbooks of the period written by advocates and clerks entitled ‘Forms of Process’. See Introduction and *infra*.

³ William Forbes, Advocate, Professor of Law in the University of Glasgow *A Journal of the Session. Containing the Decisions of the Lords of Council and Session, etc.* (Edinburgh, 1714) Preface, p.10.

eight years immediately preceding June last' (1713), had convinced the Lords of Council and Session of his 'exactness and accuracy' of observation.⁴

The improvement and refinement of the forms of process of the Court, up to this time, had led to Scots lawyers beyond Forbes expressing pride in the Scottish manner of proceeding before their Supreme Court. Craig⁵ and Stair⁶ before had expressed similar sentiments. The two hundred years to the point of Forbes' observation at the start of the eighteenth century had seen a system of pleading developed, modified and refined to meet the needs of the people for whom it operated.

The utility of the procedure was crucial to these sixteenth, seventeenth and eighteenth century commentators. A procedure before the Court which permitted of, or at least aimed for, 'justice to all' was important. The old King's Council, with its process on brieves, had been transformed into a central Court and with the new Court came a changing view of Scots Law as well as new procedures and forms of process, albeit that this change occurred against the matrix of the *jus commune* tradition. Implicit in these changes was that it was a central function of the King to ensure the equitable administration of justice to all of his subjects and that justice

⁴ Act of Sederunt (A.S. hereafter) 7 July 1713 appended at p. 48 of the Preface.

⁵ 'Our Scottish forms of legal process and judicial procedure are, no doubt, different from those in use in England; but, with all respect to our neighbours, I make bold to say, and to say advisedly, that the forms we use in Scotland are better than those used in any other country I know of.' Epistle Dedicatory, p. 9, T. Craig, *Jus feudale tribus libris comprehensum*, (3rd ed.), (Edinburgh, 1732). [I have used Lord Clyde's translation, *The Jus Feudale by Sir Thomas Craig of Riccarton with an Appendix containing the Books of the Feus*, 2 vols. (Edinburgh and London, 1934), Vol. I at p. 9.] Craig's work was finished around 1605 although only first printed in 1655, see J. Cairns, Fergus and H. MacQueen, 'Legal Humanism in Renaissance Scotland' (1990) 11 *Jour. Leg. Hist.* 40-69 at p. 49 and W.M. Gordon, 'Roman Law in Scotland' in: R. Evans-Jones, (ed.), *The Civilian Law Tradition*, (Stair Society, Edinburgh, 1995). pp. 13-40 at p. 26. For a good explanation of Craig's motives in so writing see W.D.H. Sellar, 'English Law as a Source' in: D.M. Walker (ed.), *Stair Tercentenary Studies*, (Edinburgh, 1981) p. 140 ff.

⁶ "[t]he law of Scotland in its nearness to equity, plainness and facility in its customs, tenors and forms, and in its celerity and dispatch in the administration and execution of justice, may well be paralleled with the best law in Christendom" I have used here the edition edited by D. Walker, *Stair's Institutions of the Law of Scotland* (Edinburgh, 1981) at 1, 1, 16.

should not favour one over the other by reason of their position in the hierarchy of society.⁷

The language used by Forbes and Stair betrays this. For Forbes, the reason the Scots form of process was better than anywhere else was because it was 'convenient', 'easy', 'accurate', 'known', 'distinct' and 'safe'. For Stair, the law of Scotland in its 'forms' was plain and easy, and the administration and execution of justice, swift in dispatch. Even Craig, writing against a background of recommending a closer working of English and Scots law,⁸ came to the conclusion that the Scottish forms of legal process and judicial procedure were better.

In the development of the form of process, changes were initiated by the Lords themselves, sometimes on the recommendation of the Faculty of Advocates, such as to remedy what were considered abuses of the system. More often than not, the 'abuses' arose from litigants and their legal advisers attempting to circumvent the rules of the Court or exploiting loopholes in the procedure to gain advantage over an adversary; but such tactics were generally not employed with any preconceived intention of eroding the procedure of the Court. A favourable new interpretation of an old rule, the creation of delay or the imposition of extra expense upon an adversary were tactics which could be, and were, used in the conduct of the litigation.

⁷ One also notices the same imprimatur in the preamble to the acts of sederunt. Thus A.S. 24 May 1595 refers to "the great weill and ease of our Soverane Lords leiges" and A.S. 20 January 1643 commences, "considering the great prejudice of parteis and loss of mutche tyme".

⁸ There is much in the literature on this. For an example, W.D.H. Sellar, 'English Law as a Source' in: D. M. Walker, (ed.), *Stair Tercentenary Studies* (Stair Soc., Edinburgh, 1981) 140 and by the same author, 'The Resilience of the Scottish Common Law' in D.L. Carey Miller

There were principally two sources of rules under 'the form of process' - Acts of Parliament, and declarations or ordinances by the Lords themselves, called 'Acts of Sederunt'.⁹

(ii) The Form of Process and Manner of Proceeding Before the Supreme Court from the Time of its Institution

The Court of Session itself had been founded in 1532 and ratified by act 1541.¹⁰ By the time of its institution, the old processes upon brieves had died out¹¹ and the new Court developed a form of process heavily influenced by the Romano-Canonical procedure of the Church Courts of the time.¹² In general, the procedure was oral, although initiated by a written document and where the Lords thought it expedient, parts of the procedure thereafter were in writing.¹³ There were marked similarities between this procedure and that of the church courts,¹⁴ in particular, in the method

and R. Zimmerman, (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997) 149 at 160ff.

⁹ Forbes explains the difference between decisions of the Court and A.S. as 'Acts of Sederunt differ from the decisions in this, that the former are only fixed rules of Form to be observed in the Distribution of Justice made by the Lords in *thesi*; whereas the latter are their determinations and Resolutions in *hypothesi*, upon particular points of Right or Form before them in *foro contensioso*.'

¹⁰ Then entitled the 'College of Justice', which comprised its President and fourteen ordinary Senators. See R.K. Hannay, *The College of Justice: Essays on the Institution and Development of the Court of Session* (1933), pp. 27-61.

¹¹ There is a wealth of writing on the old process upon brieves. See J.W. Cairns *Historical Introduction*, *op. cit.*, Vol. I, p. 27; I.D. Willock *The Origins and Development of the Jury in Scotland*, Stair Society, vol. 23 (1966); H.L. MacQueen 'Pleadable Brieves, Pleading and the Development of Scots Law', (1986) 4 *Law and History Review* 403-22; H.L. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (1993).

¹² John Finlay *Professional Men of Law Before the Lords of Council c.1500 - c.1550* (unpublished Ph.D. thesis, University of Edinburgh, 1997) vol. I, p. 213 and see now the same author, *Men of Law in Pre-Reformation Scotland*, Scottish Historical Review Monograph No. 9, Tuckwell Press, (2000) at p. 122. There is also much in M. Godfrey, 'The Lords of Council and Session and the Foundation of the College of Justice: A Study in Jurisdiction' (unpublished Ph.D. Thesis, University of Edinburgh, 1998) at pp.192 -215.

¹³ J.W. Cairns, 'Historical Introduction', *op. cit.* p.63-4; Godfrey *op. cit.* p. 193.

¹⁴ S. Oliphant, *The Court of the Official in Pre-Reformation Scotland: Based on the Surviving records of the Officials of St. Andrews and Edinburgh*, (Stair Society publication, vol. 34 (1982)) pp. 95 - 118; J.J. Robertson, 'The Development of the Law', in Brown (now Wormald) (ed.) *The Acts of*

of formation and formulation of argument. The church courts had long used Canonical procedure which had been influenced in the medieval period via the rediscovery of the works of logicians and orators, and the disciplines of logic, argumentation and topical reasoning, of the ancient period.

By the middle of the seventeenth century, the procedure of the Court of Session was well defined. Before turning to the procedure, prescribed mode of reasoning and pleading before the court in the early seventeenth to mid seventeenth century, one should understand how the Court was composed, including its geographical composition and how it operated in practice and to this we now turn.¹⁵

(iii) The Inner House and The Outer House.

The Court, at least from the time of its institution, sat as a unitary body, comprising the President and fourteen Ordinary Lords, although not all these Lords always sat together at one time. Nine Lords formed a quorum and causes coming before the Court were decided by a majority vote.

the Lords of the Isles 1336-1493 Scot. Hist. Soc., (vol. 22 (1986)) at pp. 151-2. For some good detective work in identifying Canonical influence in early law and in particular, steps in process and procedure, see J.J. Robertson, 'The Canon Law Vehicle of Civilian Influence with Particular Reference to Scotland', in D.L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law Aberdeen Quincentenary Essays* (Berlin, 1997), p.117 at pp. 121-5; and the same author, 'Canon Law as a Source', in D. Walker (ed.), *Stair Tercentenary Studies*, (Edinburgh, 1981).

¹⁵ What follows is based on the following sources: R.K. Hannay *College of Justice op. cit.* pp. 95-6; Royal Commission of the Ancient and Historical Monuments of Scotland, *Tolbooths and Town-Houses: Civic Architecture in Scotland to 1833* (1996), 82-6; *Our Journall into Scotland Anno Domini 1629, 5th November from Lowther* (Edinburgh, 1894) 26-30; C.A. Malcolm, 'The Parliament House and its Antecedents' in G.C.H. Paton (ed.) *An Introduction to Scottish Legal History*, (Stair Society, vol. 20 (1958)) pp. 449-58; Lord Cullen, *Parliament House A Short History and Guide* (1992); W. Forbes 'Journal of the Session' *op. cit.*, Preface, pp. ii ff.

The Court was composed of an Inner House and Outer House, separate from each other, described¹⁶ initially as the 'invarit tolbuyth' and the 'Outer Tolbuyth',¹⁷ and thereafter as the 'inner-hous' and 'utir-hous' or 'over-hous'.

The reference to 'tolbooth' was an acknowledgement of the Court's predecessor, the early sixteenth century Tolbooth, situated at the north west corner of the Kirk of St. Giles, comprising an inner and outer part.

The original Tolbooth became unsuitable for the functioning of the Court, and prompted the Lords of Session to complain to the town council of Edinburgh, which, in 1554, undertook to effect repairs,¹⁸ eventually erecting at the south-west corner of St. Giles a new Tolbooth with inner and outer houses for the purposes of Court. In 1632, King Charles I requested the town council to provide new accommodation for Parliament, the Court of Session and the Privy Council, which request the Council acceded to, and the foundation stone of a new building was laid on 3 August 1632. The building works were finally completed in the summer of 1639.¹⁹ The design was for a hall for Parliament and a jamb²⁰ to the east with a great door positioned facing the yard to the rear of St. Giles giving entry to the 'Parliament Hall'.

From at least 1555, whilst in the Tolbooth, the Court developed the practice of individual members carrying out particular functions away from the main body of

¹⁶ in the early A.S.

¹⁷ Also 'outtir tolbuyth' or 'utir tolbuyth'.

¹⁸ Hannay, *op. cit.* p.95. See also H.P. [later Lord] Macmillan, 'The Court of Session in 1629', 1900 (xii) J. R. p. 137 (drawing on the historical manuscript - C. Lowther, R. Fallow, P. Mauson, 'Our Journall into Scotland ano dni. 1629, 5th November, from Lowther' [= repr. Edinburgh, 1894 as *Our Journale Into Scotland Anno Domini 1629, 5th of November From Lowther. C. Lowther Mr. R. Fallow Peter Mauson (Douglas Edition.)*])

¹⁹ See further, M. Upton, 'The Platitute of Parliament Square' 1997 SLT (News) 273 at 274.

the Court. Although obscure,²¹ it appears in the early practice that the Lords went out to the Outer Tolbooth for the taking of depositions from witnesses. By 1564-5 an ordinance of the Lords provides for 'thrie of thaim in the uttir tolbuyth' to hear on two specified days 'all common privilegit materis'. Privileged matters²² were those which required the supplication of the Lords upon a 'bill'²³ and approval of the judge by interlocutor was a prerequisite for the raising of a summons.²⁴ These bills were considered in the 'Bill Chamber', a throw back to the institution of the College of Justice.²⁵

²⁰ i.e. wing.

²¹ The best explanation of the early development of the Lords going to the Outer Tolbooth and later the Outer House is to be found in R.K. Hannay, *op. cit.* pp.91-101. The 'Over New Tolbooth' in St. Giles' Kirk (prior to the 1640 building) comprised a connected outer and inner house. It is discussed in P. Miller's appendix to Douglas's 1894 Edition of 'Lowther's Tour' (Edinburgh, 1894) which also contains a plan at p. 27. The plan is reproduced in H.P. Macmillan's 'The Court of Session in 1629' *op. cit.* at p. 140.

²² removings, suspensions and advocations also proceeded upon bills.

²³ The Bill was in essence a draft of the summons. See further James A. Maclaren, *Bill Chamber Practice*, (Edinburgh and Glasgow, 1915) p.3

²⁴ On the Bill being passed by the Lord deputed for the consideration of the 'Billis', as 'appropriate' for progressing to the next stage as a summons ('summonds'), the bill would be returned to the writer ('wryter' or sometimes 'writtir') to the signet who had drafted it and he would draw the summons and forward it to the Keeper of the Signet, together with the Bill passed by the Lords, who received the bill for warrant and signetted the summons. Of course non-privileged summonses, of which the most common was a summons for payment of a debt, could proceed without a bill. The procedure in respect of this, as well as the forms of process generally, can be found in John Skene, *Regiam Majestatem Scotiae &c.* (Edinburgh edition, 1609) to which is adjoined '*Twa Treatises, The one, anent the order of proces observed before the lords of Counsell, and Session*' (1609). The works can be referred to under the title of the Tract '*Ane Short Forme of Process presentlie used and observed before the Lords of Counsell and Session*'. See also the work of Skene's assistant Habbakuk Bisset and his amplified and revised version *Rolment of Courtis* (1622). I have used here the version edited by Hamilton Grierson, Scottish Text Society (N.S.) Vols. 10, 13 and 18.

²⁵ C.A. Malcolm, *op. cit.* The Bill Chamber had originated as a vacation Court in the A.S. 31 July 1532. The Bill Chamber also performed another important function - that of a 'sift' for matters coming to the Court from inferior jurisdictions. Bills of Advocation sought to review the proceedings of an inferior court and Bills of Suspension (or Suspension and Reduction) sought to stay the execution of the sentences passed by the inferior court (or to reduce them.)

Sometimes parties would attempt to have a bill considered by the whole Lords²⁶ but from 1575 onwards all bills had to come before the Lord Ordinary in the Outer House and only where there was dubiety in the content, was the bill to be read to the 'haill lordis'. So we may speculate that at least two of the functions performed in the Outer House were the consideration of these bills and the taking of evidence from witnesses.

Thereafter, frequent references to the Lords sitting for variations of 'billis, witnes and uttir tolbuyth'²⁷ appear in the Sederunt books and by 1591, the practice has emerged of a 'Lord Ordinar appointit weeklie to sit in the Outer Tulbuyth.'²⁸ We may therefore speculate that by 1591, there was a Lord of the Outer Tolbooth as well as Lords in attendance for the taking of witnesses' depositions and for the Bills.²⁹

By this time, the Lords were established in the 'New Tolbooth' or 'Tolbuith'³⁰ which was now sometimes referred to as 'Parliament House.'³¹ Although the records are incomplete, it would appear that the Lord Ordinary appointed to sit in the Outer House was also given the function of hearing cases coming into the Court upon summons without a Bill, his function being to oversee the procedure of considering

²⁶ presumably with the intention of persuading the Lords to grant a remedy immediately in equity or alternatively, testing the 'haill lords' reaction to its content with neither the expense nor risk of summoning the other party to the cause (on this see *infra*).

²⁷ Hannay, *op cit.*, p.98.

²⁸ A.S. 25 May 1591.

²⁹ This is speculative. Even so, although Bisset records that '*ane of the Lordis sall pas to the uttirhouse*' and details how he is to proceed in calling actes and then the tables, citing A.S. 23 June 1579, he makes no mention of the bills or depositions of witnesses, albeit that the title under which this is stated is '*Lordis of the uttirhouse*' i.e. plural. Moreover, the following title heading *viz.*, '*The lordis of the uttirhouse suld nocht be called to voit in the Innerhouse*' states that 'It is statute that the lordis ane or ma ordourlie/ordinarlie appoynted for the uttirhouse (my emphasis) (both words are used in the two original versions used by Hamilton-Grierson) might suggest that more than one was appointed at and for any one time. *Bisset's Rolment of Courtis*, Hamilton-Grierson edition, *op. cit.*, Vol. I p. 146

³⁰ A.S. 13 July 1596

the pursuer's summons and libel and thereafter superintending the parties' subsequent oral pleadings and then granting actes or decreets where appropriate or if not, bringing the parties to a position whereby one side or the other was allowed proof of their 'allegiances.' When such a position was reached the case would fall within the remit of what became known as the 'Lord upon Oaths and Witnesses'.³²

Where the Lord Ordinary considered any matters raised to be difficult, he could 'report' it to the whole Lords for their answer.³³

The period was a turbulent one³⁴ and the Court was often forced from Edinburgh and the Tolbooth by the Scylla and Charybdis of plague and revolt. There is no record of how the Lords proceeded when forced to do so, but by the middle of the century, with the erection of the New Tolbooth³⁵ (the old tolbooth remaining and partially rebuilt for non-judicial purposes)³⁶ and the restoration of Parliament Hall after the ravages of Cromwell, the Court was back to the established pattern of appointing Lords from among their number to carry out the tasks in the Outer House, the remaining Lords sitting in the Inner House.

Forbes was not only a keen observer of the decisions of the Court. His is the best near contemporaneous account of the lay-out of the Court and the two houses, their

³¹ quoted by C.A. Malcolm, 'The Parliament House and its Antecedents', *op. cit.*, p.452

³² The two modes of proof. Lowther recorded in 1629 on his visit to the Courts that 'their trials are wholly by oath and witnesses.' Lowther *Our Journall Into Scotland Anno Domini 1629, 5th of November* (Douglas Edition, 1894) 29

³³ see *infra*.

³⁴ For good coverage of the period see generally, J.W Cairns, *Historical Introduction, op. cit.*

³⁵ to become Parliament Hall.

³⁶ It was to become a gaol.

interaction and the personnel of the College of Justice.³⁷ The procedure was in part affected by the geographical lay-out of the Court and the manner in which the judges organised their functions. This in turn affected the way in which the advocates pleaded before them. The Inner House was positioned in the jamb built to the side of Parliament Hall. It was a large square room with a room to the north side of it where the Lords put on their robes and the advocates and principal clerks their gowns. When sitting in the Inner House the Lords sat at a semi-circular Bench positioned towards the south end of the room and the bar at which the advocates pleaded formed the diameter line. In front of the Bench sat the six principal clerks at a table³⁸ At the east corner of the Inner House sat a Lord upon the Bills at a table attended by the Clerk of Bills.³⁹

On the west side of the House, two 'doors of communication' opened out into the Outer House, described by Forbes as a 'stately hall.' One was used by the Lords having business in the Outer House as well by as the clerks moving from one court to the other distributing processes to either House. The other door was the 'common door' at which was positioned a door-keeper who was discharged⁴⁰ to allow in any other than the advocates, writers to the Signet and 'persons of note'.

The Outer House (on the site of the present Parliament Hall) had a Fore Bar in the middle of the south side at some distance from the wall up which advocates would

³⁷ What follows is primarily based upon Forbes' account in the Preface to his Journal.

³⁸ and sometimes the Lord Clerk Register when he thought '*fit to attend in his gown*'. The clerks were, as we would now say, 'legally qualified'. No person could be a clerk unless they had served three years as an advocate or as a writer to the Signet. Forbes, *op. cit.*, Preface p. ix.

³⁹ C.A Malcolm gives a description that '*At each corner a Lord sat upon the bills*' but does not provide any authority for this. This may not be correct. Certainly, in the previous century it had been the practice for the Lord upon the Bills to go out to the Outer House. See the discussion *infra*.

ascend by some steps to plead. Seated within the bar were six under-clerks⁴¹ called Clerks of the Outer House and behind them there was a high Bench where the Lord of the Outer House sat. Adjoining his Bench was a table where the Clerk or Keeper of the Minute-Book sat and marked down the proceedings as they occurred.

On the east side of the Hall were the Side-Bars, wherein there were chairs for the Lord Ordinary to hear and determine causes⁴².

⁴⁰ viz. in modern language, 'charged not to'

⁴¹ Originally three serving in the Outer House. See A.S. 11 January 1604.

⁴² Although Forbes says that there was only one Lord Ordinary sitting at the Side Bar it is probable that there were three judges sitting in this area by the time of his writing. Malcolm *op. cit* p. 455, Cullen *op. cit.* p. 10. When the Court sat in the New Tolbooth, in 1610 (A.S. 11 January 1604) it is mentioned that no Lord except the 'Ordinar, sall cum to the Utter-hous, without special license askit and gevin of the Chancellor and President' - any Lord transgressing being punished, and again, in A.S. 29 January 1642, there is mention of 'the Ordinar Lord in the Utter-hous'. A.S. 8 November 1649 also makes mention of the position, such that by 1650, the A.S.2 January 1650 prescribes that the 'Lord who is Ordinar in the Utter-house' must call actions according to the order that they are insert in a roll made up by him. It continues to ordain the Lord who is 'Ordinar on the bills, to go furth [to the Outer House] everie day at nyne houris, for calling of such acts and copies, for seing of pieces [of process] and for calling of such acts as are past litiscontestatione, for satisfieing the desire thereof, and for receiving of witnesses, and for productione of principalls, remitting of protestationes, and granting of certificationes whan thair is no dispuitt'. The following Act of Sederunt (A.S. 16 January 1650) regulating the closing of depositions of Witnesses, ordains all depositions of witnesses, 'quhilks are heirafter to be received and examinat, to be closed and stamped be the Lord Examiner of the saids witnesses', - these witnesses presumably having been received by the Lords Ordinary on the Bills. A.S.6 November 1677 again notices 'Ordinaries upon the bills' and in 1686 (A.S. 4 November 1686) it is ordained that only two Lords in one day (beside the Ordinary on the Billis) shall go to the side bar one at one time to call processes (this ordinance being renewed by A.S. 16 January 1690). A.P.S. 1693 c. 30 innovates a new Ordinary appointing the Lords to 'nominate ane Auditor weekly for hearing of parties upon Concluded Causes' and to make a report of the probation to be brought into the Lords, i.e. from the Outer House. Lastly, but by no means least, there was passed A.S. 5 June 1711, entitled 'Act of Sederunt anent the Order of the Service of the Lords upon the Bills in the Outter-house, for preparing Concluded Causes, and on the Oaths and Witnesses' regulating the order of each of them going to the Outer House. This ordinance must have been within Forbes very recent and direct observation. Indeed, at p. xi. of the Preface he notes that 'Every Lord, except the President, takes his Turn of sitting in the Outer-house, upon the Bills, at the Side-Bar, upon Oaths of Parties and Witnesses, and upon concluded Causes. ...Each Lord is called the Ordinary, with respect to Affairs that come in before him. In the forenoon, there is always One Ordinary upon the Bills, Another in the Outer-house, a Third at the Side-Bar for reconsidering Matters formerly debated before him when upon the Bills, or in the Outer house And the rest of the Lords sit with the President at the same Time'. By the 18th Century, Alexander Young, W.S. could note that the Side Bars in the Outer House 'were then of a very singular construction, being merely an Arm Chair in a small recess, with a narrow shelf in front, which brought the Judge, Counsel and Agents in such close connection that

The large area of the hall was enclosed on the west side by rails through which those with business with any advocate could pass and speak with them. The Faculty had a Keeper who was charged with not admitting anyone to the area not having any business with the advocates.⁴³ On the North side of the House there were 'many Rows of Benches' on which 'advocates or others admitted within their Bar may sit'. It appears that the area in front of this was where the advocates would 'walk.'⁴⁴ The advocates would assemble on their benches or 'seats' and await instruction from the Writers to the Signet and their agents, or would await the calling of the case in which they were already instructed. There was a Keeper of the advocates' bar and seats and it seems an officer for their fees.⁴⁵ The advocates themselves had personal agents or servants, who would carry out the more menial tasks for their principals and masters.⁴⁶

(iv) The Theory, Mechanics and Dynamics of Litigation before the Court: The Bicameral Administration of Justice

they almost touched each other ... ' Alexander Young, *Memoir of Robert McQueen of Braxfield*, EUL Laing MSS. Div., ii, 113.

⁴³ This was modified such that no persons could actually access the area where the advocates sat. *The Minute Book of the Faculty of Advocates*, 2 vols., vol. I., (1661-1712), J.M. Pinkerton, (ed.), The Stair Society, No. 32, (Edinburgh, 1976, 1980) at pp. 39-40. It is recorded that the Faculty's Keeper in 1679, John Ballandine, could make 'ane compitent lyfelihood' taking 'casualties' from 'Noblemen, Gentlemen, wryters to the signet, Agents and uthers' permitting them to come within the advocate's bar. This practice was barred by order of the Lords of Session. He petitioned the Faculty for an increase in salary to reflect this prejudice, - unsuccessfully - a year later his supplication is refused. p.46

⁴⁴ Minutes for February 24, 1673, Faculty of Advocates Minute Book, *op. cit.* vol. I, p. 25. The walking up and down Parliament Hall is still practised by advocates together and advocates with agents, the reputed *raison d'être* being that other parties cannot be privy to the discussion.

⁴⁵ 3 November 1665, Faculty Minute Book, *op. cit.*, p.11

⁴⁶ See Royal Commission 1927. The Faculty's Minute Book, *op. cit.*, records, on 2 July 1664, a decision of the Faculty that only advocates and not their servants could sit in the 'first seat'. *op. cit.* vol. i, p. 8.

It was as thus assembled that the Court undertook its work. The theory of litigation was that parties would bring their dispute to the Court and once the preliminaries were dealt with, the parties would 'enter into pley' in the preliminary setting down of their respective positions, before being required to enter a judicial contract i.e., *litiscontestate*,⁴⁷ agreeing to be bound by the ultimate decision of the Court. Probation was not permitted other than that allowed by the Court and the best evidence was written.⁴⁸ If witnesses were required to prove an allegiance then, if the witnesses could be in attendance in Edinburgh, their testimony was taken by the Ordinary on Oaths and Witnesses behind closed doors, although the parties could provide lists of questions or *interrogatories*, and once the depositions were taken and noted they were sealed up to be prepared by the Lord Ordinary on Concluded Causes as part of a 'state' of the case to be brought before the whole Court as a collegiate body for its determination. Witnesses who were unable to travel to Edinburgh had their evidence taken by a Commissioner appointed by the Ordinary, which was thereafter reported back to the Ordinary on Concluded Causes.

It was a particularly Civilian way of proceeding and was testament to the Romano - Canonical methods adopted by the Court at institution.⁴⁹ Any disputes which contained weighty or intricate matters, would be decided by the whole Court whilst the preparatory work was undertaken by individual members. As Forbes explained,

⁴⁷ The A.S. 19th January 1600 refers to the parties being 'put to a point' by *litiscontestation*.

⁴⁸ This was of some antiquity. See further, Finlay *Men of Law op. cit.* The rationale was based in the Romano-Canonical distrust of the spoken word on which, see D.A.O. Edward, 'Fact-Finding: A British Perspective' in D.L. Carey Miller and P. Beaumont (eds.), *The Option of Litigating in Europe*, United Kingdom Comparative Law Series, vol. 14, (Edinburgh, 1993) p.43ff.

⁴⁹ Jeroen M.J. Chorus 'Civilian Elements in European Civil Procedure' in D.L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays* (1997) ; Finlay *Men of Law, op. cit.*, p.89.

'Business is carried on before the Session in the best Order can (*sic*) be thought of. That of greatest Moment, is calculated to be determined in Presence, and what is less Material is committed to particular Ordinaries. ... For in the Session, particular Ordinaries determine all common Business, and mostly do so ripen & prepare weighty Matters, that the Senate in the Inner-house have nothing to do, but to give them the finishing stroke. Whereas, single Judges in separate Courts (tho' of Ordinary Knowledge and Experience) cannot (unless resolved to decide at random) expedite Justice with that Celerity, may (*sic*)⁵⁰ be expected from particular Lords in the Session in their respective single Capacities, who are supported and forwarded in their Procedure, by the communicated Advice of the collegiate Body. *Facilius enim invenitur, quod a pluribus quæritur.*'⁵¹

⁵⁰ should probably read 'as may'

⁵¹ Forbes Journal p. xiv. Implicit in the Lord Ordinary ripening and preparing matters for the whole Court is the concept that they were 'delegates' of the whole Court acting in particular capacities to assist their brethren in the final judicial determination of the cases. Macmillan quotes Lowther's dismissal of the Ordinaries in the Outer House '*which doth but as it were prepare things for the Inner House*' (*op. cit.* p. 141 = Douglas' 1894 Edition at pp. 29-30) which source may have informed Professor T.B. Smith, when he considered them 'little more than commissioners executing delegated functions and reporting back to the whole Court': T.B. Smith: *British Justice: the Scottish Contribution* (London, 1961) p.55 (although this is refined a year later to 'as delegates of the Court' - T.B. Smith: *A Short Commentary on the Law of Scotland* (Edinburgh, 1962), p. 90.) See also similar sentiments in modern writing - Stair Memorial Encyclopaedia, (S.M.E.) vol. 6, para. 910 and Lord President Dunedin's propagation of the idea in *Purves v. Carswell* (1905) 8 F. 351 at 354 and in *The Clippens Oil Co. Ltd. v. The Edinburgh and District Water Trustees* (1906) 8 F. 731 at 750 which was in turn followed by Lord Thankerton in *Smith v. Education Authority of Glasgow* 1933 SC (HL) 51 at 53 and by Rt. Hon. Lord Normand in 'Scottish Judicature and Legal Procedure' Presidential Address to the Holdsworth Club, (1940-41) at p.6. However, N. Phillipson, in *The Scottish Whigs and the Reform of the Court of Session*, (The Stair Society, vol. 37) (Edinburgh, 1990), p. 44 (following J. Glassford, *Remarks on the Constitution and Procedure of the Scottish Courts of Law*, (Edinburgh, 1812), at p.20) has pointed out that the Outer House was a court of first instance in its own right. Both are right. As discussed *infra*, in the early part of the century, the manner and form of the preliminaries was known and fairly straight forward - at least in the simpler non-privileged actions, such as for payment of a debt or spuilzie. Thus, the ordinance of the Lords enjoining agents to adhere to the 'known forms'. The Ordinary in the Outer House would perform a role which was mostly supervisory in nature, ensuring parties adhered to what was at its most basic, a formulaic process, although his role would always permit of the exercise of equitable jurisdiction to modify the process before him. Thus Stair, (I have used his *Modus Litigandi* comments. See *infra*), records that, of old, ordinary Summonses were drawn by a writer to the Signet without a Bill or warrant of the Lords because '*the Stile and nature of them was current and known*' *Modus op. cit.* at p.3. The writers to the Signet had stile books which they were '*obliged and every session enjoyn'd punctually to observe*'. (p.4) As the law

Whilst this was the theory, the practice developed differently. The wiles, ploys and attempts to circumvent the procedure by litigants and their agents and advocates would often leave the Court with much more to do than the giving of a finishing stroke. More importantly, it was to be these attempts by litigants 'to steal a march' on their opponents which indirectly resulted in the development of written pleading.

But even at this early stage, and in the teeth of such tactics, it was still appreciated that the proper administration of justice required that parties to a litigation should be permitted to answer the positions put forward by the other. Thus it was implicit that a cause should be refined. It was appreciated that justice summarily dispatched was not justice at all and some delay between the initiation of a cause and its final determination would always arise. The idea was that the cause should be 'refined' between parties. The word often used in the commentaries is 'ripening'.

But whilst parties were entitled to advance arguments beyond the initial arguments by one in a summons and the response to it by the other, there were time limits to allow them to do so, after which it was not in the interests of justice to permit the Court's time to be expended. The cause would require ripening within a specified time period, after which the 'celerity' of the whole system would be affected. After the initial stage, the cause could be determined, but if it was complicated or novel, there were mechanisms to allow it to go beyond this initial stage for consideration 'in Presence' that is, before the whole Court. It was appreciated that in these circumstances, justice required the Opinion of the whole Court.

developed and became more complex, and the creation of rights, and obligations between parties came to be regulated by new legal concepts, the Court increasingly required to superintend the process, carefully preparing the resulting new forms of demand. As a result, the procedure of the Court developed and became more complicated. Thus, the role of Ordinary in the Outer House became more important, his tasks developed a discretionary

(v) The Initial Stages of a Litigation

There were two classes of case which came before the Lords – ordinary and extraordinary.⁵² Ordinary actions could pass the Signet with or without a Bill but extraordinary always required a Bill attached.⁵³ In both cases the initiating document was a Summons and it was common practice for these documents to be drafted or ‘drawn’ by Writers to the Signet, with or without the advice of an advocate. This drawing was left to writers as in the usual course ‘the stile and nature of them was current and known.’⁵⁴ In drafting the writer would consult his collection of practicks or styles⁵⁵ for the proper style to be used in the action he was to raise. The proper

nature, hence the remarks by Glassford that the Ordinaries’ duties comprised a Court at first instance in its own right.

⁵² What follows is based upon the following sources: (full titles) [Stair] *Modus Litigandi or Forms of Process Observed Before the Lords of Council and Session in Scotland* appended to *The Institutions of the Law of Scotland Deduced from its Originals and Collated with the Civil, canon and Feudal Laws; and with the Customs of Neighbouring Nations Part First and Second* by Stair, President of the Session (Edinburgh, 1681); [J. Spotswood,] *The Form of Process, before the Lords of Council and Session, etc. Written for the Use of the Students in Spotswood’s College of Law, by John Spotswood of That Ilk, Advocate* (Edinburgh, 1711); J. Glassford, *Remarks, op. cit.*; [T. Hope,] *Minor Practicks, or A Treatise of the Scottish Law. Composed by that Eminent Lawyer Sir Thomas Hope of Craighall, Advocate to His Majesty King Charles I* (Edinburgh, 1726) pp. 1-12; [G.J. Bell,] *Examination of the Objections Stated Against the Bill For Better Regulating the Forms of Process in the Court of the Law in Scotland* by George Joseph Bell, Esq. Professor of the Law of Scotland in the University of Edinburgh, (Edinburgh, 1825); and *Report of the Commissioners, 29 July 1823, For Inquiring into Forms of Process in the Courts of Law in Scotland, and the Course of Appeals from the Court of Session to the House of Lords*, P.P. Reports from Commissioners Vol. X of 1824.

⁵³ Where a Bill was required, the Summons thereupon would bear the words ‘*Ex deliberatione dominorum concilii*’ A privileged summons required to be preceded by a bill where the pursuer sought to serve upon a shorter *induciae*. (See Lord President Inglis’ explanation in *Walls’ Trustees v. Drynan* (1888) 4 R. 359 at 362.)

⁵⁴ See *infra*.

⁵⁵ As Stair notes, those passing without a bill had by his time become fixed and ordinary and commonly known and observed by the Writers to the Signet and were contained in their Stile Books and they were ‘*obliged and every session enjoyn’d punctually to observe*’ *supra*. Formerly, the Practicks and Style Books were collected by the individual practitioner and copied by others or even bequeathed onwards at death. This had occurred from a much earlier period. See Finlay’s examples in *Men of Law op. cit.* p. 88. Later they came to be printed. For example, *Practicks of the Laws of Scotland, Observed and Collected by Sir Robert Spottiswoode Of Pentland*, (Edinburgh, 1706) and George Dallas of Saint-Martins’ *System of Stiles, As now Practicable within the Kingdom of Scotland* (Edinburgh, 1697) in which the portion on summonses had been revised by Stair himself. [Rt. Hon. Lord Normand, *Scottish Judicature and Legal Procedure*, Presidential Address to Holdsworth Club, (1940-1) at 31-2.]

style required the summons (or 'libell⁵⁶') to contain the required constituent parts and would state the ground of the pursuer's action, the refusal of the defender to comply with the pursuer's demand and would conclude for the specific remedy sought.⁵⁷ The procedure thereafter was to cite the other party to appear. The practice was originally to have two summonses, the first (or principal) summons summoning on a day of compearance with a second summons thereafter containing certification that if the defender did not compear decree in absence would be granted against him. This was modified by A.S. 24 May 1595 so that all principal summonses called judicially i.e. by formally calling of the parties' names, and this was inserted into the common minute book by the Clerk, recording that fact. If the summons could be proved by writ or needed no other probation than the summons itself, then it was presumed in law to be 'true'. If it required to be proved by the Oath of the defender or the testimony of witnesses then the Second Summons was peremptory and the Clerk would record 'called and continued to such a day'. It was put under 'continuation of days' so that the defender's advocate could prepare for the second calling of the summons, and the defender himself was not required to compear until cited by the second summons. The days of compearance would be determined by the nature of the action, but generally, it was 21 days.⁵⁸ By Act of Regulations 1672, cap. 6 this was altered again, removing Acts of Continuation and second Summonses, and in cases where second Summonses would have been required, there was to be one

⁵⁶ as with all the terminology of the period, there are various spellings: viz. 'lybel', 'libel', 'lybell'

⁵⁷ There were six parts: the name of the judge at whose hand the summons was raised, the pursuer's and the defender's name, the matter for which the summons was raised, the day and time at which the defender should appear and the place of the Court. In all of this, the purpose of these strictures was to ensure that the Judges could be satisfied of the summons' conformity to the law before the action was even entertained, for it was 'unjust to permit an action to proceed which was *ex facie* groundless.' See G.J. Bell *op. cit.*, p.9ff

⁵⁸ recent *spuilzie* (the taking away of another's moveable property without lawful excuse) proceeded upon 15 days. There was another small amendment made to the procedure by A.S. 30th November 1647.

summons with two diets. Privileged or extra-ordinary cases could proceed upon six days compearance and a practice developed of agents attempting to get the summons raised as an extra-ordinary summons with the benefit of bringing the other party to the court sooner rather than later.⁵⁹ The Lords attempted to prevent the practice by A.S. 29 June 1672, ordaining that all summonses had to proceed upon 21 days other than privileged summonses, specifying which types of action could proceed by a privileged summons.⁶⁰ The extra-ordinary summons was known as a 'libelled summons' and the ordinary summons was referred to simply as that - an ordinary summons.

After the last day of compearance had passed, if the pursuer failed to show, the defender's advocate could 'protest' that his client had been summoned to compear and the pursuer not insisting, the defender was entitled to protestation which relieved him from any part of the summons until there was a new citation. If the defender failed to turn up or to be represented, the pursuer might get his decret if the summons could be proved instantly by writ or if it required to be proved by witnesses he was assigned a Term to Prove. If both parties were in attendance, the Clerk would record the parties present. There could be no further procedure until the process had been 'seen' by the defender's advocate.

The process would be comprised of the 'peeces of process' which were the documents founded on by the pursuer.⁶¹ The idea was that the defender's advocate could take this away in readiness for when the case returned in two or three days. It

⁵⁹ or even not at all. If the summons could be instantly verified by writ then the pursuer could effect diligence against the other party immediately.

⁶⁰ This doesn't appear to have been successful. Stair records the '*most part of summonses proceeding upon bills*'. Stair, *Modus Litigandi*, *op. cit.*, p.1

⁶¹ Often going to the pursuer's title to raise the action.

did not always work well in practice and A.S. 29 January 1642⁶² records complaints against the advocates for 'keeping of pieces'. The case could not call again until the process was back with the Clerk and the Act restricted the period of keeping to forty eight hours.

The keeping of pieces was still problematic in 1649. An A.S. of that year provided those pursuers prejudiced with a remedy.⁶³ Another problem arose where there was more than one defender and thus there could be a delay whilst the advocates for all the defenders perused the process. By the same Act, the advocate for the principal defender was required to allow the other defenders' advocates sight of the pieces at his house.⁶⁴ Having seen the pieces the defender's advocate would return them and write on the back that he had seen it. If the pursuer's advocate altered the summons or he added to the pieces, the procedure would be gone through all over again. This seeing of the pieces of process was superintended by the Lord Ordinary on the Bills.

If all parties had compeared and all the defenders' advocates had seen the pieces of the process then the process was 'ready for dispute' and it was 'inrolled' according to the dates of return marked on the back. There was then a 'roll' made up listing the order of the ordinary actions which were due to be called by the Lord Ordinary in the Outer House, although there seem to have been problems with this, in particular, with cases being called out of order and litigants appearing when the case did not

⁶² 'Anent keeping of Peices, (*sic*) and ordering the session-house'

⁶³ A.S. 21 November 1649. The pursuer could get his advocate to subscribe a complaint or 'ticket' which would be sent to the President or the Lord upon the Bills and the offending advocates holding the 'pieces', without just cause would be fined, until the pieces were returned. A.S. 28 February 1662 reduced the period to 28 hours and ordained the returning advocate to write his name upon the back with the date of return (with the words 'seen and returned') and the pursuer's advocate was not obliged to see the same. By Stair's time, advocates could be debarred for a second offence and agents and their servants could be incarcerated until the pieces were returned.

call. A.S. 2 January 1650, 'to the effect that the Leidges may have knowledge when their actions shall be callit and not to be tyed to ane unnecessar attendance' ordained the Ordinary in the Outer House to make a roll which he was to subscribe and affix on the wall of the Outer House and to call the actions according to the order that they were inserted. This was also for the benefit of the advocates representing the parties.⁶⁵

A.S. 28 February 1662 sought to further remedy the problems of the calling of the roll by ordaining that the roll should be called in order and ordaining the Ordinary in the Outer House for the week to call the roll in order.⁶⁶

(vi) The 'Dispute' and the Rôle of the Concept of Relevancy

On the morning that the case was due to call, the parties' advocates would be in their seats in the Outer House or perhaps walking in the hall or consulting with their clients or discussing the pending cause between or among themselves. The Clerks sitting in front of the Lord Ordinary in the Outer House, between the fore-bar and the Bench, would then call the case and the macer in attendance at the fore-bar would step out and shout⁶⁷ the case name into the hall.

Parties' advocates would then come forward, up the steps and to the bar, ready to dispute. This part of the procedure was oral and progressed in a defined and

⁶⁴ Problems with the processes continued. See A.S. 20 January 1643, 'Act anent upgivinge of Processes', and A.S. 15 December 1643, 'Act anent those who take up Summondses and Processes, after Parties have extracted their Acts, for taking their Oaths in the samen'.

⁶⁵ Stair records that the roll was put up so that 'advocates may inform themselves and be ready to dispute without surprisal or tergiversation', *Modus Litigandi* p.7

⁶⁶ The subject vexed the Faculty. See the entries for this year and thereafter in the Minutes of the Faculty in J.M. Pinkerton (ed.), *The Minute Book of the Faculty of Advocates* Vol. I. (1661-1712) The Stair Society No. 32, (Edinburgh, 1976)

⁶⁷ He had to shout over the bustle and confusion of the agents, advocates and clients milling about in front of the Bar.

formulaic manner. The pursuer's advocate would start. If the summons was an ordinary summons, he would not need to relate the whole document, but only mention the summons and crave decret if no further probation was necessary, or if it was, he would crave a 'Day to prove' or a 'Term to prove' depending upon how long he thought would be necessary to adduce the evidence. On a libelled summons, he would relate more fully the tenor of the summons and also the merits of his cause to 'inforce the justness and equity of the cause'. The Lord Ordinary might stop him in mid-stream until it was established whether the defender was controverting the relevancy of the summons.⁶⁸ In answering, the defender's advocate would relate the merits of the cause as he saw them and would then move to 'proponing'⁶⁹ his defences. These proceeded in an order.⁷⁰ The term defences was used generically, subsuming objections and exceptions. For our purposes, the most important of these defences was that the Libel or some member of it was not 'relevant'. The concept of relevancy and its related concept of sufficiency⁷¹ were very important in this formalistic manner of oral pleading.

Stair explained the concept of relevancy as follows:

'Relevancy is a *relevando*, to relieve or help: and therefore a thing is said to be relevant, when, if it be true and proven, it would relieve the pursuer or

⁶⁸ For as Stair says '[I]t is an improfitable spending of time, for the Pursuer to inforce the relevancy of the summons if the Defender controvert not the same' *Modus Litigandi, op. cit.*, p. 7. For the doctrine of relevancy *infra* this Chapter.

⁶⁹ Putting forward or setting forth.

⁷⁰ *viz.*: 1. The days of compareance were not yet past; 2. Incorrect Days of Citation; 3. The summons not having two Citations (conform to the Act of Parliament 1672 – see *supra*); 4. Defense upon the tenor of the executions; 5. The Pursuer's title was not sufficient (e.g. that of executor without production of his confirmation or assigny without his assignation); 6. All parties not called (i.e. the interests of all the defenders not cited to the action); 7. the order of discussing the defender incorrect, other parties being properly discussed before him. (e.g. where a cautioner for a tutor convened the tutor would require to be discussed first); 8. that the Libel or some part of it was not relevant; 9. that it be incompetent.

⁷¹ i.e. technical legal sufficiency

Complainer,⁷² and give him the Remedy which he infers⁷³ and concludes in his Libel, and craves to be done as due by Justice.⁷⁴

For a Libel to be 'sufficient,' that is, sufficient in Law, it had to contain an argument or 'ratiocination' which was sometimes in syllogistic form, whereby the point of law was first deduced as the major proposition or premiss in the syllogism and then the matter of fact proceeded as the minor or subsumptive proposition or premiss and from this the conclusion (the remedy sought in the libel) would be inferred as the consequent, the law being applied to the fact subsumed and remedy sought concluding, and being necessarily consequent, in Justness.

The propositions of fact and law could be presented the other way round as an 'enthimeme.'⁷⁵ In this case, the matter of fact was deduced as the antecedent premiss and from there it was to be inferred that in Justice the remedy should be adhibited.

To be relevant, the pursuer would require to refer to the Law either generally, or 'specially' - that is, that the fact related as done or omitted to be done by the defender was contrary to law⁷⁶ or was contrary to a specific point of law. Sometimes it was

⁷² The pursuer was narrated as the complainer in the libel of the summons - complaining that he had had his rights infringed and seeking the help or remedy of the court to give him relief.

⁷³ Inference is not used in the way we would understand it now, nor in the way it was used in the later period. The idea was that the conclusion was necessarily *inferred* from the premises that is, it *necessarily followed* in a logically deductive manner as opposed to an inductive one. Something would be *deduced* from a larger number of things, so, for example, a point of law would be deduced from all the points of law that could be known. This idea is shown in Stair's title to his Institutions - '*The Law of Scotland Deduced from its Originals and Collated with the Civil, Canon and Feudal Laws etc.*' Thus, when Bell records, in his review of this period, that the demand would have to be 'correctly deduced' this would have been misunderstood by the lawyers of this period. (G.J. Bell, *op. cit.*, p.11) The correct word would have been 'inferred'.

⁷⁴ *Modus Litigandi, op. cit.*, p.9

⁷⁵ 'or enthymeme' in modern logic. By Stair's time this was more frequent.

⁷⁶ or 'Equity' or 'Reason' or 'Justice'

subjoined to the conclusion, in a shorter form which would state that on the matter of fact libelled it 'ought' to be declared or decerned by the Court as libelled according to law or a particular point of law.⁷⁷ Thus, the Relevancy of the Libel or Complaint, as again Stair explains,

'is the Consequence of the Conclusion of the Libel, from the premisses thereof. Or it is the Justice of the Libel, or the Sufficiency and Goodness of the Plea. And the Probation is the Verity or Truth of the Libel. So that the Remedies of Law proceed upon Justice and Truth.'⁷⁸

(vii) Relevancy, Syllogistic Argument and Practice

The employment of syllogisms and enthymemes as a mode of reasoning had been inherited from Aristotelian and Ciceronian logic and modes of reasoning and arguing, passed through the Civil Law and into the Romano-Canonical procedure of the Church Courts⁷⁹ and from there to the Court of Session. As Professor Cairns has pointed out,⁸⁰ John Cunninghame could tell his students at the start of the eighteenth century that it was out of 'Civill Law that all our reasoning and Topicks are taken.'⁸¹

The syllogism and the enthymeme could be used by the advocate in argument before the Bench depending on the argument being advanced. The syllogistic argument

⁷⁷ or again 'Equity' or 'Reason' or 'Justice'

⁷⁸ Modus, *op. cit.*, p. 10

⁷⁹ on this see R.C. van Caenegem, History of European Civil Procedure in: *International Encyclopaedia of Comparative Law*, vol. 16 (1973)

⁸⁰ J.W. Cairns, 'The Civil Law Tradition in Scottish Legal Thought' in D.L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays*, *op. cit.*, pp. 191-233 and by the same author, Historical Introduction *op. cit.*, vol. I, p.139

⁸¹ (Following Cairns above) J. Cunninghame, Edinburgh University Library, MS. Gen. 1735, p. 5 and also National Library of Scotland, MS. 3413, p. 3 in respect of the 'Civil Law' 'in regard we borrow all our Topicks from it, in pleading.'

might be too restrictive and as Sir George Mackenzie explains,⁸² 'neither possible nor agreeable to the Nature of Rhetorick', because 'an Induction and Enthymemes were infinitely more accommodated to it.'⁸³ If, however, one of the arguments was stronger than the rest, to render it more 'formal' it would be 'reduc'd into a Syllogism'.⁸⁴ Finally, the pleader could sum up by reducing his whole argument into syllogistic form. The influence was the tradition of earlier logicians, in particular Cicero and Aristotle.⁸⁵ In an earlier work, Mackenzie acknowledges the influence of

⁸² writing at the same time as Stair.

⁸³ Sir George Mackenzie, *Idea Eloquentiae Forensis: una cum Actione Forensi ex Unaquaque Juris Parte* (1681) I have used Robert Hepburn's Translation of 1711, *An Idea of the Modern Eloquence of the Bar. Together with a Pleading out of Every Part of Law.* at p.55. See generally F.S. Ferguson, 'A Bibliography of the Works of Sir George Mackenzie Lord Advocate Founder of the Advocates' Library.' (1935 - 38) 1 Edinburgh Bibliographical Society pp.21-22. Rhetoric was the art of persuasion and argumentation. For Aristotle the art (as a 'techne', that is, capable of being learned) of rhetoric was finding, in each case, the available means of persuasion and Cicero, through his Topics, formulated the conception of proof as *argumentum* developed from rhetorical and dialectical (i.e. arguments from plausible premises) theories. The topico-rhetorical tradition influenced the Romano-canonical procedure which heavily influenced the procedure of the Court, as speculated upon here by Mackenzie. The Romano-Canonical procedure was originally interested in the oath as a means of discovering truth, but the oath could only turn on what was 'necessary', that is, what was relevant to the question in dispute. It was this concern which, through the technique of disputation on hypothesis, permitted the removal of all fallacious types of inquiry in the search for the probable truth. On all of this, see A. Guilianni, 'The Influence of Rhetoric on the Law of Evidence and Pleading' J.R. vii (1962) pp. 216 - 251 and I. Maclean, *Interpretation and Meaning in the Renaissance. The Case of Law* (Cambridge University Press, 1992) pp.75-82. See also, H.L. MacQueen, 'Pleadable Brieves, Pleading and the Development of Scots Law', *Law and History Review* (4) 1986 No. 1, pp.403-422 at p.411. Finally, on this as a mode of arguing in a historical European dimension, see R.C. van Caenegem, *History of European Civil Procedure in International Encyclopaedia of Comparative Law*, (1972) vol. 16, p.20, para. 2-17.

⁸⁴ Mackenzie, *An Idea of the Modern Eloquence*, *op. cit.* p.56

⁸⁵ Thus Mackenzie notes 'He who answers, uses with us, to repeat the Arguments which he is to answer all with one breath; before he begin to make distinct answers to them, and this process I conceive, from Aristotelick way of arguing in the Schools, wherein he who maintains the Thesis proposed, must repeat the argument before he answer it' 'What Eloquence is fit for the Bar', *op. cit.* p. 12. This type of disputation was a common manner of instruction. It seems to have been employed by John Spottiswood (for more on whom see *infra*) as a teaching mechanism for his students - disputation *exercitii gratia* (see John W. Cairns, 'John Spotswood, Professor of Law in *Miscellany Three*, (ed. W.M. Gordon), (39 Stair Society, 1992) p. 131 at p. 147 and was extended to intrants to the Scottish Bar at their 'Publick Examination'. They were required to (latterly) write a Thesis which was impugned and had to be defended. See further by the same author, 'Advocates' Hats, Roman Law and Admission to the Scots Bar, 1580 - 1812', 1999 (20), *Journal of Legal History*, pp. 24 at pp. 31-32

Cicero as the 'greatest master of that art' of Pleading⁸⁶ and in another essay, explains the role of syllogistic reasoning at the first institution of the Court, '[a]t the first institution of our Senat, It was appointed by an Act of Sederunt, That all Argunning (which term was us'd in that Age for arguing) should be Sylogisticè, and not Rhetoricé'⁸⁷ conceiving that

'our Session having been at first constitute of an equal number of Churchmen and Laicks⁸⁸, and the President being an Ecclesiastick, these Churchmen having the advantage of Learning and Authority⁸⁹, did form that Act of Sederunt according to their own breeding, by which they were tyed in their Theology-schools to debate by Syllogismes; but after-ages having found this upon experience to be very unfit and pedantick, they did not only suffer that Act to run in desuetude, but allow'd this auguster, and more splendid manner of debating'⁹⁰

For Sir George, the 'more splendid manner' was to propone one's defence using not the syllogism, but the enthymeme, as, in pleading, the 'matter of fact should come first' although the 'Sylogisme' was proper for 'Lybells (which are but a Sylogisme) yet it suits not with a Defence'. In his view, it would not suit because it would be 'ridiculous, and impossible, to wrap up a long story, many circumstances,

⁸⁶ in the introductory 'The Authors Reflections Upon these Pleadings in Pleadings in some remarkable Cases, Before the Supreme Courts of Scotland Since the Year, 1661 To which, the Decisions are subjoyn'd (Edinburgh, 1672) I have used the second edition of a year later, (Edinburgh, 1673) although the copies are identical other than removal of Mackenzie's name from the title page. See Ferguson, *op cit.*, p.21

⁸⁷ 'What Eloquence is fit for the Bar. An Essay' in *Pleadings in some remarkable Cases, op. cit.*, p. 3

⁸⁸ i.e. lay men.

⁸⁹ of the Civil Law and Romano-Canonical procedure.

⁹⁰ p. 5. c.f. Hannay p.94, *op. cit.*, citing ADC iii 405. See also *Acts of the Lords of Council 1501 – 1503* (ed.) A.B. Calderwood (Edinburgh, 1993). Thus Balfour in his *Practicks* notices the case of *Oliphant v. Innes* (1541) (at p.313 in the version edited by PGB McNeill, 1962-3) as authority for the proposition that a 'relevant libel should have three parts, the major, the minor and the conclusion'.

presumptions and probabilities in a syllogisme; and oftimes there are many defences propon'd and joyn'd together'. The most ordinary way, for him, of arguing in Law was by 'similies, instances and parallels' and thus it was improper to 'drive' these into syllogistic form.⁹¹

In all of this, of course, parties proceeded in the hypothetical as to fact. Proof of the fact in the formulation was to be decided after the Court had decided the relevancy of the forms of the parties' positions. As D.A.O. Edward has commented, where the facts alleged, even if proved could not support the claim then the case could be decided as a matter of law and proof of the fact was not merely unnecessary but positively undesirable.⁹² The law followed the maxim '*frustra probatur quod probatum non relevat*.'⁹³ That was not to say that proof could not be brought forward at this stage. If the pursuer's Libel was 'instructed' by being 'instantly verified' by writ, then, like in the case of compearance by a pursuer without a defender, the Court could hold that the Law presumed it to be true and all the defender could do was to controvert the relevancy of it, that is, to argue that the conclusion was not just or there was not a sufficient ground for it in Law or Equity. Thus, explains Stair, the pursuer must 'condescend upon what ground of law or Equity he foundeth,' unless it be clear and evident to the judge.⁹⁴ If the Lord Ordinary found the Libel relevant he would sustain it then and there and would decern, with the power to correct any

⁹¹ Professor Cairns has pointed to these writings of Mackenzie as indicative of the establishment of the "advocates' corporate sense of themselves as an independent liberal profession" following their withdrawal in 1670 and the disbarring and banishment of a large number of them in 1674. J.W. Cairns, *Historical Introduction*, *op. cit.* pp. 125-6

⁹² D.A.O. Edward, 'Fact-Finding: A British Perspective' in D.L. Carey Miller and P. Beaumont (eds.), *The Option of Litigating in Europe*, *op. cit.*, p.43

⁹³ 'It is useless to prove that, which, when proved, is not relevant to the question at issue' *Trayner's Latin Maxims*, 4th ed., (Edinburgh, 1993) pp. 232-3

⁹⁴ *Modus Litigandi*, *op. cit.*, p.10. Note the word 'condescend'. See *infra*.

errors in favourable cases⁹⁵ thereby granting it 'as it ought to have been demanded' or granting it *a libello ut libellatur*⁹⁶ in unfavourable cases. If the Libel could not be instructed instantly, for example if the documents founded on by the pursuer had not been brought to Court or were being searched for, the Pursuer would crave a Term to Prove, the conclusion or remedy depending upon proof of the fact by writ, whether as the major or minor premiss.

Relevancy as discussed above, was not solely debated with the summons and its libel. The pursuer's advocate before the Bench had a right to 'Reply' to which the defender's advocate had a right to answer by 'Duply', the pursuer's advocate answering that by 'Triply' and so on until the process was naturally exhausted, but always with the defender's advocate answering last.⁹⁷ Each of these 'allegiances' proponed was to be carefully recorded by the Clerk in the Minute Book and could be sustained and admitted to probation, if relevant, whereupon the Lord Ordinary would issue an Interlocutor to that effect.⁹⁸

After the defender's advocate had exhausted his defences as objections to the 'defects of the pursuit', he would move on to propone his 'exceptions' to the libel, that is, the bases in law which, in the terminology of the time, would 'elide' what was relevantly pleaded by the pursuer.⁹⁹ Stair classified these into 'Dilators' and 'Peremptors', the

⁹⁵ the Lord considering the overall impression of the case and the evidence produced, whether he thought it favourable or not.

⁹⁶ from the libel as laid.

⁹⁷ Spottiswoode, *Forms of Process, op. cit.*, p.45.

⁹⁸ The procedure was oral. These 'allegiances' as 'duplys' 'triplys' etc. were not lodged. c.f. D. Walker *A Legal History of Scotland* (Edinburgh, 1996) p.567 'The pursuer could lodge a reply ... the defender a Duply'.

⁹⁹ These were sometimes colloquially referred to as the 'defences'.

former not absolutely determining the cause, the latter doing so.¹⁰⁰ They were proponed to 'elide' the pursuer's action, either for a period of time 'to a certain day' or permanently. The importance of these exceptions was that they founded upon some *positive* right of the defender. Dilators had to come first and had to be proven instantly. The Court would not grant a Term for proving them and they could not be proponed after the Peremptors.¹⁰¹ The exceptions were as varied as the types of action brought before the Court,¹⁰² but an example will suffice. To use Bisset's,¹⁰³ if I am obliged to pay 'T' £100 at next Whitsunday and 'T' calls and pursues me for the said sum at any time before Whitsunday, then I could allege the dilatory exception that I should be absolved from the pursuit because the term of payment that is Whitsunday is not come. The debt is not taken away and I will still have to make payment at Whitsunday notwithstanding the exception. This dilator exception would have to be proved instantly, here, being obvious to the Lord Ordinary hearing it whether Whitsunday had passed or not. If it had not, the judge would sustain the Dilator and I would be entitled to extract a sentence thereon which was in effect an absolvitor until the pursuer raised a new citation. If, on the same facts, I propone a peremptor exception of payment, that the debt has been paid and satisfied already, and if I am successful in proving, then in court, or later, that the payment was made, then I would be entitled to be absolved *simpliciter* and never be craved thereafter for the said sum. If called upon by the judge, the parties would discuss the competency

¹⁰⁰ This was the classifying genius of Stair. In earlier times, one finds the words defence, exception and objection used interchangeably, the terms peremptor and dilator being applied to all. See for example Bisset and Balfour.

¹⁰¹ One could plead an Exception Declinator against the judge before either, but it would have to be proponed first. Bisset *Rolmentis op. cit.* p. 173 quoting *Quoniam Attachiamenta*.

¹⁰² Stair gives examples of Satisfaction (of a Debt or obligation), Payment (of a Debt), Discharge (of one's obligations), Prescription (as regulated by Acts of Parliament), Renunciation (the pursuer having renounced his right upon which the case was proceeding), Innovation (the substitution of a new right in full satisfaction of the old right being pursued), Transactions (similar to innovation but taking away the former right in whole or in part) and *exception rei judicatae* (the cause already judged and decerned).

of the exception of payment as eliding the action for payment of a debt, then the relevancy of the exception, leaving it to the Lord Ordinary to decide whether to assign a term for proving the payment.

Although these are simple examples, implicit is the acceptance by the defender that there was an obligation to make payment at Whitsunday. In the language of the time, the exception would 'acknowledge', or 'import the verity of the libel'.

Tactics here were all important. The defender's advocate would propone the exception and wait to see if it was contested by the other side as to its relevancy and competency and whether it was met with a 'reply'.¹⁰⁴ If the exception acknowledged the libel and was relevant then the defender was permitted to prove it and the pursuer did not need to prove the libel. If the exception denied the libel, or a part of it, both parties would be ordained to prove. If Replies and Duplys etc. were proponed by the parties then, if relevant and competent, depending upon whether they acknowledged or not the preceding allegiance, the allocation of proof was determined. Thus, using Stair's example, if the libel was for payment of a debt, the defender might except upon compensation,¹⁰⁵ the pursuer might reply that the debt alleged as compensation had been discharged, to which the defender might Duply that the debt compensated on was due to him as an assignee in an assignation, and if there was a discharge, it was posterior to intimation to him as the assignee, therefore the debt, in law, being still extant. Here the Libel, Exception, Reply and Duply would all have to be proven. If the pursuer failed to prove the Libel, the defender would be

¹⁰³ pp. 180 – 182. This would proceed as an ordinary summons.

¹⁰⁴ As Sir George Mackenzie notes, 'the defender propones his defence, but urges it a little, till he know if it be controverted by the Replyer, in a full Discourse', *What Eloquence is fit for the Bar, op. cit.* p. 10. See also Stair, *Modus Litigandi, op. cit.*, p. 14

assoilzied, if he proved it and the defender failed in his exception then the pursuer would succeed, and if he proved his Libel and Reply but the defender failed in the defence (exception) and Duply then again the pursuer would succeed. The whole purpose of the exercise was to determine who had to prove what.

Once the Lord Ordinary had heard the parties' advocates, he would sustain or repel the respective allegiances and determine this allocation of proof. This determination and assignation of Terms for Proving was called *litiscontestation parte comparente*.¹⁰⁶ He would grant an interlocutor or interlocutors to this effect and this was the Act of Litiscontestation,¹⁰⁷ allowing and authorising (as warrant for citing witnesses) the parties to lead proof of their articulate positions as noted in the Act. After this, parties could not propone anything new except that it could be instantly verified or emerged of new.¹⁰⁸

(viii) The Advocates' Pleading at the Disputing

In the sketch of the procedure detailed above, it might be thought that the procedure before the Ordinary could be dispatched with reasonable haste. Whilst in some quarters rhetorical style was considered only fit for 'haranguing' and long reasoning was to be discouraged,¹⁰⁹ it seems that the advocates used this 'disputing' as a way of demonstrating their skill and learning as well as their ability at pleading before the

¹⁰⁵ i.e. one debt set off against another due

¹⁰⁶ i.e. when the parties had appeared. There could also be *litiscontestation parte non comparente* when one of the parties was not in attendance. See Spottiswoode p.56 ff., and Hope, *Minor Practicks* p. 3

¹⁰⁷ Litiscontestation was known to the Roman formulary system and was part of the Canon Law although the term as used at this time connoted a different meaning whilst similar in concept. See D. Walker, *A Legal History of Scotland* Vol. IV The Seventeenth Century (Edinburgh, 1996) pp. 567 - 569

¹⁰⁸ *de novo emergens vel nuper veniens ad notiam.*

Court. 'Animated by gain, applause and custome'¹¹⁰ they might 'rail' against the adverse client or the adverse advocate,¹¹¹ expressing indignation at the 'odiousness' of the position being adopted by the other party or their advocate opponent's understanding of the law cautiously avoiding the use of what the Court might consider unbecoming language or expression.¹¹²

They might stretch out their submissions, or plead long narrations of the law, presumably for the benefit of the client and agent, which the other side would have, in any event, no objection to, and would not require to reply to, the whole narration therefore being unnecessary. Or, instead of succinctly stating the answer to the preceding allegiance, they might develop, in great depth, the reasons why it was to be enforced, mystifying the Clerks who were supposed to be noting in the minute book the allegiances, and perplexing them as to what was meant to be the Reply, Duply etc. to be noted.¹¹³ If one recalls Sir George Mackenzie's comments that the Defence (or indeed the following allegiances) could be 'a long story', comprising 'many circumstances, presumptions and probabilities' and that argument before the Court should be by 'similies, instances and parallels',¹¹⁴ it is perhaps not surprising that such disputing would test the patience of the Ordinary. We are told that such was the operation of the system, it would leave the Lord Ordinary, 'weary.'¹¹⁵

¹⁰⁹ David Erskine of Dun (Lord Dun) *'Friendly and Familiar Advices'* (1754) – 'Advice to the Advocates' pp. 34-35

¹¹⁰ Mackenzie, *What Eloquence op. cit.* p. 8

¹¹¹ *ibid.* p. 14

¹¹² See the unfortunate outcome for Mr. Kenneth Gordon, Advocate, suspended from practice for using unbecoming expression before the Court. A.S. 17th December 1708.

¹¹³ It seems that the Clerks developed a practice of trying to record everything, which was checked by A.S. 3rd November 1677 ordaining them to 'set down distinctly the defences, answers, replies and duplies etc. as they are prepared at the bar, without necessity to add reasons for enforcing thereof.'

¹¹⁴ see *supra*.

It is important to note that this was the Advocates' preferred way of stating a client's case to the Court. It encapsulated what might now be termed the 'art of persuasion', the advocate employing all and any reference to whatever purported authority, which in the opinion of the advocate concerned, would assist or bolster his client's position. This would include copious reference to Civilian authority. (Later, when the pleading proceeded mostly in writing, the same approach would be adopted, but put down on paper.) By this juncture, the operation of presumption and probability in arguing had had a long history. The net result was that these similes, instances and parallels advanced in argument were not in practice limited other than by the learning of the individual advocate employed, or the patience of the Ordinary.

(ix) Tactics Employed by the Advocates.

There were three other tactics which could be employed to the perceived and actual benefit of the parties. Firstly, the advocate might seek to persuade the judge that the whole cause as presented, or in particular, points which had emerged in the course of the dispute, were so complex or intricate or the applicable law was so doubtful that he should 'make avizandum', i.e. consider the cause or the points privately, before coming to a determination in *litiscontestatio*. The idea seems to have been that a considered determination rather than an immediate one would perhaps more likely satisfy a party, without the necessity of bringing the matter back to him for review. If this was concurred in by the Ordinary, the interlocutor would then record that it was 'Avizandum to the Lord himself.' Alternatively, on the same grounds, the Lord Ordinary might be persuaded to 'advise' with the whole Lords in the Inner House, in which case the party so requesting would 'have the Lords Answer'. In both cases it was possible that the Lord Ordinary would follow this course of his own volition.

¹¹⁵ Mackenzie *What Eloquence is Fit*, *op. cit.* p. 10

Also, in both cases, it could trigger the whole panoply of review procedures. So if, after *Avizandum*, either party was not satisfied with the interlocutor pronounced and the Act of *Litiscontestation* made, the practice had developed that the party could crave to be further heard by the Ordinary (this time at the Side-Bar)¹¹⁶ and either illustrate the arguments previously made, or propone new ones. The Lord Ordinary would then, consistent with Civilian principle,¹¹⁷ review his own previous interlocutor and either adhere to its terms or make alterations to it.¹¹⁸ If this was still unsatisfactory the party could crave 'the Lords' Answer' and the cause might be reported to the Inner House, either by the Lord 'voluntarily' or upon the defender offering security (an 'Amand'). The Lord Ordinary in this situation could refuse to Report.

The ultimate goal in these machinations was to attempt to obtain an Act of *Litiscontestation* in the most general of terms, which would allow the party to lead strictly non-relevant evidence, all of which would allow for a change of position in law and fact when the evidence came out.

The third tactic used in seeking to postpone the determination of the relevancy, here to a later stage, once the evidence had come out, was through seeking an Act Before Answer, instead of the Act of *Litiscontestation*. This was tactical because in so

¹¹⁶ Debating at the Side-bar and the confusion arising therefrom seems to have greatly vexed the Faculty of Advocates, appearing in its Minutes seven times between 1672 and 1691. See Minute Book of the Faculty of Advocates, *op. cit.* Vol. I. The difficulties seem to have been in ascertaining when the Lord Ordinary who had been Ordinary in the Outer House was due to sit at the side-bar as well as the practice of 'stopping' acts and decreets before they could be extracted which took place at the small Side Bar. See below.

¹¹⁷ see Phillipson, *Whigs op. cit.*, generally in Ch. 2.

¹¹⁸ See further Spottiswoode, *op cit.*, p. 58-59

seeking it and being granted it, one was not thereby constrained to the articulated points of an Act of Litiscontestation. It was still an interlocutor of the Ordinary, still litiscontesting the cause, but instead of determining the relevancy of the mutual allegiances of the parties, it sustained points and repelled points and allowed parties to prove their allegiances before Answer to the relevancy. When extracted it was called an Act before Answer. As Stair explains,

the Lords permit the Probation to the Discussing of the Relevancy: and therefore, before Answer, ordain Witnesses *ex officio* to be adduced. And where they see it dubious, who ought to be preferred in Probation, they use before Answer to the Dispute, to ordain Witnesses to be examined *hinc inde*, and such Writs and Evidents to be adduced, as either Party will make use of. And then they advise the Relevancy and Probation together and must not admit new Probation, or new Alledgences in Fact, competent before the Act; but the Act before Answer stands, as an Act of Litiscontestation, in all Points, and hath the same Terms to prove, with Litiscontestation.¹¹⁹

In his *Modus Litigandi*, Stair does not comment upon when these Acts became part of procedure, although by the second edition¹²⁰ he notes that 'by more recent custom, the Lords have of a long time, *ex nobili officio*' allowed parties to lead proof of witnesses before answer to the relevancy.¹²¹ The Court had always had an equitable jurisdiction to grant equitable remedies and as the phrase '*ex nobili officio*' implies, the 'remedy' of allowing Acts before Answer lay in the equitable jurisdiction of the court to grant an equitable remedy where the law could not be determined without ascertaining the facts upon which the case proceeded, as the need arose. Certainly,

¹¹⁹ pp.19-20 *Modus Litigandi*, *op. cit.*

¹²⁰ published in 1693

¹²¹ Stair, *Institutions* IV.39.5

the Act before Answer was known as a 'device' by 1674, in which year an Act of Sederunt¹²² made provision for what had to be proponed before the Act was extracted. It was appreciated by the Lords that 'questions do and may arise concerning the import and effect of such acts'. As they explained

'[C]onsidering That in severall cases they are in use, before discussing the relevancy of the points debated ... whereupon acts are extracted which are called acts before answer'

The Act of Sederunt ordained parties to propone all allegiances before the act was extracted. Whilst this was the theory, as usual, the practice was different and as Professor Bell was to remark one hundred and fifty years later, it left the issues to be proved as a 'mass of law and fact.'¹²³

At the end of all the probation, the Lord Ordinary upon Concluded Causes (from 1693 onwards), to whom the task fell, would often not be able to determine what had been allowed and what had actually been proved, and was therefore hampered in ranking the evidence and making up the 'State' of the case for advising to the whole Lords for sentence.¹²⁴ Thus, when parties came to the Inner House on the Concluded Cause, the fact that it had proceeded before Answer as to the Relevancy allowed them a greater latitude than if the relevancy had already been determined by Act of Litiscontestation.¹²⁵

¹²² A.S. 23 July 1674 ('Act concerneing Acts before Answer')

¹²³ G.J. Bell, *Examination of the Objections Stated Against the Bill For Better Regulating the Forms of Process in the Court of Law in Scotland* (Edinburgh, 1825) p. 32

¹²⁴ Moreover, as discussed later, when the preferred and usual method of taking the proof was by a Commissioner, not the Ordinary, the process became even more confused.

¹²⁵ The Act of Litiscontestation was far more restrictive in terms of the evidence which could be led. As Baron Hume could tell his students in the Scots Law class at Edinburgh University about 1821, referring to the Act of Litiscontestation: 'it was settled ... to whom the privilege of proving should be allowed; and to that party alone the choice of witnesses and the conduct of the whole proceedings was given: for they had no notion in those days of allowing a conjunct proof to both parties, of allegations, how relevant soever, which were opposite to each other, -

In terms of the two other 'tactics', as Stair's example detailed above shows, the law was becoming increasingly complicated and the rights and obligations of parties and the legal devices and methods of protecting and enforcing them were constantly being refined by the Court. It was therefore of material advantage to a litigant to bring matters before the Lords - especially if it was unusual or novel, and certainly if the Ordinary's reaction at the initial stage was unfavourable.¹²⁶ The process of allowing the party the Lords' Answer was through the procedure of 'Reporting' or 'taking to report' by the Lord Ordinary himself, and it was this procedure which was to give rise to pleading in written form.

(x) The First Steps Towards Written Pleadings – The Report, Solicitations and the Written Information.

Parties and their advocates knew that once the Lords' Answer was allowed, then the cause was definitely going to go to the whole court, which, it should be remembered, sat as a unitary body in private deciding matters on a majority vote. Rather than relying upon the Ordinary's Report to the Lords, parties, agents and advocates developed the practice of soliciting the Lords to impress upon them aspects of their case and introducing new material for their consideration beyond what had been allowed in relevancy at the superintendence of the Ordinary. In the first instance this was done orally and it was only later that the 'information' was expressed in writing.

and still less a proof at large of facts and circumstances, whereof the virtue had not been previously tried and considered.' 'Baron Hume's Lectures 1786 - 1822' (ed.) Paton, (Stair Society, Edinburgh, 1957) p. 311

¹²⁶ It was also desiderated as a party could bet that the Inner House would not all speak with one mind other than in the most simple of cases. On this, see *infra*.

The problem of solicitation vexed the Lords and their methods of dealing with the problem are worth examining.

We may observe at the outset that the origin of this practice is difficult to trace and that there have been theories placing it as a much later practice.¹²⁷ The lodging of 'exceptionis and informationes gevin in write' had formed part of the procedure of the Court in the earliest period¹²⁸ but this was probably recognised procedure in the Court differing from 'unsolicited' material. Yet, the practice of soliciting was not unknown to Bisset in 1579.¹²⁹ By 1596, parties, their advocates and agents had commenced soliciting the Lords in their houses and in the 'high streets and in the tolbooth' before the cause was to be reported.¹³⁰ One party doing this would induce the other to follow their example, in case the first persuaded the Lords of the 'goodness' of their case. The Lords considered the practice an 'intollerable abuse' and in any event unnecessary, as the 'reporte from the Utter-hous' was 'sufficient

¹²⁷ Robert Chambers in *Traditions of Edinburgh* (Edinburgh, 1868) = reprint (Edinburgh, 1967) records that the judges were 'tampered by private solicitation' after the Restoration and hints that the practice was derived from France, quoting a passage from Molière's *Misanthrope* from 1666 (*Qui voulez-vous donc, qui pour vous sollicite? Aucun juge par vous ne sera visité?*) pp. 121-2. H.P.[Lord] Macmillan in 'The Court of Session in 1629,' ((1900) 12 J.R. p. 137), refers at pp. 141-2 to Lowther's 'Our Journale (sic) into Scotland ano dni. 1629, 5th of November', [which recorded that parties and their advocates acquainted judges with their case before the hearing (1894) Douglas Edition, p. 31] and what Lord Swinton called the 'disgraceful custom' of solicitation, imported from France, in accordance with which parties, whose cases were in dependence, were in the habit of paying personal visits to the houses of Judges for the purpose of *soliciting* or giving them information.' Whilst a *Dictionnaire de Droit et de Pratique* (1749) carries explanations for the words and phrases 'Information', 'Information par Addition', 'Sollicitations aupre's des Juges, pour faire obtenir gain de cause a une des parties qui plaident' and 'Solliciteur', the practice, in Scotland at least, seems to have been known much earlier.

¹²⁸ John Finlay, *Men of Law*, *op. cit.*, p. 110.

¹²⁹ Bisset records an A.S. 23 June 1579 that '*na actis nor lettres salbe ressavit over the bar, And that na persone solist, the ordinar lordis ... that pass to the uttirhouse, to call ony act ... under pane of repruf, and forther punishment at the lordis discretioun*' p. 147 in vol. I of Hamilton-Grierson's edition of 1920. It is likely that this ordinance was directed to removing temptations from the Lords in an age when their integrity could be seriously open to question. See L. Macgregor, 'Pacta Illicita' in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland* (2 vols.) vol. 1, 129 at 135-138 and also James Maidment, *The Court of Session Garland* (London & Glasgow, 1888) p. 13ff, in chapter 'Anecdotes of the Early Administration of Justice in Scotland' for examples of judicial dishonesty and the institution of the judge's 'peat'.

information to the Lordis of the estaites, merites and circumstances of thair causes'¹³¹ and in an attempt to remove the practice imposed a system of fines and imprisonment.

Nevertheless, for better satisfaction of the parties whose actions were 'weichtie or intricate' requiring 'better consideration', these parties were allowed, on a warrant,¹³² to deliver to the Lords themselves or their servants, at a particular hour, 'the informatioun of the causis in wreitt', the Lords undertaking to read and consider them, with advocates persisting in the practice without a warrant to be debarred 'fra the tolbuthe'.

Thus, under their control, the Lords could now be informed in writing by the parties before the Lord Ordinary was to Report.¹³³ The Lords must have found that this practice assisted their preparation for the case, as the practice of soliciting was relaxed again by 1632 so that parties could go to the Lords' houses between 2 in the afternoon and 7 at night to 'sollicite' or 'give informatioun' to them for the next days calling, but doing so after 7pm the party would lose the opportunity of the case being heard the following day.¹³⁴ Again, it seems that these 'informations' were in writing, being left for the Lords to peruse. In 1629, Lowther had noted that 'the parties with their advocates will acquaint the Judges with their case before it comes to hearing, which they say maketh quicker dispatch.'¹³⁵

¹³⁰ A.S. 13th July 1596.

¹³¹ *ibid.*

¹³² i.e. with the Lord Ordinary's permission.

¹³³ Glassford, *Remarks op. cit.* p. 14 records 'At what time the use of written informations to the court was first introduced does not appear'. It is certainly about this time.

¹³⁴ A.S. 12th June 1632.

The Cromwellian conquest and occupation in 1651, the appointment of the Commissioners for the Administration of Justice in 1652 and the requirement of the 'taking of the oath to be true and faithful to the Commonwealth'¹³⁶ of those advocates wishing to continue to practise caused many at the bar to refuse to recognise or plead before the new judicial tribunal. This, it seems, resulted in another temporary¹³⁷ form of pleading in writing. As Forbes in his preface noted:

[The Commissioners] 'introduced the management of debates in writing, that they might have the more time to deliberate on their decisions, and indirectly have the assistance of the great lawyers; which written debates were drawn by the non-conforming lawyers, and presented by men of less note at the bar'.¹³⁸

Whilst this may have been true, as noted above, written pleading was already firmly established in the realm of informations and these were written in a 'debating' style. When later, pleading in writing was to be considered voluminous, bloated, and unfocused, the idea persisted that this style of pleading was as a result of English judges and cack-handed advocates in an earlier period.¹³⁹ Consider this from the Faculty of Advocates in 1824:

'The introduction, or at least the great increase of voluminous memorials in the Court of Session, has been attributed to the appointment of the English

¹³⁵ Lowther, *Our Journall Into Scotland* (repr. Edinburgh, 1894) at 31.

¹³⁶ *i.e.* the 'Tender' (abjuring the Stewart cause)

¹³⁷ For the period of the Usurpation.

¹³⁸ Forbes, *Journal of the Session* Preface, p. 16. This cannot be vouched.

¹³⁹ See Tait, M.S., *s.v.* 'Of the Court of Session', C.F. Shand, *The Practice of the Court of Session etc.* (Edinburgh, 1848), p. 339, f.n.1, and Anon., 'Scottish Law Under Cromwell' 1875 (19) *Journal of Jurisprudence* 281 at 284.

judges by Cromwell – men, ignorant of Scotch law, and deficient in judicial habits, and who were at the same time deprived of the assistance of a learned bar. To them the opportunity for repeated examination of written arguments, and for reference to text-books and decided cases, might be necessary.’¹⁴⁰

Pleading in writing by information, however, was certainly extant by the time of the Usurpation. Even if the system of pleading altered in the Cromwellian period, following the Restoration in 1660, the Court returned as did the former form of process and on the recommendations of a Law Commission appointed 1669 and reporting 1670, the Courts Act 1672¹⁴¹ confirmed that the Ordinary whose interlocutor the party sought to review had to be approached first for his consideration of whether the matter should proceed to the Lords’ review. It prohibited any Bill presented to the Lords stopping or rectifying any Act or ‘decreit’ passed in the Outer-house unless the party had firstly made an application to the Ordinary who pronounced the same. If he refused to hear the party upon any new matter ‘condiscended on’¹⁴² or in the case of doubtfulness, upon consignation of ‘*ane Amand*’, then in these circumstances the party could present the Bill to the whole Lords.

The same Act also contains an interesting provision¹⁴³ concerning how the advocates were to be paid for this written pleading. Their ‘allowance’ was in time coming to be regulated according to the ‘quality of the persones who employes them’. The section provides that

¹⁴⁰ Remarks on the Report of the Committee of the Faculty of Advocates, appointed to Consider the Provisions of the Bill for the Better Regulating of the Process of the Court of Law in Scotland (London, 1825).

¹⁴¹ s. 15

¹⁴² to become a pleading in its own right. See below.

‘for every consultation, Pleading thereupon, and drawing Bills upon any Interloquitor thereanent altogether, there be given at most to any Advocat, by Noblemen Eightein pounds, by Knights and Barrons fiftein pounds by Gentlemen and cheiff burgesis twelve pounds, and by the rest of the people nine pounds’ ... ‘nothing be allowed for drawing Informations to be given to the Lords aftir dispute, bot to one Advocat onlie and that the Allowance therfor be onlie the halfe of what is allowed for the consultation’

From this it might be inferred, firstly, that the informations after dispute were in writing, hence the verb ‘drawing’. Secondly, it seems clear that the Lords were attempting to restrict economically the length of the bills and informations and limit the numbers of advocates involved in drafting them. If the work involved before and after the dispute was limited to a ‘block’ allowance, presumably it was not in the financial interest of the advocate to draw long informations.

Yet, and perhaps because of this, by 1677, the practice of importunate sollicitation had re-emerged, and the Lords again found the practice of solliciting a great and real inconvenience. Even the President would be sollicitated. Forbes noted that Stair ‘could not indure to be sollicitated, or impertinently addressed to in Matters of Justice.’¹⁴⁴

¹⁴³ s. 27

¹⁴⁴ Forbes, Journal p.38. This, however, might be treated with caution. Professor Hector MacQueen has made a strong case for this passage having been copied directly from Stair’s writing itself. In 1689 he was subjected to an attack on his character in a pamphlet attributed to Robert Ferguson ‘*The Late Proceedings and Votes of the Parliament of Scotland contained in an Address Delivered to the King, Signed by the Plurality thereof, Stated and Vindicated*’ His Reply and defence the following year ‘*An Apology for Sir James Dalrymple of Stair, President of the Session, by himself*’ published 1690 contains a passage ‘When my Sons came to the House, I did most strictly Prohibite them to Sollicite me in any Case, which they did exactly Observe’ (at p. 3) on which this passage from Forbes could be based. Further, as MacQueen points out, Sir John Lauder of Fountainhall recorded that Stair had been sollicitated by his wife on an occasion. The whole discussion can be found in H. MacQueen, *Stair’s Later Reputation as a Jurist* in *Miscellany Three*, (ed. W.M. Gordon) (39 Stair Society, Edinburgh, 1992) p. 173 and particularly at pp. 181; 187 and 190

Parties at this time were soliciting the Lords at 'their houses scattered through the severall places of the city', paying respects to the Lords and attempting to elaborate upon the written information by 'verbal information' 'upon pretence of giving information.'¹⁴⁵ It is noted in this 1677 A.S. that written informations had by then 'become ordinary' and that all that ought to be represented to the Lords in any cause may easily and without trouble be done by written informations sent to them. The Lords, 'finding it infeasible to hinder sollicitations' by previous methods, declared that no solicitation or verbal information could be made to them whilst the cause was depending and if it was, this would be a reason for the (exception of) declinature of those Lords hearing the cause. Written informations, judicially allowed, could continue to be presented between the hours of five and eight at night. Thus, by this time, written informations and therefore what might be termed written pleading, at least in relation to reporting, was part and parcel of the Court's procedure.¹⁴⁶

This ordinance did not seem to work in the event, or at least adversaries would entertain suspicions as to whether the other had had the opportunity of speaking with any of the Lords before the whole court was to decide their cause. As a result, two years later, the Lords issued a further A.S.¹⁴⁷ ordaining not only that it would be grounds for declinature, but that at advising, if either party sought it, they would 'purge themselves' as to whether they had received verbal informations or sollicitations in the cause being decided by them.

¹⁴⁵ A.S. 6th November 1677

¹⁴⁶ They are sometimes confused with what were to become 'condescendences'. For incorrect use see for example J.W. Brodie-Innes, *Comparative Principles of the Laws of England and Scotland Courts and Procedure* (Edinburgh & London, 1903) Also Wyness Miller, *Civil Pleading in Scotland* (1932) 30 Michigan Law Review, p.556 fn 46.

¹⁴⁷ A.S. 24th December 1679

A different problem then arose, whereby parties began printing their informations, the Lords prohibiting this by A.S. 2nd January 1685. By A.S. 11th November 1690, the Lords ordered the previous Acts of Sederunt 1677 and 1679 to be printed and affixed to the walls of the Outer-house and to be observed and later the same month issued yet another ordinance¹⁴⁸ in relation to the 'Manner of delyvering Informations to the Lords'. They noted that the chief occasion of the parties' solicitation was that the 'leidges' thought that the informations would not be securely delivered unless they did so with their own hands, and in doing so would then take the opportunity of verbally informing them for good measure. To remedy this, the Lords devised a system of boxes for every one of them, each box with a slit in the top of it and locked, each judge holding his own key. The boxes were to stand in the Session house from three to seven at night so that 'informationes ... may be lett in and cannot be drawn out' until the box was opened by the individual Lord when he sent for his box at seven. Informations¹⁴⁹ were not to be delivered in any other way, except in the case of the Lord Reporter, who it seems could now also be informed. So established then was the practice of informing, that the Lords would be uncertain if a cause was to be reported if there was no information in their box the previous night. The reason that there might not be an information for a party put in the boxes was sometimes due to negligence on the part of those charged with drawing them but at other times this was tactical - waiting to see what was in the other party's information. To remedy this, the Lord Reporter was to put a note advising of the causes to be reported the next day into the Lords' boxes.

¹⁴⁸ 29th November 1690 confirmed by A.S. 2nd June 1691.

¹⁴⁹ and bills and answers. Bills were here not those for extra-ordinary summons which went before the Lord Ordinary on the Bills, but Reclamatory Bills against a Lord Ordinary's refusal to Report. Answers were those ordered by the Inner House 'answering' these bills. See below

An indication of the time-consuming nature of the reading of the parties' informations is given in the Act of Sederunt of the following year¹⁵⁰ which shortened the period that the boxes stood, by an hour 'that the Lords may have competent time to peruse their informations.'

(xi) The Ordinary's Report and the New Rôle for Informations.

In all of this, the purpose of the Report by the Ordinary should not be lost sight of, *viz.*, that the cause itself, or particular points therein, being complex or intricate or the applicable law being doubtful, or the Ordinary being mistaken, it was for the better determination of the case that the whole Lords should pronounce upon it. On the Ordinary intimating that he was to Report and the day that he was going to do so, he would peruse the Process a day or two before the day of the Report, looking over the writs which related to the points in dispute, all as (hopefully) carefully noted by the Clerk at the time the parties had made their submissions, so that he would be able to narrate distinctly and 'deduce the cause and pleading thereupon' for the benefit of the Lords. On the day, the Lord Reporter would go to the Inner House and report. The whole Lords would consider the Report and pronounce an interlocutor, unless the facts or law were intricate, profound, new or required serious consideration, in which case they would summon the parties to be heard *in praesentia*. With the advent of the judicial sanction (or tolerance) of written informations, both parties were to have their written informations ready for the Lords the night before the Report and put in the boxes of the Lords. If the Ordinary spotted anything new in fact in the Informations, which was not proponed before him at the bar, he would either hear the parties again on it, or point it out to the Lords, who, if they considered that it was 'weighty,' would desire him to hear the parties again. The Ordinary would then

¹⁵⁰ 2nd June 1691.

leave the Inner House and return to the Outer House to advise the parties of the Lords' determination and what they had sustained or repelled.

Reporting continued to be a problematic procedure. Because of 'the mistakes that fall out in reporting of Causes', the 1693 Act anent Advocats their Subscribing of the Minutes of Debate c. 33, provided that the Minutes as noted by the Clerk at the dispute would require to be signed by the procurator for 'ilk party' and by the Lord Reporter, which Minutes would also be added to the multiplicity of papers to be read by the Lords prior to the Report.

(xii) Reclaiming Petitions.

The parties' advocates could also engineer a hearing in presence by presenting a reclamatory bill by a 'Petition' addressed to the Lords in the circumstances noted above, when the Ordinary refused to report for the Lords' Answer, even upon an amand, and supplicating that the Lords should alter the interlocutor or fix a hearing in their own presence. These bills 'were for the most part ordained to be seen'¹⁵¹ and answered (in a similar manner to libels) and the day for hearing *in praesentia* was fixed. On the day of the hearing in presence, whether as a result of the Lords calling the hearing or as a result of the presentation of a reclamatory bill, the parties and their advocates would go to the Inner House and make their submissions. If the parties were appealing against the Lord Ordinary's interlocutor to refuse to report, the Lords could adhere to it, alter it, recommend to the Ordinary to hear the parties again, or appoint another hearing *in praesentia* in relation to the dispute. If the hearing was as called by the Lords themselves, they could advise it instantly, or ordain parties to give in informations again, whereupon the President would advise

the cause for the interlocutor of the Lords, which itself could be the subject of a reclaiming bill, which might be ordered to be seen and answered and thereafter heard again *in praesentia*, the Lords either adhering or altering their former interlocutor.

(xiii) The Developing Practice of Pleading by Written Documents.

Thus, by the start of the eighteenth century, students in John Spotswood's College¹⁵² would be alive to the role which written pleading had come to play in the procedure before the Scottish Courts. Other than the initial addresses by parties' advocates, the pleading was written and increasingly printed, the by-product of the Lords' attempts to remove verbal informing or soliciting. The trend towards writing was set to continue as were the Lords' attempts to control it. Yet, as we shall see below, the number of documents relating to different parts of the procedure was also to increase. What might be noted, at this key point in the development of the procedure, is that invariably, the parties' advocates, freed from the shackles of relevancy at the dispute, would, as a result, relish the opportunity given by the allowance of informations to display their learning and to extrapolate *ad longum* all that had been said in the oral submissions before the Ordinary as well as introducing new facts, new law and new legal reasoning and argument.¹⁵³ Even the wording used by the Court in permitting the parties to follow this course gives this away – the parties were 'allowed to *enlarge* in informations.'¹⁵⁴

¹⁵¹ Spotswood, *op. cit.*

¹⁵² see John W. Cairns, *John Spotswood, Professor of Law' Miscellany Three* (ed. W.M. Gordon) (39 Stair Society, 1992) p. 131

¹⁵³ For an interesting *excursus* through some of the early eighteenth century Session papers held in the Advocates' Library (and now also the Faculty's Mackenzie Building) see John A. Inglis *Eighteenth Century Pleading* (1907-8) 19 *Juridical Review* 42 - 57

In consequence, the approach which had developed at the Bar in the 'dispute' under the supposed superintendence of the Ordinary had found a new vehicle through the written word, that is *de facto* written pleading. The constructions which had been deployed in the art of persuasion before the Ordinary could now be expressed in writing, without wearying the Judge (at least in his presence). Moreover, in their drafting, more time could be used by increasingly educated¹⁵⁵ advocates, allowing them to ruminate over the client's cause and search the ever expanding Advocates' Library for whatever favourable source could usefully be deployed in the client's cause. Obviously, the Inner House in its composition, comprising fifteen individuals of differing outlooks and views, mores and abilities presented a broad platform to address. Some of the judges were undoubtedly learned jurists and scholars. Others however, were eccentric, or adopted unusual approaches to ascertaining what the law was and indeed how it should be applied. It should also be recalled that some were political appointee Extra-ordinary Lords and they were thus susceptible to submissions coloured by shared political leanings. Finally there were those who found the work taxing.

Thus, a Bill, Petition or Information, drawn with the aim of persuading the Lords to alter an Ordinary's interlocutor, would try to contain something for all: rhetorical devices would be employed; appeals *ad populum* and *ad hominem* would be included; and most commonly apologies would preface the pleading – apologising for having so to detain their Lordships but with the explanation that it was due to the unreasonableness or recalcitrance of an adversary. As a result such papers were far

¹⁵⁴ My emphasis

¹⁵⁵ There is a wealth of writing in respect of this. See for example Cairns, *Historical Introduction, op. cit.* Vol. I, pp. 125-130 and the works cited therein.

from the brocard '*non rhetorick, sed logick*' which had guided the procedure in the early period.

Part of the problem was that there was no prescribed content and, for the most part, the bills and informations from the period up to the start of the nineteenth century are long, rambling and tedious. Typically, they start with an explanation of the previous procedure¹⁵⁶ and then why the party is seeking the review. Thereafter, they often continue for page after page and it is often hard to avoid the conclusion that, in most cases, the drafter had had a stream of thoughts as to what might prove persuasive. The points made often appear random and contain a mixture of fact and authority, not necessarily at the same part of the page. Thus, Spotsiswood records that there were, 'many Inconveniencies arising from the large and unnecessary Congestion of Narratives and Matters of Fact in Informations'¹⁵⁷ At their best, with 'citationes' from the Civil and Feudal Laws and the texts thereon, they could be works of learning. At worst they were tedious collections of decisions.¹⁵⁸

But these written pleadings all had to be read, and as noted, the informations were to be ready for reading by the Lords the night before the reporting of the cause or the hearing in presence. It was not so much the content, but the length of these informations which irked the Lords. Stair, in preparing his *Decisions of the Lords of Council and Session*¹⁵⁹ notes in the *Epistle Dedicatory* the 'large Pleadings, or the

¹⁵⁶ The collections held by the Faculty do not include the Summons. The triggering of one of the review procedures meant that a copy of the original summons was included in the process. See below.

¹⁵⁷ Spotsiswood, *op. cit.* p.60 following the wording used in the A.S. 6th February 1692

¹⁵⁸ Walker *A Legal History of Scotland* Vol. V (Edinburgh, 1998) p.595

¹⁵⁹ Stair, *The Decisions of the Lords of Council and Session In the most Important Cases Debate before them, With the Acts of Sederunt. As also, An Alphabetical Compend of the Decisions; With an Index of*

Written Informations of Parties' and Forbes, somewhat dramatically records the effect of having to read them upon the Lords' health, as

'of late, since Informations and Bills were allowed to be printed, become an incredible Fatigue to the Lords: Who after toiling all Day in hearing Causes, are obliged to shut themselves up to peruse and consider a Multiplicity of Papers at Night; and thereby often to want the necessary Relaxation due to Nature, which visibly shortens their Days.'¹⁶⁰

(xiv) More Pleading in Writing

From at least the 1690s, the 'Multiplicity of Papers' which the Lords had to read included new documents called '*condescendences*.'¹⁶¹ The etymology of the word is uncertain but it will be recalled that the Courts Act 1672 had referred to matters '*condiscended on*' and Stair had referred to the situation in which a party had to '*condescend upon what ground of law or Equity he foundeth*'.¹⁶² In any event, at this time, a '*condescendence*' had taken on a very particular meaning.

If the Lord Ordinary in the Outer-house had granted an act, sentence or decret, the party who took issue with it had to make a '*stop*' to it within six days of its pronouncement, before it was extracted and diligence executed thereon. By A.S. 7th

the Acts of Sederunt, and the Pursuers and Defenders Names. From June 1661. to 1681 In two Parts Observed by Sir James Dalrymple of Stair, Knight and Baronet, &c. (Edinburgh, 1683)

¹⁶⁰ Forbes *Journal op. cit.* p. 10. It is possible that what Forbes meant was that it shortened the judges' leisure time. However, given MacQueen's thesis above and in particular the esteemed audience to whom his works were directed, a little spin and drama to emphasis how hard the judges worked would have been well received.

¹⁶¹ Wyness Millar had trouble tracing the origin of this word and seems to have failed to notice its emergence at this time. See R. Wyness Millar, *Civil Pleading in Scotland*, Part I, p. 556. He continues that '*these statements were, however, usually called 'informations' until 1850*' This is misleading. The term '*condescendence*' was used in the sense here. The term '*Memorial*' was used in relation to the comments of the parties upon the evidence adduced before the Ordinary on Oaths and Witnesses or Commissioner, and latterly, was also used to denote the document containing the parties' comments on the Minutes of Debate, although finally the terms became pretty much interchangeable.

November 1690, the said party had to insert in a 'condescendence' the points upon which he wished to be heard. If it contained a 'relevant ground' for a 'stop', the Ordinary would do so and ordain the condescendence to be 'seen' by the other party. The other party would be allowed to 'answer' this (in a document of the same name) and the whole matter would be reviewed again at the 'Side-bar' before going to the Lords, if one party or both wished to take it there.¹⁶³

Following proof, it was the duty of the Ordinary on Concluded Causes to write a 'State' of the evidence which would come to be printed and it became the practice for counsel to write 'Memorials' on the import of evidence. This practice was not properly regulated until 1752.¹⁶⁴

(xv) The Court's Difficulties with Informations, Bills and Pleadings in Writing.

By this time, the Lords were irritated by the problem of the long informations and bills (petitions) being drawn by the parties' advocates. It is clear that their previous efforts to correct this had failed or at least, were noticed more in the breach than the observance. The A.S. 6th February 1692 records The Lords of Council and Session spending 'a great part of the leidges time unprofitably in reading' the bills and informations of the parties. Because they frequently made no mention of what was to be instructed and proven, from here forward, the Act ordered that no notice would be taken of, nor answer given, by the Lords to any matter of fact contained in a bill or information. These matters of fact were to be distinctly proposed and instructed by

¹⁶² Stair, *Modus Litigandi*, *op. cit.* p. 10. See *supra*.

¹⁶³ This whole procedure was not without difficulty and some degree of confusion. The A.S. 10th June 1691 and A.S. 7th July 1691 attempted to regulate it – unsuccessfully.

¹⁶⁴ A.S. 18th June 1752. C.f. Phillipson, *op. cit.* pp.43-4, 56 and Cairns, *The Civil Jury op. cit.* p. 5

writs produced – which writs were to be marked at the points in the margin corresponding to the text upon which the party intended to rely.

The parties' allegiances were to follow the order of the minutes of debate and every allegiance was to bear the point for or against which it was proposed. Thus the act attempted to prevent the tactical with-holding of facts by a party and was an early attempt to force the parties to narrate their case specifically, with the production and marking of the relevant parts of the writs which instructed the facts, obviously all with the intention of addressing the problem of the long written pleading. Following a Commission appointed by the King to examine the procedure of the Session, the Articles of Regulation¹⁶⁵ two years later went further. The Side-Bar was abolished and the passing and refusing of Bills was now to be conducted by Ordinary on the concluding Saturday of his week. The 'abuse of the multiplying of bills and their superfluous length' was to be checked by imposing a fine on the advocate subscriber if the bill was found to be 'groundless, or in its length superfluous or litigious.'¹⁶⁶ Further, the Lords declared that in the final determination of the cause, the party prevailing could put in an 'account' of the *expenses and damage* that he had been put to in the process by reason of the content of the bill or information, which they would then either decern for or tax and modify, if found to be extravagant. The same Articles again attempted to restrict the payments to be allowed to advocates for the drawing of the information after dispute.

¹⁶⁵ Articles of Regulation concerning the Session, dated 29th April 1695 and recorded in the Sederunt Book 2nd November 1695.

¹⁶⁶ c. 23

This attempt to prevent the confusion prevalent at the Side-Bar and in particular the practice of getting causes called at it for 'stops', appears not to have worked.¹⁶⁷

Moreover, the petitions, answers and informations which were being placed in the Lords' boxes were still causing the Lords problems – although this time it was the language used in them. As we have noticed above, originally it was considered good oral pleading to use every device and every argument which one could marshal, in seeking to persuade the Ordinary of a client's case and in time this practice had been incorporated into the written pleading which took its place. A.S. 9th July 1709 records 'of late, indecent and disrespectful expressions are so frequent in informations, petitions and answers that it is necessary an effectual remedy be provided against the same' ordaining

'all advocates to be careful all petitions, answers, informations and other papers to be put in the boxes, be formed and drawn with all decent and respectfull expressions towards the Judges and parties.'

with the threat of advocates being disbarred in the non-observance of the same. But it was not just the advocates' unbecoming language. It seems disgruntled parties were not averse to letting the Court know what they thought of it at the conclusion of the proceedings before the Ordinary in the Outer House. A.S. 20th June 1710 prohibits 'cursing, swearing, reproaching and mocking of religion and piety' noting that 'abuses of that kind were sometimes committed in the Outer House'. Certainly, before the Lords in the Inner House, the observation of judges bickering and arguing¹⁶⁸ cannot have been an edifying sight. At the supposed conclusion of a cause,

¹⁶⁷ A.S. 11th November 1708 imposed an obligation on the Ordinary to make up a 'Side-Roll' and to call according to it at the Side-Bar and dictates the times and days that he was to be permitted to do so. See also Russell's explanation of it in *The Form of Process in the Court of Session and Court of Teinds To which is prefixed, A General Account of the College of Justice by John Russell, Clerk to the Signet*, (Edinburgh, 1768) at p. 59

¹⁶⁸ See A.E.J.G. Mackay, *A Sketch of the History of Scots Law. An address (in part) Delivered at the Request of the Members of the Society of Scots Law in the University of Edinburgh* (1882) 26 Journal

especially in those causes in which there had been allowed an Act before Answer, there would be a morass of law and fact before their Lordships, clouded with various memorials, condescendences, informations and bills, all in process, and out of which the Judges would have to vote on the outcome.

Twenty years earlier, an Act of Parliament had ordered that the doors of the Court should be open to the public so that the public for the first time could see their Lordships' deliberations upon their causes coming before them.¹⁶⁹ As Bell could remark,

'the observations of parties at the final decision of the cause, extending both to the relevancy and fact; the frequent imperfections of the averment and hypothesis, on which the relevancy had been decided, as appearing by the actual depositions of the witnesses; together with the open deliberations of the judges on the whole matter of the cause; exposed the final determination, which had formerly been a simple and conclusive sentence on fact, almost in the nature of a verdict, to argument and remonstrance. ... [and] of a discussion, rhetorically maintained, on the whole mass of law and fact involved in the case.'

Of course, an angry and disgruntled client might be soothed and placated with the advice that all was not lost and that he could reclaim. As we have seen, the reclaiming bill would be the appropriate vehicle to bring matters before the whole Court and could be so brought more than once. The number of times was restricted

of Jurisprudence (in 2 parts) March 1882 pp.113-129; May 1882 225-240 at part 2, p. 233. Phillipson *op. cit.* pp. 53-54. See also Henry Cockburn, *Memorials of his Time*, (Edinburgh, 1856) at p. 245. 'A bench of fifteen judges can only be a 'learned crowd.' Their number produced confusion, unseemly contention, prominence in the coarse and shrinking by the gentle'.

¹⁶⁹ 1693, c. 42 *Acta Parl.* vol. ix, p.305

to two in 1711¹⁷⁰ and further restricted in 1718¹⁷¹ so that the second reclaiming petition could relate only to new matters of fact which had recently come to parties' knowledge. But all of this might be obviated by the Ordinary who took a flexible approach to the rules of procedure and the Acts of Sederunt.

'Flexible rules of procedure meant that few steps in a cause were irrevocable. A cause was as long or as short as the litigants wanted it to be. If it progressed quickly, it was because the parties were prepared to accept the various interlocutors passed upon it by the Ordinary. Machinery existed which allowed parties to litigate for as long as their inclinations or their purses allowed them. The rules of procedure were not so much binding forms as mere premises, which could be softened by the equitable powers of the Court.'¹⁷²

(xvi) Pressures on the Court : The Development of Rules of Pleading in Writing.

This machinery, by reclaiming, and the invocation of the other methods of review, coupled with the tactics used by the advocates, (and the length of their pleadings) began to take its toll on the Court. Throughout the remainder of the first half of the eighteenth century, we see in the Acts of Sederunt the Lords engaged in a battle to force the parties to state distinctly the law and the facts upon which they were content to litiscontestate. It was a battle which they never won.

¹⁷⁰ A.S. 20th November 1711.

¹⁷¹ A.S. 26th November 1718.

¹⁷² Phillipson, *op. cit.* pp. 58-59.

In addition, to add to its woes, the amount of business coming before the Court was yearly increasing. As Phillipson has shown,¹⁷³ by the end of the century, the Court was unable to deal with a third of the business brought before it.¹⁷⁴ The answer, it was thought, was to get back to the proper superintendence of the 'dispute' before the Ordinary, even though the Court was not yet, at this stage, able to permit the abandonment of the panoply of review procedures consistent with equity and the Civilian principles which had informed the procedure from the outset. Adherence to strict form was considered to cause injustice but the 'form' could be softened by 'Equity',¹⁷⁵ and if the parties could be forced to state clearly their positions in early course, then, consistent with that equity, the procedure could be brought to a swifter conclusion.

The ordinance of 6th February 1692 relating to the content of written pleading was reinforced in A.S. 19th December 1710¹⁷⁶ and in 1715¹⁷⁷ it was provided for the first time, that where

'any party against whom any matter of fact shall be alleged which might be admitted to probation, the said party or his advocate shall be obliged to

¹⁷³ somewhat speculatively, J. Cairns, "'The Dearest Birth Right of the People of England": The Civil Jury in Modern Scottish Legal History' in (eds.) J. W. Cairns and G. McLeod, "'The Dearest Birth Right of the People of England" *The Jury in the History of the Common Law* (Oxford, 2002)

¹⁷⁴ Phillipson *op. cit.* p. 46

¹⁷⁵ Kames, author of the principal work on equity in Scotland, thought 'himself superior to rules which he considered either as nugatory and cumbersome or else hurtful to the interests of justice.' Quoted by J. Ramsay of Ochertyre, *Scotland and Scotsmen in the Eighteenth Century*, i, pp.189-90.

¹⁷⁶ see above, adding that the advocate subscriber of any written pleading would be looked upon as the drawer of it and answerable for its content. This was the subject of another A.S. 20th November 1711.

¹⁷⁷ A.S. 1st February 1715. See also Robert Wyness Millar, *Civil Pleading in Scotland* (1932) 30 Michigan Law Review, (2 Parts) No. 4, 545- 581; No. 5 582 - 746 at page 572, and at fn 126 for his discussion of the Scottish system of pleading following *ficta confessio* as well as his citation from Balfour's Practicks quoting the case of *Hay contra Diksone* 6 Dec. 1542 2 t. c. 128. It is of interest because Lord President Clyde (*primus*) corrected and added to the article. The case is

confess or deny that fact before pronouncing of the interlocutor ... which confession or denial shall be expressly marked in the minutes. And if he refuse so to confess or deny, his refusing in like manner shall be marked on the minutes, whereupon he shall be held as confessed.'

In other words, the old practice of acknowledging the libel had to be followed in writing. The Court reinforced this in 1723,¹⁷⁸ whereby it was ordained that written defences, (both dilator and peremptor) answering a summons, required to be signed by a party or his procurator and had to 'comprehend an acknowledgement or denial of the facts libelled, otherwise the said facts shall be held as acknowledged.' It will be recalled that the dispute before the Ordinary of old had proceeded orally and in the employment of the reply and duply etc. the party's advocate would tactically consider whether the 'verity' of the allegiance of the opponent should be acknowledged. By this time, it seems, the 'dispute' or 'debate' itself no longer resembled the oral proceedings of old. The defences now had to be in writing, and the summons always had been. Whilst before, it could always be inferred from a speaker's allegiance whether he acknowledged the libel or denied it, as stated to the Lord Ordinary under the old procedure, by this time the Court was expressly ordaining parties to do so in writing.

The importance of this now was the sanction to be exercised by the Court to coerce parties to do. If it was not denied, it was to be held as acknowledged. So, from his silence in answering an adversary's case, a litigant would be deemed to have tacitly admitted that which he remained silent upon.

actually an 'authority' in the loose sense of the word for proponing a peremptory exception and acknowledging a libel.

¹⁷⁸ A.S. 15th February 1723.

This provision was tried and may have been moderately successful as the latter A.S. was continued¹⁷⁹ to January 1728. In addition the Lords were to be given additional powers as there is included a provision permitting the Ordinary to award 'expences' against a party found 'shifting or delaying.' This A.S. in itself must have had effect upon parties as it was continued again¹⁸⁰ to 1st July 1729.¹⁸¹

However, the strident march of acts of sederunt imposing increasing penalties upon litigants and their pleadings slowed. Equity was once again invoked. It became permissible once more for a defender to give in their dilatory defences apart and they could delay the giving in of the peremptor defences until the dilators were discussed. The reason for this could have been that a party's title was doubtful or that there had been irregular steps of process prior to the giving in of the peremptors and it was deemed unfair (i.e. contrary to equity) to the defender to peril his case until the dilators had been discussed. Whilst there was supposed to be consignment of 20 shillings Sterling by the defender to the pursuer at the point of over-ruling the dilatory defences, in practice it came not to be observed, and became another cause for delay.¹⁸²

The 'ingiveing of Informations' continued to dog the Lords and the issue raised itself once more in 1738.¹⁸³ Whereas before, parties might delay the preparation and giving in of informations to elicit the adversary's position, and attempts were made to

¹⁷⁹ by A.S. 1st January 1726.

¹⁸⁰ by A.S. 11th June 1728.

¹⁸¹ finally being made perpetual by A.S. 19th February 1742.

¹⁸² In respect of this aspect, see the dismay of Russell writing in 1768 (obviously informed by his capacity as a Clerk to the Signet) in *The Form of Process, op. cit.*, p. 38.

¹⁸³ A.S. 29th June 1738. A.S. 13 July 1739 repeated its terms and reinforced it.

prohibit this, in any event, the practice continued. To prevent it, a party ready with an information on the appointed day could then be authorised to print the Minutes of Debate following the 'dispute' and the cost of printing was then to be recoverable from the other party and a new day was set. A dilatory party was not to be allowed to give in an information unless he paid an amand.

(xvii) Ongoing Reforms

Regulation of the Court's procedure continued apace for the remainder of the century. Acts of sederunt were passed regulating what papers could be put in their Lordships' boxes and when they should be put there,¹⁸⁴ papers were to be printed for the 'conveniency of the Judges',¹⁸⁵ Memorials on the import of prepared States of evidence were regulated,¹⁸⁶ petitions now had to be signed by an advocate¹⁸⁷ and the Minute Book was now to be printed by the Keeper and copies circulated to the Writers, as were the Outer House Rolls.¹⁸⁸

However, this was the very period which required strong measures from the Court to marshal its procedure. The written pleadings and abuse in bringing cases repeatedly back before both the Ordinaries and the whole Court were pressing concerns. A.S. 27th June 1776, prevented prorogation of reclaiming days by consent of both parties.

¹⁸⁴ A.S. 6th November 1740; 10th November 1741; 23rd November 1752; 16th December 1760; 14th June 1788

¹⁸⁵ A.S. 15th July 1768. Agents were now to be fined for 'imperfect quotations and typographical errors. See Watson, *op. cit.* p. 91.

¹⁸⁶ A.S. 18th June 1752

¹⁸⁷ A.S. 5th March 1789

¹⁸⁸ A.S. 11th March 1789

The A.S. 11th August 1787 attempted to remedy *inter alia* the 'manifold delays and obstructions to the course of justice in the Outer-house' which arose from the amending of libels, and parties not being prepared on the day of calling for the discussion before the Ordinary. The tactic appears to have developed among advocates who found themselves in a position of unpreparedness, of allowing interlocutors or decreets to be pronounced against interest and thereafter to represent to the Ordinary. The net effect of this was that the Ordinary was deprived of examining the merits of the cause at the first stage of proceedings.¹⁸⁹ This was made the subject of further control, by attempting to force parties to join issue on the facts of the case which were actually in dispute¹⁹⁰ in their written pleadings, and reverting to the old system of requiring defenders to state their whole defences, both dilatory and peremptory, together. Again a system of fines was introduced.¹⁹¹

(xviii) The Changing Nature of the Advocates' Function and the Effect of Written Pleading

Still, there was little oral debate as once there had been, and the movement towards pleadings being required in writing had resulted in the loss of the superintendence of the separation of fact and law so important in Stair's time. These written pleadings might indeed furnish the Court with all the facts and all the law pertaining or which might pertain to the case being decided, but the approach used by many drafting advocates of including all possible fact and law as opposed to all relevant fact and law left the Court with the function of selecting all that was relevant and as a result

¹⁸⁹ Watson, *New Form of Process before the Court of Session, op. cit.*, p. 57

¹⁹⁰ This was to remain a dead letter.

¹⁹¹ Lord Craig attempted to enforce these but was of the view that they were of little effect. *Notes of opinions on proposed form of process, 14th March 1809*, MSS - Proc. Scot. Jud. Com 1808 Advocates' Library.

of the increased demand for judicial time, it was a function which it could no longer efficiently perform.

The nature of the advocates' work was also changing. The conversion of counsel from verbal practitioners at the bar little involved in the practical drafting of the simple initiating court documents, to primarily drafters of pleadings with a decreased function in oral pleading before the Court, seems to have led to the loss of the skill of oratory so valued in the earlier period. In 1748, this change had not been lost on Lord President Dundas¹⁹² in his reply (as noted by the Faculty) to the Advocates, on his taking office, when he reflected upon the manner of proceeding adopted by this time in the Court:

'That in order to promote and continue at this Bar the exercise of that rational and manly eloquence that was only becoming their profession to give the senior gentlemen opportunities to exert it and the juniors to acquire it, he was resolved to endeavour to give more frequent occasions for pleading causes in the Court of Session, instead of deciding them so often as of late years had been practised, singly upon written or printed papers.'¹⁹³

His endeavours (which were not great¹⁹⁴) would prove to be unsuccessful and the greatest part of proceeding before the Court, from start to finish, was by written pleading. Not surprisingly, three quarters of the way through the century, Boswell could write that

¹⁹² He was previously Lord Arniston and was judicially known, upon taking office, as Lord President Dundas.

¹⁹³ Minutes of the Faculty of Advocates *op. cit.* Vol. II p. 225 (3rd November 1748).

¹⁹⁴ see below concerning the quantity of acts of sederunt regulating procedure over the period. Of course, it was not just the Lord President's responsibility, but that of the whole Lords. The Acts of Sederunt of this period are signed in the name of the President but with I.P.D. post fixed, that is *in praesentia dominorum*, - in the presence of the Lords.

'Ours is a Court of papers. We are never seriously engaged but when we write.'¹⁹⁵

As had always been the case, the drawer of the respective parts of the pleading had in mind the persuasion of the Court. The pleadings were always drafted with this focus. Thus, in eighteenth century pleading, if one party was concerned that the other was not being frank in their pleading, it would plead that the other was seeking to 'amuse' the Court - i.e. to deceive it. If one party considered himself prejudiced by the pleading of another it was to the Court that an appeal was made and the Court could insist that full disclosure be made in the pleadings for the benefit of the other party. The rules were such that there was no requirement to give what, in modern practice, would be called 'fair notice'. It had always been the case that the defender to a suit had a period 'to see the pieces', but the concept of giving fair notice of one's position in the pleading for the benefit of an adversary (without being so ordered by the Court) was to develop later.

(xix) Further Pressures on the Court.

The problems faced by the Court until the end of the century, have been well documented by Phillipson.¹⁹⁶ These included the taking of evidence on Commission, once the preserve of the Ordinary on Oaths and Witnesses, which was now frequently passed to a Commissioner who was allowed to call which ever witnesses he pleased to give evidence and it was thereafter left to the Ordinary on Concluded Causes, hindered rather than helped by the Memorials of the parties, to rank the

¹⁹⁵ *Boswell: the Ominous years 1774 -1776* (eds.) C. Ryskamp and F.A. Pottle, (London, 1963), p. 228

¹⁹⁶ Phillipson *op. cit.* Chapter 2 'Litigation in the Eighteenth Century' pp. 42-61

evidence and prepare a 'state' for the Lords' decision.¹⁹⁷ There was even the development of another step in proceeding which could be reduced to writing. Memorials, which it should be recalled could be ordered by the Court at the point of the concluded cause, allowing the parties to comment upon the import of evidence adduced, now were also drawn by parties commenting upon the import of the debate before the Ordinary, after the printing of the Minutes of Debate and before the very frequent Informations.

In the end, a number of factors combined to make the bringing of a suit before the Court slow, inefficient and thereby expensive – contrary to the benefits of the Scottish form of process examined at the start of this chapter. These factors included in a lengthy list, the keeping of pieces of process by defender's advocates¹⁹⁸, the mistranscription of the Minutes of Debate, the ordering of cases in their stead; the unlimited representation to the Ordinary, and the increasing incidence of Reporting; the prevalence of Acts before Answer granted by the Lord Ordinary, the frequent exercise of the two opportunities to reclaim, and the confusion of the side-bar¹⁹⁹; the protestations and stops; the unfocussed memorials, informations, representations, petitions, bills and condescendences all of 'superfluous' length and dubious content; the applications of equitable reason excusing failures on the part of litigants and their advisers to obtemper the strict rules of form; and the ever increasing business of the Court. These all conspired to bring the Court to its knees.

¹⁹⁷ Phillipson *ibid.* pp. 56-57

¹⁹⁸ Considered by Russell, an 'evil practice'. J. Russell *Forms of Process op. cit.* p. 43

¹⁹⁹ Glassford considered the rotation of Judges a 'disease inherent in the system'. J. Glassford, *Remarks, op. cit.*, p. 24

While these constituted internal problems for the Court, there were also external forces which would come to apply additional pressure for change. Since the Union, there had been a right of appeal to the House of Lords in civil matters, which appeal 'stopped' the execution of the Court's sentence (or even interlocutors) pending final determination by a judicial body which failed to appreciate the nuances of the inferior court's procedure. A litigant who had managed successfully to steer a course through the tides and eddies of the procedure of the Court of Session could still be thwarted within sight of land by a deep pocketed adversary²⁰⁰ and dragged to London where his cause might be determined by a very different approach.

By the turn of the century, there had been abortive attempts to change the constitution of the Court of Session,²⁰¹ various pamphlets had been published by concerned individuals on topics relating to the business of the Court and the problems it was encountering, and eyes were increasingly looking over the border for a panacea, or at the very least some kind of palliative. It was appreciated by those with influence, as well as by informed members of the population at large, that 'something had to be done' – only what? The Scottish political elite as well as the judiciary, on reflection, had to accept that the old method of Lords' ordinances and exhortations through Acts of Sederunt had not been successful and that in the final analysis, intervention of the British Parliament would probably be required.

²⁰⁰ It was thought that litigants would be reluctant to appeal to the House of Lords as a result of the distances to be travelled, and the costs involved, making it more likely that litigants would acquiesce in the decision of the Court. See A. J. MacLean, 'The 1707 Union: Scots Law and the House of Lords' 1983 4 *Journal of Legal History*, 50-75 at p. 69. But it was a tactic to appeal with no intention of proceeding – the sentence of the Court being 'stopped'.

²⁰¹ Henry Dundas' abortive 'Judges Bill' of 1785. See next Chapter.

More dramatic change was just around the corner, as we shall see in the next chapter, but before we leave this era, there is produced in Appendix One to the thesis an analysis of a practical example of a cause proceeding through the Court in this period, the written pleadings presented to it and the Court's interlocutors and sentence which all highlight some of the issues raised in this chapter.

(xx) Conclusion.

At the end of the 18th century, the 'form of process' was on the threshold of change. The *zeitgeist* was characterised by the general opinion that there was nothing particularly wrong with the forms of process and the undoubted problems faced by the Court, in an age of increasing prosperity, were as a result of the failure of enforcement.²⁰² But what was to be enforced had developed into a discrete, sophisticated and complicated body of rules regulating the bringing, pursuing and determining of actions before the Supreme Court. The attempts to prevent the oral informing of judges by litigants had given rise to the Court's first acceptance that the pleading of causes before could proceed in the written form. The written Information had originated in the concept of 'justice to the lieges' and was the next step from the Lords' attempts to prohibit oral informations or any oral contact with them outwith the curtilage of the Court. Once it was acknowledged as a part of process through the Acts of Sederunt, it began the slide away from the preparation of parties' positions in a litigation under the strict superintendence of a Lord Ordinary. Thereafter followed the written petitions and answers, the Memorials and the condescendences and answers. Written pleading before the Court had commenced.

²⁰² As we shall see later, such thinking has periodically surfaced with those concerned with reform of procedure in the Court of Session.

The function of the advocates thereby also changed, and it was through these documents that they now sought to display their learning and ability, although rarely succinctly. The net result was that these long documents required to be read by the judges before the matter was called in Court, which documents appear to have frequently contained matters which the Court thereafter considered 'groundless and superfluous'. Away from the superintendence of the Ordinary, the Court could no longer control what was inserted into these documents and whether it was (in the opinion of the Court) strictly relevant. Moreover, the old manner of isolating the particular points in fact and law and pronouncing interlocutors thereon, permitting probation in respect thereof could not be imposed if the parties were left to their own devices in putting forward what they themselves considered germane to their case, whether relevant or not. In allowing written pleading without regulation as to what it should or should not contain, the Court discovered that its work increased as the advocates so pleading would not naturally separate fact from law. In addition, fact and law advanced by one party was often not acknowledged as either true or false by the other, the *ficta confessio* operating badly in practice and again the work of the judges was increased.

The rules of court as acts of *sederunt* often prohibited particular conduct and behaviour and yet, their repeated continuation or reformulation perhaps suggests that these ordinances were not regularly followed and continuing enforcement was required. The reason that this was so also arose from the equitable considerations which had always informed the Court. There was a tension between these equitable considerations and the strict adherence to and enforcement of form. In allowing more and more complicated procedure beyond the initial dispute, through written pleading and justified in equity, the Court realised that it was permitting a form of

process which was far from the safe, easy and celerious forms so praised before. The case examined in Appendix one, by no means unusual in its machinations and its length, typified the problems of litigation before the Court. Hence the clamour for the more rigorous enforcement of the acts of sederunt and the form of process by some and the insistence on the preservation of equity in the manner of proceeding before the Court by others. To say that there was deadlock is to go too far, but it was appreciated that changes would be required to the Court's procedure.

Whilst the winds of change were blowing, the cause of that change at the start of the nineteenth century was to come from an unlikely source. It is to this that we now turn.

Chapter Two

An Era of Change: Re-defining the Theory of Written Pleadings and the Development of Civil Procedure, 1800 - 1825

(i) Introduction

At the start of the nineteenth century the state of the form of process in Scotland was in need of a strong medicine to cure its ills. The coming quarter of a century was to prove to be an era of change, which was ultimately to see the constitution of the Court altered for the first time in its history, individual Courts with their own jurisdictions abolished and assimilated into the Court of Session but, most importantly, for our purposes, was to provide the groundwork for the establishment of a code of procedure which in its embryonic state, was to form the basis for all later procedure in the Court of Session - even to the present day. The changes to the Court's procedure, however, did not proceed in a dramatic or revolutionary way, although there were frequent outcries by the profession as new proposals followed new proposals. Frequently ideas would lie dormant and be resurrected at a later stage.

Throughout the period 'written pleading' was to become a term of art in contradistinction to oral pleading - or in the terminology of the period '*viva voce*' pleading.¹ The written documents lodged by the parties in the previous era, not always with the sanction of the Court, in the form of Condescendences and Answers, Mutual Condescendences or Memorials, (in proper practice, containing 'articles' of pleading separated in fact and law and stating pleas-in-law), were to become recognised and formal steps in procedure, whilst others such as Minutes and the

Petitions and Answers, would be put initially to one side, re-emerging later under other steps of procedure. This was the period which created the 'closed record' which would operate as foreclosing parties from adding anything new to their pleadings, either in fact or law. The old Debate or 'Disputing' under the superintendence of the Ordinary, became bedevilled with difficulties of restricting parties' pleaded matters of fact, and whilst it would remain a step of process, it was to become formally relegated in import, no longer being used as the mode of defining the parties' respective positions in law and fact.

The debate would follow condescendences and answers as revised and at this hearing the future procedure of a cause was to be decided. By the early 1800s the preparation of the parties' pleadings had significantly departed, through practice, custom and usage, from the old defining and superintendence of parties' positions in fact and law previously undertaken by the Court. It was still accepted practice for the judges to decide cases on probability taken in the round and based on the averments of the parties in the multitude of pleadings, although this would change. As the period developed, increasingly the system and rules of written pleading were defined.

In this Chapter, we concentrate on the developing role which was to be played by written and *viva voce* or oral pleadings and the manner in which the Court and the legislature developed mechanisms for addressing the age old problem of pinning parties down to definite and concise statements of their cases, separated in law and in fact.

¹ or sometimes, pleading '*ore tenus*'

The impetus for change of the procedure in general was to come from the usual complaints about the delays of the old procedure but also from hitherto silent quarters, namely, the House of Lords and the respective governments of the day. But the internal pressure for change originated in the Whigs' admiration for the English practice of sending disputed matters of fact for decision by a civil jury and this produced ideologies which competed for the attentions of those charged with reforming the form of process, which were to cast a long shadow over the changing form of process in the early years until the establishment of the Jury Court in 1815 and even beyond that. Moreover, in what was to be a highly politicised age, it was the first time that the procedure of the Court was to become a political issue, such were the feelings roused among the (albeit restricted land owning) electorate in relation to its reform.

At first blush, it may appear that the examination of the introduction of the civil jury into Scotland has no direct relevance to the consideration of written pleading before the Court. It was, however, to be the catalyst for the bold, but ultimately unimplemented, thinking of the Commissioners of 1808 - 1810² and was to lead to the creation of a procedure which would go some way towards untying the Gordian knot - separating parties' admixture of law and facts in their pleadings, at least in the first instance. Any system which required a jury to determine disputed matters of fact in civil litigation would necessarily require the splitting of the functions of the judge and the jury and the pleadings of parties would have to be modified to meet it.

The whole issue of civil jury trial as an 'English' mechanism for the determination of fact and the question of whether it should be introduced into Scottish procedure

engendered strong opinions - opinions informed, at least initially, by nationalistic sensibilities and by the fact that there was a want of recognition by many south of the border that Scotland was an equal partner in the Union. Paradoxically, even the strongest of such views were tempered by the realisation that the two countries were growing increasingly together in outlook, language and, most importantly, in commerce, and, in the final analysis, it was thought that some assimilation (even in the manner of proceeding before each country's Supreme Courts) would probably be beneficial for both.

Parts of the country and members of the judiciary and Bar stood on the watch for 'anglicisation' of the Court as a national institution, as well as of its procedures although, at the conclusion of the era of change, the anglicisation argument would be appreciated for what it was - a red herring. Further, and in any event, the pressures for 'anglicisation' would come from within the country and not from the south.

As to the role of written pleadings, the period is marked by the attempts of the Court, government ministers and the profession to devise a system which, at an early stage of proceedings, produced a definitive account of the parties' positions in fact and law which would then permit a judicial determination. It had to be a system which called for some adherence to form, in the interests of speedy resolution (but also the expending of judicial time) but simultaneously not penalising parties too severely for failures to obtemper strict form and permitting, in the interests of equity, some mechanism for review of such judicial determinations.

² Novel ideas were advanced by Ilay Campbell and Charles Hope especially.

The old system was certainly civilian based and 'equity infused.' It was to be acknowledged that the interests of justice should not be determined by the resources of a litigant but by the balance of the competing interests of the litigants and the Court.

(ii) Early Attempts at Change

By the end of the eighteenth century, the notoriously conservative Scottish legal system was infused with the ideologies of the Scottish Enlightenment,³ and French Revolutionary notions of Justice and Liberty. Justice, it was realised, required the Court's procedure to be efficient and fairly cheap, which could be used by one and by all and which would provide a final determination in a reasonable time. In truth this was hardly novel and was in essence merely a reformulation of the rationale of the Court of Session, existing as it always had 'for the administration of justice' and 'the convenience of the lieges'.

It is fair to say, however, that the system of written pleading and the form of process had handicapped the Court in attaining these ideals and by the later eighteenth century, the Court of Session was labouring to get through the number of causes each year enrolled.⁴ The Court could only dispose of a third of these annually, and the remaining two thirds were being carried over into the new session for the following year. Unsurprisingly, criticisms of the Court focussed on this inability to get through the business and the inability was blamed on its anachronistic structure,

³ What might be now termed conservative with a small 'c'. Although the profession, and indeed the Bench, was by nature cautious in outlook and wary of change, there were elements, particularly those of Whiggish disposition, who embraced the new concepts.

⁴ As Dr. Phillipson has shown, between 1761 and 1791 the number of causes enrolled had increased 119 per cent. N. Phillipson, *op. cit.*, p. 46. See also Parliamentary Papers (hereafter P.P.) 1843, xlix, 121-6, *Return showing abstract of the extent of business done in the Court of Session since 1780*. C.f. the figures compiled by Darling in James Johnston Darling, *The Practice of The Court of Session 2 Vols.*, (Edinburgh, 1833) Vol. I, p. 3.

practice and procedure.⁵ Prior to the Union, it had previously been the practice of governments of the day to leave matters of practice and procedure to be regulated by the Court itself through its power to make Acts of Sederunt dictating the procedure to be followed before the Court. But the creation of temporary and then permanent Acts of Sederunt and the periodic re-incorporation of parts of previous Acts of Sederunt bore witness to the fact that these were often little followed in practice.⁶ Frequently, their operation in practice would be dictated, not by the Court, as intended, but by the profession. In the end, invariably, the Court would capitulate and acquiesce in deviations, alterations and failures to obtemper the prescribed form.

Why was this? In the first place, it seems that practitioners would strain against the application of any new Act of Sederunt on the basis that a continuation of the old known way of doing things was infinitely more appealing than jeopardising a client's cause upon some new alteration of procedure if, and this was the point, the Court could be pressed into the continuation in that case on the grounds of equity or justice or any other such concept. Secondly, this was made easier by the Court inadvertently failing to ensure that previous provisions were explicitly superseded or were to be held as having fallen into disuse. As a result, a new Act of Sederunt might, after diligent research, be found to conflict with a previous one, but neither profession nor Bench knew whether the previous was even extant.⁷ Many acts of

⁵ J. Cairns, 'Historical Introduction', in *A History of Private Law in Scotland* (2vols.) (Oxford UP, 2000) vol. 1, p. 150.

⁶ Glassford considered that the rules throughout the history of the Court had '*generally been calculated well*' but that '*practical evils have chiefly arisen from a relaxation in their enforcement*' and that in later times (up to 1812) '*there is less strictness in the form and a lesser degree of precision in the pleading*'. Glassford, *Remarks*, *op. cit.* p. 134.

⁷ In July 1808 the House of Lords ordered the Court of Session to prepare and send to them all the acts of sederunt then in force, separating those affecting the form of process from those altering, strictly, the law. It took the Court a year and a half and by February 1810, it transmitted a report admitting that to carry out the request was difficult beyond being actually possible and apologising for it. See Alexander *Abridgement of the Acts of Sederunt* p. ix.

sederunt were not even initially published, and were followed only half-heartedly thereafter, by which time, the practice or abuse the A.S. 'discharged' had continued.

As Lord Cringletie could still much later remark, in his submission to the Commissioners appointed in 1823 to examine the forms of process of the Court of Session:⁸

'I have often remarked, and every person acquainted with our forms must have observed, that salutary Regulations have, at different periods, been introduced by Acts of Sederunt of the Court. But every one must also have remarked, that most of these which are adverse to indolence and carelessness in the practitioners, and require outlay of money, always meet with a continued resistance, till at last they are gradually relaxed, and ultimately neglected. Indeed, many of the practitioners are unacquainted with these Acts, as they are not printed and sold by the Booksellers, till a considerable time after they are enacted.'⁹

(iii) Governmental Intervention and Scottish Sensibilities

Because the Court had not controlled its procedure other than by incremental alteration, (with varying degrees of success,) it was realised by the innocent (and not so innocent) observers in the hierarchy of the Executive that reorganisation of the

⁸ This is detailed below. The passage is taken from the Commissioners' Report 1824, p.105

⁹ Evidence of Lord Cringletie *Report of the Commissioners for inquiring into the forms of process in the courts of law in Scotland and the course of appeals from the Court of Session to the House of Lords*, P.P., x) Appendix [Hereinafter *Commissioners' Report, 1824*] See also the evidence of Daniel Fisher, SSC, to the Commissioners: 'The great complaint which I think lies against the present Form of Process, is, that the Forms are no where to be found in one connected body. They stand upon Acts of Parliament, but chiefly upon Acts of Sederunt, which alone extend now to a large folio volume. These Acts of Sederunt are framed to alter, amend or repeal a previous Act; and in this way it requires very considerable study and attention, by collating those Acts of Sederunt, to ascertain what is the precise form of procedure in particular actions. The Acts of Sederunt fixing the Forms of Process, are indeed so numerous, that extensive and continued practice is necessary, before a person can acquire a thorough knowledge of them.'

Court and the streamlining of the form of process before it, would require governmental intervention. Things came to a head in 1785, but the first skirmish was not to relate to the form of process at all.

The number of judges was a more pressing concern. The Scottish governmental representative Henry Dundas¹⁰ grasped the thistle on the death of one of the Judges, Lord Kennet.¹¹ The Inner House, it will be recollected, sat as the 'Hail Fifteen', as a unitary Court, *in praesentia*, with the Lords Ordinary performing the preparatory functions in the Outer House. Dundas proposed¹² to leave the vacancy unfilled and by a policy of not filling dead men's shoes, reduce the numbers of the Bench to about ten. The logic was that a smaller bench would operate more efficiently, unlike its previous operation adverted to in the previous chapter.¹³ In addition, whilst in the previous era of judicial and political patronage 'gowns' could be bestowed as political rewards, it was now hoped that a smaller bench would be comprised of individuals of natural legal ability. Dundas figured that the decreasing numbers of Lords would increase the Treasury limited reserves, out of which the remainder

To the want of this knowledge I ascribe part of the litigation, and of the loose pleadings which occasionally occur in Court.' *Commissioners Report, 1824* p. 117.

¹⁰ in concert with his half brother Lord President Dundas (the younger) and the Lord Advocate Ilay Campbell.

¹¹ What follows up to the introduction of Jury Trial into the Court of Session is based upon the following sources, *viz.*, N. Phillipson, *Scottish Whigs and the Reform of the Court of Session, op. cit.*, Chapters III – VI, pp. 62-164; David M. Walker, *A Legal History of Scotland, Volume V, The Eighteenth Century*, (Edinburgh, 1998) pp.458 – 65; Volume VI, *The Nineteenth Century* (Edinburgh, 2002), pp. 320-4; J.W. Cairns, *Historical Introduction, op. cit.* pp. 150 ff. I.D. Willock, *The Origins and Development of the Jury in Scotland.* (vol. 23) (Stair Society, Edinburgh, 1966). Whilst Professor Walker's contribution is synthetic in composition and Professor Cairns' work is necessarily introductory, Dr. Phillipson's contribution to the period, whilst historiographical, is as yet unsurpassed. I do not attempt to better it. This Chapter focuses on the continued development of written and oral pleading in the Court of Session and where Phillipson's material is relevant to this it will be referred to as appropriate.

¹² He prepared a Bill, commonly referred to as The Diminishing Bill, or The Judges Bill of 1785 for presentation to the House of Commons and thereafter for passing into legislation. The Bill can be found in the Scots Magazine, vol. 47 (1785) pp. 475-6. See Phillipson, *op. cit.* p. 63.

would be salaried. What Dundas did not calculate was the ensuing outcry, voiced through the newspaper columns of the Edinburgh press¹⁴ and fuelled by the quill pen of James Boswell,¹⁵ praying in aid Article XIX of the Articles of Union. Moreover, the content of the Bill (and its method of introduction) had raised the hackles of the county freeholders, a powerful collective voice of the franchise, whose meetings dictated to, and they were thus listened to by, members of parliament.¹⁶ None of the counties supported it. It was no surprise that the Bill was withdrawn by Dundas. But, 'the issue', as Phillipson notes, 'clearly flicked the national prejudices of many Scotsmen on the raw.'

What was difficult for the freeholders to swallow was the loss of the five seats on the Bench. But at the same time, five of the nine freeholder counties wished a closer assimilation with the courts in England and attached to this, crucially, the adoption of the civil jury trial.

Boswell's pamphlet was marked with the *imprimatur* of that past master of the Law of Equity, Henry Home, [Lord Kames] and in particular his opinion that matters of proof were safest in the hands of a plurality and that the function was performed by the 'Haill Fifteen' as a 'grand jury of the nation in civilibus.'¹⁷ This was part of the

¹³ Glassford considered, with some merit, that the composition of the Court at its institution was devised such as to provide the necessary authority in 'rude and lawless times'. Glassford, *Remarks* p. 12.

¹⁴ Notably the Caledonian Mercury (of 7th May 1785) and the Edinburgh Evening Courant (of May 9th 1785) See Phillipson *ibid.* at p. 65-6 and Walker, *ibid.* Vol. V at p. 485 f.n. 139.

¹⁵ *A Letter to the People of Scotland on the most alarming attempt to infringe the Articles of the Union and introduce a most pernicious innovation by diminishing the number of the Lords of Session* (1785).

¹⁶ As Phillipson points out, their additional gripe was that, through the tactless and clumsy introduction of the Bill by Dundas, they had not been consulted in its drafting, and given that it affected a Scottish institution and some argued the Scottish constitution, the net effect was always going to be its lack of support and subsequent withdrawal.

¹⁷ [H. Home] Lord Kames, *Historical Law Tracts* (Edinburgh, 1758) p.411 Kames goes on to conclude that it is a good thing in litigation that the weighing of evidence is done in Scotland by professional men rather than amateurs. This was conveniently ignored by Boswell. See Phillipson, *op. cit.* p. 73.

growing belief among many that the jury was a part of the 'antient law'¹⁸ and in some quarters it was explicitly advocated that English civil jury trial introduced into Scottish practice would prove to be the panacea for the Session's deficiencies.¹⁹ The Lord Advocate attempted to explain the thinking behind the Bill,²⁰ but to no avail. The momentum against it had gathered and whilst the reasoning against it was deeply flawed, the Bill was dead in the water. In the debate over the Bill, Scotsmen had shown extreme sensitivity to unsolicited meddling in their national institutions²¹ whilst paradoxically, in a time of increasing prosperity, accepting the need for assimilation with England, not just within the realms of the legal system and the law.²² We noted the problems faced by the Court in the last chapter, but importantly, the whole episode of the Judges Bill crystallised the realisation that the machinery and procedure of the Court, and in particular the problems it faced in compelling parties to focus their respective positions in fact and law as soon as possible after

¹⁸ Dispelled by Ilay Campbell. See below.

¹⁹ Walker has also drawn attention to the publication of Blackstone's Commentaries in 1765-69 in England which incorporated the ideology of the trial by peers of every Englishman and that this was the 'grand bulwark of his liberties'. (Blackstone, Comm., IV, 342) The work was cited with frequency in the Scottish Courts. C.f however, Ivory's criticism of Blackstone's 'fulsome and blindly indiscriminate praise' bestowed on jury trial, 'as almost to engender disgust' Ivory, *Form of Process, op. cit.*, Vol. II, p. 286. Sir William was also critical of the Scottish system of pleading in writing, and had denigrated the Session's determination of the case of *Napier v. Macfarlane* 1749 - 'No pique or spirit of party could have made such a cause in the Court of the King's Bench or Common Pleas have lasted a tenth of the time, or have cost the twentieth part of the expenses.' Commentaries, III, c.24

²⁰ Ilay Campbell, *An Explanation of the Bill proposed in the House of Commons 1785, respecting the Judges in Scotland* (1785)

²¹ Phillipson, *op. cit.* p. 77

²² As well as manners, prose style and spoken accent. Phillipson *ibid.* See the development of 'polite speech', the establishment of 'The Society for Promoting the Reading and Speaking of the English Language in Scotland' by the Select Society (*Scots Magazine*, August 1761); the well attended lectures of Thomas Sheriden, 'orthoepist' (*Scots Magazine*, July 1761), and the movement to raise funds to bring 'persons from England, duly qualified to instruct gentlemen in the knowledge of the English Tongue' (*Scots Magazine*, August 1761) It was said by Lord Monboddo that David Hume (the philosopher) died not repenting his sins, but his 'Scottiscisms'. See also J. Adam Smith, *Eighteenth-Century Ideas of Scotland* in (eds.) Phillipson and Mitchison, *Scotland in the Age of Improvement* (Edinburgh, 1996) p. 107 at pp. 110-111 and J. Clive, *The Social Background* *ibid.* p. 225 at p. 238.

commencement of an action, were inadequate. The importance of the whole saga was 'the debate it provoked rather than the remedy it proposed'.²³

The Court itself, however, had been alive to the 'fact and law' problem and had passed the A.S. 1787 attempting to coerce parties to 'join issue' and requiring a defender to lodge both dilatory and peremptory defences.²⁴

The Court made further attempts to remove argument from written pleadings. In 1800 the Lords again reverted to the old tried and trusted manner of regulating procedure by the passing of an Act of Sederunt - once more attempting to force litigants to state distinctly their positions in fact and law. Parties were to be prevented from being allowed proof until the pleadings were in a suitable state. At this juncture, the pleadings in practice contained papers called 'Condescendences'²⁵ and 'Answers' or alternatively 'Mutual Condescendences',²⁶ but now the Act provided that these should be peremptory. Section 1 of A.S. 11th March 1800 'Act concerning Proofs' stated

'That no act, or other warrant for proving, shall henceforth go out in any cause, till a distinct statement of the disputed facts and allegations shall have been previously made, in the form of a condescence and answers, or mutual condescendences; which papers shall be so framed, as to contain no

²³ Phillipson, *op. cit.* 77

²⁴ Campbell was to concede in 1808, that, in fact, this regulation was very seldom strictly observed. Ilay Campbell: *Sketch of a Report, (MSS Proceedings of Scotch Judicature Commission, 1808, S.R.O.), p. 15* [See also Phillipson *op. cit.* p. 58] There is a copy of this held in the Advocates' Library entitled *Sketch of a Report Concerning The Forms of Process in the Court of Ssion* (sic) bound (but not indexed) in *A Compilation of the Forms of Process in the Court of Session During the Earlier Periods After its Establishment; with the Variations which they have since undergone. And Likewise Some Antient Tracts concerning the Manner of Proceeding in Baron Courts, &c.* (Edinburgh, 1809) Author not printed but interlineated 'Thomas Thomson' (who was Lord Clerk Register)

²⁵ It will be recollected from the previous chapter that condescendences were latterly written in respect of the printed Minutes of Debate.

²⁶ Source: General Collection of Session Papers, Law Room, Advocates' Library [ALSP]

argument or discussion of any kind, nor even any recital of the proceedings; but, taking it for granted, that the nature of the cause is already understood from the libelled summons, defences, and pleadings, shall only state, under distinct heads, or articles, the special facts and circumstances pertinent to the cause, which are alleged, and offered to be proved on either side, in order that the same may, as nearly as possible, be brought to a precise issue, and may (so far as thought material) be admitted to proof in that form, either before answer to the relevancy, or after determining upon it, as the case may require'.²⁷

Attempts to implement the Canonical doctrine of *ficta confessio*, through the Acts of Sederunt 1715, 1723, and 1723²⁸ i.e. holding a party as confessed in the circumstance that he did not admit or deny an adversary's allegation, had been unsuccessful and the above emphasised parts of the act perhaps betray the Lords' pessimism that such precise issues could be realised.²⁹ The 'materiality' was to remain within the province and discretion of the Ordinary in allowance of proof. But this attempt was always on a sticky wicket. Whilst argument, discussion and the recital of details of previous procedure could be prohibited and whilst it was not difficult for practitioners to

²⁷ Underlined parts are my emphasis. The A.S. also authorised the granting of commissions for a Commissioner to take evidence and to report to the Court in all actions, which in the previous period had been restricted to the cases of witnesses in the hinterlands and those infirm, or elderly or sometimes abroad, unable to travel to Edinburgh. With the concurrence of the Court this was to become the pre-eminent form of taking evidence in non-jury court cases.

²⁸ referred to in the previous Chapter. These replaced the old *oaths of calumny and verity* which fell into disuse. See Watson, *Form of Process, op. cit.* pp.60-1. The concept of *ficta confessio* in the previous period arose from a defender failing to turn up to answer a summons, as he dared not, on oath, deny the libel (Stair, IV, 39, 27-28) which concept was extrapolated to the written pleading of the parties, oath removed.

²⁹ As Murray noted (at his time of writing in 1831), 'If the party does not deny the essential facts, judgment ought to be pronounced against him; but, holding a party as confessed, provided he does not deny the unessential circumstances averred, is no longer necessary. Even, under the former system, it was very rarely put in force by any explicit interlocutor' J. Murray, Introduction to Volume 5 of his *Reports of Cases Tried in the Jury Court* (etc) (5 vols.) (Edinburgh, 1818- 31) p. 15

plead by way of 'articles',³⁰ the AS did not define the pertinence of the special facts and circumstances (nor could it) and thus it remained within the province of the parties to elect what was to be inserted, so that the Lord Ordinary, in his determination of the 'materiality' still had to wade through those 'special' facts and circumstances which the parties considered had (at least) some bearing upon their cases.

Whilst it was flawed, the A.S. was again an inch in the right direction. Phillipson³¹ has criticised the whole A.S. as having little to commend it. With regard to its provisions prescribing procedure for the problematic commissions for evidence, merely exhorting the Commissioners to follow the rules of evidence, it was disappointing.³² Yet, from the standpoint of examining the imminent development of the form of process the AS must be considered crucially important. It not only provided for the first time that Condescendences and Answers should form a step of process, but also, in requiring 'Articles of Condescendence' of the facts of the case offered to be proved by a party, it laid the groundwork for the composition of such Condescendences and Answers in the procedure to be determined twenty five years later. Phillipson is correct, however, to assess the A.S. as an ultimate failure. Ilay Campbell considered that it laid down 'some very salutary and useful regulations concerning the mode of adjusting facts' but even he had to concede that the procedure could 'still admit of considerable improvement, particularly in the form of

³⁰ The practice had developed in any event.

³¹ Phillipson, *op. cit.* p. 78

³² Until the 1860s proof taken by a Commissioner was the most common form of proof, even in Edinburgh, as the Ordinaries assigned this method rather than taking the proof themselves.

preparing issues in fact before going to proof.’³³ As we will shortly explore, it was this issue which was the greatest stumbling block to revising the Court’s procedures.

(iv) A Different Approach: Swinton’s Pamphlet and Reorganisation of the Court. Tackling the Problems from Within.

By this time there was a school of thought that the way for the Lords to get through the business was to alter the very constitution of the Court and revamp the ‘Hail Fifteen’ itself. Proposals to do just that had been voiced by one of the Senators, John Swinton, in 1787.³⁴ His proposal was, *inter alia* that the Court could, in its discretion, direct jury trials for the taking of evidence. Jury trials would force the parties to focus their respective allegations of fact. Nothing, however, came of it.³⁵

All of the debate about libertarian and egalitarian reforms in the Court of Session’s procedure did not diminish the business coming to the doors of the Court and leaving from there to the table of the House of Lords. There were stirrings of complaint in London, both on the Bench of the House of Lords and within the English ministers’ corridors of power about the frequency of ‘Scotch Appeals’.

The Lords’ work load was increasing in part as a result of litigants in the Court of Session tactically appealing. The litigant was not concerned with the law that was applied to his case- only that, when he had lost the earlier round, the decision against him was overturned. A deep-pocketed litigant, having exhausted the remedies available in Edinburgh, could roll the judicial dice in the House of Lords

³³ Campbell, *Sketch op. cit.* p.11

³⁴ John Swinton, *Considerations Concerning a Proposal for Dividing the Court of Session into Two Classes or Chambers; and for limiting Litigation in Small Causes; and for the Revisal of Jury Trial in Certain Civil Actions* (1789) See Phillipson, pp. 79-84. Lord Ivory considered it ‘a very elaborate and valuable pamphlet’. Ivory, *Form of Process, op. cit.* Vol. II, 279

³⁵ Part of the problem was that Swinton’s pamphlet was deeply flawed in the technicalities and application of the principles of civil jury practice. A draft bill combining the A.S. of 1789 and 1800 and the proposals was brought forward thereafter. Swinton was the probable author.

and take a chance on the Lords finding against the Court of Session for reasons little associated with the reasoning and even less understood.³⁶ It should be noted that at this time the composition of the House of Lords Bench was purely English. 'Scotch law' was, for their Lordships, often a difficult concept, such that it was commonly easiest if the laws of the two countries were treated as the same and English law could then be applied.³⁷ Hence, a different result using a different law.

If procrastination was also a desired goal of an party appealing, the dice were loaded in his favour. By 1807, the House of Lords was three or four years in arrears with its workload, a disproportionate part of it emanating from north of the border.³⁸

Theoretically an appeal to London by a defender against a decree for payment granted in Edinburgh could be ignored for a couple of years whilst the 'successful' pursuer headed towards civil imprisonment for debt.

Also, litigants themselves had difficulty understanding why the Lords of Session had found against them.³⁹ The constitution of the Inner House - Cockburn's 'mob of fifteen judges'⁴⁰ and the manner of its decision-making hardly inspired confidence that the cause had been carefully examined, the full facts made known and the law exactly ascertained and applied. Whilst there had been a mystique surrounding the Court in the days of 'Closed Doors', now the litigant himself could witness the spectacle of Inner House decision-making in action; and whilst the decisions of the

³⁶ This was the opinion of Campbell himself later expressed in 1811. See I. Campbell, *The Acts of Sederunt of the Lords of Council and Session from the Institution of the College of Justice in May, 1532 to January 1553* (Edinburgh, 1811) pp. xxxv - xliv.

³⁷ See Chapters 3&4 below.

³⁸ Phillipson, p. 85.

³⁹ This was also the view of Campbell. see Phillipson, p. 86

⁴⁰ Henry Cockburn, *Memorials of His Time*, *op. cit.*, p. 128 A more delicate description in less earthy language is provided by Glassford '[in the former constitution of the Court] it is plain that the mere circumstances of its numbers bore the seeds of manifold contrariness in opinion, and multiplied the chances of fluctuation in judgments from natural and accidental causes' Glassford, *Remarks*, *op. cit.*, p. 17

Court continued to proceed by vote, the final determination was exposed to what Bell labelled 'argument and remonstrance' and a 'discussion, rhetorically maintained, on the whole mass of law and fact involved in the case'.⁴¹ In all the commotion, dissenting voices from some of those on the Bench could encourage a losing litigant to appeal.⁴²

And yet, whilst there remained complaints regarding the manner of the decision making, the length of time it took to make decisions continued to be a real problem. How could the Court dispose of the business more expeditiously? Treasury funds would not permit the appointment of further Lords of Session and this wasn't even canvassed as a possibility, although it had historical precedent.⁴³

The government returned to the thorny issue of leaving a seat on the Bench unfilled as a potential way of squaring the circle in the need for increased salaries for the judges whilst implicitly requiring them to work harder for their money. The

⁴¹ Bell, *Examination, op. cit.*, p. 30. See the parody and 'jeu d'esprit' purportedly written by George Cranstoun as an Inner House Advising in a fictitious case involving the respondent 'defaming' the petitioner's 'Diamond Beetle' as an 'Egyptian Louse'. '*Notes Taken at Advising the Action of Defamation and Damages, Alexander Cunningham, Jeweller, Edinburgh, Against Mr. James Russell, Surgeon There*' in Maidment, *Court of Session Garland*, (Edinburgh, 1839) at pp. 70-78.

⁴² Bell *Examination, op. cit.*, p. 34 notes 'The facts, in this course of discussion (i.e. by the Lords on the State of the case after proof) and of the decision, were as unsettled as the law - the equity, perhaps, more unsettled than either. There was no record to ascertain precise limits of a judgment into which the opinions of fifteen judges entered: And not only were the parties encouraged to dissatisfaction by the sentiments of the minority, and the occasional misapprehension of facts, to which it was easy to ascribe those of the majority, but few cases could be considered as decided for the public, while it was possible to contend that the facts were mistaken ... and both in general law and in particular cases, everything was so loose, that, as a matter of mere hope in a game of hazard, no man who could afford to appeal, would easily be persuaded to abstain from that chance' Bell, *Examination, op. cit.*, p. 34 See *infra*.

⁴³ The books of sederunt contain a letter from Queen Mary augmenting the number of judges. 'quereas it is desyrit of our saids Lords and College of Justice, for better expeditioun of the multitude of actionis that presentlie cumes befor you and thaim to haife the said College eiked the noumer of six, and in the meyn tyme the guages to be eiked and augmentit, to the

opportunity to do so came in 1805 on the death of Lord Ankerville. Lord Hawkesbury, the Home Secretary, attempted to revert to the Dundas scheme of 1785 and was met again with protestation. But the nature of the protest differed. It was no longer principally on the basis of English interference in a Scottish institution, but on the basis that the volume of work in the Courts had reached a point that it would be inexpedient to leave it to fourteen men rather than fifteen. Beneath the surface there were darker political motives.⁴⁴

But whilst reduction in the number of judges was struck from the agenda, reorganisation of the Court was back on it. The Lord President, Lord Justice-Clerk, Lord Advocate⁴⁵ and Dundas resolved to do just that in a series of discussions among them resulting in a memorandum to Hawkesbury proposing the splitting of the Inner House into two divisions, each with concurrent jurisdictions.⁴⁶ The Outer House would continue as it had done with each division providing one or two Ordinaries to carry out the functions. To preserve uniformity in the decision making of the Divisions, the President would sit in both. The rationale was the same as had been proposed by Swinton. Twice the work in half the time. The form of process, they considered, was not lacking in design. Rather the problem lay in its use by agents to procure delay or a re-consideration of a case already determined upon by the Ordinary, as well as the constant invocation of the Court's equitable powers through representation and reclaiming petitions. Although the memorandum did not

effect the said Lords may better wait upon the administration of justice: the ane and the uther we think maist raisonnabill ...' A.S. 2nd March 1562.

⁴⁴ Phillipson, *op. cit.* p. 87. By this time, Henry Dundas (as Lord Melville) had been impeached. The government was politically unstable and both Dundas and Campbell, mindful of the events of 1785, did not wish to provoke a similar reaction, thereby toppling the government.

⁴⁵ i.e. LP Campbell, the newly appointed LJ- CCharles Hope, and Montgomery respectively.

⁴⁶ See Phillipson *op. cit.* at p. 87 and references detailed therein.

explicitly address how the ongoing issue of separation of fact and law could be achieved, lurking in the background was still the introduction of civil jury trial to effect such a separation.

The scheme, however, fell with the government on the death of Pitt. A new political alliance took office with Lord Grenville at the helm and with Thomas Erskine as Lord Chancellor and his brother Henry Erskine, the former Dean whose personal litigation is examined in Appendix 1, the new Lord Advocate. The new Solicitor General was John Clerk. All of them, with the assistance of William Adam, an English barrister but former Scottish advocate, set about reform of the Court of Session and preparing a Bill for Parliament in 1807. As Whigs, it was to be expected that their model of reform should follow the English common law courts.

It was proposed that the Court of Session should be divided into three chambers with concurrent jurisdiction and litigants would be able to elect to have their causes decided upon the old form of procedure or to go to the jury. Emulation of English form and the assumption that the English model should be the basis for reconstruction, had returned.⁴⁷ The old arguments about the assimilation of the two countries and the need for the progressive march of Scottish society from 'barbarism to refined civilisation' were dusted down and re-presented.⁴⁸ In England, a litigant could nominate into which of the courts he wished to bring his case. In Scotland, this was obviously not possible, and whilst Grenville and Adam considered that a litigant should not control the progress of his case,⁴⁹ it was fair comment that his choice and

⁴⁷ It was to return again in recent times. See later.

⁴⁸ See for example J.P. Grant, *Some observations on the forms of proceedings in the Court of Session* (London, 1807)

⁴⁹ Phillipson, *op. cit* p.92

options of the *fora* in which it could be raised were non-existent. On 'joining of issue'⁵⁰ by summons and defences, if the parties resolved to go to the jury, it would require the separation of fact and law in their pleadings and would remove, in one fell swoop, their opportunities to represent to the Lord Ordinary or reclaim to the Inner House. The Bench were sceptical. In the first place, the Lords had no experience of such alien procedure and were, by habit, well versed in the old system. Secondly, to where would the parties appeal from jury trial? It was resolved to create a Court of Appeal presided over by a 'Lord Chancellor' of Scotland⁵¹ and containing the presidents of the three divisions and the Chief Baron. But it will be observed that the whole plan revolved around the parties 'joining of issue' through their summons and defences. Where, in the practice of the Court at the initial stages, positions were 'urged just a little' until the adversary's position could be ascertained, it was going to be unlikely that the summons and defences could perform the function being asked of them. The existing system was geared to edging parties to a position whereby the factual issues and the respective positions in law could be defined and proof (if required) assigned accordingly. It was never disputed that a cause needed 'ripening'.

How could parties go to a jury on defined issues of fact where the initial stages of the process were used to ascertain the grounds upon which the litigation was to be fought, and nothing was to be given away until later in the pleadings, the parties and judge engaging in a quadrille until the pleading was terminated and the cause was dispatched to proof, most commonly upon an Act before Answer? As Glassford remarked five years later,

⁵⁰ significantly, an English expression. It had been used by Stair in his discussion of Litiscontestation and the analogous English method - 'Instead of this term, the English use the term of joining issue; that is, of settling the points, whereupon the issue of the process will follow.' Stair, IV, 39, 2

'It is obvious that in the conduct of the pleadings the great difficulty is to obtain a confrontation of the true and whole allegations of the parties; since it is always the interest of one of them to elude.'⁵²

All of this had been appreciated by the Court in 1800 in its ordinance requiring the parties to prepare Condescendences and Answers or Mutual Condescendences as a second step of process, detailing 'articles' containing the facts alleged and offered to be proved. Moreover, the scheme failed to recognise the fact that once the 'basis' of the litigation had been established, it was the Judge who would determine what was relevant and what was to be proved and the attempts to narrow the factual issues were for his benefit, and not the parties'. With the advent of the popularity of the act before answer, the judge was left to determine the initial stages upon a 'probability of the whole' and thus, parties would aver not only the facts which they undertook to prove as necessary to support their action or defence, but all extraneous matter which might make their case seem probable and their opponent's case improbable with the purpose of satisfying the Ordinary that their case was 'true' or 'just' and judgment should be pronounced in their favour without recourse to proof.⁵³

The 'special facts and circumstances pertinent to the cause' could have a very wide meaning. Hence, the repeated attempts by the Court to force parties to state only the material facts – not argument, rhetoric or facts relating to probability.

⁵¹ and Henry Erskine's name was pencilled in.

⁵² Glassford, *Remarks, op. cit.* p. 142

⁵³ There is a good discussion of this by Joseph Murray, Advocate, in the Introduction to Volume V of *Reports of Cases Tried in the Jury Court at Edinburgh &c.* (Edinburgh, 1831)

Obviously the 1800 A.S. already mentioned attempted to remove rhetoric, narrations of the previous process and the 'extraneous matter' all with the purpose of getting the cause to proof whereas in the English procedure of the common law courts the facts were elicited upon a general issue during the trial by the famous (or infamous) doctrines of 'special pleading'.

As Lord Chancellor Eldon remarked in a case brought to the House of Lords on appeal from the Court of Session in 1807,

[The Condescence] 'is not accurately expressed. I should wish that those who entertain the opinion that the trial by jury would be easily introduced into Scotland, to prove this condescence. In upwards of fifty pages, they will see very little of what could be laid before a jury without immense difficulty. Before trial by Jury could be of advantage in Scotland, they must first alter their mode of pleading in that country.'⁵⁴

In what way could the parties be forced into precise articles of fact such as could go to the jury? It was always going to be unlikely that the system of the time could accommodate early disclosure of a party's position in fact for such a purpose. We may profitably pause, here, to consider the mode of pleading of this time and in particular, the problems the Court faced in getting parties to state precisely and most importantly, definitively, the facts upon which they were content to go to proof.⁵⁵

⁵⁴ *Wilson & Ors. v. Alexander & Ors.* (12th August 1807) 5 Pat. 187-90

⁵⁵ The problems of the Court of this period were not covered by Phillipson in *Scottish Whigs, op. cit.* In his first chapter he paints with a broad brush, covering a period from the mid to late eighteenth century and up to and incorporating submissions made to the 1825 Royal Commission (see below). Professor Walker follows closely the treatment in his *History*, Vol. V and VI. It is a period worth examining, for therein lie the seeds of later procedure. Moreover, this treatment will show that whilst the discussions about changes to the procedure continued at the highest levels and in radical terms, the actual changes effected, were incremental and in their treatment of the problems in the form of process, were less dramatic or revolutionary than has been previously considered.

(v) The Early Nineteenth Century Form of Process and the Rôle Therein of Written Pleading

Much of the process remained unchanged from the previous era,⁵⁶ and almost all the 'pleading' was in writing. However, the manner in which the rules of process were used by litigants, agents and advocates had become part of (or remained) the problem. There were still Lords Ordinary on the Bills, Oaths and Witnesses and on Concluded Causes all operating by rotation in the manner of before. The cause was still initiated by a printed or written summons, comprising the syllogistic formulations and narrating the pursuer's claim or ground of action, stating that the defender was required but refused to do justice in respect thereto, concluding for decree and attaching a 'will' for warrant for messengers-at-arms to cite the defenders to appear. The summons passed the Signet and was served on the defender calling him to answer the claim or to show cause why decree should not pass against him with certification that if he failed to appear decree would pass against him⁵⁷. The statement of the claim was still the 'libel' although the words summons, libel and libelled summons were used interchangeably.⁵⁸ After the 'induciae legales'⁵⁹ had elapsed, the summons was tabled, then lodged with the Clerk and on an appointed day was carried to the Outer House 'before the ordinaries came out' when the *partibus*⁶⁰ was called out whereupon the clerks of the advocates instructed by the agents and parties to appear would attend with the Clerk and mark the names of

⁵⁶ The following has been drawn from Watson, *New Form of Process*, 2nd ed. 1799

⁵⁷ There could be special certification that if the defender was referred to his oath in the summons and failed to appear and depone he would be held as confessed.

⁵⁸ Campbell, *Sketch op. cit.* p. 4

⁵⁹ the period between citation and appearance allowed for the defender to answer the claim. Ordinarily 21 days but there could be shorter periods of 15 and 6 days for privileged summonses. The pre-1672 distinction in respect of actions requiring two summonses was preserved in relation to this.

their masters.⁶¹ The Clerk would then enrol the cause,⁶² formulate a roll of causes with the names of the parties and their respective advocates and would affix this to the walls of the Outer House.⁶³ The cause would then call for a hearing before the Ordinary at an appointed day. The parties were expected to be ready for this calling – the ‘debate’ – and prior to it the defender was to have put in, in writing his ‘whole’ defences⁶⁴ both dilatory and peremptory – in terms of the A.S., stating the facts which he was insisting upon and explicitly admitting or denying the several facts set forth in the pursuer’s libel. He was also obliged to lodge an inventory of writs founded upon by him. All of this was required of the defender within six days of the summons and writs being given out for his seeing. The defender’s counsel was required to return the summons subscribed by him on the back with the words ‘seen and returned with defences apart.’⁶⁵ It appears that this was a source of delay. The 1672 Regulations had provided a six day period for seeing, but looking back in 1815, Ivory noted that the Regulations in respect of the mode of these ‘seeings’ were ‘not very rigidly attended to in practice’ as the defender’s advocate would frequently keep them and not return them.⁶⁶ Agents might also utilise the procedure for seeking to engineer a delay.

⁶⁰ names of parties and the action.

⁶¹ The advocates’ clerks filled in the ‘partibus’ with the Clerk. Ivory, *op. cit.*, Vol. I, p. 175-6.

⁶² By 1815, the Court had established a Fee Fund, and there was a fee for so enrolling which had to be paid to the Fee Fund Collector. Previously the Clerks would apportion the dues of enrolment amongst themselves. The Fee Fund was a more formal and organised, although similar, method whereby the Clerks would collect a fixed fee for each type of document enrolled and were collectively entitled to one third of the fees ingathered.

⁶³ The cause, depending upon its nature would go to the Suspension Roll or the Ordinary Action Roll, the latter incorporating the Regulation Roll. If there was appearance for the defender, the cause was transferred to the Ordinary Action Roll, if not, it was sent to the Regulation Roll (for disposal under the Regulations) or the Suspension/Advocation Roll if it had entered the Court in that form.

⁶⁴ The word ‘pleas’ starts to be used at this time rather than defences.

⁶⁵ This was without prejudice to his right to protestation against a dilatory pursuer for non-insistence. *viz.* ‘judicial protestation’.

⁶⁶ Ivory, *Form of Process, op. cit.*, Vol. I, p. 181-2. This had been a problem in the previous century.

'Such are the proceedings, where appearance has been properly entered for the defender. But it sometimes occurs in the hurry and confusion of business (this does not always arise from mistake. It is sometimes an expedient fallen upon to procure delay) that appearance is entered, and the summons taken out by a counsel who is not retained.'⁶⁷

Even the defences and the writs instructing them were often given in late.⁶⁸

Frequently, defenders wished to amend their positions after the six day period. Pursuers also were prone to seek to do so. If the party could show that there had been a new discovery which required the alteration, then he could amend on a supposed payment of an amand of 30 shillings. It seems that defenders were the worse culprits and by 1799 payment of the amand was no longer enforced, which permitted defenders to delay the hearing by lodging⁶⁹ defences in part. As Watson regretted, 'the defenders have often nothing in view but to protract the course, by giving in their defences piecemeal.'⁷⁰ Seeking amendment proceeded by giving in a note in writing at the calling of the cause. The Ordinary would allow the other party to see it until the next calling which permitted the other party to propone objections to it. At the next calling the Lord Ordinary would either refuse to admit the amendment or would 'allow it to be received' all as he saw fit.⁷¹

The situation developed such that by 1815, when the cause appeared for its first calling before the Ordinary (i.e. when the debate was expected to proceed) he almost

⁶⁷ Ivory, *Form of Process, op. cit.*, vol. I, p. 183 and fn 'v'.

⁶⁸ The defences and the writs, and also the other parts of the written pleading to be given in within a time limit, required to be lodged i.e. 'boxed'.

⁶⁹ what was termed 'lodging into the clerk's hands.'

⁷⁰ Watson, *New Form of Process*, 2nd ed., (1799) p. 58

⁷¹ Note the discretionary function of the Ordinary in this.

always would make General Avizandum⁷² or make an order for debate at the next calling. From this developed the re-incorporation of an older practice which allowed then the pursuer, in all cases, to put in written answers admitting or controverting the defences or making contrary pleas or statements.⁷³

When the cause finally called for the debate, if the pursuer was still not ready, the process was deleted out of the roll to be again re-enrolled and the cause was continued to a more 'convenient period.'⁷⁴ Sometimes the pursuer and his agent would not appear deliberately such that if the defender was present thereat, he could insist in judicial protestation and obtain decree – a pursuer's thinking being that to continue with a bungled summons to the extent of determinations by the court in fact and law thereon would give rise to the plea of *res judicata* if another summons on the same grounds was thereafter lodged, whereas payment of the costs of the defence to the debate would allow a new action to be raised on a proper footing.⁷⁵ If there was no appearance entered for the defender, the pursuer could obtain decree in absence.

⁷² unrelated to Avizandum to himself or the Great Avizandum. This was a legal fiction and required no advising.

⁷³ The received wisdom, in pleading before the Court, was that defences should give as little information to the other party as possible and thus in most cases the Summons and the Defences did not provide the information necessary to enable Counsel to debate the cause. It was then the duty of the agent to prepare full statements for Counsel prior to the debate giving all the information which at that time they possessed. On receipt of this information, Counsel would sometimes seek to amend the libel or the defences. If they did not, at the debate they would make use of such of the information which they considered it prudent to use and thus it was only at this time that the legal advisers came to know the likely grounds upon which the action was to be pursued/defended by the other side. See Evidence of David Cleghorn to the 1824 Commissioners, Commissioners Report, (See below) pp. 59-60. and see later in the Chapter.

⁷⁴ Ivory, *op. cit.* Vol. I, p. 209

⁷⁵ That this advice was given to litigants by advocates was admitted by Robert Forsyth, Advocate in his evidence to the 1823 Commissioners and is printed in the 1824 Commissioners Report (See below) at p. 137: 'If a party come into Court and cannot get his case perfectly tried in point of law or fact, the misfortune is fatal. The plea of *res judicata* puts him to silence forever. To be sure, when a Summons has been raised in a blundering way, I have sometimes directed the pursuer to let it fall by protestation, which costs him only 17s. 6d. to the opposite party, and he can raise a new action'. See also Lord Reed's comments in *Beattie v. The Royal Bank of Scotland plc* 2003 SLT 564.

If the defender or his representative appeared thereafter, he could be 'reponed' within a certain time on payment of 10 shillings amand and with any consequences in the pursuer's 'expences.'⁷⁶ If the parties were ready to debate, the pursuer would narrate the ground of action and pleas upon which it was supported and the defender stated his defences in proper order – dilatory before peremptory. The reply and duply etc. continued as of old until the Ordinary considered the parties were close enough in fact and law, and the cases were properly relevant and ready.

That was supposed to be the conclusion of the 'written pleading' and the Act of Litiscontestation could be pronounced warranting the adducing of evidence by the parties in proof or, if applicable, judgment pronounced. If the cause was one of difficulty, the Lord Ordinary could still make 'Avizandum to himself'. Most importantly, the peremptory defence of 'relevancy' was supposed to be disposed of in the 'debate'.⁷⁷ In Watson's time, he could write

'But if the process be not ripe for a decision because the facts not being ascertained, all that the Lord Ordinary can do, is to determine the relevancy; ... he determines how far it would infer the conclusions which the parties respectively draw; in which case the judge is said to find the libel or defences relevant, and in so finding he admits them to probation. The parties then must condescend upon the manner in which they will undertake to prove their averments.'⁷⁸

⁷⁶ The role of expenses in litigation and the finding of 'expences' one against the other was becoming increasingly important and a more efficacious deterrent to delaying than the Court's fines and amands. See Chapter 3.

⁷⁷ One still sees the word 'discussion' as used in the previous period, but 'Debate' had become the usual term for the oral reasoning upon the written pleading before the Ordinary before Proof or decree etc.

⁷⁸ Watson, *New Form of Process* 2nd ed. (1799) p. 74

Thereafter the cause would be directed to the side-bar at which the Ordinary would hear parties upon their Condescendences and Answers or Memorials.⁷⁹ The old manner of the Ordinary ordering or the parties requesting Memorials on the 'minutes of debate' had gone following the A.S. 1800⁸⁰ which made peremptory the lodging of Condescendences and Answers or Mutual Condescendences prior to any allowance of proof. That the Libel and Defences concluded matters before judgment or proof, was very rarely, in practice, observed, as the parties would invariably wish further alteration to their respective cases or the Ordinary considered that the pleadings did not 'join issue' on the relevant facts and law.⁸¹ In the language of the times, the cause was deemed 'not ripe for decision', the Ordinary's decision in relation to relevancy proceeding upon the litigants' positions which were not finalised in fact.

It was possible to amend one's position in the course of the debate or any continuation of it. If an advocate wished to make alterations, he was allowed, (originally within the discretion of the Ordinary) to amend, by written Condescence and written Answer, again respectively.⁸²

In all of these parts of subsequent procedure the Ordinary would 'advise' at a later calling. These later callings proceeded before the Lord Ordinary at the Side-Bar. It

⁷⁹ It seems that such documents were similar but different. A Condescence and Answer was to be strictly limited to the matters of fact which had arisen in the debate (i.e. the pertinent facts in the consideration of the respective parties). A Memorial (or Mutual Memorials) also detailed the facts but in addition contained the arguments about the law arising from them. See Evidence of David Cleghorn to the 1824 Commissioners, Commissioners Report, 1824 (See below) p. 60.

⁸⁰ Ivory, *op. cit.* Vol. I, p. 218.

⁸¹ Watson noted that there were few cases determined at the first hearing and that causes were more fully heard at the side-bar 'where by far the greatest part of the business of the Court is conducted.', Watson *op. cit.* p. 77-8.

⁸² becoming mandatory by A.S. 1800. See above.

will be recalled that the Ordinaries were in rotation and by the continuance of the procedure in the manner above, there would arise all manner of timetabling difficulties in getting the same Lord Ordinary (who had heard the debate) out of the Inner House (he not being in the Outer House for that week) to hear the cause at the Side-Bar. Moreover, it appears that there were not always continuations to a particular date, it being left to the parties to enrol a note in the Ordinary's hand-roll⁸³ to 'force in a condescence or answers to condescence.'⁸⁴

The summons as amended by condescence, the defences amended by answer, actual Condescences and Answers⁸⁵ (or Mutual Condescences⁸⁶) became the 'record of the cause' and were 'intended as the ground-work of the whole after proceedings.'⁸⁷ At a final hearing before the Ordinary, advising upon the Condescence and Answers, no further written pleadings were allowed.

(vi) The Continued Prevalence of the Act before Answer

Argument and rhetoric in all of these pleadings was supposedly bad practice and had been forbidden by the A.S. of 1800.⁸⁸ The idea was that the argument or

⁸³ the method by which the cause could be brought back to him.

⁸⁴ Watson *op. cit.* p.82.

⁸⁵ sometimes 'replies'.

⁸⁶ sometimes called mutual Memorials following the old terminology. In time Condescences would pertain to fact and Memorials to law.

⁸⁷ Ilay Campbell, *Sketch, op. cit.*, p. 6.

⁸⁸ Implicit in this is the idea that bad practice could be corrected and the aims of the Court achieved by the advocates being 'shamed' or 'embarrassed' into changing their methods of drawing their pleadings. If it was 'bad practice' to insert rhetoric, by implication the professional skills of the drawer would be questioned. Murray notes that the 'usual mode of expressing disapprobation was by a note in an interlocutor; but though the disapprobation was expressed, the erroneous statement remained in process, and was frequently the means of leading the opposite party into a similar error, and probably to a greater degree' (Murray, *op. cit.* p. 16) C.f. Stair IV, 40, 10 (on bills) 'But which is yet worse, bills are oft-times drawn by unskilful agents, mendicating the hands of advocates thereto, wherein such undigested stuff is multiplied, as none would have impudence to offer at the bar, wherein fact and law is jumbled together, without distinct proposal of points of fact instructed, or to be proven, as

'reasonings of the counsel ought not to enter into the record of the cause, being much more fit for hearing at the bar, when the formal pleadings are closed'.⁸⁹

The Ordinaries, however, found it difficult, after the allowance of all of the above procedure, to issue an interlocutor granting an Act of Litiscontestation defining the issues between the parties in fact and law and allowing proof or otherwise in respect of each. Even the disposal of the defences was awkward. Whilst A.S. 11 August 1787 ordained the 'whole defences' to be pleaded, by this time, it was '*very seldom that this regulation [was] strictly observed*'⁹⁰ and a defender could drip out his defences or pleas, mixing peremptory with dilatory - reserving some of them for later in the pleading or until called upon either by the judge or the pursuer to state them more particularly.⁹¹ The lack of enforcement of paying amands encouraged them to do so. Even with the full defences disclosed, peremptory defences in fact could still prevent the determination of the relevancy of the cause at the debate. From the time of Stair, where the facts and circumstances were disputed in relevancy and truth and where the eliciting of the facts was prerequisite to determining whether they were sufficient in law to 'infer the conclusion' (i.e. the relevancy) then the facts had to be brought out first. Hence the development of the equitable 'remedy' of the Act before

they behoved to propone at the bar: so that the Lords are necessitated to gather the matter out of that mass, wherewith there are mixed long narrations and allegiances, neither true nor competent to be proved.'

⁸⁹ Ilay Campbell, *Sketch, op. cit.* p. 6. Record here is probably used a similar manner to what was written down by the Clerks of the Outer House in the previous century following the 'discussion' But another meaning might be ascribed to it. There was at the time a feeling that the documents of the Court should stand as a record for its work, and the pleadings of the parties should be retained as historical documents to be kept in the Books of Council and Session. There was an A.S. passed for the purpose. Perhaps it was felt that the old manner of pleading rhetoric and argument would not reflect well upon the Court in these pleadings being recorded for posterity.

⁹⁰ Campbell *ibid.* p. 8.

⁹¹ Glassford *Remarks, op. cit.* p. 154.

Answer.⁹² But in granting an Act before Answer, what facts should the Ordinary allow to be adduced for such a determination? Strictly it should have been those stated in the pleadings not just for proof, in terms of the 'sufficiency' of the party's case but also those required to be proven as examined in the light of relevancy. Closely related but crucially different. As we have seen, what was stated in the pleadings was not only infused with argument and law, but the facts they were supposed to contain were constantly altered to refute a counter allegation inserted into an adversary's case. Thus, the libel was in practice amended, even after the pronouncement of an Act (being mostly an Act before Answer)⁹³ and the Condescendences and Answers were revised, amended and revised and re-revised.⁹⁴ Indeed, following the clear terms of the A.S. 1800, it seems that there was even a practice of putting in two writs under the name of Condescendence - one entitled 'Condescendence of the Grounds of the Action', and the other entitled 'Condescendence of Facts Without Argument' or 'Condescendence in Terms of the Act of Sederunt'.⁹⁵

It was certainly difficult for the Court to legislate for the circumscription of relevant individual facts in individual causes which should be allowed to be proved and this was exploited by the parties and their advisers. As already noted, it was a definite tactic to coerce the Ordinary to 'play safe' and grant an Act Before Answer which

⁹² For discussion of the Act, see MacKay, *Practice of the Court*, Vol. 1, p. 15; J. M'Glashan *Practical Notes on the Jurisdiction and Forms of Process in Civil Causes (etc)* (Edinburgh, 1842) pp. 174-5; D. M. Walker, 'Equity in Scots Law', (1954) 66 *Juridical Review*, 103 at p. 145.

⁹³ The old practice was that a Libel could be amended before Litiscontestation but not after it. *Ochterlony v. Mackenzie* (1738) Mor. 11985.

⁹⁴ Murray, Introduction to Vol. V *Jury Cases op. cit.* p. 24. Each alteration spawned another individual writ of pleading. So, the record for the pursuer's pleadings might contain the libel (summons), libel as amended, the Condescendence, the Revised Condescendence, the Amended Revised Condescendence, and the Re-revised Condescendence. Of course, this progression would be replied to by the defender.

⁹⁵ Murray, *op. cit.* p. 16.

would allow the parties to lead evidence beyond the bounds of relevancy of an Act of Litiscontestation.⁹⁶ Increasingly, the Ordinary would allow proof 'at large'.⁹⁷

As Ivory⁹⁸ explains,

[the forms prescribed in previous Acts of Sederunt] 'were attended in practice with much litigation and delay; and the consequence, of course, was, that their enforcement was, at first, gradually relaxed, and, in the end, they were in some manner altogether departed from. The practice next crept in, of allowing "the proof to be stated at large"⁹⁹ And by this means, as was early made a subject of complaint, "the preparing of causes had become entirely an operation of the clerk's servant, who made up a state of the process and proof as it stood, without observing any order with respect to the points litigated".

So in practice, the Court had permitted the parties to elaborate on the pleadings (and their adversary's position) by Memorial.¹⁰⁰ These (under the title 'Informations'¹⁰¹) had previously become a scourge by reason of their length and the Lords had tried to

⁹⁶ As Bell observes, 'The art of the advocate was now to lay his ground broad, and make his averments vague and comprehensive, that when evidence came to be taken, he might be as little circumscribed as possible, and the widest field allowed for argument to the court,' (Bell, Examination, p.32) He continues, 'The ingenuity of counsel was perpetually directed to enlarge the field of evidence and discussion, and avoid every thing that might compromise or circumscribe the party. (*ibid*, p. 33.)

⁹⁷ Russell *The Form of Process in the Court of Session'*, *op. cit.* p. 89.

⁹⁸ Ivory, *Form of Process before the Court of Session, the Jury Court, Commission of Teinds*. Two Volumes (Edinburgh, 1815, 1818) Vol. II, p. 133.

⁹⁹ The parts in parenthesis are quoted from Russell above.

¹⁰⁰ Mutual Memorials or Memorials and Answers (and after 1800 Condescendences and Answers or Mutual Condescendences) could be ordered by the Ordinary following the debate.

¹⁰¹ See the previous Chapter for the development.

prohibit them by A.S. 18th June 1752, which ordinance was never enforced and fell into disuse.¹⁰²

By 1808, the Lord Ordinary, having heard Counsel in respect of the written pleadings, would frequently have to take the most equitable course (and safest against representation and report) and pronounce an Act Before Answer, allow proof at large and to the parties grant warrant to prove the facts as contained in their pleadings and 'all facts and circumstances relative thereto.'¹⁰³

Of course, the Act before Answer was meant to be used in the circumstances which required it as a necessity or expediency (i.e. in equity) but the above practice caused, 'almost every cause where facts are controverted, to go, in a very loose and unprepared shape, to proofs before answer'.¹⁰⁴

The Lord President considered this an 'evil' and whilst acknowledging that acts before answer could not be avoided in all cases, he laid the blame for the practice squarely, if not fairly, on the shoulders of the Ordinaries who, he considered, were failing to sift the pleadings in relevancy to remove argumentative material and facts in the pleadings which were 'not material.'¹⁰⁵ For him, all superfluous and irrelevant matter should be 'thrown out' by the judge. If it was not, the consequences were obvious.

¹⁰² They even appointed a Committee by A.S. 15th June 1774 to produce proposals to remedy this and report. It appears that it never did so. Ivory, *Form of Process op. cit.* Vol. II, p. 134.

¹⁰³ Murray *Introduction op. cit.* p. 25 This would then be inserted into the warrant for Commission to take the evidence, leaving the Commissioner with the unenviable task of ascertaining what *ought* to be allowed in proof. See Campbell, *Sketch*, p. 11.

¹⁰⁴ Campbell, *Sketch ibid.*

Causes now proceeded to proof on irrelevant and immaterial fact, very commonly before a Commissioner appointed by the Court,¹⁰⁶ although it was still possible for witnesses to be examined by the Lord Ordinary in the cause. The old Lord Ordinary on Oaths and Witnesses had disappeared as an independent office as interlocutory business had increased in the Court,¹⁰⁷ parole evidence was usually taken by Commissioners on a warrant from the judge, Commissioners being appointed in 'many cases'¹⁰⁸; and habit had led to causes following the individual judges who had pronounced the previous interlocutors¹⁰⁹ (although this was not always the case). The Lord Ordinary, (or the Commissioner who had heard the evidence) was then supposed to rank the evidence in a 'State', as had been done in bygone times and if the proof was to be reported to the whole Court it had to be printed. The proof could also be reported to the Lord Ordinary in the cause.¹¹⁰ If it was reported to him, he could order memorials upon it before reporting it to the Court. If it was to be reported directly to the whole Court, he could adjust it with memorials ordered from the parties.¹¹¹

The office of Lord Ordinary on Concluded Causes had also in practice been dissolved and increasingly, the preparation of the state was left to the Clerk, as adverted to above by Ivory, to be signed by the Ordinary of the Week (assuming the

¹⁰⁵ Campbell, *Sketch op. cit.* p. 11. He also considered that the actings of agents and counsel in drawing such to be regrettable. See also Glassford, *Remarks* p. 136.

¹⁰⁶ This procedure had been tightened by the A.S. 1800 above.

¹⁰⁷ His role was to be assumed by the Lord Ordinary for the Week. See below.

¹⁰⁸ C.f. Campbell's claim that in 1808 that there were 'seldom more than 160 to 180 proofs taken by commission in a year, to be reported either to the Ordinary, or to the whole Court, while the number of causes before the Court are generally upwards of 2800 in a year' Ilay Campbell, *Sketch, op. cit.*, p. 15.

¹⁰⁹ This seems to have arisen as a result of the confusion of where a cause was to appear in the Lord Ordinary's 'hand-rolls' and when he was to sit at the Side bar.

¹¹⁰ By 1815, this was the more common method. See Ivory, *Form of Process*, Vol. II p.135

¹¹¹ A.S. 11th March 1800, ss. 8&9

role of the Ordinary on Concluded Causes) which was then inrolled in the relevant roll and determined by the whole Court.

The Memorials upon the 'state' of the case, if permitted, were another pernicious irritant. When the proof had been conducted upon an admixture of fact and law and any other matter relating thereto, especially by a Commissioner appointed by the Court, not surprisingly, drafting the Memorials for either party was far from simple. In practice, they were long and tedious¹¹² and subject to the very type of alterations prevalent in the course of the revisals to the summons, defences, condescendences and answers. Even by the time the state and associated papers got to the Inner House, there could be informations and answers ordered upon it. These papers were 'often drawn to a great length, and calculated to perplex, rather than throw light upon the cause.'¹¹³ Glassford could remark of this period that 'now, much if not most of the pleading may be posterior to the proof.'¹¹⁴

In all of this, other than disapprobation and admonishment in an interlocutor or payment of a fine, amerciation, amand¹¹⁵ or 'expences'¹¹⁶, there was little by way of sanction for the defaulting party.

¹¹² and had been in any event prohibited by A.S. 18th June 1752, 'short cases' being ordered in their place. The practice returned to boxing Memorials.

¹¹³ Campbell, *Sketch, op. cit.*, p. 24. (Discussing proceedings in the Bill Chamber but the same could be applied to these papers for the Inner House). C.f. Ivory, *op. cit.*, Vol. II, p. 114 [Whilst a cause was depending before the Inner House] 'At one time nothing seems to have been more common, than to perplex the Court in almost every stage with additional petitions, answers, informations etc.' (A.S. 10th November 1741 had prohibited any further papers after eight running days from the inrolment of the cause in the Inner House Roll, other than by appointment of the Court.)

¹¹⁴ Glassford, *Remarks, op. cit.* p. 153. It is surprising that the advocates for the introduction of jury trial failed to make anything of this point. If the procedure now was such that much of pleading on acts before answer was conducted after the proof, it would have been a small step to argue for it in the course of a jury trial. See above.

¹¹⁵ in the Inner House at any rate. In practice they were not enforced in the Outer House. Ivory, *op. cit.*, Vol. II, p. 101 f.n. 'n'.

Throughout the pleadings the 'dishonest litigant' could deny facts which he knew to be true or could aver false facts,¹¹⁷ or could put in 'a long and intricate statement' especially if he knew that his case was bad.¹¹⁸ 'Agents of an inferior class' could still exploit their own interest, lengthening papers.¹¹⁹ The obstructionist, the dilatory and the obdurate were still well catered for, particularly those who came to a litigation without concerns about cost.¹²⁰

A party could still represent to the Ordinary and could still do so without limit. Upon unsuccessful representation to the Ordinary a party could reclaim if the petition was given in within the reclaiming days permitted.¹²¹ Answers had to be put in timeously under pain of amand,¹²² which amand was, in practice, never collected in the Outer House. If the Petition and Answers were not fully stated, the Court could order a hearing in presence or the in-giving of 'replies' and 'duplies', or Memorials and Informations. New matters of fact would admit of a second and final reclaiming petition. Ultimately, in all of this, there lay a right of appeal to the House

¹¹⁶ See the more detailed discussion of this below.

¹¹⁷ Murray, *op. cit.* p. 11.

¹¹⁸ Murray, *op. cit.* p. 15.

¹¹⁹ *ibid.* p. 15.

¹²⁰ See below. The period is notable for the introduction at all stages of procedure of the awarding of 'expences' against a dilatory party, or a litigant who had missed a peremptory time limit. 'Amands' could still be awarded although in the Outer House this was rare.

Agents could be fined or amerced for default. Tracts of procedure rendered otiose by a late amendment or piece of written pleading could render the defaulter liable in the expense of the wasted parts of the procedure. It was left to the discretion of the Ordinary to allocate the expenses of the procedure by interlocutor and an interlocutor 'condemning in, or assoilzieing from expences, if pronounced by an Ordinary' could not be reclaimed against for a second time (A.S. 1 February 1715, s. 4) See Ivory, *op. cit.* Vol. II, pp. 99-101 and p. 113. See chapter 3.

¹²¹ A practice had previously developed of 'prorogating by consent of the parties the days fixed for reclaiming.' The Court considered the practice irregular and ordained that it could have no effect in preventing the lapse of the reclaiming days. A.S. 27 June 1776. There was confusion about the proper period of reclaiming days i.e. whether they were natural days or sederunt days (i.e. the days the Court was sitting). It was to be resolved by A.S. 7 February 1810 - 20 natural days.

of Lords, both in the final sentence, as well as the interlocutory pronouncements by the Ordinary and the Court. This,¹²³ the procedure of taking evidence on Commission and the lack of understanding on the part of litigants as to how their case had been decided continued to inform the pressure for change.

(vii) The Three R's: Representation, Reports and Reclaiming Petitions.

One should not forget, against all of the above, that the old equitable remedies of bringing the intermediate or final determination of a judge back before himself or his peers was always possible.

By 1812 a case was being made for the abolition of the power of representation, and although it would take until 1825 until it was finally removed,¹²⁴ in this period, at any of the stages, from the first hearing to the extended period at the side-bar, any interlocutor of the Ordinary could be represented against. A note would be enrolled in the Ordinary's hand-roll and the cause was brought out at the side-bar where the merits of the representation were debated. The Ordinary could decide it then and there or could order answers from the other party. In the latter case, the cause would be continued to a date at the side-bar or parties would bring it back to him there by note, and the Lord Ordinary would then decide to adhere or depart from the interlocutor complained of. A party could even seek another representation on the same interlocutor within ten sederunt days of the last.¹²⁵ There were no limits on the number of times that a party could represent. It was possible for the Lord Ordinary to prohibit further representations :

¹²² A.S. 12 June 1782, A.S. 26 March 1794, A.S. 24 June 1806

¹²³ the whole vexed topic of Scotch appeals. see Bell, *Examination, op. cit.*, p. 35

¹²⁴ to the chagrin of the Faculty of Advocates who argued strongly against its removal in Report of the Committee of the Faculty of Advocates 1824. See *infra*.

'in order to save trouble and expence to the parties' but '[I]n practice...such declaration is too often disregarded, more representations being given in, notwithstanding the prohibition; by which means the salutary ends which the judge has in view are often disappointed'.¹²⁶

But as Watson noted,

'It is to be regretted that there is no general rule of court limiting representations in point of number as a party who conceives himself hurt by the Ordinary's judgment, frequently brings an intolerable load of expence on his opponent and trouble on all concerned'.¹²⁷

A party could also still seek that the Ordinary report the cause to the Inner House. The underlying rationale for a report was that the cause involved much difficulty or was of such importance as to call for a solemn decision of the Inner House. If the Ordinary agreed to take the cause to Report, he would order written (later printed) memorials or informations from the parties¹²⁸ and would appoint a day for the parties to prepare and print their informations or for minutes of debate to be in the hands of the Ordinary through his clerk, grant warrant for the cause to be enrolled in the Inner House Roll and ordain the informations to be boxed.¹²⁹ As of old, the Lord Ordinary would then, on the appointed day, go to the Inner House and stand at the

¹²⁵ Watson, *op. cit.* p. 88

¹²⁶ Watson, *op. cit.* p. 90.

¹²⁷ Watson, *op. cit.* p. 90.

¹²⁸ sometimes the report could proceed upon printed Minutes as opposed to the more formal Memorials or Informations. Watson, *op. cit.* p. 136; Ivory, *op. cit.* Vol. II, p. 125.

¹²⁹ The old practice of boxing Informations to avoid solicitation of the Judges had become the method by which papers were communicated to the Court. (See previous Chapter and Stair, IV, 39. 14) The boxes were kept in the lobby of Parliament House (See previous Chapter and Watson *op. cit.* p. 91, Ivory, *op. cit.* Vol. II, pp. 93-94, Thomas Beveridge, *A Practical Treatise on the Forms of Process; containing The New Regulations before the Court of Session, Inner-House, Outer-House and Bill-Chamber; The Court of Teinds, and the Jury Court*, 2 vols., (Edinburgh, 1826),

foot of the Clerk's table and report the pleas of the parties as stated before him in the Outer House and in the printed informations. The Inner House then delivered their opinions and pronounced judgment in the cause. If attended with difficulty, as of old, they would appoint a hearing in presence or give such other interlocutor as the circumstances required¹³⁰. Against this the parties could reclaim.

Although the Act of Regulations 1672 required parties to have first represented to the Lord Ordinary before presenting reclaiming petitions, and the number of petitions was limited to two,¹³¹ reclaiming was another drain on the Court's time (even after the division of the Inner House.)¹³² Once enrolled¹³³ they were formally 'single bills' as they had not yet been answered. The Court would then order answers within a number of days under sanction of a fine (which could be prorogated on cause shown) which answers were boxed and the Court then determined whether the petition and answers should be heard in presence, or whether replies and duplies or memorials or informations should be ordered, or whether it should be remitted back to the Ordinary.

(viii) The New Tory Government, the Court of Session Act 1808 and the Reorganisation of the Court of Session.

It was against this back drop that the Whigs' bill, examined earlier, had emerged and then failed. Again, though, history repeated itself and through a lack of consultation

Vol. I, p. 256) but were to be moved to Room 9 of the Register House by A.S. 11 March 1814, ss. 4&5. (Ivory, *ibid*) It seems that by 1818, papers could be 'boxed' and 'lodged'. Ivory, *ibid*.

¹³⁰ Ivory notices that by his time of writing, almost all cases reported are 'remitted back to the Outer House for the purpose of being there matured and are not discussed in the Inner House.' Ivory, *op. cit.* p. 80.

¹³¹ A.S. 26 November 1718

¹³² see below

with those interested in the protection from alteration of the Court and its procedure, and in the face of similar nationalist sensibilities to those expressed in 1785, the Bill now presented disappeared with the fall of Grenville's ministry in 1807.¹³⁴ Would the bill have become law without the fall of the government? It is difficult to determine but, whilst emulation of English form continued to stick in the craw of many Scotsmen, the real problem was that the form of process was geared towards an end which did not fit well with the isolation of matters of fact required for a jury trial on the English model. If there was to be any hope for those pressing for the introduction of civil juries, the forms of process would need to be altered first. But reorganisation of the Court was to be the first task for the reforming incoming ministry.

The new Tory government, on taking office, had appointed Lord Eldon as Lord Chancellor. Legislation followed quickly. In the year of taking office, an Act was passed whereby judges could now be pensioned off.¹³⁵ Written copies of papers (petitions, answers, informations or other papers) 'lodged'¹³⁶ in processes before the Inner House were to be printed and signed by the advocates by whom they were respectively drawn.¹³⁷ The A.S. 15 July 1768 in respect of fines for imperfect quotations or typographical errors was to be enforced with the 'utmost vigour.'¹³⁸

¹³³ It seems that often a party would reclaim merely on the prayer of a petition. See Watson *op. cit.* 123.

¹³⁴ Phillipson, *op. cit.* pp. 86 -95.

¹³⁵ 48 Geo. III. c. 145.

¹³⁶ This is the word used in the A.S.

¹³⁷ A.S. 11th March 1808.

¹³⁸ *ibid.* The size of type had to be at least the size of the type 'called English' A.S. 21 February 1806.

In July 1808 a more important measure, carefully canvassed with the judges, the Bar and the county freeholders, passed into law, geared to 'facilitate the dispatch of business' of the Court of Session.¹³⁹ By section 1 of the (colloquially known) Court of Session (or Judicature) Act 1808,¹⁴⁰ the judges were to sit in Two Divisions, the Lord President and seven ordinary Lords of Session forming one Division and the Lord Justice-Clerk and six of the ordinary Lords of Session the second Division. The Ordinary judges of each Division were to officiate in the Outer House and Bill Chamber 'in the manner which has hitherto been practised by the Ordinary Judges of the whole Court', providing that two of the judges (one from each Division) should sit in the Outer House for hearing the Outer House business and 'two should sit in the Bill Chamber.'¹⁴¹ Parties could elect their Division by bringing their cause before the Ordinaries of that Division and once there, the cause could not be removed to the other.¹⁴² No appeals from interlocutory judgments to the House of Lords were to be allowed, except with leave of the Division. Only appeals from judgments or decrees on the whole merits of the cause were to be taken to the House of Lords,¹⁴³ with the proviso that the Division would have the power to regulate all matters relative to interim possession, execution and payments of costs and expenses already incurred

¹³⁹ 48 Geo. III, cap. 151 The preamble to the Act betrays the driving force, informed also by the mood of the time, that Scotland was a team player in the Union - 'Whereas the great extension of agriculture, commerce, manufactures, and population, and the consequent multiplication of transactions in Scotland, have greatly increased the number of law suits brought into the Court of Session ...'

¹⁴⁰ The actual title was '*An Act concerning the Administration of Justice in Scotland, and concerning Appeals to the House of Lords - 4th July 1808*'.

¹⁴¹ s. 5. Melville had wanted to make five of these Ordinaries sit in the Outer House for the whole time which would thereby prevent the dislocation of the Outer House when they were summoned to the Inner House. Eldon, however, consulted the judges, who fearing a permanent separation of the Inner and Outer Houses, persuaded him to provide the arrangement in the act. See Phillipson, *op. cit.*, p. 113.

¹⁴² s. 9.

¹⁴³ s. 15.

as may be affected by the affirmance or reversal of the judgment or decree appealed from.¹⁴⁴

Section 22 made provision for the appointment of Commissioners with powers to enquire into the administration of justice in Scotland relating to matters of a civil nature, and particularly into the forms of process in the Court of Session. We will return to the evidence they received and their Report shortly.

By the end of the same month, Ilay Campbell had been prevailed upon to retire¹⁴⁵ to be replaced by the arch conservative Robert Blair, former Dean of Faculty.¹⁴⁶

Straight away, the re-organisation of the Court led to practical changes in the operation of the form of process. Formerly, the Lord Reporter reporting a cause,¹⁴⁷ would go to the Inner House and stand at the foot of the Clerk's table and report,

¹⁴⁴ s. 17.

¹⁴⁵ Although he was a legal reformer and had some innovative ideas on the reform of the Court's procedure, as evidenced in the quotations above from his 'Sketch', he was considered not to be the right individual for the times ahead. He could be domineering (Phillipson, *op. cit.* p. 114). Cockburn remarked 'that he was ambitious of having a prevailing influence over his brethren was true of him' (*Memorials op. cit.* p. 128) His forensic writing in pleading was admirable and he had been trained and grounded in the system of pleading by writing. He was of the opinion that there was nothing wrong with the form of process, the only defect lay in the enforcement. For him there was little to resort to in the forms of pleading in England, the improvements and the acts of Sederunts and regulations of the Court being sufficient although 'too much neglected by practitioners.' For him, the preliminary pleadings of the libel and the defences correctly framed made further condescendences unnecessary (*Sketch* p. 12) and the blame for the state of the form of process was to be attributed to agents. (*Sketch*, p. 27-8) He was 'hated by the agents whom he rightly blamed for the present difficulties of the court and with whom he waged a constant and unrelenting war' (Phillipson, *op. cit.* p. 114) His views on the Presidency of the Divisions, at the planning stage, were clear whereby he would continue to preside over both. Twice the work in half the time would be left to the President's availability and would hamper the new Act's efficiency. In the end, the package put together by Melville and the Dundas' persuaded him that his time as President was over.

¹⁴⁶ As Cockburn remarked of him, 'Too solid for ingenuity, and too plain for fancy, soundness of understanding was his peculiar intellectual ability' Cockburn, *Memorials, op. cit.* pp. 150 at 151.

¹⁴⁷ Avizandum to the Lords or Great Avizandum.

stating the pleas of the parties to the Court. Under the Act, the Lords Ordinary were no longer permitted to participate in the vote before the Court and the practice of physically going to report to the Court died out.¹⁴⁸

(ix) The Work of the 1808 Commission Appointed to Inquire into the Forms of Process in the Court of Session.

The Commission authorised by section 22 gave the Commissioners a wide brief.¹⁴⁹ 31 Scottish and English Commissioners¹⁵⁰ were appointed by Royal Warrant and Lord Eldon was the Chairman. Most of the work was to be executed by the Scottish Commissioners under Ilay Campbell.

As noted above, the Condescence and Answer had become an integral part of pleading at initial stages and had indeed been made mandatory by the A.S. 1800. The A.S. simply applied the practice that had arisen up to that point, although there was no historical precedent for it and it was not part of the earlier procedure. This gave rise to a tension between Campbell and Hope over whether Condescences and

¹⁴⁸ Ivory Vol. II 124-5.

¹⁴⁹ The Commissioners 'after chusing a preses and clerk, to make full inquiries into the forms of process in the Court of Session, and to report in what cases, and in what manner and form it appears to them that jury trial could be most usefully established in that Court; and further, to report in what manner the present form of process in that Court might be improved by conducting more of the pleadings viva voce, by limiting the power vested in single Judges of frequently reviewing their own interlocutory judgments, by obviating inconveniences arising from the mode now practised, in taking proofs by commission, and by regulations relative to the proceedings in the Bill Chamber 'as well as the expediency of Ordinaries officiating in the Outer House and Bill Chamber, the form of procedure in the Admiralty and Commissary Courts, and the general topics of the inferior Courts, extracting decrees and letters of diligence, and the fees, perquisites and emoluments paid to clerks and officers of the Courts, all to report before 12 November 1809.'

¹⁵⁰ For the Commissioners, see Phillipson, *op. cit.* p. 117. The Scottish Commissioners included Lord President Robert Blair, Lord Justice-Clerk Charles Hope, Lord Chief Baron Dundas, Lord Advocate Archibald Colquhoun, Solicitor General David Boyle and Dean of Faculty Matthew Ross. Lord Melville and Henry Erskine were included as past Deans of Faculty. Most of the work on the form of process was carried out by a sub-committee of Campbell, Blair, Hope, Ross and a writer to the Signet, Robert Sym.

Answers were really required in all cases.¹⁵¹ Campbell thought not. He maintained his thesis that the real problems of the form of process lay in the failure of foreclosing parties' allegations in the summons and defences. Hope differed in opinion, pragmatically appreciating that once the basis of the action was ascertained, it was at the point of the ordering of Condescendences and Answers that frank disclosure of the parties' position could reasonably be expected, and thus condescendences and answers should form part of the procedure in every case. Thereby, parties could be forced, at that point, to admit or deny the facts stated by the other - the very purpose of the Acts of Sederunt of 1787 and 1800. When the condescendence and answer had been given in, he considered that

'it would be highly desirable to order a meeting of the two Agents to go thro' the Condescendences & Answers together to try if they cannot agree on certain of the facts. If they do these to be selected and the facts to be classed into three heads. Primo. Facts admitted on both sides. Secundo. Facts averred by the Pursuer and denied by or unknown to the Defender. Tertio. Facts averred by the Defr. and denied or unknown to the Pursuer.'¹⁵²

The work of the Commission was prodigious. The Scottish sub-committee of the Commission had been set up on 30th November 1808 and by January of the following year Campbell had formulated a sketch of procedure revolving around the central theme that 'parties in a cause ought to be foreclosed as to their assertions at some period of a cause' albeit that in his mind, this was best pursued after the libel and defences had been lodged by the bringing of the respective counsel before the Ordinary and forcing them to state whether they intended to 'rest upon' their

¹⁵¹ On all of this, see Phillipson, *op. cit.* pp. 118 - 121

¹⁵² *Hints for some improvements in our form of process*, (28th Aug. 1809) MSS Proc. Scot. Jud. Com Box 1, Quoted by Phillipson, *op. cit.* p. 119

pleadings as the ground of action or defence. Whilst this initiative was not to succeed, the key aspect in it was that parties should be foreclosed. Hope, in advancing his thesis that the point of foreclosure should follow the lodging of Condescendences and Answers¹⁵³ still accepted and joined with Campbell that there had to be a point that the parties would be foreclosed upon their respective pleadings beyond which they were not entitled as of right to expand. This was a significant departure from previous practice whereby the parties had always had the opportunities of seeking a report, unlimited representation and had the two chances to reclaim. Irrespective of where the parties were to be foreclosed in their pleading, the importance was that they could, and should be.¹⁵⁴

By February 1810, the Commission was ready to publish its First Report.¹⁵⁵ Five days later, the Court passed A.S. 7 February 1810 'anent the Form of Process in the Inner and Outer House', drawing in part upon the work of the Commissioners, but using the A.S. as an opportunity to assert some judicial control over the proposals for reform of process and court re-organisation being proposed.¹⁵⁶ Through this vehicle the Lords recorded their recognition that various aspects of procedure were being misused and although the remedies were not to be efficacious, the problems specified were examined further by the Commissioners and incorporated into their Second Report. But even although the bold steps discussed by the Commissioners

¹⁵³ In August 1809.

¹⁵⁴ this would become the genesis of the device of the 'Closed Record' advanced and implemented in 1825. Moreover, it was to follow Hope's line that it should close after the Condescendence and Answers.

¹⁵⁵ Report of the Commissioners etc. P.P. x pp. 1-19. Dated 2nd February 1810. There is nothing in it relating directly to the Commission's brief to Report on the form of process and written pleadings.

¹⁵⁶ The judges (through Lord President Blair) were opposed to the Commissioners' notions of creating permanent Lord Ordinary - i.e. sitting permanently in the Outer House. Also, on the form of process the Judges themselves were averse to preventing the amendment of libels and defences.

prior to the First Report were known to the Lords, the A.S. did not do anything other than attempt to tidy up aspects of the form of process – all in accordance with the old jurisprudence.

(x) Act of Sederunt 7 February 1810 – More of the Same.

The A.S. attempted *inter alia* to prevent the passing of decreets in absence for the purposes of delay. It noted that amendments of libels were sometimes given in and received at a very late stage of the cause which the Lords considered encouraged rash and ill-advised actions, and led to slovenliness in drawing libels in all actions. From May 1811, there was to be no amendment after proof was allowed. An amendment was not to be allowed unless produced with or before the second representation against the Lord Ordinary's first interlocutor on the merits of the cause.¹⁵⁷ The Lords recognised that there was delay occasioned by the number of representations given in to the Ordinaries against the same interlocutor and that they often contained no statement of the cause at all but were given in merely for the purpose of delay, or procuring more time to prepare a petition for the Inner House, which they considered arose because the period allowed for reclaiming was too short. From May 1811, the reclaiming days were to be extended to 20 natural days. Moreover, it prohibited any more than two representations against an interlocutor of a Lord Ordinary without prejudice to the Ordinary prohibiting a second representation upon advising the first.¹⁵⁸

Regarding the forcing of parties to define their positions in fact and law, there was little new:

¹⁵⁷ C.f. Phillipson *op. cit.* 120.

'And whereas it is highly expedient that the real nature of the action, and the facts and pleas in law set forth by both parties, should be contained in certain known and fixed papers, forming an abridged record of the cause, so that the Ordinary, the Inner House and (in the event of appeal) the House of Lords, may be able to see clearly and within short compass the real nature of the action; the Lords do hereby Enact and Declare, That they will rigidly enforce existing regulations as to the returning of defences; and they do Order and Enact, That the said defences shall not contain argument, but only a concise statement of the facts on which the defender founds, and a summary of the pleas in law which he is to maintain as applicable to those facts.'¹⁵⁹

With regard to the problems of Condescendences and Answers, again there was little novel:

'Considering how necessary it is that the averments of the parties should be fully and distinctly brought before the Lord Ordinary and the Court, and the parties compelled to bring out their averments in due time',

in addition to the regulations contained in A.S. 11 March 1800, now - where a fact was averred by one party, and not explicitly denied by the other, he was to be held as confessed, (in similar terms to the 1715 A.S.) and that fact would be held to be definitively proved against him.¹⁶⁰

¹⁵⁸ Although third representations do not appear to have been unknown See *Knox & Ors. v. Murdoch & Ors.* 3 Shaw 40 (1st Div). Practice did vary - c.f. *Arbouin v. Sime* *ibid.* p. 148.

¹⁵⁹ Although there was nothing novel in this, and it merely adopted the approach tried on previous occasions through other A.S., one might note the terminology used - in particular 'record' and 'pleas in law'. The A.S. would form one of the corner stones of the Report of the Commissioners in 1824.

¹⁶⁰ This developed in practice to become facts which 'necessarily fell within the party's own knowledge.' *Report of the Committee of the Faculty of Advocates, Appointed to Consider a Bill, Entituled, 'An Act for the Better Regulating of the Forms of Process in the Courts of Law in Scotland* (Edinburgh, 1824).

And if the Answers to Condescendences, besides explicitly admitting or denying the facts stated in the Condescendence, contained counter averments, the direction to the Lord Ordinary was clear – ‘he shall ordain parties to revise both, so that the parties may explicitly meet each other on the facts mutually set forth and such a Condescendence and Answer (so revised if necessary)’ would ‘absolutely foreclose’ both parties, as to ‘every averment, in point of fact.’¹⁶¹

(xi) The Commissioners’ Second Report.

This A.S. seemed to galvanise the Commissioners (particularly Hope and Campbell) and the Commission published its Second Report, dealing with Form of Process in the Court of Session as per the brief, on 9 March 1810. But the result was disappointing concerning the form of process and inconclusive in its recommendations – generally aping the A.S. passed the month before.¹⁶²

(xii) Outstanding Business – The Introduction of Civil Jury Trial.

Still the jury question remained unresolved.¹⁶³ The business of the House of Lords still was still increasing with appeals from the Court of Session, largely on questions

¹⁶¹ The AS was to be fixed for 3 years and was signed Robert Blair.

¹⁶² It did, however, provide the arguments for the appointment of permanent Lords Ordinary in the Outer House which was to be introduced by statute three years later. Court of Session Act 1810, 50 Geo III (c. 112); Court of Session Act 1813. 53 Geo III (c.64); AS 11 June 1813. See further Ivory, *op. cit.* p. 70 ff. By 1813, there were was a sufficiency of new appointments to the Bench such that the consent of existing Lords as at 1810, to sit in the Outer House (encapsulated in the 1810 Act) was not required and the new Lords were required so to sit, whether consenting or not.

¹⁶³ The introduction of Trial By Jury in Civil Causes was complex. Here I attempt a gloss and detail the introduction and working of the Jury Court against the background of the effect it had on written pleadings. There is a wealth of writing on the Civil Jury Trial. See for example I.D Willock, *The Origins and Development of the Jury in Scotland.* (vol. 23) (Stair Society, Edinburgh, 1966); Phillipson *op. cit.*; Cairns, Introduction, *op. cit.*; Walker *Legal History op. cit.*, vol. VI, pp 324 ff, William Adam *A Practical Treatise and Observations on Trial by Jury in Civil Causes, As now Incorporated with the Jurisdiction of the Court of Session* (1816) Appx., 92-104 See also above.

of fact.¹⁶⁴ The House of Lords protested¹⁶⁵ and themselves considered that the introduction of civil jury trial in Scotland would stem the flow of cases going south. It will be recollected that the Commissioners had been charged with considering the introduction of jury trial¹⁶⁶ yet, in their Third and final Report¹⁶⁷ could only conclude that the topic had 'been the subject of much deliberation and discussion among the Commissioners.'¹⁶⁸ They themselves could not come to a conclusion. Their jury was hung. As they noted in the Report –

' there exists among the Commissioners, upon the most important points, much difference of opinion. Some of the Commissioners are decidedly of the opinion that the introduction of Jury Trial into the proceedings of the Court of Session, in any case, would be injurious, and indeed impracticable. Some few are of a very different opinion, and conceive that in many cases the Trial by Jury might be introduced, with little difficulty and great advantage.'¹⁶⁹

¹⁶⁴ Adam, as the new Chief Commissioner could remark on 22 January 1816 in his Speech at the opening of the Jury Court 'many cases had occurred in the House of Lords, resting entirely on matter of fact, accompanied by long printed proofs, calling upon the Supreme Court of Appeal, which should only be required to decide matter of law, to perform a duty not properly belonging to it, by deciding cases resting upon intricate, difficult, and ill proved facts.' Introduction to Murray's Jury Court Reports *op. cit.* Vol. I. pp. xv – xxviii at page xvi. There was a decrease in the business coming before the House of Lords from Scotland between 1811 and 1815 (193 Scottish appeals lodged compared with 225 in the preceding four year period) but as this business comprised 80% of the House's business, the decrease was academic. See Phillipson, *op. cit.*, p.127 It should be remembered that from the date of the Union, the House of Lords as Supreme Court had been a refuge for those not content to accept a decision of the Inner House – even if that meant delaying the inevitable. See generally A.J. Maclean *The 1707 Union: Scots Law and the House of Lords* (1983) 4 Journal of Legal History pp. 50 – 75.

¹⁶⁵ See for example *Smith v. Macneil* (1814) 2 Dow 538; *Hall v. Ross* (1813) 1 Dow 201; *Earl of Seaforth v. Hume* (1814) 2 Dow 338. Phillipson, *op. cit.* p. 128. A case could even have two trips to London. See *Tovey v. Lindsay* 1 Dow 141; *Wight v. Dicksons* *ibid* 147; *Hall v. Ross* *ibid.* 211; *Tennant v. Herderson* *ibid.* 336.

¹⁶⁶ 'Whether it would be for the utility of the Subjects within Scotland, That Jury Trial should be introduced into the proceedings before the Court of Session, and in what proceedings; and in what manner and form the same can be most usefully established' Third Report P.P. 1810 p. 59 ff.

¹⁶⁷ dated 1 May 1810.

¹⁶⁸ P.P. x 1810, p. 59.

¹⁶⁹ Third Report P.P. 1810, x p. 59.

In the end, as a result of the difference of opinion among the Commissioners, they felt unable to report.¹⁷⁰

On the death of Robert Blair in 1811, Charles Hope, the ingenious thinker whose views we have already touched upon, became the new Lord President. The pressure for jury trial was to be stepped up in the next three years. At the end of the House of Lords Session of 1814, Eldon and Sir William Grant MR consulted with the heads of Court and the leading Scottish Whigs and agreed upon principles for the introduction of civil jury trial. A Bill introduced by Eldon¹⁷¹ providing for the Court of Session to decide whether a cause should go to jury trial was opposed by a Whiggish element in Scotland on the basis that jury trial should be compulsory in certain classes of action. The bill was withdrawn and another was introduced by Eldon, this time attracting the wrath of conservatives as being too akin to English common law practice. With some degree of amendment, the bill became law as the Jury Trials (Scotland) Act 1815.¹⁷² It was for the Court of Session to decide whether or not a cause should be sent to the jury and whether the jury was to return a general verdict or not. The types of cause to be sent were not enumerated, it being in the discretion of the Court to decide whether it should be remitted. The experiment was to lead to establishment of a Jury Court, headed by William Adam¹⁷³ as Lord Chief Commissioner with the second Lord Meadowbank and Lord Pitmilley as the two Commissioners. By 1819 the experiment was judged to be a success and the Jury

¹⁷⁰ 'Considering the great difference of opinion amongst the Commissioners, on this important subject, they are unable to report, with more decision, - Whether it would be or would not be expedient at p[re]sent to introduce Trial by Jury into the proceedings of the Court of Session.' Third Report P.P. 1810 x p.60

¹⁷¹ 1st December 1814.

¹⁷² 55 Geo. III. (c. 42).

Court was made permanent by the Jury Trials (Scotland) Act 1819,¹⁷⁴ now enumerating particular causes which were to be remitted to the Jury Court; and in 1830 the Jury Court was assimilated into the Court of Session.

(xiii) The Effect of Jury Court on Written Pleading in the Court of Session.

The new manner of determining matters of fact before a jury required new procedural rules and these were introduced by A.S. 11th July 1815. They were devised by Adam in consultation with the Lord President and the Lord Justice-Clerk together with his new Commissioners Pitmilley and Meadowbank. The whole form of process would now require a vehicle for determining 'issues' to be decided by the jury in the event that the Court considered that the cause should go before it (and after 1819 in the enumerated causes). Once a Division of the Inner House had determined that the cause should go to civil jury trial it issued an interlocutor to the Ordinary who sent it to the Clerk of the Jury Court. His role was to consult with the appropriate Clerk of Session and the agents and counsel and to reduce the cause to specific issues. These issues in draft were then to be returned to the Ordinary for his approval before they were then passed by him back to the Inner House for final approval by a second interlocutor. In all of this, the rules were designed so that the judges could retain control over issues although the long and cumbersome process became the subject of universal and constant complaint.¹⁷⁵ The issues were to be drafted from the record of the cause as a whole and not solely from the

¹⁷³ Adam had had a hand in the creation of the Court from the time of Eldon's first approach prior to the introduction of the first Bill. He was a member of the English and Scottish bars (although had not practised in Scotland for twenty four years).

¹⁷⁴ 59 Geo III (c.35).

¹⁷⁵ Phillipson, *op. cit.*, p. 136 ff. Professor Walker follows Phillipson's treatment closely. See Walker *History op. cit.* Vol. VI, pp. 323 ff.

Condescendences and Answers¹⁷⁶ and were to be presented to the jury in a series of questions which could be answered yes or no.¹⁷⁷

But a side benefit of drawing issues was that it at least demonstrated to agents and advocates that it could be done, that is, the whole pleadings, at least in relation to matters of fact, could be distilled into a series of simple questions and that the parties were not precluded from advancing the matters of fact which they themselves considered 'pertinent' to their cause. As Murray in the Introduction to the inaugural Volume of his Jury Court Reports¹⁷⁸ remarked

'The issues, extracted from the great mass of matter detailed in the pleadings before the Court of Session, show the questions between the parties reduced to a very small compass; while at the same time admit the proof of all the facts and circumstances which either party may think necessary to sustain their cause'.

The parties no longer required to address the mind of the judge in their pleadings: If the issues of fact were to go before a jury in simple questions then there could be no room for arguments about the probabilities of facts advanced by a party or his adversary nor whether all the facts having a bearing upon the case had been brought forward in the pleadings. In any event, whilst pleadings in the form of Condescendences and Answers addressed to a judge had this content, the rationale for such arguments was removed as juries would never see the Condescendences and Answers, nor any other parts of the pleading beyond the written issues. Moreover, arguments about how the facts were to be proved were removed and

¹⁷⁶ The approach favoured by Lord Meadowbank.

¹⁷⁷ The questions were to be formulated as 'Whether ...'

¹⁷⁸ Introduction, Murray's Jury Court Reports, (Edinburgh, 1818) p. 10.

evidence was not for the pleadings but now lay in the province of the jury. The issue would determine what it was that was to be decided and all parties would know that it was to be decided by the jury.

All of this was to effect a sea-change in the way jury case pleadings were to be drawn, at least in those cases initially sent to the Jury Court, and later in the pleading of enumerated causes. Parties would come to appreciate that in these circumstances these parts of the pleading would be best served by intimating to an adversary what the nature of the cause to be proved against him and thereby preventing 'embarrassment' and 'surprise.'¹⁷⁹

Adam even devised a method of seeing the parties in chambers to discuss issues of relevancy, 'bringing cases to a point' for the purposes of agreeing between them the issues for the trial.¹⁸⁰

The whole Jury Court experiment was, on the whole, a success. Between 22nd January 1816 and 24th February 1818, the Inner House had sent 115 causes for trial, of which 51 had been tried, 37 awaited trial and the remainder compromised or abandoned.¹⁸¹ The Lord President and the Lord Justice-Clerk were pleased with the result and the Jury Court became a permanent feature a year later.

¹⁷⁹ These were the conclusions of Joseph Murray, the editor of the Jury Court Reports and a Jury Court clerk, in 1831 in his Introduction to Vol. V of his Jury Court Reports. Vol. v, p. x – xii.

¹⁸⁰ Evidence of Robert Forsyth to the Commissioners 1823, Commissioners Report 1824 (see below), p.137. This approach he considered avoided 'the irritation of contradictory debate about unascertained facts'.

¹⁸¹ *Reports on the Jury Court, 1818* (P.P. 1818 x,) See Phillipson, *op. cit.* p. 139.

However, the impetus for its creation, the House of Lords, was less pleased. The Lords were still inundated with Scottish Appeals, albeit that there was a reduction in the appeals on fact alone. By 1823 a Select Committee of the House of Lords confirmed what the House already knew – that Scottish appeals were still forming a disproportionate amount of their workload.¹⁸² If the House of Lords was to be retained as the ultimate appellate court then the form of process would require to be modified such that the House could dispose of Scottish appeals quickly.¹⁸³ If this was not implemented the Scottish legal profession would face a stark choice. Either the jurisdiction would go or the Court would face the prospect of a forcible separation of Scots Law into the English concepts of law and equity.¹⁸⁴ Facing such a prospect, it was resolved to appoint once again a Commission charged with inquiring into the Form of Process in Scotland and the course of appeals to the House of Lords. The Commission was appointed by 4 Geo. IV. (c.85)¹⁸⁵ and on 29th July 1823 the Commissioners were appointed.¹⁸⁶ Its work would lead to the creation of the structure of written pleading in the important 1825 Court of Session Act.

(xiv) The Work of the 1823 Commission.

‘What! Put an end to written pleadings! Rob us of our business! Knock up our profession! Substitute Turkish to Scots and English justice! Whence

¹⁸² *Lords Journal* vol. iv, pp. 644-5; 788-92: The House was 225 appeals in arrears and 151 of them came from the Court of Session. Phillipson *op. cit.* p. 142.

¹⁸³ see the statistics quoted by Rt. Hon. The Lord Hope of Craighead, ‘*Taking the Case to London – Is it All Over?*’ The James Wood Lecture, given at the University of Glasgow, February 1998. (Reproduced in (1998) 43 J.R. 135) at p. 138.

¹⁸⁴ Phillipson *op. cit.* p. 143.

¹⁸⁵ *An Act for empowering Commissioners to be appointed by His Majesty, to inquire into the Forms of Process in the Courts of Law in Scotland, and the Court of Appeals from the Court of Session to the House of Lords.*

¹⁸⁶ Headed by the Lord President, Lord Justice-Clerk and Chief Commissioner, the Lord Advocate and the Deputy Keeper of the Signet.

comes this man? From the Jacobin Club, or from St. Luke's?

Jeremy Bentham¹⁸⁷

The Commissioners had commenced their work by the autumn of the same year and took as their starting point ascertaining the views of the certain members of the Bench as well as eminent members of the profession. These views were expressed in correspondence as Answers to Questions which had been posed by the Commission.¹⁸⁸

With regard to the 'Forms of Process and of Pleading in the Court of Session', the Commissioners were given a detailed but difficult brief: -

'What alterations may be made in the forms of process and of pleadings in the court of Session, with a view to secure, that in future, at the commencement of a cause, there should be given to the court a more accurate and distinct statement of the facts founded on by the pursuer, as well as those alleged in defence? Whether a more frequent resort should be had in that court to vivâ voce hearings, and whether a diminution of written and printed pleadings may not be effected, as well as an abridgement of the extent of each? And, what regulations may be enforced by legal enactment or otherwise, tending to simplify and shorten the forms of proceedings, either generally or in particular cases, in the Court of Session?'

¹⁸⁷ Quoted by Peter Campbell, *Objections to the Proposed Bill (etc.)* (Edinburgh, 1825). See J. Bentham, *Scotch Reform*, in J. Bowring, *The Works of Jeremy Bentham* (10 vols.), (1843). The quote was Bentham's parody on the profession's all consuming concern for written pleadings. Bentham himself thought that they were a 'licence for mendacity' and little better than 'a labyrinth for harpies to burrow and fatten in upon the blood of the suitors' (J. Bowring, *The Works cit sup.* vol. 5, p.24.)

¹⁸⁸ *Report of the Commissioners for inquiring into the Forms of Process, and Course of Appeals, Scotland.* (P.P. 1824 x) The Commissioners 'sent their Requisition to such of the Judges, Members of the Faculty of Advocates, Writers to the Signet, and other persons, as they thought best qualified to give information'. (*Report of the Commissioners for inquiring into the*

(xv) The Written Evidence to the Commission.

The written evidence received by the Commission covered many of the problems in the form of process and the methods used in drafting written pleadings examined earlier in this chapter.

Much of the evidence reflected the profession's views that there was nothing much wrong with the forms of process.¹⁸⁹ The submission of Roger Aytoun W.S. was typical:

But, in general I cannot conceive any system better adapted for sifting of a cause to the bottom, and preventing hasty pleadings and averments on the part of the Bar, and rash decisions on the part of the Bench, than the forms of process observed in the Court of Session These forms ... ought not to be touched, but with a sparing hand, and under the most obvious dictates of expediency and necessity.¹⁹⁰

The problems of delay arose because of the lack of enforcement of the rules by the Court. But in reality, the conduct of litigation by this time had rendered summonses and defences as mere opening gambits. It was only as the pleading ran its course that the real issues between the parties would arise. Corrections or amendments to the pleadings could, in practice, be made at any stage of the litigation and it was possible

forms of process in the courts of law in Scotland and the course of appeals from the Court of Session to the House of Lords, P.P., x) [Hereinafter Commissioners' Report, 1824] p.3

¹⁸⁹ Reflecting the thesis previously expounded by Ilay Campbell during his tenure as Lord President.

¹⁹⁰ Answers by Roger Aytoun, Writer to the Signet, *Commissioners' Report, 1824* p.41

to introduce new facts into the papers right to the end of the litigation.¹⁹¹ The procedure of the Court operated as a

'system, under which it was never too late, either to commit, or to correct, a blunder.'¹⁹²

and this facility for correction and amendment permitted initial caution such that one party would gingerly state his initial position, reserving his strong points and concealing his weak points, simultaneously attempting to tease out the position of his adversary. As the author of a text on the Form of Process before the Court of Session explained:

'Both parties are aware, that, at almost every stage of a long litigation, the defects, whether of their previous statements in point of fact, or of their previous pleadings in point of law, may be corrected and supplied. Relying on this, there is not unfrequently in the outset an inclination on either side rather to withhold and keep in the back-ground many of the facts, in the view of trying the adversary's strength, and of bringing out as far as possible the important points on which his pleas are to be rested. ... Many actions are brought, without either the pursuer or his advisers having formed any very distinct idea how they are to be supported; and many defences, on the other hand, are set up for no other reason than to procure delay, and because the party does not find it convenient, at the moment, to give that consideration to the matter in dispute, which is essential towards maturing it for judicial decision. The important facts are afterwards dropt in as circumstances may seem to require; former statements are at the same time retracted or explained away; and thus, while the complexion of the case varies at every turn, new questions in point of law are started, and sometimes a fresh source

¹⁹¹ Evidence of Daniel Fisher, SSC, *Commissioners' Report*, 1824 p. 116

¹⁹² Answers of Henry Cockburn, *Commissioners' Report*, 1824 p. 81 See also his *Memorials op. cit.* 408 - 410

of litigation is opened up in the very last stage, and just when everything seemed to have been brought to a conclusion. [In doing so] a party, before finally committing himself, endeavours to fish out not only the case of his adversary, but the leaning also of the Judge.¹⁹³

The summons and defences from the start were often incomprehensible, even to the advocates¹⁹⁴ instructed in the cause for each party.

'The Summons is generally framed in order to omit no possible *medium concludendi*, so vaguely, and the Defences are so short and cautious, that even Counsel for the parties themselves, cannot understand the case from these papers, until a full Memorial or Brieve is laid before them by the Agent; and even then the same caution is observed by the Counsel on both sides, and unless the one party commits himself to the other, the first pleading does by no means exhaust the cause. Hence the Lord Ordinary, in place of pronouncing judgment, generally finds himself obliged to order mutual Memorials in writing from the parties, or written Condescendences and Answers, so as to enable him rightly to understand the cause.¹⁹⁵

Why were the initial pleadings of the parties so vague? It should be remembered that the summons was drafted by agents, and was often hastily put together in order to

¹⁹³ Answers of James Ivory, Advocate, *Commissioners' Report, 1824* p. 148. He was particularly interested in the form of process having produced his *Form of Process before the Court of Session etc.* in the previous decade. These views in his Answer here, were shared by the agents as well. See the *Report and Additional Report of The Society of Writers to the Signet (etc.)* (Edinburgh, 1824): 'Each party tells only a little which he must tell, in order to give a fair and plausible appearance to his plea, and carefully conceals what may bear in favour of his adversary. Nor is any censure imputable to the parties for adopting such a line of conduct, so long as the forms of process are so constructed that to act otherwise would often be folly, rather than candour; for such it would be voluntarily to open up the weak points of the cause to the adversary, from whom a similar disclosure cannot, at that stage at least, be exacted.' pp.24-5.

¹⁹⁴ It should be remembered that counsel did not draw the Summons and rarely the defences and was brought in after the cause was up and running. Robert Forsyth, estimated that in 99

beat the expiry of a prescriptive period or to found diligence.¹⁹⁶ Thus, admissions in defences would not be proffered in early course until the pursuer's position was established, as there would be little point in full disclosure of the defender's position until the pursuer had formulated his in greater detail. So it was only at the point of the debate before the Ordinary that further information would be provided to Counsel and thus to the Court.

The Defence, in most cases, is very general, giving as little information to the other party as possible. In most cases, therefore, the Summons and Defences do not give the information necessary to enable the Counsel to debate the cause. It is accordingly the duty of the Agents to prepare full statements for Counsel previous to the debate, and, in these statements, to give all the information of which they are then possessed. At the debate which takes place, the Counsel state the case according to the information they have respectively received, and then, for the first time, the legal advisers of the parties come to know, generally, the grounds on which the action is likely to be maintained and defended.¹⁹⁷

It was also important to keep in mind which particular Ordinary the case would come before in its early passage through the Outer House as some would be more disposed to pursuers than defenders, or some more lenient than others.

'It became often a matter of calculation, under the old arrangement, who the Twelve or Thirteen Judges on the Bench might be, when a Petition was

cases in 100, the summons was drawn by the agent. Evidence of Robert Forsyth, Advocate *Commissioners' Report, 1824* p. 135.

¹⁹⁵ Answers by Roger Aytoun, Writer to the Signet, *Commissioners' Report, 1824*, p.42.

¹⁹⁶ Answers by Daniel Fisher, SSC: 'the great anxiety is to get the Summons speedily executed, in order that it may come as early as possible into Court. If Letters of Inhibition and Arrestment are to be used on the dependence, which is often the case, this is an additional reason for the Summons being hurriedly issued.' (p.117) See also Answers by Robert Forsyth, Advocate *Commissioners' Report, 1824* pp. 136-7.

¹⁹⁷ Answers by David Cleghorn, Esq., W.S. *Commissioners' Report, 1824* p.60.

moved, and who [were] the Two or Three necessarily absent in the Outer House, discharging their duty there as Ordinary...'¹⁹⁸

Another reason for the careful selection of the Ordinary to decide the case was that cases were very frequently decided upon their whole probability without any enquiry into fact. A pursuer could speculate that one judge over another would be more disposed to this at an early stage. Perhaps other judges would permit greater latitude to the defenders in resisting a pursuer's claims, or be more likely to permit condescendences and answers with revisals, or be more amenable to the correction of mistakes and blunders in the pleadings, or open to the introduction of new material to the point of the debate and beyond.

'Many of the cases contain statements of facts, made by the opposite parties, and not acquiesced in, the decisions are pronounced on what the Judges conclude to be the real circumstances of the case, and the law applicable to these circumstances. But as, in general there has been no distinct admission by the parties of their opposite averments, they mutually deny statements made by the other, and their Counsel are entitled to point out those differences, even in the last stages of the proceedings, before the Judges decide on the last printed papers that have been submitted to them. From the nature of these proceedings, great delay must necessarily take place before a final decision is obtained ... The parties frequently create obstacles, merely for the purposes of obtaining delay. These forms hold out a very great temptation to persons unable, or unwilling, to perform their obligations, or pay their just debts.'¹⁹⁹

¹⁹⁸ Answers of Thomas Beveridge, *Commissioners' Report, 1824* p. 54. Beveridge was one of the Assistants of the Depute Clerks of Session and would be the first to write a text on the Act passed in 1825 viz. *A Practical Treatise on the Forms of Process; containing The New Regulations before the Court of Session, Inner-House, Outer-House etc.*, (2 vols.), (Edinburgh, 1826).

¹⁹⁹ Evidence of David Cleghorn, *Commissioners' Report, 1824* p. 60

The most common types of action in the Court were actions for payment of debts. Lord Cringletie, in a somewhat world weary fashion, gave the Commission an account of his experience of these types of cases. It is worth quoting at length as it provides in itself, an example, from the judicial perspective, of the types of problems in the procedure already examined.

'In almost all cases, (for there are some exceptions) the pursuer comes forward with a Summons, setting forth that the defender is in his debt, conform to an account referred to, or a bill or bond, the substance of which is referred to; and in some instances, the pursuer sets forth that the defender owes him a definite sum, without specifying how the debt arose; the conclusion is for a decree for payment of the sum libelled, with interest from a specified period; and very often the conclusion is for a decree for the sum libelled "deducting such partial payments as the defender can instruct."

This Summons is called in Court; and if the defender appear by his Agent, it is given out to him to be seen, and sometimes all the writings on which the pursuer means to found, are given out with the Summons. But this rarely happens, as either from carelessness or design, documents are withheld, and afterwards produced and pleaded on at the bar, without the defender having an opportunity of seeing them. The defender, after having a week to see the Summons and Writings produced, if any be produced, generally returns a Defence, which is an evasion, such as saying he denies the debt, or that he is owing nothing to the pursuer, and rarely produces any writings with his Defence ... The case is then called before the Lord Ordinary in the Outer House. ... [In far more numerous classes²⁰⁰] the parties come before the Lord

²⁰⁰ i.e. in modern language 'more commonly'.

Ordinary to plead their cause; papers not produced before, are brought forward and founded on, and the defender or pursuer obtains leave to see these. Thus time is lost by the pursuer, and gained by the defender, and lost to the Judge and the whole expense of that pleading is uselessly lavished. When the case is again heard parties differ in their statement of facts ; and all that is obtained is an order by the Judge, that one or other of the parties, or perhaps each, shall put in a Condescence in terms of the Act of Sederunt,²⁰¹ which is a statement of the facts, without any sort of argument, which he offers to prove. If one of the parties only puts in such a paper, the other answers it, after which the cause is called before the Judge, when an order is given to revise these pleadings mutually, which often requires repeated orders to procure obedience. The same takes place where mutual Condescences are put in; and then either on hearing the cause, or advising it at home, the Lord Ordinary either decides it on the facts stated and admitted, or remits it to the Jury Court.²⁰²

Even after the relative success of the Jury Court and its requirements for detailed separate averments of fact, not rhetoric nor evidence, litigants still generally preferred to persuade a judge of the probability of their positions in the pleadings by incorporating averments of why their averments of facts should be preferred and the evidence which could be led to support them, even in the face of the provisions of the A.S. 1800 and 1810. The pleadings were

generally composed of a statement of facts, blended with a rhetorical exposition of the motives and conduct of the parties, and misplaced

²⁰¹ i.e. 1810.

²⁰² Answers of Lord Cringletie, *Commissioners' Report, 1824* pp. 101-2.

arguments upon their import, insomuch that it is often difficult not to lose sight of the facts of a case, buried in this mass of pleading'.²⁰³

The reasons why this was so are examined below and in the next Chapter.

(xvi) The 1824 Commissioners' Report: A New Scheme for Written Pleadings.

Following the evidence submitted to them, the Commissioners by 1824 had made their proposals relative to the preparation of causes in the Court of Session.²⁰⁴

Ignoring the prodigious evidence in relation to the preparation of Summons and Defences, and concentrating upon their brief, the commissioners started with the first hearing before the Ordinary. Full disclosure of the respective averments in point of fact and of the pleas to be deduced from them was to be the rule, and the rule, they proposed should be enforced imperatively. All documents to be founded upon now had to be produced along with the summons and the defences.²⁰⁵ After the hearing on the summons and defences the Lord Ordinary required both parties to state explicitly whether they held the summons and defences as containing their 'full and final statement of the facts' and if so, the record was to be minuted to that effect, signed by Counsel for both sides and would foreclose any new averment in point of fact at any later stage. If the parties did not so agree, or if the Ordinary did not consider the statements sufficiently distinct and explicit he was to order the pursuer or defender as was the case, to give in, the one a condescence and the other an answer, or mutual condescences from both, of the facts which they 'averred and

²⁰³ Answers of John Hay Forbes, Sheriff Depute *Commissioners' Report*, 1824 p. 128

²⁰⁴ We here concentrate solely on the form of process and the role of written pleadings within the Report. As per their instruction the commissioners also reported on jury trial although with inconclusive results.

offered to prove' in support of the summons or defences. The form of condescence was to be as regulated by A.S. 7 February 1810 with the Lords discharged to pay the 'strictest attention' to the enforcement of its terms. In addition, each fact averred had to be reduced into the form of a 'positive and substantive proposition' beginning with a 'set form of words such as The Pursuer, or Defender, avers and offers to prove' instead of the more usual 'loose narrative style' - with the same applying to answers.

Where Condescendences and Answers were ordered, revisal was to be allowed in all cases 'in order finally to adjust' averments, delete averments or to make admissions, as appropriate. The time allowed to lodge the condescence and answers was to be fixed 'on due consideration of the of the circumstances' and not extended or prorogated unless 'special cause was shewn'.

Once the averments in point of fact had been thus settled, the pleas on which the parties meant to rely, were then to be set forth. Following a similar procedure as with averments of facts the parties would be called upon to state whether their respective statements likewise contained for the one the pleas and grounds of action and for the other the defence in point of law; and where the parties did not so agree, the Court would then order them to give in short and concise notes, signed by their Counsel 'stating in the shape of distinct and separate propositions, the pleas or matter of law' which they were respectively to maintain, 'unaccompanied by any argument; but with a brief citation (by mere reference to the names, pages, chapters, sections &c.) of the authorities relied upon.' The orders for giving in such notes was to be strictly enforced. On completion of the above stages, the cause was then to be enrolled

²⁰⁵ with the power to order diligence for recovery of documents on 'cause shewn'.

before the Lord Ordinary for the purpose of the record being finally made up, and the cause was to be disposed of by such order or judgment as the Lord Ordinary thought the shape and nature of the case would require, but before doing so the Lord Ordinary would finally close the record by authenticating with his signature the adjusted condescendences, or condescendences and answers and relative note of pleas.

The Commissioners proposed that the decision of the Ordinary on the merits would be final, (i.e. no representations) and no reclaiming petition would be competent against the interlocutors of the Ordinary in the preparation of the cause. But on a note within a certain short time, desiring review of any such interlocutor or order, reclaiming was possible but with power to the Ordinary to supersede making such a report till the preparation of the cause was 'farther proceeded in or completed'.

The Ordinary was to be expressly provided with powers to suggest to the parties any improvements in the pleadings or new pleas in law which occurred to him to be relevant to the cause.

When the record was completed and closed by judge's signature, the revised condescendence and answer was to be held as the final record, foreclosing the parties as to averments in point of fact; and no further amendment of the libel would be allowed, after authentication by the Judge. The one and only exception to this was if a matter of fact had emerged *noviter veniens ad notiam* but only with the permission of the Ordinary or the Court, by means of a special application for leave to state such facts, which could be allowed subject to expenses.

The Note of pleas authenticated as before was to be held as the record of the grounds in law to which the future arguments of the parties were to be restrained.

The commissioners proposed that the first or preliminary stage of the proceedings would terminate at this point. The averments of the parties in matter of fact and their pleas in matter of law, being fully disclosed and adjusted, the cause would be ready for further discussion and the Ordinary would then either decide the cause upon the admissions of the parties, or order the facts to be ascertained by jury trial, or do otherwise as to him seemed most just and expedient. Discretion would be left to the Ordinary to (i) take time to consider the record and thereafter pronounce his judgment or (ii) order a further hearing, or (iii) order (if expedient) Cases in writing to be prepared and lodged by the parties, and to be seen, interchanged and finally adjusted between them, so that arguments in point of law met each other. When cases were lodged, the Ordinary could still call the parties again to the bar and give them an opportunity of being further heard before pronouncing sentence. Every judgment of the Ordinary on the merits of the cause was to be accompanied by a special finding with respect to the matter of expenses, giving or refusing them in whole or in part.²⁰⁶

(xvii) The 1824 Bill.

The Commissioners' Report formed the basis for the 1824 Bill. Drafting the Bill was entrusted to one of the Commissioners, G.J. Bell, but it was not to have an easy passage. It was presented in 1824 and attracted criticism from all quarters.²⁰⁷

²⁰⁶ p. 9.

²⁰⁷ The WS Society, (*Report and Additional Report to The Society of Writers to the Signet, by a Committee appointed to consider (etc.) approved and adopted as the Resolutions of the Society ... on 15th and 22nd November 1824'* (Edinburgh, 1824), the SSC Society, the noblemen, freeholders,

Cockburn, with his usual drama, wrote that the air was darkened with 'all the flights of pamphlets'²⁰⁸ and as well as the professional bodies, there were many pamphlets from individuals, often published anonymously.²⁰⁹

The Faculty in particular were vehement in their criticism of the Bill. They appointed a Committee under the Convenorship of John Hay Forbes²¹⁰ which reported on 17th August 1824 and which was approved in whole by the Faculty. The Report²¹¹ was a root and branch attack on the Bill which had been drafted under Bell's supervision. They attacked the language of the Bill which they considered departed from 'technical accuracy, leaving room for much doubt and discussion as to what ought to be the form of procedure in Court.'²¹² For the Faculty, litigation was best left in hands of the parties and their advisers.

'Let parties conduct their cause in the manner they think best. It is no part of the business of the Judge to do more than to decide the case which the parties present to him ... Your Committee cannot help thinking that it may be doubted whether the Lord Ordinary can know what is the proper statement of facts so well as the parties, and that it will be more expedient to leave the conduct of a cause in these respects with the parties themselves.'²¹³

JPs and Commissioners of Supply of the County of Edinburgh all presented petitions to the House of Lords (*House of Lords Journals*, Vol. 56, (1824), pp. 396, 405, 428); and along with the magistrates, Town Council of the Royal Burgh of Irvine, the Dean of the Faculty of Advocates and the Clerks of HM Signet, they presented petitions to the House of Commons (*House of Commons Journals*, Vol. 79 (1824), p. 507).

²⁰⁸ Memorials, *op. cit.* pp. 409-10.

²⁰⁹ See for example, (Peter Campbell) [The Author]: *Objections to the Proposed Bill (etc.) and Suggestions for Remodelling the Bill or Framing Another* (Edinburgh, 1825).

²¹⁰ who, it will be recalled had given evidence to the Commission and was, following the passing of the Act, to be elevated to the Bench with the collective judicial responsibility for enforcing the new provisions. See Phillipson, *op. cit.* 156-7.

²¹¹ *Report of The Committee of the Faculty of Advocates Appointed to Consider a Bill, Entitled, 'An Act for the Better Regulating of the Forms of Process in the Courts of Law in Scotland*, (Edinburgh, 1824).

²¹² Faculty Report, p. 3.

²¹³ Faculty Report, p. 6.

Being forced to state pleas '*in initio litis*' would occasion delay, expense and embarrassment.²¹⁴ For it to be competent for the Judge to add pleas to Notes of pleas, was, for them, anathema.²¹⁵

The Lord Ordinary's judgment in the Outer House as final also discomforted the Faculty.²¹⁶ Without a power of review, in their opinion, it could

'induce an indolent Judge (*si fas sit dicere*) not to study the cases beforehand, trusting to the discussion by counsel which he must listen to; while a Judge who reads and studies the cases will probably make up his mind on the cause before hearing the counsel.'²¹⁷

Written pleading, they argued, was the better method of proceeding in the course of litigation.²¹⁸ It was of grave concern to them that a cause could be decided without any written pleadings at all.

'For if no cases have been ordered in the Outer House, it is not imperative in the Inner House to order cases, power only being given to that effect: so that a cause may go to the House of Lords without having ever been discussed in a written argument. Now this appears by far too great and too sudden a

²¹⁴ Faculty Report. p.7

²¹⁵ In previous practice the Ordinary was empowered to suggest pleas which if inserted would be considered relevant, but by this time, the content of the pleading was firmly in the control of the advocates and the power was rarely exercised.

²¹⁶ pointing to the power of review being competent in the Roman Code, being part of the judicial code in France, the Netherlands, in Savoy and Piedmont and 'probably every country of Continental Europe adopting the Roman Code' including the Parliament of Paris. (Faculty Report, pp. 13-15) See Bell's criticism and refutation of this in *Examination*, (cit. below) at pp. 105, 108.

²¹⁷ *ibid.* This concern was to exercise the Faculty for the next fifty years.

²¹⁸ 'an argument is never so thoroughly and surely sifted as in writing ... besides affording the utmost certainty to the parties that their cause has been well and anxiously pleaded, is often most valuable in maturing the doctrines of the law, or in bringing it back to its true principles ...' Faculty Report, p. 18.

departure from the system which the Country, the Judges, and the Bar have been so long accustomed'.²¹⁹

Under fire, Bell wrote his excellent 'Examination of the Objections Stated Against the Bill,'²²⁰ answering every point made against the Bill by the Faculty.²²¹ He stingingly concluded that the Committee of the Faculty, in framing the Report, had been motivated, 'if possible, to defeat the reformation proposed, in the most prominent and useful points.'

Although Bell in his Examination was technically correct in all his assertions and particularly strong in his refutations of the Faculty's arguments against the Bill, and whilst the piece was so good it deserved a higher prominence than it received, nevertheless his writing so provoked the Faculty and the profession in general that a sacrifice was called for and it was Bell himself who was put upon the altar. Further drafting and refining of the Bill was removed from him. The task of drawing up the second and final bill was entrusted to the Lord Advocate,²²² although it followed closely the Commissioners' recommendations. The Bill was passed and the 1825 'Act for better regulating of the Forms of Process in the Courts of Law in Scotland' (colloquially known as the Judicature Act and later as the Court of Session Act 1825) became law on 5th July 1825.

²¹⁹ Faculty Report, p. 19.

²²⁰ (Edinburgh, 1825).

²²¹ as well as the WS. C.f. Faculty's Riposte - *Remarks on the Report of the Committee of the Faculty of Advocates, appointed to consider the Provisions of the Bill for the Better Regulation of the Process of the Courts of Law in Scotland* (London, 1825).

²²² For the sad story of Bell's fall from grace, see Phillipson, *op. cit.* pp. 156-7.

(xviii) Conclusion.

At the end of the eighteenth century, whilst Edinburgh was enjoying what was to be its Golden Years of the Enlightenment, the sorry state of its supreme court with its antiquated civilian based procedure, the increasing backlog of business and the numerous appeals to the House of Lords had been the catalyst which had prompted the early attempts to implement jury trial, which in turn had so touched the sensitivities of the Scots lawyers. The old civilian concepts of lengthy presentation of parties' pleadings in writing and the facility for repeatedly bringing matters before the judges for review and rehearing (and thus it was never too late to commit and correct mistakes) were ill suited for a court compelled to change. The separation of fact and law and restriction in pleading in writing had been the goals and much of the thinking which would inform subsequent changes to the procedure and manifest itself in the Court of Session Act 1825 had already been completed twenty years before. The Act introduced Scots civil procedure to the institution of the 'closed record' which has continued to be a part of procedure ever since. The work of the 1824 Commissioners was translated into many of the provisions of the Act, but whilst the Act was in parts novel and innovative, the reaction of the profession at its implementation was to push Scot law away from the intended direction.

Chapter Three

The Development of the 'Form of Process', and the Rôle and Rules of Written Pleadings.

(i) Introduction

In continuing to chart and analyse the modern development of written pleadings in Scottish civil procedure we might again ask the second question posed in the Introduction – how was it that written pleadings and the rules of written pleadings arose? Very simplistically, the answers lie in the development of procedure in the Court of Session in the nineteenth century following the 1825 and the 1850 Court of Session Acts. There has been no recent assessment of this development¹, although the practice books and modern writing on written pleading all contain the 'rules' and cite cases from this period as authority for propositions therein stated. It is generally accepted that written pleadings as a system originated in the Court of Session Act 1825 and whilst this is true, it does not present the whole picture.

It is submitted that it is not generally understood why the rules of written pleading developed as they did nor the reasons for what was to be an erosion of the 1825 statutory scheme. The following is excerpted from the recent *Report by the Working Party on Court of Session Procedure* (Chaired by Rt. Hon. Lord Coulsfield) (Edinburgh, 2000).

¹ Lord Cullen and the Working Party under Lord Coulsfield both touched on the topic. See The (then) Hon. Lord Cullen, *Review of the Business of the Outer House of the Court of Session*. (Scottish Courts Administration, Edinburgh, 1996) Chapter 4, pp. 25ff., and *Report by Working Party on Court of Session Procedure* (Chaired by Rt. Hon. Lord Coulsfield) (Edinburgh, 2000), Chapter 6. MacKenzie, 'Written Pleadings' (2003) Chapter 2 contains what is described as a 'Historical Background' but the treatment there is rather light, and does not attempt an analysis of how the rules of written pleading developed in the period.

'In its early stages,² the reformed procedure was very much under the control of the court... what was being done seems to have been very close to what is now called case management, of a detailed kind... There are a number of matters in relation to the development of the pleadings from 1850 onwards which are not entirely clear. It is not clear precisely why the case management system ... was departed from... It is also not clear how far the injunctions that the pleadings should be brief, and confined to the necessary minimum matters of fact, were observed in practice... A third point which is not entirely clear is why the pleadings began to be elaborated...'

We will examine the modern rules of written pleading in the next chapter. Whilst many of the rules, practices and conventions of modern practice have their genesis and origin in the period 1825 onwards, in what follows, an attempt is made to trace the development of written pleadings from 1825 onwards to the end of the century and, in doing so, to clarify some of the points raised above in the Coulsfield report.

In the period, it is important to appreciate that the development of what became the 'rules' of written pleadings was incremental. During this time, the body of rules regulating written pleadings arose from two sources: first, the terms of the statutory provisions augmented by acts of *sederunt* made by the Court and secondly, their practical operation through decided cases. At the time, whilst Cockburn described the Act as 'invaluable',³ for many, the changes were almost revolutionary, despite the fact that in some places the changes merely incorporated previous rules which had fallen into desuetude or, at least, perennial non-observance. The 1825 Act and the ensuing acts of *sederunt* all contained ideas which had been floating around

² *viz.* after 1825

³ H. Cockburn, *Memorials of His Time*, (Edinburgh, 1856) p. 409.

since the start of the century.⁴ In particular, the manner of coercing parties to join issue on disputed fact and the Court's attempt to keep separate fact and law, had had their genesis in the previous period.

With the reforms, the old manner of presenting written pleadings was supposed to be consigned to history. What actually happened was that the new system was modified by practice and slowly some of the former practices crept back in. That is not to say, however, that the new system was abandoned or transmogrified into the system of old.

It is important to stress that it was attempts by practitioners to avoid the peremptory requirements of the provisions, in the best interests of their clients as opposed to any pre-conceived notion of overturning the new order (albeit such a recourse was often considered to be in those best interests) as well as the Court's acquiescence in this, which resulted in the incremental development of the procedure of the Court from which emerged what we would now term 'rules' of written pleading. A reading of any of the works on practice of the initial period 1825 - 1849 might suggest that the new system worked well and that a cause could proceed efficaciously through the Court, but any such suggestion would be far off the mark. The profession, for reasons explored below, made repeated and concerted efforts to revert to the style and practice of the earlier period.

The century was to see another two statutes directly affecting written pleadings,⁵ and two occasions when radical and far-reaching proposals for written pleadings got

⁴ Æ. J. G. Mackay, 'A Sketch of the History of Scots Law' 1882 (26) *Journal of Jurisprudence* (in 2 parts) 113; 225 at p. 233

as far as Bills but were ultimately abandoned.⁶ There were also various statutes passed affecting the Court,⁷ as well as copious acts of sederunt. The century was to see another two Royal Commissions⁸ directed *inter alia* to examine written pleading. In both cases, whilst the Reports⁹ produced were disappointing,¹⁰ the evidence received by both Commissions provides a fertile source for assessing what was happening in practice regarding the form of process and the use of written pleadings at these times.

In later chapters, we consider the modern rules of written pleading and thereafter evaluate their continuing rôle, examining how they operate in the modern era. From this we may draw conclusions as to how changes to civil procedure are implemented, why these changes often produce unexpected results, and how, in time, they become altered by practice. For the present, it may be suggested that changes to civil procedure and the methods of pleading before the Court of Session have always been corrupted by their practical operation. Thus, for example, the acts of sederunt of the previous period were initially obtempered, and thereafter irregularly followed until they were not actually followed in practice at all.

⁵ Court of Session Act 1850, Court of Session Act 1868.

⁶ In 1848 and 1863.

⁷ Notably Court of Session Act 1830 abolishing the Jury Court and fusing its jurisdiction with the Court of Session.

⁸ *First Report From His Majesty's Law Commissioners, Scotland. (Pursuant to Address 9th May 1834) 12th May 1834* (P.P. xxvi 1834) (H.C. 295) (London, 1834) *Second Report From His Majesty's Law Commissioners, Scotland. Presented to both Houses of Parliament by His Majesty's Command* (P.P. 1835) (London, 1835) *First, Second, Third, Fourth and Fifth Reports of the Commissioners Appointed to Inquire into the Courts of Law in Scotland* (P.P., Edinburgh, 1868-71) viz. 1868-9 [C.4125]; [C.4188] xxv 29 & 423; 1870 [C.36]; [C.175 & 175-1] xviii, 455 and 511; 1871 [C.260] xx 257.

⁹ *First Report of the Commission op. cit.* (1834) and *Report of the Commission* (1871).

¹⁰ Lord Gill has commented that 'throughout all of the evidence tendered to these Commissioners, there was no radical proposal which in any way challenged the basic preconceptions of the system', 'The Case for a Civil Justice Review.' 1995 40 J.L.S.S. 129 at p. 132.

Provisions of the Court of Session Act 1825 and its satellite acts of sederunt suffered the same fate.

The following consideration of the development of written pleadings and the 'form of process' will spotlight three themes which will be explored later. The first is the importance of the reception given to changes to the 'form of process' and written pleadings by the users – litigants, and their solicitors and counsel. It is a basic truth that changes in civil procedure affect litigants and following such changes, their cases must be handled in a new way. But the handling is done by specialised legal advisers and if they deem the changes to be detrimental or prejudicial to their client's interests, at least compared to the prior practice, then it is human nature to attempt to revert to that prior practice. If the changes are welcomed, then they are more likely to continue to be applied. It is suggested that it all depends upon whether the changes are generally adhered to. Related to this, the second theme explores how those charged with the judicial responsibility for enforcing such changes react to attempts to revert to prior practice. Again historically, the provisions of acts of sederunt were clearly not enforced by the judges as time passed. Courts can provide solutions or remedies or alternative and innovative procedures but it is the users and those charged with enforcement who ultimately determine their future course. In the period under consideration, parties increasingly used the developing rules of pleading against their opponents to their own advantage and the judges generally did not exercise statutory powers vested in them to act in a manner which might now be termed 'pro-active' or 'interventionist'. Thirdly, changes to the permitted methods of leading evidence and the development of the law of evidence, led to changes in litigants' preferred choice for the final disposal of actions. Proof by commission was removed, jury trial became unpopular and proof before the

Ordinary became, following the 1850 Act, the Conjugal Rights (Scotland) Amendment Act 1861¹¹ and the Evidence (Scotland) Act 1866¹² the preferred choice for taking proof. These changes to the methods available for proving averments led to changes in how pleadings were presented.

Before examining the development of the form of process in this period and the rôle and rules of written pleading, there are two further points which should be noted. First, the threat of wholesale incorporation of the styles and terminology of English civil procedure was never far away,¹³ particularly around the late 1850s and early 1860s when the common law procedure of Westminster Hall was frequently cited as a viable alternative to traditional Scottish methods. In the event, English concepts in pleading were borrowed and succeeded more often than might be appreciated. Even in the literature, English pleading terms crept into usage.¹⁴ 'Confession and avoidance' could be equated with the Scots pleading of an exception, and 'traversing' associated with a denial and explanation by statement of facts. The plea to the relevancy was frequently associated with the English common law plea of demurrer, or demurrer on a declaration,¹⁵ which association caused problems for, and some dubious decisions in Scottish appeals to, the House of Lords.¹⁶ Jury trial practice continued to innovate on the traditional forms of process and it was not surprising that English ideas in English jury practice were absorbed into Scottish practice.

¹¹ c. 86.

¹² c.112.

¹³ e.g. see M'Glashan's reproduction of long passages from Stephen on Pleading. M'Glashan, *Practical Notes*, 2nd ed. (Edinburgh, 1842) pp. 273-4.

¹⁴ M'Glashan considered that comparison of the English and Scottish system of pleadings was 'not without advantage'. M'Glashan *Practical Notes op. cit.* p. 273.

¹⁵ the English equivalent of a libel.

¹⁶ See Chapter 5 *infra* and discussion below.

Secondly, the revisions to the method of pleading in writing and the new emphasis on *viva voce* pleading resulted in a decrease in the use, citation and quotation of the old Civilian texts and authorities.¹⁷ This was apparent in the years following the 1825 Act, but their citation had lived on in the 'written cases' or 'minutes of debate' procedure. Section 14 of the Court of Session Act 1850 sounded the death knell for this kind of pleading in writing before the Ordinary: It provided

'that it shall not be competent to the Lord Ordinary to direct cases or minutes of debate,¹⁸ or other written argument, to be prepared by the parties whether for the use of himself or the inner house.'

Seven years later the Council of the SSC Society reminisced about the old written minutes or cases concluding that they had formed 'a permanent source of legal knowledge of the greatest value'¹⁹ and a year later, an editorial in the *Journal of Jurisprudence* concluded that 'law learning' in Scotland had suffered as a result:

'[There is a] total disappearance of anything like general learning in the mode in which cases are handled. Pothier, and Voet, and Vinnius, and the *Corpus Juris* and all the familiar works of ancient days, occur no more. Listen to the best speeches in the court, and you hear nothing in the shape of

¹⁷ T.B. Smith remarked in his 1963 Hamlyn Lecture that, 'one interesting indirect consequence [of oral pleading was] ... the virtual disappearance of citation from the *Corpus Juris* of Justinian or of the learned Civilians such as Voet and Heineccius' T.B. Smith, *British Justice : The Scottish Contribution*, Hamlyn Lectures, 1963 p.76.

¹⁸ As explored in Chapter 2, in pre-1825 practice, the Ordinary could order 'Minutes of Debate' after the discussion or debate on the summons and defences and latterly the condescendence and answers. They tended to be rhetorical, argumentative and florid expositions of each party's case on the merits and sought to persuade the Ordinary to decide in the client's favour without proof, i.e. on the probability of the truth of the pleadings. This writ was retained in the 1825 Act (s.16) under the appellation 'written case.' By the 1840s both terms were used indiscriminately, although strictly, in 'shorter or less important questions' they were called minutes of debate. Shand, *op. cit.* p. 339.

¹⁹ *Report of the Council of the Society of Solicitors before the Supreme Courts of Scotland (1857)* [repr. in part, in:] *Business of the Court of Session (1857)* 1 *Journal of Jurisprudence* 274 at 275.

reference to authority, but quotation of a speech yesterday delivered, in all probability by the judge to whom the address is made. The speeches are admirable *ad captandum*²⁰ addresses upon the special case without any reference to those general principles of jurisprudence...Open the Corpus Juris at the present day, before any of the Supreme Courts of Scotland, and you are immediately met with the sneer, that your case must be bad indeed, when it requires such authority. Even the sound sense of Pothier, and the practical sagacity of Voet can no longer command the respectful attention with which they were listened to of yore. Craig is worse than an old almanac; Stair even is antiquated.'²¹

And the editor admonished his readers that the final abolition of traditional pleading in writing

'must necessarily end in rendering our law narrow, contracted, technical, and provincial. It will take away from it its great characteristic of being a code the least encrusted with technicalities, which has existed among the European nations since the fall of the Roman Empire.'²²

It is not the place here to discuss the 'de-civilisation' of Scots Law and its drift²³ towards English law in the mid to late nineteenth century²⁴ but it seems apparent

²⁰ *tr.* 'for the purposes of'

²¹ Anon., 'The Abolition of Written Pleading. Decline of Law Learning in Scotland', *Journal of Jurisprudence* (2) 1858 p. 49 at pp. 49-50. This article seems to have been the source for Crabb Watt's descriptions of the period in his *John Inglis... A Memoir, op. cit.* p. 55. In fact the *Journal of Jurisprudence* seems to have offered him rich pickings for his biography, to the point that it is in places plagiaristic. Paradoxically, it is Crabb Watt's work rather than the original articles which has come to be cited in the literature. See for an example A. Stewart, 'The Session Papers in the Advocates Library' in H.L. MacQueen (ed.), '*Miscellany Four*' (Stair Soc., Edinburgh, 2002) 199 at 216.

²² *ibid.* p. 52.

²³ See R. Evans-Jones, 'Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law', 114 (1998) *L.Q.R.* 228.

²⁴ This whole area is complicated and distinctions can be drawn between what was an ongoing reception of the civil law and its use thereafter as authority in the Courts. However, simply put, the following elements had a bearing on the decreasing use of civil law: fewer Scottish advocates were being educated on the Continent, the increase of case law as

that the neglect of the old Civilian texts had largely occurred by the early to mid nineteenth century²⁵ and this was in part caused by the alterations in pleading required by the 1825 and 1850 Acts. Theoretically, it might have been supposed that counsel could have continued to make use of such authority in oral submission, but it seems that they were reluctant to do so as the 'Latin and French were orally different'²⁶ to citations in minutes of debate.

All of this would fit with Lord Rodger's thesis, based on the observations of Lord Watson between 1851 to 1883, that it was about 1858 that the Court of Session, under Lord Justice-Clerk Inglis, started to welcome the citation of English authorities.²⁷

There is another, perhaps more mundane explanation for this decrease in oral citation of civilian authority. As we shall observe, the time permitted by the Court to counsel, to expound their positions on record, was very frequently circumscribed.

(ii) The Scheme of the 1825 Act and the New Judicial Duties.

The Court of Session Act 1825 received Royal Assent on 5 July 1825 and a number of acts of sederunt followed, the most important being A.S. 29 November 1825 and A.S. 11 July 1828. The Act and the A.S. 29 November 1825 followed closely the Commissioners' recommendations. Fact and law were now to be separated and kept

precedent, contemporary interest in English law from the Union onwards, and the assimilation of laws regulating matters of commerce as well as here discussed, the changes in written and oral pleading.

²⁵ It was certainly about this time. Alan [Lord] Rodger, has placed it in this period ('Thinking About Scots Law' 1996 *Edinburgh Law Review* p. 3 at p. 14), T.B. Smith, *A Short Commentary on the Law of Scotland*, (Edinburgh, 1962) 'in the nineteenth century' at 23-4, and Professor Cairns, 'by 1832', (*History of Private Law*, *op. cit.*) vol. I, p. 177. Robin Evans-Jones has suggested that it was exposure of the 'weak' legal Scottish system to the 'strong' English one which effected reception. R. Evans-Jones, 'Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law' (1998) *LQR* 228.

²⁶ The Abolition of Written Pleading, *op. cit.*, p. 51.

²⁷ Alan [Lord] Rodger, 'Thinking About Scots Law' *cit sup.* p. 16.

apart to the point of disposal of the cause. The Judges were provided with statutory powers to force practitioners to do so. It was now actually illegal to hear debates until the precise issues of law and fact had been determined and pleaded,²⁸ and a cause could theoretically proceed to a conclusion on *viva voce* pleading alone.

Written pleading was to be used sparingly and, where it was permitted, it had to be in conformity with the provisions, spirit and intention of the new Act.

There were few carrots and many sticks to enforce the profession to 'play ball'. The new form of process was peppered with sanctions for default and conferred on the Ordinaries considerable powers to force compliance.²⁹

Briefly, the scheme was as follows.³⁰ The summons continued in its usual form and there was little change in the preliminaries of signeting, citation, service and calling.

²⁸ Phillipson, *op. cit.* p. 147.

²⁹ The main sanction was that of expenses, a topic which had figured prominently in the submissions made to the commissioners in 1824. Arguments about expenses were to cause a flood of satellite litigation. Historically, expenses as a sanction had operated in the Court of Session on a more informal basis. The 23rd Article of the Regulations 1695 had provided that 'where a bill was groundless, or in its length superfluous and litigious', the Court was to 'fine the Advocate subscriber and party in such a pecuniary mulct, to be instantly paid, as they shall judge reasonable' and at the conclusion of causes, where a party's conduct in his prosecution of the cause had resulted in 'expences and damage' to the other party, that party could apply to the Lords, whereupon the Court could 'decern for' these expenses, or where they were considered extravagant, 'tax and modify' them. A.S. 6 February 1806 had formally regulated the amounts of expenses of judicial proceedings in the Court of Session and by 1809 President Campbell (*Sketch of a Report (1809) op. cit.*) could note that 'allowance of further parts of procedure '[were]'seldom allowed without a previous payment into the clerk's hands of so much money to account of the other party's expences, as the delay of giving timeous and sufficient information, must generally arise from the negligence or undue conduct either of the party himself, or of those who conduct his case'. A year later, the Second Report of the Commissioners 1810 reported 'that is it the province of the Judges to settle Accompts of Expences, or to give Costs of Suit in such cases and in such manner as they shall think proper, either by fixing the amount in the special case before them, or by laying down general rules for taxing Accompts.' In the first three years of Shaw's Reports, 26 cases dealing solely with expenses are reported and by 1833, it was 'usual to conclude for expenses in the summons' (Darling, *Practice op. cit.* pp.139-40).

³⁰ I have restricted this to the parts of the Act relating to the preparation of the parties' pleadings to the point of the record being closed. I have included the provisions of A.S. 11 July 1828 although it should be stressed that the A.S. was issued to correct practices which

Where defences were lodged containing dilatory defences, the Lord Ordinary's first duty was to dispose of them, by sustaining or repelling those dilatory defences,³¹ thereafter examining the accuracy of the summons and defences upon the merits.

In the summons, the pursuer was required to set forth, in 'explicit'³² terms, 'the nature, extent, and grounds of the complaint or cause of action and the conclusions which, according to the form of the particular action, the said pursuer or pursuers shall, by the law and practice of Scotland be entitled to deduce therefrom'³³ and in like manner the defenders in their defences were required to state, in explicit terms, 'every defence, both dilatory and peremptory, on which he or they means to rely' in particular, meeting the 'statement of facts and the conclusions deduced from them in the pursuer's summons either by denying the facts therein stated, or by admitting the same, and in answer setting forth in explicit terms, the facts on which the said defender or defenders found', subjoining a summary of the pleas in law which were to be maintained by the defender(s).³⁴

had emerged from the practical operation of the new form of process. Revisal of the pleadings is dealt with below.

³¹ subject to reclaiming. Beveridge, *op. cit.*, p. 295-7.

³² In the bill, it had been 'positive'. The Act significantly tightened the language in this regard. The Bill had narrated that the pursuer would 'set forth, in positive terms, the nature, extent, and grounds of the demand therein made, and the conclusions which, according to the form of the particular action,' he 'shall, by the law and practice of Scotland, be entitled to deduce,' and in like manner, 'the defender and defenders shall, in the defences, state every defence, both dilatory and peremptory, on which he means to rely; and shall, in particular, meet the statements of facts, and the conclusions deduced from them, in the pursuer's summons, either by denying the facts therein stated, or by admitting the same; and, in answer, setting forth, in positive terms, the facts on which the said defender or defenders mean to rely, subjoining a summary of the exceptions or defences, in point of law, which are to be maintained.' (emphasised passages were altered) See James Fergusson, Advocate, *Observations Upon the Provisions of the Bill Presented to Parliament Relative to the Trial in a Separate Tribunal of Issues of Fact arising in Actions Instituted Before the Supreme Civil Court of Scotland* (Edinburgh, 1824) p. 28.

³³ s. 2 1825 Act.

³⁴ *ibid.* s. 9 of the 1828 A.S. required the pleas to be 'short and concise' and 'without argument.'

The pursuer's 'explicit' terms in his summons were to be met by admission or denial although the defender could also provide a separate statement of the facts founded upon by him in his defence.

By section 3, the parties were required to produce the deeds or writing on which they respectively founded.

The record was to be the focal document for the determination of any further procedure. Now, neither the Lord Ordinary, nor the Court, could proceed to give judgment until the 'respective averments of the parties in fact, and their pleas in matter of law' had been set forth on the record, the record made up and authenticated. Most importantly, parties would now be barred from advancing any further averment of fact at the point that the record was closed. Initially the import of this was not fully appreciated. If the record contained all the matters of fact upon which parties could adduce evidence, where proof of fact proceeded as a jury trial,³⁵ there could be discussion at the point of framing issues as to the scope of proof. But later, when the common methods of adducing evidence came to be in proof or proof before answer before the Ordinary, the inter-relationship between pleadings and proof required development of new rules.

It was the statutory duty of the Lord Ordinary to 'examine into the accuracy of the summons and defences, and to mention to the parties', at a calling of the cause, if anything 'occurred to him'. At this calling the parties were expected to be prepared to state whether a condescence and answers, in their opinion, would be later required.

³⁵ the alternative was proof by Commission.

Having repelled all dilatory defences, and having satisfied himself that the summons and defences were 'in point of fact sufficiently explicit, and correctly deduced in point of law, and that no further disclosure of the facts or of pleas' was necessary for the due preparation of the cause for trial,³⁶ the Lord Ordinary then required the parties to state whether they held the summons and defences as containing their full and final statement of facts and pleas in law. That being so, the record was made up.

Where the summons was imperfect, (in the opinion of the Ordinary), he could dismiss the action or order an amendment of the libel.³⁷ Likewise, where the defences were imperfect, he could order defences 'more satisfactory and correct to be given in', awarding expences against the defender for 'imperfect or evasive defences', or he could order new or additional defences.

Where additional papers were ordered, a strict time period was fixed for this purpose.³⁸ Amendment of the libel or the allowance of new or additional defences was permitted, when the originals were insufficiently clear and positive in point of fact or correct in point of law, in both cases to be lodged within a strict period of time.³⁹ Once amended, if the Ordinary was satisfied that they were 'in point of fact sufficiently explicit, and correctly deduced in point of law, and that no further disclosure of facts or of pleas' was 'necessary for the due preparation of the cause for trial' he required the parties to state that they held the summons and defences as

³⁶ The most common disposal was by jury trial.

³⁷ s. 6.

³⁸ s. 44 A.S. 1825.

³⁹ *ibid.*

containing their full and final statement of facts and pleas in law in the manner before noticed.

In the event that the parties⁴⁰ did not agree so to hold the summons and defences, or where the Lord Ordinary considered fit, he could order the parties to give in, the one a condescence and the other an answer or mutual condescence,⁴¹ setting forth, 'without argument', the facts which they 'averred and offered to prove' and in these, the parties were required 'in substantive propositions, and under distinct heads or articles' to set forth 'all facts and circumstances pertinent to the cause of action, or to the defence', which they respectively 'alleged and offered to prove.' A definite period was fixed for the lodging of these pleadings,⁴² attracting sanctions for failure to do so.⁴³

Once the condescences or condescence and answers were lodged, the parties were permitted respectively to 'revise' them 'in order fully to meet the opposite averments.'⁴⁴ From there, the revised condescence and answers were lodged and held as a 'complete paper'⁴⁵ containing the whole averments in point of fact,

⁴⁰ my emphasis.

⁴¹ simultaneously producing all documents or writings on which they were founding. c.f. Ch. 6, p.2 of the *Report by Working Party on Court of Session Procedure* (Chaired by Rt. Hon. Lord Coulsfield) (Edinburgh, 2000) 'Darling explains that after a summons had been served and defences lodged the pursuer was allowed to lodge replies' This seems incorrect. Darling's treatment is as here defined, following the Act and A.S. See Darling, *Practice op. cit.* 196 – 206. In the Sheriff Court, the reply was part of the procedure. See e.g. J. M'Glashan, *Practical Notes on Jurisdiction and Forms of Process in Civil Causes of the Sheriff Courts of Scotland* (2nd ed.), (Edinburgh, 1842) pp. 199 and 208.

⁴² s. 12.

⁴³ s. 50 of the Act of Sederunt

⁴⁴ s. 9.

⁴⁵ What this meant was that the condescence and answer (or mutual condescence) had to contain the whole averments in point of fact, admissions or denials without referring to the previous papers (summons and defences or any amendments thereto) as it was deemed that the parties had passed from any allegations in the former papers, unless these were specifically and distinctly stated in the condescence and answers. These allegations could

admissions or denials respectively and accompanied with a note of the pleas in law, stating the matter of law in distinct and separate propositions, without argument, but accompanied by a reference to the authorities relied upon.⁴⁶ Importantly, where 'a statement in point of fact within the opposite party's knowledge' was averred on one side and not denied on the other, he was 'held as confessed'.⁴⁷

A cause was then ordered to the motion roll.⁴⁸ At the hearing thereon, the parties were required to be prepared to 'attend to any suggestion of the Lord Ordinary, as to any new plea' which appeared to him 'necessary to exhaust the disputable matter in law or in fact in the cause.'⁴⁹ The pleadings were finally adjusted before the Ordinary and he was directed to hear parties' explanations, again to examine the statement of facts and of the pleas, again suggesting any new plea which to him appeared necessary to exhaust the whole disputable matter in law or fact. Then the revised condescendence and answers and the relative notes of the pleas were to be signed by counsel, and 'the record⁵⁰ of the pleadings' as adjusted was authenticated by the Lord Ordinary.

not even be incorporated into the condescendence or answers by reference. *Ross v. Hall* 15th June 1820. Thus, admissions in summons and defences could be retracted. But any new allegation in a condescendence, contradictory to the summons required amendment of the libel. *Dickie v. Gutzmer* (1828) 6 Shaw 637, *Ewing's Trs. Farquharson* (1829) 7 Shaw 464.

⁴⁶ s. 9.

⁴⁷ s. 48 AS. Note the re-incorporation of the *ficta confessio* and the translation of the content of the earlier AS. (see Ch. 2)

⁴⁸ in practice parties enrolled the cause on the roll. Shand, *op. cit.* p. 334.

⁴⁹ The Ordinary furnishing the parties with a note of the new plea, in order that, before calling, they had time to consider it. It still had to be adopted by the parties though. Beveridge, *op. cit.* p. 318.

⁵⁰ i.e. as comprised of these adjusted condescendences and answers and notes of pleas. This was held to be the record of the pleadings. In modern usage 'record' is pronounced 'recòrd' with the accent on the second syllable. From the context of the use of the word in section 10 of the act here, i.e. 'the record of the pleadings' it is suggested that this pronunciation must have arisen later.

How the record was to be made up was a matter for the Lord Ordinary and he could competently put the cause into any shape he thought 'most conducive to the ends of justice.'⁵¹ His discretion was significant and he could order papers lodged and revised by parties to be removed. Finally the Ordinary authenticated the record⁵² and the parties were thereafter 'foreclosed' from stating any new averments in fact nor permitted any further amendment unless *res noviter veniens ad notiam*.⁵³ The whole facts to be proved had to be set forth in the revised condescence and answers.⁵⁴

Section 13 of the Act gave the Ordinary a discretion to decide the cause without proof at jury trial, i.e. on the pleadings themselves, when it appeared 'that the Parties have respectively admitted on the Record all the Facts requisite to the Decision of the Cause.'⁵⁵ Section 16 provided similar powers. When the Ordinary considered that the cause, by virtue of 'Admissions, or from the Nature of the Cause' was fit to be discussed in the Court of Session without recourse to jury trial or in other circumstances⁵⁶ he could proceed to decide the cause (i.e. without any proof) or take it to report as he considered expedient and in this he could order the parties to argue the whole or any part of the cause before him, as often as he considered necessary or he could direct the parties to prepare 'Cases in writing'.⁵⁷

⁵¹ Shand, *op. cit.* p. 337.

⁵² s. 10.

⁵³ Beveridge, *op. cit.* p.319-26.

⁵⁴ *Mackay v. Macleods* (1827) 4 Mur. 281, *Cleland v. Weir* (1835) 13 S. 1143, *Neilson v. Househill Coal and Iron Co* (1842) 4 D.

⁵⁵ or he could report the cause to the Inner House. s. 13.

⁵⁶ when parties concurred in seeking to have a question of law or relevancy determined before jury trial, when this was ordered by the Ordinary or Inner House or when the cause returned to the Court of Session on a special verdict.

⁵⁷ s. 16 (s. 22 and s.12 A.S. 1828 regulating the procedure).

It was clearly intended that the Lords Ordinary would act positively (what might today be termed 'pro-actively') to remove irrelevant material from the pleadings. Section 4 prohibited the Lord Ordinary from giving any judgment on the merits of a cause until parties' fact and law had been set forth on record, and examined by him, with the power given to him to 'mention to the parties, at a calling of the cause, if anything occur to him'⁵⁸ and under the Act, it was the first *duty* of the Lord Ordinary, as a matter of law, to dispose of the dilatory defences and thereafter examine into the accuracy of the summons and defences upon the merits.⁵⁹

Any deviation from the regulations was supposed to sound in expenses against the guilty party. This in itself was to produce copious satellite litigation.⁶⁰

(iii) Strictness and Discipline Under the Judicature Act 1825 – Charles Hope's New Broom.

The Lord President introduced the new form of process and the accompanying regulating acts of Sederunt with a powerful speech to the Court on 12 November 1825.⁶¹ Proclaiming, 'we are now to enter a new era in the administration of justice'⁶² he continued, explaining the whole ethos of the new system and the evils to be eradicated:

⁵⁸ Beveridge, *A Practical Treatise on the Forms of Process; containing the New Regulations before the Court of Session (etc)* (Edinburgh, 1826) 2 Vols., Vol. 1 p. 302. A similar approach was adopted in the sheriff court, the sheriff ordering amendment of the libel or defences. John M'Glashan, *Practical Notes on Act of Sederunt ... and the Forms of Process in Civil Causes before the Sheriff Courts of Scotland etc.* (Edinburgh, 1831) p. 82.

⁵⁹ Beveridge, *op. cit.* p. 295.

⁶⁰ See evidence of Hugh Macqueen, W.S. to the 1834 Commissioners 'Questions of expenses are themselves a source of much expense... and are avoided except in extreme situations', *Ans.* 16, p. 37.

⁶¹ *The Speech of the Right Honourable Charles Hope, Lord President of the Court of Session on moving the Court to pass Acts of Sederunt for the better regulating of the Forms of Process in the Courts of Law in Scotland* (Edinburgh, 1825).

⁶² Speech, *ibid.* p. 5.

‘The great improvement here is, (and a great one it certainly is,) the provision made to foreclose the parties as to their averments in point of fact, at an early stage of the cause, by closing and authenticating the record, and thus preventing the production of new averments to the very last stage of the cause, which, at present, often makes it quite a different one from what it was before the Lord Ordinary.’⁶³

Appreciating that the new system would have to be bedded in, and acknowledging the Faculty’s grave concerns, and the rest of the profession’s unease, he explained that their Lordships were

‘aware, ... that many alterations and amendments would probably be required in the course of the first two or three years’ practice under the new system, we thought it greatly preferable that they should arise out of actual practice and experience which would both point out the evil to be remedied, and the remedy to be applied.’⁶⁴

To operate, the system would require to be implemented by judge, advocate, agent (and litigant) alike, all working in co-operation. The Court’s attempts in the previous period to marshal the procedure had failed because the profession had pressed for, - and the Court (or at least individual judges) had acquiesced in, - erosions of acts of *sederunt* and the return to old forms, each of which formed a precedent for further erosion. Knowing full well the Faculty’s abilities to corrupt and modify a change in a form of process to their own ends, he implored:

‘But, my Lords, it is obvious, that neither this, nor any other form of process which can be devised, however perfect in itself, can possibly succeed,

⁶³ Speech, *ibid.* p. 6.

⁶⁴ Speech, *ibid.* p. 4.

without a cordial co-operation and determination by all persons concerned in the administration of justice, to give it a full and fair trial. On the one hand, the Bar must not start, nor must we listen to captious and frivolous objections, calculated merely to throw discredit on the New System. All such must be discountenanced to the utmost. On the other hand, where a real and unforeseen difficulty occurs, we must meet it fairly, and under the powers vested in us by the Act, endeavour to provide the remedy most consonant with the spirit of it.⁶⁵

The crisis for the Bar was that the system was designed to limit the written discussion of the cause. The old manner of pleading in copious papers was to be removed and pleading in writing drastically restricted. Many must have speculated on how, after initial written pleadings a cause could be argued orally to a conclusion thereafter. More tragically for the Faculty in general, there was to be no place in these new papers for the expressions of learning, the quotations from the Civil Law and the institutional writers, the employment of the arguments drawn from wide and diverse sources which had so encapsulated previous notions of the Bar as a fellowship of learning and wisdom. Even a 'written case' under the new procedure was no substitute for a well drawn (and lengthy) Memorial or Minute of Debate.

How could a cause progress through the Court at such a pace and with little or no opportunity for reflection on the arguments advanced? The Faculty had been groomed in the ancient system of 'ripening and maturing a cause' either by representing to the Ordinary or by reclaiming to the Inner House, originally without limit, with the express purpose of stating all and any reference in law and classical

⁶⁵ Speech *ibid.* p. 7.

learning which could be brought and applied to the facts before the Court.⁶⁶ The Faculty Committee's closely argued Report of 1824,⁶⁷ eulogising this method of proceeding and highlighting the Bar's dissatisfaction with the Bill, which Bill was now on the Statute Book in similar terms, had been brushed aside by the judicature and to boot, mockingly discredited by one of the 1824 Commissioners, Professor Bell.⁶⁸ The disaffection and disillusion felt by the Faculty was almost palpable. Yet the Lord President continued, rubbing salt into the sore,

'We must adhere most rigidly to the regulations prescribed to us by the act.⁶⁹ ... This rigid adherence to form may, and probably will, especially at first, be productive of hardship in particular cases, where, from ignorance or inattention in practitioners, the necessary forms have not been complied with. ... Where deviations take place in the Outer House, the Lords Ordinary must instantly check them, and if any have escaped the Lord Ordinary, and are detected in the Inner House, we must, without hesitation or remorse, remit the cause back to the Lord Ordinary to retrace his steps.⁷⁰

Conscious that the new measures did not commend themselves even to Ordinaries on the Bench⁷¹ and that it was likely that there lurked willing judicial conspirators⁷²

⁶⁶ As Robert Forsyth, Advocate had advised the commissioners in 1824, written pleadings had 'made a learned and accomplished bar' and they enabled 'Judges to meditate in solitude upon cases'. *Answers of Robert Forsyth, Advocate, Report op. cit* p. 138.

⁶⁷ *Report of The Committee of the Faculty of Advocates, Appointed to Consider a Bill, Entitled, "An Act for the Better Regulating of the Forms of Process in the Courts of Law in Scotland"* (Edinburgh, 1824).

⁶⁸ G.J Bell, *Examination of the Objections Stated Against the Bill For Better Regulating the Forms of Process in the Court of the Law in Scotland by George Joseph Bell, Esq. Professor of the Law of Scotland in the University of Edinburgh* (Edinburgh, 1825).

⁶⁹ Speech, *ibid.* p. 7.

⁷⁰ Speech, *ibid.* p. 8.

⁷¹ In particular, much now depended on the interlocutors having finality and not being open to review in the old way. The President warned the judges that they would have to be careful in 'deliberating upon final opinions and interlocutors as now final' (Speech, p.9).

⁷² Lord Meadowbank in 1824 had written to the Commissioners that he doubted that there would be any benefit to administration of justice were pleading *viva voce* increased. For him, pleading in writing was to be preferred as it allowed judges to 'reflect' and it was 'good for

should the Faculty attempt to evade or relax the strictures of the new scheme, he spelled out their Lordships' statutory duties, admonishing them not to rush into the new written cases procedure:

'I have to say in reference to our own duty, ... much of the success of the new system will depend on the discretion with which the Lords Ordinary exercise the power given them by the act, of ordering cases before pronouncing their judgments. On the one hand, to do so in all, or in a great proportion of causes, would counteract the obvious intention of the Legislature, by continuing, in too great a degree, the system of written pleadings. On the other hand, not to order cases in causes of great moment, and great difficulty, would, I am persuaded, be neither satisfactory to the parties, nor conducive to the administration of justice (Where a great variety of authorities, apparently contradictory, or not easily reconciled, have been quoted to the Lord Ordinary in the course of the oral pleadings before him, it is highly desirable that Cases should be ordered.)⁷³

A heavy burden was placed on the Bar, with a dire threat:

If we are, to any extent, to do the business of this Court by oral pleadings, it is absolutely necessary that counsel should adopt a more condensed and logical style of pleading than has hitherto been generally practised. For if the pleadings, which we are now to have so much more frequently, are to bear any proportion, in point of length, to the hearings in presence to which we have been accustomed, we must either shut the doors of this Court altogether, or we must render our sittings permanent'.⁷⁴

the counsel to research.' Evidence of Lord Meadowbank to the 1824 Commission, Commissioner's Report 1824, *op. cit.* p. 192.

⁷³ Speech, *ibid.* pp.10-11.

⁷⁴ Speech, *op. cit.* p.16.

The Bar, never a body openly to welcome innovation in the form of process, and still smarting from the removal of their treasured ancient methods of drawing pleadings, seem to have failed to adhere to the spirit and intention of the Act from the outset, and it was perhaps only to be expected that the Faculty attempted to continue in the manner which they knew best. But in addition, it was not just the novelty which was a disincentive. The new form would hit advocates where it hurt most - in the pocket. Although there had been previous attempts to introduce 'block fees'⁷⁵ for the drawing of pleadings for parts of the process, the Bar was still remunerated per paper⁷⁶ - the more pleading in the form of process, the more remuneration. The new system intended drastically to reduce the papers of pleading thus, in theory, reducing the Bar's source of income.⁷⁷ Moreover, it had been customary to instruct a leading and a junior counsel for any Inner House appearance, particularly where the pleadings were voluminous, but the new procedure of discussion on the revised condescendences and answers was supposed to bring the issues to the fore more quickly. In July 1826 the Court checked the oral submissions at the discussion by limiting the number of counsel appearing before them, Charles Hope considering that the new procedure was bringing parties to issue such as 'hardly to require Counsel at all, much less two on each side.'⁷⁸

⁷⁵ see Chapter 1.

⁷⁶ See Appendix to *Report of The Committee of the Faculty of Advocates, Appointed to Consider a Bill* (1824) where Daniel Fisher, a member of the Committee, had drafted an account of expenses based on the proposals contained in the Bill arguing that the new measures would increase the costs to litigants. The account includes the expenses for the individual pleadings drafted. This was dismissed as 'purely imaginary, and ... according to the fancy or the prejudice of the person engaged in making it up' and dismantled root and branch by Bell in the Memorandum of the Appendix of his superb '*Examination of the Objections*' *op. cit.* 15-30.

⁷⁷ and saving the wretched litigant expenses in the process. See immediately above.

⁷⁸ *Notes by the Lord President on the Subject of Hearing Counsel in the Inner House*, (Edinburgh, 1826) [Ordered by the Faculty to be printed 11 July 1826] p. 6.

Taking the opportunity to reflect on the Faculty's general approach to the new procedure, he continued,

'The President also stated,⁷⁹ that in the previous conversation on the subject which the Judges had held among themselves, it was the unanimous opinion of the whole of them, that great fault lay with the Faculty in carrying through the New Form of Process; that very few condescendences and answers were properly drawn, as mere substantive averments of facts; that the notes of Pleas in Law were often arguments in Law; and that very few of the cases were drawn in terms of the act of Parliament, but were fully as long and diffuse as the old memorials and informations.'⁸⁰

The bugbear for the Judges was 'that while they were obliged to hear longer *viva voce* pleadings in Court,⁸¹ their reading at home remained fully as laborious as ever.'⁸²

Later in the year, the Lord President attempted to induce the Faculty to enter into the spirit of the new system, but darkly threatening greater coercion:

'The President therefore, in the name and at the desire of the Court, requested the Dean to impress on the Faculty the absolute necessity of their entering more thoroughly into the spirit of the new Form of Process, otherwise the Court would be under the necessity of adopting strong measures, directed against Counsel and agents transgressing.'⁸³

⁷⁹ The actual speech was not recorded verbatim, thus the print by the Faculty is in the third person.

⁸⁰ *Notes by the Lord President, op. cit.* p.6.

⁸¹ thus the attempt to limit the number of counsel appearing.

⁸² *Notes by the Lord President, op. cit.* p. 6. The communication was printed in Shaw's Reports, by order of the Faculty. See (1825) 4 Shaw 839.

⁸³ *ibid.* p. 6.

and concluding, no doubt conscious of the ever growing number of appeals lying on the table of the House of Lords,

‘there has hardly been one Record made up yet, that is fit to be presented to the House of Lords, if the cause go there’.⁸⁴

The Faculty were so concerned about this that they appointed a Committee⁸⁵ to produce a Report detailing its concerns and grievances with the new form of process and the manner of its implementation which reported the following year.⁸⁶

Yet by the end of the same year, the President still fulminated on the drawing of causes under the new procedure. If he had hoped for a ‘carrot and stick’ approach to the introduction of the new rules, the carrots had not worked. It was now time for the stick.

‘[The pleadings] are generally as bad as the papers under the old forms, or worse; and as to the closed records, which have been sent us from the Outer House, they are, with scarcely any exceptions, most improperly framed, being stuffed with long quotations from documents which are founded on as evidence, with inferences, and I don’t know all what, instead of being substantive propositions.’⁸⁷

He put agents and counsel on notice that if the situation continued, he would order his clerk to write to the injured client directly ‘intimating that his case has been

⁸⁴ *ibid.* p. 7.

⁸⁵ The Committee were directed to inquire, ‘Whether the provisions of the statute in regard to the preparation of condescendences and answers have been generally observed or not; and if it shall be found that they have not been observed, to what extent such failure to comply with them has prevailed’.

⁸⁶ *Report of a Committee of the Faculty of Advocates, approved and adopted at a meeting of Faculty held February 10th, 1827 (Edinburgh, 1827).*

⁸⁷ *Scotsman*, x, (719) 29th November 1826 cited by Phillipson, *op. cit.* p.158.

bungled by his agent and counsel, and that he ought not to pay the account of expenses' concluding in exasperation that 'Something must be done to correct this evil.'⁸⁸

Six months into the new regime, pleadings presented to the Court were falling far short of the bench mark. Proper implementation now required some of the 'hardship in particular cases' which had been adverted to in the President's November speech. In two particular cases, *Sproat* and *Roy & Ors.*, with the concurrence of the First Division, he refused even to consider the record,⁸⁹ remarking in *Sproat*:

'This is one of those records to which I alluded in the early part of the Session; and if we pass it over, the new forms may be thrown aside as utterly useless. The Condescence is not even in terms of the old Act of Sederunt.⁹⁰ The facts and law are mixed together, and there are long argumentative passages. I observe also that the parties here, as in many other cases, do not state that they 'aver and offer to prove'⁹¹ that which they condescend on, and which is expressly required by the statutes. After reading these papers, I resolved that I would not judge on such a record, but leave your Lordships to do what you thought fit.'

In *Roy & Ors.*,⁹² again refusing to advise on a record which was not in conformity with the new rules, he complained:

'this record is worse than that of *Sproat's*, which I formerly objected to; and I have resolved that I will not judge in such cases. The condescence and

⁸⁸ *ibid.*

⁸⁹ *Sproat v. Mure & Ors* 1st December 1826, (1826) 5 Shaw 66 (N.E. 61).

⁹⁰ i.e. A.S. 11th March 1800.

⁹¹ This was the requirement of the A.S. 1800 and had been the recommendation of the Commissioners in their Report. Averments were supposed to start: The pursuer [or defender] avers and offers to prove' See *supra*.

⁹² *Roy & Ors. v. Wright & Ors.* 9th December 1826 5 Shaw 107 (N.E. 98).

answers are filled with quotations of interlocutors, excerpts from proof⁹³ and with allegations in point of law ... The statute must be obeyed ... the proof should not be quoted, - the object of condescendences being, not to aver what is proved, but what is offered to be proved. It is no answer to say that the Lord Ordinary did not object. We must enforce the statute. Indeed, the real truth is, that both the Ordinary and the counsel are to blame, - the counsel for giving in such papers, and the Lord Ordinary for receiving them. We cannot advise the case on such a record. It must be prepared of new.'

It was clear where the President laid the blame. The Bar was pressing for and the Ordinaries were acquiescing in, relaxations of the stricture of the new rules such as to accommodate old bad habits, all as had been foreseen by him. The eradication of argument, rhetoric and evidence from the pleadings was of paramount importance and law was to be stated only in the pleas.

The Faculty's Committee reported in February 1827 following the Lord President's Notes the year before. With much deferential pointing out of what were, in their view, teething problems, re-iterating the same old arguments about lengthy pleading being a safe-guard against hasty decision-making in causes, and confirming their collective view that two counsel presentation in the Inner House gave a more 'deliberate discussion'⁹⁴, the Report bitterly complained of the number of acts of sederunt passed ('without communication with the Bar'⁹⁵) since the inception of the Act⁹⁶ and the problems of compliance. It enclosed the results of a forensic

⁹³ The case originated as an advocacy.

⁹⁴ *ibid.* p. 9.

⁹⁵ *ibid.* p. 20.

⁹⁶ 15 between 12th November 1825 and 14th November 1826, *ibid.* p. 20.

examination of causes decided in the Court from the passing of the Act, which, it was claimed, demonstrated these problems.

However, their most serious difficulties related to 'differences of opinion which are known to have prevailed among the Lords Ordinary, and in the Courts, and in the minds of the Judges at different times, regarding the import' [of the Act and act of sederunt]. In particular, they conceded that they [the Bar] were unsure about quotation of documents in condescendences and answers, the introduction into condescendences and answers of 'remarks and minute details, not forming proper and substantive matter of averment', the construction of pleas in law and the 'proper form of preparing Cases.'

How could the Faculty obtemper the provisions of the statute and the new code if the judges were all singing verses from different hymn sheets and the desired form was a moving target? Attack being the best form of defence, the Report acerbically pointed out,

'Upon all these matters a diversity of view prevails among Counsel, which is the less remarkable, as they have been warranted by the Judges in adopting almost any given opinion. In short, the *form* of preparing a cause, in so far as committed to Counsel, has hitherto necessarily varied according to the known views of the particular Judge before whom the case has depended. The opinions of their Lordships in the Outer House have been in general very unequivocally intimated from the bench, and they have been so opposite and discordant, as fully to warrant what has now been stated.'⁹⁷

⁹⁷ *ibid.* pp. 22-3.

The Report concluded, more in hope, than expectation, that

'[the] Judges will do what in them lies to facilitate this end,⁹⁸ by exercising great patience and forbearance towards practitioners, during the infancy of the system, - and by coming to some common understanding, and adhering to it, with respect to the mode in which pleadings are to be drawn.'⁹⁹

(iv) The New Strictness and the Development of 'Rules of Written Pleading'

The Faculty's professed position regarding the conduct of proceedings in the Court, was that parties should

'conduct their cause in the manner they think best. It is no part of the business of the Judge to do more than to decide the case which the parties present to him.'¹⁰⁰

But, at least in this early period, that was 'old hat'. True, the basic principles upon which the pleadings proceeded remained the same and were those espoused from the time of Stair. As G.J. Bell explained in the 2nd and 3rd editions of his *Principles of the Law of Scotland*,

'The pursuer's case is truly syllogistical, stated commonly by enthymeme; but, when fully expressed, proceeding on the rule of law as the major proposition, the fact as the minor, and the conclusion as the result. The defender's case is either a simple case; a denial of the major as correct in law; or a denial of the conclusion: Or it is a case more complex, depending on a new and opposite right averred by the defender, and forming an opposite syllogism; admitting hypothetically, or really, the premises and conclusion

⁹⁸ *sc.* uniform and consistent application of the principles of the new system.

⁹⁹ Report, *op. cit.* p. 24-5.

¹⁰⁰ Report of the Committee of the Faculty of Advocates (Edinburgh, 1824) *op. cit.* p. 6.

of the previous summons, but avoiding or eluding it by what is technically called an Exception. And this again is subject to denial, or to exception, till the matter is finally exhausted, and the parties come to issue on one or other of the questions thus raised.¹⁰¹

However, the content of these pleadings was now regulated by the sections of the Act and the act of sederunt and the procedure to be followed was clear. In conformity with the President's edicts, the provisions of the Act and the act of sederunt were, at least initially, stringently applied by the Lords Ordinary (albeit sometimes as variations on a theme). The Court heeded the message that a close supervision of the preparation of the pleadings fell within its domain and that the loose and argumentative pleadings of the previous period were redundant. The collective view of the establishment had been enunciated by Professor Bell when he stated that the pleadings should 'proceed under the special superintendence and guidance of a judge'¹⁰² and it was, to paraphrase the Faculty's own Report, now 'part of the business of the Judge' carefully to superintend the preparation of the pleadings up to the closure of the record, strictly interpreting and implementing the statutory provisions.

The summons and defences, the amendments and additional papers, the condescendences and answers (and any revisals thereof) and the written cases all had to comply with the statutory directions. Moreover, following ss. 13 and 16 of the 1825 Act which permitted a judge to decide the cause on the pleadings without the

¹⁰¹ G.J. Bell, *Principles of the Law of Scotland* (2nd ed.), (Edinburgh, 1830) para. 2273; (3rd ed.), (Edinburgh, 1833) para. 2270.

¹⁰² G.J. Bell, *Examination of the Objections*, *op. cit.* p.87.

allowance of proof on commission or jury trial, it was possible to decide cases on questions of law or relevancy without any inquiry into the facts.

Whilst compliance was for the Court, parties quickly realised that if the Ordinaries were amenable to disposing of a cause without the need for expensive inquiry, tactical capital could be made where an opponent's pleadings had not been correctly presented in form. Such failures in 'correctness' could provide a basis for an argument directed to the relevancy and a submission seeking decree or dismissal,¹⁰³ or at the least, the ordering of new papers on the grounds that the summons or the defences were not in the proper form, or did not comply with the provisions against argument, or that the averments did not support conclusions or such like. Once the Court had signalled its intention to enforce the provisions strictly, and together with the court's willingness to decide a cause on questions of law or relevancy, parties knew that it would be of advantage to press the Court for that strict enforcement as against an opponent. Thus, increasingly the Court was engaged in determining the correctness of the pleadings as a matter of mere form, and Shaw's reports, under the heading 'process' for the years 1824 to 1833, contain a number of cases dealing with questions of absolute form which, it was said, 'were greater in number than the preceding three centuries'.¹⁰⁴

¹⁰³ Following the 1825 Act, the term 'dismissal' became a term of art and came to be used in the situation where the defender was successful without determination on the merits, as where the pursuer abandoned or the defender's preliminary plea was sustained. The pursuer could bring a new action. *Caledonian Iron and Foundry Co. v. Clyne* (1831) 10 S. 133, *Shirreff v. Brodie* (1836) 14 S. 825. A defence on the merits, if sustained, entitled the defender to absolver and formed *res judicata*. However, the distinction was not always strictly observed. Mackay, *Practice*, vol. I, p. 434.

¹⁰⁴ Evidence of Hugh Macqueen to 1834 Commissioners, Preamble to Answers, pp.35-6.

(v) Summonses

Summonses in particular were subjected to detailed textual analysis and criticism of the facts averred, the remedies concluded for and the manner in which the conclusions and the averments of fact had been composed. In his treatise on the practice of the Court, published in 1833, Darling could bring home to his readers this idea in two sub-titles in his discussion of the summons: 'Much Accuracy Now Required in Libelling'¹⁰⁵ and 'Form of Summons - Cases Illustrating Strictness Now Required'¹⁰⁶ The latter extended to five pages citing twenty nine decisions decided from the implementation of the Act and the act of sederunt and the decisions do demonstrate the rigour of the Court's approach to the summons. Indeed, as he remarked,

'The act ... has introduced a stricter form of pleading, and objections, which it would formerly have been held ridiculous to state, will now prove fatal.'¹⁰⁷

The object of libelling the summons was,

'to make the summons pointed and precise in point of fact, and correct and logical in point of conclusion. Prolixity in argument is quite out of place in a summons. All superfluous matter, quotation of documents, ... flights of imagination, ... ought to be avoided. Nothing can be more contrary to the spirit and intention of the ...act, than unnecessary amplitude. And in such cases, the Lord Ordinary may either throw out the summons altogether, or order it to be amended, by striking out the irrelevant matter'¹⁰⁸

¹⁰⁵ Darling, *op. cit.* p.129. He considered the decisions of the Court were the best commentary on the Act. Note: In the following, it is not intended to refer specifically to the cases cited by him. They can be found at the pages referred to.

¹⁰⁶ *ibid.* p. 130.

¹⁰⁷ Darling, *op. cit.* 129-30.

¹⁰⁸ Darling *op. cit.* p. 137, Shand, p. 222-3.

But there was an inherent tension in the requirement of sufficiency and what constituted 'unnecessary amplitude.' The problem for the drafters of summonses was that hasty summonses were often brought to obtemper the requirements of the law of prescription or to secure hasty diligence on sums sued for,¹⁰⁹ but at the same time, the summons had to be broad enough in its terms to permit further averments if ordered by amendment or in a condescence, without prejudicing the claim at a later stage of the action. The Ordinary on his own initiative- but probably in practice armed with the submissions of the defender - would examine the pursuer's averments checking whether they were 'in point of fact sufficiently explicit, and correctly deduced in point of law.' There had to be a sufficiency of factual averment as a matter of relevancy¹¹⁰ and these averments had to be married to what was concluded for. Thus the use of the phrase 'pointed and precise in fact and correctly and logically deduced in law' by Darling¹¹¹ and Shand.¹¹² An insufficiency in averment of fact meant that the conclusions would not necessarily follow, the action was thus irrelevant and was dismissed¹¹³ or, if it survived to the point of being ordered to be amended, the expenses were lost to the other side. Subjecting the summons to analysis of this kind was, to some extent, in the interests of the Court by ensuring that the disputed matters in fact and law between the parties were properly prepared and ventilated before allowing a cause to proceed to proof.¹¹⁴ But it was also in the interests of the defender as the action could be disposed of at an early stage, on a technical point of relevancy or, if not, he would get his expenses to the

¹⁰⁹ The Dean of Faculty gave his personal opinion to the 1834 Commissioners 'that summonses as now framed are oftener raised for the purpose either of embarrassment, or oppression, or concussion, in order to be made the foundation of diligence, and cause greater inconvenience in that way' *ibid.* p.83, Ans. 1 (Note, many adhered to this view).

¹¹⁰ not in these early stages as a matter of fair notice. This developed later. See below.

¹¹¹ Darling, *op. cit.* p. 137.

¹¹² Shand, *op. cit.* p. 222.

¹¹³ see above.

¹¹⁴ in the general sense. At this time, proof on commission or translation to the jury court for the preparation of issues by the jury clerks.

point that the summons was ordered to be amended. This was an incentive to defenders to present technical arguments on the precision, import and conclusions of the averments in a summons at this early stage.

Where a pursuer sought jury trial, averments had to be sufficiently distinct and specific to admit of the requisite issues being deduced from them for trial, and where there was a defect in this respect, the action was dismissed.¹¹⁵ But the jury never saw the pleadings, the purpose of which was to provide ultimately the issue, and thus it was thought that closing upon a summons and defences in enumerated causes would normally suffice. If it was likely that the action was to be decided without jury trial (i.e. that the cause was not an enumerated cause within the meaning of the Act) a greater degree of minuteness was advisable. The existence of the modes of proof by commission and jury trial was reflected in two styles of pleading:

‘A great deal of expense is, in many cases, most needlessly incurred, by proceeding to make up a record by condescence and answers, where the summons and defences would be quite sufficient of themselves. In ordinary cases which come before the Court, for determination on the statements and productions of parties, without farther probation, it may be advisable to detail with some minuteness the essential facts and circumstances on either side: but in cases which must be determined by a jury, to whom the pleadings are never read, the more condensed the averments are kept, the better; all that is required is, that the grounds of action and defence are brought out with sufficient precision and distinctness to suggest the proper issue or issues, and enable the parties, at the trial, to lead their proof, free

¹¹⁵ Robert Macfarlane, *The Practice of the Court of Session in Jury Causes* (Edinburgh, 1837) p. 33 citing *Rose v. M'Leod* 1821 1 Shaw 112, *M'Innes v. Dickie* 1822 1 Shaw 427 *Jackson & Ward v. Cassels* 1833 11 Shaw 908.

from any objection of not having given due notice, of the grounds of fact or law, on which they respectively rely.’¹¹⁶

But this obsession with the minuteness of detail could be dangerous to a case:

‘parties not unfrequently indulge in a much more minute detail and specification of facts and circumstances than what are necessary. By doing so they occasion expense, run the risk of errors, and needlessly expose their case. It is quite enough in the general case, that the averments be broad and distinct, leaving the minute facts and circumstances, and the manner and means of proof, to be made out and brought forward at the trial.’¹¹⁷

Any ‘unnecessary amplitude’ in the summons and the Ordinary was supposed to order the irrelevant averments to be deleted, although this was applied neither uniformly nor as had been intended by the Act.¹¹⁸ The result was that there was much discussion of the summons on the matter of its ‘form’ and the requirements of sufficiency and, once more, the Ordinaries did not approach this with any great consistency. Darling’s long discussion of ‘the premises ... sufficient to support the conclusions’¹¹⁹ and his advice that ‘care ought to be taken that no averments, except those necessary to support the conclusions, be made’¹²⁰ was helpful only insofar as it was appreciated that these were general propositions to be applied, and that there could be variations from judge to judge.

¹¹⁶ Macfarlane, *Practice op. cit.* p. 32.

¹¹⁷ Macfarlane, *op. cit.* p. 33, *Wilson v. Beveridge* (1831) 10 Shaw 110.

¹¹⁸ See below. It did sometimes happen. See the evidence of the Dean of Faculty, John Hope (Charles’ son) to the 1834 Commission in *First Report From His Majesty’s Law Commissioners, Scotland. 12th May 1834* (P.P. xxvi 1834) (London, 1834) ‘Some instances certainly have occurred of summonses being too detailed, and part of them ordered to be expunged’. Appendix, p. 83, Ans. 7.

¹¹⁹ p. 132. c.f. Shand, following the same lay-out as Darling and under the same heading, could, by 1848 give 52 cases under this head extending to 8 pages of his *Practice of The Court of Session, on the basis of The Late Mr. Darling’s Work of 1833. op. cit.* (Edinburgh, 1848).

¹²⁰ Darling, *op. cit.* p. 137.

For reasons of space, it is not possible here to provide a long exposition of the cases demonstrating the strictness of approach adopted by the Court; but as a flavour, the following examples may suffice. Thus, where the title of the pursuer was incorrectly set forth¹²¹ or the defender's title was incorrectly set forth¹²² then the rest of the averments were considered insufficient to support the conclusions. A summons founded exclusively on statute could not support a conclusion for damages at common law.¹²³ If a defence admitted the whole averments and yet denied the conclusion, it was irrelevant and decree granted.¹²⁴ If a material averment was omitted in a summons, even if the other averments were admitted by the defender and the conclusion denied, the summons would be dismissed.¹²⁵ Non-production of a document founded upon at the same time as the signing of the summons was penalised.¹²⁶

Averments required to support the conclusions of the summons (or condescendence) and if they did not, the action was irrelevant even when the defender had fully averred his version of events. This could lead to conflicts between the House of Lords and the Court of Session¹²⁷ as to what in Scots Law was a discussion on the

¹²¹ *Darling op. cit.* p. 133, *Shand op. cit.* p. 217. *Gillies v. Hunter* (1831) 9 Shaw 257 Pursuers as office bearers had to set forth distinctly their title as office bearers.

¹²² *M'Neill* (1829) 7 Shaw 696; *Rose v. McLeay and Horne* (1827) 5 Shaw 883.

¹²³ *Millar v. Mills and Vary* (1831) 9 Shaw 625.

¹²⁴ *Darling, op. cit.* p. 132.

¹²⁵ *Shand, op. cit.* p. 215.

¹²⁶ *Peter v. Mitchell* 23rd Dec. 1826.

¹²⁷ See e.g. *M'Donald v. Mackie & Co.* 8 S.&D. 686. The defenders were assoilzied by the Court of Session (Lords Cringletie, Pitmilley and the Lord Justice-Clerk) because the pursuer had failed to aver particular facts to support his conclusions. The decision was reversed by the House of Lords [reported (1831) 5 W. & S. 462] on the basis that the defenders had admitted the relevancy of the case against them by making a separate statement of the facts of the case and the time for demurrer having passed, 'it was too late to deny their [*scil.* the plaintiff's (sic) averments] relevancy', per Lord Chancellor Brougham at p. 466. The decision is odd as Brougham had been an advocate for three years before becoming a barrister in London.

relevancy which the House of Lords would sometimes equate with a plea of 'demurrer' with confusing results.¹²⁸

(vi) Defences

It will be recollected that section 2 of the Act required the defender to state in explicit terms all the defences together and the defences had to meet the statement of the facts averred by the pursuer by denying or admitting them and in answer setting forth, again in explicit terms, the facts on which the defender founded, subjoining thereto a note or summary of the pleas in law to be maintained. A.S. 8 February 1810 augmented this, requiring that the defences should not contain argument. If they did, the Ordinary could grant decree or order the defender to lodge correct defences.

Defences were subjected by pursuers, and the Court, to a rigorous examination in a similar manner to summonses.¹²⁹ Pleas in incorrect form, argument therein or argument in any part of the defences would all be attacked by a pursuer moving the Ordinary to grant decree or order new defences to be lodged. As the Faculty had conceded in its 1827 Report, pleas in law were a vexed topic and how they were

¹²⁸ In English Law, prior to the great procedural reforms instituted by the Judicature Act 1873, there were special technical rules of procedure for each division of the Court and for every form of action. 'Demurrer' was a plea whereby one party 'confessed' the facts, as stated by his opponent, to be true, thus confining himself to a denial that, in law, the facts warranted the inference against him. Similar to the plea of relevancy but crucially, once there was this election, there could be no inquiry into the fact thereafter. There had to be an initial choice – admit the facts or the law. Admitted facts permitted demurrer discussion of the law. Admitted law permitted the civil jury trial exploration of the facts from which there could then be discussion on the law. With the jury trial taking centre stage as the bulwark of the common law, demurrer came to be considered repugnant – hence the often disparaging remarks by members of the House of Lords in Scottish appeals when considering the doctrine and pleas of relevancy in Scottish pleadings. (See also *infra*. Chapter 5) Uncritical equation of the two can be found even in eminent writings e.g. Mackay, *The Practice of the Court of Session* (2 vols) (Edinburgh, 1877) Vol. 1, p. 437 'The dilatory defence that the action is irrelevant ... is equivalent, therefore, to the demurrer of English pleadings.' At best, the two are 'similar' (Bankton IV. 26. 6-7) or 'comparable'. Cf T.B. Smith, *Short Commentary, op. cit.*, p. 92. See *supra* chapter 5.

¹²⁹ at least initially.

composed and what they were to contain was not wholly understood. They were a fruitful source for a pursuer's attack on the defences. The statutory provisions¹³⁰ required that them to be short and concise notes of the legal propositions on which the action or defence was to be maintained, set forth in distinct and separate propositions without argument. This had been confirmed by the Court.¹³¹ Sections 49 and 58 of A.S. 11 July 1828 had required there to be reference to the authorities relied upon.¹³² Maclaurin explained,

'The correct form of stating the pleas in law is by no means generally understood or practised. They frequently consist of lengthy statements of facts, generally a repetition of the narrative part of the defence and they also not unfrequently contain an argumentative discussion of the case. Instead of this ... they ought to consist of concise legal propositions, free from argument, or quotation of any kind, and referring to the authorities founded on simply by the volume, book and page, or title.'¹³³

For a long period there were many in the profession who considered that pleas in law were not useful¹³⁴ or, worse, were actually injurious.¹³⁵

An admission in defences, once made, could not be easily retracted,¹³⁶ but firstly, the admission had to be taken with any explanation accompanying it¹³⁷ and secondly

¹³⁰ s. 9, 1825 Act.

¹³¹ *Fraser v. M'Kenzie* (1826) 4 S. 706.

¹³² By 1848 this was seldom done. Shand, *op. cit.* p.325, Mackay, *op. cit.* Vol. I p. 391.

¹³³ citing *Fraser v. M'Kenzie* 1826 4 Shaw 699; (N.E.) 1826 4 S. 706. J. Maclaurin, *Form of Process in Civil Causes* (Edinburgh, 1836), pp. 117-8.

¹³⁴ Evidence of Dean of Faculty to 1834 Commission. p. 86, Ans. 31.

¹³⁵ Evidence of Patrick Robertson, *ibid.* Ans. 29 & 30, p. 17.

¹³⁶ *Darling, op. cit.* p. 181, *M'Leod* (1822) 1 Shaw 333.

¹³⁷ *Darling, op. cit.* p. 181, *Carnegy v. Carnegy* (1825) 3 Shaw 566 (N.E. 389), *Grierson v. Thomson* (1831) 8 Shaw 317.

that explanation could be 'redargued' by contrary evidence.¹³⁸ It was competent, however, simply to deny the averment of the pursuer.

(vii) The Condescence and Answers

Where parties did not hold the summons and defences as a 'full and final statement' of their respective positions, the Lord Ordinary would order a condescence and answers. As Darling explained in 1833,

'It seldom happens that the parties are willing to close the record upon the summons and defences; for in general the summons does not set forth with sufficient minuteness and precision the ground of action, and the statement in the defences generally renders some counter-statement from the pursuer necessary.'¹³⁹

There were strict rules as to what did and did not fall to be properly included in these. A fact averred in a summons but not replicated in the condescence could not form part of the pleadings as the party was deemed to have abandoned or departed from it by dropping it.¹⁴⁰

It was required that the condescence and answers should meet each other by admission and denial and counter-statement, in a manner similar to the defences and the older provisions of the A.S.¹⁴¹ 1 February 1715,¹⁴² 11 March 1800,¹⁴³ and 7 February 1810¹⁴⁴ were held still to apply.¹⁴⁵

¹³⁸ Darling, *op. cit.* p. 181, *Anderson v. Rintoul* (1825) 3 Shaw 496 (aff. 1827 5 Shaw 744), *Gall v. Fordyce and Middleton* (1828) 6 Shaw 943.

¹³⁹ Darling, *op. cit.* p. 201.

¹⁴⁰ *Luke v. Magistrates of Edinburgh* (1832-3) 6 W. & S. 241 per L.C. Brougham at p. 259.

¹⁴¹ See the previous chapter.

¹⁴² Shortly, where any fact was alleged by one party, the other had to confess or deny it. If he refused to do so, he was held to have confessed and if he denied what was shown afterwards

In practice this did not operate well and A.S. 11 July 1828 introduced a convoluted procedure for condescendences and answers. It repeated the rule that the condescendence was to be without argument, consisting of separate and distinct articles containing the whole facts which the party averred and offered to prove in support of his case and the rule that the answer required to reply to each article of condescendence in order, distinctly admitting or denying, in whole or in part the statements therein, without argument or introducing into that answer any counter statement or counter averment. But if the 'respondent' sought to counter aver, then he was bound to 'annexe' to his answers a 'respondent's Statement of Facts' wherein he was required to 'aver and offer to prove' the whole facts pertinent to his side of the case. The original 'condescender' was then entitled to revise his paper and subjoin to that, under a heading 'Answers to the Respondent's Statement of Facts' his answer to such statements, in order, by admitting or denying them, in whole or in part. If he wished to include a counter statement following the respondent's averments he added it at the end of his answers whereupon the respondent was entitled to revise his answer and statement of facts in the same manner. The resulting 'revised condescendence' and 'revised answers' had to form a 'complete

in probation to have been known to him, he was required to pay all the expenses whatever the event. If he did not expressly deny it, it was, in the older language, held 'to be acknowledged.'

¹⁴³ Again, shortly, condescendences and answers were to contain no argument, discussion, or recital of the proceedings and only state under 'distinct heads, or articles, the special facts and circumstances pertinent to the cause' which were 'alleged and offered to be proved' on either side such as to bring forward a 'precise issue'.

¹⁴⁴ Which re-enforced A.S. 1715 - Where a fact was averred by one party and not explicitly denied by the other, he was held as confessed. ('Aver' and 'averment' had the same meaning as the older 'allege' and 'allegation'.)

¹⁴⁵ although in previous practice they had been rendered to all intents and purposes redundant. The 1824 Commissioners had recommended that each fact should be reduced to a 'positive and substantive proposition', beginning with the words 'The [pursuer or defender] avers and offers to prove' and that the 'strictest attention' should be paid to the provisions of A.S. 1810. Report *op. cit.* p. 6, sec. 3.

paper' containing no reference to the preceding condescence and answers.¹⁴⁶ As before with condescences and answers under the 1825 Act, a statement in point of fact averred by one party and within the opposite party's knowledge, which was not denied by that opposite party, was held to be admitted.¹⁴⁷

The proper use of a condescence was to state more clearly and specifically the grounds of action set forth in the summons,¹⁴⁸ supporting the summons and restricting these if too general.¹⁴⁹ But new grounds of action beyond, or statements inconsistent with, the summons were not received¹⁵⁰ and a summons irrelevant *ab initio* could not be cured by a condescence.¹⁵¹

No judgment could be pronounced on the merits of a cause without closing of the record,¹⁵² and the record could not be closed other than as prescribed by the statute.¹⁵³

On the whole it might be assumed from the above that the old manner of pleading had evaporated in the years following the implementation of the 1825 Act. Dr.

Phillipson has remarked of the process that '[I]t seemed as though the battle for

¹⁴⁶ See *supra* for 'complete paper' The prohibition against 'reference' is explained by the prior practice of making 'reference to' another document or another part of the process as a shorthand. Thus pleading phrases such as 'reference is made to the condescence' were prohibited as it was envisaged that the 'revised condescence and answers' would stand by themselves.

¹⁴⁷ The actual wording was 'he shall be held as confessed', again echoing the older terminology.

¹⁴⁸ *Scott v. Napier & Ors.* (1829) 7 Shaw 338.

¹⁴⁹ *Alison & Ors. v. Watt* (1829) 7 Shaw 786.

¹⁵⁰ *Dickie v. Gutzmer* (1828) 6 Shaw 637, *Ewing's Trs. Farquharson* (1829) 7 Shaw 464, *Fraser v. Dunbar* (1835) 13 Shaw 950.

¹⁵¹ *Kerr v. Kerr* (1830) 9 Shaw 204.

¹⁵² s. 4 1825 Act, *Falconer etc. v. Sheills & Co.*, (1826) 4 Shaw 829 (N.E. 836), *Doig v. Fenton* (1827) 5 Shaw 533 (N.E. 836).

¹⁵³ *Pattison v. Campbell* (1827) 5 Shaw 208 (N.E. 193).

stricter and more accurate pleadings had, at last, been fought and won'¹⁵⁴ Can this be taken as a fair assessment? Perhaps so, as an observation upon the changes in the 'form' of process. But, in practice, matters were very different.

(viii) The 'Practice and Experience' of the Judicature Act 1825 (and the Deviations).

By 1835, the new form of process and the provisions regulating the drawing of pleadings had been in operation for ten years and this is perhaps a suitable point at which to review the operation of pleadings in the Court of Session in the period, drawing on contemporary sources,¹⁵⁵ noting the problems which arose in practice and the developments which followed.

The procedure under the Act had envisaged that parties could close the record on their summons and defences, but it will be recollected that where parties refused to do so, the Ordinary would order a condescence and answers. This was exploited by defenders who would refuse to close for the express purpose of creating more

¹⁵⁴ Phillipson, *op. cit.* p. 158.

¹⁵⁵ I have used the Evidence presented to the 1834 Commissioners Chaired by Bell *First Report From His Majesty's Law Commissioners, Scotland. (Pursuant to Address 9th May 1834) 12th May 1834* (P.P. xxvi 1834) (H.C. 295) (London, 1834), (The Answers to the Commission's Questions were recorded and appear in the Appendix, [Hereinafter *Commissioner's Report, 1834*], and the contemporary books on practice: Darling's *The Practice of the Court of Session*, (2 vols.) (Edinburgh, 1833); Macfarlane's *Practice of the Court of Session in Jury Court Civil Causes*, (Edinburgh, 1837); M'Glashan's *Practical Notes (etc.) on Forms of Process in Civil Causes* (Edinburgh, 1831) and his *Practical Notes on the Jurisdiction and Forms of Process in Civil Causes* (Edinburgh, 1831) (and 2nd ed. Edinburgh, 1842); Maclaurin's *Form of Process in Civil Causes* (Edinburgh, 1836); Shand's *The Practice of the Court of Session on the basis of the late Mr. Darling's work of 1833*, (2 vols.) (Edinburgh, 1848); Shaw's *Forms of Process in the House of Lords, Court of Session, (etc.)* (2 vols.), (Edinburgh, 1843) and the introduction to Volume V (1831) of Murray's *Reports of Cases Tried in the Jury Court at Edinburgh* (Edinburgh, 1818 - 1831) by Murray himself.

delay.¹⁵⁶ But it was rare that the summons itself was sufficiently explicit to permit closing of the record. As Murray noted in 1831:

'it is found by experience that it is not in one case in a hundred, or perhaps in a smaller proportion, that the Summons is held to be the statement of facts on which the Record is closed, there seems little doubt whether a long or short Summons ... is to be preferred. Indeed, as a Condescence is in almost all cases required, it is difficult to discover the use of the detail in the Summons, especially as it may be omitted by the party in the very cases in which the Court wish it to be inserted.'¹⁵⁷

A summons, it will be recalled, was often drafted with *inter alia*, two objectives in mind, namely as the foundation for quick diligence and secondly, to allow scope for fuller averment at the stage of condescence.¹⁵⁸ As the author of *The Practice of the Court of Session* told the Commissioners,

'Inconveniencies have arisen, by rendering condescences necessary, in consequence of the vague manner in which summonses are drawn, and from the great length to which they generally extend by the unnecessary narration of circumstances, and the quotation of documents.'¹⁵⁹

What Darling meant by 'unnecessary narration of circumstances, and the quotation of documents' was that parties pleaded evidence. Not only in summonses but also in the other documents of pleadings, it appears to have been common to plead how a fact was to be proved as opposed to merely the fact itself. It was obviously difficult

¹⁵⁶ Evidence of John Hope, Dean of the Faculty of Advocates, *Commissioner's Report*, 1834, Appendix of Evidence, p. 84, Ans 14.

¹⁵⁷ Murray, Introduction, *op. cit.* p. 23.

¹⁵⁸ bearing in mind what was permitted to be introduced into a condescence after a summons.

¹⁵⁹ Answers by James Johnston Darling; *Commissioner's Report*, 1834, Appendix of Evidence, p. 27, Ans.1.

for the profession (or at least the Bar) to relinquish the desire to plead not merely what was offered to be proved but also how it was to be proved, i.e. the evidence which was to be adduced to prove the fact. But in any event, the difference between averment of fact and an averment of evidence was not always appreciated. The Dean of Faculty, John Hope, told the 1834 Commission that there was 'misapprehension by pleaders as to what constituted evidence and what not to put in pleadings.'¹⁶⁰ The statutory directions and the incorporation of the provisions of the act of sederunt prohibiting evidence in pleadings were crystal clear but they appear not to have been universally followed and this in particular exercised the House of Lords in Scottish appeals ¹⁶¹ to the extent that Lord Chancellor Brougham considered that pleading evidence was the 'inveterate practice of Scotch pleading.'¹⁶²

However, it was not always upon a misapprehension that evidence was pleaded. We shall return to this below, but for the present, it is sufficient to note that there was a school of thought prevalent at the Bar that the judges had returned to deciding cases on the pleadings alone without hearing counsel in oral submission. It will be recalled that the judges could legitimately decide cases on relevancy or in law at particular points of the process without proof.¹⁶³ To cater for this, the Bar had again reverted to overloading their pleadings with rhetoric, argument, evidence and averments designed to demonstrate the probable truth of the facts averred.

¹⁶⁰ Answers by John Hope, Dean of the Faculty of Advocates, *Commissioners' Report*, 1834, Appendix of Evidence, p. 84, Ans. 8.

¹⁶¹ *M'Donald v. Mackie & Co.* (1831) 5 W. & S. 462, *Blinchow's Trustee v. Allan & Company* (1833-4) 7 W. & S. 26 both per Lord Chancellor Brougham.

¹⁶² *Blinchow op. cit.* per LC Brougham at p. 54.

¹⁶³ ss. 13 and 16 of the 1825 Act.

The requirement that parties in their defences, condescendences and answers should meet each other by admission and denial and counter-statement also caused considerable problems and policing it was tricky. The convoluted procedure for condescendences and answers introduced by A.S. 11 July 1828 was designed to preclude parties' admissions and denials from being mixed with lengthy statements of fact, but the profession found a way of avoiding making admissions and leaving the opposite party's detailed statement of fact as merely denied.

Following the statute, the form of averment in answers to a condescendence was that the defender either admitted¹⁶⁴ or denied each head in the condescendence and following the respective acts of *sederunt*, any explicit averment falling within his knowledge which was not denied was held to be judicially admitted.¹⁶⁵ The whole object of the condescendence and answers was to bring out the factual differences between the parties by requiring each to state categorically what was factually in dispute. As the Dean, John Hope, explained to the 1834 Commissioners:

'[I]n my opinion, the most important principle of the pleadings in the Court of Session is, that the condescendence and answers are not only to contain the averments of one party, but to obtain and enforce the admissions of the other, and I think that the latter object of enforcing admissions has been too much lost sight of in the last four or five years'.¹⁶⁶

¹⁶⁴ It was sometimes said that he 'confessed', echoing the old terminology of the *ficta confessio*. e.g. see J. M'Glashan, *Practical Notes on ... the Forms of Process in Civil Causes* 1st ed., (Edinburgh, 1831) p. 91.

¹⁶⁵ *Dunns v. Livingstone* 20 Dec 1828, *Kay v. Miln &c. Hazel's Trs*, 4 Feb. 1830, *Drysdale* 17 Jan 1832.

¹⁶⁶ Evidence of John Hope, Dean of Faculty, *Commissioners' Report*, 1834, p. 86, Ans. 32.

But it was sufficient for the defender to state in answer that a fact was not within his knowledge and thereby was not admitted.¹⁶⁷ In such circumstances it was considered the correct response to aver 'not known, and therefore not admitted.'¹⁶⁸ A simple denial was sufficient to put the other party to his proof but any deviations from these formulae – such as 'irrelevant' or 'may be true' – without the word 'denied', were held not to be denials and therefore were construed as express admissions.¹⁶⁹ A good illustration of what was considered the proper manner of answering averments can be found in Maclaurin's Form of Process (1836),¹⁷⁰ where the author provides styles for the correct responses by a defender to the condescence. Where it was intended to make an admission then this was either of the whole - 'Admitted' or in part - 'Admitted [the particular statement of fact] but *quoad ultra* this article is denied'. Where averments founded upon a document produced but the content was disputed, the response was 'Admitted under reference to the[document] itself.' Where an averment fell outwith the knowledge of the defender the answer was 'Not known to the defender, and not admitted' and where the averment was not admitted the correct response was simply 'Denied' or 'Denied as irrelevant'¹⁷¹ or 'Denied and reference is made to the defender's statement of facts'.¹⁷²

¹⁶⁷ M'Glashan, *op. cit.* p.91 If it was within knowledge, the consequences only came later at proof when it was held to be an admission and expenses would be granted against the offending party (even if successful) for the costs of proving those parts of the opponent's case which he had not admitted but which were known to him.

¹⁶⁸ J. Maclaurin, *Form of Process in Civil Causes before the Sheriff-Courts of Scotland* (Edinburgh, 1836) 139.

¹⁶⁹ *ibid.* 139. See also *Ellis v. Fraser* (1840) 3 D.B.M. 271 per Lord Gillies and Lord M'Kenzie and M'Glashan, *Practical Notes* (2nd ed.) *op. cit.* p. 275.

¹⁷⁰ p. 140ff.

¹⁷¹ 'Denied and irrelevant' was acceptable in this period but was not 'good pleading' later. See J.M. Lees, *A Handbook of Written and Oral Pleading in the Sheriff Court* (2nd ed.), (1920) p. 48.

¹⁷² In Appendix 2 there are the results of a short inspection of the Faculty of Advocates' General Collection of Session Papers in the Advocates' Library.

The profession's reluctance simply to admit or deny averments of an opponent arose for a variety of reasons. In the first place, caution had to be exercised in making admissions because, once made, they could not easily be retracted.¹⁷³ Thus, given that the admission on record was conclusive as judicial proof against the party making it,¹⁷⁴ it was the safer course simply to deny the opposite averment or at best make a partial admission of 'immaterial' facts and then deny the remainder of the article of condescendence [or other part of pleading] with the suffix 'insofar as inconsistent with the following statement.' This would then permit the party to aver his statement of facts as per the procedure under A.S. 11 July 1828. Secondly, where proof was inevitable, it was possible by simply denying the averments to 'keep the pursuer as much in the dark as possible, as the facts to be proved, till the proof was led.'¹⁷⁵

Thus the requirements of the Act of 1825 could be met by simply and generally denying the averments of the other side and putting him to his proof¹⁷⁶ or, if one wished to lead evidence, by making one's own full statement of facts. As the Dean of Faculty, John Hope could tell Professor Bell and the other commissioners,

'A practice has crept in, nobody knows how, - certainly it was not the intention of the claim in the Act of Sederunt, - by which the original object of

¹⁷³ *M'Leod v. Thompsons* 1822 1 Shaw 300 (N.E. 279) J.J. Murray explained to the Commissioners, 'in practice, it frequently happens, that very serious inconvenience arises from admissions made by the less cautious litigant' *Answers of J.J. Murray, Commissioner's Report, 1834*, p. 25, Ans. 32.

¹⁷⁴ although jury trial practice had attempted to modify this. See below.

¹⁷⁵ M'Glashan, *Practical Notes* (2nd ed.) *op. cit.* pp. 275-6.

¹⁷⁶ Hence Dickson's later discussion of where the burden of proof lay in civil proof was founded upon this. 'It is only when the defences contain a simple denial of the pursuer's averments, that the onus falls as a matter of course upon him [i.e. the pursuer]. In the more common case of the defence being laid upon explanations or counter averments, which in their nature admit of proof, the question of which party must take the lead is determined by more discriminating rules. W.G. Dickson, *A Treatise on the Law of Evidence in Scotland*, 2 vols. (Edinburgh, 1855) Vol. 1 p. 3.

our pleadings seems to be entirely evaded. A man makes his statement, and there is no answer to the statement but a mere general denial. Then a separate statement is made by the other party, which ought to be in answer to the statement of the pursuer, but which you cannot take as admissions and the result is, that an immense proportion of cases are now sent to jury trial...'¹⁷⁷

He recalled how practice had developed in the immediate period after the implementation of the Act:

'If you look at the form of the first two years of the Judicature Act, when the statement of the respondent was always put, corresponding to the averments of the condescender, you will see the benefit of that form of pleading, which prevented that evasive style of pleading, by which a party merely says, in answer to a detailed and specific article "denied:" the result is, that we are losing sight of one of the main objects of our forms of pleading.'¹⁷⁸

Even the import of clear admissions on record had by 1834, been challenged in jury trial practice:

I conceive a great deal of mischief has been done by the introduction of that rule in the jury court, that the admission on the record was not complete evidence, except a separate admission was added to it. It is quite right to give to parties, before coming to trial, the opportunities of making farther admissions; but it is wrong to say, when you have sent a record to get an

¹⁷⁷ *Commissioners' Report*, 1834, p. 86, Ans. 31.

¹⁷⁸ *Commissioners' Report*, 1834p. 86, Ans. 31. Although this was his personal opinion, there were many in the Faculty who adhered.

issue prepared, the parties were not afterwards to be conclusively held by the admissions in that record.¹⁷⁹

The Dean considered that 'nowadays minute facts averred would be met with a general denial and nothing is gained by it'¹⁸⁰ and he expressed the opinion that

'the form of general denials should never be allowed in any instance. 1st, they are of no use to the court in considering the case, unless it is to end in proof; and I concur in the remarks that were made by Lord Brougham, in his speech on the administration of justice,¹⁸¹ that there can be nothing so injurious to a jury trial as the possibility of surprise which general statements or denials almost necessarily lead to.'¹⁸²

It should be remembered that the Act of Sederunt 1828 had provided that the condescendence and answers could be 'revised' and in practice this was another cause of delay.

The system of revisal and re-revisal, amended by the A.S. 1828, superseded the provisions that required parties to appear before the Lord Ordinary for finally adjusting their pleadings after the condescendence and answers to the extent that the

¹⁷⁹ *ibid.* p. 86, Ans. 32.

¹⁸⁰ *ibid.* p. 86, Ans. 32.

¹⁸¹ This is probably a reference to 'Present State of the Law. The Speech of Henry Brougham in the House of Commons on Thursday, February 6, 1828' (London, 1828) in which the MP and future Lord Chancellor scrutinised and assessed a wide range of topics in English Law. At p. 69, commenting on traditional English forms of pleading, he had stated 'The first great rule of pleading should be to induce and compel the litigant parties to disclose fully and distinctly the real nature of their respective contentions, whether claim or defence, as early as possible. The second is, that no needless impediment should be thrown in the way of either party...whereby he may be hindered to propound his case in point of fact, or of law. In the third place, all needless repetitions, and, generally, all prolixity should, as well as all mere reasoning, which neither simply affirms nor denies any proposition of fact, be prevented.' As noted above, Henry Brougham had been an advocate before calling to the English bar. A year after this speech, he would be given a peerage and elevated to Lord Chancellor in Lord Grey's new Whig administration of 1830.

¹⁸² *Commissioner's Report*, 1834, p. 86, Ans. 31.

hearing followed long periods of revisal. Under the statutory provisions,¹⁸³ the right of revisal on the motion of either party was absolute but the revisals were supposed to be made to the pleadings under the superintendence of the Ordinary and it had been envisaged that the procedure could be completed on summons and defences briefly, or if necessary, on the pursuer's condescendence and the defender's answers. There was supposed to be only one revisal; but second condescendences became normal and with the development of the 'revised' condescendence and answers and the 're-revised' condescendence and answers, parties came to view the first condescendence and answers of little importance.¹⁸⁴ Second revisals became a matter of course and three or four revisals were not uncommon.¹⁸⁵ As J. Murray, writing in 1831, explained in the introduction to Volume V of his Jury Court Reports,

'After the Defence come the Condescendence, the Answers, the Revised Condescendence and Answers, and in many cases what is called Re-Revised or Amended Revised papers; thus, in almost all cases there are three, and in some four, statements of the case of each party. Were we not accustomed to this it would excite surprise; but the fact is undoubted, that ninety-nine cases in a hundred are stated three times before they go to proof.¹⁸⁶

The revisals, contrary to whole tenor of the 1825 scheme, became 'detailed expositions of evidence of each particular fact' producing 'great intricacy and confusion'.¹⁸⁷ A motion for revisal was also used as a delaying tactic.¹⁸⁸ As a result of

¹⁸³ s. 9 1825 Act and s. 105 of the 1828 A.S.

¹⁸⁴ see Answers by Hugh Macqueen, W.S., *Commissioners' Report, 1834* Ans. 20&21, p. 37.

¹⁸⁵ See Answers by Patrick Robertson, Advocate 'Many cases of numerous and in many cases useless revisals of the condescendence and answers are now permitted' *Commissioners' Report, 1834*, Ans. 19, 20 & 21, p. 16. There was a financial incentive to agents and counsel in drafting these revisals as they were paid according to length. See M'Glashan, *Practical Notes, op. cit.*, p. 298.

¹⁸⁶ J. Murray, Advocate, Introduction to Vol. V of *Reports of Cases Tried in the Jury Court (etc.)* (Edinburgh, 1831).

¹⁸⁷ *Commissioners' Report, 1834*, p. 35.

the length and frequency of revisals to condescendences and answers, it became difficult to read the record to discover what was actually factually disputed between the parties and the Court was often faced with papers just as long as the minutes and memorials, condescendences and answers which existed under the old system. It was remarked that there was nothing 'more cumbrous and unnecessary, than the revised and re-revised papers.'¹⁸⁹

Not only did revisals elongate the process. It seems that a practice developed of the Lords Ordinary ordering minutes to explain or expand averments in the revised pleadings¹⁹⁰ and, of course, these minutes would require answers and would then both be debated at a later date.¹⁹¹

This method of presentation of fact and law was far removed from what had been envisaged in 1825 and it is not difficult to see why the situation developed. As already remarked upon, the Faculty of Advocates in this period was a professional body not particularly receptive to changes in pleading practice and from the very commencement of the 1825 Act had expressed a preference for the older methods of 'ripening or maturing a cause' by copious written pleading. It will be recalled that it had been their collective view, expressed in 1824, that the Ordinary should have a limited rôle in preparation of the parties' pleadings. Moreover, as had been envisaged by Charles Hope, the advocates appear to have successfully subverted the scheme under the Act and A.S. so that it now operated to permit alterations,

¹⁸⁸ *Campbell v. Ricketts or Campbell* (1863) 1 M. 217 per L. Curriehill at 219.

¹⁸⁹ Evidence of Joseph Murray *Commissioners' Report, 1834* Ans. 20, p. 24.

¹⁹⁰ Anon, 'The Law's Delay - The Plea of Relevancy' (1859) 3 *Journal of Jurisprudence* 57 at 60. See also Fourth Report of the Commissioners 1870, pp. 9-10.

¹⁹¹ The usual issue of contention was whether the party had introduced a 'new case' in the revisals or the minute.

variations and changes to the pleadings to be incorporated in a similar manner to the practice of the era before. The revisal procedure permitted the cause to ripen and it was not rushed to proof or trial upon averments which had not been fully answered or explored.

However, the Ordinaries themselves were not entirely blameless. Although in the immediate period following 1825 the preparation of the parties' pleadings was subjected to judicial control and most of the judges had zealously *ex proprio motu* 'struck out, amended and thrown out' passages in pleadings,¹⁹² or ordered withdrawal of papers 'unnecessarily loose and voluminous,'¹⁹³ by 1831 this was done, if at all, with 'a very sparing hand.'¹⁹⁴ The judges now preferred to allow the parties exhaustively¹⁹⁵ to thrash out the issues themselves, acquiescing in the numerous revisals and only closely examining the parties' respective positions at the closing of the record.¹⁹⁶ Hugh Macqueen, W.S., explained the procedure, in his evidence to the 1834 Commissioners

'According to the actual practice of the Court, the Judge before whom a cause comes to depend in the Outer House, does not read any of the condescendences or written pleadings until a record has actually been completed. So that during the tedious preparation of the record, the Judge, at best, can only have a general conception of the nature and character of the

¹⁹² *Charles v. South District Market Co.* (1825) 4 Shaw 506.

¹⁹³ *Mackenzie v. Magistrates of Dingwall* (1827) 5 Shaw 339 (N.E. 314), *Hamilton v. Macks* (1828) 6 Shaw 1033.

¹⁹⁴ Murray, *Introduction, op. cit.* p. 17.

¹⁹⁵ Bell's description of the 'mode of pleading' of the time is peppered with this word and he remarks that it was the *duty* of the judge to examine the summons, defences and condescendences and answers to ensure that the cause was 'fully pleaded'. Bell, *Principles of the Law of Scotland* (2nd and 3rd eds.) *op. cit.* paras. 2274 and 2271 respectively.

¹⁹⁶ See the Answers of Dean of Faculty John Hope to Commissioners that [The Ordinaries'] 'examination of the summons has not been quite so rigorously or anxiously attended to as was expected' This could be extrapolated to all the parts of the pleadings. *Commissioners' Report, 1834*, p. 83-4, Ans. 7.

litigation; and the parties not unfrequently lodge before him three or four successive papers on each side. The pursuer's first paper (after the summons,) is entitled "condescence," and the defender's first paper (after his defences,) is entitled "answers to the condescence." It is not the practice of the Judge to read these papers, in order to ascertain whether they sufficiently meet each other, or constitute a good record. As a matter of course, the pursuer is allowed to revise his condescence, and the defender to revise his answers. Entirely new papers are, after considerable delay, given in by the parties under the title of *revised* papers; and it not unfrequently happens that a *third* set of written pleadings (still without any examination by the Judge) is given in, under the appellation of *re-revised* condescence and *re-revised* answers. Numerous instances may be found, at every bar, where these *re's*, on each side, extend to *re-re-re-re*. In the end, the Judge makes avizandum, and at avizandum, he only reads the *last* one of the *re's* upon each side, on which alone the record is afterwards closed.¹⁹⁷

What was supposed to happen was that after revision, the parties were required under the Act to appear before the Ordinary for final adjustment of their respective averments of fact and their notes of pleas in law whereupon the Ordinary was to examine these, suggesting any new plea which would be required to exhaust the whole disputable matter in fact and law, permitting any further adjustment as necessary, after which the record was authenticated and closed. Occasionally the Ordinary could order further disclosure of a party's position after the closing of the

¹⁹⁷ Answers of H. Macqueen, W.S., *Commissioners' Report*, 1834, p. 37, Ans. 20 & 21. He continued that the case was with the judge thereafter at avizandum for several months preparatory to closing the record and when released, the record was closed and the parties were ordered to debate on the debate roll which could take another several months. When the debate was finally heard, it once more went to avizandum for an indefinite period.

record¹⁹⁸ but in general, it seems, the record comprising the revised condescendences and answers, was held to contain the parties' separated averments of facts and statements of law. The actual result was more often a product just as long and diffuse as the pre-1825 pleadings, containing partial admissions and general denials, averments and statements of facts containing evidence and argument, averments of the probability of the truthfulness of parties' positions, mixed with propositions in law as well as the facts both essential and non-essential and pleaded both as averment and in the pleas-in-law. It was difficult to follow what was disputed by the parties in fact and law.¹⁹⁹ The House of Lords was not favourably disposed to this presentation of pleading under the 'Scotch' system and as Lord Chancellor Brougham remarked in 1833, there could not 'by possibility, be a more inconvenient mode of proceeding than this'²⁰⁰ and that the Court was 'left to calculate and to guess; ... [and] almost left to conjecture what the real points of difference in matters of fact are between the parties'.²⁰¹

Why was it that the advocates returned to this manner of pleading? We have already discussed some of the reasons above, but there were two additional factors. In the first place, there were variations among the judges as to how the statute and provisions of the respective acts of sederunt were to be applied. Even the Divisions

¹⁹⁸ M'Glashan, *op cit.* p. 99, *M'Donnel v. Caledonian Canal Commissioners* (1829), *M'Kenzie v. Smith* (1829) D&A Reports.

¹⁹⁹ s.106 of A.S. 11th July 1828 had attempted to remedy this by stipulating how the record was to be made up: 'in all causes wherever the condescendence and answers, as revised and finally adjusted for the record, shall be printed, this shall be done either in double columns on the same page, so that the answer to each article shall be opposite to the corresponding article of the condescendence, or each answer shall follow and be subjoined to the article of the condescendence to which it relates.' Practice followed the latter.

²⁰⁰ *Blinco's Trustee v. Allan & Co.* (1833-4) 7 W. & S. 26 at 53.

²⁰¹ *ibid.* p. 56.

could vary in interpretation.²⁰² If there were different judicial interpretations of the provisions, all one could do was to draft the pleadings to meet the vagaries of the Ordinary who ordered them, but insert material which might be more favourably received by another. As Murray noted

'Besides, there is an impression prevalent at the Bar, that the Judges differ in opinion as to what ought and ought not to be stated' and 'the Bar attempt to meet those different, or they suppose different, views of the Judges; and it is no unusual apology for what is pointed out as redundant in the pleadings, that it was inserted to meet the views of the Judge who ordered the paper.'²⁰³

In his evidence to the 1834 Commissioners he expanded upon this.

'When a new system is to be introduced, it is of great importance, that it should be under the regulation of *one* mind. When there are a number acting separately, there will always be shades of difference in their views, and where these exist, it must necessarily distract and puzzle those who must thus have *various* new systems, instead of one, to learn and practise.'²⁰⁴

Secondly, there were very strong suspicions in the Faculty that the Judges were deciding cases on the records and not upon the *viva voce* pleading which was to follow at the debate after the revised condescendences and answers had been lodged. Their oral submissions on the written pleadings were often cut short by the judges²⁰⁵ and the pleadings were advised immediately *ex tempore*. Requests for proof

²⁰² e.g. the First Division considered that actions raised before the passing of the 1825 Act were now to be regulated in accordance with that Act (*Veitch v. Tennant* 4 Shaw 352) but the Second Division took the opposite view. (*Scott v. Hamilton* 4 Shaw 390).

²⁰³ Murray, *Introduction*, *op. cit.* p. 17.

²⁰⁴ Answers by J. Murray *Commissioners' Report*, 1834, Ans. 24, p. 24 See also the Evidence of Patrick Robertson, Advocate, *Commissioners' Report*, 1834, Ans. 18, p. 16.

²⁰⁵ An article written in 1859 opined 'All attempts to get through the arrears by stopping speeches and "bringing parties to the point" (as it is grimly called), only end by sending

on commission or for issues to be adjusted were often denied. To all intents and purposes, the Ordinaries had reverted to the old manner of deciding cases without proof, on the probability of the truth of parties' respective averments. Further, where the debate did proceed without judicial interruption, the Ordinary would frequently sustain a party's submission that the pleadings were irrelevant or would decide the case on the hypothetical facts (whether constituted by genuine admissions or not) applying law and obviating costly inquiry by proof.

It was thought that this was even more prevalent where the Ordinary had ordered in 'written cases'²⁰⁶ in causes of importance or difficulty after the record was closed as well as in the Inner House on reclaiming motions. The Bar considered that to counteract this, they had to jettison any attempts to comply with the strictures of the revised method of pleading and follow suit, not on the basis that this was a reversion to a more comfortable style, but because it was imperative to a client's case that all the facts connected with the case, conclusions deduced from the facts, evidence and argument, were presented to the judge, if there was a risk that he would decide on probability of the cause, without proof.

Even the leader of the Bar told the 1834 Commissioners that judges decided the cause on a 'general impression' of the record which tended to 'loose decisions on the whole matter' of the cause²⁰⁷ and Lord Moncrieff, looking back in 1867 to his early

counsel, agents and parties out of Court, dissatisfied and indignant, and in covering the table of the House of Lords with appeals.' Anon., 'The Law's Delay - The Plea of Relevancy' (1859) 3 *Journal of Jurisprudence* 57 at 63.

²⁰⁶ i.e. a written pleading on the merits. The procedure was regulated by ss. 22 of the 1825 Act and ss. 62 - 64 of the A.S. 1828. A case was prepared by printing a copy of the record as authenticated and each ground of law or pleas as stated in the record was separately argued.

²⁰⁷ Answers by John Hope, *Commissioners' Report*, 1834, Ans 17. The Commissioners concurred in this assessment. See First Report of the Commissioners *op. cit.* pp. 40-2.

years at the Bar recollected 'when I came to the bar, the Judges, who had been trained in the school of written pleadings, were impatient of oral debate in the Inner House.'²⁰⁸

Crabb Watt, in his Memoir of Lord President Inglis, observed of the period,

'Previous to debate, meagre records - which in many instances came in place of the time honoured minutes - were read overnight by certain judges who came up in the morning with clear opinions (frequently indicated to the counsel who opened) for or against either party, judgment often being given upon an insufficient hearing.'²⁰⁹

It was probably for these two reasons that the profession had returned to averments of rhetoric and argument, averments of evidence and probability and all facts connected with the cause if the judge was to determine a cause on a view of the whole pleadings.²¹⁰

(ix) The Profession's Desire for More Superintendence in the Preparation of Records and Striking Out Irrelevant Material.

Strangely, some of the evidence from the profession suggested that the best way forward was for there to be greater supervision of the parties' pleadings by the Ordinary and for the profession to realise that capital could be made from errors in the opponent's pleadings. The future Lord Robertson told the Commissioners,

²⁰⁸ Lord Moncrieff, Address to Scots Law Society 1867 [repr. 'Introductory Addresses - Lord Ormidale and the Dean of Faculty' (1867) 11 *Journal of Jurisprudence* 566 at 570 and (mis)quoted by Crabb Watt *op. cit.* p. 55].

²⁰⁹ James Crabb Watt, *John Inglis op. cit.* p. 241.

²¹⁰ This was to be an ongoing suspicion at the Bar for the next thirty years.

'Improvement of pleading will be more securely advanced by a careful superintendence of the Judge, and by practice²¹¹... It should not be left to the party to admit or deny such facts as he thinks proper²¹²... I think the Judge ought to superintend the preparation of the record *in chambers*.²¹³

And James Joseph Murray expressed this view,

'If the present form of summons is retained, it is well worthy of consideration whether, in all cases, the facts ought not to be stated, as they now are in the condescence, under separate numbers or articles, and each averred as a fact, instead of giving an involved statement of fact and inference. This will require strict attention on the part of the Judges, and I doubt whether any degree of attention, on their part, will ever be sufficient, or that anything will prove an effectual check to the statement of irrelevant matter in the summons and condescence, till the one party can be made to feel, that he derives some benefit, from laying hold of any error on the part of his opponent, though undoubtedly it must be under the direction of the Judges, till certain principles are fixed, and something like a system of accurate pleading is formed.²¹⁴

In practice, summonses were once more drafted as the 'opening gambit' and defects therein were supplied by the condescence. It was suggested that this could be corrected by the Ordinaries using their powers under the Act.²¹⁵

'Were all summonses containing argument, quotation of documents, statements tending to prove the ground of action instead of merely setting it forth in concise and explicit terms, dismissed as the present regulations authorize, there is no need of farther enactments. The Lord Ordinary should

²¹¹ *Commissioners' Report*, 1834, Ans. 24 & 25, p.16.

²¹² *Commissioners' Report*, 1834, Ans. 32,33,34,35, p.17.

²¹³ *Commissioners' Report*, 1834, Ans 38, p. 17.

²¹⁴ *Commissioners' Report*, 1834, Ans. 6, p. 23.

²¹⁵ 1825 Act s. 6.

enforce the principle, by expunging irrelevant statements, and giving expenses before allowing the record to be closed.’²¹⁶

The Ordinaries seem to have been reluctant, though, to ‘expunge irrelevant statements.’ It seems that the only category of statements which they would *ex proprio motu* order to be removed were those of an impertinent or scandalous nature, or averments unjustifiably imputing fraud, or immoral conduct on the part of others not parties to the action.²¹⁷ This came to be the only type of irrelevant averment which would be removed by the judge. In 1857, in an editorial attacking the use of the general plea of relevancy, the *Journal of Jurisprudence* remarked

‘The judges are not altogether helpless, and not entirely blameless. They are not so confined by the strait jacket of statutory enactments and fixed rules, that they cannot prevent, to some extent, this great scandal to the administration of justice. Although the plea be not impertinent and cannot therefore be struck out of the record,²¹⁸ yet the defender is not entitled to judgment on it, at his own time.’²¹⁹

The reasons for the Ordinaries’ reluctance to utilise the 1825 Act’s powers of striking out irrelevant material are more difficult to ascertain. The following considerations

²¹⁶ James Johnston Darling, *W.S. Commissioner’s Report*, 1834, Ans. 6, p. 28.

²¹⁷ The averments were not privileged and an action for ‘judicial slander’ was competent. See also *infra* Ch. 4 (for cases).

²¹⁸ my emphasis.

²¹⁹ Editorial ‘The Law’s Delay – The Plea of Relevancy’ (1859) 3 *Journal of Jurisprudence* 57. The editorial was probably the work of Sheriff Guthrie Smith who edited the *Journal* at its inception. See J.C. Brown, ‘Scottish Legal Periodicals 1829-1935’ in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society), (Edinburgh, 1935) 317 at 319. However, it is difficult to attribute many of the anonymous works which appeared in the *Journal* until its demise in 1891. Many came from young liberal and progressive advocates. The ruling principle of the journal from the outset was ‘free discussion’ and as will be appreciated from the tenor of many of the articles quoted *infra*, it was not always wise to append one’s name to the article. As Brown notes, ‘not a few editors and contributors did themselves more harm than good in the eyes of the powers that were.’ *ibid.* p. 320.

may have played a part in affecting the collective view of the judges as to their proper judicial function. One might speculate that they would have considered it to be a form of judgment on the merits of the action before the record was closed, if a decision was taken at that stage of the relevancy of the parties' averments, and so capable of forming a valid ground for a reclaiming petition, but this is not attractive as the Act prescribed that it was their duty to do this prior to the closing of the record. Of course, a closed record was different as the parties could then be held to be resting foreclosed upon the contents thereof and thus dismissal of a cause in relevancy based on the parties' pleadings on the record itself (even without oral argument) was not necessarily repugnant. One might also suggest that although the act gave the Ordinaries these powers, it had been a feature of Enlightenment thinking, a generation before, that the proper rôle of the judge was as an 'umpire' between two agonistic combatants.²²⁰ Few of the judges would have been unaware of the dicta of Lord Chancellor Eldon a few years before²²¹ and English procedural influences were extending into Scotland at this stage although they were to have greater effect later. Perhaps the reasons were more mundane. It will be recalled that these judges had been advocates at a time when the Faculty's professed position in the conduct of litigation was very far away from any concept of judicial 'interference'. Thus, perhaps the Ordinaries were amenable to submissions by counsel that it was not part

²²⁰ particularly expressed by Adam Smith. See further P. Stein, 'Law and Society in Eighteenth-Century Scottish Thought' in (eds. N.T. Phillipson and R. Mitchison) *Scotland in the Age of Improvement Essays in Scottish History in the Eighteenth Century* (Edinburgh UP, 1996) 148 at 162 and for an assessment of Smith's theories on law and reform of court procedure, see J.W. Cairns, 'Adam Smith and the Role of the Court in Securing Justice and liberty' in (eds.), RP Malloy and J. Evensky, *Adam Smith and the Philosophy of Law and Economics* (Dordrecht, Kluwer, 1994) 31 and by the same author 'Ethics and the Science of Legislation: Legislators, Philosophers, and Courts in Eighteenth-Century Scotland', (2000) 8 *Jahrbuch für Recht und Ethik* 159.

²²¹ See also the *dicta* of Eldon LC in *Ex part Lloyd* 1822 Mont 70, 72n. 'Truth is best discovered by powerful statements on both sides of the question'. It was part of English thinking at the time that the judge's role was as umpire, ensuring that justice was, and was seen to be, done, overseeing the parties and the conduct of the jury trial. His role was certainly not to become embroiled in the parties' dispute and the ascertainment of the subject matter of that dispute.

of the judge's business to interfere with the parties' preparation of their pleadings prior to closure of the record and in any event, it made for an easier judicial life if the judge permitted the parties to 'exhaustively thrash' out the issues between them using the developing rules of written pleadings, rather than descending into the arena of conflict and sorting out the parties' positions for them.

(x) The Commission's Report 1834

Reference has already been made to the evidence provided to the Commission appointed in 1834²²² to examine the implementation of the new forms of procedure following *inter alia* the passing of the 1825 Act.²²³ Under the chairmanship of George Joseph Bell²²⁴ it took evidence in the form of answers to questions (85 in total) which questions are set out at pp. 11A to 15A in the appendix to the First Report. The First Report was produced in 1834.²²⁵ In it, the Commissioners acknowledged that

'There has been, for some time past, general and increasing dissatisfaction throughout the country, with the mode in which justice is at present administered in the Court of Session. It seems to be generally felt, that the advantages which were anticipated from the changes introduced by the Judicature Act have not been realised to nearly the extent that was expected;

²²² For our purposes, we concentrate on the First Report which had been required *inter alia* to conduct [Purpose 2nd], diligent and full enquiry 'As to the methods now followed of preparing Records in the said Court, and any alteration it may be fit to make in such methods, with a view to correct investigation, and to economy and dispatch.'

²²³ Also Jury Court assimilation.

²²⁴ For background to his life and work and his involvement in the 1824 Commission and his Chairmanship of the 1834 Commission see R. Black, 'Introduction to the 1990 Reprint' in *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence by George Joseph Bell* (7th ed.), (1990 Reprint) vol. 1, (Edinburgh, 1990); W.M. Gordon, 'Introduction to the 1989 Reprint' in *Principles of the Law of Scotland by George Joseph Bell Professor of the Law of Scotland in the University of Edinburgh* (10th ed.), (1989 Reprint), (Edinburgh, 1989) and by the same author, 'George Joseph Bell - Law Commissioner' in A.J. Gamble (ed.), *Obligations in Context: Essays in Honour of Professor D.M. Walker* (Edinburgh, 1990) 79.

²²⁵ First Report of His Majesty's Law Commissioners, Scotland. 12 May 1834 (hereafter *First Report 1834*).

and that there is not merely room, but an absolute necessity for some material reform.²²⁶

But their proposals for reform were few in number and the whole Report was really a damp squib. The Commissioners accepted the evidence that the summons was often defective and inaccurate as it was frequently drafted in haste to obtain diligence but decided to retain it in the same form.²²⁷ As to abuses in the lodging of and construction of defences, the Commission considered that any evils in form had arisen from misapprehension, it being a new system. It acknowledged problems of due enforcement although it considered that any 'evils' were gradually disappearing.²²⁸

On the Faculty's suggestion that the preparation of a case for decision was no part of proper judicial duty²²⁹ the Commission was more positive. It was their strong conviction that records should be adjusted under the immediate superintendence of the judge as this was the clear intention of the Judicature Act although adjustment at the conclusion of revisal was thought to be best conducted in chambers.²³⁰

But on the anxious topic of superintendence of the preparation of parties' pleadings before this stage was reached, the Commission thought it better to leave it to the discretion of the court in checking such abuses as may occur. This approach was justified in part on the basis that changes in form could have 'injurious

²²⁶ *ibid.* p. 30.

²²⁷ *ibid.* pp.31- 33.

²²⁸ *ibid.* p. 34.

²²⁹ Members of the Faculty of Advocates had given this evidence, still adhering to the collective Faculty's position as per their 1824 Report.

²³⁰ First Report 1834 p. 39.

consequences' and they noted that since 1815 there had been 1300 reported cases in the Court of Session on points of mere form.²³¹

No new Acts of Sederunt or Acts of Parliament followed the Commissioners' Report.

(xi) The Start of the Development of 'Fair Notice'?

We may briefly notice in this period the possible start of the development of 'fair notice' and the relationship between what was averred on record and evidence which was admissible at commission or in jury trial upon issues (and later which could be led at proof). One sees a snippet in the evidence to the Commissioners reflecting concern that a party 'should have no ground to complain of surprise in proof.'²³² This idea in the evidence of James Joseph Murray, Advocate had been previously explained by him in his Introduction to Volume V of the Jury Court Reports as being part of the new function of pleadings informing the other side and not just the judge:

[the object of pleading] 'now is to inform the opposite party of the facts which, when proved, will support the action or defence'²³³ [and] 'to give information to the opposite party of the nature of the case to be proved against him, and to prevent surprise.'²³⁴

Whilst it was accepted that the information to be given to the other party was the facts which the party intended to prove but not how they were to be proved, Murray had considered that a clear and distinct statement of the ground of action or defence would 'put the opposite party on his guard as to the case which is to be proved

²³¹ p. 36.

²³² Answers of James Joseph Murray, Advocate, Commissioners' Report, 1834, Ans. 5, p. 23.

²³³ Murray *Introduction, op. cit.* p.7.

²³⁴ Murray, *Introduction, op. cit.* p. 10.

against him.²³⁵ It is odd that in the pages of evidence submitted to the Commissioners it was only Murray who had raised this. In the period, other commentators had considered that the purpose of written pleadings was to facilitate exhaustive reasoning so that the debateable grounds of the cause were fully gone over such that the judge was satisfied that the cause was fully pleaded; and if parties were not skilful enough to do this, the judge himself was required to direct parties to remedy any defects before the record was closed.²³⁶ To succeed the party had to state the whole facts of his case such as to be sufficient to infer the conclusions,²³⁷ or 'support' the conclusions, but the sufficiency element was examined technically in the context of this 'support' not as to whether there was sufficient 'notice' to the other side.

But the development of pleadings constituting notice to the opponent such as to prevent surprise and thus prevent the opponent's objection to evidence led in trial seems to have been part of jury court practice. It will be recollected that Murray himself was the editor of the Jury Trial Reports.²³⁸ Consider also this passage from the jury cause practice book of 1837 by the future Lord Ormidale:

all that is required [sc. for pleadings in jury actions] is, that the grounds of action and defence are brought out with sufficient precision and distinctness to suggest the proper issue or issues, and enable the parties, at the trial, to lead their proof, free from any objection of not having given due notice, of the grounds of fact or law, on which they respectively rely.²³⁹

²³⁵ *ibid.* p. 26.

²³⁶ See e.g. Bell's Principles 2nd ed. (1830) *op. cit.* pp. 620-1.

²³⁷ Shand, *Practice*, (1848) *op. cit.* p. 330.

²³⁸ Murray, *Reports of Cases Tried in the Jury Court at Edinburgh, and on the Circuit from November 1828 to July 1830 both inclusive.* (Edinburgh, 1818 - 1831).

²³⁹ Robert Macfarlane, *The Practice of the Court of Session in Jury Causes* (Edinburgh, 1837) p. 32. My emphasis.

By 1842, this concept of notice to the other side as a *requirement* had developed. In this year, John Hope²⁴⁰ was the Lord Justice-Clerk. In *Neilson v. Househill Coal and Iron Company*,²⁴¹ a complicated patent action, he told the jury,

‘if each party has not full²⁴² and fair notice of the adversary’s case, he cannot be able to meet it in evidence; and if a verdict passes in consequence of parties entering on a line of enquiry, of which the adversary got no notice, and on which he could not be prepared, a trial would be the most imperfect and defective mode of investigation which could be conceived. The evil of this state of things was universally felt in England, and the eloquent and striking problem of these evils, in the celebrated and most instructive speech of Lord Brougham on law reform,²⁴³ led to what all think still an imperfect and incomplete remedy in England. We have always had a complete protection against such evils in Scotland in our system of pleadings, and in the principles on which they are framed, and by which, under statute, they must be framed in Scotland. The beauty of the Scotch system is, that, without disclosing what is properly called evidence, you must at least state the line of defence, and the main facts and points in the enquiry on which you rest, so that the other party shall be fully able previously to investigate the case, and be prepared for it.’²⁴⁴

²⁴⁰ whose views on written pleadings expressed to the 1834 Commissioners when he was Dean of Faculty we have already examined.

²⁴¹ (1842) 4 D. 1187. Shand *ibid.* cites this case as an authority for the above proposition that the whole facts to be proved had to be set forth in the condescendences and answers – not that it was required as fair notice to the other side to prevent surprise.

²⁴² notice the word ‘full’

²⁴³ referred to above.

²⁴⁴ p. 1193. The defenders had lodged a ‘Note of Objections’ and had argued that they were ‘not to be limited to their record’ (p. 1192.)

The concept of fair notice as specification, at least outwith jury trial, seems to have developed later²⁴⁵ and the modern rules are examined in the next chapter, but it might be suggested that the origins of the concept arose about this time as part of the practice of the jury court. By the mid fifties, Dickson could state in his *Treatise on Evidence*, under the heading 'Variance between the Allegation and the Proof'²⁴⁶

'As the object of making up a record is to bring out the facts in dispute between the parties, and thus to prevent surprise on either side, a different case from that which is averred cannot be proved, although it may in itself be a good ground of action or defence.'²⁴⁷

He explained that a variance between averment and proof in a matter of essential description was fatal, because

'the other party having come prepared to meet a certain defined case, he might be surprised and seriously prejudiced, if a case materially different in description were allowed to be proved against him'.²⁴⁸

Thus, if the substance of the issue, or of the libel where there was no issue, was not proved the defender was successful. But it was enough that the issue or libel was proved substantially as a pursuer did not require to prove immaterial facts, and the

'Court will not listen to objections of a captious or hypercritical nature if the verdict is clear according to a natural and common sense reading of the verdict although not framed with technical precision or strict logical accuracy'.²⁴⁹

²⁴⁵ see *infra* in this chapter.

²⁴⁶ Dickson *A Treatise on The Law of Evidence in Scotland*, 1st ed., 2 vols., (Edinburgh, 1855) vol. i, pp. 34.

²⁴⁷ *ibid.* p. 34-5.

²⁴⁸ *ibid.* p. 38.

²⁴⁹ citing *Lawson v. North British Rail Co.* (1850) 12 DBM 1250. *ibid.*

The General Session papers held in the Advocates' Library contain pleadings from the period. Appendix 2 to this thesis contains a brief examination of terms used in the pleadings from 1843 to 1873. The standard plea during this period was that the 'averments of the pursuer are not relevant or sufficient to support the conclusions of the summons' or a variation thereof. By the end of this period, one sees in pleadings 'calls' for further specification such as 'The pursuer is called upon to provide dates and particulars relating to ...' However, the first use of a plea directed to specification *per se*, seems to have been around 1885 when pleas such as 'The averments of the defenders are irrelevant and wanting in specification and should not be remitted to probation' and 'The pursuer's statements are irrelevant and wanting in specification' are found.

(xii) Ongoing Problems with Written Pleadings and Further Proposals for Change

Following the Commissioners' Report, the Bar in any event continued to plead evidence, and closure on a summons and defences was rare. On 6 March 1839 the Lords Ordinary published a Notice in an attempt to 'purify and simplify the records.' In their collective view, records were not being 'prepared according to the true meaning and spirit of the Judicature Act.' They advised that from now on '[E]very possible encouragement shall be given to parties to close the record on summonses and defences'; minor amendments would be permitted; and they called upon the Faculty to 'abstain...from expositions of evidence, or displays of circumstances, plainly meant to operate as argumentative views of the facts.' No more than one revisal was to be allowed as a matter of course, and no 'quotations from statutes, deeds, correspondence or other documents' were to be permitted - 'except of a few words or lines to indicate the passages relied on'.

Regarding the use of argument, the Notice does not seem to have been closely followed in practice, for reasons similar to those which had blunted the provisions of 1825 Act explained above, and closing on a summons and defences remained infrequent.²⁵⁰

In 1847/8, the Court, in a draft Act of Sederunt, made another attempt to prohibit bad practices in pleadings and prevent revisals and re-revisals. The draft was, in part, a regurgitation of previous proposals. It proposed that the summons could be amended before closing the record,²⁵¹ the Ordinary could record on the Interlocutor sheet whether it was his view that further papers were required after the summons and defences, the defender's statement of facts would be incorporated in the answers, admissions and denials were to be specific and no arguments, observations or inferences were to be introduced into the record. There would be only one revisal and the revised condescence and answers would not form separate papers.²⁵² An admission could be deemed where an averment was not denied and was within or even *outwith* the parties' knowledge. It was proposed that there could be no quotation from documents other than those 'forming the ground of the action or defence.' The Ordinary would continue to have the power of ordering matter improperly introduced into the record, or which in his opinion was unnecessary or irrelevant, to be deleted. At the closing of the record, it was envisaged that the Ordinary could 'put it to the party, whether he intends to stand on particular averments or denials.'

²⁵⁰ There was an act of sederunt passed 10 July 1839 once more reinforcing earlier provisions that a fact relevantly averred which was not admitted or denied by the party within whose knowledge it was, was held to be admitted.

²⁵¹ This was later implemented. See *infra*.

²⁵² This was also implemented later. See *infra*.

The Faculty responded in the usual way by appointing a Committee to investigate the proposals, which duly reported in May 1848.²⁵³ For the Committee and the Faculty, the proposals were a curate's egg – good in parts. They considered that the summons should contain the condescendences as articulate statements of the facts,²⁵⁴ and the incorporation of the defender's statement of facts was generally a good idea but would not work in practice. They were vehemently opposed, however, to the idea that the Ordinary could delete parts of the record as irrelevant prior to hearing the parties on the merits because, (as they had expressed before²⁵⁵) 'the party ought to be entitled to state his case in such way as his advisers think right.'²⁵⁶ It was best if the power of deletion was exercised only to delete averments improper in form such as long quotations from documents or argumentative pleading.²⁵⁷ They dismissed the idea that there could be a deemed admission of a fact outwith a party's knowledge as an error in the draft as it would be 'plainly inadmissible.'²⁵⁸

The draft was abandoned. Lord Cockburn²⁵⁹ had been one of the draftsmen of the proposal and with his usual sense of drama he recorded the episode in his Journal,

'The Committee of Judges (of whom the Justice-Clerk Hope and I were the most active) framed as complete a new system as was possible without a Statute last session, and the rest of the Court agreed with it with greater

²⁵³ *Report of the Committee Appointed by the Faculty of Advocates to Consider the Proposed Act of Sederunt* (Edinburgh, 1848) [hereafter *Faculty of Advocates' Report 1848*].

²⁵⁴ *Faculty of Advocates' Report 1848 op. cit.* p. 3.

²⁵⁵ It will be recalled that in 1824 the Faculty had considered that it was for the parties to 'conduct their cause in the manner they think best.' They expressed the view that it was 'no part of the business of the Judge to do more than to decide the case which the parties present to him.' *Report of the Committee of the Faculty of Advocates* (Edinburgh, 1824) *op. cit.* p. 6. See *supra*.

²⁵⁶ *Faculty Report, 1848 op. cit.* p. 11-12.

²⁵⁷ This was how the provisions in the 1825 Act had been interpreted. See *supra*.

²⁵⁸ *Faculty Report, 1848 op. cit.* p. 10.

²⁵⁹ He had also been one of the Ordinaries who issued the Notice in 1839. See above.

unanimity than I ever knew prevail among them on such a matter. But "The Bodies" flew up in arms, and exclaimed against the whole project, on grounds which implied that in their opinion everything was quite right. The solicitors were the least bigoted – the advocates the most so. The Judges aware of the hopelessness of their forcing good medicine down a resisting corporate throat, gave the scheme up, but told the Lord-advocate that a Statute was indispensable. So we stand now. If the procedure be corrected effectually and speedily, the Court has a chance : if not, half or the whole of it will be quashed.'²⁶⁰

New proposals in the form of a bill²⁶¹ followed the same year drafted under the hand of the Lord Advocate, Andrew Rutherford Clark, and the bill was to become the Court of Session Act 1850. The proposed changes were again subjected to criticism by the Faculty²⁶² but strangely, and quite out of character, the Bar acquiesced in many of them.

As already noted, one of the Bill's major innovations was to prohibit the Lords Ordinary from ordering 'written cases.'²⁶³ The Lord Advocate had considered that the system of written pleadings had been abused and it was generally thought

'that the Lords Ordinary, whenever they met with difficulties '*rushed into cases*' and that in consequence, there was a grievance that could only be

²⁶⁰ H. Cockburn, *Journal of Henry Cockburn, Being a Continuation of the Memorials of His Time 1831 – 1854* (2 vols.) (Edinburgh, 1874) , ii, pp. 228-9.

²⁶¹ *A Bill to Facilitate the Procedure in the Court of Session in Scotland*. (Edinburgh, 1849)

²⁶² *Report of the Committee Appointed by the Faculty of Advocates to Consider the Bill 'To Facilitate the Procedure in the Court of Session in Scotland'* (Edinburgh, 1849), *Report of the Sub-Committee Appointed by the Faculty of Advocates to Consider the Clauses in the Bill 'To Facilitate the Procedure in the Court of Session in Scotland' Which Relate to The General Forms of Process* (Edinburgh, 1849), *(Second) Report of the Committee Appointed by the Faculty of Advocates to Consider the Bill 'To Facilitate Procedure in the Court of Session'* (Edinburgh, 1850).

²⁶³ s. 14 1850 Act.

remedied by taking from the Lord Ordinary all power of ordering minutes of debate.’²⁶⁴

Crabb Watt later memorably wrote that

‘The 14th section of the Court of Session Act of 1850 wrought greater havoc in the habits of lawyers than anything had done for a hundred years.’²⁶⁵

and commented that whilst still at the stage of a bill

‘The largest Committee of Faculty of Advocates ever appointed unanimously condemned the proposal.’²⁶⁶

But this was not strictly true. The Faculty had agreed that the change was required as Lords Ordinary were ordering cases at the beginning of a cause before it had ‘matured’²⁶⁷ and considered that ‘some restraint of the system might be effected without depriving the Lord Ordinary altogether, of the aid of written argument in cases when he considered it proper for the ends of justice.’²⁶⁸ They had proposed to let the clause stand as it still permitted the Lord Ordinary to report causes to the Inner House without cases.

²⁶⁴ Editorial: ‘The Abolition of Written Pleading. Decline of Law Learning in Scotland’ 1858 *op. cit.* p. 49. c.f. Crabb Watt *op. cit.* p. 54 ‘The Lords Ordinary in the Outer House rushed into “cases” to relieve themselves of difficulties, small and great, occurring before them.’ See also Report of the Council of the Society of Solicitors before the Supreme Courts of Scotland (repr. in parts) in: Business of the Court of Session (1857) 1 *Journal of Jurisprudence* 274 at 275 which reported that cases were ordered where ‘there was no real difficulty’.

²⁶⁵ Crabb Watt *op. cit.* p. 54. c.f. ‘These four lines [scil. of section 14] have had a greater influence upon the pleading in the courts of Scotland than all other Acts of Parliament or Acts of Sederunt or decisions of the Courts since law was practised as a science in Scotland’. Editorial: ‘The Abolition of Written Pleading. Decline of Law Learning in Scotland’ 1858 *op. cit.* p. 49.

²⁶⁶ Crabb Watt, *op. cit.* p. 55.

²⁶⁷ Report of the Sub-Committee Appointed by the Faculty of Advocates to Consider the Clauses in the Bill 1849) *cit. sup.*, p. 14. The Sub-Committee’s Report was adopted in the following Report of the Committee of the Faculty of advocates to Consider a Bill to Facilitate Procedure in the Court of Session in Scotland *op. cit.* pp. 14-15.

²⁶⁸ *ibid.*, p. 14.

The Faculty were more concerned that the judges of the Inner House were deciding cases on the record or the Minutes of Debate and recorded in their report on the bill that the judges of the Inner House should not be 'held to have formed an opinion on any case until the parties have been heard at the bar.'²⁶⁹ The abolition of written cases or Minutes of Debate ordered by an Ordinary would actually help them to make fuller oral submissions in the Inner House whilst there might be a chance of retention of the institution where justice required it. The Bar perceived that if the judges desisted from deciding the cause on the written pleadings then there would be no need to plead argument and evidence. But even on the eve of clause 14 becoming law, the Faculty seems to have resigned itself to the disappearance of the procedure, meekly observing that they remained

'of the opinion that it is not expedient to deprive the Lords Ordinary of the power of ordering written argument in cases, the nature or difficulty of which may seem to them to render this course advisable as the means of arriving at a satisfactory judgment.'²⁷⁰

In the result, the ordering of minutes of debate and written cases by the Ordinary was prohibited²⁷¹ but they could be still ordered by the Inner House. Even then, their use in that forum petered out. As the *Journal of Jurisprudence* recorded eight years later,

²⁶⁹ *Report of the Committee Appointed by the Faculty of Advocates to Consider the Bill (1849) cit sup.* p. 15.

²⁷⁰ *(Second) Report of the Committee of the Faculty (1850) op. cit.*, p. 3.

²⁷¹ s. 14 1850 Act. The Council of the Society of Solicitors before the Supreme Courts in 1857 looked back with fondness on the system as a source of learning. 'Prior to 1850 questions of mercantile law depending as much upon English authorities as upon the judgments of the Court of Session, invariably disposed of upon minutes or cases, and these pleadings form a permanent source of legal knowledge of the greatest value' *Report of the Council of the Society of Solicitors before the Supreme Courts (Edinburgh, 1857) repr. (in part) in Anon., 'Business of the Court of Session' 1857 1 Journal of Jurisprudence 274 at p. 275.*

'Since it became law²⁷² we believe that not a dozen cases have occurred where either division has ordered written pleadings, however difficult the subject or important the stake. The debate has been entirely oral.'²⁷³

But the abolition also had an unforeseen effect. Increasingly, parties reclaimed as a matter of course to the Divisions.²⁷⁴

(xiii) The Court of Session Act 1850

The Bill had had a surprisingly smooth passage through the House of Commons²⁷⁵ and became law on 29 July 1850.²⁷⁶ It introduced a new form of summons in accordance with a style appended to the act, integrating the condescence and pleas in law into the summons.²⁷⁷ Now the pursuer had to

'set forth in such summons, in such way and manner as the Court, having regard to the forms set forth in Schedule (A) hereunto annexed, may from time to time prescribe by Act of Sederunt, as applicable to the various forms of action now in use, the name and designation of such pursuer, and the name and designation of the defender, and the conclusions of the action, without any statement whatever of the grounds of action;²⁷⁸ but the allegations in fact, which form the grounds of action, shall be set forth in an articulate condescence, together with a note of the pursuer's pleas in law, which condescence and pleas in law shall be annexed to such summons, and shall be held to constitute part thereof.'

²⁷² *scil.* section 14.

²⁷³ Editorial 'The Abolition of Written Pleading. Decline of Law Learning in Scotland.' *op. cit.* 49 at p. 50. The session papers for the period and thereafter do however contain 'Cases'. See comments in Appendix 1.

²⁷⁴ Crabb Watt, *Memoir, op. cit.* p. 242.

²⁷⁵ *Phillipson, op. cit.*, p. 171.

²⁷⁶ (13. & 14. Vict. c.36).

²⁷⁷ The Faculty had welcomed this whilst a provision in the *Bill Report of the Sub-Committee etc. op. cit.* p. 3.

²⁷⁸ These had previously been stated but were now to be stated in the Condescence.

The parties could close the record on the summons and defences²⁷⁹ as before but if not, the record was to be made by the pursuer by revising the condescence annexed to his summons and revisal by the defender of his defences²⁸⁰ although there could be only one revisal of the condescence and answers²⁸¹ after which parties were to attend the Ordinary in chambers with a view to adjusting the pleadings and closing the record, the Ordinary allowing or requiring 'such alterations and amendments to be made on the records as to him may seem proper.'²⁸² The act also altered the procedure regulating jury trial and the taking of proof.²⁸³ As a result, there would develop a reluctance on the part of the judges to decide causes on relevancy or admissions which was disparagingly said to be a 'decision on hypothetical facts'.²⁸⁴

With the implementation of this Act, what might be considered the modern form of written pleading developed. In the following chapter the 'modern' rules of written pleading are examined. As we shall see, many of the cases decided in the period 1825 onwards are still relevant as authorities.

(xiv) Continuing Reform 1850 – 1875.

²⁷⁹ s. 3.

²⁸⁰ s. 2.

²⁸¹ s. 2. C.f. the Lords Ordinary Notice of 6 March 1839.

²⁸² s. 2.

²⁸³ Briefly, s. 36: aligning practice in jury trials before and after closing of the record with other Court of Session causes, s. 37: abolishing the issue and jury clerks, s. 38: providing a new procedure for adjustment of issues before the Ordinary, s.41: permitting closing submissions at close of evidence, s. 45 and 46: restricting the grounds for review by Bills of Exceptions and reclaiming Notes, s. 48: introducing a special facts procedure allowing disposal of matters of fact without jury trial or proof on commission, s. 49: permitting the Ordinary to take evidence by commission except in the enumerated causes (with the consent of the parties), s.50 providing for arbitration as an alternative to litigation, s. 51: making reporting by the Ordinary summary and verbal.

²⁸⁴ Mackay, *op. cit.* vol. ii, p. 19.

This period was important for the development of the rules of written pleading. The changes implemented by the 1850 Act bedded in and the old practice of revisal and re-revisal was modified to permit only one revisal and then increased alteration at adjustment. The introduction of amendment of the pleadings, at any time, partly removed the need for revisal until its use petered out in practice. The powers of the Ordinary to intervene in the preparation of the record were circumscribed by practice, and the idea that judges could suggest additions or corrections to pleadings or actively remove irrelevant material²⁸⁵ was rarely implemented in practice. This seems to have occurred as the parties themselves raised objections to the pleadings on pleas to the relevancy or sufficiency of averment and these objections were thereafter discussed at debate. Development of the law of evidence continued as well as rules defining what could be proved as related to what was averred. Fair notice as a requirement could lead in itself to dismissal of an action prior to any allowance of proof. Moreover, proof on commission (and the inveterate practice of prorogating the commission) fell out of favour, as did jury trial other than in the specific causes. The habit of judges deciding cases on relevancy and law without inquiry fell away as proof became popular, although there was to be an increase in the allocation of proof as 'before answer' and associated problems of what this phrase actually meant. The Court of Session Act 1857²⁸⁶ altered the rules regulating how business was distributed in the Court and the rules of procedure themselves were further modified, which would lead up to the Court of Session Act 1868.

²⁸⁵ other than impertinent or scandalous averments.

²⁸⁶ colloquially known as the Distribution of Business Act.

From this period onwards, written pleadings and the Court's procedure remained in similar form right into the 20th century and remains the basis for the modern law, examined in the next chapter.

(xv) Continuing Difficulties with Pleas in Law

The 1850 Act had not altered the requirements for stating pleas in law and the 1825 Act and subsequent provisions continued to apply.²⁸⁷ Pleas in law remained, however, problematic. The pleas were supposed to state the matter of law in distinct and separate propositions, without argument, but accompanied by a reference to the authorities relied upon.²⁸⁸ But there was little guidance as to what this actually meant. How long was this statement to be? Could there be any factual material included? Were all the authorities to be included and, if so, were parties precluded from advancing other authorities at a later stage? The Faculty of Advocates had experienced difficulties with pleas since at least 1827 and we have already seen the evidence of some of their members to the effect that they considered that a plea in law was redundant or even injurious.²⁸⁹ Right up to 1869, there were calls for the abolition of pleas-in-law. The citation of authority ceased to be followed in practice and pursuers resorted to a practice of inserting a general plea in case the particular pleas failed. A letter to the editor of the *Journal of Jurisprudence*²⁹⁰ commented:

[The] custom which now so universally prevails, in the preparation of actions is to annex to the summons, instead of detailed and articulate pleas applicable to all the points of law which are involved in the case raised, a

²⁸⁷ The 1850 Act had contained a Schedule detailing how summonses were to be constructed, but under 'Note of Pleas in Law' had merely provided 'State them articulately'.

²⁸⁸ 1825 Act s. 9.

²⁸⁹ See *infra*.

²⁹⁰ Correspondence to the editor of the *Journal of Jurisprudence*, 'Pleas in Law' (1860) 4 *Journal of Jurisprudence* p. 586-7.

general plea to the effect that, 'in the circumstances condescended on, the pursuer is entitled to decree in terms of the conclusions of his action.'

Such a plea was held by Lord Justice-Clerk Inglis to be a 'loose and unmeaning statement'²⁹¹ and the Court reiterated that:

'a plea in law ought to be a distinct legal proposition, applicable to the facts of the case.'²⁹²

Nevertheless, the practice continued²⁹³ and sometimes records were adjusted and closed without any other plea than the general plea being stated.²⁹⁴

Defenders also used general pleas, attacking the relevancy of the pursuer's averments, in the form 'the pursuer's averments are irrelevant and insufficient to support the conclusions of the summons' or with similar wording, with a view to protecting themselves against specific points which they had not foreseen as well as hopefully preventing the pursuer from getting to jury trial or at least causing him additional expense. Moreover, any decision on the plea at debate could be reclaimed against, causing the pursuer further delay and expense. An editorial in the *Journal of Jurisprudence* for 1859 observed:

'In two-thirds of the records of the cases depending in the court of law in Scotland, there will be found, (*sic*) as the first plea for the defender, the dear old, familiar words, - "The pursuer has not set forth averments relevant or sufficient to entitle him to decree as concluded for" ...²⁹⁵

²⁹¹ *Young & Co v. Graham* (1860) 23 D. 36.

²⁹² *Young, supra*.

²⁹³ and could be recommended as good practice in texts on procedure written decades later. See Mackay, *Practice* Vol. 1 p. 392, Mackay, *Manual*, p. 195, Maclaren, *Practice*, p. 313 and see also Chapter 4 *infra*.

²⁹⁴ Correspondence, 'Pleas in Law' *op. cit.* at 588.

²⁹⁵ Editorial, 'The Law's Delay - The Plea of Relevancy' (1859) 3 *Journal of Jurisprudence* 57 at 58.

In not one case in one thousand is the plea sustained. It is not in that hope that it is put upon record. It is put there in order to worry, wear out, and weary the pursuer. A great discussion takes place before the Lord Ordinary, if the case be in the Court of Session. Four counsel set to work, - two in ridiculing, sneering at, and perverting the meaning of the pursuer's condescence, - the other two in finding in it a model of the most elegant composition, and of terse and precise narrative.' ... The whole actors in the affair know it is a sham and a farce; but the one is fighting for delay, and the other is anxious to get his proof, his jury trial, and his decree.'²⁹⁶

The plea was directed at the relevancy of the pursuer's averments, but also at the specification of what was alleged, that is, whether the averments were 'sufficient.' Jury practice of the earlier period which had required specification as fair notice was now becoming part of the ordinary procedure leading up to proof.

'Before a case is allowed proof, a lengthened discussion ensues upon what is called the 'sufficiency of the pursuer's averments.' The object [of pleadings] is to give fair notice to opposite party of the case that is to be maintained against him ... but the object of this kind of discussion ... is the ascertainment of whether the pursuer's case has been stated with technical sufficiency and, above all, whether the details of the case which he intends to prove have been set forth with sufficient circumstantiality and detail.'²⁹⁷ ... The defenders, on the chance of defeating the action, address themselves, too often with superfluous ingenuity, to a criticism of the summons, dealing with it as if it were an instrument to be construed, instead of being, as it is, or ought to be, a mere notice to the opposite party of the questions intended to

²⁹⁶ *ibid.*

²⁹⁷ 'Court of Session Practice' (1863) 7 *Journal of Jurisprudence* 13 at 14.

be tried. In the generality of cases, an issue of some degree of relevancy is found to be extractible.²⁹⁸

To survive debate the pursuer's pleadings had to be 'technically accurate.'²⁹⁹ It will be recalled that there was no provision for amendment after the record was closed and thus immediately before, at, or following debate.³⁰⁰ A pursuer, whose pleadings had been successfully subjected to this technical analysis, could either abandon or go to jury trial on issues which were not those sought or could reclaim to the Inner House. The doctrine of fair notice was advancing by this time,³⁰¹ although occasionally phrases such as 'full and fair notice' (and perhaps what was meant thereby was a higher degree of specification) can be seen in the literature³⁰² and indeed the cases.³⁰³

But as above noticed, some of the Lords Ordinary were increasingly reluctant to deal with cases on relevancy. This reluctance seems to have arisen from their anxiety not

²⁹⁸ *ibid* at 15. Although this appears in 1863, a perusal of the Session papers from 1860 - 1885 suggests that in the 60s and 70s the plea was something like 'the statements of the pursuer are irrelevant and insufficient (as grounds of action) to support (or warrant) the conclusions of the summons'. Specification was not mentioned. Sometimes particular averments relating to fraud or dishonestly are challenged with a particular plea as to their relevancy ('as being insufficient in the circumstances of this case'). Sometimes there are 'calls' in the averments of one party calling for 'further details' as to particular facts. So far as the writer can ascertain, it is not until the mid 80s that the plea 'the pursuer's averments are irrelevant and are deficient in (lack) specification and are insufficient to support the conclusions of the summons' appears. This is an area which would benefit from further research in the session papers held by the Advocates' Library.

²⁹⁹ Anon., 'Court of Session Practice' (1863) 7 *Journal of Jurisprudence* 13 at 14.

³⁰⁰ The Record was closed and no new material could be introduced other than condempnations *res noviter veniens ad notiam* although minor, trivial or clerical errors could be corrected. Mackay, *Manual*, p. 250 and cases cited at fn (d), (e) and (f).

³⁰¹ though not reflected in the pleadings as specific pleas-in-law directed to lack of specification. See discussion *supra*.

³⁰² even in modern times. See A. Murray, 'Fair Notice - The Role of Written Pleadings in the Civil Justice System' in H.L. MacQueen and B.G.M. Main (eds.), *The Reform of Civil Justice* (1997) 5 Hume Papers on Public Policy 49 at 57 *viz.* 'both parties require full and complete notice of the case they are to meet'.

³⁰³ see *Neilson v. Househill*, per L J-C Hope discussed above.

to decide the cause on the hypothetical facts.³⁰⁴ An article in the Journal of Jurisprudence of 1860 quoted Lord Kinloch in a case *Inglis v. The Western Bank of Scotland*³⁰⁵

'The safest judicial course is first to ascertain the facts. It was a blot on our ancient procedure that the Court was in use to pronounce hypothetically on relevancy, and any general practice of deciding relevancy before the ascertainment of facts, would be simply a return to the error of our ancestors.'³⁰⁶

It complained that in the previous few years the 'invariable practice' of delaying disposal of relevancy until after proof or trial had effected 'needless and ruinous expense' and rendered the decisions of the Court 'comparatively useless as legal authorities' as it was 'impossible to extract any ruling principle from the published opinions of the judges'.³⁰⁷

But this view was not universal.

'The old system of raising questions of law in the form of discussions on relevancy is now universally admitted to be wrong in principle, although to a considerable extent it still deforms our practice. The plea of relevancy either involves matter of law or matter of pleading. In the latter sense it is a bugbear, and an unmitigated evil to both parties. As a separate occasion for

³⁰⁴ even though this was what a decision on relevancy properly entailed. English Common Law procedure was at this time heavily influencing thoughts about Scots procedural reform.

³⁰⁵ The writer has been unable to trace the citation of this case

³⁰⁶ Discussed in Anon., 'The Expediency of Disposing of the Relevancy Before Proof' (1860) 2 *The Scottish Law Journal and Sheriff Court Record* 28.

³⁰⁷ *ibid.* p. 29

argumentative discussion, it should no longer be permitted to interrupt the progress of the case to a rational issue of law or fact.³⁰⁸

As it was, changes in the law of evidence and the competent modes of proof altered pleading practice. With the demise of the practice of deciding cases on relevancy came a decrease in the pleading of matters other than the facts pertinent to the cause. As Alexander Asher told the Commissioners in 1869, after the changes to the modes of competent proof:

Formerly, when many cases were disposed of without probation ... and therefore to some extent on the *prima facie* aspect of the case, there was an inducement to set forth evidence on the record in detail, which does not now exist, because cases are now decided only on the facts as proved, and not upon statements as made.³⁰⁹

(xvi) Jury Trial, Proof on Commission and the Procedure for Proof before the Ordinary Sitting Without a Jury

It will be recollected that in the early part of the nineteenth century, evidence was almost universally taken by a commissioner,³¹⁰ to the extent that it was at one time questioned whether the court still retained the power to hear evidence.³¹¹ Jury trial, introduced in 1815, provided an alternative method of proof, later in enumerated causes³¹² and the 1825 Act permitted proof by commission where parties differed as to the facts which did not require to be ascertained by jury trial.³¹³ In the period

³⁰⁸ 'Court of Session Practice' (1863) 7 Journal of Jurisprudence 13 at 17.

³⁰⁹ Evidence of Alexander Asher, Advocate (Evidence appended to Commissioners' 3rd Report, December 1969) para. 17,397 p. 700.

³¹⁰ following its introduction by AS 11 March 1800.

³¹¹ in 1832. See Mackay, *Practice*, vol. ii, p. 6.

³¹² 1825 Act s. 28.

³¹³ 1825 Act s. 14.

leading up to the 1850 Act there was an increasing dissatisfaction with jury trial and the retreat from jury trial began. The Act permitted proof on commission of consent³¹⁴ or where special cause was shown. Where parties consented, the Act also provided for trial of a cause without a jury by the Ordinary, on adjusted issues.³¹⁵ It was also made competent for the Ordinary to investigate questions of fact³¹⁶ without the need for trial or commission and without the requirement to adjust issues, the facts being decided at 'trial' by Ordinary himself³¹⁷ although these provisions were infrequently used.³¹⁸ The general rule was 'that cases involving questions of fact should go to a jury, and parties who wish(ed) a proof on commission instead of a jury trial, need(ed) to show special cause to induce the Court to allow it.'³¹⁹

However, proof before the Ordinary without jury was not far off. It had its origins in the Conjugal Rights Act 1861³²⁰ which provided for a diet of proof before the Ordinary where proof had been allowed.³²¹ This was well used in such causes³²² and a Bill³²³ drafted two years later contemplated the allowance of proof in like form in

³¹⁴ even in the enumerated causes excluding actions for libel, nuisance or in substance actions for damages. It was also competent for the Ordinary to take this proof on commission on the motion of one party with the leave of the Inner House upon report by the Ordinary. s. 49.

³¹⁵ 1850 Act, s. 46. This was unusual in practice. Anon., 'Judge or Jury? Under the Evidence Scotland Act', 1866, (1866) 10 Journal of Jurisprudence 309 at 311.

³¹⁶ called 'special facts'.

³¹⁷ 1850 Act, s. 48.

³¹⁸ 'Judge or Jury' *cit. sup.* at 311. Mackay, *Practice*, vol. ii p. 7. Mackay suggests that this was probably because the decision on fact was made final. *ibid.* See also Walker, *Legal History, op. cit.*, vol. 6, p. 519.

³¹⁹ *Cameron v. Kerr* (1861) 23D. 1257 per L. J.-C. Inglis. I have converted this quotation into the past tense.

³²⁰ Conjugal Rights (Scotland) Amendment Act 1861 (c. 86). Mackay considered it a 'fortunate experiment' Mackay, *Practice*, vol. ii, p. 7.

³²¹ the judge taking down the evidence himself or dictating it to a clerk and thereafter reading it over to the witness to be signed by him, or by causing it to be taken down in shorthand by a shorthand writer. The judge also had to make a note of any evidence admitted or rejected (with the grounds for rejection) as well as any ruling on admissibility. Crabb Watt recorded that shorthand had been used in practice since the 1840s in cases under the Lands Clauses Consolidation (Scotland) Act 1845. (c.19). Crabb Watt, *Memoir, op. cit.* p. 247

³²² It was considered a 'perfect success': Editorial 'Why Jury Trial in Civil Causes Has Failed.' (1863) 7 Journal of Jurisprudence 467 at p. 472.

³²³ Court of Session Consolidation Bill 1863. See 'Court of Session Bill' (1863) 7 Journal of Jurisprudence 288 at 291 and also at 297ff for a draft of the bill.

all actions other than personal actions for payment of money. The Bill was abandoned but three years after that, the Evidence (Scotland) Act 1866³²⁴ prohibited the taking of proof by commission³²⁵ and where proof had been allowed, permitted the taking of that proof before the Ordinary³²⁶ even in enumerated causes, where parties consented.³²⁷

(xvii) The Falling Out of Favour of the Jury Trial and the Taking of Evidence on Commission

The provisions of the 1866 Act proved popular. The availability of proof before the Ordinary led to a diminution in jury trials. The reasons for the popularity of proof over jury trial in the majority of actions were fairly self evident. In the first place, there had been long standing objections to the delay and the resultant expense in taking a case to the jury, such that the satirist could pen this couplet:

‘When a man has money and time to spare,
To the Jury-Court let him straight repair’³²⁸

and by 1859, it was said that ‘for uncertainty, delay, and expense, no form of trial exceeds that by Jury.’³²⁹ The delay could arise from upwards of two years spent refining the pleadings before an order for proof or jury trial.³³⁰ Expense arose from this delay, the higher fees for counsel and agents, the bringing to trial of all potential

³²⁴ (c. 112).

³²⁵ s. 1 (under exceptions contained in s. 2).

³²⁶ irrespective of the motions of the parties and no leave was required of the Inner House. The provisions for the taking down of the evidence were the same as those in section 13 of the 1861 Act *supra*.

³²⁷ s. 4.

³²⁸ ‘Joys of the Jury Court. A New Song’ in Maidment: The Court of Session Garland (1839) contained in (1888) reprint at 210.

³²⁹ Anon, ‘Trial by Jury in Civil Causes’ (1859) 1 Scottish Law Journal and Sheriff Court Record 29 at 30-1.

³³⁰ *ibid.* p. 31, Anon, ‘The Law’s Delay – The Plea of Relevancy’ (1859) 3 Journal of Jurisprudence 57 at 59.

witnesses, and the copying and printing of all documents.³³¹ Jury trial was, it was said, 'a costly luxury'³³² and as Lord Ormidale told the Commissioners Appointed to Inquire into the Courts of Law in Scotland in 1869, the expense of jury trial was so great that it frightened people.³³³ As he explained,

'I have heard it suggested, and it is probably the case, that they³³⁴ make a great parade and fuss about jury trial; it is treated as a grand dramatic performance, and great performers are thought to be necessary for such a proceeding ... It is thought necessary to obtain the services of certain individuals at the bar, and probably for the purpose of securing these individuals large and most unnecessary fees are given. That leads to very great expense.'³³⁵

By this time he had been a judge for seven years during which time he had superintended only 58 jury trials.³³⁶

Secondly, there was always doubt that the jurors understood the evidence. For many, jury trial was a 'wager' or a 'haphazard lottery.'³³⁷ Although it became unpopular, pursuers still attempted to get a jury trial in cases designed to elicit the sympathy of a jury such as 'coal-pit accidents' where there had been a loss of life, or cases which were essentially speculative.³³⁸

³³¹ *ibid.* p. 31.

³³² *ibid.* p.31.

³³³ Evidence of Lord Ormidale to 1869 Commissioners, contained in Appendix to Second Report, p. 436, para 11,411.

³³⁴ i.e. the parties.

³³⁵ *ibid.* p. 436, para. 11,416.

³³⁶ p. 435, para. 11,409.

³³⁷ Anon., Why Jury Trial in Civil Causes Has Failed, (1863) 7 *Journal of Jurisprudence* 467 at 476.

³³⁸ E.J. MacGillivray, 'The Influence of English Law' in *An Introductory Survey of the Sources and Literature of Scots Law*, by various authors, *Stair Soc.*, Vol. 1, 207 at p. 224. 'Editorial, Judge or Jury? Under the Evidence Scotland Act, 1866'. (1866) 10 *Journal of Jurisprudence* 309.

But many jury trials were compromised before they had even commenced,³³⁹ although this frequently happened only at the door of the court. Thus, there was still expense in getting to the compromise. Settling actions at this late stage seems to have been fairly common. The Journal of Jurisprudence recorded that the July jury sittings of 1863 had had 23 jury cases set down³⁴⁰ of which none proceeded to conclusion.³⁴¹

A process of 'compromise and abandonment', it was said, proceeded at every sitting.³⁴² The parties' forces were 'marshalled before peace was concluded'³⁴³ and settlement was frequently sought, even at the last minute.

'On the day of trial, the courage of the agent and of his client begins to evaporate; and singularly enough, the courage of the opposite agent and of the opposite client is at the same moment undergoing a similar process. And thus in a state of alarm, nervousness and anxiety the parties approach each other for a settlement each giving up one-half of his pretensions and each taking the burden of his own costs.'³⁴⁴

The procedure for taking the proof by commission worked badly³⁴⁵ and was equally ill-favoured, primarily because the whole process tended to drag on, the commission being prorogated for additional days of evidence, agents often accommodating each

³³⁹ Anon., 'Trial by Jury in Civil Cases' (1859) 1 Scot. Law Jour. and Sh. Crt. Reporter 29 at pp. 30-31.

³⁴⁰ The figures are taken from Editorial 'Why Jury Trial in Civil Causes Has Failed. (1863) 7 Journal of Jurisprudence 467.

³⁴¹ 3 were discharged by the court. Of the 20 that remained, 11 survived a week, 2 of them being withdrawn within half an hour of the trial commencing, and the rest disappeared one by one, being compromised, withdrawn or abandoned.

³⁴² *ibid.*

³⁴³ p. 31.

³⁴⁴ Why Jury Trial in Civil Causes Has Failed, *op. cit.* p. 466.

³⁴⁵ Charles Scott, Advocate in Evidence appended to the Second Report of the 1869 Commissioners, p. 541, para. 13,805. It was said to be the 'most dilatory, expensive and unsatisfactory mode of proof ever devised.' Anon., 'Judge or Jury?' *cit. sup.* at 318.

other in each prorogation. Prorogations³⁴⁶ were the great evil of proofs taken before commissioners.³⁴⁷

[I]n regard to prorogations – and here it is fair to state that many of my brethren differ from me as to this matter – of old the mode of granting prorogations led to great abuse; so much so, that an agent almost took it as a personal affront if the opposite agent refused to grant a prorogation. The effect of that was often to put agents in a very awkward position – between doing an uncourteous thing to a brother agent, and doing their duty to the client.’³⁴⁸

The Commissioners appointed by the Court were not bound to record exactly what was spoken in evidence. They needed only provide the gist of witnesses’ testimony³⁴⁹ without comment on the import of the evidence nor any assessment of the credibility of the witnesses. Thereafter, it will be recalled, the evidence was made up into a ‘State’ and further written pleadings were lodged by both parties commenting on the tenor of the evidence upon which the Ordinary had to decide the cause.

The same year brought attempts by the Court to alter the format of bringing causes in the Court of Session.

³⁴⁶ likewise ‘adjournments’ of the commission.

³⁴⁷ Evidence of Lord Ormidale *op. cit.* p. 439, para. 11,464. See also Anon., ‘Judge or Jury? *cit. sup.* at 312 and preamble to Evidence (Scotland) Act 1866.

³⁴⁸ John Carment, Preses of SSC, in Evidence appended to the Second Report of the 1869 Commissioners p. 520, para. 13,386.

³⁴⁹ Crabb Watt, Memoir, *op. cit.* p. 246.

(xviii) Moncrieff's Bill of 1863 and the Court of Session Act 1868

The Court of Session Act 1868³⁵⁰ followed four years of political 'to-ing and fro-ing' following Lord Advocate Moncrieff's Court of Session Consolidation Bill of 1863. By the early 1860s, the procedure of the Court of Session was universally considered to be productive of the evils of delay, uncertainty and expense. The Court was losing much of its business to professional arbiters who had sprung up after 1850 although the general amount of business in the Court of Session had been on the decline for a considerable time. The strictures of the rules regarding altering one's position at later stages of the action led to calls for powers of amendment akin to English Common Law Procedure.³⁵¹ Reclaiming motions were frequent. Preparation and adjustment of issues were time consuming. The problem of revisals has already been considered. Debates on relevancy were almost *de rigueur* and were used by defenders to stifle the progress of a cause, and the outdated and expensive modes of proof were additional causes of complaint. There were other causes for complaint, which will be examined shortly.

The Consolidation bill,³⁵² in twelve parts, had proposed dividing procedure between petitory and declaratory actions. The latter modified slightly the form of summons permitting amendment but omitting pleas in law. Where practicable, it was envisaged that the Ordinary would take proof in a manner similar to that introduced by the Conjugal Rights Act. Procedure for the former class³⁵³ was streamlined. Such

³⁵⁰ 31 and 32 Vict, (c. 100) headed 'An Act to amend the Procedure in the Court of Session and the Judicial Arrangements in the Superior Courts of *Scotland*, and to make certain Changes in the other Courts thereof.

³⁵¹ Anon, 'Court of Session Practice' 1863 7 Journal of Jurisprudence 13 at 15.

³⁵² The draft is reproduced at (1863) 7 Journal of Jurisprudence 297.

³⁵³ most commonly actions for payment of money which almost always involved some inquiry into the facts. Anon, 'The Court of Session Bill', (1863) 7 Journal of Jurisprudence 288 at 290.

actions were to be commenced by a summons in prescribed form similar to the writ of summons in England under the Common Law Procedure Act.³⁵⁴ The defender would 'join issue.' It was envisaged that the parties could proceed upon the summons and defences and could even dispense with pleadings.

Where condescendences were required, each article had to contain one cause of action,³⁵⁵ and law and evidence were not to be stated,³⁵⁶ nor any explanatory narrative.³⁵⁷ The manner of pleading contract, personal injury, injury to property, and defamation was prescribed.³⁵⁸ Averments of time, place, quantity, quality and value were to be considered as merely notice and did not need to be proved (unless essential to the cause of the action) and variance between averment and evidence was to be considered immaterial.³⁵⁹ General objections to the relevancy of the whole condescendence were not permitted. Any averment denied had to be denied without qualification or met with a counter statement; and there was no need for any averments 'admitted that' as all averments denied or countered were to be treated as an issue to go straight to trial without adjustment. John M'Laren, Sheriff of Chancery had assisted Moncrieff in the preparation of the bill and explained this part of the procedure thus:

the defender was to be obliged to meet that³⁶⁰ in one of three ways. First, he might demur; or, secondly, he might traverse the statement, that is, deny the whole or a material part of it; or, thirdly, he might meet it by way of confession and avoidance, or as we should say, by special defence; and in the

³⁵⁴ without conclusions, merely stating the amount claimed and the cause of action.

³⁵⁵ s. 21.

³⁵⁶ s. 22.

³⁵⁷ s. 23.

³⁵⁸ ss. 24-30.

³⁵⁹ s. 31.

³⁶⁰ *scil.* the pursuer's statement of the grounds of the action.

latter case the pursuer again might either demur, or traverse the defender's statement, or he might meet it by replication.³⁶¹

Defenders were thereafter to lodge 'rejoinders to special averments in replication' and the condescence and answers, replication and rejoinder were to be lodged without revisal and would later form the record.

The proposals, and in particular the adoption of Common Law Procedure and terminology produced an outcry.³⁶²

'There were outbursts from all quarters of the country at the anglicising of the court, and Moncrieff and the Home Secretary Sir George Grey, were assailed with invective...'³⁶³

The proposals were abandoned.³⁶⁴ Until 1868, no further proposals for altering the Court's procedure followed other than an attempt³⁶⁵ to organise the procedure on

³⁶¹ Evidence of John M'Laren to the 1869 Commissioners, Appendixed to Second Report p. 389, para. 10,398.

³⁶² The Faculty of Advocates, Writers to the Signet, SSC, Procurators of Glasgow and the Juridical Society all commented that the Court of Session's procedure was unsatisfactory as a result of the delays and expense ('Reforms of the Court of Session', (1868) 12 *Journal of Jurisprudence* 3 at 4) but were not all in favour of the bill as a solution. See also *The Court of Session Bill - 1863. A Voice of Warning; with Appendix of Letters published in the Scotsman. By a Law Agent* (Edinburgh, 1864), and for commentary on the proposals: 'Reviews', (1863) 2 (New Series) *Scottish Law Magazine and Sheriff Court Reporter* p. 43, 'Court of Session Reform', (1864) 3 (New Series) *Scottish Law Magazine and Sheriff Court Reporter* 1,

³⁶³ Crabb Watt, *Memoir* at 243. English terminology and concepts had been a particular part of the Court of Session procedure in 'Exchequer Cases' since at least the early 1800s wherein it was usual to draft pleadings as 'informations, Declarations, Bills, Pleas, Answers, Exceptions, Demurrers, Replications &c.' See *Historical View of the Forms and Powers of the Court of Exchequer in Scotland to which is added an appendix containing the Rules of Procedure, and certain minutes of the Rules of Procedure, and certain minutes of the Court relating thereto*. Baron Sir John Clerk, Bart and Mr. Baron Scrope (Edinburgh, 1820) p. 264ff.

³⁶⁴ although some of the innovative parts were to be incorporated into the Court of Session Act 1868.

³⁶⁵ A.S. 15 July 1865. It followed proposals by the Faculty. *Rules for the Regulation of Procedure Before the Lords Ordinary, Proposed for the consideration of the Court, by the Faculty of Advocates* (Edinburgh, 1865). See also (1865) 4 *Scottish Law Magazine and Sheriff Court Reporter* for comment.

the debate rolls to prevent the copious discharges of debates through counsel not being available³⁶⁶ and an attempt to prevent the frequent continuations on the adjustment roll by requiring that further continuations were granted only on 'cause shown'.³⁶⁷ In general, however, there were ongoing complaints as to the delay and expense of Court of Session procedure. Many wanted the power to amend the closed record,³⁶⁸ as it was thought that this would lead to fewer technical discussions of the form and sufficiency of the summons³⁶⁹ as parties would not feel compelled to state their cases in as much detail if this facility was afforded them after the record had closed. Foreclosure on points of fact was said to be a 'pestilent inheritance ... from the Judicature Act.'³⁷⁰ The proper duty of the Court, it was said, was to decide matters really in dispute between the parties and thus permit amendment to do so.³⁷¹ The abolition of supplementary summonses to cure defects was mooted. It was also thought beneficial if the Ordinary could determine the future procedure at the closing of the record and required the parties to state whether they renounced probation³⁷² and general pleas were susceptible to improvement by stating the exact ground which was deemed to be objectionable in the pleadings.³⁷³

³⁶⁶ This remained a problem. Lord Shand, 'Business of and Procedure in the Court of Session', Address to the Scots Law Society, 1874 [repr. in part in (1874) 18 Journal of Jurisprudence 656 at 659.]

³⁶⁷ AS 15 July 1865 s. 10. Counsel attempted to soften the stricture of this by agreeing to close the record 'on facilities', i.e. that each would give the other the facility of continuing to adjust up until the time that the closed record required to be printed. Maclaren, *Practice*, p. 355. This was a tolerated practice for a long period thereafter. See Evidence of Dean of Faculty to 1927 Royal Commission "There is also "Closed subject to facilities," the phrase which has come into vogue, and then you go on adjusting as you like until the case is put out.' at p. 169.

³⁶⁸ akin to the English common law procedure. 'Court of Session Practice' (1863) 7 Journal of Jurisprudence 13 at 15. Provision for amendment had been made in the 1863 Bill.

³⁶⁹ 'Court of Session Practice' *cit. sup.* p. 16.

³⁷⁰ 'Reforms in the Court of Session' *op. cit.* p. 8.

³⁷¹ *ibid.*

³⁷² *ibid.* p. 17.

³⁷³ *ibid.* p. 19.

There were calls to introduce various English pleading devices such as a 'notice to produce documents'³⁷⁴ and 'notices to admit' writings or productions.³⁷⁵ Calls for 'issuable pleading' akin to English jury court practice were once more heard,³⁷⁶ and the abandonment of stating pleas-in-law was considered the only method of preventing the copious debates and reclaiming notes. Similar to older practice, reclaiming was thought to be necessary in nearly every case.³⁷⁷

'The truth is, that the discussion before a Lord Ordinary, and the judgment by him, neither is, nor, for obvious reasons, can, in the general case, be looked on or treated by litigants as much more than a mere initiatory step taken, because it cannot be avoided, towards the Inner House, whose judgment alone is held to be decisive of anything.'³⁷⁸

Every interlocutor of the Ordinary became final and therefore became *res judicata* if it was not reclaimed against.³⁷⁹ The object of a reclaiming note was an attempt to throw the whole case open to review by the Inner House³⁸⁰ although the rule was that previous interlocutors were not brought under review and parties thus felt compelled to reclaim each interlocutor *seriatim*.³⁸¹ Sometimes, however, the parties attempted to avoid further delay³⁸² and expense by 'adjusting' mutual admissions, giving up 'what they thought the true state of the facts.'³⁸³

³⁷⁴ 'Proofs in the Outer House' (1867) 11 Journal of Jurisprudence 1 at 3.

³⁷⁵ *ibid.* The expense of proving the documents fell on the party refusing to admit.

³⁷⁶ 'English and Scotch Pleading Contrasted' (1863) 7 Journal of Jurisprudence 546 at 547ff.

³⁷⁷ 'The Law's Delay - The Plea of Relevancy' *op. cit.* 59.

³⁷⁸ Lord Ormidale on the Reform of the Court of Session, (1867) 6 Scottish Law Magazine and Sheriff Court Reporter 83 at 86.

³⁷⁹ which was contrary to Sheriff Court practice and in appeals to the House of Lords. 'Court of Session Practice' *op. cit.* p. 20.

³⁸⁰ 'The Law's Delay - The Plea of Relevancy' *op. cit.* 60.

³⁸¹ 'Court of Session Practice' *op. cit.* p. 20.

³⁸² It was considered that each reclaiming note was 'equivalent to a sist of process for twelve months.' 'Court of Session Practice, *op. cit.* 21.

³⁸³ p. 541, paras. 13,807 - 13,809.

In 1867, Lord Ormidale,³⁸⁴ in an address to the Juridical Society, sketched a typical action in the Court remarking upon the 'battledore and shuttlecock'³⁸⁵ between the Outer and Inner houses and the fact that one cause could produce as many as ten reclaiming motions.³⁸⁶ He concluded that 'the discontent and dissatisfaction arising from the great expense, delay and uncertainty attending the administration of justice' amounted to a 'public scandal.'³⁸⁷

The 1868 Act followed the next year. It comprised a miscellany of provisions *inter alia* tidying up elements of judicial arrangement,³⁸⁸ regulating summonses,³⁸⁹ calling and decrees in absence,³⁹⁰ jury trial,³⁹¹ Inner House Procedure³⁹² appeals from inferior courts,³⁹³ and accountings, suspensions and summary petitions.³⁹⁴ Under the fourth part, by s. 25, neither party was now entitled as matter of right to ask for a revisal of his pleadings; but it was 'competent for the Lord Ordinary to allow or to order a Revisal of the Pleadings upon just Cause shown.' s. 26 provided a fixed period for 'adjustment' and thereafter closure of the record with parties being required to state whether they renounced further probation. If so, the cause was to be debated. If not, the cause was debated with a view to determining the nature of probation, if allowed.³⁹⁵ The interlocutors of the Lords Ordinary were to be treated as final unless

³⁸⁴ He had long had an interest in procedure and had written on jury practice. See *supra*.

³⁸⁵ Lord Ormidale on the Reform of the Court of Session *op. cit.* at 84.

³⁸⁶ Crabb Watt, *op. cit.* at 244.

³⁸⁷ Introductory Addresses – Lord Ormidale and the Dean of Faculty (1867) 11 Journal of Jurisprudence 566. See also Crabb Watt, *op. cit.* p. 244 and Reforms of the Court of Session (1868) 12 Journal of Jurisprudence 3.

³⁸⁸ ss. 4-12.

³⁸⁹ ss. 13-21.

³⁹⁰ ss. 22-24.

³⁹¹ ss. 34-50.

³⁹² ss. 51-63.

³⁹³ ss. 64-80.

³⁹⁴ ss. 81-92.

³⁹⁵ s. 27.

reclaimed against within six days.³⁹⁶ Reclaiming notes would operate to subject all prior interlocutors to review³⁹⁷ but it was not competent to present a reclaiming note without leave of the Ordinary against any interlocutor until the whole cause had been decided.³⁹⁸

The most important measure was the allowance of amendment at any time.³⁹⁹ By s. 29, the Court or the Ordinary could at any time 'amend any Error or Defect in the Record or Issues in any Action or Proceeding in the Court of Session, upon such Terms as to Expenses and otherwise' as to the Court or Ordinary seemed proper and all such 'Amendments as may be necessary for the Purpose of determining in the existing Action or Proceeding the real Question in Controversy between the Parties shall be so made.'⁴⁰⁰

Proofs before the Ordinaries were to proceed without adjournment except on special cause,⁴⁰¹ and evidence could be recorded in shorthand in jury trials.⁴⁰² The English stated case procedure was made available where parties were agreed upon the facts but disputed the law.⁴⁰³ Finally, the power of the Court to make regulations by Act of Sederunt was formalised.⁴⁰⁴

(xix) The 1868 Act in Practice

³⁹⁶ s. 28.

³⁹⁷ s. 52.

³⁹⁸ ss. 53-54.

³⁹⁹ This had been a component of the 1863 Bill which had been well received. s. 20 regulated amendment of summonses and pleadings in undefended causes.

⁴⁰⁰ but, following the older rules, not amendments increasing the sum or property sued for.

⁴⁰¹ s. 32.

⁴⁰² s. 37.

⁴⁰³ s. 63. This had been introduced in Exchequer cases in 1856 by the Exchequer Cases (Scotland) Act 1856.

⁴⁰⁴ s. 106.

After an eventful eight years which had seen dramatic changes to the competent modes of proof and alterations to pleading practices, a Royal Commission was established to Inquire into the Courts of Law and to make

'diligent and full inquiry into ... the forms of writs and pleadings, and the rules of procedure... with a view to ascertaining whether any, and what changes and improvements, either by altering the constitution or jurisdiction of, or the forms of writs and pleadings, and procedure... so as to provide for the more speedy, economical and satisfactory despatch of the judicial business now transacted.'⁴⁰⁵

The commission worked quickly, taking copious evidence from all parts of the profession and publishing the evidence in three reports,⁴⁰⁶ with conclusions in the Fourth and Fifth Reports. The operation of the 1868 Act and the previous Acts altering the competent modes of proof were reviewed in the evidence presented to the Commission⁴⁰⁷ and reviewed by the Commissioners in their conclusions.

The Commission reported that the 1850, 1861 and 1866 Acts had increased demands on the time and attention of the Lords Ordinary.⁴⁰⁸ Although the Court of Session Act of 1868 had not been long enough in operation to allow the full effect of it to be ascertained, the Commissioners recorded a general concurrence of opinion that it had introduced many important improvements in the forms of process and

⁴⁰⁵ First Report of the Commissioners 1869 p. 4.

⁴⁰⁶ First, Second, Third, Fourth and Fifth Reports of the Commissioners Appointed to Inquire into the Courts of Law in Scotland (P.P., Edinburgh, 1868-71).

⁴⁰⁷ some of which has already been referred to above.

⁴⁰⁸ Fourth Report 1870, p. 6.

procedure.⁴⁰⁹ Amendment seemed to be working well. As John M'Laren told the Commissioners,

'I think that the power of amendment given by recent statute has enabled parties to state their case shortly, because they are no longer under any apprehension that their statements may be found irrelevant for want of specification of details. That may be supplied by amendment at any stage; and in practice the pleadings in the Court of Session are very much shorter and less prolix than those of the Court of Chancery.'⁴¹⁰

The Commission however recommended an extension of the power of amendment introduced into the 1868 Act.⁴¹¹ In the end, it was left to the Court to define the limits of amendment.⁴¹²

Regarding pleas in law, it recommended their retention as

'they greatly conduce to the proper conduct of the cause. They not only indicate the points upon which the argument is to rest, but they also lead to accuracy and distinctiveness in the statement of the facts, by compelling attention to the selection of such facts in the case as are relevant to the legal grounds which are to be maintained.'⁴¹³

⁴⁰⁹ *ibid.* p. 8.

⁴¹⁰ Evidence of John M'Laren, Advocate and Sheriff of Chancery, Commissioners' 2nd Report p. 394, para. 10,453 See also Evidence of Alexander Asher, Advocate (Evidence appended to Commissioners' 3rd Report, December 1869) p. 700 para. 17,397.

⁴¹¹ *ibid.* p. 9 i.e. to permit enlargement of the conclusions permitting a greater sum (fund or property) to be sued for than that concluded for in the summons.

⁴¹² See Mackay, *Practice*, Ch. 38. At one point it was thought that the Court had no discretion to allow or refuse an amendment as the wording of s.29 was peremptory and not permissive. See e.g. *Guinness Mahon & Co. v. Goodwin & Co.* (1891) 18 R. 441. However, the Court has since determined that the allowance of amendment falls firmly within the Court's discretion. An attempt by the pursuer's counsel before the House of Lords in *Thomson v. Glasgow Corporation* 1962 SLT 105 to resurrect the old approach was firmly rejected.

⁴¹³ *ibid.* And pleas could now be added after the record had closed.

Regarding 'sufficiency of averments' and the vexed question of what constituted 'fair notice' the Commission rejected the suggestion put in evidence that a party should have the power to 'demand particulars', because where the Court was satisfied that a party was 'suffering any prejudice from the vagueness or deficiency of the statement made by his opponent', it had full power to meet the difficulty by directing the desired information to be given in a 'minute.'⁴¹⁴

However the Commission was more receptive to the suggestion⁴¹⁵ that a party 'should have power to tender to his opponent a note of admissions demanded from him, not only of documents,⁴¹⁶ but also of certain facts.' The reason for this recommendation was that the 'detailed form in which records were formerly drawn, and the revisal of the pleadings, to some extent served the purpose of such a note of admissions; but the absence of revisal⁴¹⁷ and the shorter form of records, make it the more necessary that some form of procedure as that suggested should be made competent.'⁴¹⁸ It also recommended the introduction of a Notice to Produce Documents.⁴¹⁹

⁴¹⁴ *ibid.* pp. 9-10. This practice had developed following 'revisals' to the condescence and answers (or more rarely summons and defences). The Minute would require to be answered. See *supra*.

⁴¹⁵ borrowed from English Common Law procedure. See Evidence of John M'Laren, Advocate and Sheriff of Chancery, Commissioners' 2nd Report p. 390, para. 10,415.

⁴¹⁶ This was the extent of the English provision.

⁴¹⁷ there was an abundance of evidence that revisal had 'almost ceased to exist'. e.g. Evidence of John Clerk Brodie W.S. in Appendix to Commissioner's 2nd Report p. 406, para. 10,719 which had led to greater alteration at adjustment. Evidence of Alexander Asher, Advocate (Evidence appended to Commissioners' 3rd Report, December 1869) p. 700, para. 17,397.

⁴¹⁸ *ibid.* p. 10. They also approved of the suggestion that where one of the parties was requested by the other, at a reasonable time before the trial, to admit specific facts and that party refused without reasonable cause, the judge could disallow or order costs incurred as a result of that refusal. A 'Minute of Admissions' had been mooted in the draft A.S. of 1848. See 'Report of the Committee Appointed by the Faculty of Advocates to Consider the Proposed Act of Sederunt' (Edinburgh, 1848) p.7.

⁴¹⁹ Fourth Report 1870, p. 10. Again a concept borrowed from English Common Law procedure. Evidence of John M'Laren, Advocate and Sheriff of Chancery, Commissioners' 2nd Report p. 390, para. 10,417.

(xx) Conclusion

Following the 1868 Act, Scots civil procedure now possessed most of the characteristics of the modern day procedure. The system of written pleadings was in a near finalised state and would continue in near identical form to the present day.

Small trifles occasionally troubled the Court thereafter. Thus it became entangled for a while as to what a proof before answer actually meant but the issue was finally resolved.⁴²⁰

Statutory provisions post 1868 made further alterations but left the scheme of procedure fundamentally the same. AS 10 March 1870 altered the procedure for renouncing probation. AS 20 March 1907 permitted the record to be amended at any time during the continuation of the cause. The great Codifying Act of Sederunt 1913 brought together all the acts of sederunt of the court which were still extant. Further modernising changes to the procedure of the Court of Session were effected by the Administration of Justice (Scotland) Act 1933 following the work of a Royal Commission in 1927 under the chairmanship of the first Lord President Clyde.⁴²¹

Written pleadings by the start of the twentieth century were in a highly developed state. The profession's reluctance in the earlier period to part with control of the content of the pleadings and the pace of litigations, combined with what was felt to be a closer affinity to England, finally pushed civil procedure away from the civilian

⁴²⁰ i.e. was it before answer as to the relevancy or competency or any other preliminary plea. For discussion see Mackay, *Manual, op. cit.* pp 329 - 332

⁴²¹ *Report of the Royal Commission on the Court of Session and the Office of Sheriff Principal with Summary of Evidence* (2 vols.), Cmd. 2801 (Edinburgh, 1927)

concepts which had informed the earlier period. This produced a legacy of 'adversarialism'. This aspect and the practice of written pleadings in the twentieth century is discussed in Chapter Five. But before that, we must first examine the modern rules of written pleadings.

Chapter 4

The Rules, Form and Language of Written Pleadings in Modern Civil Procedure

(i) Introduction

In this chapter, the principal 'rules' of written pleadings are examined.¹ We have already followed the development of written pleadings up to the end of the nineteenth century. Here we examine the modern 'rules'² encompassing the nature

¹ In this chapter, I acknowledge the following sources: Æ. J. G Mackay, *The Practice of the Court of Session*, (2 vols.) (Edinburgh, 1877 – 97) (hereafter 'Mackay, *Practice*') Æ. J. G., Mackay, *Manual of Practice in the Court of Session*, (Edinburgh, 1893) (hereafter 'Mackay, *Manual*'), J.A Maclaren, *Court of Session Practice*, (Edinburgh, 1916) (hereafter 'Maclaren, *Practice*'), G. R. Thomson and J. T. Middleton, *Manual of Court of Session Procedure*, (Edinburgh, 1937) (hereafter 'Thomson & Middleton, *Manual*'), Maxwell, D., *The Practice of the Court of Session*, (Edinburgh, 1980) (hereafter 'Maxwell, *Practice*'), R. Black, *An Introduction to Written Pleading*, Law Society of Scotland (Edinburgh, 1982) (hereafter 'Black, *Introduction*'), Lees, J.M., *A Handbook of Written and Oral Pleading in the Sheriff Court*, (1st ed., 1888), (2nd ed., ed. T.A. Fyfe, Edinburgh and Glasgow, 1920) = reprint in: *A Handbook of Written and Oral Pleading & Notes on the Structure of Interlocutors* (Aberdeenshire, 1988) (hereafter 'Lees, *Handbook*'), I.D. Macphail, *Sheriff Court Practice* (1st ed.), (Edinburgh, 1988), (2nd ed.), (eds. C.G.B. Nicholson & A.L. Stewart), (Edinburgh, 1998) [the relevant chapter on Written Pleadings viz. Ch. 9 has minor revisals in the 2nd edition and the same paragraph numbering is adopted] (it is hereafter referred to as Macphail, *Practice*), B. Kearney, *An Introduction to Ordinary Civil Procedure in the Sheriff Court*, (Edinburgh, 1982), R. McEwan, *Pleading in Court*, (2nd ed.) (Edinburgh, 1995), R. Wyness Millar, 'Civil Pleading in Scotland' (1932) 30 Michigan Law Review, (2 Parts) No. 4, 545- 581; No. 5 582 – 746 (with Notes by L.P. Clyde), D. Dundas, 'Observations on the Art of Advocacy' (1903) 15 J.R. 329, D. (Lord) Blades, 'The Art of Pleading' (1948) 64 SLR (No. 758) 25 and (No. 759) 53, J.A. Clyde, 'Practice and Procedure in the Court of Session' (1906-7) 18 J.R. 319-340, C. Scott Dickson, 'Pleading' (1897) 9 J.R. 26, A.G. Walker, 'Written Pleadings' (1963) 79 SLR (No. 945) 161, E. Bowen, 'Written Pleadings in the Sheriff Court' (1999) 4(4) SPLQ 245, P. Brodie, 'Professional Conduct and Responsibility in Drafting' (1997) (unpublished), P. Brodie, 'Basic Guiding Principles', Written Pleadings Course, Law Society of Scotland/Update) (1993), C. Sutherland, 'Written Pleadings – Recent Cases' Written Pleadings Course, Law Society of Scotland/Update) (1993), C. Hennessy, *Civil Procedure and Practice*, (Edinburgh, 2000), R. Conway, *Personal Injury Practice in the Sheriff Court*, 2nd ed., (Edinburgh, 2003), John S. MacKenzie, *Written Pleadings*, (Edinburgh, 2003), Green's *Annotated Rules of the Court of Session*, RCS 1994 as amended (repr. from Div C of the Parliament House Book (Edinburgh, 2003)), (hereafter 'Annotated Rules')

² In recent years, a number of specialised categories of action in the Court of Session have grown up, with their own specialised forms and sometimes rules for pleading. For reasons of space, their treatment is not here considered. Thus, the quirks and specialisms of the following are not detailed: Family actions, (RCS Ch. 49), old style Optional Procedure actions, (RCS old Ch. 43), New Personal Injury actions, (RCS new Ch.43 (2003), Commercial actions, (RCS Ch. 47), Intellectual Property causes (RCS Ch. 55), Petition Procedure, (RCS Ch. 14), Minute and Note procedure (RCS Ch. 15) and Judicial Review procedure (RCS Ch. 58) . Also

and function, form and language of written pleadings. Although these modern rules have been greatly elaborated through decisions of the courts and subsequent legislation, much remains, at least in concept, from the earlier period.

The rules continue to be comprised of a combination of custom and practice, the rules of court³ (including Acts of Sederunt⁴ and Practice Notes) and decided cases.

(ii) A Definition of Written Pleadings.

Firstly, what is meant by 'the pleadings'? We may adopt Lees' short definition, as it is as good as any:

"The pleadings" means the written statements by the parties of their grounds of action and defence, which, when finally adjusted, form the closed record.⁵

(iii) The Functions of Written Pleadings.

Written pleadings perform various functions. In the first place they should define the four corners of the matter in dispute between the parties. As Lord Blades, while still at the Bar, observed, some years ago:

'Before a judicial tribunal is called upon to decide any question that has arisen between litigants, the matter to be submitted to it should be clearly

the approach of the Court in 'Asbestosis Actions'. However, the 'rules' of written pleading will have application to them to a greater or lesser extent. New Personal Injury actions and Commercial actions (both in the Court of Session and the sheriff court (as applicable) are considered briefly in the next chapter.

³ Both sheriff court and Court of Session *viz.* Ordinary Cause Rules 1993 as amended and Rules of the Court of Session 1994 as amended. The language used throughout this chapter is that of the Court of Session, although the rules have an equal application in the sheriff court. Thus, 'conclusion' can be read also as 'crave'. A particular rule relating to sheriff court procedure will be mentioned where relevant.

⁴ which can only be departed from where special cause is shown. *Hutchison v. Galloway Engineering Co.* 1922 SC 497 per LJ-C Dickson at 499.

⁵ Lees, *Handbook*, para. 1.

and precisely set forth. Hence our system of written pleadings whereby the real issue between the parties is definitely ascertained and all that is irrelevant to the issue or immaterial is put aside, with a great saving to all concerned in time and to the parties in money...the parties should know what they are fighting about, because, if they don't, nobody else is likely to discover. In order to attain this object, it is necessary that pleadings should be drawn according to certain fixed rules, the purpose of which is to compel each party to state clearly and succinctly, and I should add intelligibly, the material facts on which he relies, omitting everything that is immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material fact alleged against him.⁶

A modern commentator expresses a similar view:

The function of our system of written pleading is, accordingly, to ascertain and demonstrate with precision the matters on which the parties differ and those on which they agree; and thus to arrive at certain clear issues on which both parties differ and those on which they agree; and thus to arrive at certain clear issues on which both parties require a judicial determination.⁷

Implicit in these quotations is the second function of written pleading, that is, giving notice to others of the basis of one's case, whether that is the objective reader, including the judge, or one's opponent.⁸ The Scottish procedural system remains

⁶ Blades, *The Art of Pleading*, *cit. sup.* pp. 27-8. See also the *dicta* of Lord Prosser in *ERDC Construction Ltd. v. H.M. Love & Co. (No. 2)* 1997 SLT 175 at 180 for very similar observations.

⁷ Macphail, *Practice*, para 9.03. See also *Brydon v. Railway Executive* 1957 SC 282 per L. Patrick at 291.

⁸ *Parker v. Lanarkshire Health Board* 1996 SCLR 57 (Ex. Div) per L. McCluskey at 58.

adversarial and it is still⁹ no part of the court's remit to raise issues for determination or to suggest to parties the manner in which they should present their case.¹⁰ The pleadings encapsulate all the elements of the case and the four corners of that case may be assumed by the court and one's opponent to be stated within the pleadings. Thus they serve the function of notice.

'What sometimes, I think, tends to be forgotten in the Sheriff Court, is that the purpose of written pleadings is to enable the court, the solicitors and everyone else concerned to discover very quickly, flicking over a few pages, to discover at a glance, the issues between the parties and the stand which each party is taking on these issues.'¹¹

A case presented clearly in written pleadings will impress the court and make the task of the court easier.¹² The pleadings give the court the first impression of the cases being advanced and defended by the parties¹³ before any oral proceedings and a case set out with clarity and accuracy may create a favourable, advantageous, impression from the start, which advantage may be never thereafter lost.¹⁴ The present Sheriff Principal of Glasgow and Strathkelvin offers this:

'Pleadings which contain a precisely identified request for a remedy, followed by a clear and crisp narrative of the issues by the parties, focused in turn by accurate pleas in law, will receive the interest, attention and respect of any judge far faster than those which ramble in a wayward and jumbled fashion with references and cross-references to passages which

⁹ This is discussed in the following chapter.

¹⁰ c.f. the previous attempts to do so examined in the previous chapter.

¹¹ A.G. Walker, 'Written Pleadings' *cit. sup.*, p. 162 See also, Scott Dickson, 'Pleading' *op. cit. sup.* p. 14 and Blades, 'The Art of Pleading' *cit. sup.* p. 28 for similar views.

¹² Frederick (Hon. Mr. Justice) Lawton, 'The Role and Responsibility of the Advocate' being a public lecture in the University of Bristol 4th November 1966.

¹³ Macphail, *Practice*, para. 9-06, P. Brodie, 'Basic Guiding Principles', *cit. sup.* p. 14.

¹⁴ C. Sutherland, 'Written Pleadings – Recent Cases', *cit. sup.* p. 3.

cannot be clearly identified and which end in a long list of garbled pleas in law which plainly indicate that the pleader has recognised his own inability to identify the issues.¹⁵

This is important as it is upon the pleadings that a court will base procedural decisions for the duration of the life of the action¹⁶.

The pleadings also serve the function of giving notice to an opponent, but this is more of a requirement than a function. Simply stated, a party must provide the other side with 'fair' and 'adequate' notice of the case to be met. It is part of the requirement of specification and is examined below.

It might also be observed that the pleadings provide a summary of the pleader's case to himself. They will act as an aide-mémoire, detailing the facts he alleges support the grounds of the action defined, and will, prior to proof, quickly highlight the facts in dispute and to be proved.¹⁷

(iv) Care Required in Drafting Pleadings.

These functions highlight the importance of written pleadings, and the drafting of pleadings must be carefully discharged.¹⁸ Before drafting any pleading, it has been the advice of various eminent commentators that the pleader should firstly carefully acquire a command of the facts and then make a thorough investigation of the law

¹⁵ E. Bowen, 'Written Pleadings in the Sheriff Court' (1999) 4(4) SPLQ 245 at 248

¹⁶ The changes introduced by OCR 1993 as amended providing for an 'Options Hearing' place an even greater emphasis on creating a good first impression on the sheriff prior thereto. Bowen, *ibid.*

¹⁷ Macphail, *Practice*, para. 9-06, P. Brodie, 'Basic Guiding Principles', *cit. sup.* p. 14.

¹⁸ Macphail, *Practice*, para. 9-12.

involved in, and surrounding the subject-matter of the action.¹⁹ It has been said that drafting written pleadings acts 'as an encouragement to each party to analyse the substance of his case, before trying to give it expression in writing.'²⁰ From there, the case can be committed to writing, keeping to the forefront of one's mind the 'legal hurdles to be jumped'²¹ and using only the facts which are relevant to the pleas-in-law. To do otherwise is to engage in, what Professor Black has called 'Blunderbuss Pleading'²² or to continue the martial theme, what Sheriff Kearney described as 'shotgun' pleading.²³ In such cases the pleader attempts to scatter in the pleadings as much as possible in the hope that somewhere in the morass there may be a relevant case. As Lord President M'Neill said as long ago as 1856,

'I do not understand how any one can frame a record properly without having in his mind the issue he wishes to try, and selecting from the materials before him those, and those only, that are pertinent to that issue. To throw into a record all matters directly or indirectly connected with the case, or having any possible bearing on it, is not the right way of framing a record; it may save the trouble of thinking at that stage, and relieve from the labour of selecting and arranging the materials; but it is not the right way of framing a record'.²⁴

¹⁹ A.G. Walker, *Written Pleadings*, *cit. sup.* p. 165, Macphail, *Practice*, para. 9-12, Dundas, 'Observations on the Art of Advocacy' *cit. sup.* p. 329.

²⁰ *ERDC Construction Ltd. v. H.M. Love & Co. (No. 2)* 1997 SLT 175 per L. Prosser at 180.

²¹ Black, *Introduction*, p. 3.

²² *ibid.*

²³ B. Kearney, *An Introduction to Ordinary Civil Procedure in the Sheriff Court*, (Edinburgh, 1985) p. 27.

²⁴ *Burden v. Mitchell* (1856) 18 D 339 per Lord President M'Neill.

It is important therefore that any written pleading has at least passed through the 'crucible of the pleader's mind',²⁵ and he does not engage in 'stream of consciousness pleading.'²⁶

In drafting the pleadings the pleader must be honest, candid, and at all times act in good faith.

Lord Stott made the following observation:

'Our whole system of pleading and of disposal of cases upon preliminary pleas must depend upon each party stating with candour what are the material facts upon which he relies and admitting the facts stated by his opponent which he knows to be true.'²⁷

The pleader must have evidence for any averment made²⁸ and should not insert an averment in the hope that 'something will turn up' in the course of evidence.²⁹ The pleader must keep in mind that at all times he is also an officer of the court.³⁰ In

²⁵ J.A. (later Lord) Clyde, 'Practice and Procedure in the Court of Session' (1907) 18 JR 319 326

²⁶ R. Black, *Introduction*, p. 17. Professor Black considers that this type of pleading is due, in part, to the use of dictating machines. (*ibid*). Complaints about modern technology are not new. One hundred years ago, the future Lord Dundas complained that '[t]he growing use of both short hand dictation and of typewriting is making its mark on written pleading of today, and not for the good.' Dundas, *Observations on the Art of Advocacy*, *cit sup.*, pp. 332-3. In present practice, it is generally the case that counsel themselves draft pleadings on lap-top computers using word-processing software.

²⁷ *Ellon Castle Estates Co. Ltd. v. Macdonald* app'r'd in *Gray v. Boyd* (I.H.) 1995 SCLR 1075.

²⁸ *Boustead v. Gardner* (1879) 7 R. 139 per LJ-C Moncreiff at 145, *Thompson v. British Medical Association* [1942] AC 764 per Lord Atkinson at 771, Macphail, *Practice*, para. 9-12.

²⁹ 'It is not the function of pleadings to justify an inquiry which *may* result in evidence being led which might establish the pleader's case.' *Morrison v. Rendall* 1986 SC 69 per L. Robertson at 78. See also *Stout v. United Kingdom Atomic Energy Authority* 1979 SLT 54 per LP Emslie at 56, *Pollock v. Stead & Simpson Ltd.* 1980 SLT 76.

³⁰ *Batchelor v. Pattison and Mackersy* (1876) 3 R. 914 per LP Inglis at 918. The Law Society of Scotland's 'Code of Conduct for Solicitors holding Practising Certificates' (2002) requires that a solicitor must 'never knowingly give false or misleading information to the court' and the Supplementary Code of Conduct for Solicitors exercising extended Rights of Audience' (Code of Conduct, Sch. 2) requires that solicitor-advocates have a proper basis on precognition or in

drafting his pleadings he should follow the rules, form and language of written pleading and it is to this that we now turn.

The Rules, Form and Language of Written Pleadings

(v) The Summons and the Initial Writ.

As we have seen, the form of a pre-1850 summons consisted of the Address, Instance, Conclusions and the Will which was altered by s. 1 of the Court of Session Act 1850 introducing the condescence and pleas-in-law annexed to the summons. The additional parts are now commonly considered to be part of a summons³¹ and the modern day summons comprises the Instance, Address and Charge, Warrants, Conclusions, Condescence and Pleas-in-law.³² The action in the Sheriff Court is commenced by an Initial Writ.

(vi) The Conclusions.

The summons may contain any number of conclusions but these should be stated in accordance with the appropriate style contained in Form 13.2(2) of the rules.³³ They should not be vague or inspecific.³⁴

In averring the grounds of the action, the grounds as conclusions may be pled cumulatively,³⁵ (i.e. multiple grounds) alternatively³⁶ or eventually.³⁷ Thus, common

the light of consultation with the client for stating a fact in any pleadings' See MacKenzie, *Written Pleadings*, *op. cit.* pp. 22-3.

³¹ They are also so considered by the Rules of Court, see RCS 1.3(1).

³² and is in Form 13.2-A (RCS).

³³ The formal requirements for a sheriff court initial writ are very well covered in Macphail, *Practice*, paras. 9.40 -9.50.

³⁴ *Bank of Scotland v. Logie* 1986 SLT (Sh Ct) 47, Macphail, *Sheriff Court Practice para.* 17-14.

³⁵ Mackay, *Manual* p. 185.

examples of alternative conclusions are those for implement which failing, payment and payment which failing, declarator of breach of contract and damages³⁸.

Alternative inconsistent or mutually incompatible grounds may be averred³⁹

but conventional advice is that such a form should rarely be resorted to, as the failure in the principal perils the secondary conclusion. Where such an action has been raised, the conclusion for declarator must be abandoned or decided adversely before the conclusion for damages can be insisted in.⁴⁰

(vii) The Condescence.

The condescence contains the allegations in fact forming the grounds of action which must include title and interest to sue,⁴¹ and those essential⁴² facts which in the particular case give a right of action.⁴³ There should be no disconformity between the condescence and conclusions.⁴⁴ The importance of the condescence lies in the fact that the averments give notice to an opponent of the case which the pursuer will

³⁶ Thomson & Middleton, *Manual*, p. 64, Maxwell, *Practice* p. 172, *M'Kellar v. Dallas's Ltd.* 1928 SC 503, *Mackay v. Campbell* 1967 SLT 337.

³⁷ e.g. Action for declarator with eventual conclusions for interdict and damages. See also Mackay, *Manual*, p. 185 citing dicta of LP Inglis in *Jameson v. Sharp* (1887) 14 R. 643 at 648 (action of furthcoming).

³⁸ Mackay's dated example is that of conclusions for declarator of marriage which failing damages for seduction or breach of promise. Mackay, *Manual*, p.185 citing *Robertson v. Henderson* (1833) 12 S. 70, *Stewart v. Menzies* (1837) 15 S. 1198.

³⁹ *Norwich Union Life Insurance Society v. Tanap Investments V.K. Ltd (in Liquidation) (No.1)* 1998 SLT 623 per L. Penrose at 628.

⁴⁰ *Robertson v. Henderson* (1833) 12 S. 70.

⁴¹ *Smith v. Stoddart* (1850) 12 D. 1185, *Anderson v. Duncan* (1861) 23 D. 258, *Kilmarnock Mags. v. Mather* (1869) 7 M. 548, *Bentley v. Macfarlane* 1964 SC 76 per L. Guthrie at 83, *Microwave Systems (Scotland) Ltd. v. Electro-Physiological Instruments Ltd.* 1971 SC 140 per L. Thomson at 143, *Fraser v. Church of Scotland General Trustees* 1986 SLT 692 per L. Dunpark at 696, Mackay *Manual*, p. 193.

⁴² *Brown v. Redpath Brown & Co.* 1963 SLT 219. In the sheriff court, OCR r.3(1) and App. 1, Form G1 requires the pursuer to state the facts which form the ground of action.

⁴³ *Cameron v. Hamilton* (1858) 18 D. 423, *Dallas v. Mann* (1853) 15D. 746 For reasons of space, there is no treatment here of the law relating to domicile and jurisdiction, title and interest to sue, nor parties' special capacities. Up-to-date statements of the law pertaining thereto can be found in Macphail, *Practice* (2nd ed.) and Green's Annotated Rules of the Court of Session, (2003).

⁴⁴ *Ewing's Trs. v. Farquharson* (1829) 7 S. 464, *Muir v. Braidwood* (1831) 10 S. 83, *Wilson v. Walker* (1856) 18 D. 673, Maxwell, *Practice* p. 173.

try to prove.⁴⁵ A pursuer stands or falls on his establishing the averments he makes on record and is not entitled, in the course of inquiry into the facts, to make a new case for which he has no record.⁴⁶ A defender has to meet the case made against him on record and nothing more.⁴⁷ A pursuer cannot prove more than he avers⁴⁸ and cannot succeed, as a matter of fair notice, against a defender on a ground which is not averred on record,⁴⁹ although he may succeed in circumstances in which evidence is led by the pursuer at proof in support of that ground which is not objected to timeously.⁵⁰

As Lord Justice-Clerk Wheatley explained in *Mackenzie v. West Lothian D.C.*⁵¹

'Our Scottish procedure pays observance, not lip service, to pleadings. A pursuer or petitioner must set out in his final pleadings averments which, if established on the basis of the law on which he founds, warrant the remedy which he seeks.'⁵²

⁴⁵ *Ward v. Coltness Ironworks* 1944 SLT 409.

⁴⁶ Lord Reid in *McGrath v. NCB* (4 May 1954, unreported) applied in *Hamilton v. John Brown & Co. (Clydebank) Ltd.* 1969 SLT (N) 18 and *Carroll v. Scott's Shipbuilding Co.* 1969 SLT 46, *Morrison's Associated Companies v. Rome* 1964 SC 160 at 182; *McIntosh v. Walker Steam Trawl Fishing Co.* 1971 SLT (N) 75, Maxwell, *Practice* p. 173.

⁴⁷ *McGrath v. National Coal Board* (4th May 1954, unreported) per Lord Reid.

⁴⁸ *Campbell v. M'Nee* 1903 SLT 278.

⁴⁹ *Black v. John Williams & Co. (Wishaw)* 1924 SC (HL) 22, "*Vitruvia*" *S.S. Company Ltd. v. Ropner Shipping Co. Ltd.* 1923 SC (HL) 31, *Morrison's Associated Companies. Ltd. v. James Rome & Sons Ltd.* 1946 SC 160 per L. Guthrie at 190. See also *Cleisham v. The British Transport Commission* 1964 SC (HL) 8 per L. Reid at 13 and per L. Guest at 22 (Note that the three other English law lords considered that a case could be made outwith the corners of the record) and *Riddell v. Reid* 1941 SLT 179, *Gordon v. Wilson* 1992 SLT 849.

⁵⁰ *Albacora SRL v. Westcott & Laurence Line Limited* 1966 SC (HL) 19 per L. Reid at 23 and L. Guest at 26, *McGlone v. British Railways Board* 1966 SC (HL) 1 per L. Reid at 12, *Brown's Executor v. N.B. Steel Foundry* 1968 SLT 121, *Hamilton v. John Brown & Co. (Clydebank) Ltd.* 1969 SLT (N) 18, *O'Donnell v. Murdoch McKenzie & Co. Ltd* 1966 SC 58, 1967 SC (HL) 63, *Rafferty v. J.&C.M. Smith (Whiteinch) Ltd.* 1990 SLT 2, *Royal Bank of Scotland plc v. Malcolm* 1999 SCLR 854, *Hislop v. Lynx Express Parcels* 2003 SLT 785. Factual matters which have not been specifically averred but bear upon legal issues pled will not necessarily be excluded. *Taylor v. Taylor* 2000 SLT 1419.

⁵¹ 1979 SC 433 at 437-8.

⁵² This has been frequently quoted. See Macphail, *Practice*, para. 9.14.

The issue between the parties must raise a live, practical question and not be something hypothetical, premature or academic.⁵³ In dealing with relevancy of the pursuer's case, the conclusions and condescence will be read together.⁵⁴

The condescence should be brief⁵⁵, and pointed insofar as consistent with clearness.⁵⁶ It should not be vague⁵⁷ but such that the pursuer should give the defender adequate notice of the case to be made against him.⁵⁸ 'Exuberance of epithets', 'copious use of superlatives' and 'vituperative verbiage' should be avoided.⁵⁹ The averment should not commence with the words 'averred that'⁶⁰ although averments following a denial of the other party's averments usually commence with the phrase 'Explained and averred that' and sometimes 'Further explained and averred that' as further differentiation at adjustment.⁶¹

⁵³ *Macnaughton v. Macnaughton's Trs.* 1953 SC 387 per LJ-C Thomson at 392, *Glasgow Navigation Co. Ltd. v. Iron Ore Co. Ltd.* 1910 1 SLT 345 per LC Loreburn at 347, *Aberdeen Development Co. v. Mackie, Ramsay & Taylor* 1977 SLT 177, *Marco's Leisure Ltd. v. West Lothian District Licensing Board* 1994 SLT 129.

⁵⁴ *M'Coll v. Gibson* (1868) 5 SLR 267, *Brown's Trs. v. Hay* (1897) 24 R. 1108, per LP Robertson. See *infra* under plea to the relevancy.

⁵⁵ Dundas, *cit. sup.* p. 19. As the annotators to Green's Annotated Rules of the Court of Session point out, 'an unfortunate modern practice has developed of making articles long and cumbersome.' para. 13.2.4. See also Green's Litigation Styles at A3-005, 'Quotations, 1995 SCLR 1174. C.f. Conway, *Personal Injury Practice in the Sheriff Court cit. sup.* p. 62

⁵⁶ *Wardrope supra.*

⁵⁷ *Jackson v. Earl of Cassillis* (1833) 11 S. 908; *Henderson v. Minto* (1860) 22D 1126. Maclaren, *Practice* p. 311, Maxwell, *Practice* p. 173.

⁵⁸ *Carruthers v. Caledonian Rly Co.* (1854) 16D 425 at 429, *Beattie v. Beattie* (1883) 11 R. 85, *Gunn v. M'Adam & Son* 1949 SC 31 at 38, *Hope v. Hope's Trs.* (1898) 1 F. (HL) per L. Watson at 3, *Eadie Cairns v. Programmed Maintenance Painting Ltd.* 1987 SLT 777.

⁵⁹ Scott Dickson, 'Pleading' *cit. sup.* p. 24, Black, *Introduction*, p. 11.

⁶⁰ This is the developed practice. See e.g. E. Bowen, 'Written Pleadings in the Sheriff Court', *supra* p. 249. It will be recalled post-1825 averments were required to start 'Averred and offered to prove that...' See Ch. 3.

⁶¹ C.f. MacKenzie, *Written Pleadings, op. cit.* para 4.80 where the phrase is considered 'unnecessary verbiage' although *ibid.* see para. 5.13.

The averments should not contain argument,⁶² nor set forth the manner in which the averment is to be proved⁶³ nor the evidence itself as averment.⁶⁴ It is bad practice to plead impertinent, scandalous or irrelevant averments⁶⁵ such as allegations of immorality,⁶⁶ and professional misconduct⁶⁷ where these are not pertinent to the cause or to make averments regarding the propriety of actings of third parties who are not party to the action.⁶⁸ It is *pars judicis* for a court to notice such averments and to order them to be withdrawn.⁶⁹ There are some cases or averments which require a high degree of specification. This is part of the concept of fair notice and the requirement that pleadings be specific. These are examined below, but the following examples may be presently observed.

⁶² *Connell v. Ferguson* (1861) 23 D 683 per L. Neaves at 686. In this case, it was averred that the grounds of the claimants' proceedings were fully explained and averred in attached pamphlets which pamphlets the Court considered to be written chiefly in an 'argumentative, or rather a declamatory style'.

⁶³ *HM Advocate v. Lamont* (1857) 19 D. 779 per LP M'Neill. Dundas, 'Pleadings' *cit. sup.* pp 23-24.

⁶⁴ *Roy v. Wright* (1826) 5 S. 107 (NE 98), *Tulloch v. Davidson* (1858) 20 D. 1045 per L. Cowan at 1056. However, in specialised circumstances, averments of evidence having a 'direct bearing' on the resolution of the cause may be pled. *Alexander & Sons v. Dundee Corporation* 1950 SC 123, *Bark v. Scott* 1954 SC 72, *Strathmore Group Ltd. v. Crédit Lyonnaise* 1994 SLT 1023. Also, where a party to the litigation has made an 'extra-judicial' admission details of the admission must be averred. *Hutchison v. Henderson* 1987 SLT 388, *Jackson v. Glasgow Corporation* 1956 SC 354.

⁶⁵ *Wardrope, supra*, *A. v. B.* (1895) 22 R. 402, *Paton v. Clydesdale Bank* (1896) 33 SLR 533, (see also Mackay, *Manual* p. 194 citing *Herdman v. Young* 1744, M. 13,987 and Macphail, *Practice*, paras 10-63 citing *Hamilton v. Anderson* (1858) 20 D. (HL) 16, *Mclsaac v. Leonard* 1915 31 Sh. Ct. Rep. 303, *Sellars v. IMI Yorkshire Imperial Ltd.* 1986 SLT 629.

⁶⁶ *M. v. S.* 1909 1 SLT 192, *C. v. M.* 1923 SC 1, *MacGregor v. MacGregor* 1946 SLT (N) 13 (defender's mother of immoral character), *Morrison v. McArdle* 1967 SLT 58 (fornication)

⁶⁷ *C. v. W.* 1950 SLT (N) 8.

⁶⁸ *Wardrope, supra*.

⁶⁹ with expenses. Mackay, *Manual*, p. 194. Green's Encyclopaedia of Scots Law, vol. 1 s.v. 'Actions' [Æ. Mackay] p. 119 at p. 120. See also *Sproat v. Mure* (1826) 5 S. 61, *Wardrope v. Duke of Hamilton supra.* (1876) 3 R. 878, *A. v. B.* (1895), 22 R. 402, *H. v. P.* (1905), 8 F. 232, *M. v. S.* 1909 1 SLT 192. The averments deleted, however, may themselves constitute sufficient notice to the other side such as to permit a line in cross-examination. *A. v. B. op. cit.* per LP Robertson, *H. v. P.* (1905) 8 F. 232, *C. v. M.* 1923 SC 1, but there must have been fair notice. *Clinton v. News Group Newspapers Ltd.* 1999 SLT 590 per Lord Nimmo Smith at 592.

Where a pursuer requires to make averments of fraud then very specific averments are required.⁷⁰ This is also true where a party alleges 'conspiracy.'⁷¹ When a party makes a case of fault, averments of fault should also be specific.⁷²

Where a pursuer founds on vicarious liability, the name of the negligent employee or person should be averred or if 'his name is to the pursuer unknown'⁷³ there must be a sufficiency of facts and circumstances in the averments from which the defender can establish that the person by whom the negligence was committed was his employee.⁷⁴ This is part of the general duty on a party to provide specification in the pleadings of the identity of persons referred to therein.⁷⁵

Where a pursuer sues under statute and at common law, the grounds of action must be set forth separately and distinctly in the averments of the condensation and in the pleas in law⁷⁶ but reference to a statute in the pleadings is not necessarily inconsistent with a party's intention to plead common law.⁷⁷ Where the same set of

⁷⁰ *Gillespie v. Russell* (1857) 18 D. 677, *Drummond's Trustees v. Melville* (1861) 23 D. 450, *Wright v. Guild & Wyllie* (1893) 30 SLR 785, *Thomson & Co. v. Pattison, Elder & Co.* (1895) 22 R. 432. *Shedden v. Patrick* (1852) 14 D. 721 per L. Fullerton at 727 and (1854) 1 Macq. 535 at 581 and 586, *Kaur v. Singh* 1998 SC 233, *Royal Bank of Scotland plc v. Holmes* 1999 SLT 563 *Buchan (Stewart) Garages Ltd v. BEC (Scotland) Ltd. and Anr.* (unreported) (2001 GWD 3-126) (19 January 2001 per L. Macfadyen at para. 14), *Wright v. Cotias Investments Inc.* 2001 SLT 353, *Simple Cochrane plc v. Clarke* 2003 SLT 532 and see *infra* under Plea of Lack of Specification. The same applies with statutory penalties *Carruthers* (1854) *supra*, p. 427.

⁷¹ *Anderson v. Express Investments Co. Ltd. & Anr.* (unreported) 4 September 2002 per L. Eassie.

⁷² *Thomson & Co. v. Pattison, Elder & Co.* (1895) 22 R. 432.

⁷³ This is the commonly used stylistic way of stating that the person is not known to the pursuer.

⁷⁴ *Davanev v. Yarrow Shipbuilders Ltd.* (unreported) 4th December 1998.

⁷⁵ *Boulting v. Elias* 1990 SLT 596.

⁷⁶ *M'Grath v. Glasgow Coal Co. Ltd.* 1909 2 SLT 92 per L. Low at 94, *Keenan v. Glasgow Corporation* 1923 SC 611, *Gaitons v. Blythwood Shipbuilding Co. Ltd.* 1948 SLT (N) 49. C.f. *Campbell v. United Collieries Ltd.* 1911 2 SLT 434. However, in actions for personal injury, where the grounds are differentiated in the condensation a single plea of fault is sufficient. *Durnin v. William Coutts & Son* 1955 SLT (N) 9. The common expression of the plea is 'The pursuer having suffered loss, injury and damage through the fault *et separatim* breach of statutory duty of the defenders is entitled to reparation from them therefor'.

⁷⁷ *Stuart Eves v. Smiths Gore* 1993 SLT 479.

facts founds a breach of common law and statutory duties, where the one fails, the other may still succeed.⁷⁸ Again, further examples are examined below with regard to the plea of lack of specification.

Where a party wishes to plead a non-essential fact, (e.g. for the purposes of cross-examination⁷⁹) which is not known to him⁸⁰, but which might be within the other party's knowledge⁸¹ and the fact is a reasonable inference from facts known by him and pled or represents an averment of belief, he may do so by employing the phrase 'believed and averred'.⁸² The phrase is also properly employed where the party must prove a material fact to succeed, and the fact is not known to him: Then he may still succeed by inviting the court to draw an inference from other facts pled as 'categorical assertions'⁸³ – in other words, the evidence of one fact is proof of another by reasonable inference.⁸⁴ If there is an insufficiency of these other facts, the court will not draw the inference.⁸⁵

⁷⁸ *Oates v. Atlantic Drilling Co. Ltd.* 1995 SLT (N) 71.

⁷⁹ Query whether this in itself offends the general rule that only essential and relevant facts should be averred? See Macphail, *Practice*, para. 9-54.

⁸⁰ *Shaw v. Renton & Fisher* 1977 SLT (N) 60, *Leslie v. Leslie* 1983 SLT 186, *Oil Technnics Ltd. v. Thistle Chemicals Ltd & Ors.* 1997 SLT (N) 416.

⁸¹ *McCrone v. Macbeath, Currie & Co.* 1968 SLT (N) 24. The importance is that the fact cannot be within the pleading party's knowledge. *Leslie v. Leslie* 1983 SLT 186, *Shaw v. Renton & Fisher* 1977 SLT (N) 60.

⁸² *Leslie v. Leslie* 1983 SLT 186 at 188, *Magee & Co. (Belfast) Ltd. v. Bracewell Harrison & Coton* 1980 SLT (N) 102, *McCrinkle v. Sandilands* 1980 SLT (N) 12.

⁸³ *Brown v. Redpath Brown & Co.* 1963 SLT 219. *Stark v. Crichton and Anr* (unreported) 12 July 1996 per Temporary Judge Wheatley. C.f. *Akbar v. Crichton* (unreported) 1999 GWD 29 – 1356.

⁸⁴ *Strathmore Group Ltd. v. Crédit Lyonnaise* 1994 SLT 1023 per L. Osborne at 1032, *Littlejohn v. Wood & Davidson Ltd.* 1997 SLT 1353.

⁸⁵ e.g. *Partnership of Ocean Quest v. Finning Ltd* 2000 SLT 157, *McIntosh & Anr. v. Scottish Borders Council* (unreported) 24 April 2001 per Temp Judge Coutts. It may be difficult to persuade a court that a reasonable inference of conspiracy can be drawn as 'believed and averred' from averments of fraud even where the averments are properly specific. See *Subsea Offshore Ltd. v. Broom and Anr.*, 2003 SCLR 309.

It is perfectly competent to plead a case on alternative factual grounds. Thus, where a pursuer raises an action convening multiple defenders, pleading cases against them in the alternative, where liability may lie with any one of them and it cannot be averred which is liable, the action may be dismissed against some but still survive against others.⁸⁶ But where averments are not in the alternative then they must not be self contradictory.⁸⁷

In many cases, substantial justice requires that a case may be stated not only alternatively but on inconsistent averments of fact.⁸⁸ However, in other cases it would not be compatible with justice to the opposite party to permit the case to proceed on these alternative bases, and thus sometimes an election must be made.⁸⁹ Although the question of pleading such cases is one of practice and procedure and it has been thought neither necessary nor desirable to pursue too far an enquiry for abstract principles,⁹⁰ it is suggested that the following may be stated. Pleading on alternative inconsistent bases is deemed permissible where a party is excusably in ignorance of the essential facts⁹¹ but it is not permissible where a party is shown to

⁸⁶ *Stout v. UKAEE* 1979 SLT 54, *Gallacher v. Kleinwort Benson Trustees Limited & Ors.* (Unreported, 12 March 2003).

⁸⁷ *Maclaren, Practice* p. 311, *M'Sourley v. Magistrates of Paisley* 1902 10 SLT 86 approved in *Smart v. Bargh* 1949 SC 57. For early examples see *Campbell v. Grierson* (1848) 10 D. 361, *London and Caledonian Marine Insurance Co. v. London and Edinburgh Shipping Co.* (1867) 5 M. 982.

⁸⁸ *M v. M* 1967 SLT 157. Maxwell, *Practice* p. 174, Macphail, *Practice*, para 9-35. The importance is that the inconsistent cases must be stated alternatively. So, even where the pursuer was not aware of which of two companies had failed in their duties, convening both without making an alternative case against the second company led to dismissal against the second on the grounds of relevancy. *Allison v. Isleburn Ltd. and Eurolink Ferries Ltd.* 1997 SCLR 791 per L. Macfadyen at 796. This particular area of pleading, in the past, has caused practitioners difficulties. For an example of the confusions which can arise see J. Morrison, 'Pleading Alternative Cases' 1987 SLT (News) 193 and J.A. Russell, 'Further Observations on Pleading Alternative Cases' 1987 SLT (News) 396.

⁸⁹ *Royal Bank of Scotland plc v. Harper Macleod & Ors.* 1999 SCLR 781.

⁹⁰ *Smart v. Bargh* 1949 SC 57 per L. P. Cooper at 61-2.

⁹¹ *Finnie v. Logie* (1859) 21 D. 825 per L.P. M'Neill at 829, *Clarke v. Edinburgh and District Tramways Co. Ltd.* 1914 SC 775, *Valley v. Wiggins Teape Ltd.* 1979 SLT (N) 50, *Safdar v. Devlin* 1995 SLT 530.

have knowledge which permits him to elect which case to present.⁹² It has been considered that a greater latitude is given to defenders to plead such a case⁹³ but it is ultimately for the Court in its discretion to control the more extreme type of cases.⁹⁴

In testing of the relevancy of the cause so pled, as a whole, if one branch is relevant and the other branch is irrelevant, the whole case may be held to be irrelevant⁹⁵ as the weaker alternative is always the test of the case.⁹⁶ Where one factual ground of action is not supported by relevant averments, the whole action is dismissed.⁹⁷ This is known colloquially as the 'weaker alternative rule.' The concept has been explained thus: 'If legal liability arises only on proof of the fact A, and if all that a pursuer offers to prove is that it is either A or B, his pleadings are irrelevant. The relevancy of the case is tested on the weaker alternative.'⁹⁸ Where, however, legal liability arises from proof of either A or B, then the action would still be relevant. It is important to note that the weaker alternative is that which is weaker in law.⁹⁹ The fact that an alternative case is being made should be clearly indicated at the outset of a separate condescence by using the word 'Alternatively'.

Where a pursuer wishes to create an alternative case based on factual averments of a defender which are in principle denied, he may commence the condescence with

⁹² *Cass v. Edinburgh and District Tramways Co. Ltd.* 1908 SLT 957.

⁹³ *Smart v. Bargh* 1949 SC 57 per L. P. Cooper at 61-2, *M v. M* 1967 SLT 157.

⁹⁴ *Smart supra*, Maxwell *Practice* p. 174, *Royal Bank of Scotland v. Harper McLeod* 1999 SLT 99.

⁹⁵ *Finnie v. Logie* (1859) 21 D. 825 per LP M'Neill at 829.

⁹⁶ *Hope v. Hope's Trustees* (1898) 1 F (HL) 1 per L. Watson p. 3 and L. Shand at 5, *Smart supra* per LP Cooper at 93.

⁹⁷ *Finnie supra*, *Murray v. Wyllie* 1916 SC 356, *Percival v. Bairds & Scottish Steel Ltd.* 1952 SLT (Sh. Ct.) 80, Maxwell, *Practice*, p. 174. For examples see *Weir & Anr. v. East of Scotland Water Authority* 2001 SLT (N) 1205, *Grant v. Macdonald* 1998 SLT (Sh Ct) 76.

⁹⁸ *Haigh & Ringrose Ltd. v. Barrhead Builders* 1981 SLT 157 per Lord Stott.

⁹⁹ *Stewart's Executors v. Stewart* 1993 SC 427 per L.P. Hope at 457.

the phrase 'Alternatively, *esto*¹⁰⁰ [the defender's facts] (which are denied)'. Thus, if the defender's averments are proved, and the pursuer fails in his substantive case, he is still entitled to succeed on the defender's proven facts as he has the alternative case on record.¹⁰¹

(viii) Quotations in Averments, Reference to Statutes and the Incorporation of Documents *Brevitatis Causa*

Historically, correspondence or other documents¹⁰² which did not constitute part of the grounds of the action were not to be stated at length, or incorporated *ad longum* but only referred to.¹⁰³ The same applied with Public General Statutes as part of the general prohibition against pleading law - as long as the facts averred were sufficient to bring them within the ambit of the statute.¹⁰⁴ Where an action was based on a private Act of Parliament the relevant provision was set out at length.¹⁰⁵ Where a document did form part of the ground of action, such as a libellous letter in an action of damages for defamation, it was considered proper that it was incorporated.¹⁰⁶ It was formerly considered irregular to refer to a pamphlet or other extraneous matter, and hold it as inserted in the pleading.¹⁰⁷ Where clauses of statutes or documents

¹⁰⁰ *scil.* 'assuming that'.

¹⁰¹ *M. v. M. supra.*

¹⁰² *Charles v. South District Market Co.* (1826) 4 S. 514, *Tulloch v. Davidson* (1858) 20 D. 1045

¹⁰³ Lords Ordinary Notice 6th March 1839, s.3. See also *Roy v. Wright, supra.* Historically, in the pleadings a produced document would be referred to as '[Document] No. [] of process'. It did not require to be 'incorporated' See Chapter 3 and Appendix 2.

¹⁰⁴ *Glasgow Rly Co. v. Tennent* (1848) 11 D. 212, *Carruthers v. Caledonian* (1854) 16 D 425, *Granger v. Geils* (1857) 19 D. 1010. (Formerly, actions laid solely on the terms of the Employer's Liability Act brought in the sheriff court required the Act and the section founded on to be pleaded to permit transmission of the cause to the Court of Session. See *Lees, Handbook*, p. 36).

¹⁰⁵ Maxwell, *Practice*, p. 173 following Maclaren, *Practice* at p. 312.

¹⁰⁶ Maxwell, *Practice*, p. 173.

¹⁰⁷ Presumably on the basis that a pamphlet could contain argument or rhetoric and extraneous matter had no place as an 'essential fact' in the cause.

would necessarily require to be referred to in deciding the cause, for convenience it was the general practice to quote them in the pleadings.¹⁰⁸

In modern practice, it is thought that some of the above is still relevant, but the law is now clear as to what should be averred and what can be incorporated. Regarding the averring of provisions of statutes, where the cause arises out of the contravention of particular public general statutes the practice is to quote the relevant section or part thereof and specify the way in which it has been contravened.¹⁰⁹ In actions for damages for negligence, it is the practice to aver the specific duties owed to a pursuer by a defender by virtue of statutory provisions.¹¹⁰ In actions based on the Occupier's Liability Act 1960, the Act is often averred.¹¹¹ Private Acts of Parliament before 1850 require to be pled¹¹² as does foreign law, if different from Scots law.¹¹³

Where a party bases his case on a document i.e. he 'founds' on it or a part thereof, he must produce the document¹¹⁴ insofar as it is within his possession and control,¹¹⁵

¹⁰⁸ p. 194. Maxwell, *Practice*, p. 173 following Maclaren *Practice* p. 312 and authorities therein cited. See also *Laming v. Seater* (1889) 16 R 828 cited by *Lees Handbook* p. 31 and Scott Dickson, 'Pleading' *cit sup.* p. 25.

¹⁰⁹ e.g. the Factories Acts. Maxwell, *Practice*, p. 173. See also *NV Devos Gebroeder v. Sunderland Sportswear Ltd.* 1987 SLT 331 for authority that a failure to specify the statutory provision founded upon is not always fatal. (in this case provisions of the Sale of Goods Act 1979). The practice seems inconsistent.

¹¹⁰ Macphail, *Practice*, para 9-18. The practice has been criticised D.M. Walker, 'Pleadings in Negligence' (1956) 72 Scot LR 241, Walker, *Delict*, p. 187 but it continues as the usual style of pleading such actions. See for example Green's Litigation Styles, Styles A04-39, (Construction (Health, Safety and Welfare) Regs. 1996, and A04-42A, (Noise at Work Regulations 1989) and R. Conway, *Personal Injury Practice in the Sheriff Court*, 2nd ed., (Edinburgh, 2003) p. 68. See also comments of Lord Kissen, 'Delict' 1966 SLT (News) 45.

¹¹¹ even though the Act merely restored the common law. See Green's Litigation Styles, Styles A04-41, A04-43.

¹¹² Interpretation Act 1978, s. 3.

¹¹³ *Emerald Stainless Steel Ltd. South Side Distribution Ltd.* 1982 SC 61.

¹¹⁴ i.e. the whole document. *Murry's Trs. v. Wilson's Exrs.* 1945 SC 51, *Unigate Foods Ltd. v. Scottish Milk-Marketing Board* 1975 SC (HL) 75 per L. Fraser at 106. This was always a requirement. It is now incorporated into OCR by r. 21.1(1) and RCS by r. 27.1.

¹¹⁵ *Western Bank of Scotland v. Baird* (1863) 2 M. 127.

and he must describe it accurately and specifically in the pleadings. A document not produced cannot be considered by the Court.¹¹⁶ Where the part thereof is in short compass, the actual wording used in the document may be pled. If the document is overly long to put in the pleadings, then it should be incorporated into the pleadings by reference. This is done by using a phrase such as '[The document] is adopted and held to be herein repeated *brevitatis causa*.'¹¹⁷ The important part is the repetition '*brevitatis causa*' i.e. for the sake of brevity.¹¹⁸ In this situation, it is the proper course to incorporate the whole document as failure to do so prevents the court examining the document¹¹⁹ unless the parties have lodged a joint minute dispensing with probation of the document.¹²⁰ Thus the phrase is not wording of mere style¹²¹. It must be present in some form to give fair notice to the other side that the condescence is to be read as if the document formed part of it and to enable a court to examine the document so incorporated by reference. Therefore a document not incorporated into the pleadings cannot be examined by the Court at procedure roll even though the document may be lodged.¹²²

¹¹⁶ *Hayes v. Robinson* 1984 SLT 300 per L. Ross at 301.

¹¹⁷ Macphail, *Practice*, para. 9-67, Black, *Introduction* p. 12. *Gordon v. Davidson* (1864) 2 M. 758 per LJ-C Inglis at 758, *Redpath Dorman Long Ltd. v. Tarmac Construction Ltd.* 1982 SC 14 per L. Ross at 18, *Grampian Hydraulics (Buckie) Ltd. v. Dauntless Marine Engineering and Supply Co.* 1992 SLT (Sh Ct) 45, *Halliday v. Rolland Decorators Ltd.* 1994 SCLR 305. Sometimes the phrase '[The document] is produced herewith, adopted and held to be herein incorporated *brevitatis causa*' is used - see *Grampian Hydraulics (Buckie) Ltd. v. Dauntless Marine Engineering and Supply Co. cit. sup.*

¹¹⁸ It has been suggested that the latter should always be used. S. Woolman, 'Pleadings', in H.L. MacQueen (ed.) *Scots Law into the 21st Century. Essays in Honour of W.A. Wilson* (Edinburgh, 1996) 277 at 280.

¹¹⁹ *Gordon v. Davidson* (1864) 2 M. 758.

¹²⁰ *Ribble Paper Mills, Ltd. Clyde Paper Mills Ltd.* 1972 SLT (N) 25, *Stone v. Macdonald* 1979 SC 363 per L. Ross at 365, *Trade Development Bank v. D.W. Haig (Bellshill) Ltd.* 1983 SLT 107 per L. Stewart at 109, *Eadie Cairns v. Programmed Maintenance Painting Ltd.* 1987 SLT 777, *Grampian Hydraulics supra*, *Mcllwraith v. Lochmaddy Hotel Ltd.* 1995 SCLR 595 per L. Prosser at 497.

¹²¹ *Grampian, supra*.

¹²² *Chalmers v. Martin* 1996 SLT 1307.

As part of the general prohibition against pleading evidence, a document containing opinion should not be incorporated,¹²³ particularly where the document is an expert report and, even more so, where it refers to another report.¹²⁴ Factual material, however, such as invoices, schedules and lists can be incorporated.¹²⁵

A document which 'is referred to for its terms' is not an averment of fact upon which a plea-in-law can be based¹²⁶ and a phrase along the lines of '[the document] is referred to for its terms and adopted *brevitatis causa*' is strictly, incorrect.¹²⁷ Where a party replies to the proper incorporation of a document with the wording '[the document] is referred to for its terms' sometimes with 'beyond which no admission is made' conjoined, then he may be taken to be admitting the existence of the document but not its terms.¹²⁸ But the authorities are not unanimous on this point, as it has also been held to mean that the very existence of the document is not admitted¹²⁹ and stating that the 'alleged document is referred to for its terms' has been construed as meaning that the existence of the document requires to be proved.¹³⁰ Macphail, *Practice*, offers the practical advice that the party should

¹²³ *Connell v. Ferguson* (1861) 23 D. 683 per L. Neaves at 685, *Westwood v. Keay* (1950) 66 Sh. Ct. Rep. 147, *Barton v. William Low & Co.* 1968 SLT (N) 27.

¹²⁴ *Englert v. Stakis plc* 1996 (unreported) per Temporary Judge Wilkinson, Q.C.

¹²⁵ *Royal Bank of Scotland plc. v. Holmes* 1999 SLT 563.

¹²⁶ Macphail, *Practice*, para. 9.67.

¹²⁷ In *Royal Bank op. cit.* the phrase was considered to be 'unusual' although the pursuer's counsel accepted, for the purposes of the debate, that it could amount to incorporation. The confusion perhaps arises from parties knowing that they must use the words '*brevitatis causa*' but not that they must also adopt the terminology of incorporation 'by reference'. It appears that this phrase is becoming increasingly accepted by some in practice as the proper way of incorporating documents. See MacKenzie, *Written Pleadings, op. cit.*, paras. 3.68 and 4.174. As noted, strictly this is incorrect or at least 'unusual'.

¹²⁸ *Pringle v. Bremner and Stirling* (1867) 5 M. (HL) 55, *H. Widdop & Co. Ltd. v. J & J Hay Ltd.* 1961 SLT (N) 35.

¹²⁹ *McConnel v. Pringle* (1960) 76 Sh Ct Rep 67, Maxwell, *Practice* p. 188, fn 2.

¹³⁰ Lees, *Handbook* at para. 119, Maclaren, *Practice*, p. 377.

actually expressly set out his position in relation to the document rather than relying on these phrases.¹³¹

Confusion has arisen from the practical application of these rules as to when a document may be referred to in the course of debate on relevancy and/or specification.¹³² The confusion arises from *dicta* of Lord Avonside in *Eadie Cairns* when he stated that:

‘It is a strict rule of our system of pleadings, for long recognised, that in debates related to relevancy and specification no reference whatsoever can be made to productions lodged by one side or another said to support written pleadings unless both sides are in agreement that such productions are accurate and acceptable. I should have thought that this established rule should have been known to any advocate who drafted pleadings.’¹³³

It has been considered that *Eadie Cairns* was a decision on its own facts¹³⁴ and the above remarks were *obiter*.¹³⁵ But a closer reading of the facts of the case show, it is submitted, that there is actually little to be confused about. The pursuers’ action was based on the defective performance of a contract by the defenders where the details of defective performance were found in various technical reports obtained by the pursuers. These were used by them in substitution for factual averments of the defects and of loss and damage arising therefrom. The clue to Lord Avonside’s *dicta*

¹³¹ Macphail, *Practice*, para. 9.67.

¹³² *Steelmek Marine and General Engineers’ Trustee v. Shetland Sea Farms Ltd. (sub. nom Reid v. Shetland Sea Farms Ltd.)* 1999 SLT 30 per Sh. Pr. Bowen at 30-1. See E. Bowen, ‘Written Pleadings in the Sheriff Court’ *cit. sup.* p. 250. See also, C. Hennessy, *Civil Practice and Procedure* para 3.31 – ‘The precise application of this rule is not entirely clear however.’ and G. Junor, ‘Eadie Cairns – R.I.P.?’ (2003) 8(1) SLPQ 22.

¹³³ *Eadie Cairns v. Programmed Maintenance Painting Ltd.* 1987 SLT 777 at p. 780E.

¹³⁴ *Grampian, supra.*

¹³⁵ *Halliday, supra, Steelmek, supra.*

lies in the wording which the pursuers used in their attempt to incorporate the reports. They pled: 'the said defects are as set out in two reports ... both of which are produced and referred to *brevitatis causa* for their whole terms.' Strictly there was no incorporation, repetition or adoption by reference. As noted above, the words used are not merely stylistic.

The Court decided that in these circumstances, the grounds for breach of contract and the details of the loss and damage caused by the defenders should have been on record as a matter of fair notice and as a matter of relevancy and specification. Thus without proper incorporation the case was irrelevant. What Lord Avonside was referring to was the situation where there was no incorporation of the documents irrespective of any enquiry into specification or relevancy of the pleadings. This construction of the case has been confirmed by Lord Macfadyen in the recent case of *Royal Bank of Scotland v. Holmes*.¹³⁶ Sometimes, therefore, a party can meet the requirements of fair notice and relevancy and specification by properly incorporating documents but as to whether the incorporation will meet those requirements, each case will turn on its own facts.¹³⁷ We may note also that it has been held that a properly incorporated document may itself constitute sufficient notice to the other side as part of a case not fully averred on record.¹³⁸

Against this background Lord Avonside's remarks are quite apposite and as Lord Jauncey said in the same case:

'If the pursuers wish to rely on certain passages from the reports they should incorporate those passages into the pleadings, so that the defenders

¹³⁶ 1999 SLT 563 at 570F.

¹³⁷ *Royal Bank supra*.

¹³⁸ *Lord Advocate v. Shipbreaking Industries (No. 2)* 1993 SLT 995.

may have fair notice of what particular points are being taken against them.¹³⁹

The point is still to be considered by a Division of the Court of Session but it is submitted that the approach adopted by Lord Macfadyen is the pragmatic and correct one.

(ix) The pursuer's Pleas-in-Law.

As examined in the previous chapter, the requirement for pleas-in-law was part of the Judicature Act 1825¹⁴⁰ and A.S. 11 July 1828 and, although initially unpopular, the requirement has never been dispensed with. Pleas must appear in the modern summons and defences. Pleas-in-law represent the detailed application of the law to the facts pled in the condescence or answers and should be specific, distinct and separate propositions in law without argument¹⁴¹ stating in as few words, as is consistent with clearness, the rule of law founded upon.¹⁴² The pleas will mirror the substantial parts of the conclusions and, taken with the condescence, they should give the defender sufficient notice of the case made against him.¹⁴³ Each legal proposition will be represented by a plea in law.¹⁴⁴ It has been said that the stating of the appropriate pleas-in-law remains a cornerstone of the system of written pleadings.¹⁴⁵ The classical definition of a plea-in-law was provided by Lord Justice-Clerk Inglis:

¹³⁹ at 783F. Emphasis added.

¹⁴⁰ or Court of Session Act, ss. 9 and 11.

¹⁴¹ Maxwell, *Practice*, p. 174. See also *Fraser v. M'Kenzie* (1826) 4 S. 699 (note) (NE 706, note). and Mackay, *Manual* p. 194 fn (e).

¹⁴² Mackay, *Manual*, p. 195.

¹⁴³ *Gunn & Ors. v. M'Adam & Sons Limited & Ors* 1949 SC 31 at 39.

¹⁴⁴ A.G. Walker, *Written Pleadings*, *cit. sup.* p. 166.

¹⁴⁵ *Kelly v. Capital Bank plc* 2004 SLT (N) 483 per L. Carloway.

'a plea in law ought to be a distinct legal proposition, applicable to the facts of the case.'¹⁴⁶

However, although there is a requirement to state specific pleas, custom, practice and tradition sanctioned the pleading of general pleas. Maclaren states that at least one specific plea should be averred but suggests that a general plea may be advisable *ob majorem cautelam*.¹⁴⁷ Although this is more common with defenders, particularly with regard to preliminary pleas to the relevancy and specification,¹⁴⁸ the older authorities suggest the insertion of pleas such as: 'in the circumstances condescended upon, the pursuer is entitled to decree in terms of the conclusions (or the alternative conclusions)¹⁴⁹ even though it was this plea which L.J.-C Inglis had considered a 'loose and unmeaning statement'.¹⁵⁰ It should be said that its modern use is frowned upon¹⁵¹ and its use may, in any event, have abated. Lord President Clyde commented in 1932:

'so far as I am aware no such plea was ever sustained in the Court of Session; and obviously could not be properly sustained, since it means nothing. It has now gone out of use.'¹⁵²

Another common¹⁵³ general plea for a pursuer, particularly in actions for payment, is that 'The defender being due and resting owing to the pursuer in the sum sued for,

¹⁴⁶ *Young & Co v. Graham* (1860) 23 D. 36. This is really a restatement of earlier requirements for 'concise legal propositions' in the pleas in law. See Ch. 3 *supra*.

¹⁴⁷ (for greater security). Maclaren *Practice* p. 313. He treats the pleas for the pursuer and defender together.

¹⁴⁸ see *infra*.

¹⁴⁹ Mackay, *Practice* Vol. 1 p. 392, Mackay, *Manual*, p. 195, Maclaren, *Practice*, p. 313 Mackay, *Practice* Vol. 1 p. 392

¹⁵⁰ *Young, supra*.

¹⁵¹ Maxwell, *Practice* p. 174, Lord Cullen, *Review of Business of the Outer House of the Court of Session* (1995) p. 28.

¹⁵² R. Wyness Millar, 'Civil Pleading in Scotland' (1932) 30 Michigan Law Review, p. 562, f.n. 81. See also Scott Dickson, 'Pleading' *cit. sup.* pp.20-1.

decree therefor should be pronounced as concluded for.’ It is a plea of great antiquity¹⁵⁴ but it cannot be said to be a proposition in law and cannot therefore be a plea-in-law.¹⁵⁵ However, there may be one, and only one situation in which it can have an application. In the situation where the pleadings aver a loan was made by a pursuer to a defender which remains due but unpaid, the plea may be employed.¹⁵⁶

It is not now thought that a Lord Ordinary would suggest any new plea which may to him appear necessary to exhaust the whole disputable matter in fact or law¹⁵⁷ although he may raise matters of competency which are *pars judicis* to notice. The Court cannot give effect to a plea not stated on record¹⁵⁸ and if the pleas-in-law disclose no basis in law which would entitle a pursuer to decree, or if the pleas do not give the defender fair notice of the case in law made against him, the action will be irrelevant and fall to be dismissed.¹⁵⁹ A pursuer may table preliminary pleas against the pleadings of the defender and this is examined below.

(x) The Defences.

¹⁵³ e.g. see ‘Quotations’ 1993 SCLR 62.

¹⁵⁴ It appears as ‘due and restand awand’ in G. Dallas, *System of Stiles* (Edinburgh, 1697)

¹⁵⁵ *R.H.M. Bakeries (Scotland) Ltd. v. Strathclyde Regional Council* 1985 SLT 214 per Lord Fraser of Tullybelton at 215, *Halliday v. Rolland Decorators Ltd.* 1994 SCLR 305, *Pie in the Sky v. McCafferty* (unreported) 1996 GWD 34-2040, Maxwell, *Practice*, p. 174, Green’s Annotated Rules of the Court of Session, Annotations, para 13.2.5, Cullen *Review op. cit.* p. 28

¹⁵⁶ *Kelly v. Capital Bank plc* 2004 SLT (N) 483 per L. Carloway, *Royal Bank of Scotland plc v. Malcolm* 1999 SCLR 854. Wyness Millar, *supra* cites this example at *op. cit.* p. 574. So also where a statute provides a government body with powers to assess payment to the Crown and upon notification the debt becomes statutorily due. See *Lord Advocate v. Johnston* 1985 SLT 533 (Customs and Excise suing only upon this plea under powers of statute.)

¹⁵⁷ Mackay, *Manual*, p. 195 noted that s. 10 of 1825 Act gave the Ordinary the power to do so and considered that this was still part of procedure of the Court in 1893 although rarely acted on. The section has been repealed and it was never utilised, as discussed in the previous chapter.

¹⁵⁸ *Kelly v. Edmund Nuttal Sons & Co. (London) Ltd.* 1965 SC 427. In the older practice the court could - *Buchanan v. Lumsden* (1837) 9 Jur. 449, *Broom v. Anderson* (1837) 9 Jur. 450

¹⁵⁹ *Kelly v. Capital Bank plc* 2004 SLT (N) 483 per L. Carloway.

The effect of lodging defences is that litiscontestation takes place and any decree pronounced thereafter is a decree *in foro*.¹⁶⁰

The defences consist of numbered answers corresponding to the articles of condescence annexed to the summons and the appropriate pleas in law.¹⁶¹

A defender must answer concisely, accurately and candidly the pursuer's articles of condescence meeting every fact in the averments in the traditional way.

As Lord Stewart explained:

'Our whole system of pleading and disposal of cases upon preliminary pleas must depend upon each party stating with candour what are the material facts upon which he relies and admitting the facts stated by his opponent which he knows to be true.'¹⁶²

As we have seen in the previous chapters, AS 1 Feb 1715, AS 7 Feb 1810, and s.105 AS 11 July 1828 regulated admissions so that a fact averred and not denied was held to have been admitted.¹⁶³ Mackay noted that these provisions 'have not been always enforced and laxity has prevailed in consequence in the matter of admission and denial'¹⁶⁴ However, in modern practice the rules are clear cut and the traditional manner of responding to each of the pursuer's averments is by admitting, or denying

¹⁶⁰ Act 1672 cap.40 (record edition) cap. 16 (12mo edition), article 19, *Gow v. Henry* (1899) 2 F. 48 per L. Young at 52, *Argyllshire Weavers v. Macaulay* 1962 SC 388 per L. Hunter at 394-5. See also comments of L. Wilberforce in *Dick v. Burgh of Falkirk* 1976 SLT 21 and L.P. Rodger in *Coutt's Tr. v. Coutts* 1998 SCLR 729 and Annotated Rules of the Court of Session, *op. cit.* para. 18.1.2, Maxwell, *Practice* p. 186, Macphail, *Practice*, para. 8.19. The matter, however, has not always been without doubt. See *Clydesdale Bank v. D&H. Cohen* 1943 SC 244. The original meaning of an act of litiscontestation is discussed in Chapter 1 *supra*.

¹⁶¹ RCS 18.1(1).

¹⁶² *Ellon Castle Estates Co. Ltd. v. Macdonald* 1975 SLT (N) 66.

¹⁶³ *Dunn v. Livingston* (1828) 7S. 218, *Drysdale v. Wood* (1832) 10 S. 198.

¹⁶⁴ Mackay *Practice*, Vol. 1, p. 390.

the averment or by stating that the averment is 'not known and not admitted' or exceptionally stating that the averment is 'believed to be true'. These responses can be employed as single sentences in answer to the pursuer's whole condescence, if appropriate. As a starting point, every statement of fact made by one party should be answered by the other.¹⁶⁵

(xi) Admissions.

In making admissions on record, it is best practice to admit candidly all that one can admit including those issues which are not seriously questioned or in doubt.¹⁶⁶

Where an averment of fact is admitted this is done by starting the averment with 'Admitted that...'. Where the averment is admitted but coupled with an explanation or qualification which can be shortly stated, 'admitted that ... under explanation that...' is used. If the qualification or explanation is lengthy the averment should be denied and an explanation added after the general denial.

An admission must be construed with reference to the averments to which it forms the answer,¹⁶⁷ and where qualified with an explanation, it must be taken along with the qualification¹⁶⁸ unless the explanation can itself be disproved¹⁶⁹ or is held to be irrelevant.¹⁷⁰ One should not 'admit' what is not averred.¹⁷¹

¹⁶⁵ *Gray v. Boyd* 1996 SLT 60, *Walkers on Evidence* (2nd ed.) p. 44. The Sheriff Court rules specifically require this. OCR 9.7.

¹⁶⁶ *Macphail*, para 9-26, *Ellon Castle Estates Co. Ltd. v. Macdonald* 1975 SLT (N) 55, *Foxley v. Dunn* 1978 SLT (N) 35, *Lossie Hydraulic Co. v. Ecosse Transport Ltd.* 1980 SLT (Sh. Ct.) 94

¹⁶⁷ *Edwards v. Butlins Ltd.* 1998 SLT 500 per LJ-C Cullen at 503F.

¹⁶⁸ *Carnegy v. Carnegy* (1825) 3 S. 566 (N.E. 389) *Grierson v. Thomson* (1830) 8 S. 317, *Scottish Marine Insurance Co of Glasgow v. Turner* (1853) 1 Macq. 334 per L. Truro at 340, *Edwards v. Butlins Ltd.* 1998 SLT 500 per LJ-C Cullen at 502K, *Walker and Walker, Evidence* (2nd ed.) para. 48(a). This rule is of some antiquity. See *Darling, The Practice of the Court of Session* (Edinburgh, 1833) p. 181 and previous Chapters *supra*.

¹⁶⁹ *Anderson v. Rintoul* (1825) 3 S. 496, *Gall v. Fordyce* (1828) 6 S. 943, *Campbell v. Arrott* (1835) 13 S. 557, *Milne v. Donaldson* (1852) 14 D. 849, *Campbell v. McCartney* (1843) 14 D. 1086, *Picken v.*

It is thought that care should be employed in making admissions as they are conclusive against the party making them¹⁷² and do not require of proof¹⁷³ and even admissions deleted prior to closing of the record can form the basis for a line in cross-examination at the subsequent proof or proof before answer.¹⁷⁴

Equally, however, an admission must be clear and unmistakable and it has been held that a Court will not readily assume an admission by implication¹⁷⁵ unless the party fails or refuses to answer a statement of fact.¹⁷⁶ However there are other exceptions to this. Firstly, where a party refers to statutory provisions for their terms beyond which no admission is made, (often with an averment that the defender fulfilled all statutory duties incumbent upon him, or like words,) this is construed as an admission that the statutory duties arising from these provisions apply in the case,

Arundale & Co. (1872) 10 M. 987, *Gelstons v. Christie* (1875) 2 R. 982, *Chrystal v. Chrystal* (1900) 2 F. 373, *Armour & Melvin v. Mitchell* 1934 SC 94 at 96. Darling *ibid*.

¹⁷⁰ *Robertson & Co. v. Bird & Co.* (1897) 24 R. 1076, *Rothwell v. Stuart's Trs.* (1898) 1 F. 81, *Coghill v. Coghill* 1896 4 SLT 215, Maxwell, *Practice*, p. 188, Macphail, *Practice*, para. 9-25.

¹⁷¹ Scott Dickson, 'Pleading' *cit. sup.*, p. 26.

¹⁷² in that cause. *Scottish Marine Insurance Co. v. Turner* (1853) 1 Macq. 334 per L. Truro at 340. It had always been the position that admissions could not be easily retracted. Darling, *The Practice of the Court of Session* (Edinburgh, 1833) p. 181 citing *M'Leod* (1822) 1 S 333. See also Ch. 3.

¹⁷³ Erskine IV. ii.33. See also the maxim '*confessio facta in iudicio omni probatione major est*' (judicial admission is stronger than proof). It is, however, only an admission which will permit of this. A pursuer cannot so found on an 'averment' of the defender which has not been proved. *Lee v. National Coal Board* 1955 SC 151 per L. Sorn at 160, *Stewart v. Glasgow Corporation* 1958 SC 28 per LP Clyde at 39, *Wilson v. Clyde Rigging & Boiler Scaling Co. Ltd.* 1959 SC 328 per L. Strachan at 334.

¹⁷⁴ *Lennox v. National Coal Board* 1955 SC 198, *Carter v. Allison* 1966 SC 257. However, the Court will attach less weight to the evidence of a party who himself is unable to explain how it has come to appear in the pleadings, as where his solicitor has inserted it without proper consultation with the party. *Campbell v. Inverness District Council* 1993 GWD 11-772 per L. Osborne. Other changes to the pleadings after the record is closed may also form the basis for cross-examination. *Kirkham v. Cementation Co. Ltd. & Anr.* 1964 SLT (N) 33.

¹⁷⁵ *Cruickshank v. Fraser & Co. v. Caledonian Rly.* (1876) 3 R. 484, *Wilson v. Clyde Rigging and Boiler Scaling Co. Ltd.* 1959 SC 328 per L. Strachan at 334, ('treat as admissions only such statements as are expressly framed as admissions'), Maclaren, *Practice*, pp. 376-7. However, see below.

¹⁷⁶ *Scottish North Eastern Rly. v. Napier* (1859) 21 D. 700 per L J-C Inglis at 703, Lees, *Handbook*, p. 46.

and the defender is prevented thereafter from putting the applicability of the provisions in issue.¹⁷⁷ However, where the Court considers that the statutory provision clearly has no application and considers that this would lead to an artificial resolution of the litigation, the issue becomes a live one for the Court.¹⁷⁸

Secondly, where a narrative is provided in the averments of a party which does not seriously dispute similar averments of the other, then these may sometimes be taken as impliedly admitting the opponent's narrative or version of events.¹⁷⁹ So, although averments have no evidential significance unless and until they are proved¹⁸⁰ it is not always the case that a party can found only upon what his opponent concedes to him in the actual form of an admission. In practice, cases occur in which the court will treat an averment in answer as equivalent to an admission depending on the particular case and the particular pleadings.¹⁸¹ Thus, where in answer to a pursuer's averment of material fact, the defenders had made a general denial but added an explanation in which they made an explicit averment which met that of the pursuer¹⁸² the court treated that fact as an agreed fact although not formally admitted by the defenders.¹⁸³

¹⁷⁷ *McNaught v. British Railways Board* 1979 SLT (N) 99. This however, has been recently criticised as tending towards artificiality and technicality and can be potentially misleading. see *English v. North Lanarkshire Council* 1999 SCLR 310 per Lord Reed.

¹⁷⁸ *Lamont v. Monklands D.C.* 1992 SLT 428 per L. Caplan, *Ballantyne v. John Young & Co. (Kelvinhaugh) Ltd.* 1996 SLT 358 per L. Clyde.

¹⁷⁹ *Paterson v. Scottish Solicitor's Discipline Tribunal* 1984 SLT (N) 99, Macphail, para 9-24

¹⁸⁰ *Lee v. National Coal Board* 1955 SC 151 per L. Sorn at 160, *Stewart v. Glasgow Corporation* 1958 SC 28 per LP Clyde at 39, *Wilson v. Clyde Rigging & Boiler Scaling Co. Ltd.* 1959 SC 328 per L. Strachan at 334.

¹⁸¹ *Dobson v. Colvilles Ltd.* 1958 SLT (N) 30 (but not reported upon this point) per Lord Sorn and referred to in the judgment of the Ordinary (Wheatley) at first instance in *Wilson supra.* at 330. *Dobson* was reviewed by the Division in *Wilson* without comment.

¹⁸² instead of admitting the averment but adding an explanation.

¹⁸³ *Dobson v. Colvilles Ltd op. cit.*

The whole topic of deemed or implied admissions could be said to be complicated and not necessarily coherent¹⁸⁴ and it might therefore be considered best practice regarding the answering of material averments to force the other party to clarify their position with the service of a Notice to Admit¹⁸⁵ or by making a call in the pleadings calling upon him to expressly admit or deny that averment.¹⁸⁶

Where an admission is withheld of a fact which is afterwards proved, the party so withholding may be punished in increased interest and expenses, whether successful in resisting the pursuer's claim or not.¹⁸⁷ Further, a matter which is not admitted on record by a party which is subsequently admitted by him in evidence will affect the Court's assessment of his credibility.¹⁸⁸

(xii) Averments 'Believed to be True'.

Where a defender has no knowledge of the truth of the pursuer's factual averment but believes it to be true, then he may answer 'Believed to be true that...'. Caution should be exercised in this, however, as it is the equivalent of an admission¹⁸⁹ and dispenses with the necessity of evidence to prove it.¹⁹⁰

¹⁸⁴ C.f. Lord Strachan's *dicta* in *Wilson cit. sup.* and Lord Sorn's *dicta* in *Dobson* as reported in *Wilson*. Lord Sorn's approach has been preferred. See *Lord Advocate v. Gillespie* 1969 SLT (Sh Ct) 10.

¹⁸⁵ see *infra*.

¹⁸⁶ MacKenzie, *Written Pleadings*, para 5.21.

¹⁸⁷ *Ganley v. Scottish Boatowners Mutual Insurance Association* 1967 SLT (N) 45, *J.C. Forbes v. Duignan* 1974 SLT (Sh. Ct.) 74. See also Ch. 3 for historical position.

¹⁸⁸ *McDonald v. Glass* (1883) 21 SLR 45.

¹⁸⁹ *Scottish North Eastern Rly. v. Napier* (1859) 21 D. 700 per L J-C Inglis at 703, *Music Hire Service (Manchester) Limited v. Roccio and Anr.* 1961 SLT (N) 13. This rule is really an continuation of the practice of the Court implemented by s. 105 of AS 11th July 1828 examined in the previous chapter - (*viz.* where a statement in point of fact 'within the opposite party's knowledge is averred on the one side and not denied on the other, he shall be held as confessed').

¹⁹⁰ *Binnie v. Rederij Theodoro DV* 1993 S.C. 71.

(xiii) Averments 'Not Known and Not Admitted'.

Simply, if the averment of fact is not within the defender's knowledge and he is not prepared to admit it to narrow the issues between the parties, he should answer it 'Not known and not admitted that...'. The use of the phrase in answer to an averment of fact which is within the defender's knowledge will be treated as an admission. The use of the phrase 'Not known but believed to be true' is a concession of the averment, and is deemed an admission, following the practice relating to an averment 'believed to be true'.¹⁹¹

(xiv) Notices to Admit and Notices of Non-Admission.

We may conveniently notice at this point a particular feature of both Court of Session and sheriff court procedure, of fairly recent design, whereby a party may intimate and lodge a 'Notice to Admit' at any time after the closing of the record calling on any other party to admit any facts pertaining to an issue in the pleadings of that cause or to admit the authenticity of a document lodged in process.¹⁹² In the Court of Session, the party so called upon, must within 21 days of intimation, intimate a 'Notice of Non-admission' stating that he does not admit the facts or the authenticity of the document, which failing he is deemed to have admitted the fact or the authenticity of the document.¹⁹³ From anecdotal evidence and in the writer's experience the procedure is little used.

¹⁹¹ *North-Eastern Rly Co. v. Napier* (1859) 21 D. 700 per L J-C Inglis, Lees, *Handbook*, p. 49

¹⁹² RCS 1994 as amended, (introduced by SI 1994/1443) r.28.A.1 and OCR 1993 as amended r. 29.14. It will be recollected that this was an element of English Common Law procedure which had been part of the aborted 1863 Bill, but was not incorporated into the 1868 Act although it was recommended for adoption by the 1869-71 Commissioners Inquiring into the Court of Law, Fourth Report. See Ch. 3 *supra*. The procedure in modern form was recommended by the Working Party under Lord Jauncey on the White Paper on Intellectual Property and Innovation (Patent Litigation) which led to the introduction of patent actions in 1991 and was extended to Ordinary actions in 1994. See Cullen, *Review, op. cit.* p. 34

¹⁹³ RCS 28A.2. This procedure does not prevent parties lodging minutes of admission prior to proof in terms of RCS 36.7.

(xv) Denials.

Any remaining averments which are to be denied should be covered by a general denial using the formula '*Quoad ultra, denied*' because where a defender fails to deny¹⁹⁴ an averment, of which he has knowledge then he is 'held as confessed' and the non-admission is deemed an admission.¹⁹⁵ To reverse it and specifically deny averments leaving the others '*Quoad ultra, admitted*' is dangerous, particularly at the point the pleadings are adjusted.¹⁹⁶

The party's 'knowledge' is tested as his state of knowledge at the time of answering the averment¹⁹⁷ on any matter which does not require investigation by him¹⁹⁸ and exceptionally has been held to include the knowledge of his legal representative.¹⁹⁹

Where a defender makes a reply that an averment is 'not admitted' this is not equiparated with a formal denial.²⁰⁰ An averment 'denied and irrelevant' is not good pleading²⁰¹ nor is 'denied as stated'²⁰² which has been considered to be a

¹⁹⁴ and it is the failure to use the word 'deny' which is crucial.

¹⁹⁵ *Ellis v. Fraser* (1840) 3 D. 264, *Pegler v. Northern Agricultural Implement Co.* (1877) 4 R. 435 per LP Inglis at 438 and Lord Mure at 440, *Central Motor Engineering Co. v. Galbraith* 1918 SC 755, *Gilmour v. Scottish Clan Motorways Ltd.* 1928 S.N. 19, *Gray v. Boyd* (I.H.) 1995 SCLR 1075 per LJ-C Ross at 1079, *Walkers on Evidence*, (2nd ed.) (2000) p. 44, OCR 1993 r. 9.7. See also the previous Chapters *supra* for the development of this.

¹⁹⁶ Black, *Introduction*, p. 21, A.G. Walker, 'Written Pleadings', *cit. sup.* p. 171 disagreeing with Lees' recommendation to do this, if convenient. See *Handbook* para. 115, p. 47.

¹⁹⁷ *Central Motor Engineering Co. supra.*, per LP Strathclyde at 765 and L. Mackenzie at 770.

¹⁹⁸ *O'Connor v. W.G. Auld & Co. (Engineering) Ltd.* 1970 SLT (N) 16.

¹⁹⁹ *Mohammed v. Mohammed* 1954 SLT (Sh. Ct.) 93.

²⁰⁰ *Ellis, supra.*, *Callaghan v. J. & A. Weir Ltd.* (1955) 71 Sh. Ct. Rep. 312, *Clark v. Clark* 1967 SC 296 at per L. Milligan at 305.

²⁰¹ Because it is one at the same time a plea and a defence. *North British Rly Co. v. Brown & Co.* (1857) 19 D. 840.

²⁰² as you cannot deny an averment other than stated. Scott Dickson, 'Pleading' *cit. sup.* p. 26 although Lees, *Handbook* recommends its use where the averment is not fiction but is distorted. *Handbook*, p. 48, para 119.

'meaningless superfluity'.²⁰³ 'Specifically denied' is competent but technically otiose as the averment is but an accentuated denial.²⁰⁴

It is submitted that candour and frankness in admission and denial is paramount. The use of the 'denied' answer to averments has not been, and is not always exercised responsibly, nor with candour and frankness. In an adversarial system, where the pursuer will generally bear the onus of proof, the more generous the defender's admission, the easier the pursuer's task at proof and the less likely that he will overlook some element of his case. But the whole Scottish system of pleading depends upon a party stating with candour the material facts upon which he relies and admitting those of his opponent which he knows to be true.²⁰⁵ Even in 1893, Mackay could note that:

'In practice, two contradictory modes of pleading are in use. The one is to admit all adverse statements which the pleader knows by his instructions to be well founded; the other is to deny all adverse statements which are not certain to be proved. The theory on which the latter mode of pleading is defended is that the defender is entitled to put the pursuer to proof of his case. ... the former, it is submitted, is the correct practice, and ought to be enforced.'²⁰⁶

²⁰³ *Morrison v. McArdle* 1967 SLT 58.

²⁰⁴ Annotated Rules Annotations, para 18.1.3. It may be 'soothing to the client's feelings but it is not as good pleading as the simple "denied" or "quoad ultra denied"', Scott Dickson, 'Pleading' *cit sup.* p. 26. c.f. Black, *Introduction*, p. 22.

²⁰⁵ *Ellon Castle Estates Co. Ltd. v. Macdonald* 1975 SLT (N) 66 per L. Stewart. See also *Cook v. UIE Shipbuilding Scotland* 1989 SCLR 156 per L. Morison at 157.

²⁰⁶ *Mackay Manual*, p. 219.

In modern practice, the law has developed a strict approach to the interpretation of those defences which have as their object the delaying of decree and the putting of the pursuer to his proof. We return to this below.

As touched upon in the previous chapter, from the mid-nineteenth century onwards, a practice developed of denying the pursuer's averments 'under reference to' or 'subject to' the defender's statement of facts²⁰⁷. Alternatively it might be pled that the pursuer's averments were denied 'so far as inconsistent' with the defender's statement of facts. These constructions became the usual practice²⁰⁸ but it was common and sometimes convenient for the sake of brevity not to make a separate statement of facts but to introduce in the form of explanations or qualifications to admissions, any separate facts which the defender deemed necessary to establish his defence.²⁰⁹ There were no hard-and-fast rules and it was a matter of discretion for the defender's counsel.²¹⁰ The format of 'denied so far as inconsistent' was thought not very safe as the defender could be held to have made admissions quite unconsciously destructive of his case, as a fatal averment could well not be inconsistent and was therefore to be deemed admitted.²¹¹ The better practice was to deny 'insofar as the pursuer's statements were not coincident (or did not coincide) with the statement of facts.'²¹²

²⁰⁷ or to other heads of the defender's answers.

²⁰⁸ Mackay, *Manual* p. 218. In the sheriff court provision was made for this under Rule 43 of the Schedule to the Sheriff Courts 1907 Act. For an example see *Compagnie des Forges v. Gibson* 1920 SC 247.

²⁰⁹ Mackay, *Manual* p. 218.

²¹⁰ Maclaren, *Practice* p. 372. A statement could be ordered by the Court where the pursuer did not respond to the defences and the pursuer could be ordered by the Court to answer it. *A v. B* (1899) 36 SLR 533, *Reid v. Reid's Trs.* (1887) 14 R. 770.

²¹¹ *Campbell v. Ricketts or Campbell* (1863) 1 M. 217 per L. Curriehill at 219, *Andersons v. Lows* 1863 2 M. 100 per L. Deas at 107, Maclaren, *Practice*, p. 377, Lees, *Handbook*, para 116, A.G. Walker, *Written Pleadings*, *cit. sup.* p. 170.

²¹² *Campbell supra.* per L. Curriehill, A.G. Walker, *Written Pleadings*, *cit. sup.* p. 170. There was a difference of opinion among practitioners as to the use of these phrases although their use

In modern practice remnants of this as an averment persist but the averment is used by pursuers in answering the defender's averments of fact. In practice these defender's explanations, qualifications and averments advancing a positive defence now immediately follow the '*Quoad ultra, denied*' formula mentioned above.

Although as a matter of relevancy, the defender is not required to state more than a general denial of the factual averments,²¹³ if he wishes to advance a defence he must as a matter of notice make averments relating to that defence as he cannot succeed in a substantive defence not stated on record.²¹⁴ If he does not make such averments, he may be prevented from invoking that ground of defence later²¹⁵ and if he can get to a proof resting on general denials, he is thereby prohibited from leading any positive evidence i.e. adducing a substantive defence²¹⁶ and the court will draw 'most favourable' inferences from the facts as proved by the pursuer²¹⁷ insofar as these inferences are reasonable²¹⁸ or legitimate.²¹⁹

was common in practice, (*Campbell supra.* per LP M'Neill) in answering a statement of fact for the defender, or in a Minute endorsed on the Summons and Defences consenting to close thereon.

²¹³ *Penny v. Aitken* 1927 SC 673, *Ganley v. Scottish Boatowners Mutual Insurance Association* 1967 SLT (N) 45, *Ellon Castle Estates Co. v. Macdonald* 1975 SLT (N) 66, *Redpath v. McCall* 1963 SLT (S Ct) 47, *Edward Gibbon (Aberdeen) Ltd. v. Edwards* 1992 SCLR 561, *Gray v. Boyd* 1995 SCLR 1075. C.f. *Robertson Construction Co. (Denny) Ltd. v. Bone Steel Ltd. & Ors.* (unreported) (29 October 2003) per L. Clarke. In this commercial action, the defender attempted to 'shelter behind a general denial' admitting that there was a contract but refraining from saying what the contract terms were, putting the pursuer to proof of the terms. L. Clarke considered this insufficient where the defender was a party to the contract, under reference to Lord Stewart's observations in *Ellon Castle Estates op. cit.* See also the observations of L. Penrose in another commercial action. *Hamilton Estates Ltd. v. Central Regional Council* (unreported) 1996 GWD 27 - 1564.

²¹⁴ *Robb v. Logiealmond School Board* (1875) 2 R. 417.

²¹⁵ *Quinn v. Cameron & Robertson* 1956 SC 224, Maxwell, *Practice* p. 189.

²¹⁶ although it is thought he could still lead evidence of witnesses in simple denial of the pursuer's positive assertion of a fact.

²¹⁷ *Ross v. Associated Portland Cement Manufacturers* [1964] 1 WLR 768 per L. Reid at 775, *O'Donnell v. Murdoch McKenzie & Co.* 1967 SC (HL) 63 per L. Upjohn at 66 1967 SC (HL) 63 *Binnie v Rederij Theodoro DV* 1993 S.C. 71, *Penman v. Blue Cap Logistics* 1999 S.L.T. 199.

²¹⁸ *Johnston v. City of Glasgow DC* 1986 SLT 51.

A defender accordingly cannot, as a general rule, plead a defence of which he has not given notice on record²²⁰ but a defence emerging upon cross-examination of the pursuer's witnesses and unforeseen by the defender may competently be urged.²²¹

So, positive averments are required to establish or set up the substantive defence. Thus, defences of e.g. contributory negligence, or defective performance require averment. Where acquiescence is pleaded, knowledge on the part of the person acquiescing should be averred.²²² Where 'prior use' is the defence in a breach of patent case, the prior use must be detailed.²²³ If the defence to an action of defamation is privilege, details must be specified by the defender.²²⁴

(xvi) The Defender's Positive Averments in Defence.

The rules here are similar to those explored above in relation to the pleading of a condescendence by the pursuer.²²⁵ The averments should be brief but not vague or lacking specification,²²⁶ nor contain argument. Evidence should not be pled.²²⁷ If it is

²¹⁹ *Cordiner v. BRB* 1986 SLT 209.

²²⁰ *Smith v. Green*, (1853) 15 D. 549, (1854) 16 D. 429, *Hunter v. Broadwood* (1854) 16 D. 441 at 449, *Kerr v. Clark & Co.* (1868) 7 M. 51.

²²¹ *Bile Bean Mfg. Co. v. Davidson* (1906) 8 F. 1181.

²²² *Hunter v. Broadwood* (1854) 16 D. 441 per LP M'Neill at 449 Mackay, *Manual*, p. 217.

²²³ *Neilson v. Househill Co.* (1842) 4 D. 1187 (c.f. *Russell v. Crichton* (1838) 16 S. 1155 where general averments of prior use were permitted for issue for jury trial)

²²⁴ *Smith v. Green*, *cit. sup.*, *Ralston, Goodwin v. M'Lean* (1857) 19 D. 878.

²²⁵ Historically, there was no fixed practice as to the cases in which it was proper to make a 'separate statement' as provided for by s. 1 of the 1850 Act. It was thought that facts collateral or incidental to the defence could be stated in the defences but facts constituting a counter case or a 'separate and substantive case' (Scott Dickson, 'Pleading *op. cit.* 26-7 citing *Police Commissioners of Arbroath v. Corsar* 1893 1 SLT 596) required to be stated in the separate statement. It became a question of convenience (LP Clyde in *Wyness Millar op. cit.* 576) until practice sanctioned that any of the facts averred by the defender should be stated in the defences.

²²⁶ *Brown v. George Wilson (Stonehouse) Ltd.* 1982 SLT (Sh Ct) 96, *RHM Bakeries (Scotland) Ltd. Strathclyde Regional Council* 1985 SLT 3. (2nd Div.)

²²⁷ *Neilson v. Househill Coal and Iron Co.* (1842) 4 D. 1187 per LJ-C Hope at 1193.

it may be ordered to be withdrawn.²²⁸ Scandalous averments may also be deleted by the Court.²²⁹ Law should not be pled subject to the exceptions detailed above. A false averment should not be made²³⁰ nor a frivolous defence stated which can of itself be an abuse of process.²³¹

Where a defender founds on a document the rules above detailed will apply. In actions involving multiple joint defenders, where there is a 'principal' defence and the other defenders adopt this defence,²³² it is thought appropriate that the latter defenders can 'adopt and repeat' the defence using the phrase 'The defender has seen and adopts the statement of facts and pleas in law in the defences for A.B. and holds them as repeated *mutatis mutandis* on behalf of himself.'²³³

Defences may be inconsistent²³⁴ and pled in the alternative,²³⁵ more latitude being given to a defender to do so,²³⁶ although the 'weaker alternative' rule will apply²³⁷. Denial of a debt and prescription are still frequently pleaded together.²³⁸ But inconsistent defences ought seldom to be pleaded unless there is serious doubt of success in the primary defence.²³⁹

²²⁸ *Ure v. Pollock* (1832) 10 S 450 (Action of aliment for illegitimate child, defender averred medical evidence directed to impotency).

²²⁹ *A. v. B.* (1895), 22 R. 402, *H. v. P* (1905) 8 F. 232, *M. v. S.* 1909 1 SLT 192.

²³⁰ *Boustead v. Gardiner* (1879) 7 R. 139.

²³¹ *Stewart v. Stewart* 1984 SLT 58.

²³² *Cowie v. Merry* (1828) 7S. 23.

²³³ Mackay, *Manual*, p. 432, Maclaren, *Practice* p. 377. In the nineteenth century it was common for subsidiary defenders to plead that the leading defence was 'adopted and incorporated *brevitatis causa*'.

²³⁴ *Buchan v. Boyd* (1828) 6 S. 1025 per L. Corehouse.

²³⁵ *Smart v. Bargh* 1949 SC 57 per LP Cooper at 61.

²³⁶ *Smart v. Bargh* 1949 SC 57 per LP Cooper at 61-2, *M. v. M.* 1967 SLT 157.

²³⁷ *Aberdeen v. Straton's Trustees* (1867) 5 M. 726 per L. Colonsay; *Finnie v. Logie* (1859) 21 D. 825, *Blackhall & Anr. v. MacInnes* 1997 SLT (N) 649 (not reported on this point) 3 August 1995 per L. Hamilton.

²³⁸ *Campbell v. Grierson* (1848) 10 D. 361, *Alcock v. Easson* (1842) 5 D. 356.

²³⁹ Mackay *Manual*, p. 218-9.

(xvii) Skeletal Defences and Summary Decree.

As above noted, a defender is entitled to rest on a denial of the pursuer's case or any part of it²⁴⁰ and, as a matter of pure relevancy, the defender need only state a general denial of all of the pursuer's averments.

It will be recalled that the procedural reforms of the early and mid nineteenth century aimed at coercing one party to answer the factual averments of the other²⁴¹ and it was not uncommon to see in the pleadings of the period a simple 'Denied' in answer to a condescence.

Where, however, the defender sought to advance a positive or substantive defence 'in answer', then he had to 'set forth in explicit terms' the line of defence and the facts on which he founded²⁴² such that the other party could investigate them and prepare to meet that case.²⁴³ Whether the averments in the articles of condescence were answered as 'admitted' or 'denied' or whether explicit facts were also advanced in defence, the end result was that it left clearly defined alleged facts in issue for determination thereafter. As practice developed, however, it became more usual to make partial and limited admissions and thereafter to make a denial 'under reference to' or 'subject to' the defender's statement of facts or his other answers to separate articles of condescence. From there, the practice arose of inserting positive averments, setting up a substantive defence, into the answer itself.

²⁴⁰ *Sabre Leasing Ltd. v. Copeland* 1993 SLT 1099.

²⁴¹ c.f. Court of Session Act 1825 s.2 - 'by denying the facts ... or by admitting the same'.

²⁴² *ibid.*

²⁴³ *Neilson v. Househill Coal and Iron Co.* (1843) 4 D. 1187 per LJ-C Hope at 1193.

In modern practice, a general and bare denial to all of the pursuer's articles of condescence, termed a 'skeleton defence'²⁴⁴, is thought to be 'rarely proper or satisfactory.'²⁴⁵ In one case, the defenders simply denied the pursuer's clearly set out factual averments including matters which must have fallen within the defenders' knowledge. Lord Ordinary Morison considered the defenders' conduct 'reprehensible.'²⁴⁶

There may be cases where such a defence is perfectly fair as well as relevant.²⁴⁷ Thus, for example, if the defender denies any factual or legal relationship with the pursuer, - i.e. basically that the pursuer is a stranger to him - it may be that the proper response to the condescence is 'denied'.²⁴⁸ Even these cases are, however, very rare²⁴⁹ and where a pursuer avers in detail the nature and extent of the relationship between the parties and the defender maintains his bare denial, then the court will probably conclude that the defender is failing to obtemper his obligation to answer.²⁵⁰

The other appropriate use of skeleton defences is as a holding mechanism while the defender endeavours to ascertain the factual position stated in the pursuer's

²⁴⁴ judicially recognised as a term of pleading. See *Ellon Castle Estates Co. Ltd. v. Macdonald* 1975 SLT (N) 66 per L. Stewart *ibid.* For a (somewhat outdated) account of the operation of the rules pertaining to skeletal defences under the old summary cause rules in the sheriff court, see R. Mays, 'The Barest of Bones' 1993 SLT (News) 137.

²⁴⁵ Green's Annotated Rules of the Court of Session, *cit sup.* para. 18.1.3.

²⁴⁶ *Cook v. UIE Shipbuilding (Scotland) Ltd.* 1989 SCLT 156 at 157.

²⁴⁷ *Redpath v. McCall* 1963 SLT (Sh. Ct.) 47, *Ganley v. Scottish Boatowners Mutual Insurance Association* 1967 SLT (N) 45, *J.C. Forbes v. Duignan* 1974 SLT (Sh. Ct.) 74, *Jarvie v. Laird* 1974 SLT (Sh. Ct.) 75, *Lossie Hydraulic Co. v. Ecosse Transport Ltd.* 1980 SLT (Sh Ct) 94 *McManus v. Spiers Dick and Smith Ltd.* 1989 SLT 806, *Gray v. Boyd* 1996 SLT 60.

²⁴⁸ *Edward Gibbon (Aberdeen) Ltd. v. Lee Edwards* 1992 SCLR 561.

²⁴⁹ Sutherland, 'Written Pleadings - Recent Cases' *cit sup.* p. 6.

²⁵⁰ *Grampian, Lossie Hydraulic supra, Ellon Castle Estates Co. Ltd. v. Macdonald* 1975 SLT (N) 66, *Foxley v. Dunn* 1978 SLT (N) 35.

summons or writ.²⁵¹ Once the facts and law are elucidated, the skeletal defences should be expanded or withdrawn.²⁵² To leave the defence in the same state at the closing of the record may raise questions of the character of the defender's agent or counsel, particularly where it is an attempt to delay or postpone decree.²⁵³

Lord Stewart expressed this view:

'Whatever be the justification at an early stage in a case for the tabling of skeleton defences, it is destructive of the whole concept of our system of civil pleading for a defender to continue to maintain a blanket denial of pages of relevant averments and to adopt the attitude that she is entitled to make the pursuers prove every fact which they aver.'²⁵⁴

If the defence is persisted in,²⁵⁵ the court, at procedure roll or debate, will construe the defence in relevancy very strictly.²⁵⁶ An inconsistency between averment and other features of the pleadings may permit the court to infer an admission²⁵⁷ and grant decree *de plano*.

A good summary of the present position may be found in Macphail, *Practice* at para 9.114.

'An exiguous or uncandid defence consisting mainly of a general denial may be held to be irrelevant if it contains an admission of facts which require

²⁵¹ Black, *Introduction*, p. 25, Macphail, *Practice*, para. 9-114.

²⁵² Macphail, *ibid*.

²⁵³ which can amount to an abuse of process and have financial consequences for the agent himself in payment of the other party's expenses. *Stewart v. Stewart* 1984 SLT (Sh Ct) 58.

²⁵⁴ *Ellon Castle Estates op. cit.* p. 66.

²⁵⁵ *Redpath v. McCall* 1963 SLT (Sh Ct) 47, *J.C. Forbes Ltd v. Duigan op. cit.* *Jarvie v. Laird* 1974 SLT 75. *C.f. Turner's (Ayr) Ltd. v. Hay* 1963 SLT (Sh Ct) 45.

²⁵⁶ *Ellon Castle Estates, op. cit.*, *Foxley v. Dunn* 1978 SLT (N) 35, *Lossie Hydraulic op. cit.*

²⁵⁷ *Gray v. Boyd op. cit.*, *Park Lane Motor Ltd. v. Malcolm* (unreported) (Ex. Div) 1st December 1995 (1996 GWD 2-118), *Unity Trust Bank plc v. Frost & Anr.* (unreported) 6th Feb 2001 (Ex. Div).

explanation²⁵⁸ or an admission,²⁵⁹ or an implied admission,²⁶⁰ averment²⁶¹ or plea-in-law²⁶² inconsistent with the denial. When determining the relevancy of such a defence the court will consider any material probative documents which are produced²⁶³ and any explanations or concessions made at the bar.²⁶⁴

It may not be only probative documents which the court can consider. Where a pursuer made detailed averments about matters which should have been within the knowledge of the defender, which averments were denied, and the pursuer also lodged documents which *ex facie* supported his averments, the defender's case was considered irrelevant.²⁶⁵ In another case, where the defender made an unqualified denial of the pursuer's detailed averments on matters which fell within the defender's knowledge, the court regarded the defence as uncandid, 'exiguous and evasive' and under reference to documents produced by the pursuers supporting their position, granted decree *de plano*.²⁶⁶

²⁵⁸ *Roberts v. Logan* 1966 SLT 77.

²⁵⁹ *Lloyd's Bank Ltd. v. Bauld* 1976 SLT (N) 53, *D.Roy (Roots and Floors) Ltd. v. McCorquodale* 1979 SLT (Sh Ct) 96. (To this can now be added 'an inconsistency between an averment or partial admission and other features of the pleadings notwithstanding a general denial, such as to give rise to an irresistible inference of liability', *Lutea Trustess Ltd. v. Orbis Trustees Guernsey Ltd.* 1998 SLT 471).

²⁶⁰ *Ulferts Fabriker A.B. v. Form and Colour Ltd.* 1977 SLT (Sh. Ct) 19, *Brown v. George Wilson (Stonehouse) Ltd.* 1982 SLT (Sh Ct) 96.

²⁶¹ *Foxley, supra*, *Grampian Hydraulics, supra*.

²⁶² *Lossie Hydraulic, supra*.

²⁶³ *Lloyd's Bank, supra*.

²⁶⁴ *Ellon Castle Estates, supra*.

²⁶⁵ *Oesterreichische Landerbank v. Weir* (unreported) (16 August 1993 per Sh. Pr. Mowat).

²⁶⁶ *EFT Finance Ltd. v. Hawkins* 1994 SC 34. Although this case was doubted in *Gray v. Boyd op. cit.* per LJ-C Ross at 1080 on the basis that it appears on one reading that Lord Osborne accepted that the defenders' denial was uncandid and from there accepted that the pursuer's averments were well founded; but the pursuer in this case had incorporated *brevitatis causa* letters demonstrating that the matter was within the defender's knowledge. This is not readily apparent from the report in Scots Law Times but has been confirmed to the writer by the counsel who acted for the successful pursuer.

However, a straight denial cannot be converted into an implied admission. Where a defender denies the pursuer's case, even though the averments may lie within his knowledge and even though it might be deemed that he is acting less than candidly, this defence will not be held to constitute an implied admission merely because the denial was less than candid.²⁶⁷ The decision in *Gray v. Boyd*²⁶⁸ is not wholly satisfactory, as Lord Morison dissented²⁶⁹ and the other judges decided the case on different grounds²⁷⁰ but in the event, the writer's view is that the Lord Justice-Clerk's reasoning was technically correct.

Very recently, the Second Division have re-visited *Gray v. Boyd* and the whole topic of uncandid skeletal defences. It appears now that a straight general denial in the face of full averments made by a pursuer may not entitle the defender to put the pursuer to his proof. The Court has examined the issue, not as a question of whether a general denial can be converted into an implied admission, but whether such defences can resist summary decree as a matter of relevancy when the pursuer has made averments such as to set up a *prima facie* case. Lack of candour is evidenced by the denial in those circumstances. In *Urquhart v. Sweeney & Ors.*,²⁷¹ the Court has held that,

'Where a party lodges skeletal defences that are uncandid in their responses to positive averments of the pursuer, that party is not entitled to rely upon general denials to put the pursuer to the proof of his averments. In such circumstances the only serious question to arise is whether the court should

²⁶⁷ *Gray v. Boyd op. cit* (L. Morison diss.)

²⁶⁸ 1996 SLT 60.

²⁶⁹ with some powerful (but flawed) reasoning.

²⁷⁰ It was followed 'with regret' by the Sheriff Principal in *Castleton Homes Ltd. v. Eastern Motor Co. Ltd.* 1998 SLT (Sh Ct) 51, and has been again followed, (or at least not adversely commented upon) by the Division in *Unity Trust Bank v. Frost & Anr.* 2001 SCLR (N) 344.

²⁷¹ (unreported) 18 March 2004 (2nd Div.)

grant summary decree. Counsel for the appellant has relied on *Gray v. Boyd* for the proposition that a general denial in defences is sufficient to prevent the grant of summary decree. That, in our view, is an overstatement. If *Gray v. Boyd* were to be interpreted in that way, it would encourage the uncandid tactical pleading that has been a problem in our procedure for so long. On that approach, summary decree would probably be appropriate only in the rare cases where the defences contained an admission of liability. In our view, *Gray v. Boyd* is distinguishable. In that case the pursuer's claim depended on proof by writ or oath. The court held that a general denial could not constitute the unqualified admission for which the pursuer contended.²⁷²

...The respondents have pled a relevant *prima facie* case that they are tenants under an agricultural lease. They have lodged a *prima facie* valid offer of such a lease and have averred that the offer was accepted by the taking of possession and by the payment of rent. *A fortiori*...those averments, if proved, would establish the existence of a protected agricultural tenancy. In the face of averments such as these, it is for the appellant, if he challenges the existence of the lease, to aver and prove why the *prima facie* inference of a tenancy should be displaced. We do not accept that, by pleading a bare denial, the appellant is entitled to an enquiry in which the respondents are put to the proof of their averments. The court has repeatedly deplored that sort of approach.²⁷³

The writer's view is that this takes the law further away from *Gray v. Boyd*. It must now be questionable whether there is still a principle in civil procedure that a defender is entitled to put a pursuer to his proof, irrespective of the degree of detail a

²⁷² at paras. 41 and 42 per L J-C Gill.

²⁷³ at para. 44 per L J-C Gill.

pursuer inserted into his averments. In *Gray*, the focus was on defences being converted into implied admissions. From *Urquhart*, it now seems that if a pursuer makes positive averments, which set up a *prima facie* case, then a defender is not entitled to simply deny them, such an approach lacking candour, the only question being for the court to consider granting summary decree. The question of construction of defenders' denials as admissions in these circumstances is neatly side-stepped.

As referred to by the Second Division in *Urquhart*, the danger for a defender seeking to rely upon a skeleton defence or otherwise 'exiguous and evasive' defence is that he may face the prospect of a motion for summary decree from the pursuer.²⁷⁴ This remedy has been available in the Court of Session since 1984 and in the sheriff court since 1992. The present rules are found in Chapter 21 of the Rules of the Court of Session 1994 as amended and in Chapter 17 of the Ordinary Cause Rules 1993 as amended.

At any time after the defences are lodged, a pursuer may apply for summary decree on the ground that there is no defence to the action, or a part of it, disclosed in the defences.²⁷⁵ It has been held to apply to the situation in which there is no valid stateable defence and procedural technicalities are used to delay settlement.²⁷⁶ It is not properly used to supplant debate at procedure roll.²⁷⁷ A pursuer must

²⁷⁴ Treatment here will be brief. For further material see Green's Annotated Rules paras. 21.1.1 – 21.3.1, Macphail, *Practice* (2nd ed.) paras 14.71 – 14.74, and G. Maher, 'Summary Decree in the Court of Session' (2 parts) 1987 SLT (News) 93 and 101.

²⁷⁵ RCS 21.2(1). Some actions are excluded. (RCS 21.1).

²⁷⁶ *McAlinden v. Bearsden and Milngavie D.C.* (unreported) 26 March 1985 per L. McDonald.

²⁷⁷ *Frimoker (UK) Ltd. v. Mobile Technical Plant (International) Ltd.* 1990 SLT 180, *Brunswick Bowling and Billiards Corp. v. Bedrock Bowl Ltd.* 1991 SLT 187.

demonstrate "near certainty" of success before he can secure summary decree²⁷⁸ as the Court is concerned to discover whether a defence is disclosed.²⁷⁹ The court will proceed with caution because it involves determining the case without further inquiry into the facts.²⁸⁰

A matter of law raised in the motion will not prevent the hearing of the motion,²⁸¹ the test being whether it admits of a clear and obvious answer.²⁸² If the defences raise matters of fact it may be difficult for the court to conclude that there is no stateable defence.²⁸³ The court is entitled to look to material beyond any pleadings and may proceed upon affidavit evidence,²⁸⁴ even in the face of denials.²⁸⁵ The court, while being astute to repel purely dilatory defences, should not summarily preclude inquiry where it appears that there is a genuine issue to try.²⁸⁶

(xviii) The Defender's Pleas-in-law.

It has long been recognised²⁸⁷ that the defender's pleas-in-law fall into two categories: (i) preliminary pleas and (ii) pleas on the merits. The former are the basis for preliminary or dilatory defences²⁸⁸ and the latter for peremptory defences.²⁸⁹ If the former is sustained, the case against a defender is dismissed. This does not

²⁷⁸ *P & M Sinclair v The Bamber Gray Partnership* 1987 SC 203, per Lord Prosser at 206, *Henderson v. 3052775 Nova Scotia Ltd* (unreported) 9th December 2003 per L. Carloway.

²⁷⁹ *Keppie v The Marshall Food Group* 1997 SLT 305 per Lord Hamilton at 308.

²⁸⁰ *Keppie v The Marshall Food Group supra* at 308.

²⁸¹ *Royal Bank of Scotland v. Dinwoodie* 1987 SLT 82.

²⁸² *Mackays Stores Ltd. v. City Wall (Holdings) Ltd* 1989 SLT 835, *Construction Center Group Ltd v. Highland Council* 2002 SLT 1274.

²⁸³ *Patterson & O'Grady v. Alu-Lite Windows Ltd.* (unreported) 10 September 1985.

²⁸⁴ *Rankin v. Reid* 1987 SLT 352.

²⁸⁵ *Ingram Coal Co. v. Nugent* 1991 SLT 603.

²⁸⁶ *Henderson v. 3052775 Nova Scotia Ltd op. cit.*

²⁸⁷ See previous chapters. There was in the very early period a third class of 'Declinatory' pleas but in modern practice there are only two, the declinatory plea now being treated as a dilatory defence following *Stair, I, 39. 14.*

²⁸⁸ *Ross v. Young* (1831) 9 S. 275.

²⁸⁹ *Geils v. Geils* (1851) 1 Macq. 36 per Lord Chancellor Truro at 39-40.

render the cause *res judicata* and the pursuer may bring a new action on the same grounds,²⁹⁰ subject to the law of prescription and limitation. The latter type of plea will result in the defender being assoilzied from the conclusions of the summons²⁹¹ and does form *res judicata* preventing any subsequent action on the same grounds.

Generally, a preliminary plea must be disposed of before any inquiry into the merits. Where, however, the plea is so bound up with the merits, or requires that proof should be led and the facts ascertained in order to dispose of the plea, the Court will permit of a proof before answer reserving consideration of the plea until after proof rather than disposing of it on procedure roll or at debate. A preliminary plea may itself be the subject of preliminary proof where, if sustained, it would exclude a proof at large on the merits.²⁹² A plea on the merits will require factual inquiry, unless the facts have been agreed between the parties. If sustained, the defender will be granted decree of absolvitor.

In previous chapters, the development of the law relating to the stating of preliminary pleas and pleas on the merits in defences at the same time has been considered. The modern position is that a defender cannot reserve or hold back from stating his defence on the merits in the defences on the basis that he has a preliminary plea which would dispose of the action.²⁹³

²⁹⁰ *Menzies v. Menzies* (1893) 20 R. (HL) 108 per L. Watson at 110, *Govan v. Old Victualling Society Ltd. v. Wagstaff* (1907) 44 SLR 295.

²⁹¹ *Shirreff v. Brodie* (1836) 14 S. 825.

²⁹² The principal examples are pleas to jurisdiction and timebar. See the fuller explanation in Macphail, *Practice*, para. 8.60.

²⁹³ (Historically see Court of Session Act, 1825, s.2, A.S. 20th March 1907, CAS, C, iv. 4(b)) *Thorburn v. Dempster* (1900) 2 F. 583, *Fingland & Mitchell v. Howie* 1926 SLT 283, Maxwell, *Practice*, p. 192, Macphail, *Practice*, para. 9.109, Mackay, *Manual*, p. 218 citing *Campbell v. Grierson* (1847) 10 D. 364 per LJ-C Hope, *Alcock v. Easson* (1842) 5 D. 366.

Finally both types of plea must have a foundation in averment²⁹⁴ with the exception of preliminary pleas to competency and relevancy (and relevancy as specification) based not upon specific averments, but upon the whole nature of the case as pleaded or the pleadings as a whole.²⁹⁵

(xix) Preliminary Pleas.

These pleas may be divided into three categories: objections to the instance²⁹⁶; objections to the jurisdiction of the court to entertain the action²⁹⁷; and pleas against the action itself.²⁹⁸ We concentrate here on the last category. Fuller treatment of the first two categories can be found elsewhere.²⁹⁹

(xx) Pleas against the Action itself.

(a) Incompetency.

A plea to the competency of the action is an objection to the form of the summons.³⁰⁰ Generally the test is that there is some ground of law which the conclusions of the summons violate.³⁰¹ An objection to the relevancy of the summons is an objection to *media concludendi* or statement of the grounds of action, but the distinction between competency and relevancy can be narrow and 'the question whether an action is

²⁹⁴ *NB Rly v. Brown, Gordon and Co.* (1857) 19 D. 840.

²⁹⁵ Macphail, *Practice*, para. 9.115.

²⁹⁶ 'No title to sue', and 'All parties not called'.

²⁹⁷ 'No jurisdiction', '*forum non conveniens*', '*lis alibi pendens*'

²⁹⁸ Macphail, *Practice*, para. 9.116, Thomson & Middleton, *Manual*, p. 77, Maxwell, *Practice*, p. 192 ff.

²⁹⁹ Macphail, *Practice*, para. 9.117 ff, Green's Annotated Rules of the Court of Session, *op. cit.*, Annotation para. 18.1.4, Maclaren, *Practice*, pp. 380 ff., Mackay, *Manual*, pp. 221 ff., Mackay, *Practice*, I, pp. 434ff., Maxwell, *Practice*, p. 192 ff.

³⁰⁰ strictly, the conclusions of the summons. *McEwen v. Davies* (1824) 2 S. 696, Mackay, *Practice*, I, p. 436.

³⁰¹ Mackay, *op. cit.* p. 437.

irrelevant or incompetent is a very nice question, as they very much run into each other.’³⁰²

So, an action for damages raised in respect of breaches of separate, unrelated contracts will be incompetent, as will an action in a multiplepinding where there is no double distress or fund *in medio*. An action for a remedy unknown to law will be incompetent.³⁰³ The plea should specify the ground upon which the plea is taken.³⁰⁴

If the action is held to be incompetent it should be dismissed and a new action brought if so advised.³⁰⁵ Questions of competency may be noticed *pars judicis* and an action may be dismissed as incompetent in respect of the form of the action presented³⁰⁶ or in respect of the remedy craved³⁰⁷ or where, to effectively decide the cause, all parties have not been called. This is so, even though no plea is taken by one of the parties.³⁰⁸

Finally, a party can be held to have waived his right to invoke his plea to competency by his own inconsistent actings³⁰⁹ and he cannot challenge the competency of proceedings which he himself has initiated.³¹⁰

³⁰² *Coutts v. Coutts* (1866) 4 M. 802 per LP M’Neill at 803.

³⁰³ *Jack v. Jack* 1962 SC 24.

³⁰⁴ *Coxall v. Stewart* 1976 SLT 275 per L. Maxwell at 276, Thomson & Middleton, *Manual*, p. 77, Macphail, *Practice*, para. 9.121, Green’s Annotated Rules, Annotation 18.1.4, Black, *Introduction*, p. 26.

³⁰⁵ *Coutts supra.*, *M’Naught v. Milligan* (1885) 13 R. 366 per LP Inglis at 368, Maxwell, *Practice*, p. 194, Maclaren, *Practice*, p. 388.

³⁰⁶ *Clark v. Campbell* (1873) 1 R. 281 per LP Inglis at 283.

³⁰⁷ Macphail, *Practice*, para 2.14 and authorities cited at fn 59.

³⁰⁸ *Hamilton v. Murray* (1830) 9 S. 143, *Macgregor v. Macfarlane* (1914) 31 Sh. Ct. Rep.104, *McCallum v. Cohen* (1915) 32 Sh. Ct. Rep. 39. Maxwell, *Practice*, p. 194, Macphail, *Practice*, para. 9.121, *Lord Advocate v. Black* 1995 SLT 540 per Temporary Judge Coutts at 542. C.f. Maclaren *Practice*, p. 289 citing *Connell v. Ferguson* (1857) 19 D. 482.

³⁰⁹ *North British Railway Co. v. Carter* (1870) 8 M. 998. It is suggested that it is not clear when the court should *ex proprio motu* dismiss an action on the grounds of competency having

(b) Relevancy.

A plea to the relevancy³¹¹ of the pursuer's averments manifests itself in two ways. First, the case will be relevant if the facts of the case all add up to justify the remedy sought. Thus irrelevancy, following *Stair* and the maxim *frustra probatur*,³¹² will arise when, even assuming that the pursuer's averments are true,³¹³ he is not entitled to the remedy which he seeks - in other words, his averments do not support the conclusions of the summons and he is bound to fail.³¹⁴

The following quotations are helpful:

'The object of a condescendence is not merely to give fair notice to the other side of what the framer hopes to establish in fact, but - coupled with the note of pleas-in-law - to present a relevant case, that is, to disclose a position in fact and law which requires or justifies the remedy asked. It is as if the pursuer came into court and said: 'This is a summary of my case.' The summary must be sufficiently full to enable the court to determine whether, assuming the facts to be verified either (a) *instanter* by admission or by probative documents, or (b) by evidence to be subsequently led, the pursuer has a good

noticed the incompetency *pars judicis*, and the circumstances where the defender has implicitly waived his entitlement to invoke the ground. Every such decision will turn on its own facts but it is submitted that the Court will determine the question against the principles of safeguarding the public interest in ensuring the proper conduct of litigation or protecting third parties not called to the litigation against prejudice in the event that the cause would otherwise proceed. See generally Macphail, *Practice*, para 2.09.

³¹⁰ *Davie v. Edinburgh Mags.* 1951 SC 720.

³¹¹ See generally D.M. Walker, 'The Theory of Relevancy' (1951) 63 J.R. 1.

³¹² See previous chapters, *supra*.

³¹³ Thus, in testing the relevancy of the party's pleadings, his averments of fact are said to be taken '*pro veritate*.' It will be recalled that evidence should not be averred and a party cannot be criticised in relevancy for not specifying the evidence which he proposes to adduce to prove the averments. *Horsburgh v. Thomson's Trustees* 1912 SC 267, *Mackay v. Campbell* 1966 SC 237 per L J-C Grant at 249.

³¹⁴ *Hope v. Hope's Trs.* (1898) 1 F (HL) 1 at 3, *Jamieson v. Jamieson* 1952 SC (HL) 44 per L. Normand at 50 and L. Reid at 63, *Wilson v. Norwich Union Fire Insurance Soc. Ltd.* 1999 SLT 1139 per L J-C Cullen at 1140H, Maclaren, *Practice*, p. 389.

case in law. If the pursuer fails in this, his case is dismissed without enquiry into the matters of fact alleged on either side'³¹⁵

In stating a plea to the relevancy the pleader effectively

'says: 'What the opposite party says may be true, or it may not, but even if it be assumed that it is all true, nevertheless he cannot prevail against me, *either* because an essential fact is unrepresented in his averments, *or* because the facts he avers would not, even if proved, justify the application of the legal principle to which he appeals.' The plea to the relevancy, in short, avoids, or at least postpones, any joinder of issue in the merits of the case.'³¹⁶

This quotation expresses both the meanings of relevancy. The process of determining relevancy might be simply put. First, a defender examines the law and acquires a grasp of what must be established by the pursuer, in law, in order to succeed; then he comes to examine the pleadings and discovers that the pursuer has failed to plead a material and crucial fact required by the law or has failed to make factual averments from which that fact may be inferred. Then the pursuer's case is irrelevant.

The second manifestation of relevancy is where there is no omission of a material fact but, upon closer inspection, the defender has brought a case upon facts which, if proved, would not assist him in establishing the grounds of the action such as to support the conclusions as remedies which he is seeking.

³¹⁵ Lord President Clyde, Explanatory Note in R. Wyness Millar, 'Civil Pleading in Scotland' (1932) 30 Mich. L.R. 545, 709 at 561-562, fn 74.

³¹⁶ L.P. Clyde, *ibid.* p. 568, fn 96.

Of the first type, if in an ordinary action for damages for defamation,³¹⁷ it is not averred that the defamation was false³¹⁸, the action is irrelevant. Again, if the defamatory statement was uttered on a privileged occasion, and facts and circumstances inferring malice are not averred,³¹⁹ the action is irrelevant.³²⁰ These somewhat dated examples are taken from the practice books. A simple example would be where a pursuer sued in negligence but failed to aver fault on the part of the defender³²¹ or failed to aver facts from which fault could be inferred by the Court. Another example of this type would be where a pursuer's case was based on a defender's inadequate system of inspection and maintenance. The law requires a pursuer in these circumstances to make averments defining the intervals at which the inspection ought to have taken place, and averments to support the conclusion that such a system would have been reasonable and practicable.³²² Without these averments, the action would be irrelevant. So also the situation where a pursuer bases his case upon the defender's fault in maintenance. In that scenario the maintenance which the pursuer contends should have been implemented must be specified.³²³

Of the second type, we may examine briefly *Donoghue v. Stevenson* which went as far as the House of Lords on a plea to the relevancy.³²⁴ The pursuer and a friend visited Mr. Minchella's Wellmeadow Café in Paisley, where they intended to have 'ice

³¹⁷ The older authorities refer to 'slander'.

³¹⁸ *Campbell v. Ferguson* (1882) 9 R. 467, *Gray v. S.S.P.C.A.* (1890) 17 R. 1185, Maxwell, *Practice*, p. 195, Maclaren, *Practice*, p. 389.

³¹⁹ *Gordon v. British & Foreign Metaline Co.* (1886) 14 R. 75, *Gray, supra, Murdison v. SFU* (1896) 23 R. 449, Maxwell, *Practice*, p. 195, Maclaren, *Practice*, p. 389.

³²⁰ Maclaren, *Practice* p. 389, Maxwell, *Practice*, p.p. 194-5.

³²¹ *Duff v. National Telephone Co.* (1889) 16 R. 675.

³²² *Riddell v Reid*, 1941 SC 277 per LP Normand at 283; *Gibson v Strathclyde Regional Council*. 1993 SLT 1243.

³²³ *Argyll & Clyde Health Board v. Strathclyde Regional Council* 1988 SLT 381.

³²⁴ 1932 SC (HL) 31. For a full discussion of the case, see A.F. [Lord] Rodger, 'Mrs. Donoghue and Alfenus Varus' 1988 CLP 1.

drinks.' Her friend bought some 'ginger' in an opaque bottle and poured the contents over Mrs. Donoghue's ice cream. The 'ginger' had been manufactured by Stevenson. There was no contractual nexus between the manufacturer and the pursuer. Later in the evening the same friend poured the remainder of the 'ginger' over ice for Mrs. Donoghue and as the last of it emptied from the bottle, a decomposing snail fell into her ice which resulted in Mrs. Donoghue becoming ill. She had no contractual remedy against either Minchella or Stevenson as the ginger was purchased by the friend. She sued the manufacturers in delict. Their response to her pleadings was that even if she could demonstrate all of the above factual material, there did not exist in law a liability on the part of the defenders as manufacturers to this pursuer as an ultimate consumer of the product. This was their plea to the relevancy of the pursuer's averments.³²⁵

Other common examples include situations where the pursuer seeks to establish that the locus of an accident causing injury was e.g. a 'building' or 'construction site' or 'place of work' for the purposes of statutory provisions and regulations or where he contends that the work he was doing was a 'manual handling operation' for the purposes of statutory regulations, or where he hopes to demonstrate that the equipment which he was using which caused the accident was e.g. 'work equipment' or some other statutory phrase for the purposes of statutory regulations.³²⁶ The plea to the relevancy will contest that, in law, the 'item or place or operation' falls within the statutory definition. If it does not, the action is irrelevant.

³²⁵ Obviously their plea was repelled.

³²⁶ There are very many examples. See further Munkman on Employer's Liability 13th ed. (2001), Redgrave's Health and Safety, 3rd ed., 1998 and supplements.

So also, where the pursuer avers that there is a duty on a defender to do something or to prevent something which, in law, does not exist then upon discussion as to the relevancy the action will be dismissed insofar as it is related to that contention.³²⁷

In both spheres of relevancy, the onus falls upon the defender.³²⁸ He must show that the pursuer's action must necessarily fail.³²⁹ Where a pure case of irrelevancy arises, it ought to be decided before inquiry into the facts.³³⁰

In judging of the relevancy of the pursuer's averments, the Court will examine those averments, taking account of any admissions of the defender's averments³³¹ and may take into account a pursuer's bare denial of the defender's averments on an essential matter.³³² But the Court will prefer the most reasonable and ordinary construction of the averments under consideration and will avoid an analysis which, 'pushed to extreme, would evacuate simple and plain statements and tear their plain meaning to pieces.'³³³

³²⁷ e.g. *McGuffie v. Forth Valley H.B.* 1991 SLT 231, *Spiers v. British Railways Board* 1997 SLT 1144, *Duncan v. Beattie* 2003 SLT 1243.

³²⁸ *Jamieson v. Jamieson* 1952 SC (HL) 44 per L. Normand at 50.

³²⁹ *Millar v Galashiels Gas Co* 1949 S.C.(H.L.) 31, *Jamieson v. Jamieson supra.* per L. Normand at 50 and L. Reid at 63, *McArthur v. Raynesway Plant Ltd.* 1980 SLT 74, *Millar v Galashiels Gas Co.* 1949 S.C.(H.L.) 31. The dicta in *Jamieson* are very frequently cited. For a recent example see *Nisbet v. North Lanarkshire Council & Anr.* 2003 SC 324 (Extra Div.)

³³⁰ *Mackay Manual*, p. 223.

³³¹ *Pringle v. Bremner & Stirling* (1857) 5 M. (H.L.) 55 per L.C. Chelmsford at 58 and L. Colonsay at 61, *Hamilton v. Santi* (1916) 32 Sh.Ct. Rep 73.

³³² *Murray v. Edinburgh D.C.* 1981 SLT 253 per L. Maxwell at 256. This includes not only a bare denial but also poorly formulated averment in answer to such an averment by a defender. *Potter & Co. v. Braco de Prata Printing Co. Ltd.* (1891) 18 R. 511 per LP Inglis at 517.

³³³ *Baikie v. Glasgow Corporation* 1919 SC (HL) 13 per L. Shaw at 17.

Actions for damages for negligence will be dismissed as irrelevant only in clear cut cases³³⁴ and in simple 'running down cases' or simple road traffic cases the pleadings are generally not scrutinised with strictness.³³⁵

It will be seen that relevancy in the senses used here will always involve an interpretation of the substantive law pertaining to the facts of the individual case. One cannot determine whether a material fact has been omitted or whether the pursuer's case in averment fails to meet a test in the law if the law has not been ascertained.

Historically the plea to the relevancy was stated as 'The averments for the pursuer are not relevant or sufficient to support the conclusions of the summons, and the action should therefore be dismissed.'³³⁶ But in modern practice the plea is invariably taken in conjunction with a plea to the specification of the averments, along the lines of 'The pursuer's averments being irrelevant *et separatim* lacking in specification, the action should be dismissed.'³³⁷ The proper disposal upon relevancy or specification is dismissal. A plea to the effect that 'The pursuer's averments being irrelevant *et*

³³⁴ *Miller v. S.S.E.B.* 1958 SC (HL) 20, per Viscount Simmonds at 32, and L. Reid at 33, *Murray v. Edinburgh D.C.* 1981 SLT 253, *McGeouch v. Strathclyde R.C.* 1985 SLT 321, *Blaikie v. British Transport Commission* 1961 SC 44. It is almost *de rigueur* for *Miller supra.* to be cited by a pursuer at debate in a personal injury action. For examples of such 'clear cut cases', see *Davie v. Edinburgh Corporation* 1977 SLT (N) 5, *Robb v. Dundee D.C.* 1980 SLT (N) 91, *Rae v. City of Glasgow Council* 1998 SLT 292, *Nisbet v Chief Constable, Strathclyde Police*, 2003 SLT 634

³³⁵ *Adamson v. Roberts* 1951 SC 681, *Prentice v. Chalmers* 1985 SLT 168, *Barrow v. Bryce* 1986 SLT 691, *McLatchie v. The Scottish Society for Autism* (unreported) 4 February 2004 per Lord McEwan, Macphail, *Practice*, para. 9.33. See R. Conway, *Personal Injury Practice in the Sheriff Court*, para 17.14.

³³⁶ see Ch. 3.

³³⁷ But not reduced to a rump 'The pursuer's statements are irrelevant' or 'No relevant case' or 'irrelevant'. J.S. (later LP) Clyde, *Practice and Procedure in the Court of Session* (1906-7) 18 JR 319 at 327-8. As discussed in the previous chapter, it seems that the plea as here formulated appeared about the mid-1880s.

separatim lacking in specification they should not be admitted to probation' was considered to be unusual and incorrect in form.³³⁸

The plea to the relevancy that 'The averments for the pursuer are not relevant or sufficient to support the conclusions of the summons, and the action should therefore be dismissed' is a general plea attacking the action as a whole, and a general plea is enough.³³⁹ It has often been said that this is a defect in the system of written pleadings. The Annotators to the RCS offer this advice:

'It is good practice to disclose in the plea the ground on which the plea is taken, particularly in the case of general pleas of relevancy and specification; the practice heretofore of regarding proper notice of fact or the line of evidence as essential but not notice of the point of law is defective.'³⁴⁰

In the writer's experience, the plea (in conjunction with a plea to specification) will be found in nearly every summons drafted by counsel, if only *ob majorem cautelam* as Maclaren suggested.³⁴¹ But it is perfectly competent and proper to direct a plea of relevancy against particular averments in the pursuer's pleadings, e.g. 'The pursuer's averments in Article 2 of condescendence etc.' or the pursuer's averments *anent* (or relating to) [particular matter] etc.'

³³⁸ *McSkimming v. The Royal Bank of Scotland plc* 1997 SLT 515 per L. Gill at 518C. C.f. Annotated Rules of the Court of Session, Annotations to 18.1.4 at A(9).

³³⁹ Black, *Introduction*, p. 28

³⁴⁰ Green's Annotated Rules of the Court of Session, Annotations to 18.1.4 at A.

³⁴¹ see *supra*.

If particular averments are irrelevant but that irrelevancy is insufficient to lead to dismissal, there should be a plea to the effect that the pursuer's averments being irrelevant *et separatim* lacking in specification, should not be remitted to probation'.³⁴²

Although the above passage has concentrated upon the plea of irrelevancy³⁴³ as being at the disposal of a defender, a pursuer may himself table a plea against a defender's positive or substantive defence, on the basis that even if the defender proves all of his averments, he will still necessarily fail in establishing a defence such as to resist the pursuer's claim.

(c) Specification.

The plea of lack of specification finds its proper application in a case where the other party³⁴⁴ does not know the case against him and objects to being taken by surprise at proof.³⁴⁵ Thus, it has been said that the test in matters of specification is whether the opponent can be said to be prejudiced by lack of fair notice of what the case against him is.³⁴⁶ The rules requiring pleadings to be specific thus giving fair notice³⁴⁷ are based in fairness and where in all the circumstances fair notice has been given, the opponent cannot object to the pleadings on the basis of lack of specification.³⁴⁸ The

³⁴² C.f. *McSkimming v. The Royal Bank of Scotland plc*, *supra*. In actual practice this plea is very common. It might be suggested that the judge in *McSkimming* took exception to the plea as it in part sought to exclude the pursuer's averments from probation on the basis of relevancy, dismissal being the proper disposal. However, where averments are lacking in specification, but not sufficiently to warrant disposal by dismissal, it is suggested that this is the appropriate plea.

³⁴³ alternatively stated as 'the plea to the relevancy'.

³⁴⁴ most commonly the plea is taken by a defender, although a pursuer may table the plea against the averments of a defender.

³⁴⁵ *Macdonald v. Glasgow Western Hospitals* 1954 SC 453 per LP Cooper at 465, Macphail, *Practice*, para 9-29.

³⁴⁶ *Allison v. Isleburn Ltd. and Eurolink Ferries Ltd.* 1997 SCLR 791 per L. Macfadyen at 796.

³⁴⁷ *Brydon v. Railway Executive* 1957 SC 282 per L. Patrick at 291.

³⁴⁸ *Buchanan (Stewart) Gauges Ltd. v. BEC (Scotland) Ltd. & Anr.*, (unreported) (2001 GWD 3-126) 19 January 2001 per Lord Macfadyen at para. 14.

objection based upon this ground of lack of specification and want of fair notice can be viewed as a form of irrelevancy³⁴⁹ or perhaps a species of the genus irrelevancy, although they are separate points.³⁵⁰ Thus, it can be possible for a case on record to be relevant in that the averments support the conclusions yet be lacking in specification as not giving the other party fair notice of the facts which are to be established in evidence.

As Lord McCluskey explained,

To test the relevancy of the pursuers' pleadings it is necessary to ask whether or not the pursuers, if they prove no more than what is averred, are entitled to succeed.³⁵¹ But it goes further than that. Pursuers must also give sufficient specification of what they intend to prove. Thus, for example, if a pursuer averred that an accident was caused by the fault of the defenders, and, at proof, proved fault, he would be entitled to recover damages for the loss, injury and damage sustained in the accident. But if, at an earlier stage, the relevancy of the pleadings had to be determined, a bald averment of "fault" would nonetheless fail to pass the test of relevancy; because the pursuer must, in the ordinary case, specify what the fault is. Exactly how much specification is needed will certainly vary from case to case. In a simple street accident case, a strict and literal interpretation of the pleadings would be inappropriate (*Adamson v. Roberts* 1951 SC 681.) But a sufficient basis of fact would have to be condescended upon in the pleadings.³⁵²

³⁴⁹ *Campbell v. United Collieries Limited* 1911 2 SLT 434.

³⁵⁰ *Sinclair v. NCB* 1962 SLT 422 per L. Hunter at 423.

³⁵¹ *pace* Lord McCluskey, this may be considered a judicial 'slip of the pen'. The true test of relevancy is whether on the facts as presented, the pursuer is, or is not, bound to fail. If he is not, the action is relevantly pleaded. *Jamieson v. Jamieson* 1953 SC (HL) 44 per L. Normand at 50. For another example of loose language in this regard see *M'Dougal v. M'Dougal's Trs* 1931 SC 102 per L. Hunter at 114.

³⁵² *Argyll & Clyde Health Board v. Strathclyde R.C.* 1988 SLT 381 per L. McCluskey at 383.

The degree of specification required for fair notice does depend on the particular circumstances of every case,³⁵³ but as a minimum, the other party should be able to know what is being alleged against him and to prepare his case accordingly.³⁵⁴ In assessing whether fair notice has been given, the Court will consider the matter in broad terms and not subject the record to 'the careful and meticulous scrutiny devoted to a conveyancing deed'.³⁵⁵ It is only where material prejudice is occasioned to a defender through the want of fair notice that the court will entertain and sustain the plea.³⁵⁶

It has been suggested that all material dates, times and places which ought reasonably to be known to the party should be averred³⁵⁷ unless these cannot be ascertained by the party and they fall within the knowledge of the other, in which case the plea may be repelled.³⁵⁸

Generally, where qualitative terms are averred in respect of the defender's failures or otherwise, e.g. 'not proper' or 'excessive' or 'inadequate' or 'insufficient', the standard which the defender should have fulfilled or obtempered must be averred,³⁵⁹

³⁵³ Macphail, *Practice*, para 9-29.

³⁵⁴ *Boulting v. Elias* 1990 SLT 957, *Kennedy v. Norwich Union Fire Insurance Society* 1994 SLT 617.

³⁵⁵ *McMenemy v. James Dougal and Sons Ltd.* 1960 SLT (N) 84 per L. Guest (O.H.). See also *Tucker v. Gray & Duncan* 1994 GWD 20-1235, and *Galbraith's Curator ad litem v. Stewart* 1997 SLT 418 per L. Osborne at 424D (both using the same conveyancing analogy). Even in 1863 it was complained that defenders subjected the summons to criticism 'as if it were an instrument to be construed', Anon., 'Court of Session Practice', (1863) 7 *Journal of Jurisprudence* 13 at 15.

³⁵⁶ *Avery v. Hew Park School for Boys* 1949 SLT (N) 6, *Lockhart v. National Coal Board* 1981 SLT 161 at 170.

³⁵⁷ A.G. Walker, 'Written Pleadings' (1963) S. L.R. 161 at 169. See e.g. the comments of L. Carloway in *Dunn v. Solaglass and Tibbet and Britten UK plc* (24th May 2002, unreported)

³⁵⁸ *Gunn v. McAdam & Sons* 1949 SC 31, *Johnston v. Gill* 1978 SC 74, Macphail, *Practice*, para 9-29.

³⁵⁹ *Argyll & Clyde Health Board v. Strathclyde R.C.* 1988 SLT 381 per L. McCluskey at 384, ('properly maintained') and *McGhee v. National Coal Board* 1973 SLT 14 per Lord Reid at 21 ('sufficiently cooled'), *Maroney v. Hugman* 1997 SLT 240 ('too heavy'), *McArthur v. Strathclyde*

although in certain circumstances a Court may accept the broad averment as sufficient.³⁶⁰ Thus where a pursuer averred that the defenders did not carry out frequent and regular inspections, as a matter of notice he required to specify the circumstances by which it was to be proved that the defenders' system of inspection was inadequate giving notice of the system which the pursuer averred that they should have instituted.³⁶¹ In some circumstances the pursuer will also have to aver that the inspection would have revealed the defect.³⁶² Frequently a pursuer's averments of 'loss' will be attacked as lacking in specification.³⁶³ There must also, as a matter of notice, be averments of causation, connecting the loss with the basis of liability alleged. If these are absent the action will be dismissed.³⁶⁴

Where a pursuer brings his case under the provisions of the Occupier's Liability Act 1960, he must place on record averments directed to the defenders being the owners or occupiers or having control of the defective premises.³⁶⁵

Regional Council 1995 SLT 1129 (obstruction 'associated with' road works) There are many other examples.

³⁶⁰ *Marony v. Hugman* 1997 SLT 240, *O'Connor v. Auld* 1970 SLT (N) 16. See also broad averments for professional negligence as sufficient in *Rowallan Creamery Ltd. v. Henry Dawes & Sons* 1988 SLT 95.

³⁶¹ *Davie v. Edinburgh Corporation* 1977 SLT (N) 5 per L. Kincaig at 7. See also *Johnstone v. City of Glasgow DC* 1986 SLT 51.

³⁶² *Kilbride v. Scottish & Newcastle Breweries* 1986 SLT 642, *Cordiner v. BRB* 1986 SLT 209.

³⁶³ e.g. *Johnston v. WH Brown Construction (Dundee) Ltd* 2000 SLT 223 (loss arising from defective works), *Galbraith's Curator ad litem v. Stewart* 1997 SLT 419 (specification of necessary services as component of claim for loss, injury and damage). MacKenzie, *Written Pleadings, op. cit.* para 4.114. However, there are some heads of loss which may proceed upon the very briefest of averment where the Court's assessment of loss will be approached on a broad basis. See *Smith's Executrix v. J. Smart Contractors plc.* 2002 SLT 779 per LP Cullen at 780 (loss of support). Historically, the averments of loss were often very briefly stated. See Wyness Millar's pleadings example *op. cit.* p. 715 (Cond. 4).

³⁶⁴ MacKenzie para. 4.115 citing the examples of *Moffat v. West Highland Publishing Ltd* 2000 SLT 335, *McFarlane v. Tayside Health Board* 1998 SLT 307, *Gilles v. Lynch* 2002 SLT 1420.

³⁶⁵ *Murray v. Edinburgh Corporation* 1981 SLT 253, *Wallace v. City of Glasgow DC* 1985 SLT 23.

Where a pursuer founds his action on the defender's breach of statutory duty, the particular statutory duty breached must be averred together with averments directed to how the duty was breached by the defender.³⁶⁶

Vague terminology and looseness of language, will signal a specification point. In one case, matters stated to 'several friends' without specifying the friends was held to be lacking in specification³⁶⁷ as was a case based on 'several accidents' in the recent past.³⁶⁸

In actions for damages for negligence it is a basic requirement of fair notice that the pleader sets out the essential facts relied on with reasonable clarity and then plainly states the duties alleged to have been breached, being duties which a court can be satisfied at least might have been incumbent upon the defenders in the circumstances.³⁶⁹ As Lord McCluskey observed:

[The] 'normal method of pleading is to set forth the general duties in law and then, by reference to the particular circumstances, to deduce and set forth particular duties which counsel, at the trial or proof will argue were applicable and were breached on the occasion of the accident'.³⁷⁰

The particular duties must be set in the context of some general framework set by precedent or law or practical standard and it is not appropriate to aver a general

³⁶⁶ Macphail, *Practice*, para 9-30, *British Steamship Co. Ltd. v. Lithgows Ltd.* 1975 SLT (N) 20 (Sale of Goods Act 1893).

³⁶⁷ *Boulting v. Elias* 1990 SC 135.

³⁶⁸ *Murray v. Nichols* 1983 SLT 194. This would have been competent if specification of the accidents had been averred. *W. Alexander & Sons v. Magistrates of Dundee* 1950 SC 123.

³⁶⁹ *Jamieson v. Allan McNeil & Son W.S.* 1974 SLT (N) 9 per L. Maxwell, *Stevenson v. Glasgow Corporation* 1908 16 SLT 302.

³⁷⁰ *Ayre v. Milne* 1989 SLT 659 per L. McCluskey at 660.

duty and then to 'pluck out of the air' alleged particular duties which are not set in that context.³⁷¹

In relying upon fault as *culpa*, the pursuer must aver facts and circumstances from which fault can be inferred. The pursuer must also give notice either of the precise fault founded upon or of the facts and circumstances which, in the absence of a better explanation, infer some fault on the part of the defender.³⁷² General allegations are not sufficient.³⁷³

In pleading duties in actions for damages for personal injury³⁷⁴ it has been considered a well settled rule that when a general duty is averred followed by a particularisation of the specific ways in which that duty has been breached,³⁷⁵ the inquiry on the facts is restricted to the specific breaches of which notice has been given, excluding any evidence directed towards establishing a breach of that general duty in another way.³⁷⁶ That is not to say that, generally, a pursuer cannot succeed where his proof deviates from the four corners of his record.

Where the evidence presents a case which is 'variation, modification or development' of the case on record, so long as it is not something 'new, separate and distinct' the

³⁷¹ *GUS Property Management Ltd. v. Littlewoods Mail Order Stores Ltd.* 1982 SC (HL) 157 per L. Stewart (OH) at 161-2 under reference to the 'major and minor premisses' of the 'old form of indictment in criminal cases.'

³⁷² *Argyll & Clyde Health Board v. Strathclyde R.C.* 1988 SLT 381 per L. McCluskey at 383.

³⁷³ *Harper v. Dunlop & Co.* (1902) F. 208 per L. M'Laren.

³⁷⁴ Helpful analyses of the key requirements in pleading such an action can be found in *Jamieson v. Alan McNeil & Sons W.S.* 1974 SLT (N) 9 and *Stevenson v. Glasgow Corporation* 1908 SC 1034. See also Macphail, *Practice*, para 9-34.

³⁷⁵ *Sinclair v. National Coal Board* 1962 SLT 422.

³⁷⁶ *Morrison's Associated Companies supra*, per LP Clyde. See also *Hook v. Brown and Ors.* 1963 SLT (N) 52.

pursuer may still succeed.³⁷⁷ Whether he should be entitled to do so is a question of fairness between the parties³⁷⁸ and cases will often turn on their own facts.³⁷⁹ In this, the Court may construe averments in particular ways³⁸⁰ or read averments of broad duties generally,³⁸¹ or look to whether a defender has sought to counter a pursuer's case on general or particular grounds,³⁸² or on rare occasions, found on facts averred by the defender and spoken to in evidence by his witnesses as the basis for liability.³⁸³ However, where the case so put forward is wholly inconsistent with the pursuer's case on record, as a matter of fairness and notice, he is not entitled to succeed.³⁸⁴ Where, in proof, it becomes apparent that the evidence being adduced has departed from what has been presented on record, the proper course to be adopted by a party is to make a motion to amend fairly soon after the difficulty has arisen.³⁸⁵

³⁷⁷ *Burns v. Dixon's Iron Works* 1961 SC 102 per L J-C Thomson at 107-9, *Carroll v. Scott's Shipbuilding and Engineering Co, Ltd.* 1969 SLT (N) 46 per L. Cameron at 47, *O'Hanlon v. John G. Stein & Co. Ltd* 1965 SC (HL) 23.

³⁷⁸ *Maclean v. The Forestry Commission* 1970 SLT 265 per LJ-C Wheatley at 272.

³⁷⁹ *McCluskey v. Wallace* 1998 SC 711.

³⁸⁰ e.g. *McCusker v. Saveheat Cavity Wall Insulation Ltd.* 1987 SLT 24.

³⁸¹ *Gibson v. British Rail Maintenance Ltd.* 1995 SC 7.

³⁸² *Wyngrove's C.B. v. Scottish Omnibuses Ltd.* 1965 SLT 286. C.f. in a question of relying upon the defender's averments (as opposed to admissions) for corroboration, *Lee v. National Coal Board* 1955 SC 151 per L. Sorn at 160.

³⁸³ *O'Hanlon supra* per L. Guest at 42 and L. Reid at 39 i.e. without the pursuer having made an alternative case on an *esto* basis exploiting the defender's own averments and evidence. Cf *Kemp v. Secretary of State for Scotland* 1997 SLT 1174 per Lord Johnston and *North Scottish Helicopters Ltd. v. United Technologies Corporation Inc. (No. 2)* 1998 SLT (N) 778 per L. Davidson where a pursuer was held not entitled to advance a case of fault against one defender upon averments and evidence of another where these were radically different from his own averments.

³⁸⁴ *Johnstone v. Clyde Navigation Trs.* (1949) 82 Lloyds Reports 187 per Lord Reid at 195, *Gunn v. McAdam & Son.* 1949 SC 31, *Lawrence v. Sir William Arrol & Co.* 1958 SC 348, *Hamilton supra*, *Carroll supra*, *North Scottish Helicopters Ltd. supra*, *Macphail, Practice*, para 9-28.

³⁸⁵ *Lawrence supra*, *Gunn supra*, *Black v.*, *John Williams & Co. (Wishaw)* 1924 SC (HL) 22, *'Vitruvia' S.S. Co. Ltd. v. Ropner Shipping Co. Ltd.* 1924 SC (HL) 31, (disapproving *Davidson v. Logan* 1908 SC 350), *Thomson v. Glasgow Corp.* 1962 SLT 105.

With the modern development of the law of negligence, at common law, averments of foreseeability³⁸⁶ must be supported with averments of the facts and circumstances from which such foreseeability can be inferred,³⁸⁷ whether these are specific previous complaints³⁸⁸ or specific previous and similar accidents.³⁸⁹ And where a duty of inspection is pled, as a matter of fair notice the intervals of inspection which were reasonably practicable must be averred.³⁹⁰ There is a recognised exception to this in Factories Acts cases.³⁹¹ Where the pursuer can show a breach of a statutory provision, in some cases the statute will provide the defender with a defence of 'reasonable practicability' but the defender bears the onus of proof and averment in this.³⁹²

With the increase³⁹³ in European Directives regulating health and safety at work, implemented in member states through regulations³⁹⁴ it is suggested that it is now easier to formulate a case in negligence which falls within the ambit of the

³⁸⁶ Reasonable foreseeability is an essential ingredient of any case of negligence at common law. *Parker v. Lanarkshire Health Board* 1996 SCLR 57 (Ex. Div) per L. McCluskey at 61. See also R. Conway, *Personal Injury Practice in the Sheriff Court*, para. 8-29.

³⁸⁷ Macphail, *Practice* para 9-30, *Robb v. Dundee D.C.* 1980 SLT (N) 91.

³⁸⁸ *Bryce v. Allied Ironfounders Ltd.* 1969 SLT (N) 29.

³⁸⁹ *W. Alexander & Sons v. Dundee Corporation* 1950 SC 123, *Murray v. Nicholls* 1983 SLT 194, *Stirling v. Wood* 1987 GWD 1-33.

³⁹⁰ *McGuffie v. Forth Valley Health Board* 1991 SLT 231.

³⁹¹ *Mains v. Uniroyal Englebert Tyres Ltd.* 1995 SLT 1115.

³⁹² *Nimmo v. Alexander Cowan & Sons* 1967 SC (HL) 79, *Gibson v. BICC* 1973 SLT 2 per L. Reid at 3.

³⁹³ What Munkman describes as the 'European Revolution'. Munkman, *op. cit.* pp. 17ff.

³⁹⁴ Framework Directive 89/391, Management of Health and Safety at Work Regulations 1992 (SI 1992/2051) and the following 'six pack' regulations: Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004), Provision and Use of Work Equipment Regulations 1992 (SI 1992/2932), Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966), Manual Handling Operations Regulations 1992 (SI 1992/2793) Health and Safety (Display Screen Equipment) Regulations 1992 (SI 1992/2792) and Control of Substances Hazardous to Health Regulations 1992 (SI 1994/3246) and Control of Asbestos at Work (Amendment) Regulations 1992 (SI 1992/3086). These have been amended (e.g. Management of Health and Safety at Work Regulations 1999, Provision and Use of Work Equipment Regulations 1998) and many further Regulations have been implemented following 1992 (e.g. Lifting Operations and Lifting Equipment Regulations 1998). The Regulations must be construed 'purposively' by the Court and any dispute resolved by reference to the wording of the Directive. see e.g. *Cullen v. North Lanarkshire Health Board* 1998 SLT 846, *English v. Lanarkshire Health Board* 1999 SCLR 310, *McGhee v. Strathclyde Fire Brigade* 2002 SLT 680.

appropriate regulation. Whilst considerations of foreseeability and proximity and considerations of fairness, justice and reasonableness are still frequently required as being necessary for a relevant claim³⁹⁵ and whilst there is no 'strict liability' *per se* under the regulations, often the test of reasonable foreseeability under a regulation will be less demanding than at common law.³⁹⁶ In such actions parties draft averments under a common law article³⁹⁷ and a statutory article.³⁹⁸ The latter often simply narrates that e.g. the 'work, equipment or place of accident' was as defined in the regulations, detailing the wording of the regulation³⁹⁹ and that the defenders were under a duty to comply with the regulations. Then it is stated, in short averments, the facts which constitute the breach of the regulation and that the breach caused or materially contributed to the injury and concludes the condescence by specifying that the defenders failed in their duties under the regulations and are liable to make reparation.⁴⁰⁰ This formula will often withstand arguments based on specification at debate. In *McIntosh v. City of Edinburgh Council*,⁴⁰¹ Lord McEwan noted of such a formula⁴⁰² :

'The modern trend following the Coulsfield reforms is to have less said in pleadings than formerly. In my view in a case involving these Regulations very little needs to be said. The averments were criticised as " formulaic". In my opinion they do not merit this description, since they give fair notice to the defenders of the facts which the pursuer offers to prove. I do not consider

³⁹⁵ *Bennett v Lamont & Son* 2000 S.L.T.17 at p.21.

³⁹⁶ *Hall v City of Edinburgh Council*, 1999 S.L.T. 744, per Lord Macfadyen at page 746H-L.

³⁹⁷ Pursuers increasingly have departed from presenting common law cases, resting entirely on the statutory provisions as it is easier to formulate the case, avoid debate and get to proof.

³⁹⁸ kept separate. see *infra*.

³⁹⁹ This has not been held as offending the requirements not to plead law in articles of condescence.

⁴⁰⁰ See Green's *Litigation Styles op. cit.* for a number of examples.

⁴⁰¹ 2003 SLT 827 per L. McEwan.

⁴⁰² The case was brought under the Manual Handling Regulations.

it necessary to be more specific about the Regulations and their application than appears here.' : *Millar v Galashiels Gas Co* 1949 S.C.(H.L.) 31

Where in a cause relating to contract, a party seeks to incorporate general conditions of contract by implication as arising from 'prior or a previous course of dealings between the parties' the previous dealings must be specified⁴⁰³ and if it is alleged that the cause rests on an implied term of the contract, there must be averments explaining why and how the term came to be implied.⁴⁰⁴

Averments relating to knowledge of the defender often fall foul of specification. Thus, if in an action for damages arising from an accident occasioned by a defect in heritable property the pursuer does not aver that the defender had a duty to inspect and repair same, or that he knew of the defect and did not put it right, the action will be dismissed as irrelevant.⁴⁰⁵

Some averments, by their nature, require a high degree of specification. As noted already, averments of fraud must be minute and specific.⁴⁰⁶ and there should be detailed specification in respect of averments in actions of defamation.⁴⁰⁷ The very

⁴⁰³ *GEA Airexchangers Ltd. v. James Howden Ltd.* 1984 SLT 264.

⁴⁰⁴ *Fraser v. Tennent Caledonian Breweries Ltd.* 1990 SCLR 284, *Anderson v. Commercial Union Assurance Co. plc* 1998 SC 197 So also, it may be required as a matter of notice to aver the details of an offer and acceptance and the fact that the acceptance was communicated to the offerer. *Sabre Leasing Ltd. Copeland* 1993 SLT 1099.

⁴⁰⁵ *M'Martin v. Hannay* (1872) 10 M. 411, *Paterson v. Kidd's Trustees* (1896) 24 R 99 See Lees, *Handbook*, p. 41.

⁴⁰⁶ *Bousted v. Gardner* (1879) 7 R. 139 per LJ-C Moncrieff p. 145, and Lord Young p. 147. *Wright v. Guild and Wyllie* (1893) 30 SLR 785, *Thomson v. Pattison, Elder & Co.* (1895) 22 R. 432, per Lord Low, p.435 and Lords Dunedin and Kinnear, *Wright v. Cotias Investments Inc.* 2001 SLT 353 per L. Macfadyen at 366.

⁴⁰⁷ In an action of defamation, where it was envisaged by a pursuer that the defender would plead privilege it was necessary to plead that the defender had acted maliciously or at least make sufficient averments from which this could be inferred. *M'Bride v. Williams* (1869) 7 M. 427, *Hamilton v. Emslie* (1868) 7 M. 173, *Gibb v. Edinburgh Brewery Co.* (1873) 11 M. 705. Lees in his *Handbook* deals with this under the heading 'The Averments must be Sufficient' *op. cit.* at

words used, or insofar as remembered must be averred and the place where and the persons before whom the defamatory words were uttered all require to be averred.⁴⁰⁸

Where the defamatory statement consists of innuendo, the meaning to be attached to the words used as comprising defamation must be averred.⁴⁰⁹ Where the slanderous statement was privileged, malice must be averred and the circumstances in which malice consisted must be averred.⁴¹⁰

A party can insert into his pleadings an averment⁴¹¹ 'calling' on the other party to provide further specification.⁴¹² This is often employed where a party requires the other to lodge a document founded upon. In addition, where a party has a preliminary plea to the relevancy of another's averments, a call⁴¹³ will operate to put that other party on notice that the averments referred to are considered irrelevant or lacking in specification and so there can be no complaint at a later date when they are challenged at debate.⁴¹⁴ A call need not be answered if it is unrelated to a plea in law or if the party considers that it is not necessary in law or fact to do so,⁴¹⁵ but where the call is answered, it should be removed by the party who inserted it.

p. 37. Bare averments of malice will not be enough. *Campbell v. Cochrane* (1905) 8 F. 205, *Suzor v. McLachlan* 1914 SC 306, *Quilty v. Windsor* 1999 SLT 346.

⁴⁰⁸ Lees, Handbook, p. 40 citing *Broomfield v. Grieg* (1868) 6 M. 992, *Walker v. Cumming* (1868) 6 M. 318. See also *Martin v. McLean* (1884) 6 D. 981, *Bisset v. Ecclesfield* (1864) 2 M. 1096.

⁴⁰⁹ Lees Handbook *op. cit.* p. 41, citing *Fraser v. Morris* (1885) 18 R. 454, *A. v. B.* (1898) 25 R. 1888, *Godfrey v. Thomson* (1890) 17 R. 1108. See also *Reid v. Moore* (1893) 20 R. 712, *Murdison v. Scottish Football Union* (1896) 23 R. 449.

⁴¹⁰ *Scott v. Turnbull* (1884) 1 R. 1135, *Gordon v. Brit & For. Metalline Co* (1886) 14 R. 75, *Selbie v. Saint* (1891) 18 R. 88 although in some cases a general averment of malice can be sufficient: *Innes v. Adamson* (1889) 17R. 11, *Ingram v. Russell* (1893) 20 R. 777.

⁴¹¹ it is not an averment of fact.

⁴¹² The terminology is a 'call.' The averment will usually be in the form 'The [defender] is called upon to produce [document].'

⁴¹³ in the form 'The [pursuer] is called upon to aver...[details of the specification sought]'

⁴¹⁴ *Gordon v. Donaldson* (1864) 2 M. 758 per LJ-C Inglis at 768, *Bryce v. Allied Ironfounders Ltd.* 1969 SLT (N) 29, *M Publications (Scotland) Ltd. v. Meiland* 1981 SLT (N) 72, *Woodland v. Advocate General & Ors.* (Unreported) 2004 RepLR 63 per Temporary Judge Gordon Reid.

⁴¹⁵ *Bonnor v. Balfour Kilpatrick Ltd.* 1974 SC 223.

(xxi) Peremptory Pleas or Pleas on the Merits.

The pleas or defences on the merits of the action will depend upon the nature and facts and circumstances of the individual case and thus are as numerous and various as the grounds of action.⁴¹⁶ Where the plea is successful, the court will grant decree of absolutor in favour of the defender. When the issue between the parties involves a matter of disputed fact, the defender should state a general plea to the effect that 'the pursuer's averments, so far as material, being unfounded in fact, the defender should be assoilzied.'⁴¹⁷ Where a sum of money is concluded for, it is also often practice to insert another general plea to the effect that 'the sum sued for being excessive, decree should not be pronounced as concluded for.'⁴¹⁸

(xxii) Adjustment.

As noticed in the previous chapter, under the procedure prior to the 1868 Act, parties were entitled to revise their pleadings⁴¹⁹ under the supervision of the Court. With the abolition of revisal other than on cause shown, it became mandatory⁴²⁰ to 'adjust' the printed pleadings⁴²¹ on what was termed the adjustment roll,⁴²² which adjustment

⁴¹⁶ Macphail, *Practice*, para 9.125. There are number based on practice and procedure which are commonly employed *viz.* res judicata; compensation; prescription; *mora*; taciturnity and acquiescence; and retention.

⁴¹⁷ Scott Dickson, 'Pleading' *cit. sup.*, p. 21, Macphail, *Practice*, para. 9.127, Green's Annotated Rules of the Court of Session, p. C160/1. The classical expression of the plea has the wording 'from the conclusions of the summons' at the end. See J.A. (later LP) Clyde, *Practice and Procedure in the Court of Session*, (1906-7) 18 JR 319 at 327.

⁴¹⁸ Green's Annotated Rules *ibid.*

⁴¹⁹ the summons and the defences, and frequently the condescendences and answers.

⁴²⁰ 1868 Act s. 26

⁴²¹ called the 'Open Record'. In the sheriff court, the procedure (introduced by the Sheriff Courts Act 1907) was different. The pleadings were not printed, the record was not made up until after adjustment, which adjustment was supposed to be carried out by the Sheriff Substitute on the suggestion of parties' agents.

⁴²² The adjustment roll was abolished in 1998 (AS (Rules of the Court of Session Amendment) (Miscellaneous) 1998 [S.I. 1998, 890]) although the calling boards in Parliament House still refer to 'Continued Adjustment Rolls'.

was then examined by the Court.⁴²³ In modern practice, the object of adjustment is still to make the parties' pleadings meet one another so that the issues in dispute between them may be ascertained.⁴²⁴ In Court of Session practice,⁴²⁵ an open record is ordered to be made up within 14 days after the lodging of defences, and the pursuer⁴²⁶ must lodge two copies in process and send copies to every other party in the action.⁴²⁷ On lodging, the date of the commencement of an eight week adjustment period is assigned by the Keeper's office⁴²⁸ during which parties are entitled to adjust their pleadings, intimating the adjustments to each other.⁴²⁹ At the end of this period the record closes. At adjustment the parties have large powers to extend, amplify, and revise their condescendence, answers and pleas in law as they see fit⁴³⁰ other than alterations to the instance of the cause or the conclusions, which must be altered by amendment. The Court now has no control over the nature or scope of the adjustments made by the parties⁴³¹ and parties may adjust to make quite radical

⁴²³ There had been adjustment after revisal previously but those adjustments before the Ordinary could not amount to or be equivalent to what should have been a revisal. With the dramatic decrease in revisal after 1868, this rule was no longer enforced. See Mackay, *Manual* 229.

⁴²⁴ *M'Bain v. Wallace* (1881) 8 R. (HL) 106 per L. Watson. See also A.G. Walker, 'Written Pleadings' *op. cit.* at 162-3.

⁴²⁵ This is not required in sheriff court procedure. The procedure for adjustment in the sheriff court differs slightly following the implementation of the Ordinary Cause Rules 1993 as amended. The procedure is discussed in more detail in the next chapter.

⁴²⁶ or sometimes minuter or petitioner.

⁴²⁷ RCS 22.1.

⁴²⁸ The rule provides that it is the Deputy Principal Clerk of Session. RCS 22.2(1)

⁴²⁹ Formerly the adjustments were marked on the Open Record which produced a 'ticker tape' like document which was hard to follow. Professor Black described the process as a 'sort of nightmarish combination of a jigsaw puzzle and a game of Scrabble.' Black, *Introduction*, p. 31. Under present practice, it is more common to mark the adjustments electronically and for the document to be emailed between the parties.

⁴³⁰ Maclaren, *Practice*, p. 355.

⁴³¹ originally other than the noticing and ordering the removal of scandalous or impertinent averments. See *supra.* and *Sellars v. IMI Yorkshire Imperial Ltd.* 1986 SLT 629 per L J-C Ross at 635-6. Modern practice operates against the Court being able to do so until the action is brought back to the Court on closure of the Record. At that point it is submitted that the Court retains the power to order the removal of such averments, (see *supra.*) However, their incorporation at adjustment may ultimately be considered to be sufficient notice of a line of cross-examination to be employed at proof, even though the averments are ordered to be removed by the Court. (see *supra.*)

alterations to their pleadings, such as introducing wholly new cases, even where such a case is outwith the statutory time limit.⁴³² This period of adjustment may be extended as the Court thinks fit.⁴³³

The process of adjustment is usually initiated by the pursuer, who must admit,⁴³⁴ deny or state 'not known and not admitted' in answer to the defender's averments on the same principles as the defender's answers to the condescence.⁴³⁵ This process is often prefaced with a phrase such as 'With reference to the defender's averments in answer... admitted, not known and not admitted...etc.'⁴³⁶ Thereafter the pursuer may introduce new averments and where these answer averments introduced in the defences, the phrase 'Explained and averred' can be used, although it may be more convenient to insert these in the midst of existing averments.⁴³⁷ The pursuer may wish to use the defender's averments to present an 'esto case' in the alternative and this should be reflected in the averments⁴³⁸ and where necessary, the pleas-in-law.⁴³⁹ To prevent accidentally admitting averments impliedly, as already noticed, the pursuer should end the averments with a phrase such as '*Quoad ultra* the defender's averments in answer are denied except insofar as

⁴³² *Sellars v. IMI Yorkshire Imperial Ltd.* 1986 SLT 629.

⁴³³ RCS 22.2(3)(b).

⁴³⁴ or aver that the averment is 'believed to be true'.

⁴³⁵ see *supra*.

⁴³⁶ This phrase acts as a signpost to someone quickly reading the record that the following passage is the pursuer's answer to the defender's positive averments of fact.

⁴³⁷ Black, *Introduction*, at 32.

⁴³⁸ employing the preface *separatim* if the defender's facts differ from those pled in the condescence. Macphail, *Practice*, paras. 9.46 and 9.56.

⁴³⁹ Macphail, *Practice*, paras. 9.56, 9.57, 9.104 and 9.128.

coinciding herewith.⁴⁴⁰ If the pursuer adds a plea to the relevancy of the defender's averments at adjustment, this should be inserted after the original pleas in law.⁴⁴¹

The defender may thereafter adjust in light thereof⁴⁴² and the whole process may continue until the end of the adjustment period.

(xxiii) Procedure on Closure of the Record.

In the Court of Session, on the automatic⁴⁴³ closure of the record, within four weeks thereafter the pursuer must lodge copies of the closed record⁴⁴⁴ (comprising the pleadings of the parties and the interlocutors pronounced to that date) and send copies to the defender and other parties to the cause.⁴⁴⁵ The pursuer must then lodge a motion craving the Court to appoint further procedure.⁴⁴⁶

A plea to specification, usually linked with relevancy, will be disposed of in

Procedure Roll and the plea either reserved or disposed of. If the averments are

⁴⁴⁰ *Central Motor Engineering Co. v. Galbraith* 1918 SC 755. This has become accepted practice (see e.g. Macphail, *Practice*, para 9.131) although it was at one time thought that it could be dangerous to use this phrase. See *supra*.

⁴⁴¹ Macphail, *Practice*, para. 9.131. Inserting it before the original pleas and then renumbering is a common error. Black, *Introduction*, p. 31.

⁴⁴² introducing a counterclaim or inserting averments setting up a third party notice.

⁴⁴³ An interlocutor was previously required.

⁴⁴⁴ There can be a motion to allow the closed record to be received late. See P.N. No. 5 of 1991 for provisions regulating such motions.

⁴⁴⁵ RCS 22.3(1).

⁴⁴⁶ The parties are required to discuss further procedure at closing (Practice Note No. 3 of 1991) and the expenses of an unnecessary hearing on the By Order (Adjustment) Roll will be awarded against the party who has not entered into such discussions. Where parties are agreed on further procedure the motion will crave one of Procedure Roll debate, preliminary proof on specified matters, PBA, proof, issues for jury trial or some other specified order. Where parties are not agreed, the motion is to appoint the cause to the By Order (Adjustment) Roll where further procedure is determined. If a party insists in a preliminary plea the cause is sent to procedure roll although the other party may in such circumstances offer a Proof Before Answer, for the purposes of ultimate expenses, should the insisting party fail at debate.

irrelevant or wanting in specification, or both, the court may dismiss the case⁴⁴⁷ or refuse to allow such averments as are irrelevant to be proved⁴⁴⁸ or, if requested, give the pursuer the opportunity of amending his record.⁴⁴⁹ At procedure roll, the onus is on the defender. There is no onus on the pursuer to show that if proved his action is bound to succeed.⁴⁵⁰ If the pursuer's averments are relevant and specifically stated the defender's plea will be repelled.

Where the relevancy of the case is so doubtful, or so bound up with the merits, that it is necessary to have the facts ascertained before deciding upon relevancy then the Court will assign a Proof Before Answer.⁴⁵¹ Previously, this course was often followed in actions of reparation⁴⁵² although the Court may do so in any cause.

(xxiv) Notes of Argument.

In Court of Session procedure, if the cause has been appointed⁴⁵³ to the procedure roll,⁴⁵⁴ then preliminary pleas are debated and disposed of⁴⁵⁵ and irrelevant

⁴⁴⁷ *Mone v. Anderson* (1842) 4D 786, *Chiene v. Archibald* (1868) 6 SLR 62, *Gray v. Scottish Society for the Prevention of Cruelty to Animals* (1890) 17 R. 1185, *Evans v. Stein & Co.* (1904) 7 F. 65 per L. Kinnear 72.

⁴⁴⁸ *A. v. B.* (1895) 22 R. 402, *Inglis v. National Bank of Scotland* 1909 SC 1038 per L. M'Laren

⁴⁴⁹ *Robertson v. Cockburn* (1875) 3 R. 21. It was thought previously that a case was rarely dismissed for want of specification as the Court either allowed an amendment or ordered a proof before answer. See R.E. Monteith Smith, Advocate, in (ed. J Chisholm) *Green's Encyclopaedia of the Law of Scotland* (Edinburgh, 1910) s.v. 'Defences' at 323. This is probably still apposite, as it has been considered unjust to dismiss an action because of a formal pleading defect which can be put right without prejudice to the other side. *GUS Property Management Ltd. v. Littlewoods Mail Order Stores Ltd.* 1982 SC (HL) 157 per Lord Keith of Kinkel at 178.

⁴⁵⁰ *Jamieson v. Jamieson* 1952 SC (HL) 44 at 50 and 63.

⁴⁵¹ *Robertson v. Murphy* (1867) 6 M. 114, *Macvean v. MacLean* (1873) 11 M. 506, *Gilillan v. Lanark County Council* (1902) 9 SLT 432.

⁴⁵² *Hunter v. John Brown & Co.* 1961 SC 231, *Robertson v. Smith* 1962 SC 628, *Cole-Hamilton v. Boyd* 1963 SC (HL) 1.

⁴⁵³ following a motion by either party. The party not so moving is not however precluded from debating his own preliminary plea. *McIntosh v. Cockburn & Co. Ltd.* 1953 SC 88.

⁴⁵⁴ see *infra*.

⁴⁵⁵ including whether inquiry into the facts should proceed by proof or jury trial or whether there should be a preliminary proof.

averments are excluded.⁴⁵⁶ In an ordinary action,⁴⁵⁷ the Court may at its own instance or on the motion of a party, ordain a party to lodge in process a concise note of argument⁴⁵⁸ consisting of numbered paragraphs stating the grounds on which he proposes to submit that a preliminary plea should be sustained.⁴⁵⁹ It has been said that 'the provisions of Rule of Court 22.4 and of the Practice Note No.4 of 1997 are intended to facilitate the efficient use of diets allocated for Procedure Roll discussions by the conveyance of information by one party to another party concerning the criticisms which the former intends to level at the pleadings of the latter.'⁴⁶⁰ In practice, the procedure has not worked particularly well, and late or non-existent Notes of Argument will not necessarily prevent a party arguing his preliminary pleas at procedure roll discussion.⁴⁶¹ Where a Note has been ordained, this requirement is often obtempered by lodging a Note containing some degree of argument, not necessarily concise, nor containing all of the points which could be taken. At Procedure Roll discussion, it is not uncommon for counsel to depart from the grounds contained in the Note.⁴⁶² There does not appear to be any sanction

⁴⁵⁶ *Inglis v. National Bank of Scotland Ltd.* 1909 SC 1038.

⁴⁵⁷ There are separate provisions in respect of (old) personal injury actions, commercial actions and intellectual property actions.

⁴⁵⁸ one may note that the requirement re-introduces what had been practised, although discouraged, in the previous period. See Chapters 2 and 3.

⁴⁵⁹ RCS 22.4. The rule seems to give the Court a discretion in ordering Notes although Practice Note 4 of 1997 requires the Ordinary (peremptorily) to 'appoint' a note within 28 days (without specifying the starting date) although a practice note will not alter the discretion of the court or alter a statutory instrument. The confusion which has arisen has been said to be 'unfortunate'. *Fairbairn v. Vayro* 2001 SLT 1167 per L. Osborne. The P.N. is rather unsatisfactory as it also does not specify how it is to be read in conjunction with a previous practice note, viz. P.N. No. 3 of 1991, introduced to reduce the number of causes appointed unnecessarily to the Procedure Roll (80% appointed taken off before hearing). The 1991 provision required that where a cause was appointed to the P.R., the party whose plea was to be argued would inform his opponent of the nature of the proposed argument at the earliest opportunity. It has been suggested that this provision has been superseded by the 1997 provision, although the former has not been (and ought to be) formally withdrawn. *Fairbairn supra*.

⁴⁶⁰ *Fairbairn supra*.

⁴⁶¹ *Speirs v. British Railways Board* 1997 SLT 1144 (under P.N. No. 3 of 1991), *Fairbairn supra*.

⁴⁶² See e.g. *Livingstone v. Fife Council* (unreported) 13th January 2004 per Lord Philip.

attached to this practice other than the usual adverse award of expenses in the more extreme type of case. Even in a proof before answer, it may be open to a party to take a point of relevancy of which no notice has been given in the Note, at a very late stage.⁴⁶³

In the sheriff court, under OCR 22.1, where a party seeks to insist upon a preliminary plea, he must lodge a 'Note of Basis of Preliminary Plea'⁴⁶⁴ not later than three days before the 'options hearing.' He will be deemed to be no longer insisting upon the plea should he fail to do so and the plea(s) will be repelled⁴⁶⁵ and will not be permitted to be re-inserted in the course of amendment.⁴⁶⁶ Parties in the Sheriff court will only be permitted to proceed to debate where the court is satisfied that there is a legal point worthy of debate.⁴⁶⁷

(xxv) Debate, Proof Before Answer and Proof.

It will be apparent from the above that a debate⁴⁶⁸ proceeds upon the law pertaining to the case. For the purposes of a debate, the averments of the parties are taken *pro veritate*. If, after argument, the court is minded to finally determine the action, the result will be dismissal of the action or decree *de plano*. Prior to debate the parties must give intimation of the basis of the points which they will be seeking to

⁴⁶³ See *Caledonia North Sea Ltd. v. London Bridge Engineering Ltd.* 2000 SLT 1123 which was a (391 day) proof where the defenders had a general plea to the relevancy in their pleadings, although obviously no Note of Argument. They were held to be entitled to insist in the plea on day 381. See further MacKenzie, *Written Pleadings, op. cit.*, p. 189.

⁴⁶⁴ often referred to as a 'Rule 22 Note'.

⁴⁶⁵ *Bell v. John Davidson (Pipes) Ltd.* 1995 SCLR 192, *Group 4 Total Security v. Jaymarke Developments* 1995 SCLR 303, *Colvin v. Montgomery Preservations* 1995 SCLR 40, *Ferguson and Menzies v. JW Soil Suppliers* 1998 SCLR 1043.

⁴⁶⁶ unless they are directed at new material in the other party's minute of amendment. *George Martin (Builders) Ltd. v. Jamal* 2001 SLT 119.

⁴⁶⁷ OCR r. 9.12(3)(c), *Gracey v. Sykes* 1994 SCLR 909, *MacFarlane v. Falkirk Council* 2000 SLT (Sh Ct) 29, *Colvin op. cit.*

⁴⁶⁸ In the Court of Session, a debate is usually called a 'Procedure Roll Discussion' following the terminology of an earlier period. In practice, however, it is increasingly also called a 'Procedure Roll Debate.'

debate.⁴⁶⁹ If the court considers that the point of law raised cannot be decided without inquiry into the facts, it will permit the case to go to a proof before answer. In the Court of Session, in ordinary actions, a party may still insist in his preliminary pleas and take the case to debate. In other types of Court of Session action⁴⁷⁰ and in the sheriff court, a debate will only be granted if the court is satisfied that there is a point to be debated. Debates on relevancy as specification were once common place, strict interpretations of the pleadings were entertained and this frequently resulted in dismissals.⁴⁷¹ Now, the general tendency in the Court of Session seems to be against such an approach.⁴⁷² A proof will be allowed⁴⁷³ where, (as appropriate) the parties do not insist in their preliminary pleas or where the court is either not satisfied that there is a point to be debated or decides that Proof before Answer is inappropriate.

(xxvi) Amendment in Defended Actions.

The introduction of the power of amendment and its development at the end of the nineteenth century has been examined in the previous chapter.⁴⁷⁴ The Court is still seized of the power to permit parties to make alterations to their pleadings. The procedure is governed by RCS 24.1.⁴⁷⁵ The Court may⁴⁷⁶ at any time before final judgment, allow an amendment of a principal writ, which may be necessary for the

⁴⁶⁹ In the Court of Session by a Note of Argument and in the sheriff court by a Rule 22.1 Note of Basis of Preliminary Plea. (see *supra*.)

⁴⁷⁰ i.e. in commercial causes under Chapter 47. In 'new personal injury actions' under new Chapter 43 debate is heavily discouraged.

⁴⁷¹ see Chapter Five *infra*.

⁴⁷² see e.g. *McLatchie v. Scottish Society for Autism* (unreported) 4 February 2004 per Lord McEwan.

⁴⁷³ the terminology harks back to the period examined in Chapter One whereby a party was granted an Act of Litiscontestation or Act Before Answer, and then a 'Term for Proving' circumducing what could be proved and thus proof was permitted or 'allowed'.

⁴⁷⁴ Following the 1871 Commissioners' Fourth Report the power of amendment was eventually greatly increased by AS 20 March 1907 such that the record could be amended at any time during the continuation of the cause on conditions as to expenses.

⁴⁷⁵ ss. 20 and 29 of the 1868 act were repealed by the Court of Session Act 1988, Sch. 2. In the sheriff court, amendment is regulated by OCR, r. 18.2 in similar terms to Ch. 24 of the RCS.

⁴⁷⁶ The allowance is discretionary. *Thomson v. Glasgow Corporation* 1962 SC (HL) 36.

purpose of determining the real question in controversy between the parties,⁴⁷⁷ notwithstanding that in consequence a sum sued for is increased or restricted or a different remedy is sought from that originally concluded for⁴⁷⁸ and it may allow and amendment of a condescence, defences, answers, pleas-in-law or other pleadings which may be necessary for determining the real question in controversy between the parties.

From its introduction in 1868, there has been a progressive relaxation of the system thought too rigid for modern conditions. Amendment is, in theory, a belated adjustment for which the laggard has to pay.⁴⁷⁹ In amendment⁴⁸⁰ the court has a wide discretion.⁴⁸¹ The amendment must be competent and the Court must be satisfied that it is in the interests of justice that the amendment is allowed.⁴⁸² The Court, in exercising its discretion, will consider any delay in seeking the amendment, any prejudice occasioned to another party by the allowance of amendment as well as the stage at which amendment is sought. It may attach conditions to the allowance of amendment, such as the expenses occasioned thereby.

The amendments to his pleadings proposed by a party will be contained in a minute of amendment. The procedure for amendment is contained in RCS 24.2 and OCR 18.2. A party may seek leave to amend at any time from the closing of the record to

⁴⁷⁷ the modern wording mirrors the 1868 wording. See *supra* Chapter 3.

⁴⁷⁸ RCS 24.1(1) and (2). The rule also permits changes to the instance. See RCS 24.1 and *supra*.

⁴⁷⁹ LJ-C Thomson in *Thomson v. Glasgow Corporation*.

⁴⁸⁰ In the following the principal points relating to amendment will be noticed. The case law pertaining to amendment is considerable and reference is made to Macphail, *Practice*, Ch. 10, Green's Annotated Rules of the Court of Session, Annotations at paras. 24.1.1ff. and Maxwell, *Practice* at pp. 161-2, 214-5, 303, 307-9 and 330 ff.

⁴⁸¹ *Rackshaw v. Douglas* 1919 SC 354.

⁴⁸² *Thomson op. cit.* per LJ-C Thomson at 51, *Dryburgh v. National Coal Board* 1962 SC 485 per L. Guthrie at 492.

final judgment. It is accordingly competent to seek leave before or at procedure roll discussion, once proof or issues have been allowed, immediately before (or during) proof or jury trial and even after the proof or jury trial but before judgment.

Amendment may also be sought before appeal or reclaiming, during it, and again after it.⁴⁸³

⁴⁸³ There is much case law relating to amendment at all of these stages. See Macphail, *Practice*, paras. 10.15-10.28, and Green's Annotated Rules 24.1.1ff.

Chapter Five

The Use of Written Pleadings in the 20th Century.

(i) Introduction

At the present time the system of written pleadings in Scotland is under attack. It is more the practice than the theory which is criticised, yet the system as a whole is seen as productive of delay, expense and failing to perform the functions attributed to it at the start of Chapter 4. The causes of these failures are complex but lie partly in the foundation of the system as being based in 'adversarialism' and partly because twentieth century practice developed in a particular way. Now the system and the traditional rôles of the judge and the parties in civil litigation are being re-assessed. Abolition of written pleadings as traditionally practised is a possibility and is examined in the next chapter. In this chapter, I trace how Scottish civil procedure embraced English notions of 'adversarialism' albeit with modifications and how written pleadings were practised in light of that in the twentieth century. At the end, I offer some of my own reflections on the rules of written pleadings and their practice, drawing on their evolution in this period.

(ii) The Historical 'Civilian Stock' in Scottish Civil Procedure.

In the first three chapters of this thesis, the development of written pleading has been traced from the late seventeenth century onwards and in Chapter Four, a statement of the modern rules relating to written pleadings in Scots civil procedure has been attempted. In this development, we have noticed the early control exercised by the Court in requiring parties to state their pleas in fact and law as short propositions, written down, and debated as to relevancy. Proof was not automatic, only being

permitted through the vehicle of the act of *litiscontestatio*. The opportunity of representation, reporting and reclaiming provided avenues for parties to force the Court to reconsider decisions and was part of the Civilian doctrines which it had inherited from its institution. As procedure developed, the Court still exercised control over the preparation of parties' positions in fact and law, albeit that parts of this procedure increasingly were in written form. The introduction of civil jury trial, however, was the first step in parties' pleadings stating facts quite independently of the statements of law. With the development of the Court's procedure under the Court of Session Act 1825 and the Court of Session Act 1850, the Court was still nominally controlling the content of written pleading. But the element of 'supervision' and 'intervention' was little used, perhaps for the reasons discussed in Chapter Three, and parties came to control the content of the pleadings, and to a large extent, the pace of progress of the cause. As demonstrated in the last chapter, the modern rules¹ for written pleading reflect the fact that it is still for the parties to control the content of the pleadings.² Subject to recent innovations in Court of Session and sheriff court procedures, some would maintain that the parties retain *de facto* control of the pace of 'their' litigation. The detailed rules regulating admissions, deemed admissions, the requirement for formal denial, the circumstances in which a party may aver that he does not know the truth of an averment, and the 'weaker alternative rule' all operate against this background of party control. If there is anything remiss or which offends one of the rules, it is for the opposing party to endeavour to bring it before the Court for consideration, not for the Court to notice it and suggest an alteration. Although historically the Court has had powers to do so,

¹ i.e. the traditional rules or those conventionally understood to apply to written pleading.

² subject to the Court ordering the removal of impertinent or scandalous averments.

the right of controlling the content of written pleadings has been jealously guarded by the profession.

Recent reforms to the system of written pleadings have altered traditional views. Procedure in the Court of Session is presently undergoing incremental change both in practice and theory. Litigation has conventionally been conducted 'adversarially.' These reforms have implicitly called into question whether certain elements of adversarialism still have a place in modern civil litigation.

In the examination of the operation of pleadings in the 'culture of adversarialism' one may question the true rôle of the judge and the parties. The characterisation of Scottish civil procedure as adversarial pre-conceives a number of factors. These are relevant to any consideration of how civil procedure and written pleadings should operate or, indeed, should be reformed.

From there, we can legitimately question whether our system of written pleading is inherently flawed and, if so, we might ask how the system should be changed. Should pleading in writing be removed altogether, or simplified, or is it the case that the system requires only minor alteration? If alterations are required to modern civil procedure should we proceed with caution on the basis that such changes can have as profound an effect as alterations to the substantive law?³ The first point of exploration in answering these questions is to consider what is meant by civil procedure operating as an 'adversary' system and it is to this that we now turn.

³ C.K. Davidson, [Rt. Hon. Lord], 'Law Reform - Who Cares?' (1992) 37 J.L.S.S. 130.

(iii) The Adversarial Culture and the Rôle of the Judge.

In modern practice it is uncontroversial to say that the nature of the rules of civil procedure and the system of written pleadings in Scotland is adversarial⁴ or accusatorial.⁵ From the earliest periods in the history of civil procedure, an action was brought by a pursuer summoning the defender and thereafter the parties battled it out until the court found in favour of one or the other. In the battle, the parties could use the courts' procedure tactically. Written pleadings initially were designed not to give the other side notice of one's case but to provide information to the court which would help in its decision making, hopefully in one's favour.

But a classification of a civil procedural system as 'adversarial' or 'accusatorial' also brings with it pre-conceived ideas about the function of the judge, fact finding and the rôle of written pleadings. These ideas are directly inherited from the development of English civil procedure and other 'common law' systems.

Historically,⁶ in Anglo-American jurisprudence, the adversary system was⁷ considered fundamental to civil procedure, and almost an article of faith for the common lawyer.⁸ Written pleadings played a key rôle in the selection of matters of controversy between the parties and reflected the role of the Court.⁹ Because the concept of adversarialism required the court to act as a kind of impartial judicial

⁴ Hon. Lord Cullen, *Review of Business of the Outer House of the Court of Session* (1996) accepted this as stated fact. Here I mean that the system is adversarial in the wide sense of pitting adversaries against each other.

⁵ I.D. Macphail, 'The Path to the Summit' 1963 SLT (News) 21.

⁶ for the purposes of this discussion, after the English Judicature Acts 1873-75.

⁷ the past tense is used as English procedural law has recently retreated from the adversarial principles of this period.

⁸ J. Jacob, *The Fabric of English Civil Justice* (Hamlyn Lectures, 1987) p. 5ff.

umpire,¹⁰ only deciding matters between the parties,¹¹ it was for the parties as adversaries to formulate their cases in their own way subject to the rules of pleadings,¹² setting out the material facts and answering the pleading of his opponent detailing his response to each allegation of fact. The parties could not depart from their pleadings without leave of the court and the parties would thus know each other's position and would not therefore be taken by surprise at trial. In this, it was no part of the duty or function of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves raised in their pleadings.¹³

In the pre-1873 period in England, the rules of pleading in the *fora* of common law and equity, had become highly complex and irrational.¹⁴ In 'common law pleading' the plaintiff had to choose a form of action to which he was thereafter tied, and mistakes were fatal, and in 'equity pleading' the goal was to bring all the facts before the court.¹⁵ There followed the large procedural reforms of the nineteenth century.¹⁶

⁹ W. Holdsworth, *A History of English Law* (4th ed., 1926) Vol. IX, pp. 280-1, J. Jacob and I. Goldrein, *Pleadings, Principles and Practice*, (Sweet & Maxwell, Litigation Library) p. 8, *Fallon v. Calvert* [1960] 2 QB 201 per Pearce LJ at 204.

¹⁰ A.A.S. Zuckerman, 'A Reform of Civil Procedure – Rationing Procedure rather than Access to Justice' (1995) 22 *Journal of Law and Society* 155 at 158.

¹¹ J. Jacob, 'The Present Importance of Pleadings' (1960) 13 *Current Legal Problems* 171 at 174

¹² L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, *Esso Petroleum Co. Ltd. v. Southport Corporation* [1954] 2 QB 182 per Morris LJ at 207.

¹³ Jacob, 'Importance' *ibid.* p. 175. also quoted by Macphail, *Practice op. cit.* para 9.05

¹⁴ D.A. [Mr. Justice] Ipp, 'Reforms to the Adversarial Process in Civil Litigation' (1995) 69 *Australian Law Journal* 705.

¹⁵ See further W. Holdsworth, *A History of English Law*, *op. cit.*, Vol IX, p. 336, J. Jacob, *Pleadings, Principles and Practice*, *op. cit.* pp. 19-26.

¹⁶ This has been touched upon in previous chapters. In particular see the explanatory foot notes on demurrers in Chapter 3. The reform was incremental through the Hilary Rules 1834, Law Procedure Acts 1852 and 1854 (abolishing demurrers for want of form), the Judicature Acts 1873-75 (which swept away both forms and replaced them with a uniform system of pleading) and the 1883 Rules of Court which abolished demurrer and replaced it with a rule which permitted the taking of a preliminary point of law on the pleadings which was dealt with as a separate issue whereby if the point was decisive of the rights of the parties, then there was no need for a trial on facts and if the claim was bad in law, even on the assumption that the facts alleged by the plaintiff were true, the action could be dismissed. See Jacob,

With the reforms came the ultimate abandonment of common law 'issuable pleading' i.e. that the pleadings would culminate in the emergence of a single issue of fact or law between the parties,¹⁷ with its rigid and technical defects of *inter alia* 'demurrer' and 'protestation.'¹⁸ The reforms refined 'equity pleading' i.e. that all the facts should be brought before the court in its determination of all the matters in controversy between the parties.¹⁹ Thereafter, 'fact pleading' was to operate, i.e. that parties had to state a series of allegations of fact, not evidence, nor legal conclusions drawn therefrom and the defendant had to deny such of these statements as he wished to put in controversy, alleging any additional facts upon which he relied to which the plaintiff could reply.²⁰

Following these reforms, it was still the proper function of the judge in civil proceedings to act impartially, not entering into the merits of the case between the parties before he was called upon to do so, and thus the function of pleadings was to determine the issues for adjudication. Like an umpire at a cricket match, the judge's rôle was to answer the question 'How's that?'²¹ In American civil procedure, the approach was the same, - what was called the 'sporting theory of justice'.²²

Pleadings, Principles and Practice op. cit. *ibid.*, and in addition K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd ed., tr. Tony Weir), (Oxford, 1998) 198, J. A. Jolowicz, 'Abuse of Process of the Court: Handle with Care', (1990) *Current Legal Problems* 77 at 82-3.

¹⁷ and thus fact would go to the jury and law for decision by the court. See *supra* Ch. 3

¹⁸ J. Jacob, *Pleadings, Principles and Practice*, op. cit. pp. 22.

¹⁹ J. A. Jolowicz, Reform of English civil procedure: a derogation from the adversary system?' in (same author) *On Civil Procedure* (Cambridge UP, 2000) 373 at 373-4.

²⁰ J.A. Jolowicz, 'Some twentieth-century developments in Anglo-American civil procedure' in (same author) *On Civil Procedure* (Cambridge UP, 2000) 23 at 35. Fact Pleading had developed in New York in 1848. *ibid.*

²¹ Pollock and Maitland, *History of English Law* (2nd ed.) (Cambridge UP, 1968) 670-1.

²² This was Roscoe Pound's term. He had castigated this theory of justice as 'rights' of one party were vested in procedural errors of the other and did not provide substantive justice. R. Pound, *Causes of Popular Dissatisfaction with the Administration of Justice* (1906) 40

In summary, the central tenets of the Anglo-American traditional adversarial system were: that it was the parties who initiated the action; framed the pleadings; selected the material facts; selected the bases in law upon which the suit proceeded; and determined to a large extent the progress of the suit, the conduct of the trial and any appeal thereafter.²³ The pleadings and the procedure pre-trial were all directed towards a set piece, single session trial²⁴ at which both sides would confront each other before the presiding judge and the jury.²⁵ Thus justice would be best served if the advocate and the decision maker were different persons.²⁶ The task of the judge throughout was to ensure the due administration of justice between the parties, not necessarily the ascertainment of truth.²⁷ The judge was the referee and the parties were the competitors. As Lord Denning commented in *Burmah Oil Co. v. Bank of England*,²⁸

‘In litigation, as in war. If one side makes a mistake, the other can take advantage of it. No holds are barred.’²⁹

American Law Review 729. See also DAO Edward, Different Assumptions – Different Methods, SSC Biennial Lecture (23 November 1990) p. 9.

²³ M.R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale UP, 1986) 104ff, C. Glasser, ‘Civil Procedure and the Lawyers – the Adversary Principle and the Decline of the Orality Principle’ (1993) 56 MLR 307, N. Andrews, ‘The Adversarial Principle: Fairness and Efficiency: Reflections on the Recommendations of the Woolf Report in (eds. A.A.S. Zuckerman & R. Cranston) *Reform of Civil Procedure. Essays on ‘Access to Justice’* (Oxford, 1995) 169 at 171.

²⁴ which could not be adjourned.

²⁵ P. Stein, *Legal Institutions: The Development of Dispute Settlement* (London, 1984) 36-7.

²⁶ B. Danet and B. Bogoch, ‘Fixed Fight or Free-For-All? An Empirical Study of Combativeness in the Adversary System of Justice’ (1980) 7 *British Journal of Law and Society* 36.

²⁷ *Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394 per L. Wilberforce at 438-9 and L. Denning M.R. at 411. However, there have been contrary opinions expressed. Thus, ‘Truth is best discovered by powerful statements on both sides of the question’ per Lord Chancellor Eldon in *Ex part Lloyd* 1822 Mont 70, 72n and see Denning L.J. himself in *Jones v. NCB* [1957] 2 Q.B. 55 at 63 also quoting Macauley that the ‘fairest decision is obtained when two men argue as unfairly as possible, on opposite sides’ for then ‘it is certain that no important consideration will altogether escape notice’. Note, also referred to by I. D. Macphail, ‘The Path to the Summit’ *op. cit.* p. 22.

²⁸ [1979] 1 WLR 473 at 484.

²⁹ Such an approach gives credence to Couture’s concept of civil litigation as ‘civilisation’s substitute for vengeance’ (E. Couture, ‘The Nature of Judicial Process (1950) 25 *Tulane LR* 1 at

Before considering the Scottish position, we must notice the other historical approach to civil procedure and judicial function in Western legal thought and tradition.

'Continental' or 'civil law' systems are said to be 'inquisitorial'.³⁰ What is meant by this, at its simplest, is that the civil law procedural systems do not possess a jury, do not rely so heavily upon written pleadings and the judge is vested with greater powers to investigate the 'truth' of the parties' contentions and he is bound to question, inform, encourage and advise the parties, lawyers and witnesses so as to get a true and complete picture.³¹ The judge is normally a trained professional.³² He may even make findings on legal grounds not advanced by the parties.³³ Previous cases on similar facts do not necessarily determine the dispute in the present, civil law systems placing a greater store on the elucidation of principle from institutional writers, codes and principles encapsulated in previous decisions.

Separately but related to this, Lord President Cooper saw differences between the two systems in the modes of reasoning employed in each:

A civilian system differs from a Common Law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally

7). C.f., however, the comments of Lord Donaldson, M.R. in *Davies v. Eli Lilly and Co.* [1987] 1 WLR 428 at 431 - '[L]itigation is not a war or even a game.'

³⁰ which to many in common law systems conjures up images of the methods of the Spanish Inquisition. J.A Jolowicz, 'Fact-Finding: A Comparative Perspective', in D.L. Carey Miller and P. Beaumont (eds.), *The Option of Litigating in Europe*, United Kingdom Comparative Law Series, vol. 14, (Edinburgh, 1993) 133 J. Chorus, 'Civilian Elements in European Civil Procedure', in: D.L. Carey Miller and R. Zimmerman (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, (Berlin, 1997) 295 at 298.

³¹ K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd ed., tr. Tony Weir), (Oxford, 1998) 273.

³² i.e. from an early stage, candidates are selected for judicial training and do not practise as opposed to the common law systems in which the judge will almost always be appointed after a long period in practice.

³³ J. Chorus, 'Civilian Elements in European Civil Procedure', in: D.L. Carey Miller and R. Zimmerman (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, (Berlin, 1997) 295 at 301.

reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?" The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematise. The working rule of the common lawyer is *solvitur ambulando*.³⁴

In conclusion, it might be said that the two systems approach reasoning and 'fact-finding' in different ways. The common law tradition 'perceives fact-finding as a 'lay' activity separate from, and generally anterior to the 'judicial' activity of interpreting and applying the law' whereas the civil law tradition sees 'fact-finding as an integral part of the process by which a dispute between laymen is submitted for determination by a trained professional judiciary.'³⁵ It has been said that there is also a psychological distinction in this approach to fact-finding, the adversarial system assuming a witness will be unlikely to tell the truth unless he testifies in open court and is challenged by the party against whom he is testifying and the inquisitorial procedure assuming that a witness will be inhibited by the prospect of challenge and is more likely to tell the truth in private to a judge who questions him from a neutral standpoint.³⁶

³⁴ Rt. Hon. Lord Cooper of Culross, 'The Common Law and the Civil Law - A Scot's View' in: *Selected Papers 1922 -1954* (Edinburgh, 1957) 201 at 204. Note, though, that he added that this was a deliberate overstatement of the position. *ibid*.

³⁵ D. Edward, 'Fact-Finding: A British Perspective', in D.L. Carey Miller and P. Beaumont (eds.), *The Option of Litigating in Europe, United Kingdom Comparative Law Series*, vol. 14, (Edinburgh, 1993) p.43 at 55.

In reality, these two classifications are probably more misleading than helpful³⁷ as they presuppose two parallel procedural systems which can be directly compared point by point. Broad comparisons can of course be made³⁸ but in practice, continental systems differ amongst themselves and there are elements of adversarialism in all.³⁹ Sometimes inquisitorial systems do not actually employ all of the elements which the common lawyer would perceive as inquisitorialism in civil (i.e. non-criminal) actions.⁴⁰ So also, common law systems have retreated from the standards of adversarialism and for some time have adopted, in part, so-called 'inquisitorial' approaches.

(iv) Civilian and Common Law Elements in the Development in Scots Civil Procedure From 1800 Onwards.

What of Scotland? Scots law is said to be a 'mixed system' of law. What is meant by this, very simply, is that Scots law, as a result of its development, has one foot in the English common law system and the other in the civil law tradition.⁴¹ This is so in the context of civil procedure. From the examination of civil procedure and the development of written pleadings in the previous chapters, it is apparent that up to the introduction of civil jury trial, Scotland from the inception of the College of

³⁶ P. Stein, *Legal Institutions: The Development of Dispute Settlement* (London, 1984) 38.

³⁷ D. Edward, 'Fact-Finding' *cit sup.* p. 43, *idem.*, Different Assumptions – Different Methods SSC Biennial Lecture 1990 at 8, J.A Jolowicz, 'Fact-Finding: A Comparative Perspective', in D.L. Carey Miller and P. Beaumont (eds.), *The Option of Litigating in Europe*, United Kingdom Comparative Law Series, vol. 14, (Edinburgh, 1993) 133 at p. 133-5, J. Chorus, 'Civilian Elements in European Civil Procedure', in: D.L. Carey Miller and R. Zimmerman (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, (Berlin, 1997) 295 at 298.

³⁸ J.A. Jolowicz, 'Fact-finding' in *On Civil Procedure*, (Cambridge UP, 2000) p. 205

³⁹ D. Edward, 'Fact-Finding' *cit sup.* p.43.

⁴⁰ D.A.O. Edward, Different Assumptions – Different Methods SSC Biennial Lecture 1990 p. 11.

⁴¹ This is very simplistic. In recent years there has been considerable debate on the past, present and future relationship of Scots Law with common law and civil law. The purpose of the following is to assess Scottish civil procedure against the background of some of the constituent elements of common law 'adversarialism' and civil law (historical and present) 'inquisitorialism.'

Justice in the sixteenth century, had a form of process which had been influenced by Romano-canonical procedures of the ecclesiastical courts. Thus the deployment of syllogistic or enthememic argument in pleading, the summons in writing, the nature of defences available to defenders, the oral dispute or debate, which was carefully noted, judged in the first instance in relevancy (taking fact in the hypothetical) and then followed by *litiscontestatio* with warrants for proof, (the allowance of probation being a matter for the Court) were all features of Romano-canonical procedure and the old civilian systems of the continent. So too, the use of rhetorical written pleadings to advance arguments in probability, the power of the Ordinary to act unilaterally in reporting, the sitting of the Court unitarily, the power of the judges to suggest to parties pleas which if inserted might be relevant,⁴² the availability of proof other than by oral testimony, the oaths and presumptions and the questioning of witnesses by judges,⁴³ and initially at least, unrestricted opportunities for review also demonstrate this lineage. Later, the practical operation of deciding causes on written pleadings with little *viva voce* or oral pleading also mirrored developments on the continent.⁴⁴ The avowed intention of the Court at the start of the nineteenth century was to separate fact and law in pleadings for the proper determination of causes such that the newly introduced jury trial could determine issues of fact. This marked the start of the slide towards English common law procedure. But that is not to say that jury practice converted the Scottish system of written pleadings into one akin to the contemporaneous English common law. The 1825 Act was packed with provisions which could be categorised as derived from civilian stock. As has been

⁴² Stair, IV. 39.14. See also J. Chorus, 'The Judge's role in the conduct of civil proceedings: Some Continental and Scottish Ideas from before 1800', in D.L. Carey Miller and D.W. Meyers, (eds.), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith, Q.C.*, (Edinburgh, 1992) 32 at 46.

⁴³ by the Ordinary on Oaths and Witnesses.

shown, the summons was still a logical ratiocination of law as the major premise, the facts as the minor and the conclusion (under that heading) the order or remedy sought. The law as the major premise was stated in pleas-in-law. Defenders required to answer the facts by denials or admissions, the *ficta confessio* being an integral part of interpreting these answers; and where a defender required to insert his statement of facts, this was executed in the same syllogistical manner, and the pursuer's answers were interpreted in the same way. The judge himself was required to examine into the accuracy of the summons and defences, order the removal of irrelevant material, and could mention 'anything which occurred to him' including suggesting new pleas which had been omitted but which, if the parties inserted them, he would consider relevant. It was the judge who had the power of ordering amendment of the summons and defences, as well as condescendences and answers, and it was his job to put the record into a shape 'most conducive to the ends of justice', authenticating it as properly prepared under his supervision. As Bell remarked, the pleadings proceeded under the 'special superintendence and guidance of the judge'.⁴⁵ It was also the proper function of the judge to decide himself whether the action could be disposed of on relevancy upon the pleadings alone or whether the action should be permitted (i.e. by him) to proceed to jury trial⁴⁶ or to proof. If the latter was permitted, it was invariably sent to a commissioner for the taking of witnesses' evidence but this practice had arisen not from the Court relinquishing its power of questioning witnesses but from the practical consideration that there was insufficient judicial time to permit of it and also, that it was considered a hardship to insist in bringing witnesses from distant parts of the country to be examined in

⁴⁴ P. Stein, 'Common Law and Civil Law in historical perspective', (1997) 5 *Zeitschrift für Europäisches Privatrecht* 385 at 389.

⁴⁵ G.J. Bell, *Examination*, *op. cit.* p.87 See Chapter 3 *supra*.

⁴⁶ although the delineation of 'enumerated causes' restricted this to those causes.

Edinburgh.⁴⁷ Finally it was the judge who decided whether to order 'written cases' thus permitting the argument in writing of older practice.

In all of this, the Ordinary was not merely a 'judicial umpire'. Whilst the parties selected the facts, his statutory responsibilities required him actively to look behind the parties' pleadings and to investigate their positions, even suggesting improvements which each could make, ultimately with the judicial aim of producing in one document the elements of fact and law upon which the parties were at issue. Thereafter it was within his judicial power to decide how the action was best disposed of. It was not for the parties to insist on disposal by relevancy, or proof on commission and the allowance of jury trial was statutorily and, as already noted, judicially controlled.

With the passage of time, the functions of the judge, the parties and the pleadings changed and took on a character which would bear the hallmarks of English civil procedure. Reclaiming, reporting and representation were all severely restricted. As discussed in Chapter 3, the pro-active powers of the Ordinary under the 1825 scheme came to be infrequently exercised, certainly in the 'expunging' of irrelevant material from the pleadings. Pleadings were drafted by a profession trained in 'ripening' causes over a period of time and whose professed creed was that it was no part of

⁴⁷ Preamble A.S. 11 March 1800. Proof before the judges was supplanted by proof by commission. Mackay quotes James Ivory, *Form of Process* as authority for the proposition that by 1815, proof by commission was 'near universal'. In fact, Ivory notes that proof 'is generally appointed to be taken by a commissioner' (Vol. I, p. 220) but where a proof by witnesses was allowed, 'this proof is now always taken before a commissioner' (Vol. I, p. 229) [my emphasis]. It was even debated in 1832 whether it was still competent for the Court to order the taking of the proof before itself. The court considered that it was only practice which had changed. See Mackay, *Manual, op. cit.* 323 and *Practice, op. cit.* vol. ii, 6.

judicial business to do more than decide a cause,⁴⁸ that it was for the parties to conduct their cause in the manner they chose, and it was expressly stated that it was 'proper' for a party to state his case in such a way as 'his advisers saw fit.'⁴⁹ There was a realisation by the profession that capital could be made by taking points of procedure and pleading. Tactical pleading developed. The general denial was competent as a defender had to meet what was averred on record and nothing more.⁵⁰ Through failures in drafting technically correct pleadings and by tactical subversions, causes came to be still 'ripened' but now in the fields of condescendences and answers, revisals thereto and the re-introduced minutes and answers. Over time, the control of the pleadings had been wrested from the hands of the Ordinaries, parties thrashing out their positions 'exhaustively.'

The rules of pleading developed against this background of judicial non-intervention in the preparation of the parties' positions on record, and to a large extent reflected what had happened and was happening in English civil procedure.⁵¹ The pleadings had to define the issues for the court's determination, but importantly their preparation came to fall outwith the ambit of the judge. The civil jury trial and the preparation of issues pushed general pleading practice in the direction of English

⁴⁸ *Report of the Faculty of Advocates (1824)* See Chapters 2 and 3 *supra*. There is occasionally reference in the literature to the judge as 'judicial umpire'. See e.g. *A Letter to the Hon. Fox Maule, M.P. Chairman of the Committee of the House of Commons appointed to enquire into the Administration of the Law in Scotland, on some points connected with the subject of that enquiry, by a Member of the College of Justice*, (Edinburgh, 1840) pp. 8-9 (Quoted in Phillipson, *Scottish Whigs, op. cit.*, p. 170).

⁴⁹ *Faculty Report (1848)*. See Chapter 3 *supra*. although some in the profession had thought that greater not less judicial supervision was required. Evidence to 1834 Commissioners. See Chapter 3 *supra*.

⁵⁰ paradoxically this was an inheritance from the older civilian based system.

⁵¹ The first Lord Clyde, whilst still at the Bar, considered in an essay on Scottish procedure, that the Scottish practice lay between a system of written pleadings which excluded oral argument which was 'nearly universal' in continental Europe and the oral system which was characteristic of England. J.A. Clyde, 'Practice and Procedure in the Court of Session', (1906-7)

common law. The trial was a single session which the parties worked towards, the issues in controversy between them crystallised in the pleadings, which had to be specific and could not admit of 'surprisal' during trial. With the advent of dissatisfaction with jury trial and the development of proof before the Ordinary sitting without a jury, Scots pleadings were performing a function similar to those found in Westminster Hall. Even the commissions to take evidence, at which the commissioner stood in the Ordinary's stead and at which the parties were circumscribed in what could be put to witnesses,⁵² fell away, and came to be used to only take the evidence of frail or elderly witnesses or those unable to travel to Edinburgh. It is not surprising that the influence of English civil procedure was at its greatest in this period, and that there were calls for reforms which emulated 'issuable pleadings.' Nor is it surprising that there were actual proposals to incorporate English methods into Scots practice,⁵³ nor that on occasion parts of English procedure did find a place in reforms of Scottish procedure. The feeling of this time, influenced by England, was that it was best to get to the facts, hence the dissatisfaction in some quarters with the continued inclusion in the record of pleas-in-law as to the merits, as well as complaints about pleas to the relevancy. The development of pleas to specification (albeit as a species of relevancy), the reluctance of the Court to decide cases on relevancy (pejoratively referred to as 'deciding cases on hypothetical facts') and the increased employment of the proof before answer were also part of this approach. The requirements of fair notice and specification seem to have originated in jury practice (following English procedure), to have been translated to particular

18 JR 319 at 325. This mis-categorises the English position. Although the 'orality principle' was a key feature of English adversarial procedure, written pleadings were also important.

⁵² By 'interrogatories'.

⁵³ at the behest of the Lord Advocate. See e.g. the 1863 proposals in Chapter 3 *supra*.

types or categories of averment⁵⁴ as a protection to the parties⁵⁵ and as a guard against judicial slander⁵⁶ which was thereafter adopted in general practice.⁵⁷

The allure of English procedure was significant from the 1860s onwards and, even as late as 1927,⁵⁸ there were calls for the adoption of elements of English procedure, from the profession generally, from senior members of the Bar and even from some of the Bench.⁵⁹ English procedure was considered simpler, more expeditious and cheaper although there were some in the profession who considered that the judge should exercise greater control in the preparation of parties' pleadings and exclude irrelevant averments.⁶⁰ The Royal Commission of 1927, under Lord Clyde's chairmanship, rejected the English system as a possible model for reform, and swept

⁵⁴ e.g. fraud, malice, dishonestly, immorality, professional misconduct, other averments affecting reputation or anything impertinent or scandalous. See Chapter 4 *supra*.

⁵⁵ particularly those not party to the action.

⁵⁶ In the nineteenth century, if slanderous or false statements were averred by a pursuer which were not pertinent to the issue between the parties, the pursuer could be found liable in damages and even if the averments were pertinent, if they were made maliciously, the agent could also be held to be liable for the fault of his client. See Mackay, *Practice*, I, 112, *Forteith v. Earl of Fife* 2 M. 463, *Mackellar v. Duke of Sutherland* (1859) 21 D. 222 and 24 D. 1124, *Bayne v. Macgregor* (1862) 24 D. 1130, *Taylor v. Swinton* (1824) 1 S. 60, *Johnston v. Scott* (1829) 7 S. 234, Lees, *Handbook*, p. 36. See also Scott Dickson's comments in 'Pleading' *cit. sup.* p. 16 ⁵⁷ see Chapters 3 and 4 *supra*.

⁵⁸ *Report of the Royal Commission of the Court of Session and the Office of Sheriff Principal with Summary of Evidence*, (Chairman, Lord President Clyde) 2 vols., (1927) Cmd. 2801. (hereafter '1927 Report'). Some of the Commission's Recommendations were incorporated into the Administration of Justice (Scotland) Act 1933 c. 41.

⁵⁹ in particular the adoption of the English claim and defence (Evidence of Mr. James H. Jameson W.S. on behalf of the W.S. Society, Summary of Evidence, p. 42, Evidence of Hon. Lord Ashmore, *ibid.* p. 95) or at least simple 'forms' (Evidence of the Faculty of Advocates represented by JCS Sandeman, Dean of Faculty, Mr. J. Keith, Advocate and Mr. TM Cooper, Advocate, *ibid.*, p. 167-8), the abolition of the device of the closed record, replaced with the power to call for further particulars and the removal of the plea of relevancy (Evidence of Hon. Lord Moncreiff, *ibid.*, pp.107, 110 and 113, Evidence of the Faculty of Advocates p. 161 re. 'particulars') and the dispensing with pleas-in-law (Lord Moncreiff, *ibid.*, p. 110, Evidence of the Faculty of Advocates, *ibid.*, p. 161, Dean and Cooper dissenting).

⁶⁰ See evidence of Dean of Faculty Sandeman to the 1927 Commission, *ibid.*, p. 169 that it should be the judge's duty to cut down and strike out irrelevant material 'just as with scandalous pleadings', his decision on this being final. See also the evidence of the W.S. society that it would be better if the Ordinary exercised more supervision over the record as they had to do under s. 6 of the Judicature Act. *ibid.*, p. 48ff. This approach of course had historical precedent.

such suggestions to one side, as they were not 'strongly pressed' and were 'not unanimous.'⁶¹

It is against the background of all of this that the rules of written pleading, examined in Chapter Four, developed and Scots civil procedure was brought into almost perfect alignment with 'adversarial' English common law procedure, David Hume's comments in 1807 about the 'English yoke' resonating across the decades.⁶² But why only 'almost'? Scots law has never separated equity from law⁶³ and had never subordinated the right to the remedy.⁶⁴ Further, the required formulation of the summons as a syllogism and the retention (albeit sometimes precariously) of the doctrine of relevancy⁶⁵ have remained as vestiges of the former civilian system.

(v) Modern Scots Procedural Law and 'Adversarialism'

In modern Scottish practice, written pleadings and civil procedure are part of the common law adversarial family.⁶⁶ However, the retention of relevancy gives Scottish civil procedure a slightly different character to other members of the family. Further,

⁶¹ 1927 Report, p. 74. See also comments of Lord Gill in 'The Case for a Civil Justice Review. Contemporary Relic in Need of an Overhaul', (1995) 40 JLS 129 at 132.

⁶² '[I]n new modelling our plan of judicial proceedings after the English standard, we are preparing our necks, and those of our posterity, for the yoke of servitude to the law of England.' *Substance of the Speeches delivered by some Members of the Faculty of Advocates at the Meetings on 28 February, 2 and 9 March 1807 to consider the Bill "for better regulating the Court of Justice in Scotland and the Administration of Justice therein"* (Advocates' Library, Law Tracts, I.2), p. 25.

⁶³ T [Lord President] Cooper, *Selected Papers, op. cit.* p. 183, D. Walker, 'Equity in Scots Law' (1954) 56 JR 103.

⁶⁴ Cooper *ibid.*, N.R. Whitty, 'From Rules to Discretion: Changes in the Fabric of Scots Private Law' (2003) 7 Edin LR 281 at 304.

⁶⁵ Although England recognised something similar after 1883, it was a preliminary point and had to be disposed of before any exploration of the facts. See *supra*. A PBA was unknown.

⁶⁶ Usually this is explained by the Scottish adoption of civil jury trial. D. Edward, 'Fact-Finding: A British Perspective', *op. cit.* p. 46, J. A. Jolowicz, 'Fact-Finding: A Comparative Perspective' *op. cit.* p. 134.

the formulation of pleadings as a syllogism, whereby the principle of law⁶⁷ is advanced as the major premise and stated as the plea-in-law, and the facts forming the 'grounds of the action' are the minor premise subsumed thereunder and the conclusion necessarily following, is the legal justification for granting the remedy sought.

It is sometimes said that in searching for major premisses the Scots lawyer is more concerned with principles than precedents⁶⁸ and the process of reasoning is deductive,⁶⁹ the remedy necessarily following as a conclusion. Also, from this, it has been considered a characteristic of Scots law that decisions are founded on principle rather than precedent.⁷⁰ It is not the place here to consider the merits of these assertions but it might be suggested, as Lord Rodger has, that Scots Law has long been built by the working out of doctrine in the case-law and it is this that gives strength to any statements of principle which may from time to time emerge.⁷¹

The point is that, on occasion, Scots lawyers have considered that the formulation of written pleadings, the rationalisation of the law with the facts and the ultimate decision all operate in accordance with the rules of logic whether the major premise is derived from statements of institutional principle⁷² or from principles to be found

⁶⁷ as the *ratio decidendi* of a previous decision or an existing or novel principle of law.

⁶⁸ D.M. Walker, 'Principle and Authority as Sources of Norms' 1982 JR 198 at 212

⁶⁹ Which has spawned a jurisprudential theory of legal reasoning in itself. See N. McCormick, *Legal Reasoning and Legal Theory* (1978) (reprint with corrections, Clarendon Press, 1994).

⁷⁰ Lord Macmillan, 'Two ways of thinking', Rede Lecture 1934 [repr. in *Law and Other Things* (1937) at p. 76]. See also comments in A. Rodger, 'Thinking About Scots Law' (1996) 1 *Edinburgh Law Review* p. 3 at 11.

⁷¹ A. Rodger, 'Thinking About Scots Law' *cit sup.* at 5. See also comments of D. Edward, 'Scottish Legal Education and the Legal Profession in H.L. MacQueen, (ed.), *Scots Law into the 21st Century. Essays in Honour of W.A. Wilson* (Edinburgh, 1996) 50 at 63.

⁷² c.f. R. Black, 'Practice and Precept in Scots Law' (1982) JR 31 at 46.

in previous cases.⁷³ This is so even though in practice the system of written pleadings, up until the consideration of relevancy, operated and operates in the elucidation of matters in controversy between the parties in a manner akin to common law procedures.⁷⁴

The difference in the two procedures is that in testing any principle or rule advanced, a party in Scotland will employ this plea to the relevancy.⁷⁵ So taking the averments of fact *pro veritate*, if the averments of fact focussed by the pleas-in-law do not support the conclusions of the summons then the pursuer is bound to fail and the action is irrelevant.⁷⁶

(vi) Notions of Judicial Function in Scotland: The Adversarial System, the Preparation of Pleadings and the Rôle of the Judge at Proof

If Scottish civil procedure is 'adversarial', what then is the rôle of the judge in the single session trial of fact?⁷⁷ Is the judge there to ascertain the truth as in continental systems, or is he or she the umpire or referee overseeing the rules of the game?

Proof before a judge became increasingly popular from the 1860s onwards and, as in the preparation of the parties' pleadings, the rôle of the judge at proof was 'hands-off', permitting the parties to lead such evidence as they saw fit. The

⁷³ Walker, 'Theory of Relevancy' *op. cit.* p. 14.

⁷⁴ The interplay between averment and proof however, differs.

⁷⁵ T.B. Smith, *Judicial Precedent in Scots Law* (Edinburgh, 1952) 71, D. Walker, 'The Theory of Relevancy' (1951) 63 JR 1.

⁷⁶ See Chapter Four.

⁷⁷ in Scotland, the proof or if relevancy is postponed the proof before answer. The terminology of 'trial' is English although the new procedures for personal injury actions use the phrase. See below.

judge's function was to listen to the evidence adduced by examination in chief, cross examination and re-examination, rule on evidential points as they arose, hear parties' submissions on the evidence and then simply adjudicate thereon at the close of proof. He himself could not call witnesses, and could question them only with caution, leaving it to the parties to present their cases virtually uninterrupted.

But if it was the judge's job to ensure the due administration of justice between the parties, was he also there to ascertain the truth? In the late 1950s, Lord Justice-Clerk Thomson observed:

'Judges like to think that the object of a litigation is to discover the truth. We try to do so and fortunately we often do discover it. But the decision of a [trial judge] is in the last analysis only an adjudication by a trained mind on the material which the parties can or choose to put before him.'⁷⁸

A year later he expanded upon this.

'Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence ... It is on the basis of two carefully selected versions that the judge is finally called upon to adjudicate. He cannot make investigations on his own behalf; he cannot call witnesses; his undoubted right to question witnesses who are put in the box has to be exercised with caution. He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgment. That judgment must be based only on what he is allowed to hear ... A litigation is in essence a trial of skill between opposing parties conducted under recognised rules,

⁷⁸ *Islip Pedigree Breeding Centre v. Abercromby* 1959 SLT 161 at p. 165 per LJ-C Thomson.

and the prize is the judge's decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests they see that the rules are kept and count the points.'⁷⁹

We can note in the latter quotation that Lord Justice-Clerk Thomson considered that Scotland had rejected inquisitorialism which he equated with a lack of independence, the litigation being a trial of skill with the judge merely adjudicating upon two competing versions advanced by the parties. A contemporaneous reviewer of the case thought that

'Lord Thomson clearly envisaged each party to the litigation manoeuvring its forces, uncovering its batteries and deploying its fighting strength according to the exigencies of the struggle and with the general object of destroying the enemy.'⁸⁰

Indeed the *dicta* of Lords Wilberforce and Denning on fact-finding in adversarial English civil procedure in *Air Canada v. Secretary of State for Trade*⁸¹ and Lord Denning's 'litigation as war' analogy in *Burmah*⁸² sit remarkably well with Lord Justice-Clerk Thomson's view of the Scottish position.

But just as in England, there were differing judicial opinions as to whether this was really the case. Lord Thomson himself had expressed a view years earlier that there

⁷⁹ *Thomson v. Glasgow Corporation* 1961 SLT 237 at per L J-C Thomson at 245-6. The pursuer's counsel in the case thought that the judgment was 'entertaining in a cynical kind of way'. See G. Stott, *Lord Advocate's Diary 1961-66* (Aberdeen UP, 1991) 4-5.

⁸⁰ 'Notes from Edinburgh' (1962) 78 *Scottish Law Review* 47 at 48.

⁸¹ *Air Canada v. Secretary of State for Trade* [1983] 2 A.C. 394.

⁸² *Burmah Oil Co. v. Bank of England* [1979] 1 WLR 473 at 484.

was nothing more 'sacred' than 'ascertainment of truth and the doing of justice'⁸³ and in the same year as *Thomson*, the First Division under LP Clyde had commented,

'[If] litigations in these courts were just games of skill and ingenuity that argument [by counsel of the defender] might have some force: but the object of a litigation is to enable the court to ascertain the truth, not to give either scope or, indeed, encouragement to tactical manoeuvring.'⁸⁴

Can these views of Scottish procedure be reconciled? Taking both positions, it might be said that the proper function for the judge at proof is to decide where he thinks the truth lies on the evidence which the parties have adduced before him. He is not the seeker of truth nor the adducer of evidence and is therefore, in the adversarial context, impartial.⁸⁵

In conclusion, the traditional Scottish position may be stated as follows. The process is adversarial; the litigants are in competition and they possess the initiative; the judge is impartial and decides between them; and the 'truth' is derived from the evidence which those litigants lead.⁸⁶ The process of the parties' preparation of their pleadings is directed towards this 'end game' of proof, so that they tie themselves and tie their opponent to specific matters of law and fact for determination. This is one of

⁸³ *Lennie v. Lennie* 1948 SLT 382 at 385. See also I Macphail, 'The Path to the Summit' *op. cit.* at 22.

⁸⁴ *Duke of Argyll v. Duchess of Argyll & Anr.* 1962 SLT 333 at 338. The same review *supra* commented that the two expressions of judicial function were 'totally different' although the two divisions might be taken as agreeing 'to differ'. 'Notes from Edinburgh' *ibid.*

⁸⁵ See comments of Lord Migdale in *McCallum v. Paterson* 1969 SC 85 at 93 and Macphail, *Practice* para. 16.38.

⁸⁶ The essence of Scottish procedural law...is that the initiative is left almost exclusively to the parties and their advisers, the role of the Court being the relatively passive one of determining by interlocutory or final judgments the various matters presented by the parties for determination, but only as and when these matters are so presented.' Lord President Cooper, 'Defects in the British Judicial Machine' in *Selected Papers, op. cit.* 244 at 253.

the most important functions of written pleadings.⁸⁷ But because the concept of relevancy is still an integral part of Scots law and by virtue of the fact that the parties are in competition, in the Scottish system the parties can attack the pleadings of each other, before the controverted issues get to proof, thus removing the need for the trial or they can coerce each other to state in more explicit terms their assertions of fact and law thus saving time and expense.⁸⁸ The pre-trial rigidity of relevancy and its disposal before proof is conventionally considered an inherent strength of Scottish procedure and prevents a later 'roving or raking inquiry' at proof and is better therefore than 'more free-and-easy forms of procedure.'⁸⁹ As Lord Shaw of Dunfermline explained,

It is difficult to overestimate the value of this procedure to Scotland. Under it the scandals which sometimes appear elsewhere are avoided – of a trial taking place involving a prolonged, harassing, and most costly inquiry upon an issue which, if it had been stated to begin with in plain words, and there and then adjudicated upon, would have been settled... for a fraction of the expense and in a fraction of the time... For ... persons charged with fraud know from the beginning the substance of what they have to meet, and they are not exposed to the hardships of a merely fishing or raking inquiry.'⁹⁰

⁸⁷ see Chapter 4 *supra*.

⁸⁸ H. Burn-Murdoch, *Notes on English Law as Differing From Scots Law* (Edinburgh 1924) p. 10 citing *Clydesdale Bank v. Paton* (1896) 23 R. (HL) 22 per L. Halsbury at 388, *N. Staff Rly. Co. v. Edge* [1920] SC 254 per L. Dunedin at 264. See also *Edgar v. Lord Advocate* 1965 SC 67, *Bryce v. Allied Ironfounders Ltd.* 1969 SLT (Notes) 29, I.D. Macphail, 'Summary Adjudication in Civil Proceedings in Scotland' in I.R. Scott (ed.), *International Perspectives on Civil Justice, Essays in Honour of Sir Jack I. H. Jacob*, Q.C. (1990) 67 at 75.

⁸⁹ *Gibson v. BICC* 1973 SC (HL) 15 per Lord. Kilbrandon at 32.

⁹⁰ *Mair v. Rio Grande Rubber Estates Limited* 1913 SC (HL) 74 per Lord Shaw of Dunfermline at p. 78.

(vii) The House of Lords and the Plea to the Relevancy.

If Scottish civil procedure is a member of the Anglo-American adversarial family, when it periodically pays a visit, with its baggage of relevancy, to its English relations it is perhaps sometimes viewed as an unruly cousin. An understanding of the development of English and Scottish pleadings from the nineteenth century onwards and in particular the Scottish insistence in relevancy and the English abandonment of demurrer, will explain what sometimes appears in reported decisions on Scottish appeals to the House of Lords⁹¹ to be English law lords' misunderstandings of, or failures to appreciate the Scottish concept of relevancy and/or the nature and function of Scottish pleadings in general.⁹² It will be recollected that demurrer was never known to Scots procedure⁹³ and the plea to the relevancy only ever at best 'roughly corresponded'⁹⁴ to, or was 'analogous'⁹⁵ to, or 'comparable'⁹⁶ with demurrer.⁹⁷

⁹¹ i.e. when the English judges do not merely concur with their Scottish brethren and venture into the unsheltered waters of Scottish civil procedure.

⁹² see e.g. R. Wyness Millar, 'Civil Pleading in Scotland' *op. cit.* p. 586.

⁹³ There might be said to be an exception to this, as the device was known in old Exchequer procedure but not surprisingly so as the procedure used was English. See Chapter 3 *supra*. The Union in 1707 established the Court of Exchequer (Act 6 Anne, c.26) and it was provided that the court was to employ English procedure. The Court was abolished in 1856 (Exchequer Courts (Scotland) Act 1856). The Court's power, authority and jurisdiction was transferred to the Court of Session. However, in Exchequer causes in the Court of Session, English procedure was still employed. Commencing with the Crown Proceedings Act 1947, a number of statutes supplanted the English procedure with Scottish civil procedure in Exchequer cases. Presently, Exchequer cases commence by summons and follow the procedure of an ordinary action. RCS 48.2. See further Lord President Cooper, 'The Central Courts After 1532' in: *An Introduction to Scottish Legal History* (Stair Society) (Edinburgh, 1958) 341 at 347-8, GCH Paton, 'The Eighteenth Century and Later' *ibid.* p. 50 at 55, *Green's Annotated Rules of the Court of Session*, Chapter 48, Annotations at RCS 48.1.1-2.

⁹⁴ R. Wyness Millar, 'Civil Pleading in Scotland' *ibid.*

⁹⁵ Lord President Cooper, 'The Scottish Legal Tradition' in *Selected Papers*, *op. cit.* p. 193

⁹⁶ T.B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962) p. 92. Cf however T.B. Smith, *British Justice: The Scottish Contribution* (Hamlyn Lectures) (London, 1961) p. 78.

⁹⁷ Lord President Normand, in a 1941 lecture (which was not delivered on account of the war but which was published), explained that the plea to relevancy 'is not the demurrer formerly in use in England. For in the debate on relevancy the party taking the plea merely accepts his opponent's averments for the purpose of the argument. If therefore the plea is repelled by the court the issue of fact remains and must be decided.' *Scottish Judicature and Legal Procedure*, Presidential Address to the Holdsworth Club, (1940-1) p. 36.

We may leave to one side the often acerbic remarks of the Lords of the nineteenth century, so joyously chronicled by Dewar Gibb,⁹⁸ and concentrate here on more modern pronouncements and views of the Lords expressed in the twentieth century when Scottish written pleading as a system was highly developed. The Introduction to this thesis has already examined the case of *Gibson v. BICC*⁹⁹ in which Lord Morris of Borth-Y-Gest was content to follow (one suspects blindly) the Scottish judges,¹⁰⁰ and there was Viscount Dilhorne's frank admission that he was in ignorance of the particular aspect of Scottish pleading before the House. Consider also the following. In *Mair v. Rio Grande Rubber Estates Limited*,¹⁰¹ Haldane LC for some reason considered that questions of relevancy did not easily apply in cases of fraudulent misrepresentation¹⁰² although Lord Shaw of Dunfermline forcibly set the record straight.¹⁰³ Lord Moulton thought relevancy equated with the old English demurrer.¹⁰⁴ In *M'Kinlay v. Darngavil Coal Co. Ltd*¹⁰⁵ Viscount Cave LC in an appeal on relevancy commented that 'The practice of stopping a case on what amounts to demurrer is less common in England than it was, but in this case the Scottish practice has to, of course, be followed.' *Cleisham v. British Transport Commission*¹⁰⁶ was an appeal relating to corroboration and whether the evidence at jury trial had fallen

⁹⁸ A. Dewar Gibb, *Law From Over the Border. A short account of a strange jurisdiction*, (Edinburgh, 1950) pp. 42-114.

⁹⁹ 1973 S.C. (H.L.) 15.

¹⁰⁰ *ibid.* p. 23.

¹⁰¹ 1913 SC (HL) 74.

¹⁰² *ibid.* at p. 77.

¹⁰³ *ibid.* at p. 78.

¹⁰⁴ 'The defenders allege as a plea in law that the pursuer's averments are irrelevant to support the conclusions of the summons, or, as one would have said in old times in England, they demur to the whole declaration, i.e. they allege that it discloses no valid cause of action' *ibid.* at p.83.

¹⁰⁵ 1923 SLT 203.

¹⁰⁶ 1964 SC (HL) 8.

within the ambit of the pleadings. While the two Scottish judges¹⁰⁷ dissented and followed the Inner House, the three English judges¹⁰⁸ allowed the appeal, Lord Devlin accepting that he was 'accustomed to much less stringent rules of pleading than those which prevail in Scotland.'¹⁰⁹ In *Nimmo v. Alexander Cowan & Sons*¹¹⁰ Lord Upjohn could mention the 'much stricter rules of pleading in Scotland.' In *McGlone v. British Railways Board*¹¹¹ Lord Pearce comes close to suggesting that the difference which appeared between averment and evidence was 'academic.'¹¹² There are other examples. Lord Denning in *Miller v. South of Scotland Electricity Board*¹¹³ observed that the defenders had

'taken in this case a course similar to that taken by the defender in *Donoghue v. Stevenson*. They have objected to the action on the ground that the pursuer's averments are irrelevant and insufficient in law to support the conclusion of the summons. The only question on such a plea is whether, taking the pursuer's averments pro veritate, they disclose a case relevant in law so as to entitle him to have them remitted for proof. This procedure in Scotland is similar to the old procedure of demurrer in England...Demurrers were abolished in England by the rules of 1883 and since that time the English Courts prefer to decide the facts first so as to see whether the point of law really does arise: but the Scottish Courts are still ready on occasion to decide the law first so as to see whether it is necessary to have an inquiry into the facts at all. That is what happened in this case.'¹¹⁴

¹⁰⁷ Lords Reid and Guest.

¹⁰⁸ Lords Morris of Borth-Y-Gest, Hodson and Devlin.

¹⁰⁹ at p. 27. For good commentary on the case see W.A. Wilson, 'Cleisham and Corroboration', 1964 SLT (News) 57.

¹¹⁰ 1967 SC (HL) 79.

¹¹¹ 1966 SC (HL) 1.

¹¹² at p. 18.

¹¹³ 1958 SC (HL) 20.

¹¹⁴ *Miller v. South of Scotland Electricity Board* 1958 SC (HL) 20 at 36. See also his comments in *Bulmer v. Bollinger* [1974] 1 Ch. 401 at 423 'As a rule you cannot tell whether it is necessary to

From these examples, one might ask whether it really matters that English members of the House of Lords on occasion have experienced difficulty with the Scottish system of written pleadings and the doctrine of relevancy and whether there were any real consequences for Scots law. If so, the thesis is simple. If the Lords considered that relevancy was the same or 'equated to' the old demurrer, then, in their minds, the pursuer would have no recourse 'to law' thereafter if the case was irrelevant. It was perhaps not appreciated that if the pursuer's action was dismissed he could still bring a new action. Moreover, if they thought that relevancy was demurrer, then perhaps they failed to appreciate that a pursuer's case, if relevant, still permitted an inquiry into the facts or if relevancy was not easily determined without inquiry into the facts, a proof before answer. Debate on relevancy was not the joining of the parties on the issue of law only as the final and only determination of the case. Further, the English judges may have been intolerant of a technical procedure or class of rules which impeded the court getting to the facts of the case. Whilst Lord Diplock considered that it was only 'natural that lawyers from two countries should prefer that system of pleading with which they are the more familiar,'¹¹⁵ if there was confusion then it related to understanding of the concept of relevancy in Scots law and the Scottish requirement that one could only prove what one had averred. One might ask whether this could have been a factor in these judges preferring less technical constructions of the pleadings.

Alternatively, it could be posited that those who are not immersed in the intricacies of a system are able to put that system in context, or point out deficiencies from the

decide a point until all the facts are ascertained. So in general it is better to decide the facts first.'

broader point of view or elucidate the true principles, viewing the wood not the trees. What is true is that the House of Lords in a period from the 1950s to the early 1970s decided a number of cases which eased what had become a strain between form and equity as fairness in the interpretation of written pleadings. The strict administration of the system of pleadings, particularly in the Divisions, had made it rigid, inelastic and often unfair. Technical pleading points often succeeded. The approach adopted by the House of Lords in the period to a large extent ignored these technical rules of written pleadings and looked at the broader picture and the equity in the cases before it. This was particularly so in actions for damages for personal injuries.¹¹⁶

(viii) Pleading Practices, Reparation and Jury Trials in the 1960s and 1970s. The Development of the 'Procedure Industry'.

From the nineteenth century the law relating to damages for personal injury frequently produced harsh decisions and particularly so in 'death' cases. This arose sometimes for policy reasons which were judicially sanctioned. At times it was simply because the court took a hard line on matters of pleading. Errors in pleading frequently would be fatal. The cards were stacked in favour of defender employers or 'masters' and the defences of common employment, and contributory negligence were complete defences. Many a pursuer's case failed for lack of corroboration. The hurdles were significant for a pursuer before he could recover against his employer and latterly a high degree of specification was required.

¹¹⁵ *Rockware Glass Ltd v. MacShannon* [1978] AC 795 at 815.

¹¹⁶ Since 1988, the Court of Session has interpreted the Court of Session Act 1988 c. 36, s. 40(1)(b) as not permitting an appeal to the House of Lords on a matter of Scottish pleading or

There had been the importation of categories of wrongdoer into Scots Law in occupier's liability cases *via* the House of Lords in *Dumbreck v. Addie & Sons Collieries*¹¹⁷ which was only remedied by s. 2 of the Occupier's Liability Act 1960.¹¹⁸ Prior to this, the pursuer had to make averments relating to the injured person as invitee, licensee or trespasser.¹¹⁹ The defence of common employment was particularly pernicious. It had never been part of the law of Scotland and had been introduced by the House of Lords into Scots Law. In England, *Priestly v. Fowler*¹²⁰ had established that an employer¹²¹ owed an employee a duty of care at common law and that an employee could sue his employer if the breach of the duty caused physical injury. But it also introduced into England the doctrine of 'common employment': that, if the injury had been caused by a fellow employee, the employer was not vicariously liable for that negligence.¹²² The employee was taken to have assumed the risk of negligence of a fellow employee when working in his employment. In Scotland, *Priestly* was initially rejected.¹²³ From at least 1839, the Scottish courts had developed a different jurisprudence regulating the employer/employee relationship. The employer's common law duties to his employee were to provide a safe system of

practice. See Rt. Hon. Lord Hope, 'Taking the Case to London - Is it All Over?' (1998) 43 J.R. 135 at 147.

¹¹⁷ 1929 SC (HL) 51.

¹¹⁸ Lord Reid in *M'Glone v. British Railways Board* 1965 SC (HL) 1 at 11, refused to apply the old case law to the new statutory provisions.

¹¹⁹ *M'Glone op. cit.*

¹²⁰ (1837) 3 M & W 1. On the case and its background see R.L. Howells, 'Priestly v. Fowler and the Factory Acts' (1963) 26 MLR 367.

¹²¹ The terminology used at the time was 'master' and for employee - 'servant'

¹²² There was one exception to this. If the injured employee could demonstrate that the fellow employee was incompetent, then the employer could still be in breach by negligently engaging him. See further, *Munkman on Employer's Liability*, (eds. J. Hendry & M. Ford) 13th ed., (2001) para. 1.13. See also 'Negligence' in: (eds. K. Reid and R. Zimmermann) *A History of Private Law in Scotland*, vol. 2 (Obligations) 517 at 540-1. On the whole topic see also J. Ingman, 'The Rise and Fall of the Doctrine of Common Employment' 1978 J.R. 106, and further P. Simpson, 'Vicarious Liability' in *History of Private Law*, *ibid* p. 584 ff.

¹²³ *Dixon v. Ranken* (1852) 14 D 420, although not unequivocally. Simpson, *op. cit.* 589-91.

work,¹²⁴ and safe and adequate equipment.¹²⁵ He was placed under a duty¹²⁶ to take care for the safety of his employees,¹²⁷ by taking all reasonable precautions to protect them from accident.¹²⁸ The case which introduced or rather imposed common employment on Scotland was *Bartonshill Coal Co. v. Reid*.¹²⁹ From then on, the employer owed inherent duties to an employee, duties in reasonable care to employ competent servants, to provide and maintain adequate equipment and to provide a safe system of work. However, he was not vicariously liable for the actings of a negligent fellow employee.

From the late 1870s and early 1880s onwards, those representing employers frequently seem to have taken specification points (i.e. lack of fair notice pleading points) against pursuers, which in turn could account for the extension of specification as fair notice into general actions at about this time.¹³⁰ As the Coulsfield Working Party noticed, this would also account for comments in Lees' *Pleading and*

¹²⁴ *Sword v. Cameron* (1839) 1 D 493 (quarry 'shot-firer' detonating explosion before pursuer far enough away.)

¹²⁵ *Brydon v. Stewart* (1855) 2 Macq. 30.

¹²⁶ As Professor Black has pointed out, in reparation actions in the period, it became common to plead that the employer had a 'duty' to do such and such and that he 'had failed to do so'. See R. Black, *A Historical Survey of Delictual Liability in Scotland for Personal Injuries and Death, Part III*, (1975) 8 CILSA 318 at p. 321.

¹²⁷ *Paterson v. Wallace & Co.* (1854) 1 Macq. 748.

¹²⁸ *Brydon v. Stewart* (1855) 2 Macq. 30 followed in *Adair v. Colville & Sons* 1926 SC (HL) 51 per Lord Atkinson at p. 58. See the latter for analysis of the employer's duties to his employees at pp. 58-9.

¹²⁹ 17 D 1017, (1858) 20 D (HL) 13, 13 Macq. 266, *Bartonshill Coal Co. v. McGuire* (1858) 20 D (HL) 13, 3 Macq. 300 was also decided at about the same time. Common employment as a complete defence had been rejected in both cases at first instance and in the First Division. See D. Walker, *The Law of Delict in Scotland*, (2nd ed.) (Edinburgh, 1981) at p. 551. See also Rt. Hon. Lord Hope of Craighead, *Taking the Case to London - Is It All Over?* (1998) 43 J.R. 135 at p. 142.

¹³⁰ See Chapter 3 *supra*. From the author's brief inspection of the General Collection of Session Papers held by the Faculty of Advocates, it is about this time that a preliminary plea directed to specification itself as opposed to 'irrelevant and insufficient to support the conclusions of the summons' appears in pleadings.

Interlocutors reflecting the author's anxiety that averments should be sufficient to ensure the leading of evidence and the provision of 'fair notice' to his opponent.¹³¹

The doctrine of common employment was restricted thereafter,¹³² through the Employers' Liability Act 1880,¹³³ and its effects were mitigated by the Workmen's Compensation Acts of 1897,¹³⁴ 1906,¹³⁵ and 1925¹³⁶ until it was finally abolished¹³⁷ in 1948.¹³⁸ The Law Reform (Contributory Negligence) Act 1945 removed contributory negligence on the part of an employee as a complete defence.

Concurrently, Parliament instituted a series of statutory safeguards to protect workers. There followed the Mines Act 1911,¹³⁹ Mines and Quarries Act 1954, Factory

¹³¹ *Report by Working Party on Court of Session Procedure* (Chairman: Lord Coulsfield) (2000) [This report will be hereafter referred to as 'Coulsfield Report'], Ch. 6, p. 3. By Lees' time, pleas to specification were well established. See *supra*. Chapters 3 & 4.

¹³² For development of the law up to 1947 see Viscount Simon in *Miller v. Corporation of Glasgow* 1947 SLT 63 and *Neilson v. Glasgow Corporation* 1948 SLT 42. See also Simpson, *op. cit.* pp. 592 - 599.

¹³³ Shortly, the employee could succeed if he could prove that the injury was caused by the accident and the accident resulted from defects in the 'ways, works, machinery or plant' or from the negligence of an employee whose orders the employee had to obey or the negligence of an employee placed in a position of superintendence, or in railway cases, the negligence of a signalman or engine driver. See Munkman, *op. cit.* para. 1.22.

¹³⁴ Compensation was payable where an employee was injured and incapacitated due to an accident 'arising out of and in the course of employment' (restricted to particular industries) without the requirement of proof of negligence of the employer or any of its employees.

¹³⁵ increasing cover to employees earning above a particular sum. This had the net effect of decreasing common law proceedings in the Court of Session. J.L. [Later Lord] Wark, 'The Business of the Law Courts', Address delivered to the Glasgow Juridical Society on 11 February 1930 by Mr. J.L. Wark, K.C., Sheriff of Argyllshire (1930) 46 *Scottish Law Review* (in 3 parts) p. 73, 93, 153 at p. 73.

¹³⁶ Mainly a consolidating Act, but also covering industrial accidents. In its final form the scheme under the Act was enforced in the sheriff courts.

¹³⁷ see comments of L J-C Thomson in *Sullivan v. Gallagher & Craig and Ors.* 1960 SLT 70 at 77.

¹³⁸ Law Reform (Personal Injuries) Act 1948, s.1(1). See also *Lindsay v. Charles Connell & Co.* 1951 SC 281. The Act repealed the 1880 Act and the Workmen's Compensation Acts

¹³⁹ and associated Regulations e.g. General Regulations for Coal Mines 1913 (S R & O 1913, no. 748) *Lee v. National Coal Board* 1955 SC 151.

and Workshop Act 1901¹⁴⁰, the Factories Act 1937 amended by the Factories Act 1948 and 1959 before the Factories Act 1961. The Offices, Shops and Railway Premises Act 1963 extended protection to other workplaces culminating in the Health and Safety at Work etc. Act 1974.

These statutory provisions provided much work for the courts. To obtain damages, the injured pursuer firstly had to bring himself within the terms of the statute or statutory regulations, and the courts, in determining personal injuries cases, were obliged to engage in statutory interpretation, e.g. laying down what type of circumstances fell within a statutory wording. Thus under the Workmen's Compensation Act 1897 if the pursuer was not injured in a 'factory', there could be no compensation, as the injury had occurred in a place outwith the statutory definition and thus the case was irrelevant.¹⁴¹

To the modern eye, many of the decisions turned on fine and narrow distinctions. Technical objections to formulations of cases in pleadings were often entertained. So, as noticed in Chapter 4, when damages were sought at common law and alternatively under Employer's Liability Act 1880 and where there was no separation of the facts under each alternative head and no differentiation in the pleas in law between the two, it was considered that this amounted to lack of fair notice to defenders and the pleadings were irrelevant.¹⁴²

¹⁴⁰ s.79 also permitted the Secretary of State to make Regulations in regard to dangerous manual labour, e.g. The Building Regulations 1926 (S R & O 1926, No. 738). For an example of a case based in these statutory regulations, see *Riddell v. Reid* 1941 SC 277.

¹⁴¹ e.g. *Campbell v. M'Nee* 1903 SLT 277.

¹⁴² *M'Grath v. Glasgow Coal Company Limited* 1909 2 SLT 92 (Second Division) per Lord Low at p. 94. C.f. *Campbell v. United Collieries Limited* 1911 2 SLT 434. The Court continued to insist in this, although it became a matter of proper pleading as opposed to a lack of relevancy. *Keenan v. The Corporation of Glasgow* 1923 SC 611.

By the 1940s the House of Lords had become less disposed to permitting the dismissal of actions for damages for personal injuries on mere technicalities. For example, it held that a different standard of pleadings was required in Workmen's Compensation cases and that it was, in general undesirable to dismiss such cases on a plea to the relevancy.¹⁴³ From there, the First Division held that only in two exceptional circumstances should Workmen's Compensation cases be so disposed of, firstly, where the issue was focussed in a point of law independent of any dispute in fact and secondly where the claim was presented 'without a shred of averment to supply the background or foundation for any claim under the Workmen's Compensation Acts.'¹⁴⁴

With the removal of common employment as a defence and of contributory negligence as a complete defence, reparation actions for personal injury in the Court of Session increased dramatically.¹⁴⁵ Injured workmen were often sponsored by their trade union,¹⁴⁶ the actions were frequently resisted by insurance companies for employers¹⁴⁷ and such cases were very keenly contested. The defenders looked for any pleading point, technical or otherwise, to defeat the pursuer's claim. Lord Justice-Clerk Aitchison once told counsel that he thought that such cases were 'just a game between the workman's union and the employer's insurance company, in which the poor man's interests were never considered at all.'¹⁴⁸ Where the litigant was impecunious and without any funding, there were counsel who took actions

¹⁴³ *M'Mahon v. David Lawson Ltd.* 1944 SC (HL) 1.

¹⁴⁴ *Garty v. Jute Industries Ltd.* 1947 SLT 16.

¹⁴⁵ J.C.K.M., (James Cyril King Miller) *Fifty Years of Parliament House 1970* (Edinburgh, 1977) p. 15.

¹⁴⁶ and later Legal Aid.

¹⁴⁷ plus ça change!

speculatively, their payment coming from the expenses following success.¹⁴⁹ They required to be adroit in their pleadings to avoid dismissals at debate in order to earn some kind of living.¹⁵⁰ In all events, technical sure footedness was required by pursuers at debate.

A major objective for defenders in contesting a pursuer's claim for damages was not just to dispose of the action on relevancy but to stop the case going to a jury.

Following the decrease in their popularity after the 1868 Act, civil juries came once more into vogue at the turn of the century, averaging 21 trials per annum between 1900 and 1926;¹⁵¹ and this increased to 46 per annum in the following decade, despite disparaging remarks in the 1927 Royal Commission Report. The prominence of the civil jury even defied the general decrease in judicial business and depression of trade of the 1930s. Lord Justice-Clerk Wheatley remembered that when he was called to the Bar in 1932, only rarely did reparation actions not go to jury trial,¹⁵² and in 1941, Lord President Normand, in a prepared lecture for an English audience, explained that the practice of those times was that actions of damage for personal injury were normally sent to jury trial unless of course special cause to the contrary was shown.¹⁵³ Jury trials were effectively suspended during the Second World War but again became very popular¹⁵⁴ in the 1950s and 1960s¹⁵⁵ – considered by some to

¹⁴⁸ quoted in *Fifty Years of Parliament House*, *op. cit.* p. 16.

¹⁴⁹ Such practices were initially frowned upon but thereafter appreciated as serving those who had nowhere else to turn for legal redress. See *Fifty Years of Parliament House*, *op. cit.* p. 2, Rt. Hon. Lord Wheatley, *One Man's Judgment. An Autobiography*, (London, 1987) p. 64.

¹⁵⁰ *Fifty Years of Parliament House*, *op. cit.* p. 2.

¹⁵¹ 1900 – 1926. The figure reflects only those cases which 'ran'. Many civil jury trials were compromised before trial, just as in the 1860s and 70s. What follows regarding the figures is taken from A.M. Hajducki, Q.C., *Civil Jury Trials* (Edinburgh, 1998) p.10.

¹⁵² Rt. Hon. Lord Wheatley, *One Man's Judgment. op. cit.* p. 64.

¹⁵³ LP Normand, *Scottish Judicature and Legal Procedure*, Presidential Address to the Holdsworth Club (Holdsworth Club, University of Birmingham, 1940-41) at 37

¹⁵⁴ Hon. Lord Brand, *An Advocate's Tale*, (1995) p. 46.

be the golden age for the civil jury trial.¹⁵⁶ Industrial accidents and road traffic accidents¹⁵⁷ seem to have been the most common type of case which proceeded to jury trial. A dip into Lord Stott's recollections and reminiscences of the time in his 'Q.C.'s Diary' testifies to their prevalence in this period.¹⁵⁸ The trials rarely lasted more than two days¹⁵⁹ and senior counsel could be involved in two reparation actions in a week.¹⁶⁰

The reason pursuers wanted to get to jury trial was that juries gave bigger awards of damages than judges did at proof and would decide cases upon considerations of sympathy rather than the evidence¹⁶¹ – or at least that was the perception. Juries were viewed by many in a bad light.¹⁶² It will be recalled that the right to jury trial was statutorily enshrined and it was only where there was 'special cause' to withhold the case from the jury that the case would be decided at proof. Therefore, as now, defenders sought to take the case to debate to prevent the risks of an inflated sum of damages being awarded against them in a jury trial. To succeed in this, defenders would attack the pursuer's pleadings in relevancy and specification at the debate.

¹⁵⁵ see the figures for incidence of jury trial between 1955 and 1959 in the Strachan Committee Report, *Civil Jury Trial in Scotland. Report by a Committee Appointed by the Secretary of State For Scotland* (Chairman Hon. Lord Strachan) Cmnd. 851 (1959) at para. 26 and Appx. D.

¹⁵⁶ Hajducki, *Civil Jury*, *op. cit. ibid.*

¹⁵⁷ Lord President Cooper thought civil jury trial was an 'accessory of the internal combustion engine' *Selected Papers*, *op. cit.* p. 194. See also *ibid* p. 63.

¹⁵⁸ Rt. Hon. Lord Stott, *Q.C.'s Diary 1954 - 1960* (Edinburgh, 1998). See also *Lord Advocate's Diary 1961 - 1966* (Aberdeen University Press, 1991), and his *Judge's Diary 1967 - 1973* (Edinburgh, 1995).

¹⁵⁹ Hajducki, *Civil Jury*, *op. cit. ibid.*

¹⁶⁰ Lord President Hope, 'Judicial Business - A Review' (1991) JLSS (in 2 parts) pp. 219 and 266 at 219.

¹⁶¹ e.g. Wark, *The Business of the Law Courts*, *op. cit.* p. 154. Cf D. Walker, 'Civil Jury Trial' (1959) 75 *Scottish Law Review* 181 at 182.

¹⁶² e.g. Wark, *ibid.* p. 154, *viz.*, the general issue is 'in many cases an instrument of evil' weighing the 'scales heavily against defenders.' Also Lord Kilbrandon considered civil juries a 'bingo session' (Hamlyn Lectures quoted in Hon. Lord Brand, *An Advocate's Tale op cit.* p. 75). See also Lord President Cooper, 'Trial by Jury in Scotland: Is there a Case for Reform?' in *Selected Papers*, *op. cit.* p. 58.

'Pernickety' or merely technical pleading points were entertained and were often successful. Some thought that this was because the Court was minded to protect defenders from the vagaries of jury trial. In a case review, Professor Wilson expressed this view.

'It can be argued that the continuing conflict of views in recent years between the Inner House and the House of Lords on questions of relevancy, pleading and corroboration is a result of the existence of the civil jury. The modern Scottish view of these matters is based on a desire to give defenders some protection against the jury. If all cases went to proof before a judge, we would be content to have them decided on credibility and not on technicality.'¹⁶³

So defenders required the pursuers to jump through all the procedural hoops to ensure that their cases in their pleadings were tightly formulated, and relevant in both senses if they were to get to jury trial and thereby the possibility of a larger sum of damages than would have been awarded by a judge, whether or not the trial actually proceeded.¹⁶⁴ Lord Gill, in a lecture, has explained that

'Essentially problems first arose in the 50s and 60s with the growth of the procedure industry in the Court of Session. Often matters were determined by jury trial in personal injury actions. At this time the jury trial mattered. Corroboration was required...There were strict rules regarding hearsay... At that time you required a jury trial. To get one you would require to answer calls in the defences, specify in answer to the defender's requirements, survive

¹⁶³ W.A. Wilson, 'Cleisham and Corroboration' 1964 SLT (Notes) 57 at 59.

¹⁶⁴ As in the previous period, the costs involved in a jury trial and the concerns of defenders that juries would not necessarily decide on purely legal grounds meant that trials were compromised at the last minute. The settlement would obviously be at a higher level than if the parties had compromised before proof. The same applies today and it is thought that the 'judge award multiplicand' will attract a multiplier of 1.5 up to 3 for the purposes of settling a jury trial.

a Procedure Roll Debate, amend and only then would you get your jury trial.¹⁶⁵

In another lecture Lord Gill pointed out that,

‘Twenty-five years ago it was still possible for an advocate to make a good living on the procedure roll taking pleading points to which the court was all too willing to listen but which nowadays seem pettifogging and pedantic.’¹⁶⁶

The Coulsfield Report noted,

‘It is notorious that during that period highly technical objections were made, and were accepted by the court, at least to the extent of holding that a case was unsuitable for jury trial. It is not too strong to say that the system of written pleadings was distorted during that period.’¹⁶⁷

The ‘distortion’ of the system arose from the technical approach to the interpretation of written pleadings. Just about any point, no matter how technical, could and would be taken, not just at debate, but as objection in the course of proof leading to interruptions in the leading of evidence, in highly technical submissions on the import of the evidence thereafter or in motions for new trials on the basis that the evidence did not accord with the pleadings. Judge Edward has recollected:

‘Until the House of Lords insisted on a laxer approach, the rules of pleading were strictly applied and much linguistic ingenuity was devoted for the

¹⁶⁵ Hon. Lord Gill, ‘The Standard of Written Pleadings’: Lecture to a Seminar ‘Written Pleadings in the Sheriff Court’ (LSA, 12 February 1996).

¹⁶⁶ Hon. Lord Gill, ‘The Case for a Civil Justice Review’ (1995) 40 J.L.S.S. 129 at 132.

¹⁶⁷ *Report of the Working Party on Court of Session Procedure (Chaired by Lord Coulsfield)*, Ch. 6 p. 4. See also *infra* Lord Cullen’s reference to the ‘overcritical attitude to pleadings which was part of the culture of the courts some 40 years ago’ in Lord Cullen, *Review of Business of the Outer House of the Court of Session* (1996) *op. cit.* p. 15.

pursuer, to guarding against the uncertainties of precognition¹⁶⁸ and, for the defender, to taking nice pleas to the relevancy, objections to evidence and motions to withdraw.¹⁶⁹

Against this background, there were numerous cases which were taken to London, appealed on points of procedure and pleading. Such cases gave the House of Lords the opportunity of reviewing the law on grounds of broad principle which, as indicated in the above quotation, resulted in a relaxation of the rules relating to written pleading; and this relaxation 'was brought about through what amounted to judicial legislation by the House of Lords during the 1950s, 1960s and early 1970s.'¹⁷⁰ These appeals were on pleading points and relevancy and, whatever the English judges understood of the doctrine of relevancy and the rules of written pleading as applied in Scotland, the net effect of the decisions in the period was to temper the strict approach to the interpretation of pleadings in the Scottish courts.

(ix) The House of Lords and the Development of Pleading Practices in the 1950s, 1960s and 1970s.

For the reasons above examined, litigation in the 1950s and 1960s was a keenly contested affair. Examining cases reported in the Session Cases for the period demonstrates the points which would be taken, the types of arguments advanced to the Court and how the decisions of the Court of Session and the House of Lords shaped pleading practice thereafter.

¹⁶⁸ Gordon Stott, whilst still at the Bar was particularly skilled in the art of deceptively simple pleading, being responsible e.g. for the formula 'The pursuer lost his footing' to cover all possible variants of 'tripped' 'slipped' or 'stumbled'.

¹⁶⁹ D. Edward, 'Scottish Legal Education and the Legal Profession in H.L. MacQueen, (ed.), *Scots Law into the 21st Century. Essays in Honour of W.A. Wilson* (Edinburgh, 1996) 50 at 53-4

¹⁷⁰ DAO Edward, *Different Assumptions - Different Methods*, SSC Biennial Lecture, *op. cit.*, p. 9.

Although the status of the Open Record and the averments therein had been clarified for some time,¹⁷¹ often parties would insert averments founding on any adjustments made by an opponent which removed averments from the Open Record. Lord Guthrie noted in 1955 that 'for many years one has frequently seen in written pleadings references by one party to statements made by the other in his summons or defences which have been deleted or altered at adjustment.'¹⁷² It was thought that these averments were necessary for setting up in cross-examination a line of questioning directed to why the averments had been removed at adjustment. *Lennox* held that such averments were irrelevant.¹⁷³

A pursuer's pleadings would be taken to debate on relevancy in the strict sense and on relevancy as specification. As Lord Gill recalled, in this period there was a 'procedure industry'¹⁷⁴ i.e. most cases were taken to debate on procedure roll, the industry being the ingenuity of counsel. The test for relevancy had been definitively stated by the House of Lords in *Jamieson v. Jamieson*,¹⁷⁵ that any action would not be dismissed as irrelevant unless it had to necessarily fail even if all the pursuer's averments were proved.

¹⁷¹ *Clydesdale Bank Ltd. v. D. & H. Cohen* 1943 SC 244 per LJ-C Cooper at 246.

¹⁷² *Lennox v. National Coal Board* 1955 SC 438 at 439. Lord Brand thought that Lord Guthrie had 'a pharisaic veneration for the Rules of Court.' Hon. Lord Brand, *An Advocate's Tale* (1995) at p. 28.

¹⁷³ although it was still possible to cross-examine a witness on the changes. See also *Carter v. Allison* 1966 SC 257.

¹⁷⁴ Hon. Lord Gill, 'The Standard of Written Pleadings': Lecture to a Seminar 'Written Pleadings in the Sheriff Court' (LSA, 12 February 1996).

¹⁷⁵ 1952 SC (HL) 44.

At this time, a party's written pleadings in their formulation really did matter. The pursuer's case required to be corroborated evidentially and desperate measures were sometimes employed in the search for corroboration.¹⁷⁶

The decade before had seen the development of the law of negligence and the requirement for reasonable foreseeability. A defender would not be liable unless what happened to the pursuer was reasonably foreseeable¹⁷⁷ which subsequently was considered a 'sort of jury question' for judges.¹⁷⁸

By the mid fifties, the Court of Session placed a considerable stress on a party formulating his case in a particular way and as a matter of fair notice did not permit him to depart from it, if he wished to succeed.¹⁷⁹ Sometimes this approach developed the law. The Court developed the test for professional negligence at this time.¹⁸⁰

Actions of reparation founding on the developing statutory regulations noticed above, required to be properly pled¹⁸¹ and defenders would take relevancy points if there was any deviation¹⁸² or if there was any doubt as to whether the regulation applied to the facts of the individual case. As already noticed, what might be now

¹⁷⁶ see. *Lee v. National Coal Board* 1955 SC 151 where the pursuers at the motion for new trial unsuccessfully argued that they could found on the averments of the defenders as corroboration. The Court considered that averments had no factual significance until they were proved although an admission on record would be equivalent to proof.

¹⁷⁷ See e.g. *Bourhill v. Young* 1942 SC (HL) 78, *Muir v. Glasgow Corporation* 1943 (SC) 3, *Malcolm v. Dickson* 1951 SC 542.

¹⁷⁸ *Harvey v. Singer Manufacturing Co. Ltd.* 1960 SLT 178.

¹⁷⁹ e.g. *McGrath v. British Transport Commission* (Unreported, 4 May 1954, House of Lords), *Jackson v. Glasgow Corporation* 1956 SC 354 per Lord Russell at 362, *Esso Petroleum v. Southport Corporation* [1956] 2 WLR 81 per Lord Normand at 87, *Quinn v. Cameron & Robertson* 1956 SC 224 per Lord Russell at 240.

¹⁸⁰ *Hunter v. Hanley* 1955 SC 200. For the pursuer's counsel's account of this case see Stott, *Q.C.'s Diary* pp. 19-20.

¹⁸¹ *Gaitens v. The Blythswood Shipbuilding Co. Ltd.* 1948 SLT (Notes) 49.

¹⁸² *Durnin & Ors. v. William Coutts & Son* 1955 SLT (Notes) 9.

termed technical objections or 'nice pleas to relevancy' were entertained by the Court.¹⁸³ In 1958, the House of Lords attempted to dictate practice regarding relevancy and personal injury actions. In *Miller v. SSEB*¹⁸⁴ it was held that in claims for damages for alleged negligence, it was only in 'rare and exceptional circumstances' that an action could be disposed of on relevancy.¹⁸⁵ Nevertheless defenders continued to take pleading points in reparation actions in the hope of dismissal although it was argued for pursuers (albeit unsuccessfully) in *Blaikie & Ors. v. British Transport Commission*¹⁸⁶ that this decision meant that it was no longer open to the Court to dismiss such actions as irrelevant and all such cases had to proceed to proof before answer.

In any event, the Court of Session continued to insist on the 'proper' formulation of cases as a matter of relevancy and fair notice, dismissing actions at debate and sustaining appeals after proof or granting new trials where respectively the case was not properly laid or the evidence did not meet the averments on record. Moreover it was well established that averments of duty had to be formulated generally and then particularised,¹⁸⁷ the scope of inquiry being restricted to the specific breaches of duties of which notice had been given, and evidence directed to other ways in which the general duty had been breached was excluded.¹⁸⁸ The only exception to this was

¹⁸³ e.g. *Sagar v. The National Coal Board* 1955 SC 424, *Angus v. The National Coal Board* 1955 SC 175.

¹⁸⁴ 1958 SC (HL) 20.

¹⁸⁵ Lord Keith of Avonholme at 33. See also Viscount Simonds at 32.

¹⁸⁶ 1961 SLT 189.

¹⁸⁷ no particularisation would be fatal. *Baxter v. Colvilles Ltd.* 1959 SLT 325.

¹⁸⁸ *Hook v. Brown & Ors.* 1963 SLT (Notes) 52, *Morrison's Associated Companies Ltd. v. James Rome and Sons Ltd.* 1964 SC 160 per Lord President at 182. This was so in both contractual and delictual cases. *Morrison's* was a breach of contract case. The Coulsfield Report describes this as a 'heresy' of the time. (Ch. 6 p.6). The Report also notes that there was another heresy apparent in the cases which was that 'if the pursuer made an averment of a certain point, he then required to prove it, whether or not the averment was necessary to his case as a matter of law.' *ibid.* This was not true generally but it might be assumed that the Report was making

if a pursuer could table on record a case of *prima facie* fault (with sufficient notice) and then, if he failed in proving certain breaches or failures in precaution the *prima facie* case of fault might not be displaced and he would still succeed.¹⁸⁹

Particularly in proof, a party could not deviate from his case on record as, again as a matter of fair notice, it would be unjust for a defender to be found liable on a ground which he could not refute, having prepared to meet the case on record.¹⁹⁰ This was strictly applied.¹⁹¹

In reparation actions against an employer, prior to the decision of the House of Lords in *Brown v. Rolls Royce Ltd.*¹⁹² it had been pleading practice, following what was known colloquially as the 'Dunedin Formula', to make averments that an employer was at fault because it had not done something which was commonly done by other such employers in like circumstances.¹⁹³ In *Brown*, it was held that in an action founded on negligence, it was for a pursuer to show that the defenders had been negligent and that that negligence had caused the injury. In this, if it was averred that the employer had not followed a common practice followed by other like employers this might yield an inference of negligence but that the court had to consider the issue against all the circumstances of the case. Before the decision in

reference to the case law on 'reasonable practicability' which developed through cases such as *Hall v. Fairfield Shipbuilding Co.* 1964 SC (HL) 72, *Nimmo v. Alexander Cowan & Sons Ltd.* 1967 SC (HL) 79, *Jenkins v. Allied Ironfounders Ltd* 1970 SLT 46 (HL) and *Gibson v. BICC* 1973 SC (HL) 15. See *infra*.

¹⁸⁹ *Gunn v. M'Adam & Son* 1949 SC 31.

¹⁹⁰ *Morrison's Associated Companies op. cit.* per Lord Guthrie at 190.

¹⁹¹ see *Thomson v. Glasgow Corporation* 1962 SLT 105.

¹⁹² 1960 SC (HL) 22. See Black, *Introduction, op. cit.*, p. 29

¹⁹³ Lord Dunedin had considered in *Morton v. Dixon* 1909 SC 807 that in order to prove fault on the part of the employer it was necessary to show (a) that the thing which was not done was commonly done by other persons in like circumstances, or (b) that it was something which was so obviously wanted that it would be folly in anyone to fail to provide it.

Brown it had been thought (and in some cases held¹⁹⁴) that once the pursuer had proved that the defenders had not followed common practice, the onus shifted to the defenders such that they would not escape liability unless they proved as a reasonable certainty that even if they adopted the common practice it would have had no effect. *Brown*, following *Cavanagh v. Ulster Weaving Co.*¹⁹⁵ and *Paris v. Stepney Borough Council*¹⁹⁶ held that Lord Dunedin's dictum in *Morton v. Dixon* had merely expressed a proposition of good sense and not a principle of law.¹⁹⁷

By the mid sixties, the House of Lords had ameliorated the stringency of the rules that a deviation between record and evidence might be fatal by holding that a pursuer could succeed, if, following the approach of LJ-C Thomson in *Burns v. Dixon's Iron Works*,¹⁹⁸ the case established in evidence was a variation, modification or development of the case on record.¹⁹⁹ *Cleisham* was concerned with whether the pursuer's evidence during a jury trial supported her own case on record and whether there was corroboration for her version of events. The English judges considered that the case established in evidence was a variation of the case on record;²⁰⁰ the Scottish judges both concluded that the evidence did not support her only case on record²⁰¹ with Lord Guest arguing that a record could not be extended to cover a case not falling fairly within the terms of the pleading, 'if the sanctity of pleading was to be

¹⁹⁴ see *Brown v. Redpath Brown* 1963 SLT 219 (decided 1952) purportedly following *Morton v. Dixon* 1909 SC 807. See also *McLaughlan v. Craig* 1948 SC 599.

¹⁹⁵ [1959] 3 WLR per Lord Keith at 274.

¹⁹⁶ [1951] AC per Lord Normand at 382.

¹⁹⁷ see further discussion of the case in 'The Dunedin Formula - An Obituary?' (1960) 76 *Scottish Law Review* 57.

¹⁹⁸ 1961 SC 102 per LJ-C Thomson at 107.

¹⁹⁹ See *Cleisham v. British Transport Commission* 1964 SC (HL) 8 and *O'Hanlon v. John G. Stein & Co.* 1965 SC (HL) 23.

²⁰⁰ Lord Morris of Borth-y-Guest at 13 ff, Lord Hodson at 20 ff, and Lord Devlin at 24 ff.

²⁰¹ Lord Reid at 13 and Lord Guest at 23. For analysis of the decision see W.A. Wilson, 'Cleisham and Corroboration' *op. cit.*

preserved in any real sense.²⁰² Nevertheless the English judges were persuaded that the pursuer's case was so covered and that there was corroboration.

Even so, in the Divisions and the Outer House, pleadings continued to be strictly construed, both at debate or in proof or jury trial. The rules for pleading were elaborate, technical and to some extent artificial. One commentator remarked:

'it is becoming increasingly obvious that sooner or later the Scottish rules of pleading will have to be reconsidered. It is impossible to read such decisions as *Cleisham* and *Thomson v. Glasgow Corporation*, without reflecting that the rigour of the record may sometimes result in injustice. Strict rules of pleading may have worked well in more leisurely days but under modern conditions they perhaps make too little allowance for the frailties of litigants and their advisers.'²⁰³

In 1966, the House of Lords in two cases made further inroads into the conventional rigour of the record by holding that a failure to object to evidence substantiating a case not on record would permit the court to consider the evidence in assessing liability. The point was first developed in *M'Glone v. British Railways Board*²⁰⁴ and then confirmed in *Albacora SRL v. Westcott & Laurence Line Limited*.²⁰⁵ In another case the same year, Lord Reid, in view of the 'increasing frequency of attacks on the form

²⁰² *Cleisham, op. cit.*, per Lord Guest at 23.

²⁰³ Wilson, 'Cleisham and Corroboration' *op cit.* at 59.

²⁰⁴ 1966 SC (HL) 1 per Lord Reid at 12 and per Lord Guest at 14-5.

²⁰⁵ 1966 SC (HL) 19 per Lord Reid at 23 and per Lord Guest at 26. Note Lord Pearce followed the Scots judges but based his judgment on the fact that, in his view, 'neither party had been prejudiced by the misconceived allegations of the other party.' (at 26). See also *O'Donnell v. Murdoch M'Kenzie & Co.* 1966 SC 58; 1967 SC (HL) 63 in which evidence for a pursuer which materially differed from his record was 'reluctantly' treated by the Second Division as competent evidence in the case in the absence of timely objection: per LJ-C Grant at 1966 SC 60 (Macphail, *Evidence*, (Edinburgh, 1987) para 8.40) Note however, that the defenders did not call any evidence and the House of Lords considered, following *Ross v. Associated Portland*

of pursuers' pleadings in Scottish appeals' drew attention to the fact that the Scottish system of pleading, 'admirable' as it was, required 'care and skill to be exercised in framing the condescendence.'²⁰⁶

Further decisions of the House of Lords in the sixties brought the issue of strict interpretation of pleadings in Scots Law to the fore and put in sharp relief the artificiality or at least the complexities which sometimes arose from such an approach. Throughout the period, the law was in a state of flux as to which party bore the onus of proof in relation to statutory duties, qualifications therein and failures thereof, which affected pleading practice in such cases. The issue was important as many of the statutory regulations made provision for a defence of 'reasonable practicability' and if as a matter of relevancy a pursuer required to aver this, then he was also required to prove it, the onus of doing so remaining upon him. This of course was consistent with the general onus on a party to prove his case and for a defender to put him to his proof. In *Wardlaw v. Bonnington Castings Ltd.*²⁰⁷ the Court considered that in a case based upon breach of statutory duty, the onus was on the pursuer to prove the breach of the duty averred and that the breach caused the injury. *Hall v. Fairfield Shipbuilding and Engineering Co. Ltd.*²⁰⁸ went to the House of Lords on the same point, the Lords deciding that if a pursuer made averments of reasonable practicability and then failed to establish them in evidence then he was precluded from presenting a case on a broader front.²⁰⁹ Lord Reid (in a dissenting

Cement Manufacturers [1964] 1 WLR 768, that the most favourable inferences could therefore be drawn from the pursuer's evidence.

²⁰⁶ *Wyngrave's Executrix v. Scottish Omnibuses* 1966 SC (HL) 47 per Lord Reid at 80.

²⁰⁷ 1956 SLT 135.

²⁰⁸ 1964 SC (HL) 72 per Lord Reid at 79-80.

²⁰⁹ per Lord Guest at 84.

speech²¹⁰) noted that the pursuer could refrain from making averments directed towards reasonable practicability on the basis that it was for the defender to aver and prove reasonable practicability as a defence. In *Hall*, he did not do so and the point in law as to whether it was a defence or an inherent part of the statutory offence was not decided.²¹¹ The pursuer having made averments of reasonable practicability was held to have accepted the onus of proving them. As he could not discharge the onus, he failed. In *Donno v. British Railways Board*²¹² it was held that it was for the pursuer to aver and establish reasonable practicability²¹³ whilst a year later, in *Duncan v. Smith & Phillips*²¹⁴ it was held that it was for the defender to do so. *Nimmo v. Alexander Cowan & Sons*²¹⁵ settled the issue. The case concerned s. 29(1) of the Factories Act 1961 which required that every place at which any person had at any time to work 'shall, so far as reasonably practicable, be made and kept safe for any person working there.' The pursuer averred that the place of his work was not made and kept safe but did not go onto aver²¹⁶ that it was reasonably practicable for the defenders to do so. The defenders appealed to the House of Lords on the point that the case was irrelevant in the absence of this latter averment. Lord Reid accepted that there was much doubt where the onus rested in cases where a statutory duty was qualified²¹⁷ and in a dissenting judgment considered that the onus lay with the

²¹⁰ Lord Reid later explained his rationale in *Gibson v. BICC* 1973 SC (HL) 21 that the ordinary rule was that the burden of proof rested upon a pursuer and that (pre *Nimmo*) the pursuer had thus accepted the onus in making averments of reasonable practicability. If he was contesting the onus, he should have taken the case to debate on relevancy on the basis that the defenders had not made positive averments that it was not reasonably practicable to have made the work place safer. (Conversely, this is what the defenders did to the pursuers in *Nimmo* to force a decision on relevancy in the absence of averments of reasonable practicability on the pursuer's record.)

²¹¹ Lord Reid at 80.

²¹² 1964 SLT (Notes) 108.

²¹³ see also *Fern v. Dundee Corporation* 1964 SLT 294.

²¹⁴ 1965 SLT (Notes) 16.

²¹⁵ 1967 SC (HL) 79.

²¹⁶ deliberately, as it was presented as a test case.

²¹⁷ *ibid.* at p. 96.

pursuer. But by a majority, the Lords held that the onus rested with the defender.²¹⁸ For a period thereafter, there remained a tension between *Hall* (decided on the facts) and *Nimmo* (decided as a matter of relevancy) as to the consequences of a pursuer making averments of reasonable practicability.²¹⁹ *Jenkins* was appealed to the House of Lords.²²⁰ The Lords did not find any inconsistency between *Hall* and *Nimmo* but affirmed that if a pursuer made averments about reasonable practicability then he had to prove them. If there were no averments then the pursuer could not lead evidence to demonstrate how the work place could have been made safe as a matter of reasonable practicability but would be entitled to cross-examine the defender to demonstrate measures which would have been reasonably practicable. These cases all led up to the decision of the House of Lords in *Gibson v. BICC*²²¹ examined in the Introduction to this thesis in which there is found Lord Diplock's scathing assessment of Scottish pleading practice of the time. In *Gibson*, the House of Lords confirmed the decision in *Nimmo* that the onus of proving reasonable practicability rested on the defender. Lord Reid, who had dissented in *Nimmo*, considered in *Gibson* that the defender was bound to prove a negative, i.e. that it was not reasonably practicable to make the place safer and he only required general averments and proof in general terms in doing so. It was then open to the pursuer's counsel in cross-examination to put to defender's witnesses whether particular methods not adopted were in fact reasonably practicable. A concession would assist the pursuer, as the defender would have failed to discharge the onus on him following *Nimmo*. But without averments on record as to reasonable practicability the

²¹⁸ Lord Guest deciding that the onus lay on the defender as did Lords Upjohn and Pearson, Lord Wilberforce following Lord Reid.

²¹⁹ See *Jenkins v. Allied Ironfounders Limited* 1969 SC 139 where, by a majority, the First Division followed *Hall*.

²²⁰ 1970 SC (HL) 37.

²²¹ 1973 SC (HL) 15.

pursuer would be prevented from leading positive evidence.²²² Thus, as Lord Reid appreciated, a pursuer's counsel faced difficulties in conducting such litigations because: if the pursuer wished to allege that there was a method which his employer should have employed and that that method was reasonably practicable, then to succeed on that basis, he required averment and proof. Doing so, however, might endanger the whole of the pursuer's case, as he periled the case on proving the method, following *Hall*. Sometimes therefore, it was better as a precaution against that eventuality, to refrain from making averments about reasonably practicable methods, and simply leave it to the defenders to discharge the onus upon them, following *Nimmo*. This would permit the pursuer's counsel to try to elicit a concession from the defender's witnesses that there were other reasonably practicable methods which were not employed, which concessions would be founded upon by the pursuer.²²³ The question for the court in *Gibson* was whether the pursuer's averments directed to reasonable practicability, which were denied on record by the defenders but in any event were not proved by the pursuer in evidence, discharged the defender's general onus imposed following *Nimmo*. Lord Reid revisited his dissenting opinions in *Hall* and *Nimmo* and came to the view that if the pursuer averred methods of reasonable practicability he was still to prove them by positive evidence and could not prove any other methods beyond those averred; but even if he did not or could not prove them, this did not absolve the defender from the general onus imposed after *Nimmo*, requiring proof that there was no other reasonably practicable method.²²⁴ Lord Kilbrandon accepted that the 'Scottish requirement of detailed pre-trial notice of the foundations of the parties' respective

²²² per Lord Reid at 20.

²²³ even though the pursuer by that stage could not lead positive evidence of the other reasonably practicable methods.

²²⁴ per Lord Reid at 22.

cases' had been 'criticised in the past and is not without its detractors in the present.' Considering that the Lord President's analysis of the law was inadequate in the lower court²²⁵ he opined that the defenders in this case were coming to proof not only under the burden of meeting the pursuer's case on record but also under the obligation of proving at the trial that it was not reasonably practicable to make and keep safe the place of work.²²⁶ In agreement with Lord Reid, he expressed this view:

'In such a case, the pursuer must specify that neglect as part of his grounds of fault if he wishes to lead evidence about it. But if no such specific ground is alleged, or if, being alleged, it fails of being proved, that does not affect the onus incumbent on the defenders of proving that it was impracticable to make a dangerous place of work reasonably safe, nor is the pursuer's counsel inhibited from challenging the evidence given by a defender's witness by asking him about the practicability of any method which that witness may expressly, or impliedly by ignoring it, have repudiated.'²²⁷

The development of these cases on reasonable practicability raised matters of pleading. The courts had to reconcile four principles inherent in the Scottish system of pleading with the statutory qualification: namely that the onus of proof was normally on the pursuer; that in making averments of fault, a pursuer was required to make general averments of duty and then to particularise duties arising therefrom;²²⁸ that this was required as a matter of fair notice to a defender; and to succeed a pursuer required to prove the particular duties and could not set up a case

²²⁵ as he had not even referred to *Nimmo* in his judgment.

²²⁶ per Lord Kilbrandon at 34-5.

²²⁷ per Lord Kilbrandon at 36.

²²⁸ see *supra*.

for which there was no averment on record²²⁹ as a defender needed only to prepare to meet the case on record.²³⁰ The end result was, to put it mildly, a complicated set of rules for averment and proof where a pursuer founded upon a statutory provision which contained wording such as 'insofar as reasonably practicable'. Against this background, one can perhaps understand Lord Diplock's comments on a system of pleading which could require or enable counsel for the pursuer to cross-examine a defender's witness, without any notice, as to methods of reasonably making a work place safer in the hope of gaining an admission in his favour which failing the pursuer was debarred from leading any positive evidence in rebuttal, as 'capricious'²³¹ and a 'game of skill and chance.'²³²

Before moving on to examine the legacy of this era in modern pleading practice, one final aspect of pleadings of this time should be noticed. As might be imagined, when pursuers' pleadings were subjected to attacks in relevancy and when the courts construed the pleadings strictly, applications to amend as a result were frequent. Parties also sought to do so when proof or jury trial was imminent. At the time,²³³ amendment was governed by Rule 117(1)(d) of the Rules of Court 1948 which provided that it was 'competent for the Court at any time before final judgment to allow any amendment of pleadings which may be necessary for determining the real question in controversy between the parties.' It seems that up until the early sixties it

²²⁹ *Morrison's Associated Companies Ltd. v. James Rome & Sons Ltd.* 1946 SC 160 per L. Guthrie at 190. See also *Cleisham v. The British Transport Commission* 1964 SC (HL) 8 per L. Reid at 13 and per L. Guest at 22.

²³⁰ Lord Reid in *McGrath v. NCB* (4 May 1954, unreported) applied in *Hamilton v. John Brown & Co. (Clydebank) Ltd.* 1969 SLT (N) 18 and *Carroll v. Scott's Shipbuilding Co.* 1969 SLT 46, *Morrison's Associated Companies v. Rome* 1964 SC 160 at 182; *McIntosh v. Walker Steam Trawl Fishing Co.* 1971 SLT (N) 75.

²³¹ per Lord Diplock at p. 28.

²³² per Lord Diplock at p. 30.

²³³ i.e. pre 1965 (when the Rules of Court were changed).

was relatively easy to obtain an amendment at a late stage in a case.²³⁴ Thereafter however, the Inner House became more severe on late amendments. In *Thomson v. Glasgow Corporation*,²³⁵ LJ-C Thomson considered that amendment was, in theory, 'a belated adjustment for which the laggard has to pay.' He appreciated that it was well known that parties would amend following relevancy debates²³⁶ but considered that amendments put forward at a late stage were generally undesirable, noting that

'the number of minutes of amendment which are now tendered at various stages is far too great. The habit has been gradually increasing over the last few years. It is a bad habit and one which reflects no credit on those responsible for the initial preparation of the case or for the state of the pleadings. The present Rules of Court as to amendment were intended to get rid of rigidity and formality. They were not intended as a cloak for laziness, ignorance and incompetence.'²³⁷

In *Dryburgh v. National Coal Board*,²³⁸ Lord President Clyde remarked that if delays in the legal machinery were to be eliminated, 'last-minute amendments on the eve of inquiry by proof or jury trial must, except in highly special circumstances, in my view, be refused.'²³⁹ Less than a year later he remarked in *Strachan v. Caledonian Fish-selling and Marine Stores Co.*²⁴⁰ that:

²³⁴ See Anon., 'The Pleader', (1958) 74 *Scottish Law Review* 217 and Anon., 'Notes from Edinburgh' (1962) 78 *Scottish Law Review* 48.

²³⁵ 1961 SLT 237.

²³⁶ *ibid* at 247.

²³⁷ *ibid* at 248. For commentary on the case, see 'Amendment of Pleadings' (1961) 77 *Scottish Law Review* 21. For the private thoughts of the pursuer's counsel who moved the amendment before the court in this case, see G. Stott, *Lord Advocate's Diary 1961 - 1966* (Aberdeen UP, 1991) p. 5. For a similar sentiment in modern times, see C. Glasser, 'Civil Procedure and the Lawyers - The Adversary System and the Decline of the Orality Principle' (1993) 56 *M.L.R.* 307.

²³⁸ 1962 SC 485.

²³⁹ per LP Clyde at 491.

²⁴⁰ 1963 SC 158.

'there have been recently far too many instances of this practice of attempting to bring forward late amendments which, with proper preparation, could have been made much earlier and would have avoided a postponement of the trial or proof beyond the date fixed for it...If a case is so inadequately prepared that only a very short time before the trial or the proof some new matter is brought up which reasonable diligence could have revealed before, the party concerned may well have to suffer the consequences of his own failure.'²⁴¹

Perhaps reasons for the frequency of late amendments are not too difficult to guess, and one might posit that frequently the counsel involved in these cases, whilst proof or jury trial was imminent, realised late in the day that there were flaws in the pleading of the case, which flaws, of course, could be fatal.

(x) Drafting and Standards of Written Pleadings.

Throughout the period examined in the previous chapters, it is clear that, systematically, rules were created by the Court regulating its procedure and providing standards for practitioners to follow. These were frequently not followed in practice, sometimes because lawyers were not aware of the terms of the regulations, at other times because the lawyers perceived the regulations or rules to be disadvantageous to their clients and persuaded the Court not to require them to be followed. Again, the lawyer could persuade the court to twist the application or interpretation of the rule, this then became a precedent in itself and, in time, the accepted interpretation of that rule. In the literature, it is a frequent theme that the procedures of the court or the actings of the parties were sources of delay and

²⁴¹ per LP Clyde at 160-1.

expense and that parties were not pleading properly. One might recall the remarks of Charles Hope at and following the implementation of the 1825 Act, the attempts of the Lords Ordinary in 1829 to 'purify and simplify records', the Court's draft act of sederunt in 1847, leading up to the 1850 Act with the abolition of written cases before the Ordinary, Lord Advocate Rutherford Clerk's attempts to regulate written pleading along English lines in 1863; and the terms of the 1868 Act whereby the finality of the closed record was finally softened by the allowance of amendment. In this evolutionary process, up to the end of the nineteenth century, the rules regarding pleadings became clearer as cases were decided and it appears that the standard of written pleading improved.²⁴² Even so, from then onwards, the Court frequently bemoaned the fact that the standard was falling and that, although the system was a good one, more could be obtained from its operation if the rules of pleading were followed more closely. Consider Lord President Clyde's comments in 1906:

'It is possible to doubt whether we are getting as full value out of our written pleadings as we formerly did, or as we might still do ... our pleadings are becoming less and less well written... And the increasing unwillingness of the Court to throw a case out on the pleadings alone encourages a laxity which threatens to forfeit the most valuable of the advantages which the system of written pleadings ought to secure to us...Slipshod draughtsmanship is the outward sign of a degeneracy in our written pleadings which goes deeper than external form.'²⁴³

²⁴² Even from the brief examination of the Session Papers contained in Appendix 2.

²⁴³ James Avon (later Lord President) Clyde, 'Practice and Procedure in the Court of Session', (1906-7) 18 JR 319 at 326.

Increasingly however, it is the system of written pleadings itself which has been subject to attack. The Royal Commission of 1927, under Clyde's Chairmanship reported that the practice of adjustment of the Open Record before closing was a 'fruitful source of delay' and that delay was the 'one serious defect in the Scottish system of written pleadings.'²⁴⁴ Recently there have been more trenchant criticisms which have raised prominently issues of cost, delay, access to justice, the proper rôle of the parties and the judge and the rôle of traditional written pleadings in a modern civil justice system. The last decade produced some vigorous debate²⁴⁵ and although there was heat there was very little light.

Certainly, it is only now that it has been appreciated that the approach to written pleading as exemplified in the reported cases of the 1950s, 1960s and 1970s has had a detrimental effect on the modern practice of drafting pleadings. The approach emphasised the need for proper formulation of parties' cases on record, which failing parties could and would lose actions on pleading points. The reaction to this has seen pleadings become engorged with unnecessary detail in order that parties are protected (as they suppose) from attacks by an opponent based on fair notice and

²⁴⁴ *Report of the Royal Commission on the Court of Session and the Office of Sheriff Principal with Summary of Evidence* (2vols) 1927 Cmd. 2801, Vol. 1 p. 78. However the Commission considered that the merits of the Scottish plan did 'not lack appreciation in other countries' *ibid.* p. 74.

²⁴⁵ See for example: H. Neilson, 'Sheriff Court Options Hearings' (1993) 38 J.L.S.S. 425, N.M.P. Morrison, 'The Rules of the Court of Session' (1994) 39 J.L.S.S. 315, N.M.P. Morrison, 'Scotland's New Commercial Court' (1994) 39 J.L.S.S. 354, The Hon. Lord Morton of Shuna, 'Procedural Reform of the Court of Session', (1995) 1 Civil Practice Bulletin 2, M. Upton, 'The Cullen Review' (1996) 41 JLSS 111, R. Mays, 'Case Management in the Scottish Civil Courts. Whose Case is it Anyway?' (1997) 1 S.L.P.Q. 65, N. Morrison, 'The Cullen Report' 1996 SLT (News) 93, R. Wadia, 'Judicial Case Management in Scotland. Indecision and Indigestion.' 1997 SLT (News) 255, R. Clancy, A. Murray and R. Wadia, 'The New Commercial Cause Rules' (2parts) 1997 SLT (News) 45; 1997 SLT (News) 53, B.G.M. Main and A. Park, 'Pre-trial Settlement: Who's for Two-way Offers?' (1999) SLPQ 30, A. Murray 'Court of Session Procedure: Past, Present and Future' 1997 SLT (News) 259, R. Mays, 'Frying Pan, Fire or Melting Pot? - Reforming Scottish Civil Justice in the 1990s', (1997) 2 J.R. 91, N.M.P. Morrison, 'Reform of Civil Procedure' 1998 SLT (News) 137.

specification. Lord Cullen observed in his Review of Business of the Outer House of the Court of Session,²⁴⁶

‘The overloading of pleadings with unnecessary detail is not a new development but has, in my view, become more obvious as pleaders have reacted to the over-critical attitude to pleadings which was part of the culture of the courts some 40 years ago. I am in no doubt that in general pleaders aver too much and overstep the boundary between what is required to give fair notice of their case and what is more a matter of evidence.’²⁴⁷

The writer respectfully agrees with this proposition. In my relatively short experience of written pleadings as a solicitor, research scholar and now advocate,²⁴⁸ it has frequently occurred to me that much more detail is inserted into pleadings than is strictly necessary. So, in a basic breach of contract case where there is a disputed written contract, one often sees averments of how the parties originally met, how their relationship developed, and what each was thinking and doing up to the point that they entered the contract. Strictly, all of this is unnecessary and would in any event be classed as pleading evidence. Even when ‘extraneous’ averments are necessary for setting up a case based on implied terms of contract, or upon a previous course of dealing, often there are no averments or inspecific averments until the third article of condescendence where there may be found a bald averment that there was an implied term of the contract upon which the pursuer founds but the basis for the term being implied is not immediately apparent. Similar considerations apply in reparation actions for damages for personal injuries and in the construction of cases of fault at common law.

²⁴⁶ (1995).

²⁴⁷ *ibid.* para 3.24.

There is a gulf of difference between fair notice and full notice. It is a recognised tactic of defenders to require full averments on every facet of the pursuer's case thus pushing the pursuer into periling his case on very narrow points.

Certainly, in drafting, one is on the watch for inspecific averments and the possibility of being taken to debate but I suspect that this is not the whole answer for when written pleadings fall short of the mark. In the previous chapter, we noted the sage advice on drafting pleadings that before doing so, one masters all the facts and then conducts a thorough investigation of the law applying to the case and then analyses the substance of the case. I doubt whether in practice this commonly happens.²⁴⁹

Experienced practitioners may already know the law, but less experienced practitioners may rush to style books or previous pleadings, slavishly converting the style rather than analysing the law and facts first and then modifying the style as applicable. It is not suggested that practitioners are sloppy or slipshod in their methods²⁵⁰ but simply that the preparation of written pleadings in the modern legal world where time is short, money even shorter and pressures for delivery are constant, the resources available to the practitioner to sit and analyse the facts and law of the case before drafting are circumscribed. There is always a more pressing matter at hand. The Hughes Commission noted in 1980 that 'there is a human

²⁴⁸ Incidentally the author does not suggest that his own drafts of written pleadings are always the epitome of clarity and good practice!

²⁴⁹ The main point in law can be overlooked, even in those cases which reach the House of Lords. Lord Keith of Kinkel in *GUS Property Management Ltd v. Littlewoods Mail Order Stores Ltd*. 1982 SC (HL) 157 observed in the circumstances of that case that 'there is no doubt that the pursuers' pleadings are not drawn with that degree of accuracy which counsel might normally hope to achieve. The draftsman does not appear to have had in the forefront of his mind a sound grasp of the true legal position, namely that the pursuers are suing not for their own loss, but for that suffered by [their predecessors in title.]' (at p. 178).

²⁵⁰ Some have so suggested. See A. Murray, 'Court of Session Procedure: Past, Present and Future' 1997 SLT (News) 259 at 262.

tendency for even the most responsible professionals, if they are busy men, to put off work which can wait.²⁵¹ Perhaps drafting pleadings lends itself to an attitude that there will be procedures available at a later stage in the course of the litigation to 'sort things out'.

The manner of drafting pleadings may not lend itself to best practice. Professor Black considered that 'stream of consciousness' pleading was due, in part, to the use of dictating machines.²⁵² One hundred years ago, the future Lord Dundas complained that '[t]he growing use of both short hand dictation and of typewriting is making its mark on written pleading of to-day, and not for the good.'²⁵³ In 1957, the future Lord Stott was obviously so amazed that 'five juniors now dictate their summonses and other writings to (*sic*) [tape recorders]' that he recorded the fact in his diary.²⁵⁴ In present practice, at least at the Bar, the tendency is to draft pleadings on lap-tops using word processing packages and then to email the agent the draft.²⁵⁵ This in itself may give rise to a tendency to 'cut and paste' from previous drafts of pleadings.

At its best and with resources of time and money, the system of written pleading does perform all of the functions ascribed to it at the start of Chapter 4. Lord Gill expressed this view that,

'The Scottish system is logical and intellectually disciplined. In theory, it enshrines a regard for the basic structures of legal philosophy: a rigid distinction between fact and law; the consideration of relevancy before

²⁵¹ *Royal Commission on Legal Services in Scotland*, (Chairman, Rt. Hon. Lord Hughes) Cmnd. 7846 (2 vols.) (1980) See also A. Deutsch, 'Two Gripes from the Sheriff Court', (1996) 10 CPB 8 'The natural human tendency is leave everything to the last minute.'

²⁵² R. Black, *Introduction*, *op. cit.* p. 17.

²⁵³ Dundas, *Observations on the Art of Advocacy*, *op. cit.*, pp. 332-3.

²⁵⁴ G. (Hon. Lord) Stott, '*Q.C.'s Diary 1954 - 1960*' (Edinburgh, 1998) at p. 143.

²⁵⁵ See Chapter 4 *supra*.

inquiry into fact – a concept central to the practice of the canonists from medieval times until today; and the epitomisation of a party's legal propositions in the form of concise pleas-in-law relating fact to law and relating the law to the remedy sought. In an ideal world in which time and cost are irrelevant it is an intellectually satisfying way in which to conduct civil litigation.²⁵⁶

But it cannot be said that drafting pleadings is easy or a skill that is easily acquired. The rules relating to written pleading are fairly complex. It takes years of training and experience before a solicitor or advocate can be said to be truly proficient in drafting written pleadings.²⁵⁷ Thus it has been said that drafting written pleadings is an 'art',²⁵⁸ as well as a 'science',²⁵⁹ or a 'skill',²⁶⁰ or a 'craft'²⁶¹ to be learned. However defined, the mastery of written pleading is fundamentally necessary for practice in the courts. Without a knowledge of the rules, one cannot negotiate the procedural obstacles and ultimately successfully pursue or defend a claim. But knowledge may not be enough. It is often said that a full understanding of the rules of written pleading will not be acquired until one has had one's own attempts scrutinised at debate or until one comes to make legal submissions at the end of a proof or proof before answer relying on the pleadings. The Faculty of Advocates has long required

²⁵⁶ Lord Gill, 'The Case For a Civil Justice Review' *op. cit.* p. 132. See also Lord Cullen, *Review, op. cit.*, para. 3.21 and the Coulsfield Report '[T]he composition of satisfactory written pleadings, and the criticism of them, are, in some ways, a challenging and a satisfying intellectual exercise. Coulsfield Report, Ch. 6 *op. cit.*, para. 4.

²⁵⁷ C. Hennessy, *Civil Procedure and Practice*, Preface, v.

²⁵⁸ D. Dundas, 'Observations on the Art of Advocacy' (1903) 15 J.R. 329, D. (Lord) Blades, 'The Art of Pleading' (1948) 64 SLR (No. 758) 25 and (No. 759) 53, R. McEwan, *Pleading in Court*, (2nd ed.) (Edinburgh, 1995) p. 1, D. Walker, *The Scottish Legal System* (6th ed) (Edinburgh, 1992) 222, J. MacKenzie, *Written Pleadings, op. cit.* p. 1.

²⁵⁹ B. Kearney, *An Introduction to Ordinary Civil Procedure in the Sheriff Court*, (Edinburgh, 1982), p. 32.

²⁶⁰ A.G. Walker, 'Pleaders and Pleading in The Sheriff Court' (1951) 67 Scottish Law Review 33 at 42, E. Bowen, 'Written Pleadings in the Sheriff Court' (1999) 4 SLPQ 245.

'devil advocates' to undergo a period of 'devilling' or training, under the close supervision of an experienced junior counsel.²⁶² As part of that training, for approximately seven months, devils daily are required to draft pleadings using the materials sent to their 'devil master' which attempts are then corrected by their devil master (often extensively).²⁶³ Thus the devil acquires training in the skill or craft of drafting written pleadings. He or she will build up a bank of knowledge and experience and often a collection of styles for future use. On calling, the new advocate will enter into practice and will be expected to be fairly proficient in drafting written pleadings. Even then, in cases which require a formulation in pleading which is unusual or unorthodox, he or she will have recourse to the collective pool of knowledge of others at the Bar,²⁶⁴ styles from the Session Papers as well as advice from their devil master. Solicitors are not so favoured in their training. Whilst they are better equipped to learn the skills of drafting than previously²⁶⁵ and all solicitors have instruction in pleading whilst at University,²⁶⁶ they do not have the same period of intensive instruction available to the devil advocate. If they choose to

²⁶¹ P. Brodie, 'Basic Guiding Principles', *Written Pleadings Course*, Law Society of Scotland/Update) (1993) p. 3

²⁶² Long ago it was considered the 'idle year' during which the prospective advocate 'purged' himself of outside business interests and prepared for entry to the profession (see e.g. Lord Macmillan, *A Man of Law's Tale*, (London, 1952) p.26) but from 1968 onwards the Faculty reorganised the Regulations for devilling. DAO Edward, 'Faculty of Advocates: Regulations as to Intrants' 1968 SLT (News) 181, D. Edward, 'Scottish Legal Education and the Legal Profession' in H.L. MacQueen, (ed.), *Scots Law into the 21st Century. Essays in Honour of W.A. Wilson* (Edinburgh, 1996) 50 at 56.

²⁶³ As Professor Black has wryly noted: "Torn apart (and frequently torn up)". *Introduction, op. cit.* p. 2. The writer's efforts as a devil were frequently torn apart and invariably interlineated, delineated and marked in the margins with copious devil master remarks. These marks did decrease towards the end of devilling.

²⁶⁴ informally of course. It is one of the greatest strengths of the Scottish Bar that its collegiate nature permits advocates to converse with one another on points of difficulty or upon problems in cases in which they are engaged.

²⁶⁵ See E. Bowen, 'Written Pleadings in the Sheriff Court' *op. cit.* p. 246.

²⁶⁶ in the Diploma in Legal Practice.

practise court work, they will then progressively acquire increasing experience in the skills of drafting written pleading in the same way as a newly called advocate.²⁶⁷

As the Coulsfield Report noted,

'Counsel have learnt, and indeed have devoted a considerable amount of time and energy to learning, the skill of writing written pleadings in their present form and the skill of analysing and picking holes in such written pleadings. Further, the composition of satisfactory written pleadings, and the criticism of them, are, in some ways, a challenging and a satisfying intellectual exercise.'²⁶⁸

If the training period for advocates is longer than that enjoyed by solicitors, does this affect the standard of written pleading in the Court of Session and the sheriff court?

Again from my limited experience I would say that the standard of written pleading in the Court of Session is higher. My experience apart, it has been remarked that in the sheriff court, the standard is lower than that in the Court of Session²⁶⁹ and historically pleading in the sheriff court has been trenchantly criticised.²⁷⁰

Is the standard of written pleading declining? From the literature, it seems that the standard has been declining ever since the Court of Session Act 1825. But for long the author has suspected that the answer to the question depends upon who is asked.

²⁶⁷ Although perhaps less so. This is not a criticism. The junior advocate's daily work is the drafting of pleadings. It is a key component of the occupation. The solicitor may not be required to draft pleadings every day.

²⁶⁸ Coulsfield Report, *op. cit.*, Ch. 6, p. 4.

²⁶⁹ J. MacKenzie, *Written Pleadings op. cit.* p. 109, R. Black, *Introduction, op. cit.* p. 1. Scottish Law Commission, *Multi-Party actions: Report by Working Party Set Up BY Scottish Law Commission* (1993) para. 3.43. LP Clyde considered sheriff court pleadings as 'often rough and defective.' R. Wyness Millar, 'Civil Pleading in Scotland' *op. cit* fn 184 at pp. 719-20.

²⁷⁰ See comments in *Boyle v. Glasgow Corporation* 1949 SLT 274, *McGrath v. Glasgow Coal Co. Ltd.* 1909 2 SLT 92.

At a formative research stage, I set up a study designed to elicit the views of solicitors and sheriffs as to written pleadings in the sheriff court. The methodology and results can be found at Appendix 3(b) and 4(b). In particular, I wished to test what the profession and the judiciary thought about the standard of written pleading in the sheriff court and whether it had declined following changes to the sheriff court rules. The results were interesting. In the Sheriff Study,²⁷¹ 31%²⁷² of sheriffs thought the standard of written pleading in the sheriff court was poor, 54% thought it fair and only 6% thought that the standard was good. As to whether they thought that the standard of written pleading had fallen in the previous ten years, the response was equally divided. 50% of sheriffs thought that it had and 50% considered that it had not. In the Solicitor Study, 5% of solicitors thought that the standard of written pleading in the sheriff court was good, 78% thought it moderate and 15% thought it poor. When asked whether the standard had fallen in the previous ten years, 25% thought that it had and 73% thought that it had not. When asked whether the current system of written pleadings should remain part of civil litigation, 63% thought that it should and 37% thought that it should not.

The research was carried out in 1997-8 and from the results it might be suggested that the impression of both sheriffs and solicitors on standards of written pleading in the sheriff court at that time was that they were 'not good'. Whether the standard had dropped seemed to be matter of personal opinion, although the division in the Sheriff Study was marked. In any event, whatever the standard of written pleading,

²⁷¹ Reference will hereafter be made to the 'Sheriff Study' corresponding to Appendix 2 and the 'Solicitor Study' corresponding to Appendix 3.

²⁷² The responses in the Sheriff Study varied from question to question and for ease of analysis I have converted the figures into percentage terms.

in both the sheriff courts and the Court of Session, one might ask the more pertinent and fundamental question of whether the system should continue in modern civil procedure.

(xi) Some Thoughts on Written Pleading.

If it takes considerable time and energy to master the Scottish system of written pleading, the question must arise: why? Is the system overly complicated? Is it the case that written pleadings really act as a trap for the unwitting or unwary?²⁷³ Is it right that cases can be won and lost on pleading points or that a decision after proof rests on what was or was not covered by the party's pleadings? Is the expenditure of time in the composition of the closed record really worth the effort?

Before returning to these broad issues, let me start with some general observations which have occurred to me during my research of the development of written pleadings.²⁷⁴ In researching the topic, I have realised that there are themes which emerge from an examination of the historical development of written pleading. Many of these themes run through what has been already analysed in the previous chapters. I consider that it is important that the historical development is understood before contemplating reforms to modern civil procedure. To this extent, I would associate myself generally with Stein when he notes that

'[O]nly one who has a sure grasp of the historical origins of a rule of law, and of the connection of that rule with a particular set of social or economic

²⁷³ C. Hennessy, *Civil Procedure and Practice*, (Edinburgh, 2000) para. 3.03.

²⁷⁴ There are twelve. I will follow these with four specific observations.

conditions, can see that the time has come to abandon it when the challenged circumstances no longer require it.²⁷⁵

(xii) Themes in the Historical Development of Written Pleadings and Civil Procedure.

Firstly, as discussed earlier in this chapter, Scottish civil procedure, whilst always adversarial in the sense of pitting a pursuer against a defender, would historically not have recognised the judge as an impartial observer in the preparation of pleadings. His function necessarily required participation in defining the matters in dispute between the parties. The plea of specification as a species of relevancy was a relatively late development, as initially pleadings were for the judge's information, not for informing the other side of the basis of one's case. The canonical *ficta confessio* was utilised in attempts to force the parties to meet each other in law and fact, implying admissions in the absence of formal denials and thus producing clear issues for judicial determination. The idea of the judge as legal umpire arose from voluntary non-participation by the judges in rules of court which gave them such powers, practitioners' expressions of opinion that the judge should have no rôle in this preparation which then shaped practice, the effect of jury practice and ultimately the implicit adoption of English ideas on the proper function of the judiciary. As the rules for written pleading developed, issues in dispute were focussed without the need for judicial assistance.

Secondly, and following this, it seems to me that those who champion the detailed rules and conventions of full written pleading in Scots civil procedure do so from the

²⁷⁵ Peter Stein, 'Law and Society in Scottish Legal Thought' in (eds. N.T. Phillipson and Rosalind Mitchison) *Scotland in the Age of Improvement* (EUP, 1996) p. 148 at p. 158.

standpoint that these rules are inherently 'Scottish', have much to commend them and should be altered only with a light hand. They perhaps believe that traditional written pleadings are part of the tradition of Scots Law. As posited in the Introduction, those who express such views point to historical laudatory reviews of the Scottish system and take umbrage at less admiring reviews. The sentiment is that if pleadings must be reformed, we should not go a-whoring after the 'strange gods' examples of other common law jurisdictions but should find a national cure for any internal maladies. Whilst I would agree that cures should be 'internally valid', objections to reforms in pleading which proceed upon the basis that it is no part of the judge actively to assist parties in the preparation of their positions in these pleadings is not only historically inaccurate, but simply mimics the nineteenth century contentions of the Faculty of Advocates, which subverted the idea of judicial participation in the first place. The rules of written pleading which developed proceeded upon notions of party and judicial function which were inherently English. Where the defenders of the Scottish system of written pleadings argue that any changes must incorporate retention of the doctrine of relevancy, I accept that they are on surer historical ground.

Thirdly, it seems to me that changes to the earlier form of process and more modern civil procedure have always been incremental in nature and have redeployed ideas from before, sometimes unconsciously. Even the changes implemented by the Court of Session Act of 1825 and 1850, considered by some the *fons et origo* of the Scottish system of written pleadings, incorporated ideas from the past and were in other parts simply a reaction to ongoing practical problems in civil causes. Modern complaints about tinkering reforms to civil procedure fail to appreciate the historical tradition that all reforms to civil procedure have been incremental. Perhaps with the

exception of the failed attempts to incorporate English pleading methods in 1863, Scots Law has never thrown away the principles and doctrines of her civil procedure and started again from scratch. I do not consider that this would be possible without supplanting it with a foreign system, as was contemplated in 1863.

Fourthly, in making changes, the Court has always struggled to devise a system which is sufficiently rigid to ensure that parties are compelled to state their positions in fact and law for final determination within a relatively short time frame but also allows within the system a degree of elasticity or latitude for parties to alter their positions in light of each other's pleadings and further information which becomes available in the course of the litigation.

Fifthly, and following this, parties to litigation have always reacted against being forced or compelled to state their final positions at a very early stage of a litigation. The previous thinking that a cause required to 'ripen' is just as apposite today as it was in the eighteenth and nineteenth centuries.

Sixthly, the success of any changes which have been made have depended to a large degree on the willingness of practitioners to follow such changes thereafter as well as the attitude of the court in imposing sanctions for non-obedience. Unpopular procedural changes have in the past been thwarted, frustrated or by-passed by practitioners, often with the tacit (and sometimes the express) consent of judges. Where changes have been followed by sanctions for non-compliance in conjunction with strong expressions of disapprobation from the bench, the older practices have often re-emerged later or have corrupted the intentions of the changes. In light of this phenomenon, frequently the Court has had to consider a tension in its proper rôle in

delivering justice to litigants and the chastisement and education of litigants and practitioners should they thwart, frustrate or generally fail to follow rules of court. Examples include the successive acts of sederunt of the eighteenth century as well as Charles Hope's attempts to coerce parties to follow the reforms instituted by the 1825 Act which attempts, in the event were only partially successful and a decade on, practitioners had reverted to older practices, albeit as adaptations of the rule changes.

Seventhly, it occurs to me that since at least the seventeenth century, defenders have attempted to put as many obstacles in the way of a pursuer and his decree as possible. Perhaps by virtue of the fact that it has always been the pursuer who raises the action, defenders have always sought delay. Moreover, historically, delay and resultant expense have been more hurtful to a pursuer than a defender. It might be said that this is just an example of exploiting the adversary nature of civil litigation. For certain, practitioners have always used procedural devices to gain advantages over their opponents and, as a corollary, advantages have often been obtained over an opponent through his failure to follow the court's procedure. In addition, general denials and general pleas to the relevancy have been used by defenders as tactics to delay final determination of litigation. It should be remembered that those who litigate want to win and failure has always come at a price. Tactics have always been important.

Eighthly, defenders have traditionally been entitled to put a pursuer to his proof. Thus, as a minimum, they have only ever required to meet the case pled against them. As the rules developed and jury trial and proof became the established modes of proof, this was extrapolated to restrict the extent of any evidence which the

pursuer sought to lead in that he was not permitted to prove what he had not averred. This was part of the development of the concept of fair notice mentioned above. As part of this, before a cause got to proof, defenders, with 'superfluous ingenuity',²⁷⁶ made detailed textual criticisms of, and the courts favoured strict interpretations of, pursuers' pleadings at debate on pleas to the relevancy.

Ninthly, the advice to practitioners in drafting summonses, defences, condescendences and answers has been consistent from the beginning of the nineteenth century up to the modern writings examined in the previous chapter. Although the Court has repeatedly required, and the practice books have repeatedly advocated, the pleading of 'essential' or 'material facts', separated from law, not as evidence nor even rhetoric, there is perhaps a natural temptation to plead evidence in factual articles of condescendence, as well as 'law' outwith the plea-in-law. When parties have done this by design, such an approach may have been exacerbated by misconceptions about the degree of specification which is actually required in written pleadings.

Tenthly, from the establishment of civil jury trial and thereafter proof before the Ordinary, parties have prepared pleadings and their evidence with these diets in mind. The phenomenon of settling causes just prior to, or at, such diets seems to have developed because, by that stage, the parties and their advisers had assembled their cases ready for final determination, had marshalled their facts and evidence, prepared legal submissions and thus were in command of all facets of their case, knowing the strengths and the weaknesses. So prepared, they were in a position to negotiate a settlement.

²⁷⁶ as was said in 1863. See chapter 3 *supra*.

Eleventh, as noted already, the House of Lords has affected pleading practices in Scotland throughout the centuries. At the start of the nineteenth century, it was the large number of appeals from the Court of Session which was partly the catalyst for the introduction of jury trial and the introduction of the reforms in the 1825 Act. The Lords in Scottish appeals thereafter do not seem to have appreciated the nuances of the new Scottish written pleading. As seen in Chapter 3, some of their decisions are not easily understood. As discussed earlier in this chapter, more modern pronouncements of the House of Lords in respect of Scottish methods of pleading suggest a similar lack of appreciation. The decisions of the House in the 1960s to the early 1970s did have effects on pleading practices in Scotland, although it may be maintained that the overall effect was beneficial.

Finally, the practice of written pleading has always been susceptible to 'trends'. Thus, in the past, parties have pled evidence when they thought that Ordinaries were deciding cases on probability. At one time parties truncated their pleas-in-law. From the Session Papers, it is clear that the vocabulary of pleading altered to the point where the averments in parts were highly formulaic. The development of taking specification points as relevancy also betrays a trend incorporated from jury court practice. Lastly, in taking pleas to relevancy and specification, there have been trends in going to debate on the pleas and not doing so, 'keeping the powder dry' and not alerting opponents to flaws which might be cured if warning was given.²⁷⁷

²⁷⁷ See S. Woolman, 'Pleadings' in H.L. MacQueen (ed.) *Scots Law into the 21st Century. Essays in Honour of W.A. Wilson* (Edinburgh, 1996) 277 at 281.

The above points are general points which have occurred to me in my research of the development of written pleadings. There are also four specific points relating to pleading practice which I would like to highlight.

(xiv) Four Problem Points of Practice?

I have always found it difficult to understand why a system which was designed to focus matters in dispute permitted a general plea to the relevancy. The plea developed (in slightly different language²⁷⁸) in the nineteenth century and has continued to be part of civil procedure. But I have often considered that it is irrelevant and lacking in specification in itself. At best it was only ever a safety net for a defender who might not have noticed particular relevancy points in the pursuer's pleadings. It was inserted, as Maclaren observed, *ob majorem cautelam*.²⁷⁹ Professor Black considered it 'one of the most serious defects in the Scottish system of pleading.'²⁸⁰ Other eminent writers on procedure have agreed.²⁸¹ Retaining the concept of relevancy but proscribing the general plea, would, I have always thought, compel parties to focus on relevancy at a much earlier stage in the life of a case. There is evidence in the literature that defenders previously sheltered behind general pleas with no intention of debating the plea.²⁸² Moreover, a specific plea to relevancy would fulfil the requirements of fair notice which are often said to be a central characteristic of the system. Recently the introduction of Notes of Argument in the

²⁷⁸ i.e. that there were 'insufficient averments to support the conclusions of the summons'. What this meant was that the averments had to be 'sufficiently positive and clear' and the conclusions 'regularly and legally deduced.' See *Gillespie v. Russel* (1857) 18 D. 897 at 913.

²⁷⁹ (for greater security). Maclaren *Practice op. cit.*, p. 313.

²⁸⁰ Black, *Introduction, op. cit.*, p. 28.

²⁸¹ See I.D. Macphail, 'Summary Adjudication in Civil Proceedings in Scotland' in (ed.) I.R. Scott, *International Perspectives on Civil Justice. Essays in Honour of Sir Jack I.H. Jacob Q.C.* (London, 1990), Macphail, *Practice*, (1st ed.) *op. cit.*, paras. 13-21, 13-22, Woolman, 'Pleadings' in H.L. MacQueen (ed.) *Scots Law into the 21st Century. Essays in Honour of W.A. Wilson* (Edinburgh, 1996) 277 at 282.

²⁸² See Chapter 3, and in this chapter *infra*.

Court of Session and the Options Hearing and Rule 22.1 Notes in the sheriff court have required that parties intimate the basis upon which they intend to found on their relevancy plea, but this focus occurs after the pleadings are drafted, not during the drafting.

I have also considered whether the incorporation of documents *brevitatis causa* is just a stylistic formality which has proven more obstructive than helpful. Obviously fair notice has traditionally required that an opponent knows the parts of the document which are being founded on, but if the document is lodged and those parts are referred to in the pleadings, maybe that should be sufficient. Historically, 'incorporation *brevitatis causa*' was used in the specialised circumstances where there was more than one defender convened by the pursuer, and the subsidiary defenders adopted the averments in the defences of the principal defender. From a brief examination of the Session Papers as well as the decided cases of the nineteenth century, it is apparent that the phrase was not used in the context of documents and the pleadings. In fact, I have found only one case in the period where the phrase was used in the sense of incorporation.²⁸³ The pursuer concluded for payment and had averred that the 'defender is justly addebted and owing to the pursuer the sum of £27.17.6 as per account herewith produced and herein referred to and held to be repeated *brevitatis causa*.' The question for the court was whether these averments were sufficient to support the conclusions of the summons. The court considered that they were on the basis that the account had been produced and could be considered part of the summons. Ordinarily, documents were averred to be 'produced and referred to', and later with the addition 'for their terms.' The obligation was to produce the documents founded upon, not to ensure that they were incorporated

into the pleadings. In modern practice, as discussed in Chapter 4, the decision of *Eadie Cairns v. Programmed Maintenance Painting Ltd.*²⁸⁴ caused confusion for practitioners as to what documentary evidence could be referred to in the course of debate, although in reality there was little to be confused about, and the case turned on its own facts. Two recent cases, one decided in the Outer House²⁸⁵ and the other decided by the Sheriff Principal of Glasgow and Strathkelvin²⁸⁶ reflect, it is submitted, the true position in law, but is the stylistic phrase really required? I do not think so.

My third specific point relates to candour and the ability of defenders to deny simply the averments of the pursuer and put him to his proof. In Chapter 4, the issue of skeletal defences and the case of *Gray v. Boyd*²⁸⁷ was discussed. I concluded that the decision was unsatisfactory although technically correct. The procedure for summary decree has alleviated the problem to some extent and the decision of the Second Division in the very recent case of *Urquhart v. Sweeney & Ors.*²⁸⁸ must be taken to advance the law further. However, it is still possible for a defender to aver that something in the pursuer's pleadings is 'not known and not admitted' when in reality they could, with little or no effort acquire that knowledge and make the appropriate admission.²⁸⁹ Further, and as an integral part of the adversarial system, parties can, and are expected to, keep all of their evidential cards face down until the date of proof.

²⁸³ *Newberry & Sons v. Abbey* (1827) 6 Shaw 7.

²⁸⁴ 1987 SLT 777.

²⁸⁵ *Royal Bank of Scotland v. Holmes* 1999 SLT 563.

²⁸⁶ *Steelmek Marine and General Engineers' Trustee v. Shetland Sea Farms Ltd. (sub. nom Reid v. Shetland Sea Farms Ltd.)* 1999 SLT 30 per Sh. Pr. Bowen.

²⁸⁷ 1996 SLT 60.

²⁸⁸ (unreported) 18 March 2004 (2nd Div.).

²⁸⁹ See also Lord Gill, 'The Case for a Civil Justice Review' *op. cit.* p. 132.

Finally, I have often questioned whether the system of written pleadings in Scots civil procedure, with all of its rules and the myriad byzantine exceptions to those rules, is not capable of root and branch simplification. In the course of my research, various schemes for implementing a system of shortened or 'abbreviated' pleadings have been proposed and in some cases²⁹⁰ implemented. Initially, I thought that any system of abbreviated pleading would necessarily require more pro-active judicial participation in the preparation of cases for determination than was traditional in an 'adversary system'. From there, I wondered whether this discretionary participation would lead to inconsistency and a lack of coherence in judicial approach to the management of preparing causes, which would cause unpredictability in forecasting likely attitudes of the court and lead to the administration of justice on an *ad hoc* basis.²⁹¹

I still hold the view that abbreviated pleadings generally do require greater judicial input. Whether this proceeds under the label 'case management' or some other description does not matter. There would be nothing novel in such an approach. Supervision of the preparation of pleadings, not just in form, but also to a degree in content, was historically part of the rôle of the courts. I now believe that some parts of procedure can operate in abbreviated form without this greater input but that where this is so it is derived from the nature of the actions brought under it. I consider that any changes to civil procedure and the system of written pleadings

²⁹⁰ To date, these changes have affected particular types of actions in the Court of Session.

²⁹¹ This was part of the focus for the author's article 'Access to Justice : Lessons from the Sheriff Court?' in the Hume Papers on Public Policy publication, examining the operation of the Ordinary Cause Rules 1993 as amended in the Sheriff Court. The article is reproduced in Appendix 6. The same considerations informed some of the questions posed to participants in

would require to incorporate some elements of the existing system and possess a degree of institutional 'fit' if they are to be successful.²⁹² Success, I believe, is dependent upon a willing implementation by the profession and the attitude of the courts in ensuring compliance. However, I believe that it would always remain open to reformers to create an abbreviated system but to retain traditional pleadings for cases of complexity or difficulty.

I would now argue that discretion does not equate with inconsistency,²⁹³ provided there are guidelines or principles or policy considerations which police the exercise of that discretion.²⁹⁴ Finally, I remain uncertain how the rules of traditional written pleadings which require fair notice of a case to be proved to be pleaded with sufficient specification and that proof beyond that is prohibited would be applied to abbreviated pleadings where such specification is not necessarily required and the same degree of notice is not given. In other words, if the record does not dictate the extent of proof, then there must be real dangers that the inquiry into fact could become a 'raking or fishing inquiry' and therefore longer, not shorter, proofs and jury trials would result.

(xv) Conclusion.

The above are some of my thoughts on written pleadings as they were practised in the twentieth century. In the following chapter some of these issues are developed

my empirical Sheriff Court study. See Appendices 3 & 4. Cf also comments in Coulsfield Report *op. cit.* Ch 3, p. 1.

²⁹² What, the Coulsfield Working party, in the context of their remit, called 'a local solution to a local problem'. Report, *op. cit.* Ch 1, p.2.

²⁹³ although 25/66 sheriffs in my sheriff court study thought that it did. See Appx. 4(b). In my solicitor study, 66% thought that increased judicial discretion leads to decreased consistency in judicial approach. See Appx. 3(b).

²⁹⁴ Coulsfield Report, *op. cit.* Ch. 3, p. 1.

further in contemplating the future for written pleadings. Practice in the Scottish courts increasingly is moving away from the concept of strict adversarialism, with its attendant ideas of judicial passivity, full written pleadings and their strict interpretation. Novel parts of procedure in the Court of Session and the sheriff court run counter to such traditional views. Whilst all litigation in Scotland is still adversarial (in the widest sense) the rôles of the judge, practitioner and litigant under these procedures are all being re-defined. Whether traditional written pleadings will survive is a moot point.

Further, as is characteristic of the historical development of civil procedure in Scotland, and as was characteristic of the development of written pleadings from the start, doctrinal changes proceed slowly and incrementally, shaped by practitioner attitudes to them and judicial approach to their implementation. The thesis concludes by examining recent changes to component parts of civil procedure which may indicate an uncertain future for traditional written pleadings. If these changes represent the start of a doctrinal slide away from conventional adversarialism towards a different system of pleading and procedure with a re-defined role for pleading in writing, the end result may produce a modern system which is, ironically, not only in sympathy with older 'forms of process' but which is not dissimilar to how the system of written pleadings was actually intended to operate at a formative stage. The recent changes are now examined.

Chapter Six

The Future for Written Pleadings? A Conclusion.

(i) Introduction

In recent years commentators, judges and academics have started to address such questions as: should written pleadings continue in the Scottish civil procedural system?; are they unnecessarily complicated?; do they perhaps obstruct rather than assist the resolution of civil disputes? This re-assessment of the rôle of written pleadings has occurred against the background of a debate on the civil justice system as a whole. There have been incremental reforms to parts of the system setting up specialised procedures which do not require and actively discourage the use of the full panoply of written pleadings as per the traditional system. Such specialised procedures are still the exceptions to proceeding in the courts, but as their operation proves increasingly successful, one queries whether they should be exceptions rather than the rule?

(ii) The Need for Reviewing the System of Written Pleadings: The Rationale.

The rationale behind calls for a review of modern civil procedure and the system of written pleadings is relatively simple. Presently, litigation is not expeditious and is inefficient, and therefore the costs involved in litigating are unnecessarily high. Approximately 95 per cent of actions settle but most of them do so only a short time before a diet of proof or jury trial or at the 'door of the court' itself. Thus there is wasted time, effort, money and judicial resources in settling cases at a late stage which could have been settled earlier. The system of written pleadings leaves the

parties to determine the content of their pleadings and allows them to decide the evidence to be adduced. The court's rôle is in making interlocutory pronouncements *en route* to parties finalising their respective positions and thereafter determining the case on the evidence led as restricted by these pleadings. When written pleadings are operated well, disputed issues are focussed expeditiously and therefore cheaply, well before this final determination. So focussed, parties should be able to assess the strengths and weaknesses of their cases and if necessary compromise their claims in early course, weighing risk and cost in the usual way. But as the system is based in adversarialism, it is open to abuse or can be manipulated to avoid this important focussing function. Pleadings can hinder rather than assist focus and expedition, cases drag out, the adjustment period is ill-used, the pleadings are frequently 'tinkered with' under the hand of different counsel and become bulky and unreadable,¹ the matters in dispute remain unfocussed, and parties' true positions frequently become apparent only in the course of amendment at a late stage (incurring extra and unnecessary expense).² When the Record is closed, many consider this the end of the beginning and not the beginning of the end.³ Thus, if a system of abbreviated pleading can be devised which performs the focussing function in early course, and which is not so apt to be manipulated, then the 95 per cent of cases which settle late can settle earlier with savings to all in time and money. Judicial time is saved as the court will know which actions are to proceed on any

¹ S. Woolman, 'Pleadings' *op. cit.* p. 280.

² In the more extreme cases of delay, in my experience, the pleadings *per se* have not been the cause. I have been personally involved in two actions where the litigation carried on for years. In the first, a trust case, it had gone on so long that fixing a procedural hearing was problematic as many on the present Bench had had previous involvement with the case. In the other, a damages for personal injury case (fatal), the accident had occurred in 1986, proceedings were initiated in 1996 (limitation period interrupted by reason of pursuers' non-age) and the record is still not closed. In both cases, no delay arose for pleadings reasons. In both however, the capacity of the system to tolerate delay was and is an issue.

³ Lord Gill, 'Case for Civil Justice Review', *op. cit.*, p. 129.

particular day. Parties save money as they do not have to pay for lengthy pleadings documents and such documents are restricted in number. Moreover, as the abbreviated pleadings are fairly simple, there is less scope for technical complexity and the costs of preparation are less.

(iii) Recent Criticisms of Scottish Civil Procedure and Traditional Written Pleadings.

The impetus for review of civil procedure and the reform of written pleadings has continued throughout the last decade to the present time. Prior to that, periodically there were comments by judges and Royal Commissions and committees and other consultative bodies on the efficacy of the procedure. As early as 1906 the first Lord Clyde⁴ questioned whether all litigation in the Court of Session 'required the luxury of professional assistance of the highest class.'⁵ In 1953, Lord President Cooper wondered why the courts offered a 'hand-made Rolls Royce' service when it might have been better to offer a 'mass-produced utility article', and he questioned whether the public actually wanted a procedure which at its best was a magnificent article, on which infinite care was lavished but which inevitably consumed in its production a great deal of time and of money.'⁶ He bemoaned the fact that time was lost in the 'laborious adjustment and amendment of written pleadings' and suggested that the time was ripe

'for a revision of the whole system of procedure by giving the Court effective powers to take control of the litigation once it has been brought into

⁴ whilst still at the Bar.

⁵ J.A. Clyde, 'Practice and Procedure in the Court of Session', (1906/7) 18 JR 319 at 331.

⁶ LP Cooper of Culross, 'Defects in the British Judicial Machine' in *Selected Papers, op. cit.* 244 at 257.

court, and by greatly simplifying the preparatory stages, even at the risk of occasional prejudice to one or other of the parties.’⁷

We have already examined the remarks on the adjustment of pleadings made in the 1927 Royal Commission Report under the chairmanship of the first Lord President Clyde.⁸ In 1967 the Grant Committee observed that court procedures were ‘notably slow, and apparently tortuous.’ It thought that in some instances greater speed could be shown⁹ but appreciated that ‘progress of litigation was in the hands of the parties.’¹⁰ It noted, however, that adjustment was the most important single cause of delay in disposing of civil proceedings¹¹ and that solicitors sometimes tolerated dilatory tactics on the part of their opponent.¹² It found that four-fifths of pleas to the relevancy had no substance and were intended only to delay matters.¹³ It recommended ‘the institution of a timetable indicating with reference to the date of the service of the initial writ, the various procedural steps that the parties are required to take and the time for taking them.’¹⁴ The recommendation was not implemented. In 1979 the Kincaig Committee considered that adjustments and amendments were highly contributory to delays in personal injury litigation.¹⁵ In 1980, the Hughes Commission on Legal Services suggested that a solution to the evils of cost and delay in procedure and the ‘well known but intractable problem of late settlements’ might lie in ‘the court taking a more active rôle in controlling the

⁷ *ibid.* p. 254.

⁸ *Report of the Royal Commission on the Court of Session and the Office of Sheriff Principal with Summary of Evidence* (2vols) 1927 Cmd. 2801, Vol. 1 p. 78.

⁹ Rt. Hon Lord Grant, *The Sheriff Court. Report by the Committee Appointed by the Secretary of State for Scotland* (Chairman: Rt. Hon. Lord Grant) 1967 Cmnd 3248, para. 60.

¹⁰ *ibid.* paras. 19 to 22.

¹¹ *ibid.* para. 584.

¹² *ibid.* para. 586.

¹³ *ibid.* para. 593.

¹⁴ *ibid.* para 577.

¹⁵ The Hon. Lord Kincaig, *Consultative Document on the Report on Procedure in the Court of Session in Personal Injury Litigation* (Chairman: Hon. Lord Kincaig) (1979).

conduct of a case than has been traditional in our brand of adversary procedure.’¹⁶ It questioned whether the procedures in the system for ensuring that each party had fair notice of the other’s case were ‘unnecessarily sophisticated and whether again, perhaps by greater intervention on the part of the court, the required result could be achieved with less delay and formality.’¹⁷ In 1986 the Maxwell Report found that only 60% of judicial time was expended in hearing cases¹⁸ primarily as a result of late settlements.¹⁹ In 1993, Lord Rodger, (as Lord Advocate) commented in an academic article that,

‘[t]here must be room for further consideration of our system of written pleadings. They can, of course, serve a most useful purpose in certain cases. But they absorb an enormous amount of the time of counsel and solicitors and it is not always clear that so much effort and resulting expense are justified.’²⁰

(iv) Changes to Civil Procedure in the 1980s and 1990s.

Following these Reports and comments, changes were made to parts of procedure in the 1980s and 1990s which reflected the start of a ‘sea change’ in procedural thinking. In 1984 the rules for summary decree were introduced as it was perceived that the normal rules for pleading did not prevent a defender simply putting a pursuer to his

¹⁶ *Royal Commission on Legal Services in Scotland* (Chairman: Rt. Hon Lord Hughes) 1980 Cmnd. 7846 (2 vols.) para. 14.7.

¹⁷ *ibid.* para 14.8. Quoted by Lord Cullen, *Review of Business, op. cit.*, para. 3.29.

¹⁸ Hon. Lord Maxwell, *Report of the Review Body on the Use of Judicial Time in Superior Courts* (1986) para. 2.28.

¹⁹ *ibid.* para. 6.46.

²⁰ Lord Rodger of Earlsferry, ‘A Civil Justice System in Motion’ in H. L. McQueen, (ed.) *The Costs of Justice. Proceedings of a Conference Sponsored by The Faculty of Advocates 3rd November 1993* (DHI, Occasional Paper No. 43, 1993) 13-14.

proof on minimal defences which necessitated the pursuer having to wait to go to debate.²¹

The Optional Procedure for reparation actions followed in 1985. This was designed to expedite simple actions,²² it being envisaged that an optional procedure case would last six to nine months from signeting to proof. The procedure was said to be ideally suited to cases arising out of road traffic accidents, and those arising from industrial accidents where the facts were in small compass and the medical evidence straightforward.²³ Written pleading requirements were less stringent than in ordinary Court of Session actions²⁴ although still required a sufficiency of specification as fair notice.²⁵ Although initially popular²⁶ there followed a number of decisions which introduced more conventional aspects of ordinary pleading practice,²⁷ and practitioners came to dislike the relatively rigid structure of the procedure. They considered the judicial application of the rules to be inconsistent and were often uncertain as to the degree of specification required for optional procedure pleadings.²⁸ The general nature of averments under the procedure also gave rise to difficulties in dealing with objections at proof.²⁹ Its popularity waned, and at the end,³⁰ was little used.³¹

²¹ (S.I. 1984, No. 499) They were based upon the model of the English procedure for summary judgement (then) (RSC Ord. 14). See Green's Annotated RCS *op. cit.*, Annotation 21.2.1.

²² (SI 1985, No. 227) following Report of the Kincaig Committee 1979.

²³ *Giles v. Fleming Bros. Structural Engineers Ltd* 1987 SLT 114 per L. Jauncey.

²⁴ *Dunbar v. British Coal Corporation* 1988 SLT 437.

²⁵ *McFarnon v. British Coal Corporation* 1988 SLT 642.

²⁶ R. Sutherland, 'Optional Procedure in the Court of Session 1991 SLT (News) 17.

²⁷ *Rodgers v. British Steel plc* 1990 SLT 642: averment that injury was sustained from slipping on floor due to mixture of dust and water. Evidence disclosed there was on the balance of probabilities only dust on the floor at the time of the accident and pursuer failed.

²⁸ Coulsfield Working Party Report, Ch. 5, p. 1.

²⁹ Hon. Lord Cullen, *Review of Business, op. cit.* para 3.55.

³⁰ The procedure has been replaced by the new Personal Injury Actions procedure introduced in 2003.

³¹ Coulsfield Report, *ibid.*

Following the remarks of Lord Fraser of Tullybelton in *Brown v. Hamilton District Council*³² new rules were introduced for a remedy of judicial review in which applications proceeded on simple pleadings.³³ In 1994 the Rules of Court were overhauled.³⁴ The same year, following the report of a working party chaired by Lord Coulsfield,³⁵ the procedure for commercial causes was radically overhauled. There had been a previous procedure³⁶ but it was perceived as failing to meet the needs of the business community for early decisions by 'business aware' judges.³⁷ The Commercial Cause Rules 1994 attempted to address these and introduced to Court of Session practice simple abbreviated pleadings and a pro-active judge.³⁸

(v) Changing Cultures. The Experiment of the Sheriff Court Ordinary Cause Rules 1993.

In 1993, new rules were introduced into the ordinary procedure of the sheriff court which incorporated a judicial pro-activity element. In the early 1990s, the Sheriff Court Rules Council instigated a review of sheriff court civil procedure concentrating on ordinary cause procedure with a view to reducing 'delay, cost and complexity.' Many thought that the rules required alteration.³⁹ Following two consultation

³² 1983 SC (HL) 1 at 49.

³³ (SI 1985 No. 500).

³⁴ (SI 1994, No. 1443). See further, N. Morrison, 'The Rules of the Court of Session' (1994) 39 J.L.S.S. 315.

³⁵ *Report of the Review Body on Commercial Actions in the Court of Session* (Chairman, The Hon. Lord Coulsfield) (Scottish Courts Administration, 1993).

³⁶ as constituted by (SI 1978, No.690) which was amended in 1988 and 1990.

³⁷ R. Clancy, R. Wadia and A. Murray, 'The New Commercial Cause Rules' 1997 SLT (News) (2parts) 45, 53 at 45.

³⁸ This is examined *infra*.

³⁹ In my sheriff study, 59/69 sheriffs agreed that the old rules required revision. See Appx. 4(b). In the solicitor study, 90% thought so. See Appx. 3(b).

papers,⁴⁰ the Rules Council issued a Report with draft rules, which draft, with minor modifications, became the new rules for ordinary actions in the sheriff court.⁴¹ The Council had set itself five policy objectives in drafting the rules. 1. cases should call in court only when necessary; 2. the number of callings should be kept to a minimum; 3. the rules should prescribe periods for completion of the various stages of procedure; 4. the control and management of cases should be vested in the court rather than leaving the parties free to litigate at their own pace; and 5. the procedures of the Court of Session and the sheriff court should be harmonised wherever possible.⁴² The new rules undermined the assumption that the function of a judge was simply to act as a judicial umpire. As Sheriff Principal Risk Q.C. observed,

‘The 1993 Rules have changed certain of the underlying assumptions upon which litigation is conducted, one of their main principles being that the sheriff should take an active part in ensuring the progress of the cause through the court’⁴³

The rules created an ‘options hearing’ at which the court exerted control over the future progress of case.⁴⁴ The sheriff is under a duty to ‘seek to secure the expeditious progress of the cause by ascertaining from the parties the matters in dispute’⁴⁵ as well as any other matters relating to further procedure. Duties were also imposed on the

⁴⁰ Sheriff Court Rules Council, *Consultation Paper. Review of Sheriff Civil Court Procedures and Practices*. (SCA, Edinburgh, January 1990) and Sheriff Court Rules Council, *Consultation Paper. Proposals for Review of the Format of Processes Used in Civil Litigation in the Sheriff Court*. (SCA, Edinburgh May 1990).

⁴¹ Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SI 1993 No. 1956. For further discussion of the causes of delay prevalent in the sheriff court pre-1993, the Consultation Paper and Report see D. Parratt, ‘Access to Justice: Lessons from the Sheriff Court?’ in H.L. MacQueen and B.G.M. Main (eds.), *The Reform of Civil Justice* (1997) 5 Hume Papers on Public Policy 96 at 97-9. [Repr. in Appendix 6].

⁴² See also Sheriff Court Rules Council, ‘The New Ordinary Cause Rules’ (1993) 38 JLSS 334.

⁴³ *Welsh v. Thornhome Services & Ors.* 1994 SCLR 1021.

⁴⁴ Note that the rules of written pleading were unaltered.

⁴⁵ OCR 1993, r. 9.12(1).

parties. A pursuer is required to lodge a certified copy of the record not later than two days before an options hearing or continued options hearing⁴⁶ At the hearing, both parties are under a duty to provide the sheriff with sufficient information to enable him to conduct the hearing as provided for in the rule. To be entitled to go to debate, parties must lodge a Note of Basis of Preliminary Plea,⁴⁷ foreshadowing the points for debate, three days before the options hearing and the sheriff is not bound to send the cause to debate unless he is satisfied that there is a preliminary matter of law which justifies the debate.⁴⁸ Adjustment is time limited and ceases 14 days prior the options hearing.⁴⁹ No further adjustment is permitted other than with the leave of the sheriff.

The rule changes were welcomed by many and viewed as innovative. Lord Morton of Shuna considered that they 'demonstrated a line that could be followed with profit'⁵⁰ and in the House of Lords he recorded his regret that the Court of Session did not incorporate such elements.⁵¹ Lord Cullen in preparing his Review, noted in the rules the 'elements of a case management system'.⁵²

The implementation of the rules was not without teething problems.⁵³ There was for some time divergence in shrieval views as to aspects of the rules, even at the level of sheriffs principal. Practitioners, initially, did not obtemper the requirements. Records

⁴⁶ OCR 1993, r.9.11.

⁴⁷ colloquially known as a Rule 22.1 Note.

⁴⁸ OCR 1993, r.9.12(3).

⁴⁹ OCR 1993, r. 9.8.

⁵⁰ The Hon. Morton of Shuna, 'Procedural Reform of the Court of Session' (1995) 1 CPB 2 at 3.

⁵¹ 'There has recently been a radical review of procedure in the sheriff court, including a system under which the sheriff has much more control of the way the case proceeds and the speed at which it proceeds. Unfortunately, none of that applies in the Court of Session....' (Hansard No.1614: 16th November to 24th November 1994, No. 183).

⁵² Hon Lord Cullen, *Review of Business, op. cit.* para 6.9.

⁵³ See Parratt, *Access to Justice, op. cit.*

were late, time limits were missed, and Rule 22.1 Notes were not lodged. The courts prevaricated over whether such misdemeanours required to be punished by dismissal or whether the expedition of the cause required a lesser sanction or a more purposive construction of the rules. The former approach was consistent with altering practitioner attitudes,⁵⁴ the latter with doing overall justice between the parties without additional expenditure to one party consequent on dismissal.⁵⁵ Sheriffs themselves were uncertain how to exercise their pro-active function.⁵⁶

The differing approaches were satisfactorily resolved, and practitioners increasingly fulfilled their duties under the rules. But idiosyncratic practices had arisen in different sheriff courts. The incidence of dismissal for default varied widely. Adjustment continued after the periods permitted. Procedure was innovated upon. Aberrations of procedure were condoned. Procedural lay-bys such as procedure rolls or miscellaneous procedure rolls were created in some courts.⁵⁷ Tactically, adjustments were intimated on the last days of adjustment periods. The writer's research confirmed many of these points although it was apparent that both sheriffs and solicitors considered the rules to have been a success.⁵⁸

⁵⁴ and brings to mind Charles Hope's approach at the implementation of the 1825 Act.

⁵⁵ On these points see Parratt, *op. cit.* pp. 102-5.

⁵⁶ E. Samuel and R. Bell, *Defended Ordinary Actions in the Sheriff Court: Implementing OCR (93)* (Scottish Office, 1997), para 5.92.

⁵⁷ This was found in the writers sheriff court study. See Appendices 3&4. See also E. Samuel and R. Bell, *op. cit.* para. 7.12.

⁵⁸ In my **sheriff** study: 47/69 of the sheriffs considered that the rules had altered practitioner attitudes, 60/69 of them thought that the rules had reduced delay. 63/68 agreed adjustments should be time limited. Only 8/68 said that they would dismiss an action for there being no record lodged prior to the options hearing at which the parties were in attendance, but the majority said they would award expenses against a defaulting pursuer on a defender's motion; 60/68 of sheriffs had a Miscellaneous Procedure Rolls (for which there was no provision in the rules). The majority thought that the incidence of diets of debate was lower. In the **solicitor** study: 81% thought that 1993 rules had reduced delay in ordinary actions; 83% thought that the rules had altered practitioner attitudes; 82% thought that there was inconsistency in shrieval approach to interpretation of the rules; 85% thought that sheriffs were pro-active at options hearings; 90% thought that adjustment should be time limited; 69%

Since then, anecdotal evidence and the writer's experience confirm the view that the sheriff court rules for ordinary causes, now seem to operate fairly efficiently⁵⁹ and the 'pro-active sheriff' is a permanent and understood fixture in sheriff court practice.

(vi) Changing Cultures in the Court of Session: The 1994 Commercial Cause Rules.

As mentioned above, in 1994 the Commercial Court was established with its own dedicated chapter of the rules of procedure⁶⁰. The rules introduced the concepts of 'case management' and 'judicial proactivity' to the Court of Session. Put simply, cases of a business or commercial nature are managed through three principal types of hearing: preliminary hearing, procedural hearing and then a final disposal hearing.⁶¹ Generally speaking, cases appear before the same judge throughout.⁶² The judge acts pro-actively.⁶³ For our purposes, it is important to note that the formal requirements of written pleadings as practised in ordinary Court of Session actions are usually dispensed with. A summons need contain only the orders sought, detail of the parties to the action, the transaction or dispute from which the action arises, and a summary of the circumstances out of which the action arises and the grounds

thought that the incidence of debates was lower than pre-1993; 80% were required by sheriffs to justify Rule 22 Notes at options hearings; 82% reported that their courts had Miscellaneous Procedure Rolls or Procedure Rolls. See appendices 3(b) and 4(b) *infra*.

⁵⁹ Cf Mays' anecdotal evidence from 1997 in 'Frying Pan, Fire or Melting Pot? - Reforming Scottish Civil Justice in the 1990s', (1997) J. R. 91 at 97.

⁶⁰ RCS 47 and associated Practice Note, No. 12 of 1994.

⁶¹ The intention here is not to examine in depth all the workings of the Commercial Court. For analysis of the operation of the Court see Clancy et al., *op. cit.*, N. Morrison, 'Scotland's New Commercial Court' (1994) 39 J.L.S.S. 354, C. Macleod, 'The Commercial Court' (UPDATE course: 'Court of Session Practice and Procedure', Clyde Hall, Glasgow, 3rd March 1997.), and the Annotations to Chapter 47 in Annotated Rules of the Court of Session 2003.

⁶² Although there is an increasing tendency to transfer cases among the 'commercial judges'.

⁶³ He is required to do so. See PN No.12 of 1994, para. 5. See Clancy *et al. op. cit.* for what this has meant in practice.

on which the action proceeds. Appended to the summons is a schedule listing the documents founded upon or adopted as incorporated in the summons.⁶⁴ In practice, the pleadings will vary according to the nature of the case although the Practice Note gives guidance that the pleadings should be 'in an abbreviated form'.⁶⁵ Where the parties seek a judicial construction of a term in a contract, the pursuer may serve a summons simply containing details of the contract and averments of the preferred construction.⁶⁶ There is no necessity to make up a summons containing headings 'condescendence' and 'pleas-in-law.' Lengthy narrative in averment is discouraged. Lengthy quotations from documents are not necessary. Detailed written pleadings are not expected nor required.⁶⁷ There is still a requirement of fair notice⁶⁸ and parties are expected to make full and frank disclosure and may be pressed to do so by the commercial judge.

Although there are the three types of hearing, RCS 47.5 provides that 'the procedure in a commercial action shall be such as the commercial judge shall order or direct.'⁶⁹

Defences are in the form of answers with any additional statement of facts or legal grounds. If documents are founded upon or adopted as incorporated in the defences they must be lodged and listed in a Schedule attached to the defences.

⁶⁴ RCS 47.3. Note that there is no need to employ the pleading phrase 'adopted etc. *brevitatis causa*'.

⁶⁵ PN No 12 of 1994, para. 3(1).

⁶⁶ *ibid.*

⁶⁷ Morrison, 'Scotland's New Commercial Court' *op. cit.*, p. 355.

⁶⁸ and detailed notice is required where a party makes allegations of fraud. *Kaur v. Singh* 1998 SC 233.

⁶⁹ in practice, the Court will deal with and dispose of most actions at Preliminary Hearings and continuations thereof. Clancy *et al. op. cit.* conducted research into the disposal rate, finding that 75% of cases settled at or before the preliminary hearing stage.

The commercial judge has a very wide discretion at the preliminary hearing⁷⁰ and the procedural hearing.⁷¹ The hearings will take place on a set day at a set time. The preliminary hearing is used to identify and focus the real issues in the case. It is not automatic that the court will allow further adjustment of the pleadings. If further pleadings are necessary, these will be controlled and superintended by the court. Adjustment 'at large' is unusual. It is more common that the Court orders a party to amplify an aspect of his case and a specific period will be permitted to do so. The emphasis is on candour and disclosure and technical pleading conventions such as 'Not known and not admitted' or partial admissions coupled with '*Quoad ultra* denied' are discouraged. The judge has the power to determine whether further specification is required, if so, the extent of the specification and how that specification should be presented.⁷² It need not proceed by way of written pleadings. The court will desire to have relevant documents produced at the earliest opportunity and the traditional rules for recovery of evidence will not apply. In practice, if you know or even suspect that your opponent has a document and that he has not produced it, then mention of it to the judge with submissions on the import of the document will often result in the court ordering the party to produce it.

Prior to the procedural hearing, parties must produce written proposals for further procedure, written notes of argument (if debate is sought) lists of witnesses and expert reports. From this information the court will determine how the case should progress. Debates will be granted only if the commercial judge considers that a debate will assist the resolution of the case. Insisting in preliminary pleas will not guarantee debate. Obviously, a debate on relevancy as specification will be extremely

⁷⁰ RCS 47.11.

⁷¹ RCS 47.12.

⁷² RCS 47.11(1).

rare, if it happens at all.⁷³ Methods other than conventional proof may be considered in determination of the case. Proof is not restricted to the pleadings but may include matters set out in written statements lodged in advance of the procedural hearing.⁷⁴ The fact that proof is led beyond the four corners of a record will not found an appeal. Commercial cause proofs are still susceptible to late settlement⁷⁵ although, in practice, a by order hearing will be fixed shortly before the proof for parties to advise on the likelihood of settlement.

On balance, the commercial cause procedure of the Court of Session works well. It has delivered the 'speedy resolution of commercial disputes'⁷⁶ which the Scottish business community had originally called for. In an empirical study, Clancy *et al.* showed that 87 per cent of commercial causes were disposed of within a year with 55 per cent of that figure disposed of within 6 months.⁷⁷ The same researchers found that there were 3 or 4 preliminary hearings in 31 per cent of cases.⁷⁸

The traditional function of written pleadings in narrowing the matters in dispute is limited in commercial causes. It is extremely unlikely that a commercial cause would be lost due to poor written formulation. The procedure impliedly rejects traditional conceptions of the judge as a 'boxing referee' counting the points. The judge is heavily involved in superintending and managing the case from the start, but he does not *ex proprio motu* determine what the parties' factual and legal positions

⁷³ A party will indicate to the court that he wishes greater specification on a point. He does not take it to debate.

⁷⁴ *Highland and Universal Properties Ltd. Safeway Properties Ltd.* 1996 SC 424.

⁷⁵ Clancy *et al.*, *op. cit.*

⁷⁶ Lord Coulsfield's Review Body reported that this was of over-riding importance to commercial litigants.

⁷⁷ Clancy *et al.*, *op. cit.* p. 46.

⁷⁸ Anecdotal evidence suggests that this percentage might now be higher, although there has been no recent research on the operation of the Court.

'should be', but uses the procedure to compel the parties to define those positions in early course. To that extent he does not act like an inquisitorial civilian judge. For this reason his decision-making at the final determination cannot be called into question on the grounds of partiality or lack of judicial independence nor can he be accused of having 'pre-judged' the merits of the action.⁷⁹

The commercial cause procedure, however, is not above criticism. First, by its nature, it requires extensive, and therefore expensive, preparation on the part of the parties at the start of the action, whereas in ordinary actions the heavier costs are usually incurred towards the end of the action leading up to the final determination.⁸⁰ Secondly, as a matter of principle, where a court is provided with discretionary powers, in the interests of justice, fairness, consistency and predictability, the scope of that judicial discretion should be defined. It has been said that 'Loose and unfettered discretion...is a dangerous weapon'⁸¹ and the exercise of a wide discretion may cause unpredictability⁸² and arbitrariness.⁸³ In practice, again from anecdotal evidence, the approaches taken by the commercial judges do vary, but the variation appears to be accepted by the profession as part and parcel of the procedure⁸⁴ and to my knowledge, in ten years of operation, no appeal has ever been taken on the point. That is not to say that some appellate guidance on the scope of discretion is not desirable. Thirdly, the procedure is demanding of judicial time. Preliminary hearings

⁷⁹ Cf N. Morrison, 'The Cullen Report' 1996 SLT (News) 93 at 96-7.

⁸⁰ although focussing of issues may prompt earlier settlement and as Clancy *et al.* point out, the costs at this stage may save greater expense being incurred in a proof at large' *op. cit.* p. 57.

⁸¹ *Morgan v. Morgan* (1869) LR 1 P&D 644 per Lord Penzance.

⁸² Sir Roger Ormrod, 'Judicial Discretion' (1987) Current Legal Problems 123 *ibid.*

⁸³ M. Zander, 'Consistency in the Exercise of Discretionary Powers' (1996) 146 New Law Journal 1.

⁸⁴ It might also be argued that the concurrent increase in judicial pro-activity in other types of Court of Session action has led to the profession being more comfortable with the concept. See *infra*.

are set down for, and normally take half an hour. The cost to the court is higher than in other types of action.⁸⁵ Fourthly, it might be argued that the procedure enables a judge to decide the issues he/she wants to decide rather than those which the parties seek determined.⁸⁶ As previously discussed, this is an argument of some longevity. Where the issues are focussed with the assistance of the parties, then those parties cannot complain that they were not party to defining the issues for decision. Finally, Clancy *et al.*⁸⁷ questioned whether the procedure conflicted with the traditional view 'that there was no rule of practice or principle that required a defender as a matter of relevancy to state more than a general denial of the factual averments on any issue raised between the parties'.⁸⁸ Following the recent case of *Urquhart*⁸⁹ the law may be moving away from this as a statement of principle in any event.

(vii) Further Inroads Into The Theory of Written Pleadings: The Cullen Report 1995.

On 24 May 1995, Lord Cullen was appointed by Lord President Hope to carry out a review of the business of the Outer House of the Court of Session.⁹⁰ He reported in

⁸⁵ see N. Morrison, 'The Cullen Report' 1996 SLT (News) 93 at 95 and 'Reform of Civil Procedure' 1998 SLT (News) 137 at 142.

⁸⁶ Cf N. Morrison, 'The Cullen Report', *op. cit.* p. 97.

⁸⁷ *op. cit.* at 58.

⁸⁸ *Ganley v. Scottish Boatowners Mutual Insurance Association* 1967 SLT (Notes) 46 per LJ-C Thomson quoted with approval in *Gray v. Boyd* 1996 SLT 60.

⁸⁹ (unreported) 18 March 2004 (2nd Div.).

⁹⁰ In summary, his remit was 'to review the manner in which business was administered, conducted and allocated' with a view to making recommendations as to improvement, and in particular to consider what measures should be taken (whether by changes in the rules of procedure, the practice of pleading etc.) to simplify procedure and expedite the progress and disposal of cases; achieve a greater degree of judicial control and management of cases; minimise the late settlement of cases and ensure that cases are allocated among Judges, and judicial time is used, to best advantage. Hon. Lord Cullen, *Review of Business, op. cit.*, Foreword, p. 1.

December 1995 and the report was published in January 1996. Some of his observations have already been examined.⁹¹

Lord Cullen recommended a system for abbreviated written pleadings (which could be expanded to full traditional pleadings at the order of the court); the earlier and wider disclosure of evidence; the introduction of case management hearings and pre-proof reviews;⁹² and the organisation of business to avoid delays in proofs and jury trials.⁹³ In relation to written pleadings, he had five criticisms *viz.* 1. that the parties averments, and in particular the averments of the party on which the burden of proof lay tended to become encumbered by detail⁹⁴; 2. frequently there was a lack of candour in defences⁹⁵; 3. that an undue reliance on points of pleading was prejudicial to the doing of 'justice on the facts of the case'⁹⁶; 4. the system of pleading was unduly elaborate⁹⁷ particularly in the simpler case, in requiring explicit answers in the form 'admitted', not known and not admitted' etc. which led to a formality of pleadings;⁹⁸ and 5. the system of pleadings did not operate well in exposing latent ambiguities or differences of understanding between the parties prior to proof.⁹⁹ He accepted that the progress of an ordinary action was affected to a significant extent by the conduct of the parties and that the court was restricted in what it could raise

⁹¹ In the following, I will cover the Report's general observations and concentrate on the principal points relating to Lord Cullen's comments on written pleadings and case management. For fuller analyses of the Report and his Recommendations see N. Morrison, 'The Cullen Report' *op. cit.*, M. Upton, 'The Cullen Review' (1996) 41 JLSS 111, The Hon Lord Gill, 'The Woolf, Cullen and Coulson Report. Justice, Money and Efficiency' (1997) 42 JLSS 437.

⁹² It has been argued that these three recommendations were evidently influenced by the Lord Woolf's report into English Civil Justice. (Lord Woolf, *Access to Justice*, (1995)) Mays, 'Reforming Civil Justice in the 1990s, *op. cit.*, p. 102.

⁹³ N. Morrison, 'The Cullen Report' 1996 SLT (News) 93.

⁹⁴ Hon Lord Cullen, *Review of Business*, *op. cit.* para 3.22.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ *ibid.* para 4.13.

⁹⁹ *ibid.* para 3.28.

itself.¹⁰⁰ He noted that the court had limited ability to inflict sanctions for non-compliance with the rules.¹⁰¹

Lord Cullen rejected calls for the replacement of the system of pleadings by forms similar to those used before statutory tribunals, as they would not permit the giving of fair notice of the case and facts relied on in support of the stated ground on which the case was based¹⁰² nor permit a candid acknowledgement by the opponent of the facts relied on which he knew to be true. In this, he considered pleadings had an essential rôle to play.¹⁰³ Instead he recommended abbreviated pleadings in which the condensation would contain brief statements of fact forming the grounds of the claim and 'appropriate' pleas-in-law.¹⁰⁴ Defences would no longer require to answer individually every averment of the pursuer.¹⁰⁵ The defender would not be permitted to adjust other than with the consent of the pursuer or the judge.¹⁰⁶ If the court was satisfied that the action was 'difficult or complex',¹⁰⁷ then the pleadings could proceed in 'normal' form but with the defender under an explicit duty to make a candid response to the pursuer's averments¹⁰⁸ and the parties entitled to adjust within a 'tailor made' time frame, decided *ab ante*.¹⁰⁹

¹⁰⁰ *ibid.* para. 3.30.

¹⁰¹ *ibid.* para 3.37

¹⁰² *ibid.* para 4.4.

¹⁰³ *ibid.*

¹⁰⁴ *ibid* paras. 4.9 – 4.12.

¹⁰⁵ *ibid* para 4.14 which would have removed 'implied admissions'.

¹⁰⁶ *ibid.* para 4.28.

¹⁰⁷ The test of unsuitability for Optional Procedure. Note that Lord Woolf at the time was recommending a two track approach in England, but based upon the value of the claim.

¹⁰⁸ *ibid.* para 4.17. Lord Cullen rejected a suggestion that the pleadings should also contain 'argument'.

¹⁰⁹ *ibid.* para 4.30.

With regard to judicial control exercised through case management, the Faculty of Advocates' response was at least historically consistent. Lord Cullen recorded the Faculty's objections in short.¹¹⁰ These were:

1. that the adversarial system and judicial passivity had functioned reasonably well in the Court of Session and there would not be an advantage in judges being given an interventionist role;
2. the parties and their advisers were best placed to know what is in the parties' respective interests and to manage their case;
3. judicial intervention would reduce the function and effectiveness of the bar;
4. judicial pro-activity could conflict with the appearance of due impartiality;
5. the number of judges would have to be increased and
6. the problems in the procedure of the Court of Session could be resolved by indigenous means allowing the traditional judicial role to be retained.

Lord Cullen queried the Faculty's use of the word 'interventionist' and confirmed that there was no question of 'moving away from the adversarial system.' What he was proposing was the application of a degree of control and direction to litigation.¹¹¹ He thereafter laid out his version of case management suitable for the Outer House.¹¹² On ancillary matters, Lord Cullen proposed allowing Notices to Admit at any time from the time defences were lodged.

(viii) The Debate 'Post- Cullen' and the Continued Criticism of Written Pleadings.

¹¹⁰ *ibid.* para. 6.12.

¹¹¹ *ibid.* para. 6.15

¹¹² *ibid.* paras. 6.16 – 6.39 Prior to case management hearings parties were to be required to complete questionnaires and the Court would 'seek consistently with doing justice between the parties, the expeditious progress of the action and the avoidance of unnecessary expense.' para. 6.19 and 6.31.

Lord Cullen's Report re-ignited debate on the role of written pleadings in Outer House procedure in the Court of Session and whether there was a place in that procedure for a pro-active Lord Ordinary. The Faculty's stated position remarkably adopted arguments similar to those advanced by it in the nineteenth century. Another commentator thought that the proposals would allow of inspecific defences, and he prayed in aid fallacious historical precedents,¹¹³ warning of the dangers of adopting elements of English procedure by another name,¹¹⁴ the loss of the Scottish doctrine of relevancy¹¹⁵ and the removal of the advantages of encapsulating parties positions in one document. In addition to the Faculty arguments, Morrison stated that case management would 'enable the judge to decide what issues he or she wants to decide rather than what parties wished determined,'¹¹⁶ would in any event be performing the function traditionally ascribed to written pleadings and was an English procedure which if adopted would result in the system falling into the unfortunate state of the English legal system in relation to procedure.¹¹⁷ One commentator even thought that the proposals, if implemented, would introduce English discovery procedure into Scotland.¹¹⁸

Some commentators took the opposite line, complaining that Lord Cullen's approach was merely reformist¹¹⁹ of a system in crisis,¹²⁰ that lawyers could not be trusted to promote revolutionary reform and that wholesale review was imperative.¹²¹ Others

¹¹³ Morrison, 'The Cullen Report' *op. cit.* p. 94.

¹¹⁴ Another historically recognised manoeuvre for resisting changes to written pleadings.

¹¹⁵ implying the demise of the whole doctrine as opposed to specification as relevancy. *ibid.*

¹¹⁶ *ibid.* p. 97.

¹¹⁷ *ibid.* p. 100.

¹¹⁸ A. Murray, 'Fair Notice - The Role of Written Pleadings in the Scottish Justice System' in H.L. MacQueen and B.G.M. Main (eds.), *The Reform of Civil Justice* (1997) 5 Hume Papers on Public Policy 49 at 59.

¹¹⁹ Mays, 'Reforming Civil Justice in the 1990s' *op. cit.* p. 106.

¹²⁰ *ibid.*

¹²¹ *ibid.*

advocated solutions incorporating elements from different juristic and cultural traditions,¹²² with the Cullen Report being the first step and not the last word.¹²³ Some pointed to England and the Woolf Reports for inspiration.¹²⁴

As it became apparent that there were undisclosed problems with implementing the Cullen Report recommendations, some academics called for reasoned and rational debate on all the issues raised in the Report.¹²⁵ Debate, though was half-hearted.

Of all Lord Cullen's recommendations, only a few of the more insignificant ones were implemented in the period thereafter. Notices to admit before proof, a requirement for lodging medical records, and making averments about medical treatment were implemented in 1996. For a period of seven weeks, the star of pursuer's offers¹²⁶ shone brightly before imploding when the rule was revoked.¹²⁷

Traditional written pleadings continued to be criticised in the literature and cases. In 1996, Lord Prosser made these remarks on the theory and practice of written pleadings in the Scottish courts.¹²⁸

¹²² Hon. Lord Gill, 'The Woolf, Cullen and Coulon Reports' *op. cit.* 437.

¹²³ *ibid.*

¹²⁴ R. Mays, 'Case Management in the Scottish Civil Courts. Whose Case is it Anyway?' *op. cit.*

¹²⁵ R. Wadia, 'Judicial Case Management in Scotland. Indecision and Indigestion' 1997 SLT (News) 255 at 258, A. Murray, 'Court of Session Procedure: Past, Present and Future' 1997 SLT (News) 259 at 262.

¹²⁶ recommended by Lord Cullen, para. 7.2 and introduced by RCS 34A.6(2)

¹²⁷ By SI 1996 No. 2769. On the whole fiasco, see further B.G.M. Main and A. Park, 'Pre-trial Settlement: Who's for Two-way Offers? 1999 SLPQ 30, D. Stevenson, 'Pursuer's Offers' (1996) 11 Green's Civil Practice Bulletin 2, D. Bartos, 'Pursuer's Offers to Settle in the Court of Session, Settle or Else?' (1996) 41 J.L.S.S. 434, Anon, 'Pursuers' Offers: The Legacy' 1997 SLT (News) 21. For status and history of pursuer's offers, see *Tenbey v. Stolt Comex Seaway Ltd. & Anr.* 2001 SLT 418

¹²⁸ *ERDC Construction Ltd. v. HM Love & Co* 1996 SC 523 at 532. For commentary on the case see J. Murray 'Letting Arbiters Get on with the Job' 1997 SLT (News) 64.

'I should like to add to your Lordship's comments about written pleadings. Whatever machinery is used for the resolution of a dispute, there is likely to be some place for both written and oral material. A requirement that each party should formulate its position in writing at the outset has fundamental advantages, not only as a means of giving fair notice to the other side and helping to focus and cut down issues in dispute, but also, and fundamentally, as an encouragement to each party to analyse the substance of the case, before trying to give it expression in writing. In my opinion, if a high quality of written formulation can be achieved at the outset, much expensive and time consuming oral procedure can be avoided. I would not therefore wish to say anything which might be interpreted as denying the importance of written formulation, or encouraging recourse to oral evidence or submissions without such a written formulation. That said, I am quite satisfied that pleadings of the type currently used in ordinary court procedure are frequently, and indeed normally, ill-suited to their true function, failing to put essentials in sharp focus, and often putting in sharp focus inessential matters of detail, which then become the subject of pointless procedural scrutiny.'

In 1998, (the then) Lord President Rodger told a conference that he thought that pleadings needed to be simplified.¹²⁹ Lord Gill told the same conference that procedure in Scotland was productive of delay, Scottish civil justice needed reform and opined that it was inevitable that Scotland would adopt a simplified civil procedure.¹³⁰

¹²⁹ Rt. Hon. Lord President Rodger, Introduction to Conference 'The Reform of Civil Justice' DHI/Faculty of Advocates, 1 June 1998.

¹³⁰ Lord Gill, 'Future Directions', Paper presented to Conference 'The Reform of Civil Justice' DHI/Faculty of Advocates, 1 June 1998.

(ix) The Coulsfield Proposals and the New Personal Injury Rules in the Court of Session.

Following Lord Cullen's Report, the more radical proposals to introduce case management and abbreviated pleadings were shelved as it was considered that case management hearings in all defended causes would simply add another expensive layer to a large number of cases which would, in any event, settle well before proof or trial; and whilst intensive case management might be desirable in more complex cases, it did not at first sight seem necessary in all.¹³¹ A short study of cases coming into the court was conducted by Lord Coulsfield which suggested that cases could be divided between those requiring a simple form of procedure and those which might require management. In light of the study the Lord President set up a working party under the chairmanship of Lord Coulsfield with the remit to consider whether routine cases (mainly cases of personal injury) could proceed under a simplified procedure and to devise such a procedure eliminating unnecessary delay and expense, making the most of judicial and administrative staff time.¹³² The Working Party reported in 2000. Lord Cullen's proposals for case management in all cases were abandoned and the group recommended reforms for personal injury reparation actions. The reforms envisaged *inter alia* a fixed timetable, light supervision of parties' preparation of their pleadings; and minimal pleadings. The Rules Council thereafter rejected the proposals as they favoured extended pleadings, particularly in relation to the merits of actions for damages for personal injuries.¹³³ Part of the group met again and once more reported to the Lord President by Supplementary Report in 2002. The group endorsed the recommendations of the Working Party, considering

¹³¹ Coulsfield Working Party Report, *op. cit.* Ch. 1, p. 1.

¹³² *ibid.*

¹³³ Supplementary Report of Lord Coulsfield's Working Party on Court of Session Procedure (2002) (hereafter Coulsfield Supplementary Report).

that unless extremely well carried out, written pleadings tended to obstruct rather than facilitate the proper progress of an action but had a place in cases where there was novelty or real difficulty. In response to a suggestion made to the group that 'it was desirable that parties should apply their minds to their real cases at an early stage and that the present concentration on written pleadings enabled that to be done', the group considered that observation to be contrary to common experience and that the final formulation of a party's position is normally in a Minute of Amendment prior to proof. The group accepted that changes to written pleading practice depend for success on the daily operation of the changes in individual cases, but emphasised that the pleadings should be short and simple, not technical nor artificial and should exclude 'stylistic standard phrases and ritual incantations.' Illustrations of style were attached to the 2002 Report. Finally they expressed the view that the pleadings should require individual answers to particular averments of fact, whether made by pursuer or defender and thus discourage general denials. The new rules for the disposal of personal injury actions came into force on 1 April 2003¹³⁴ together with Practice Notes Nos. 2 and 3 of 2003.

The summons¹³⁵ now has no 'condescendence'. It is termed the 'statement of claim.' Pleas-in-law are not attached.

The new personal injury actions in the Court of Session have now been in operation for a year. From experience and discourse with colleagues, I would tentatively suggest that the rules are operating efficiently, that they were generally well received and that there has been little complaint or criticism. Abbreviated pleadings are now

¹³⁴ SSI 2002, No. 570.

¹³⁵ As Form 43.2-A.

part of reparation practice which is still the largest class of actions in the Court of Session. Experience of 'by order' hearings suggests that agents also have come to grips with the new procedure. A number of reported decisions have ironed out early problems.¹³⁶ Cases seem to be settling more quickly than they would have done under the old procedure.

Case management is increasing in other parts of civil procedure. It is now used for asbestosis and mesothelioma cases in the Court of Session in the period leading up to proof where they appear in a separate roll.¹³⁷ The judge is pro-active. He can continue the by-order for production of documents or the clarification of a party's position. The nature of such actions makes them fairly formulaic. Actions are often very old and the by orders are used to push (often multiple former employer) defenders towards agreeing periods of employment, negligence exposure, medical evidence and diagnosis of pursuer's condition.

Mention was made above of Judicial Review procedure.¹³⁸ The Court of Session exercises its supervisory jurisdiction under this accelerated procedure. The form of a

¹³⁶ *Tudhope v. Finlay Park* (unreported) 7 January 2004 per Lord Cameron of Lochbroom (whether action against solicitors for professional negligence in respect of a Vibration White Finger claim was a 'personal injuries action' in terms of RCS 43.1.1 (no); *Hamilton v. Seamark Systems Ltd* (unreported) 26 February 2004 per Lady Paton (non-automatic entitlement to procedure roll debate, and whether proof therefore is proof *simpliciter* or whether before answer is competent. (PBA competent if Note of basis); *Clifton v. Hays plc* (unreported) 7 January 2004 per Lady Smith. (although simplified pleadings, defenders entitled to be able to ascertain without undue difficulty the nature of the case against them. Pursuer still required to set out the bones of case in order to obtemper RCS 43.2 i.e. stating all the facts necessary to establish the claim.)

¹³⁷ The creation of this roll proceeded from the policy decision taken by the Court that such actions required a quicker disposal than other reparation actions. This was because pursuers in such cases are often close to death and damages (even interim) should be awarded if appropriate *ante mortem*.

¹³⁸ RCS Ch. 58.

petition for judicial review must be in Form 58.6 which encourages short and brief statements.

In 2001 provision was made for the creation of Commercial Actions in the Ordinary Cause Rules in the sheriff court.¹³⁹ The rules provide for dispensation with written pleadings in actions turning on the construction of a document¹⁴⁰ and lengthy narrative is discouraged in pleadings in other actions. The commercial sheriff holds Case Management Conferences.¹⁴¹

(x) A Disparate Approach to Pleading in Writing.

We are now at a juncture where a number of procedures in the Court of Session and the sheriff court operate different aspects of case management/judicial pro-activity and abbreviated pleadings to a greater or lesser degree. Thus the ordinary cause rules in the sheriff court permit traditional pleadings but judicial pro-activity is applied on their completion. The commercial rules in the sheriff court permit traditional pleadings but spreadsheets, schedules and electronic presentations are increasingly used in substitution and the sheriff is pro-active throughout.

Commercial causes in the Court of Session discourage traditional pleadings and the judge is again pro-active throughout. The new personal injury actions do not use full pleadings and the judge does not exercise a high degree of pro-activity. Asbestosis cases also use traditional written pleadings but the pro-activity of the judge comes at a later stage prior to proof. Petitions for judicial review encourage brief and short

¹³⁹ by Ordinary Cause Rules (Act of Sederunt (Ordinary Cause Rules) Amendment (Commercial Actions) 2001 (SSI 2001/8). OCR 1993 (as amended) Ch. 40.

¹⁴⁰ OCR 40.7

¹⁴¹ OCR 40.12

statements as the process is accelerated and by necessity decisions must be issued quickly.

As for the inter-relationship between abbreviated pleadings and case management/pro-activity it seems that there is a direct correlation. The more abbreviated the pleading the greater the judicial rôle. The only exception to this is the new personal injury procedure, in which the judge's pro-active rôle is limited although the pleadings are abbreviated. This is because of the nature of such actions. The heads of claim for damages for personal injuries will fall into particular categories: solatium; interest thereon; wage loss (past with interest and future); services (past with interest and future) etc. Indeed, the personal injuries procedure anticipates this in the 'quantum of damages' form to be completed by the parties. Thus, by requiring completion of various stages by particular times, parties can be edged, with slight judicial encouragement, to agreement and settlement.

The overall increase in such procedures and the decreasing use of the system of traditional written pleadings in civil procedure necessarily raises the question of whether the system as conventionally practised can remain part of Scottish civil procedure.

(xi) Conclusion. The Future for Traditional Written Pleadings.

This thesis started with three questions. The last question was whether the system of written pleadings as traditionally practised would continue to play a part in Scottish civil procedure.

As I appreciated from the beginning, answering that question is problematic. It is always difficult to predict what is round the civil procedural corner. But if the historical perspective is understood, tentative and speculative predictions about the future might be made.

I have remarked already that the historical perspective is useful in this, not just as historicism but because parallels can be drawn between what has happened in the past and the challenges of the present and future. This is sometimes lost on those who advocate reform but who have not made a study of the past.

The author's publication reproduced in Appendix 6 was one of five essays on 'The Reform of Civil Justice.' A reviewer of all these essays said this:

'The history of procedural reform is almost as old as the history of procedure. And history, or a knowledge of history, is the proper framework for forming public policy. If a small criticism can be made of this valuable collection of five essays, it is perhaps that historical perspective is largely absent; and that, in consequence, there is here and there a little too much earnestness (as if these problems had never happened before).¹⁴²

And to paraphrase the Coulsfield Working Party, a system which places a reliance on written pleadings will demonstrate certain tendencies which are inherent in the system.¹⁴³

¹⁴² Angus Stewart, Q.C. : Book Review of 'The Reform of Civil Justice', [Hume Papers on Public Policy (Edinburgh, 1997)] in (1999) 3 Edinburgh Law Review 265 at p. 265-6.

¹⁴³ Coulsfield Working Party Report, Ch. 6.

First, as will be apparent from the context, when I have referred to 'traditional written pleadings'¹⁴⁴ I mean the system as discussed in chapter 4. Written pleadings are the basis of a litigant's case which is then developed orally in court. Could reform of civil procedure accommodate a purely oral system or a purely written system? Neither, I suggest, is likely. As Lord Prosser considered, 'Whatever machinery is used for the resolution of a dispute, there is likely to be some place for both written and oral material.'¹⁴⁵ Lord President Hope expressed the view that 'orderly presentation of facts, both on paper and at the bar' was the method 'which [wa]s most helpful to the judges'¹⁴⁶ and discounted the introduction of a system of written presentation with a minimum of oral argument as he thought that it would impede the conduct of judicial business.¹⁴⁷ He doubted whether oral advocacy could be safely dispensed with 'which provides us with so much of the information which is the basis for our decision-making.'¹⁴⁸

Historically, sometimes Scots law has relied on oral presentation by itself, and at other times nearly exclusively on written presentation. In early practice the 'dispute' followed the pursuer's summons and was conducted orally, parties' positions being noted down. Once the Court of Session accepted pleading in writing, its role in the preparation of pleadings steadily decreased as the traditional approach to oral presentation was expressed in the pleadings, until practice went to the other extreme and there was little pleading *viva voce*. The reforms at the start of the nineteenth century sought to strike a balance using both approaches, much to the chagrin of the

¹⁴⁴ in chapter 5 and in this chapter.

¹⁴⁵ *ERDC Construction Ltd. v. HM Love & Co. cit sup.*

¹⁴⁶ Rt. Hon. Lord Hope of Craighead, 'Inside the Crystal Ball' (1991) 36 JLSS 305 at 307.

¹⁴⁷ Rt. Hon. Lord Hope of Craighead, 'Judicial Business - A Review' (2 parts) (1. *Of Judges and Criminals*, 1991 36 J.L.S.S. 219-222) and (2. *The Court of Session*, (1991) 36 J.L.S.S. 266-269 at 267

¹⁴⁸ Rt. Hon. Lord Hope of Craighead, 'Helping Each Other to Make Law' (1997) 2 Scottish Law & Practice Quarterly 93.

Bar. When in 1825 Charles Hope proclaimed that Scotland was entering a 'new era in the administration of justice' the novelty was that pleadings had to be 'brief' in a certain form and in a 'condensed style' and the judges had to ensure that they carefully 'superintended' the preparation of the parties' pleadings, if necessary suggesting to them improvements in style and content. For 'condensed style' and 'superintendence' we might substitute 'abbreviated pleadings' and 'pro-active case management'.

After over a century of presenting arguments to the court in writing, the condensed style did not come easily to the practitioners. They were accustomed to 'ripening' a cause and it was for them to select the material which was to be presented to the court. Hence the truculent remarks of the Faculty that it was 'no part of judicial business to do more than decide a cause'. But what they were really objecting to was that the new statutory scheme permitted a judge to suggest improvements in the presentation of the merits of the case rather than overseeing its progress and compliance with the statute. Hence the comments in 1834 that improvement of pleading would be 'more securely advanced by a careful superintendence of the Judge, and by practice.'

Perhaps history repeated itself with Lord Cullen's proposals and the Bar's response examined above. Lord Cullen was suggesting the application of a degree of control and direction to litigation and the introduction of abbreviated pleadings. The Faculty however latched onto the word 'interventionist', imbued it with a meaning which was not intended, and directed their attack on the proposals on the basis of arguments about 'judicial impartiality' and 'non-interference in what the parties and their advisers were best placed to know was in the parties' respective interests' in the

management of their case. Note that there was no attack on abbreviated pleadings *per se*.

When one considers the position a decade on and the prevalence of procedures which now incorporate a 'pro-active' element in conjunction with 'abbreviated pleading' the reaction to Lord Cullen's proposals seems to be rather extreme, particularly as these procedures have proved popular and the very same practitioners have voted with their feet. Again we may observe such a phenomenon from a historical perspective. The Cullen proposals came at a time when England was engaged in a systematic review of its whole civil procedure. By 1995, Lord Woolf had published his Interim Report which had recommended the implementation of case management. In fact, the concept had swept through the Anglo-American common law world from the late 1980s. Perhaps the Scottish sensitivities of those reading the Report were perturbed by the thought that Scotland was about to incorporate an English procedure and the Faculty and those doughty defenders of conventional pleadings were 'flicked on the raw'. This would explain the Faculty's comments that 'the adversarial system and judicial passivity had functioned reasonably well in the Court of Session' and that 'problems in the procedure of the Court of Session could be resolved by indigenous means.' So we can compare this with the attempted introduction of jury trial in the late 1700s. Originally rejected as an English procedure, it was nevertheless introduced and thereafter became the practitioners' chosen method of disposing of cases on fact.

There were other reasons why civil jury trial came to be so successful. One of these was that practitioners became accustomed or acclimatised to the innovation, realising that the institution was actually beneficial to their clients. This resulted in the

arguments about it being an English institution polluting the Scottish form of process and it being a contravention of the Act of Union being quietly discarded.

Practitioners' acclimatisation or accustomisation to changes in civil procedure and the system of written pleadings is part of what I have referred to in this thesis as the incremental development of civil procedure. Practitioners have always had the best interests of their clients at heart and thus, generally, a change in procedure which is beneficial will be embraced and a change which is considered malign or contrary to interest is railed against by arguing against it, or appealing it or even ignoring it. The practitioner is not expected to take the law as he finds it, but may subvert it, bend it and shape it in the interests of the client.¹⁴⁹ His duty is to win his case and he may do so by adopting a narrow or even backward looking approach if that is the way to carry the argument.¹⁵⁰ So, historically, acts of *sederunt* have ossified and fallen into desuetude and rules have given way to their derogations. New rules have been introduced and not followed or distorted in practice and approaches under old rules have periodically re-surfaced. The duty of the advocate may often be to do so.¹⁵¹ Thus, incrementally, changes take effect within civil procedure as time passes and what was rejected at one time is embraced at another.

¹⁴⁹ The Rt. Hon. Lord Rodger of Earlsferry, 'Thinking About Scots Law' (1996) 1 *Edinburgh Law Review* 3

¹⁵⁰ The Rt. Hon. Lord Rodger of Earlsferry, 'The Bell of Law Reform' 1993 *SLT (News)* 339 at 344.

¹⁵¹ An argument is sometimes maintained that the practitioner's professional duty to the court precludes him from disobeying the rules of court. see e.g. A. Murray, 'Fair Notice - The Role of Written Pleadings in the Civil Justice System' in H.L. MacQueen and B.G.M. Main (eds.), *The Reform of Civil Justice* (1997) 5 *Hume Papers on Public Policy* 49 at 62. This operates within limits and will be a question of degree. See Justice D.A. Ipp, 'Lawyers' Duties to the Court' (1998) 114 *LQR* 63.

Incorporation of new aspects of procedure can affect procedure in established areas both benignly and malignantly. So historically the civil jury trial forced practitioners to separate in their pleadings issues of fact from issues of law if they wanted a jury trial. This in turn affected ordinary procedure and helped the profession understand how fact and law could be separated. So too the plea of specification which seems to have grown from civil jury trial and was exported to ordinary actions from the 1850s onwards. More recently, the pleadings for civil jury trial in the 1950s and 1960s distorted the practice of written pleadings in actions in the Court of Session. At the present, as different parts of procedure in the courts increasingly employ non-conventional rules, the traditional system becomes increasingly fragile.

I would speculate that we are in the midst of an incremental move towards case management and abbreviated pleadings being applied in all actions in the Court of Session. Practitioners are increasingly exposed to the concepts involved and have acclimatised to the procedures. These procedures are popular and, where elective, well used. The traditional adversarial view that a judge must be passive and only decide what is placed before him must now be seriously open to question. The once staunch defenders of traditional written pleadings have become less vociferous. The exceptions are already eating into the traditional rules and the winds of change are blowing in a very definite direction.

If this prognosis is correct, one might then question when this transition might take place. Although this belongs to the realm of prophesy, we might speculate that the

changes will be incremental, perhaps with the retention, initially at least, of full or traditional written pleadings for cases of difficulty or complexity.¹⁵²

Lord Penzance once said that

‘Procedure is but the machinery of the law after all – the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.’¹⁵³

The Scottish system is habile to accommodate these flaws. In these times, the cost of litigation is often prohibitive except for the rich, the poor and those with legal expenses insurance. Delay is money and wasted resources.

So too in this modern era in civil procedure, when substance is more important than form, and where tradition yields to efficiency, the Scottish system of written pleading is perhaps an antiquity belonging to a by-gone age.

And yet, if our tentative speculations on the future for written pleadings are well founded, it is somewhat ironical that, the procedure produced will be a more faithful emulation of older Scottish practice, which might satisfy traditionalist and reformer alike. Although the old system of written pleadings would slip away, Scottish civil procedure would start the 21st century dressed in an inherited christening gown, and not draped in an old shroud.

¹⁵² Perhaps simultaneously addressing the ‘four problem points of practice’ discussed in chapter 5.

¹⁵³ *Kendall v. Hamilton* (1879) 4 App. Cas. 504 at 525.

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Appendix 1

The Heritors of Kingsbarns against Rev James Beatson.

An Example of Eighteenth Century Pleading

As referred to in Chapter One, it is useful to scrutinise in detail an actual example of late eighteenth century pleading in writing, which scrutiny highlights some of the issues discussed in that chapter and demonstrates some of the problems of the conduct of litigation in the Court of Session up to this period. The search for a suitable form of process for the Court of Session started a period of dramatic change in civil procedure which continued to the end of the nineteenth century.

I have selected the case of (full title) *The Hon. Henry Erskine, Dean of the Faculty of Advocates, and Others, Heritors and Feuars in the Parish of Kingsbarns, in the County of Fife, whose Lands are not Church Lands, Suspenders against The Reverend Mr. James Beatson, Minister of the Gospel at Kingsbarns, Charger*¹. As might be gathered from the instance, the dispute between the Dean of Faculty and the others (as Feuars and Heritors) and the minister, related to a glebe for the minister from lands owned by some of the suspenders² who were heritors of the parish by virtue of their feu-holding. The case is interesting in that, not only did the Dean act and appear in his own instance³ and thereby one might expect the Dean's pleadings to be the epitome of clarity and contemporary good practice,⁴ - at least in his own cause - but in

¹ I have used the Faculty Collection Session Papers relating to the case as well as Morison's reporting of the decision(s). There are many tomes of Session Papers in the Advocates Library beyond this collection. See Angus Stewart, Q.C., 'The Session Papers in the Advocates Library' in H.L. MacQueen (ed.), *Miscellany Four* (Stair Soc., Edinburgh, 2002) 199.

² see *infra*.

³ and Henry Erskine was regarded as 'the leading practising lawyer of his time.' Francis Watt, *The Book of Edinburgh Anecdote*, (London & Edinburgh, 1913) pp. 17-8

⁴ Moreover, it is also a good example as Erskine had by this time acquired a reputation for knowledge and experience in Church matters. See Lieut.-Colonel Alex. Fergusson, *The*

addition, he was assisted in his cause by his able friend,⁵ David Cathcart, Advocate, later to become Lord Alloway. On the other side were retained the notable advocate William Tait,⁶ assisted by the equally able James Clerk, Advocate.⁷

A slight quirk of the case is that it did not commence by summons as an ordinary action, but as a bill of suspension which was remitted to the ordinary procedure to continue as an ordinary action. Whilst it related to land and the rights and duties attached thereto, which had always been a common currency of the Court, in this case it related to the duties of heritors and the designation of glebes.⁸ The ultimate decision is interesting as the Court was to recognise unfairness to the Reverend Beatson but in this instance did not temper the decision with equity, as the question raised had to be answered as a matter of strict statutory interpretation.⁹ The point finally determined in the Dean's action was to become (in time) the position in law in respect of glebes.¹⁰

By way of background to the case,¹¹ the parish of Kingsbarns in Fife had been disjoined from the parish of Crail in 1631¹² and thereafter a manse and offices were

Honourable Henry Erskine Lord Advocate for Scotland with Notices of certain of his Kinsfolk and of his Time Compiled from Family Papers and Other Sources of Information, (Edinburgh, 1882) at p. 155.

⁵ *Fergusson* at pp. 405 and 511ff. They were both ardent Whigs. Erskine was the older man and was the senior advocate and it is likely that Cathcart was acting as his junior.

⁶ Henry Brougham considered Tait one of the most accomplished lawyers of his time. *The Life and Times of Henry Lord Brougham. Written by Himself*. (3 vols.), (Edinburgh and London, 1871) vol. 1, p. 232.

⁷ Brougham thought Clerk's knowledge of the law as profound as Tait's 'in all its branches, and not merely in its theory, but in all its most minute details of practical application' and noted that he would 'argue points of the greatest difficulty, and propound original views which sometimes at first startled himself.' *Life and Times, ibid.*

⁸ The terminology is hereafter explained *in gremio* of the facts.

⁹ The fact that equity was raised and discussed throughout is indicative of the leanings of the Court. This was normal. See *supra*.

¹⁰ See e.g. Green's Encyclopaedia of Scots Law, Vol. 6, s.v. Glebe

¹¹ the following is taken from the later respective Informations for the parties.

built for the minister of the newly erected parish by the heritors of the parish.¹³ However, there was no glebe¹⁴ designated for the parish. In 1720, the heritors had come to an arrangement with the then incumbent Minister that they would pay L.60 Scots, yearly, in lieu of glebe. The Reverend Beatson had not been content, like his predecessors, to rely upon this, and had applied to his presbytery of St. Andrews, on 8 April 1790, for a glebe to be designated. There were church lands within the parish¹⁵ but the presbytery assigned four acres of temporal¹⁶ lands which lay contiguous to the manse. The Dean, had through marriage, acquired the '*considerable estate*' of Newhall, close to Crail, in the East Neuk of Fife¹⁷ The Dean took command of the litigation as first heritor suspender.¹⁸ From one of the Informations¹⁹ given in for the Dean and the other suspenders, they submitted the whole proceedings of the presbytery to the review of the Court by bill of suspension, which bill must have passed the preliminaries and continued as an Ordinary action. Thus inrolled, it came to be heard at the 'debate' stage before the Ordinary in the Outer House, who, on 19th January 1791, was Lord Monboddo. His Lordship, having heard the parties 'discuss',

¹² by the Court of the High Commission of Teinds. At the time, this was a separate Court but operated with the same Judges of the Court of Session – exercising different powers under a different jurisdiction. The jurisdiction had been passed to the Court by The Kirks and Teinds Act 1706.

¹³ A heritor was strictly any landowner, but in practice the term was confined to a landowner in his role of a person liable to contribute to the upkeep of a parish. Dewar Gibb *Students' Glossary of Scottish Legal Terms* (Edinburgh, 1946) p.40

¹⁴ a 'glebe' was land, which the minister of a landward parish had right to, over and above his stipend. Dewar Gibb, *op. cit.* [citing Erskine, *Principles I, v., 16*] at p. 38,. See also The Law Society of Scotland and Butterworths, *Glossary Scottish Legal Terms and Latin Maxims and European Community Legal Terms* (Edinburgh, 1992), p. 34

¹⁵ We are informed in a later Information that these were the lands of Pitmillie and Falside and Newton. (The spelling varies.)

¹⁶ as opposed to the spiritual lands

¹⁷ Fergusson *op. cit.*, p.131

¹⁸ It appears that he had title and interest in the raising of the suspension on the basis that he was a feuar and heritor of the parish as opposed to any of the lands of Newhall being taken for the glebe.

¹⁹ It should be recollected that the Session Papers of this time normally contain only the printed pleadings of the parties at the point of informing on a representation as well as later procedure in the Inner House including reclaiming petitions and answers.

pronounced an interlocutor,²⁰ finding the minister entitled to the benefit of a glebe (my emphasis) and ordaining the heritors of Kingsbarns to produce their title deeds to their respective lands and to put them in process against the next calling, appointing the 'parties procurators to be then ready to debate on the other points in the cause.' It is explained in a later Information for the charger (the minister), and much must have been made of it at the early dispute, that his opponents had originally advanced the argument that the minister was not entitled to a glebe as his predecessors had been used to a sum in lieu, thereby waiving entitlement,²¹ This, however, was later removed by the suspenders at the dispute.²²

The next calling took place on 29 June of the same year, the minutes of the debate having been printed and memorials²³ given in for the reverend charger, as well as for the suspenders.²⁴ The Lord Ordinary,²⁵ considering the minutes and the memorials

²⁰ it seems immediately, without taking it to avizandum.

²¹ The Information goes into great detail as to the machinations of his predecessors and the predecessors in title of the heritors.

²² as it is alleged 'they saw very plainly, that there was not the smallest ground or pretence of reason for maintaining such a plea' It will be noted that this was a dilator exception which elided the charger's position that as a minister he was entitled to a glebe, an exception probably dropped at the initial dispute as there would no likely legal basis for asserting that the Reverend could be, here, bound by the actings of his predecessors. Hence the terms of Monboddo's interlocutor.

²³ Here a Memorial commenting upon the content of the Minutes of Debate. Much is made of the suspenders' failure to produce the title-deeds within the period of eight days of the previous interlocutor which had had '*serious consequences*' for the minister being prevented from obtaining possession of a glebe. As we will see, at least one of them was forced by letters of diligence to do so. Moreover, this was in contravention of an existing A.S. regulating the lodging of productions as ordered by the Court. On the eventual production of the titles, they disclosed that Pitmilly was Bishop's land and Fallside was Prior's land and were situated a mile and a half from the minister's manse. See *infra*.

²⁴ It will be recalled that the Memorials, often called 'Mutual Memorials' where both parties were to give them in, should have been ordered by the Ordinary and stated in the Interlocutor. It seems here, however, that although the Ordinary ordered them, it was not contained within the interlocutor.

²⁵ In usual course, it would be Lord Monboddo, either at the side bar or in the Ordinary roll if it was his week, he having heard parties in the dispute.

for both sides, and hearing the parties' advocates, found²⁶ that the minister was entitled to half an acre for his house, stable, barn, byre and garden, which had to be supplied from lands contiguous to his manse, whether church lands or others and *to this extent* (my emphasis) the Ordinary approved of the designation made by the presbytery, and decerned.²⁷ However, with respect to the glebe, the Lord Ordinary was not so sure. He made a finding stating that,

'before he determines any thing upon these points, desires to know whether there be any more church lands in the parish²⁸ and desires also to be informed, how these, and other church lands that may be in the parish, are situated with respect to the manse, and at what distance from it.'

Regarding the first part of the interlocutor, this was reclaimed against to the Inner House by the suspenders, which petition was refused on 22 November 1791.²⁹ This seems to have been sufficient for the Dean and his fellow feuars and heritors³⁰ which left only the question of whether the glebe lands had to be designated from the existing church lands of the parish or more conveniently situated temporal lands.

The Lords remitted the case back to the Outer House to proceed on the remaining ground of what related to the designation of the glebe and whether it had to be designed out of the church lands of the parish or temporal lands, if more conveniently situated for that purpose, mutual memorials being ordered on the

²⁶ By making an interlocutor which was termed 'advising' of the Minutes and 'advising' of the Memorials.

²⁷ also allowing the minister the building of a barn, of consent of the parties.

²⁸ besides those of Pitmillie and Falside (there are various spellings)

²⁹ The minister's later Information states: 'these arguments were disregarded by your Lordships, who unanimously, of this date (22 November 1791) refused the Petition without answers; so that the first two points in this interlocutor are finally settled.'

³⁰ Probably as a result of the unanimity of the Court in its finding. An uncommon occurrence.

point. There seems to have been something of a hiatus³¹ as the cause is not back before the Ordinary until 29 June 1793, when upon advising these memorials,³² he took the cause to report and ordered Informations for that purpose.

The parties then drew Informations in relation to this point. For the suspenders, the Information³³ was drawn by David Cathcart and extends to 21 pages. For the charger, the Information³⁴ was drawn by James Clerk and extends to 17 pages.³⁵ Firstly the suspenders' position as laid in the Information is summarised (bearing in mind that this would probably have been considered good written pleading). After a three page narration of the previous procedure, it states the 'facts which relate to the point'. It opens with drawing the Lords attention to the importance and novelty of the point:

'Your Lordships will be sensible, that this is a question of very considerable importance to the proprietors of temporal lands in Scotland, as this attempt, which is now for the first time made, goes the length of subjecting their property to a severe and heavy burden, of which it has always hitherto been entirely free ...'

although continues that 'the question, although of importance, seems not to be of very difficult discussion.'

There then follows a full discourse on the position of glebes before the Reformation, noticing statutes 1563. cap. 72, and 1572. cap. 48 with full incorporation of their contents, together with Sir George M'Kenzie's (*sic*) observations on the latter act and

³¹ perhaps due to various representations to the Ordinary?

³² These are not in the papers.

³³ It is dated 5th September 1793

³⁴ It is dated 10th September 1793

³⁵ It was common to have even lengthier pleadings.

the case of Inverkeithing *contra* Kerr 11th February 1631, Durie's Decisions. Then there is a discussion relating to contiguous glebes, covering the previous defects in the law, which were rectified by statutes 1592, cap. 118 and 1593, cap. 165, 1606 cap. 7, 1644, cap. 31 (again with quotations), the law developing such that any designation to a minister should be from the lands of the parish. Over the next five pages, the law is applied to the particular facts of the case. Then reference is made to the 'opinions of our lawyers' citing Stair,³⁶ Bankton³⁷, Erskine,³⁸ all showing that 'Every lawyer, then who has written upon the subject, is clearly of opinion, that a glebe cannot be designed from temporal lands, if any church lands remain in the Parish.'

There follows an analysis of the charger's position in law,³⁹ and this is applied and tested against the facts. It concludes,

'Upon the whole, therefore, the suspenders humbly flatter themselves, that they have shown your Lordships, that it has been the constant and invariable intention of the Legislature, to confine the burden of glebes to church lands alone; and that temporal lands can only at present be designed in the event of there being no church lands in the parish; and as, therefore they have pointed out church lands, most convenient for a glebe, within half a mile of the kirk, they cannot doubt that your Lordships will suspend the decree of the presbytery, making a designation of the nearest temporal lands. In respect whereof, &c.'

³⁶ II, 2, 40 and the case of Lord Forrat *contra* Maters, 6th February 1678

³⁷ II, 8, 126

³⁸ II, 10, 596

³⁹ (including his previous 'objections') which are measured against reported cases. Nicolson *contra* Porteus 2nd July 1722 Dict. Vol. (obliterated) p.337; Haliburton *contra* Paterson 13th July 1636 Durie's Decisions, Pottar against Ure, reported by Lord Kaimes in Dictionary Vol. I *voce* Glebe 5th December 1710 (which the Charger states was differently reported by Lord Fountainhall and which report is any event analysed), Durie and Black *contra* Thomson 12th December 1755 Dict., vol. 3, p. 147 *voce* Glebe,

The Reverend charger's Information⁴⁰ commences in the same manner, detailing all of the preceding procedure, then the facts relating to the lands of the parish and the same Acts (with slightly different passages therefrom quoted). Erskine is cited,⁴¹ as is Bankton,⁴² Stair being notable by his absence. Much is made of the decision observed by Fountainhall⁴³ and only some of the cases⁴⁴ cited by the suspenders, are referred to as they 'are the only ones that bear any reference to it' the charger leaving 'this branch of the cause to your Lordships consideration without any farther observations, being firmly persuaded that your Lordships will be guided by the spirit and intendment of these acts of Parliament'. All of this is 'his argument upon the general point' before progressing (at page 11) to 'the particular circumstances of the case' which it is said 'will tend to strengthen the argument upon the general question very much, and to show that the exemption claimed by the heritors of temporal lands, is neither founded in the strict interpretation of the acts of Parliament, nor in the equity of the case'. Arguments are then advanced, applying 'the intention of the Legislature to accommodate clergymen' to the individual facts of the village and Parish of Kingsbarns. The arguments of the suspenders are discredited, the stronger their plea is based 'upon the general point' – so much the better it is for the charger's argument as it 'endeavours to deduce⁴⁵ from the particular situation of the parish.' Inferences are drawn, presumptions argued, and appeals are made to judicial knowledge, lest the temporal heritors 'take an undue advantage, and commit manifest injustice.' It concludes with the point made that the

⁴⁰ It is dated 10 September 1793. Both are taken from the Faculty Collection of Session Papers, Advocates' Library, 1793 No 124

⁴¹ II, 10, 59

⁴² II, 8, 6

⁴³ See above.

⁴⁴ *viz.* Halliburton; Forrat; Potter (as above)

⁴⁵ By this time, the word 'deduce' could be used in the same manner as 'inferred' had been used in the earlier period. See chapter 1.

Lord Ordinary pronounced a decision, in respect of the half acre, in favour of the charger, which was adhered to by the Court, which 'appears extremely favourable to the plea which he at present humbly maintains'.

The Court heard parties again on 17 January 1794 and pronounced the following interlocutor:

'Upon Report of Lord Monboddo, and having advised the mutual informations for the parties, the Lords find the lands of Lochfurr, being temporal lands, are not liable to be designated for a glebe to the minister, when there are church-lands in the parish, and therefore sustain the reasons of suspension of that designation, and in so far suspend the letter and decern'.

Morison's Dictionary gives an account of the case.⁴⁶ It records that 'The Court were much divided in their sentiments.' Several of the Judges considering that where church lands lay at an inconvenient distance, the glebe should be designated from temporal lands, properly interpreting the statutes of 1649 and 1663. However, the majority, whilst appreciating the hardship on the minister, opined that as 'in this question the power of the Court arose entirely from statutes, they were bound to adhere to their strict letter' and on a sound construction, church lands must first be designated, 'especially as this was the opinion of Stair, whose authority must have great weight in all cases like the present which turn upon the construction of our older statutes, and where the point is not settled by a train of decisions.'⁴⁷ Thus, 'by a

⁴⁶ William Maxwell Morison, *The Decisions of the Court of Session from its first institution to the present time, digested under proper heads, in the form of a Dictionary*, (Edinburgh, 1803), Vol. XI, 1794, No.22, p.5140.

⁴⁷ On this as a development in the citation of authority, particularly in relation to older Scots Law, see J. W. G. Blackie, 'Stair's Later Reputation as a Jurist' in (ed.) D. M. Walker, *Stair*

narrow majority' the Court found that the lands allocated by the presbytery, being temporal lands, were not liable to be designated, when there were church-lands in the parish; and therefore sustained the reasons of suspension of that designation.

This, however, was not quite the end of the matter. The Reverend charger reclaimed by Petition⁴⁸ (of 26 pages) covering the same ground and concluding that

'The Petitioner has the greatest respect for the suspenders; but he cannot help saying, that he has been very much surprised indeed at their conduct in the present process, as he is not sensible of requesting anything which it was improper in him to ask, or becoming in them to refuse.'

The suspenders gave in answers⁴⁹ (10 pages). On 10 June 1794, the Court, on advising the reclaiming petition with answers, adhered.

Thus, the cause, from the first 'debate' before the Ordinary on 19th January 1791 to its final determination on 10 June 1794 had taken three and a half years.

The pleadings demonstrate some of the points raised in chapter 1, that a cause required to ripen and develop. That it took four years to reach a resolution was not uncommon of the time. The pleadings themselves show the tactics each party chose to adopt and the urging 'but a little at a time' of one's case until the position of the opponent became more apparent. One is struck in reading the pleadings that, with the removal of the rhetoric and the versions of previous procedural events, the

Centenary Studies, op. cit. pp. 207-27 at 219-20 and also John W. Cairns, *Historical Introduction, op. cit.*, Vol. I, pp. 170-171.

⁴⁸ dated 29th January 1794. Session Papers, Advocates' Library, No. 125

⁴⁹ dated 10th April 1794

presentation in writing is not greatly removed from what could be presented orally in a modern debate. There is citation of previous decisions of the Court, Acts of Parliament, and references to principles enunciated by institutional writers. The submissions fall into general and particular categories and the law is ascertained and tested against the facts as the argument is developed.

Postscript

There is a postscript to the case, disclosed later in Morison's Dictionary⁵⁰ and what was to happen sums up much of what was wrong with procedure, process and pleading in the late eighteenth century. Following the Court's decision on 10 June 1794, the presbytery designed the glebe out of the church lands⁵¹ at Newton belonging to a Mr. Balfour Hay. He now brought a suspension against the designation, there being other church lands lying more contiguous to the manse.⁵² Lord Monboddo again was the Ordinary and again reported to the Lords. On 17 May 1798 the Lords advised on Informations and repelled the suspension which interlocutor Hay reclaimed against. The Court ordered Answers for the other parties concerned in the designation (the other heritors)⁵³ and on 27 November 1798 the Lords (two of whom were with the arguments for the suspender) adhered to the interlocutor reclaimed against but reserving to Hay a claim against the other heritors. On pronouncing this, 'great doubts were entertained of the propriety of the judgment 10 June 1794',⁵⁴ and Hay presented another reclaiming petition.⁵⁵ Upon

⁵⁰ Appendix, Part I, pp. 3 - 9

⁵¹ that is originally they were Church lands.

⁵² the closer lands were lands originally belonging to a bishopric and the College of St. Andrews.

⁵³ including the (by now) Henry Erskine still as assisted by Cathcart

⁵⁴ i.e. the Court's decision in Erskine's earlier case. In 1796, Henry Erskine, old Dean and the embodiment of Whiggery, had been removed by machinations of his political adversaries.

advising this petition, with answers, the Lords adhered to the interlocutor complained of but found:

'that in the circumstances of this case, the minister has the right to have his glebe designed out of lands lying near to his manse whether they be kirk-lands or temporal lands; but found that the heritor whose lands shall be so designed, is entitled to a proportional relief from the other heritors in the parish, liable in payment of the £60. Scots hitherto received by the minister in *lieu* of a glebe.'⁵⁶

Thus, nearly a decade later, the minister had his glebe and the Court had altered its position.⁵⁷ William Forbes' praise of Scotland's Form of Process (detailed at the start of chapter one) in the first years of the century was undeserved at the end of it. Such eulogies would have rung hollow to litigants such as the minister of Kingsbarns, forced through such machinations, and the case in its conclusion had been successful for him. It would have been galling to those whose causes took a similar path and for whom the outcome was different.⁵⁸

⁵⁵ arguing that he had been a minor at the time of the decision and it was not therefore binding on him, and stating reasons for the alteration of the judgment.

⁵⁶ my emphasis

⁵⁷ There was at this time no concept of *stare decisis* See T. B. Smith, '*British Justice: The Scottish Contribution*' Hamlyn Lectures, 1963, pp.75-77

⁵⁸ See the case of *Groat v. Sinclair* 15th May 1819, *Fac. Coll.*, initiated in 1780 to recover payment of the price of certain lands together with interest and the near quarter of a century taken to resolve the litigation.

Appendix 2

Illustrative Examples of Written Pleadings in the Faculty of Advocates' Session Papers in the period 1843 – 1863

One can obtain an indication of the methods used in pleadings across the period examined in Chapter Three from the Session Papers of Session Cases stored in the Advocates' Library.¹

This brief excursus into the pleading practices of the period should be read in conjunction with Chapter Three.

First Period 1843

In the first sample one observes long and often rambling summonses met by defences in short compass. Following revision, re-revised or re-re-revised condescendences and answers for the parties put the pleadings in a semblance of order. Long passages from statutes are commonly cited. Pleas in law are appended in separate Notes as per the statutory directions. There are general pleas in law in the form 'There are no grounds either set forth in the summons, or existing in the circumstances of the case, for setting aside the deeds sought to be reduced' (or other remedies sought). The specific pleas often contain lengthy propositions of law and cite authority – mirroring those citations *in gremio* of the Condescendence and

¹ The exercise is illustrative only. I have taken four periods, all in the Winter Session, a decade apart. The papers mainly consist of the process from hearings before the Inner House. The review was conducted using the Faculty of Advocates' General Collection (ALSP Gen. Coll.) The four periods and Session Papers are a] 1st November 1843 – 2nd December Vol. 391, No.'s 5-27; b] 1853 2nd November – 7th December Vol. 477, No.'s 1 – 32; c] 1863 2nd November – 9th December Vol. 567 No.'s 1-53; d] 1873 15th October – 22nd November Vol. 643 12 – 45. For further discussion on the Session Papers held in the Advocates' Library see the recent valuable paper by Angus Stewart, Q.C., - 'The Session Papers in the Advocates Library' in H.L. MacQueen (ed.), *'Miscellany Four'* (Stair Soc., Edinburgh, 2002) 199 – 223.

Answers. 'Appendices' are attached to the pleadings and lodged in process containing the 'deeds and writs produced in process' and sometimes Memorials or Cases for the Opinion of Counsel as well as the Opinions of Counsel. Parties mark that they 'agree to close the record' on the revised pleadings and further procedure is appointed by the Court. At this stage the pleadings often comprise short statements of facts, sometimes in three or four lines, answered with 'admitted' or 'admitted under reference to' for example, a document produced by the other party or 'admitted under reference' to that party's own separate statement of fact, the latter being widespread. 'Denied', 'Denied in toto', 'The whole of this article is denied', or denials of particular averments appear. One often sees 'the rest of the article is denied' or similar wording and at the end, as the situation required '*Quoad ultra* denied' or '*Quoad ultra* admitted'. Sometimes less circumspect language is used: 'this article is in general an entire misrepresentation, and the allegations contained in it are denied.' There are various 'Statements of belief' of the veracity of the other's averments - 'the defender believes the statement here to be true' or [a particular statement] is 'denied and *quoad ultra* [the party] does not know and does not admit the truth.' There are phrases such as '[the content of the averment] is true but under explanation'. Some answers are to more than one condescence. Evidence is often pleaded and argumentative pleading is common. Averments going to the probability of one's averments and the improbability of the averments of one's opponent can be seen.

Second Period 1853

In the second period the approach seems to have been similar to the earlier period, although summonses are in the new format, but not always. Revised condescences and answers are short and to the point. Pleas are still in general

and specific form. The general plea to the relevancy is stated as 'The pleas are irrelevant, (incompetent) and groundless' or 'The pursuer has not set forth averments relevant or sufficient to entitle him to decree as concluded for'. There are general pleas for pursuers stated as 'The pursuer is entitled to decree in terms of the conclusion of the libel' or other such similar wording. 'Admitted', 'Admitted under reference', 'Denied' and '*Quoad ultra* admitted or denied' are still used. 'Believed to be true' and 'not known and not admitted' appear. The pleas in law are now shorter and authority is not so frequently cited therein. One often sees explanations for previous procedure explaining that a party had wanted to close the Record on the Summons and Defences - 'the pursuers, being desirous of closing the Record on the Summons and Defences, but requiring before doing so to make certain additions to the condescence annexed to the summons in respect of certain statements of the defenders.' Parties seek amendments - 'leave craved to allow to amend [the condescence or answers] by deleting and substituting therefor' or ' substitute instead thereof' Argumentative averments and averments of probability still appear although seem less frequent.

Third Period 1863

The third period sees a continuation of the development of the language of admitted and denied and '*quoad ultra*' and one sees 'denied as stated', 'denied insofar as they do not coincide', 'No admission is made' and 'not admitted'. Deeds and documents are 'referred to for their terms'. Documents or other previous pleading are often 'referred to' - 'reference is made to the pursuer's [or defender's] other 'statements' or other parts of the pleading. There is no 'incorporation'. Condescences and Answers are longer. General pleas are common - 'the present action being unnecessary and unfounded the defender ought to be assoilzied', 'The conclusions

for [whatever remedy] being unfounded and untenable, the defender ought to be assoilzied therefrom.’, ‘The pursuer has not set forth averments relevant or sufficient to entitle him to decree as concluded for’, ‘the averments and pleas of the pursuers are irrelevant and insufficient to support the conclusions of the summons.’ General pleas on the merits are also found - ‘generally in the circumstances above set forth the pursuers are entitled to decreet as concluded for’, ‘in all the circumstances before condescended upon the pursuer is entitled to decree in terms of the conclusions of the summons.’² Where cases are ordered these are often long³ extrapolations of the law and contain detailed argument. Commissions are frequent and adjournments or prorogations numerous.

The Fourth Period 1873

The fourth period demonstrates pleadings in similar terms to the third. There is the same use of ‘admitted’ with or without qualifications. So there is a simple ‘admitted’, or in embellished form, admitting the whole article of condescence: ‘The facts set forth in this article are admitted. *Quoad ultra* no admission is made.’ The admissions with qualifications are ‘admitted under explanation’ or ‘admitted under reference to [the document] itself’ or ‘Under the following explanation [] the article is admitted.’ ‘*Quoad ultra* denied’ is frequent as is ‘*Quoad ultra* not admitted.’ ‘*Quoad ultra* not known and not admitted’ or ‘This fact is not within the knowledge of the defender and therefore not admitted’ is used or in longer form, ‘*Quoad ultra* the statements contained in answer to this article are not known and not admitted’. ‘The statements of the defender embodied in his defence to this article are denied’ then particular

² Even after Lord Justice-Clerk Inglis’ decision in *Young & Co. v. Graham* 1860 23 D. 36 see above.

³ Sometimes up to fifty pages.

denials. *Quoad ultra* denied (or not admitted) so far as inconsistent with this answer.'

Documents are very often 'referred to for their terms.' The pleas are short and very rarely contain citation. Specific pleas are well drafted. General pleas are common

'The pursuer is entitled to decree in terms of the conclusions of the libel' or 'the pursuer is entitled in all the circumstances to decree in terms of the conclusions'.

Pleas to the relevancy appear as e.g. 'The averments of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons against the defender'

There are pleas to the facts: 'The averments upon which the pursuer's claim rested being unfounded entitles the defender to be assoilzied', 'The statements on which

the conclusions of this summons are based being unfounded in fact, the pursuer has no good ground of action and the defender should be assoilzied' So also, 'The pleas

of the defenders being unfounded, ought to be repelled and decree pronounced

against him in terms of the conclusions of the summons' or 'the averments of the pursuer being unfounded in fact and there being no grounds truly existing to

support the conclusions of the summons, the defenders ought to be assoilzied with expenses.' Proof before answer allowed 'The Lord Ordinary while indicating that a

proof must be allowed has thought it better at present to repel none of the pleas of the parties until the facts are ascertained'.

Observations

The regulation of pleading changed significantly across the period and one might have expected to see greater changes in the pleadings from the Session Papers.

Pleading of argument, rhetoric and probability certainly decreases. The length of articles of condescence and answers increases. The number of articles of condescence are greatest in the middle period – sometimes as high as thirty. The presentation of the averments in the condescence and answers follows both

styles prescribed by s.106 of A.S. 11 July 1828 although the 'double column' method becomes increasingly infrequent. This is maybe because when printed in this way, the text is very small and difficult to read. The Notice of 6 March 1839 by Lords Ordinary does not appear to have been obtempered.

We do not see pleas to specification. There are pleas that the averments of the pursuer are irrelevant and insufficient to support the conclusions of the summons, but not that they are 'lacking in specification.' This formulation seems to have developed much later.⁴

⁴ See discussion in Chapter 3.

Appendix 3(a)
Sheriff Court Survey
***Pro Forma* Questionnaire sent to solicitors' firms**

1. Firm Name: _____

2. Position: _____

3. Local Sheriff Court _____

4. Approximately, what proportion of the civil litigation workload of your firm is:
ordinary non-consistorial (ordinary)? _____

ordinary consistorial (family)? _____

5. How many fee earners participate in civil litigation within your firm? _____

6. Do you use agency solicitors for appearances? yes / no

7. Do you act as agent for other solicitors? yes / no

Written Pleading

8. How would you evaluate the standard of written pleading in the sheriff court? poor / moderate / good

9. Do you consider that the standard of written pleading has fallen in the last ten years? yes / no

10. Has the introduction of OCR 1993 affected the standard of written pleading? yes / no

11. Do you hold training programs e.g. seminars, workshops etc. for trainees and young solicitors learning to draft written pleadings? yes / no

12. Should the current system of written pleadings remain part of civil litigation? yes / no

13. Do you consider that 'abbreviated pleading' (as per Cullen proposals) should be introduced into the sheriff court in:
a) family cases? yes / no
b) ordinary cases? yes / no

14. If 'abbreviated pleading' was introduced, do you consider that problems would arise with requirements of specification and relevancy? yes / no

OCR 1993 as amended

15. Did you consider that the previous rules required revision? yes / no

16. In your opinion, has OCR 1993 reduced delay in
a) family actions? yes / no
b) ordinary actions? yes / no

17. Do you consider that OCR 1993 has altered practitioner attitudes? yes / no

18. Is there inconsistency in shrieval approach as to the interpretation of OCR 1993? yes / no

19. Do you think that the exercise of a sheriff's discretion is sometimes dependant upon the reputation of the defaulter? yes / no

20. Have shrieval approaches to procedural errors generally become more lenient since the introduction of OCR 1993? yes / no

21. How often do you lodge motions for summary decree? rarely / infrequently / often

22. Generally, do you move for decree by default (if competent) for an opponent's default? yes / no

23. Have you had expenses awarded against you personally for default? yes / no

24. If you have experience of family litigation in the sheriff court, do you consider OCR 1993 as suitable for family actions? yes / no

25. In your court, are options hearings held on more than one day? yes / no

26. Are family and ordinary options hearings held on different days? yes / no

27. Do you consider that individual options hearings should be heard at e.g. 15min intervals? yes / no

28. Generally, in your opinion, what proportion of records are not lodged for options hearings? [%] _____

29. Is this proportion increasing / static / decreasing?

30. If the record has not been lodged timeously, do the sheriff clerks in your court accept the record as 'tendered'? yes / no

31. In general, are sheriffs pro-active at options hearings? yes / no
32. Do sheriffs in your court adopt a strict approach at options hearings?
(as expounded in case law) yes / no / partly
33. What is your perception of the proportion of cases that
are dismissed for failing to lodge a record? [%] _____
34. In your court, if the sheriff has not had the opportunity
of reading the record (i.e. default), generally does he / she
- a) continue the options hearing? yes / no
 - b) hear parties and try to read the record on the bench? yes / no
 - c) adjourn the hearing until the end of the options roll? yes / no
 - d) discharge and re-assign the options hearing? yes / no
 - e) (if ContOH) continue the options hearing for a second time? yes / no
35. Have you appealed an options hearing 'decision' of a sheriff ? yes / no
36. In your experience, what proportion of options hearings
(in total) are continued? _____
37. Do you consider that the adjustment period should be time limited? yes / no
38. Do you find adjustment by opposing parties at, or near, the last
permitted day for adjustment to be problematic? yes / no
39. Do you consider that this is sometimes used tactically? yes / no
40. If this is done prior to an continued options hearing, in general
how do sheriffs proceed?
- a) by amendment? yes / no
 - b) by further adjustment? yes / no
 - c) other? (yes / no) _____
41. In comparison with the situation pre-1993, is the incidence
of diets of debates presently fixed: higher / the same / lower?
42. If the incidence is lower, do you consider that this is
due to the requirement that 'OCR 22 Notes' must be lodged? yes / no
43. At an options hearing, are you required by the sheriff to justify
any OCR 22 Notes? yes / no
44. Does your court have a Miscellaneous Procedure Roll or
Procedure Roll? yes / no
45. What is your perception of the incidence of motions to sist

made by parties in ordinary actions? _____

46. Have you ever encountered 'time limited' periods of sist? yes / no

47. Is Additional Procedure commonly used? yes / no

Pro-activity, Case management and Adversarialism

48. Do you consider that a sheriff should hear an individual case from its commencement to its conclusion:

a) In family cases? yes / no / undecided

b) In ordinary cases? yes / no / undecided

49. Do you consider that sheriffs should specialise in 'areas' of law? (if logistically possible) yes / no / undecided

50. Should the sheriff court become the only court of first instance? yes / no / undecided

51. Should a sheriff have the power to call for evidence? yes / no / undecided

52. Should the sheriff have the power to call parties? yes / no / undecided

53. Should there be an additional 'options hearing' or 'procedural hearing' prior to a diet of final disposal? yes / no / undecided

54. In your opinion, does increased judicial discretion lead to decreased consistency in judicial approach? yes / no

55. Do you consider that the adversarial nature of civil litigation hampers settlement? yes / no

56. Should solicitors be paid for taking avoidable procedural steps in litigation? yes / no

Thank you for taking the time to participate in this study

Appendix 3(b) Sheriff Court Survey Results Collated from all Responses

Introduction

This research was carried out to elicit practitioners' views on the operation of the Ordinary Cause Rules 1993 and to ascertain how the profession viewed written pleadings as part of sheriff court civil procedure. The cases reported after the implementation of the rules suggested that the new system under the Rules was being implemented in conflicting ways and that different courts and different sheriffs were taking different approaches and indeed held divergent views on how the provisions were to be interpreted. The literature suggested that solicitors themselves also differed in their opinions as to how the provisions were supposed to operate and what was appropriate in the preparation of parties' pleadings to the point of the Options Hearing and thereafter.¹ This project was designed to ascertain the views of practitioners across Scotland on these themes.

In the debate leading up to the creation of the 1993 Rules, and for sometime thereafter, the role of written pleadings in civil procedure was being questioned. Conventionally, pleadings were a mechanism for requiring and encouraging the parties to a litigation to state clearly and concisely their respective positions in fact and law, and to do so expeditiously, such as to bring forth clearly the disputable matter between them for the Court's determination. As canvassed in Chapter 5, the traditional view was that it was the parties² who dictated the content of the pleadings and they had, by the late 1980s and early 1990s often acquired *de facto* control over the progress of ordinary actions in the sheriff court. The provisions of the Rules were designed to reverse this trend, instituting definitive time periods for the preparation of pleadings and requiring parties to state Notes of their legal positions before consideration could be given to permitting a diet of debate. The writer wished to ascertain whether the system of written pleadings had been affected by these and other provisions of the 1993 Rules and what practitioners themselves actually thought about written pleadings and their continued use in civil procedure. As part of the early 90s debate mentioned above, it had been mooted that written pleadings should be scrapped completely and replaced with 'abbreviated pleadings' and this line of thinking had been adopted (in part) by Lord Cullen (as he was then) in his *Review of the Business of the Outer House of the Court of Session*. (Scottish Courts Administration, Edinburgh, 1996). The views of the practitioners on this and associated topics was sought.

¹ See discussion in Chapter 5

² Throughout, reference is made to 'parties' or 'litigants'. This is part of the well known euphemism that it is the parties' legal advisers who actually act. These words can be read as encompassing both litigants and their advisers.

As has been explored in the main text of the thesis, receptions of changes in civil procedure very often turn upon the how the change is viewed by practitioners, whether it is followed in practice and how courts react to situations when deviations from the prescribed course are requested by the parties. The first step, though, is to ascertain the views of those who must in practice follow and abide by the changes. Secondly, any change must be implemented by the courts, sometimes with, other times without the practitioner's concurrence. Finally, if there are deviations from a prescribed course, one must ask whether they are 'one-offs', permitted in the interests of justice, or whether there are the start of a deeper erosion. The 1993 Rules prescribed the course to be followed in ordinary actions in the sheriff courts of Scotland and following implementation, all of this was apparent from the case law. The research here was designed to test this directly with the practitioners. The results are interesting and go some way to affirming the hypothesis and confirming the case law. The results and analysis, as appropriate are incorporated into the main body of the thesis text.

Methodology

The research was carried out in the period September 1997 – April 1998. The methodology adopted was to send out unaddressed (see below for explanation) questionnaires and S.A.E.'s with a covering letter. The questionnaire is reproduced in Appendix 3(a).

A problem presented itself in that it was difficult to ascertain from listings of these solicitors' firms whether they were chamber practices, criminal court practices, or civil court practices. The Law Society of Scotland was approached but it did not possess this information. It was decided that best method of obtaining responses from the target group of civil court practice firms was to write to the local area Bar Associations, Faculties and Societies which could then be used as the vehicle for distribution to these firms in their areas. It was agreed with them that they would select the firms in their areas which operated civil court practices and would forward the questionnaires and accompanying S.A.E.'s. The bodies which kindly assisted with the distribution were: Aberdeen Bar Association; Dunoon Faculty of Procurators; Glasgow Bar Association; Faculty of Procurators of the Highlands; Society of Procurators of Orkney; Society of Procurators and Solicitors in the City and County of Perth; Society of Solicitors and Procurators of Stirling and Western Isles Faculty of Solicitors

Responses were invited from the Senior Partner of the civil court department of firms with a civil court practice, to be completed on behalf of his or her firm. It was a condition of participation that the results would be reproduced anonymously.

Results

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
Number of firms responding	17 ³	1	2 ⁴	9	2	4	5	1	41	-
6 ⁵ . Do you use agency solicitors for appearances?										
yes	14	1	2	6	-	3	3	1	30	73%
no	3	-	-	3	2	1	2	-	11	27%
7. Do you act as agent for other solicitors?										
yes	9	1	-	6	2	4	5	1	28	76%
no	4	-	2	3	-	-	-	-	9	24%
Written Pleading										
8. How would you evaluate the standard of written pleading in the sheriff court?										
poor	4	-	-	-	1	-	1	-	6	15%
moderate	11	1	2	7	1	4	4	1	31	78%
good	2	-	-	-	-	-	-	-	2	5%
poor/moderate ⁶	-	-	-	1	-	-	-	-	1	2%
9. Do you consider that the standard of written pleading has fallen in the last ten years?										
yes	5	-	1	3	-	1	-	-	10	25%
no	11	1	1	5	2	3	5	1	29	73%

³ This was the highest return for any of the areas. As discussed in Chapter 5 there was a strict approach adopted in this Sheriffdom and this may have had some bearing on the high response rate. However, it should be noted that the percentage figures in the final column incorporating the high Aberdeen response may not always be representative of a pan-Scotland response.

⁴ This response level was admittedly disappointing.

⁵ Questions 1-5 (see Appendix 2A) were designed for administrative purposes only and no use is made of the results.

⁶ This was a hybrid answer inserted in 2 of the responses.

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
don't know	1	-	-	-	-	-	-	-	1	2%
10. Has the introduction of OCR 1993 affected the standard of written pleading?										
yes	6	-	-	2	2	1	1	-	12	29%
no	10	1	2	6	-	3	4	1	27	66%
don't know	1	-	-	1	-	-	-	-	2	5%
11. Do you hold training programs e.g. seminars, workshops etc. for trainees and young solicitors learning to draft written pleadings?										
yes	4	-	1	2	-	1	1	-	9	22%
no	13	1	1	7	2	3	4	1	32	78%
12. Should the current system of written pleadings remain part of civil litigation?										
yes	10	1	1	7	1	2	3	-	25	63%
no	7	-	1	1	1	2	2	1	15	37%
13. Do you consider that 'abbreviated pleading' (as per Cullen proposals) should be introduced into the sheriff court in:										
a) family cases?										
yes	14	1	1	6	2	4	4	1	33	85%
no	3	-	1	1	-	-	-	-	5	13%
don't know	-	-	-	1	-	-	-	-	1	2%
b) ordinary cases?										
yes	7	-	1	3	2	3	4	-	20	53%
no	10	1	1	3	-	1	-	1	17	45%
don't know	-	-	-	1	-	-	-	-	1	2%
14. If 'abbreviated pleading' was introduced, do you consider that problems would arise										

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
with requirements of specification and relevancy?										
yes	13	-	2	6	-	-	1	-	22	58%
no	4	-	-	2	1	3	3	1	14	37%
possibly ⁷	-	1	-	-	1	-	-	-	2	5%
OCR 1993 as amended										
15. Did you consider that the previous rules required revision?										
yes	15	1	1	9	2	4	4	1	37	90%
no	2	-	1	-	-	-	1	-	4	10%
16. In your opinion, has OCR 1993 reduced delay in										
a) family actions?										
yes	13	1	1	7	2	4	4	1	33	85%
no	2	-	1	1	-	-	1	-	5	13%
don't know	-	-	-	1	-	-	-	-	1	2%
b) ordinary actions?										
yes	14	1	1	7	2	4	3	1	33	81%
no	3	-	1	1	-	-	2	-	7	17%
don't know	-	-	-	1	-	-	-	-	1	2%
17. Do you consider that OCR 1993 has altered practitioner attitudes?										
yes	15	1	2	8	1	3	3	1	34	83%
no	2	-	-	1	1	1	2	-	7	17%
18. Is there inconsistency in shrieval approach as to the interpretation of OCR 1993?										
yes	12	1	2	7	1	4	4	-	31	82%

⁷ This was an answer inserted into 2 of the results.

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
19. Do you think that the exercise of a sheriff's discretion is sometimes dependant upon the reputation of the defaulter?	5	-	-	2	-	-	-	-	7	18%
yes	12	1	-	8	1	3	3	-	28	72%
no	5	-	2	1	1	1	-	1	11	28%
20. Have shrieval approaches to procedural errors generally become more lenient since the introduction of OCR 1993?										
yes	2	-	2	-	-	-	-	-	4	10%
no	14	1	-	8	2	4	4	1	34	90%
21. How often do you lodge motions for summary decree?										
rarely	5	1	1	4	2	3	3	1	20	50%
infrequently	10	-	1	5	-	1	1	-	18	45%
often	2	-	-	-	-	-	-	-	2	5%
22. Generally, do you move for decree by default (if competent) for an opponent's default?										
yes	7	1	1	2	2	1	1	-	15	38%
no	10	-	1	6	-	3	3	1	24	62%
23. Have you had expenses awarded against you personally for default?										
yes	3	-	1	1	1	-	-	-	6	15%
no	14	1	1	7	1	4	4	1	33	85%
24. If you have experience of family litigation in the sheriff court, do you consider OCR 1993 as suitable for family actions?										
yes	7	1	1	4	1	3	2	1	20	69%
no	3	-	-	3	1	1	-	-	8	28%

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
not always	-	-	-	1	-	-	-	-	1	3%
25. In your court, are options hearings held on more than one day?										
yes	14	-	2	1	-	-	2	-	19	48%
no	3	1	-	8	2	4	2	1	21	52%
26. Are family and ordinary options hearings held on different days?										
yes	16	-	1	-	-	-	-	-	17	44%
no	1	1	1	9	2	3	4	1	22	56%
27. Do you consider that individual options hearings should be heard at e.g. 15min intervals?										
yes	6	-	1	6	-	3	2	1	19	47%
no	11	1	1	3	2	1	2	-	21	53%
28. Generally, in your opinion, what proportion of records are not lodged for options hearings?	4%	-	5%	4%	5%	3%	8%	5%		
29. Is this proportion										
don't know		1								
increasing	-	-	1	-	-	1	-	-	2	6%
static	12	-	1	4	2	-	1	1	21	66%
decreasing	4	-	-	1	-	3	1	-	9	28%
30. If the record has not been lodged timeously, do the sheriff clerks in your court accept the record as 'tendered'?										
yes	13	1	1	4	1	2	3	-	25	66%
no	4	-	1	1	1	2	-	-	9	24%
don't know	-	-	-	3	-	-	-	1	4	10%
31. In general, are sheriffs pro-active at options										

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
hearings?										
yes	16	1	2	6	-	4	4	1	34	85%
no	1	-	-	1	2	-	-	-	4	10%
depends on sheriff	-	-	-	2	-	-	-	-	2	5%
32. Do sheriffs in your court adopt a strict approach at options hearings? (as expounded in case law)										
yes	11	-	-	3	-	-	-	-	14	36%
no	-	-	1	1	2	-	1	-	5	13%
partly	6	1	1	4	-	4	3	1	20	51%
33. What is your perception of the proportion of cases that are dismissed for failing to lodge a record? ⁸	3%	-	2%	-	0%	1%	0%	0%		
don't know		1		4						
34. In your court, if the sheriff has not had the opportunity of reading the record (i.e. default), generally does he / she										
a) continue the options hearing?										
yes	4	-	-	2	1	1	-	-	8	29%
no	6	1	2	3	1	3	3	1	20	71%
b) hear parties and try to read the record on the bench?										
yes	9	-	1	1	1	2	1	-	15	48%
no	5	1	1	3	1	2	2	1	16	52%
c) adjourn the hearing until the end of the options roll?										
yes	4	1	1	4	-	1	1	-	13	43%
no	10	-	1	-	2	2	2	1	17	57%

⁸ The perception was expressed by all those responding, as a percentage.

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
d) discharge and re-assign the options hearing?										
yes	1	-	-	1	-	-	1	-	3	10%
no	11	1	2	4	2	3	2	1	26	90%
e) (if ContOH) continue the options hearing for a second time?										
yes	-	-	-	1	-	-	-	1	2	7%
no	12	1	2	4	2	3	3	-	27	93%
35. Have you appealed an options hearing 'decision' of a sheriff ?										
yes	9	-	-	1	1	-	-	-	11	28%
no	8	1	2	7	1	4	4	1	28	72%
36. In your experience, what proportion of options hearings (in total) are continued? ⁹	46%	50%	83%	36%	23%	48%	38%	30%		
37. Do you consider that the adjustment period should be time limited?										
yes	14	1	2	8	2	4	3	1	35	90%
no	3	-	-	1	-	-	-	-	4	10%
38. Do you find adjustment by opposing parties at, or near, the last permitted day for adjustment to be problematic?										
yes	14	1	2	8	2	4	4	1	36	90%
no	3	-	-	1	-	-	-	-	4	10%
39. Do you consider that this is sometimes used tactically?										
yes	11	1	2	6	2	4	4	1	31	76%
no	6	-	-	3	-	-	1	-	10	24%
40. If this is done prior to an continued options										

⁹ Some of the responses were in percentage figures and other expressed the proportion as a fraction. The latter were converted into the former.

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
hearing, in general how do sheriffs proceed?										
a) by amendment										
yes	10	1	1	5	2	4	3	1	27	84%
no	2	-	1	2	-	-	-	-	5	16%
b) by further adjustment										
yes	5	-	1	2	-	1	1	-	10	35%
no	7	1	1	3	1	2	3	1	19	65%
c) other										
yes	2	1	1	-	-	-	1	-	5	39%
no	5	-	-	1	-	1	1	-	8	61%
41. In comparison with the situation pre-1993, is the incidence of diets of debates presently fixed:										
higher	-	-	-	-	-	-	-	1	1	3%
the same	4	-	1	2	1	1	2	-	11	28%
lower	12	1	1	6	1	3	3	-	27	69%
42. If the incidence is lower, do you consider that this is due to the requirement that 'OCR 22 Notes' must be lodged?										
yes	12	-	1	8	1	4	3	-	29	94%
no	-	-	1	-	-	-	-	-	1	3%
partly	-	1	-	-	-	-	-	-	1	3%
43. At an options hearing, are you required by the sheriff to justify any OCR 22 Notes?										
yes	14	1	2	5	1	4	5	1	33	80%
no	3	-	-	2	1	-	-	-	6	15%
depends on sheriff ¹⁰	-	-	-	2	-	-	-	-	2	5%

¹⁰ This was an answer inserted into 2 of the responses

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
44. Does your court have a Miscellaneous Procedure Roll or Procedure Roll?										
yes	15	1	2	4	2	4	2	1	31	82%
no	2	-	-	3	-	-	2	-	7	18%
45. What is your perception of the incidence of motions to sist made by parties in ordinary actions? ¹¹	frequent	-	low	-	80%	-	high	many		
don't know		1		-		-				
46. Have you ever encountered 'time limited' periods of sist?										
yes	4	-	1	-	-	-	1	-	6	15%
no	13	1	1	8	2	3	4	1	33	85%
47. Is Additional Procedure commonly used?										
yes	3	-	1	-	-	-	1	1	6	15%
no	14	1	1	7	2	4	4	-	33	85%
Pro-activity, Case management and Adversarialism										
48. Do you consider that a sheriff should hear an individual case from its commencement to its conclusion:										
a) in family cases?										
yes	7	-	2	6	1	2	1	1	20	50%
no	6	1	-	3	1	2	2	-	15	38%
undecided	3	-	-	-	-	-	2	-	5	12%

¹¹ This question strayed in design from the *pro forma* format and the responses were resultingly confusing. Many responses simply left this answer blank. Those who did complete the question used varying terms but which were close in import and meaning. Thus 'frequent', 'low', 'high' and 'many' represent as closely as possible the responses and the figure of 80% only arises from the fact that there was the one response from Orkney.

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
b) in ordinary cases?										
yes	4	-	2	3	1	-	1	1	12	31%
no	9	1	-	5	1	4	2	-	22	56%
undecided	3	-	-	-	-	-	2	-	5	13%
49. Do you consider that sheriffs should specialise in 'areas' of law? (if logistically possible)										
yes	10	1	1	6	1	1	3	1	24	58%
no	6	-	1	2	1	3	2	-	15	37%
undecided	1	-	-	1	-	-	-	-	2	5%
50. Should the sheriff court become the only court of first instance?										
yes	4	-	-	3	1	1	2	-	11	27%
no	9	1	1	4	1	3	2	-	21	53%
undecided	4	-	1	2	-	-	-	1	8	20%
51. Should a sheriff have the power to call for evidence?										
yes	11	1	2	3	2	3	2	1	25	61%
no	3	-	-	4	-	1	1	-	9	22%
undecided	3	-	-	2	-	-	2	-	7	17%
52. Should the sheriff have the power to call parties?										
yes	8	1	2	3	2	3	2	1	22	54%
no	6	-	-	4	-	1	1	-	12	29%
undecided	3	-	-	2	-	-	2	-	7	17%
53. Should there be an additional 'options hearing' or 'procedural hearing' prior to a diet of final disposal?										
yes	2	-	1	3	2	1	3	1	13	32%

	Aberdeen	Dunoon	Glasgow	Highland	Orkney	Perth	Stirling	W.Isles	Total	%
no	9	1	1	1	-	3	1	-	16	39%
undecided	6	-	-	5	-	-	1	-	12	29%
54. In your opinion, does increased judicial discretion lead to decreased consistency in judicial approach?										
yes	11	1	1	7	2	1	3	1	27	66%
no	6	-	1	2	-	3	1	-	13	32%
undecided	-	-	-	-	-	-	1	-	1	2%
55. Do you consider that the adversarial nature of civil litigation hampers settlement?										
yes	8	1	1	6	2	1	1	-	20	49%
no	9	-	1	3	-	3	3	1	20	49%
don't know	-	-	-	-	-	-	1	-	1	2%
56. Should solicitors be paid for taking avoidable procedural steps in litigation										
yes	9	-	1	1	2	2	1	1	17	46%
no	7	-	1	4	-	2	3	-	17	46%
depends ¹²	-	1	-	-	-	-	-	-	1	3%
unsure ¹³	-	-	-	2	-	-	-	-	2	5%

¹² This was inserted in 1 of the responses.

¹³ This was inserted in 2 of the responses.

Appendix 4(a)
Sheriff Court Survey
***Pro Forma* Questionnaire sent to all full time sheriffs**

This was the questionnaire sent to the Sheriffs in the six Sheriffdoms.

1. How long have you been a full time sheriff? _____
2. Before your appointment as a sheriff were you an advocate or a solicitor? [Advocate / Solicitor]
3. Have you always been a sheriff in this sheriffdom? [yes / no]
4. If not, in which sheriffdom(s) were you previously resident? _____
5. What proportion of your workload is allocated to ordinary non-consistorial actions? _____

Written Pleading

6. How would you evaluate the standard of written pleading in the sheriff court? [poor / moderate / good]
- [Comment]
7. Do you consider that the standard of written pleading has fallen in the last ten years? [yes / no]
8. Has the introduction of OCR 1993 affected the standard of written pleading? [yes / no]
9. If yes, in what way?
10. Do you consider that 'abbreviated pleadings' should form part of ordinary procedure? [yes / no / undecided]
10. If so, would this remove pleas to relevancy and specification? [yes / no / undecided]

OCR 1993 as amended

12. Did you consider that the previous ordinary cause rules required revision? [yes / no]

13. Have the OCR 1993 altered practitioner attitudes? [yes / no / undecided]

14. In your opinion, have the OCR 1993 reduced delay in the disposal of ordinary actions? [yes / no]

15. Were you given official guidance as to the exercise of the pro-active powers prior to the implementation of OCR 1993? [yes / no]

16. Has this been continuous? [yes / no]

17. If not, would you wish continuous training/guidance? [yes / no]

Options Hearings, adjustment, amendment and debate

18. Have you observed another sheriff conducting an options hearing? [yes / no]

19. Are you allocated time within the court schedule to read records prior to options hearings? [yes / no]

20. In your court, are options hearings held on more than one day in the week? [yes / no]

21. Do you consider that individual options hearings should be heard at e.g. 15min intervals? [yes / no]

22. What proportion of records are not lodged for an options hearing? _____

23. Is this proportion: [increasing / static / decreasing]

24. In your experience, what proportion of options hearings are continued? _____

25. Do you read through the process if the record has not been lodged timeously for an options hearing? [yes / no]

26. If the record has not been lodged for an options hearing, and the parties are in attendance at the options hearing, in general, would you dismiss the action? [yes / no]

27. If there is no record for the options

hearing and no-one appears, do you dismiss the case? [yes / no]

28. Is the exercise of your discretion dependant upon the reputation (for default) of the defaulter? [yes / no]

29. For actions dismissed, what proportion of these dismissals are on the defender's motion? _____

30. If in general you do not dismiss actions, do you: continue the options hearing? [yes / no]

try to read the record on the bench? [yes / no]

discharge and re-assign the options hearing? [yes / no]

continue the options hearing for a second time? [yes / no]

31. Would you award expenses against a pursuer for the default of no record

ex proprio motu? [yes / no]

on defender's motion? [yes / no]

32. Have you awarded expenses against a solicitor personally? [yes / no]

33. Do you consider that adjustment should be time limited? [yes / no]

34. If one party makes significant adjustments on or near the final day for adjustment prior to a continued options hearing, would you permit the other to answer? [yes / no]

If yes: [by adjustment (& Record)]
[by amendment & Hearing)]

35. Do you perceive the current use of amendment in actions as: [increasing / static / decreasing]

36. In your interpretation of OCR 14.3.(2)(c), does the sheriff have pro-active powers akin to an options hearing? [yes / no]

37. In comparison the situation pre-1993, is the incidence of diets of debates fixed: [higher / the same / lower]

38. If the incidence is lower, is this due to the requirement that 'OCR 22 Notes' must be lodged? [yes / no]

39. At an options hearing, do you require solicitors to justify any OCR 22 Notes? [yes / no]

40. Does your court have a Miscellaneous Procedure Roll or Procedure Roll? [yes / no]

41. Is OCR 1993 Ch. 10 Additional Procedure commonly moved for? [yes / no]

42. Have you ever 'time limited' a period of sist? [yes / no]

Pro-activity, case management

43. Do you consider that a sheriff should hear an individual case from its commencement to its conclusion? [yes / no / undecided]

44. Do you consider sheriffs should specialise in 'areas' of law? [yes / no / undecided]

45. Should the sheriff court become the only court of first instance? [yes / no / undecided]

46. Should a sheriff have the power to call for evidence? [yes / no / undecided]

47. Should the sheriff have the power to call parties? [yes / no / undecided]

48. Should there be an additional 'options hearing' prior to a diet of final disposal? [yes / no / undecided]

49. In your opinion, does increased judicial discretion lead to decreased consistency in judicial approach? [yes / no]

50. Do you consider that the adversarial nature of civil litigation hampers settlement? [yes / no]

51. Should solicitors be paid for taking avoidable procedural steps in litigation? [yes / no]

Appendix 4(b)

Sheriff Court Survey Results Collated for all Sheriffdoms

Introduction

This research was carried out to ascertain sheriffs' views on the operation of the Ordinary Cause Rules 1993 and written pleadings as part of sheriff court civil procedure. The cases reported after the implementation of the rules suggested that the new system under the Rules was being implemented in conflicting ways and that different courts and different sheriffs were taking different approaches and indeed held divergent views on how the provisions were to be interpreted. The literature suggested that solicitors themselves also differed in their opinions as to how the provisions were supposed to operate and what was appropriate in the preparation of parties' pleadings to the point of the Options Hearing and thereafter.¹ This project was designed to ascertain the views of sheriffs across Scotland on these themes.

In the debate leading up to the creation of the 1993 Rules, and for sometime thereafter, the role of written pleadings in civil procedure was being questioned. Conventionally, pleadings were a mechanism for requiring and encouraging the parties to a litigation to state clearly and concisely their respective positions in fact and law, and to do so expeditiously, such as to bring forth clearly the disputable matter between them for the Court's determination. As canvassed in Chapter 5, the traditional view was that it was the parties² who dictated the content of the pleadings and they had, by the late 1980s and early 1990s often acquired *de facto* control over the progress of ordinary actions in the sheriff court. The provisions of the Rules were designed to reverse this trend, instituting definitive time periods for the preparation of pleadings and requiring parties to state Notes of their legal positions before consideration could be given to permitting a diet of debate. The writer wished to ascertain whether the system of written pleadings had been affected by these and other provisions of the Rules and what practitioners themselves actually thought about written pleadings and their continued use in civil procedure. As part of the early 90s debate mentioned above, it had been mooted that written pleadings should be scrapped completely and replaced with 'abbreviated pleadings' and this line of thinking had been adopted by Lord Cullen (as he then was) in his *Review of the Business of the Outer House of the Court of Session*. (Scottish Courts Administration, Edinburgh, 1996). The views of the practitioners on this and associated topics was sought.

As has been explored in the main text of the thesis, receptions of changes in civil procedure very often turn upon the how the change is viewed by practitioners, whether it is followed in practice and how courts react to situations when deviations from the prescribed course are requested by the parties. The first step, though, is to ascertain the views of those who must in practice follow and abide by the changes. Secondly, any change must be implemented by the courts, sometimes with, other

¹ See discussion in Chapter 5

² Throughout, reference is made to 'parties' or 'litigants'. This is part of the well known euphemism that it is the parties' legal advisers who actually act. These words can be read as encompassing both litigants and their advisers.

times without the practitioner's concurrence. Finally, if there are deviations from a prescribed course, one must ask whether they are 'one-offs', permitted in the interests of justice, or whether there are the start of a deeper erosion. The 1993 Rules prescribed the course to be followed in Ordinary Actions in the Sheriff Courts of Scotland and following implementation, all of this was apparent from the case law. The research here was designed to test this directly with the practitioners. The results are interesting and go some way to affirming the hypothesis and confirming the case law. The results, as appropriate are incorporated into the main body of the thesis text together with analysis of them.

Methodology

The research was carried out in the period September 1997 – February 1998. The methodology adopted was to send a questionnaire and a S.A.E.'s with a covering letter to all the (then) full-time practising sheriffs in the six Sheriffdoms in Scotland. The questionnaire is reproduced in Appendix 4(a).

Results

	Answers	Number answering (from total of 70 Sheriffs)
1. How long have you been a full time sheriff?	Average 14.8 years	68
2. Before your appointment as a sheriff were you an advocate or a solicitor?		69
	Advocate	36
	Solicitor	31
	Both	2
3. Have you always been a sheriff in this sheriffdom?		68
	yes	37
	no	31
4. If not, in which sheriffdom(s) were you previously resident?		
5. What proportion of your workload is allocated to ordinary non-consistorial actions?	Average 19.90 %	67
Written Pleading		
6. How would you evaluate the standard of written pleading in the sheriff court?		68
	poor	21
	moderate	37

	good	4	
	Variable	1	
	Abysmal	1	
	Moderate/Good	1	
	Moderate /Poor	2	
	Depends	1	
7. Do you consider that the standard of written pleading has fallen in the last ten years?			66
	yes	33	
	no	33	
8. Has the introduction of OCR 1993 affected the standard of written pleading?			
	yes	22	67
	no	45	
	Not significantly	1	
9. If yes, in what way?		See Comments ³	
10. Do you consider that 'abbreviated pleadings' should form part of ordinary procedure?			67
	yes	20	
	no	26	
	undecided	20	
	Don't understand the concept	2	
11. If so, would this remove pleas to relevancy and specification?			58
	yes	14	
	no	26	
	undecided	16	
	Don't understand the concept	2	
OCR 1993 as amended			
12. Did you consider that the previous ordinary cause rules required revision?			69
	yes	59	
	no	8	
	yes, but not replacement	1	
	yes, in part	1	
13. Have the OCR 1993 altered practitioner attitudes?			69
	yes	47	

³ The following were received as comments: 'dramatically – there is now a need to be specific earlier and avoid waffle'; 'improved generally because of need to focus at an earlier stage'; 'favourably'; 'very slightly improved'; slight improvement'; 'improved'; 'more slipshod and hurried'; 'not significantly'; 'in several ways'; 'some of the emphasis for clear pleadings has been removed by the rules'; 'a little better'; 'improved a bit'; 'concentration of minds'; 'agents now think anything goes'; 'more precise/timeous'; ' more focussed'; 'practitioners think about relevancy more closely'; 'discussion at options hearing frequently identified remediable deficiencies'; 'agents think more carefully about what they put in their pleadings when they raise an action'; 'options hearing focuses minds and rule 22 Note identifies defects'; 'less flexibility'.

	no	10	
	undecided	10	
	not much	1	
	yes + qualification	1	
14. In your opinion, have the OCR 1993 reduced delay in the disposal of ordinary actions?			69
	yes	60	
	no	9	
15. Were you given official guidance as to the exercise of the pro-active powers prior to the implementation of OCR 1993?			68
	yes	43	
	no	21	
	question misconceived	1	
	don't understand the question	3	
16. Has this been continuous?			62
	yes	14	
	no	46	
	question misconceived	1	
	don't understand the question	1	
17. If not, would you wish continuous training/guidance?			65
	yes	19	
	no	44	
	discussion would be useful	1	
	question misconceived	1	
Options Hearings, adjustment, amendment and debate			
18. Have you observed another sheriff conducting an options hearing?			66
	yes	10	
	no	57	
19. Are you allocated time within the court schedule to read records prior to options hearings?			69
	yes	44	
	no	22	
	yes (unofficially)	3	
20. In your court, are options hearings held on more than one day in the week?			67
	yes	29	
	no	37	
	don't know	1	
21. Do you consider that individual options hearings should be heard at e.g. 15min intervals?			68
	yes	8	

	no	52	
22. What proportion of records are not lodged for an options hearing?		See Comments ⁴	
22. Is this proportion:			62
	increasing	2	
	static	50	
	decreasing	8	
	no statistics	1	
	don't know	2	
	varies	1	
24. In your experience, what proportion of options hearings are continued?		See comments ⁵	
25. Do you read through the process if the record has not been lodged timeously for an options hearing?			69
	yes	33	
	no	32	
	if necessary	1	
	if looks settled	1	
	depends on circumstances	2	
26. If the record has not been lodged for an options hearing, and the parties are in attendance at the options hearing, in general, would you dismiss the action?			68
	yes	8	
	no	50	
	depends on reason	3	
	hear parties first	1	
	yes, or award expenses	1	
	generally no/ depends on reasons		
	not necessarily	2	
	sometimes	1	
	no, if motion is made	1	
	dismiss 50%	1	
27. If there is no record for the options hearing and no-one appears, do you dismiss the case?			69
	yes	45	
	yes, probably	2	
	yes, usually	1	
	yes, but few	1	
	yes + qualification	3	
	no	9	
	not always	1	

⁴ The following were received as responses to this question: 'small'; 'very small now'; they are almost always lodged unless the case has settled'; 'I don't have any statistics'; 'very few in this court'; 'very few'; 'low'; '50%'; '20%'; '15%'; '10%'; '10-15%'; 'about 5%'; '5%'; 'less than 5%'; '3%'; '2%'; '0.1%'; 'none'; 'impossible question'; 'a few dismissals have had a very salutary effect'.

⁵ The following were received as responses to this question: 'proportion continued 50%'; '75% (probably my fault)'; '25%'; 'approximately 40%'; '50%'; '50-60%'; '70%'; '75%'; '60%'; 'a third to a half'; '90%'.

not necessarily	1	
not without inquiry	1	
not usually	1	
probably not	1	
no, peremptory diet	1	
varies	1	
never happened	1	
28. Is the exercise of your discretion dependant upon the reputation (for default) of the defaulter?		67
yes	5	
no	55	
yes, partly	3	
possibly	2	
saves appeal procedure	1	
don't know	1	
29. For actions dismissed, what proportion of these dismissals are on the defender's motion?	See comments ⁶	
30. If in general you do not dismiss actions, do you:		
continue the options hearing?		56
yes	33	
no	16	
possibly	1	
depends on circumstances	2	
yes <i>ex proprio motu</i>	1	
either continue or read	1	
sometimes	1	
MPR	1	
try to read the record on the bench?		58
yes	25	
no	27	
possibly	1	
yes, partly	1	
depends on circumstances	2	
either continue or read	1	
MPR	1	
discharge and re-assign the options hearing?		54
yes	4	
no	45	
yes, but depends on circumstances	1	
depends on circumstances	2	
sometimes	1	
MPR	1	
continue the options hearing for a second time?		58

⁶ The following were received as responses to this question: 'unable to say'; 'it has hardly ever happened although I would not dismiss unless the defender moved for it'; 'most I would think'; 'practically nil'; 'all but they are few'; '100%'; 'nil'; 'not known'; 'no idea'; 'don't know'; '50%'; 'very small proportion'; 'it is not a question of the defender's motion. The action must be dismissed unless the pursuer has a (good) explanation. The defender's attitude may have a bearing'; 'as many as pleaders can get away with'.

	yes	11	
	no	45	
	depends on circumstances	1	
	MPR	1	
31. Would you award expenses against a pursuer for the default of no record <i>ex proprio motu</i> ?			
			65
	yes	11	
	no	44	
	perhaps	1	
	possibly	2	
	probably	1	
	or parties	1	
	depends on reasons	2	
	depends on circumstances	2	
	never had to	1	
on defender's motion?			
			64
	yes	43	
	no	9	
	perhaps	1	
	not necessarily	1	
	possibly	4	
	expenses	1	
	depends on reasons	2	
	depends on circumstances	2	
	maybe	1	
	never had to	1	
32. Have you awarded expenses against a solicitor personally?			
			68
	yes	34	
	no	31	
	unlikely	1	
	yes, but not for this	3	
33. Do you consider that adjustment should be time limited?			
			68
	yes	63	
	no	4	
	depends on circumstances	1	
34. If one party makes significant adjustments on or near the final day for adjustment prior to a continued options hearing, would you permit the other to answer?			
			66
	yes	57	
	no	6	
	if proper	1	
	depends on circumstances	1	
	not usually	1	
	not necessarily	1	

by adjustment (& Record)		
yes	16	
yes, if permitted by the rules	1	
no	1	
depends on circumstances	4	
depends on history	1	
see my article	1	
either	7	
varies	1	
usually	1	
not usually	1	
by amendment (& Hearing)		48
yes	31	
no	2	
depends on circumstances	4	
depends on history	1	
see my article	1	
either	7	
occasionally	1	
usually	1	
35. Do you perceive the current use of amendment in actions as:		68
increasing	25	
static	35	
decreasing	5	
no statistics	1	
don't know	1	
impossible question	1	
36 In your interpretation of OCR 14.3.(2)(c), does the sheriff have pro-active powers akin to an options hearing?		59
yes	47	
no	12	
37. In comparison with the situation pre-1993, is the incidence of diets of debates fixed:		66
higher	1	
the same	24	
lower	43	
38 If the incidence is lower, is this due to the requirement that 'OCR 22 Notes' must be lodged?		45
yes	39	
no	2	
partly	4	
39 At an options hearing, do you require solicitors to		66

justify any OCR 22 Notes?		
yes	28	
yes, in outline	1	
yes, on occasion	2	
yes, sometimes	1	
yes, if necessary	1	
yes and no	1	
no	25	
depends on terms of note	3	
depends if lacks substance	1	
not usually	1	
sometimes	2	
infrequently	1	
40. Does your court have a Miscellaneous Procedure Roll or Procedure Roll?		68
yes	60	
no	8	
41. Is OCR 1993 Ch. 10 Additional Procedure commonly moved for?		68
yes	10	
no	56	
occasionally	1	
rarely	2	
42. Have you ever 'time limited' a period of sist?		69
yes	9	
no	60	
Pro-activity, case management		
43. Do you consider that a sheriff should hear an individual case from its commencement to its conclusion?		68
yes	22	
no	37	
undecided	9	
depends on circumstances	1	
44. Do you consider sheriffs should specialise in 'areas' of law?		68
yes	13	
yes, but not strictly	1	
yes, with child law	1	
no	47	
undecided	6	
sometimes	1	
45. Should the sheriff court become the only court of first instance?		68
yes	22	
no	38	
undecided	8	
46. Should a sheriff have the power to call for evidence?		68

	yes	18	
	no	45	
	no, except in children cases	1	
	in what circumstances?	1	
	undecided	3	
47. Should the sheriff have the power to call parties?			68
	yes	16	
	no	45	
	in what circumstances?	1	
	only exceptional - children	1	
	undecided	5	
	call them what?	1	
48. Should there be an additional 'options hearing' prior to a diet of final disposal?			67
	yes	14	
	no	38	
	undecided	11	
	don't understand the question	3	
	not clear question	1	
49. In your opinion, does increased judicial discretion lead to decreased consistency in judicial approach?			66
	yes	25	
	no	27	
	don't know	4	
	yes, probably	5	
	possibly	1	
	not necessarily	2	
	don't understand the question	3	
50. Do you consider that the adversarial nature of civil litigation hampers settlement?			66
	yes	20	
	probably	1	
	no	40	
	no (except family cases)	1	
	not necessarily	2	
	how anything other advers.	1	
	not to the exclusion of	1	
	don't understand the question	1	
51. Should solicitors be paid for taking avoidable procedural steps in litigation?			67
	yes	9	
	yes, grey area	1	
	no	51	
	depends on circumstances	3	
	depends on the reason	1	
	too broad a question	1	
	for taxation	1	

Appendix 5 (a)
Questionnaire for Students Completing Diploma's Civil Practice Section.

1. Did you graduate in law from this university? Yes / No
2. Do you have a traineeship? Yes / No
3. If so, will your traineeship encompass civil court experience? Yes / No / Don't know
4. Which area of law do you intend to specialise in?
or undecided
5. Have you observed actions in the sheriff court or Court of Session? If so, which? Yes / No
If yes:-
- Sheriff Court
- Court of Session
6. Do you believe that the Diploma is the best vehicle for learning the rudiments of civil procedure? Yes / No / Don't know
7. Which have you found to be more instructive.....
tutorials or lectures? Tutorials / Lectures / Neither /
Both
8. Have you participated in a mock debate? Yes / No
9. Have you participated in a mock proof? Yes / No
10. Have you examined in detail the 'rules' of written pleading i.e. when to use different pleading formula e.g. 'believed to be true' or 'believed and averred'? Yes / No
11. Do you understand the concept of Proof before Answer? Yes / No / Unsure
12. How would you characterise your proficiency in drafting pleadings? Very good / good / fair / bad / very bad

13. Do you fully understand the concept of relevancy?

Yes / No / Unsure

14. When you have drafted mock pleadings,
have you made use of styles?

Yes / No

If so, which of the following have you used?
Court

Bennett: Style Writs in the Sheriff

Greens Litigation Styles
Dobie: Sheriff Court Styles
Diploma Handout
Other

15. Have you referred to any of the following books whilst completing this part of the Diploma?

Maxwell: The Practice of the Court of Session_____	Yes / No
Thomson & Middleton: Manual of Court of Session Procedure_____	Yes / No
McBryde and Dowie: Petition Procedure in the Court of Session_____	Yes / No
Stair Memorial Encyclopaedia, vol 17, Civil Procedure_____	Yes / No
Greens Annotated Rules of the Court of Session_____	Yes / No
Macphail: Sheriff Court Practice_____	Yes / No
Lewis: Sheriff Court Procedure_____	Yes / No
Kearney: An Introduction to Ordinary Civil Procedure in the Sheriff Court_____	Yes / No
McCulloch & Laing: New Ordinary Cause Rules_____	Yes / No
White: Ordinary Cause Rules 1993_____	Yes / No
Lees: Pleading and Interlocutors_____	Yes / No
McEwan: Pleading in Court_____	Yes / No
Black: An Introduction to Written Pleading_____	Yes / No
Jacob & Goldrein: Pleadings Principles and Practice_____	Yes / No

16. Are you conversant with the rules of procedure for the 'Commercial Court' in the Court of Session?

Yes / No

17. How do you view abbreviated pleadings?
concept

For / Against / Don't know
Don't understand the

18. Do you think a judge should:-

(i) only decide cases and let parties dictate the progress of litigation?

Yes / No / Don't

know

(ii) act in an interventionist manner and endeavour to speed up cases?

Yes / No / Don't

know

19. Do you think that the current system of pleading

-will stay unchanged?

Yes / No / Don't know

-should stay unchanged?
know

Yes / No / Don't

20. If not, why not?

Comment:-

Thank for taking the time to complete this questionnaire.

Appendix 5 (b)

Responses to Questionnaire for Students Completing Diploma's Civil Practice Section.

Introduction

This research was initiated to canvass the views of students undertaking the then¹ Diploma in Legal Practice in academic year 1996-7 as to *inter alia* written pleadings, civil practice and procedure and changes thereto made and proposed. To the writer's knowledge no attempt had been made previously to do so. The Diploma at that time was a one year course required by the Law Society of Scotland prior to entering into a traineeship. It was a procedurally based course, preparing the student for work in a legal firm. After a two year traineeship the individual is entitled to apply for a practising certificate from and admission to the Law Society of Scotland.

At the time of research, the Diploma was offered at five universities, namely Aberdeen, Dundee, Edinburgh, Glasgow and Strathclyde. Entry to the course was not controlled other than by the requirement that the intending diplomate had a law degree from a Scottish University.

Students on the Diploma were taught civil court practice and procedure and instruction took the form of lectures and tutorials, with the latter being taken, in general, by practising members of the profession.

Purpose of Research

The views of the students were sought for a number of reasons. Firstly, as the sample group would be practising solicitors within two years, the writer considered that it would be interesting to ascertain from the group their thoughts about written pleadings and procedure and what they thought the future held for both. At the time of the sample, there had been discussion in the profession generally as to whether the system of written pleadings should or would be retained. As new eyes on the procedure of the courts, it was thought that their comments, albeit without the benefit of practice would provide an interesting contribution to thoughts on procedure. Secondly, the civil practice and procedure component of the course was designed to instruct students in the rudiments of procedure and practice including the drafting of written pleadings. The sample were asked for their views on their own proficiency in this drafting as well as their understanding of some of the technicalities. Thirdly, at the time, it was being questioned whether the Diploma was the best vehicle for the practical training of students and

¹ since then, the format of the Diploma has changed.

questions were directed to this point insofar as it related to civil practice and procedure. Finally, changes to the sheriff court rules and changes to commercial actions in the Court of Session had emphasised a new role for the judge. Their views were sought in relation thereto and opportunity was provided for the sample to record their views on written pleadings at the end of the questionnaire.

Methodology

The views of all students undertaking the Diploma in the academic year 1996-7 were sought. This comprised a total of 455 students at the five universities. Aberdeen had 94 registered students, Dundee 50, Edinburgh 101, Glasgow 120 and Strathclyde 90.

The views of the students were sought using a pro forma questionnaire consisting of two pages. It was considered that a greater degree of response would be achieved if the questionnaire could be completed relatively quickly and the writing of the text was kept to a minimum.

The concurrence of the five Directors of Diploma at the respective universities was kindly provided and the questionnaire was replicated and forwarded to them. The Directors undertook distribution, completion and return. As a result, the mode of distribution and collection was outwith the writer's control.

At the point of sampling the students had all completed the courses in civil practice and procedure and were either about to sit the required examination or had just sat it. The questionnaires were completed anonymously as it was felt that this would induce a greater degree of candour.

Results

	Aberdeen	Dundee	Edinburgh	Glasgow	Strathclyde	Total	Percentage
Registered students	94	50	101	120	90	455	
Completed questionnaires returned	70	45	26	103	40	342	62%

	Aberdeen	Dundee	Edinburgh	Glasgow	Strathclyde	Percentage
5. Have you observed actions in the sheriff court or Court of Session?						
Yes	46	33	15	50	27	63%
No	21	11	9	53	12	34%
Observed Court of Session?						
yes	12	12	13	8	12	26%
no	55	32	11	95	27	70%
6. Do you believe that the Diploma is the best vehicle for learning the rudiments of civil procedure?						
Yes	23	13	8	10	17	29%
No	22	13	6	66	17	38%
Don't know	21	18	11	25	4	29%
7. Which have you found to be more instructive.... tutorials or lectures?						
Tutorials	26	16	5	78	11	39%
Lectures	15	9	9	2	13	22%
Neither	2	7	1	17	2	9%
Both	27	12	11	6	12	29%
8. Have you participated in a mock debate?						
yes	22	30	16	57	12	49%

	Aberdeen	Dundee	Edinburgh	Glasgow	Strathclyde	Percentage
9. Have you participated in a mock proof?						
no	48	15	10	46	28	51%
yes	62	40	26	74	9	74%
no	8	5	0	29	31	26%
10. Have you examined in detail the 'rules' of written pleading i.e. when to use different pleading formula e.g. 'believed to be true' or 'believed and averred'?						
yes	40	30	19	50	22	60%
no	30	14	6	50	18	38%
11. Do you understand the concept of Proof before Answer?						
Yes	38	25	19	43	35	62%
No	15	11	3	26	1	17%
Unsure	17	9	4	33	4	20%
12. How would you characterise your proficiency in drafting pleadings?						
very good	1	0	1	0	1	2%
good	15	4	8	3	3	14%
fair	46	25	15	62	28	62%
bad	7	12	2	29	1	15%
very bad	1	3	0	8	3	5%
13. Do you fully						

	Aberdeen	Dundee	Edinburgh	Glasgow	Strathclyde	Percentage
understand the concept of relevancy?						
Yes	26	24	18	34	31	54%
No	19	7	4	30	2	18%
Unsure	25	14	4	39	7	28%
14. When you have drafted mock pleadings, have you made use of styles?						
Yes	94%	91%	100%	99%	68%	90%
No	3%	2%	0%	1%	10%	3%
If so, which of the following have you used?						
Bennett: Style Writs in the Sheriff Court	32%	17%	62%	78%	7%	39%
Greens Litigation Styles	8%	2%	31%	38%	15%	94%
Dobie: Sheriff Court Styles	17%	2%	15%	18%	11%	13%
Diploma Handout	97%	100%	96%	90%	93%	95%
Other	5%	5%	15%	16%	11%	10%
15. Have you referred to any of the following books whilst completing this part of the Diploma?						
Maxwell: The Practice of the Court of Session	3%	2%	4%	4%	0%	3%
Thomson & Middleton:	0%	0%	0%	1%	0%	1%

	Aberdeen	Dundee	Edinburgh	Glasgow	Strathclyde	Percentage
Manual of Court of Session Procedure						
McBryde and Dowie: Petition Procedure in the Court of Session	0%	2%	0%	3%	0%	1%
Stair Memorial Encyclopaedia, vol 17, Civil Procedure	11%	4%	39%	21%	13%	18%
Greens Annotated Rules of the Court of Session	19%	16%	19%	34%	30%	24%
Macphail: Sheriff Court Practice	49%	62%	77%	83%	35%	61%
Lewis: Sheriff Court Procedure	1%	2%	0%	1%	0%	1%
Kearney: An Introduction to Ordinary Civil Procedure in the Sheriff Court	9%	9%	31%	9%	0%	11%
McCulloch & Laing: New Ordinary Cause Rules	0%	2%	12%	38%	15%	13%
White: Ordinary Cause Rules 1993	7%	9%	0%	12%	3%	6%
Lees: Pleading and Interlocutors	1%	0%	0%	2%	3%	1%
McEwan: Pleading in Court	6%	4%	4%	8%	5%	5%
Black: An Introduction to Written Pleading	6%	29%	62%	84%	8%	34%
Jacob & Goldrein: Pleadings Principles and	1%	0%	0%	0%	0%	1%

	Aberdeen	Dundee	Edinburgh	Glasgow	Strathclyde	Percentage
Practice						
No answer	0%	2%	0%	1%	3%	1%
No reference to any of the above	40%	31%	12%	4%	43%	26%
16. Are you conversant with the rules of procedure for the 'Commercial Court' in the Court of Session?						
Yes	1	0	1	29	6	10%
No	69	44	25	74	34	90%
17. How do you view abbreviated pleadings?						
For	7	2	1	31	11	15%
Against	4	1	4	1	1	5%
Don't know	24	14	5	30	17	31%
Don't understand the concept	33	27	16	41	10	47%
18. Do you think a judge should:-						
(i) only decide cases and let parties dictate the progress of litigation?						
Yes	9	9	2	11	7	14%
No	42	20	18	58	21	57%
Don't know	17	14	3	27	5	21%
(ii) act in an interventionist manner and endeavour to speed up cases?						

	Aberdeen	Dundee	Edinburgh	Glasgow	Strathclyde	Percentage
Yes	42	25	19	74	30	67%
No	13	7	3	7	2	12%
Don't know	14	12	4	20	6	21%
19. Do you think that the current system of pleading will stay unchanged?						
Yes	17	10	7	6	13	22%
No	18	10	8	50	15	33%
Don't know	33	25	11	46	12	44%
-should stay unchanged?						
Yes	13	5	8	5	12	19%
No	22	11	12	50	13	37%
Don't know	34	28	6	47	15	43%
20. If not, why not?						
Comment:- SEE BELOW						

Responses to Question 20

Aberdeen:

- 'Should be less adversarial procedure'
- 'Too complex and too much repetition'
- 'It is a very long and drawn out procedure'
- 'A move should be made to keep actions out of court by negotiation'
- 'Use of archaic terms and phrases seems unnecessary'
- 'Procedure is far too inaccessible to the public'
- 'There seems to be many areas which could be cut out'
- 'Self interest in the law profession will fight changes that may reduce their earning potential'
- 'Should become more paperless'

'Far too expensive, drawn out and complex'
'Pleadings are far too laborious'

Dundee:

'Too time consuming, complex, confusing, becomes an ego contest'
'Too cumbersome'
'Too time consuming, too complicated by arbitrary rules'
'Because it is so confusing and longwinded – wastes people's time'
'Final product is a mess'
'Written pleading is laborious and esoteric. Terms like 'quoad ultra denied' and the rules for admission should be taken out.'
'Too slow and laborious'
'It is ponderous and too long and wordy'
'Practitioners won't push for change because it will reduce fees'
'Because the profession as a whole abhors change, and since the public have no choice the profession don't have to change'

Glasgow:

'Its too slow'
'Language should be updated and simplified'
'Needs simplified and made more accessible to the public'
'The Cullen report suggests sensible changes'
'Too convoluted, needs simpler English and less rules on procedure'
'Currently cumbersome'
'Its too complex and convoluted and the language used is too old fashioned'
'Seems too time consuming and repetitive'
'Archaic'
'The current system of pleading isn't perfect therefore should not remain unchanged'
'It costs parties vast sums of money. Should be more user friendly'
'Should be readily understandable to both solicitors and members of the public'
'Very complex and very time consuming'
'In time I believe that civil proceedings may become less legalistic'
'Will change to meet recommendations of the Cullen Report'
'Too time consuming and easy to make mistakes'

'Abbreviated form may be more effective'

Strathclyde: 'It is archaic'

'The use of a judge with increased powers of examination would greatly increase the speed at which cases are dealt with'

'Too long, too complicated, too slow and too expensive'

'Move with the times. Change with court pressures'

'Long winded and too time consuming - not in the parties' interests'

'The system needs to speed up. The current system allows delay and tying up the matter in complicated legal arguments'

'Bringing the system more into the real world would do no harm'

'I think as we move into the 21st Century the system of pleading will have to as well'

'A great deal of facts are included which do not need to be argued. Abbreviated pleadings should be more widely used'

Appendix 6

Publication

The following article by the author was published in (eds.), Hector L. MacQueen and Brian G.M. Main, *The Reform of Civil Justice, Hume Papers on Public Policy: Vol. 5 No. 4* (Edinburgh University Press, 1997). Parts of it have been used in Chapter 5 of this Thesis. In accordance with the University of Edinburgh Higher Degree Regulations, Regulation 3.9.11, published papers must be included in the thesis and the formal permission of the publisher obtained. I am grateful to Edinburgh University Press for granting permission to use the material.

Access to Justice: Lessons from the Sheriff Court?

In 1540, the Scottish Parliament of the time passed an Act ratifying the creation of the College of Justice, the forerunner to the present Court of Session. It provided, *inter alia* that the College 'remain perpetuallie, for the administratioun of justice' and devolved:

'to the President, Vice-president, and Senatoures power to make sic acts, statutes and ordinances, as they sall think expediente, for ordouring of proces, and haistie expedition of Justice' (A.P.S. 1540, cap. 10.).

'Access to Justice' as a concept has been a powerful force in the regulation of civil disputes in Scotland since the sixteenth century. It incorporates the idea that civil justice 'should be available to all on the basis of equality, equity and fairness' (Jacob 1982: 277). Individuals are entitled to just and fair adjudication of their 'private' disputes by the courts. To this end courts must provide a defined and simple procedure which does not result in unnecessary delay and undue expense for the litigant.

It is argued in some quarters that the present system of civil procedure in Scotland does not meet these aims. Outmoded and 'a contemporary relic of a vanished age' (Gill 1995:129), there are criticisms of the fundamental bases upon which the system operates:- the adversarial nature of the system results in unnecessary delay and resultant expense and nurtures a mentality which is not conducive to the resolution of disputes (Jacob 1988: 16, Gill 1997: 129); the emasculated role of the judge as passive arbiter or 'umpire' results in avoidable delays in the expeditious progress of litigation; the formal requirement of presentation of argument by written pleading adds to expense and as currently practised produces 'the antithesis of the candid, concise and lucid document' the system was designed to produce (Woolman 1997: 280). It is argued that for these and other reasons, the costs incurred by litigants and the public in general (as indirect funders of the system) have increased to such an unacceptable level that the system must not only be reformed but radically overhauled (Mays 1997, Gill 1995).

In recent years those responsible for the administration and smooth operation of the civil justice system have made a number of changes to the rules of civil procedure (e.g. Commercial Court procedure, Optional procedure). More are

contemplated (Cullen 1995). Central to these changes (implemented and proposed) is the conceptual shift in the perception of the role of the judge. This article examines the changes which were made to sheriff court ordinary cause procedure in 1993 which incorporated a similar shift, the problems the changes addressed and attempts an assessment as to whether they have achieved their objectives. Similar problems with civil procedure are perceived to exist in Court of Session Outer House ordinary procedure and Lord Cullen has recommended the adoption of changes, some of which are similar to those which have been implemented in sheriff court ordinary procedure (Cullen). Change may be required, but it must not be change for change's sake. The John Wheatley Centre has warned that wide-scale reform of our system of civil justice is not to be undertaken lightly (Wheatley 1997: 3). Before any radical reform is made, it may be prudent to take cognisance of the reception of the 1993 Rules changes which were implemented in the sheriff court.

Adversarialism and Defended Ordinary Cause Actions Pre-1993

Traditionally, 'ordinary' actions in the sheriff court were conducted in accordance with the principles of an adversarial system. In an adversarial system, the court plays a passive, non-interventionist role and the parties play a major, dominating, independent role, seeking to persuade the court to adjudicate in their favour (Jacob 1987: 7).

The adversarial system is often contrasted with the inquisitorial system. With an inquisitorial system of civil justice the roles of the court and parties are different. The court takes a more active, interventionist and authoritative role; the underlying principle being that the court is vested with the public duty and interest to ensure the proper conduct, content and progress of the proceedings. The parties' role is minor and supportive, assisting the court in ascertaining and determining the dispute (Jacob 1987: 7).

Prior to 1993 the sheriff's function included ensuring that court rules were observed and that progress of the proceedings was orderly and expeditious. His role did not encompass however, taking control of litigation once it had been brought into court (Macphail 1987: para 5-110). The pace and extent of litigation was largely the prerogative of the parties. As one Sheriff Principal remarked, '.....the sheriff can exercise control but under the rules they are not explicitly required to do so. The sheriff can act legitimately as a neutral referee under the rules' (Morris and Headrick 1995: 27). This traditional role of the sheriff was viewed by many as hindering the expeditious progress of cases through the court which led to delay and expense. Another contributory factor was the procedure itself.

Three aspects of the procedure in particular were perceived as contributing to delay and unnecessary expense (Grant 1967; Hughes 1980; Morris and Headrick 1995: 13-15. C.f. Gill 1995: 129 and Cullen 1996 paras 3.6-3.20).

1. *Adjustment*: (c.f. Murray supra) Adjustment is the technical name given to the process of each party altering their case. After the pursuer has stated his case in law and fact, and the defender has answered this, the parties are afforded a period for further alteration called adjustment. Adjustments by one party are often made in light of issues raised by the other side. Under the old procedure, adjustments were made by the parties on 'adjustment rolls' whereby cases called before the sheriff to allow him to see the extent of progress being made by each side and to grant further continuation where there were reasons for doing so. When both sides had completed

their adjustment, the record (the document containing the parties respective final cases for adjudication) was 'closed', which prevented further adjustment and the case was sent for final determination. No time limit for the completion of adjustment was provided. In theory, after one continuation, further continuations of the case on the continued adjustment roll were only granted on 'cause shown' (which precluded continuation by reason only that the parties had agreed to it) (Macphail 1987: para 8-33). Although the adjustment and continued adjustment rolls were intended to provide parties with the opportunity to make alterations to their pleadings to focus and clearly define matters in dispute (Macphail 1987: para 8-27), in practice, the continued adjustment roll became a significant cause of undue delay. Parties often failed to focus the issues timeously, and on average cases were continued five or six times (Dailly 1993: 180). New issues were often raised at the last minute requiring further continuation to allow the 'intimatee' the opportunity to answer in the interests of fairness.

It has been suggested that the last minute adjustment 'syndrome' (c.f. Deutsch 1996: 8-9) prevalent at the time was due to poor preparation or as a result of tactical decisions both of which resulted in delaying final determination of the case. Joint motions for continuation were often granted without inquiry albeit that this did not conventionally amount to 'cause shown'.

2. *Procedure Roll*: This was the roll to which cases were sent for miscellaneous procedure e.g. for settlement and negotiation, minutes of amendment and answers thereto, the lodging of joint minutes etc. In effect it became a procedural lay-by. In the event that the sheriff refused further continuation for adjustment, some parties would attempt to continue 'adjusting' their cases by lodging minutes of amendment and answer on the procedure roll. Amendment is the procedure whereby parties seek to alter their case after the record is closed. (In some cases, fundamental changes to a parties' pleading prior to closing the record must also proceed by amendment.) A party wishing to amend must get the approval of the court before the amendments can be incorporated into the record. This would be sought ordinarily on the procedure roll.

3. *Fixing of Debates*: A debate is a hearing where the parties argue their preliminary pleas-in-law. Preliminary pleas are technical propositions of law which do not go into the merits of the case. If a party insisted on his preliminary plea, under the old procedure, the case was normally sent to debate. A significant number of cases would have diets of debate assigned but thereafter discharged at or immediately prior to the diet.

As a member of the Sheriff Court Rules Council explained:

'Another problem was that on average, eight out of ten debates fixed in ordinary actions did not proceed. This was another unnecessary step in procedure that was routinely used' (Dailly 1993: 180).

Sheriff Principal Risk Q.C. has subsequently observed:

'As every experienced sheriff knows, the problem which existed under the old rules was the fixing of scores if not hundreds of debates which were never likely to proceed.....In many cases, when the record was closed, the fixing of a diet of debate meant no more than a three-month delay

(Dinardo Partnership v. Thomas Tait & Sons 1995 S.C.L.R. (Sh. Ct) 941 @ 945D)

Morris and Headrick found that sometimes it was the delay *per se* which was sought and thus the debate was fixed with no considered intention of proceeding or as a second preferred option when further continuation on the continued adjustment roll was refused (Morris and Headrick 1995: para 4.25).

Reform of Sheriff Court Procedure and the 1993 Rules

The Sheriff Court Rules Council (hereafter 'The Rules Council') is a statutory body whose function includes keeping under review the procedure and practice followed in civil proceedings in the sheriff court (Sheriff Courts (Scotland) Act 1971 s.34(2)).

The Rules Council carried out a study of a sample of ordinary cause actions which had concluded in 1988 to investigate the extent of problems existing in sheriff court ordinary procedure. They also received representations from interested parties regarding undue delay, complexity and unnecessary attendance, and as a result the Rules Council decided to instigate a review of civil court procedures and primarily ordinary cause procedure. Their term of reference was: 'To examine the procedure and practices in the sheriff's ordinary court and make proposals for reform with a view to reducing delay, cost and complexity.' The Rules Council issued a consultation paper outlining proposals for change together with propositions upon which views were invited from interested parties (Consultation Paper 1990). Following consideration of the responses to the consultation paper, the Rules Council issued a report containing their conclusions (Report 1991) together with draft rules which became, with minor modification, Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 S.I. 1993 No. 1956 (S.223) and which came into force on 1st January 1994. The rules implemented the Rules Council's five policy objectives for ordinary cause procedure. These were: 'cases should call in court only when necessary; the number of callings should be kept to a minimum; the rules should prescribe periods for completion of the various stages of procedure; the control and management of cases should be vested in the court rather than leaving the parties free to litigate at their own pace; and the procedures of the Court of Session and the Sheriff Court should be harmonised wherever possible' (McCulloch & Laing 1995: 24; Morris and Headrick 1995: 6-7; Mays 1997: 94).

The 1993 Rules attempted to radically alter the way ordinary causes were conducted in the sheriff court and in doing so the ethos which had existed under the previous procedure. As Sheriff Principal Risk Q.C. observed: 'The 1993 Rules have changed certain of the underlying assumptions upon which litigation is conducted, one of their main principles being that the sheriff should take an active part in ensuring the progress of the cause through the court' (Welsh). A 'blow-by-blow' account of the rules is beyond the scope of this article, but for more detailed examinations, see for example: McCulloch & Laing (1995); White (1994); Mays (1997).

The rule changes were welcomed in many quarters and were viewed as innovative and 'demonstrating a line that could be followed with profit' (Morton 1995: 3). Lord Cullen in preparing his Review, visited sheriff courts to observe their operation, principally the innovative options hearing procedure (Cullen 1995: para 2.5), and noted that the rules incorporated 'elements of a case management system' (Cullen 1995:6.9). Lord Cullen subsequently incorporated the concept as one of the

proposals in his Review. In the House of Lords, Lord Morton of Shuna, in a speech relating to the provision of civil justice in Scotland, noted that:

‘There has recently been a radical review of procedure in the sheriff court, including a system under which the sheriff has much more control of the way the case proceeds and the speed at which it proceeds. Unfortunately, none of that applies in the Court of Session....’ (Hansard No.1614: 183)

Some of the concepts introduced by the rules were not original:

In 1967, the Grant Committee, (1967, p.175) recommended that in order to avoid unnecessary appearances at court, ‘there should not be repeated appearance for the adjustment of pleadings’ and unnecessary attendance could be prevented by ‘the institution of a timetable indicating with reference to the date of the service of the initial writ, the various procedural steps that the parties are required to take and the time for taking them.’

In 1980, the Hughes Commission (Hughes Commission 1980), considering the misuse of procedure as a source of delay concluded: ‘It may be that a solution is to be found in the court taking a more active role in controlling the conduct of a case than has been traditional in our brand of adversary procedure.’

The 1993 Rules attempted to eliminate aspects of previous procedure which were misused and resulted in delay.

To counter the appointment of ‘wasted’ debates, a party wishing to debate a preliminary plea must prepare a ‘note of basis of preliminary plea’ and lodge it with the court not later than three days before the options hearing or any continuation of it. (OCR 22) The sheriff will only appoint the cause to debate if, after consideration of the note in conjunction with submissions by the parties, he is *satisfied* that there is a preliminary matter of law which justifies the debate (OCR 9.12.(3)). It was envisaged that the sheriff would use this power to restrict cases seeking debate to those cases where there was *bona fide* reasons for debate.

To counter the possibility of the adjustment period being misused, adjustment is time-limited after which no further adjustment is permitted (except with the leave of the sheriff). Rule 9.8 provides that the parties may adjust their pleadings until fourteen days before the options hearing or any continuation of it. The imposition of the time limit was intended to prevent the repeated continuations which had existed under the old procedure which had been the cause of unnecessary delay. The 1993 Rules do not provide for a ‘Procedure Roll’ or ‘Miscellaneous Procedure Roll’.

The most significant change implemented by the rules, however, was the creation of the ‘options hearing’ which incorporated an element more commonly found in inquisitorial systems of civil procedure. At the options hearing the court exerts its control over a case by dictating future procedure including the mode of final disposal. The sheriff is under a *duty* to ‘secure the expeditious progress of the cause by ascertaining from the parties the matters in dispute’ (OCR 9.12(1)), as well as any other matters relating to further procedure.

The discharge of the sheriff’s duty is reliant on the parties fulfilling corresponding duties imposed upon them. It is the duty of the pursuer to lodge a certified copy of the record with the court which contains the pleadings (i.e. the respective component final parts of each side’s case) including authorised alterations,

not later than two days before the options hearing or continued options hearing (OCR 9.11) and it is the duty of both the parties to provide the sheriff with sufficient information to enable him to conduct the hearing as provided for in the rule.

The sheriff reads the record prior to the options hearing and hears submissions from the parties at the hearing. Thereafter, the rules provide that the sheriff *shall* appoint the case to proof (or proof before answer if a Note has been lodged). Both of these are final hearings which deal with the merits of the case and lead to final disposal; or the sheriff sends the case to a debate if he is *satisfied* that there is a preliminary matter of law justifying debate. Alternative courses of action are available however. The sheriff *may* grant a continuation of the options hearing for a period not exceeding 28 days (or first suitable court day thereafter). There can be only one continuation of the options hearing. This is designed to prevent the recurrence of numerous continuations prevalent under the previous procedure. The sheriff *may* order the case to proceed under Additional Procedure if he is *satisfied* as to its difficulty or complexity. As its name suggests, this is a procedure which allows the parties further procedure to clarify the issues in dispute and is designed to deal with cases of such complexity that they cannot reasonably be completed within the ordinary time frame. Finally, if a party is in default, the sheriff *may* grant decree as craved, decree of absolvitor or dismiss the cause with expenses, as the case may be. The ambit of situations in which a party is held to be in default is defined in Rules 16.2 (ordinary procedure) and 33.37 (family procedure). It includes the failure to lodge, or failure to intimate the lodging of any production or part of process within any time period provided for by the rules or by the sheriff. Also, failure to implement an order of the sheriff or failure to appear or to be represented at any diet (i.e. court date) will result in default. Therefore, if one or either of the parties fail to 'obey' the rules they will be deemed to be in default. For example, if the pursuer does not lodge the record timeously prior to the options hearing, the pursuer is in default. When a party is in default the sheriff may grant decree against him. Of the decrees the sheriff can grant, the first two decrees are final decrees. Respectively, neither the defender nor the pursuer can come back to court. They have lost the action. This is a very severe sanction. All they may do is appeal to a higher court. If the case is dismissed, the aggrieved party may come back to the court and re-start the action from the beginning. He has to re-incur previous expense to bring the action back to its point of dismissal. If the sheriff dismisses the cause with expenses, the party must pay, in whole or part, the expenses run up by his opponent from the start to the point of dismissal as well as his own.

Late Records, Dispensing Power and the Expeditious Progress of the Cause

A party who fails to comply with the rules and is held to be in default can appeal to the sheriff to be excused. He must have a *bona fide* reason or reasons for his failure. He must explain to the sheriff the reason(s) and then move the sheriff to grant relief from the consequences of his default by exercising the dispensing power under Rule 2.1. Whether relief is granted thereafter is a matter for the sheriff's discretion.

At the time the rules were introduced, it was envisaged that in most cases a proof would be assigned following the options hearing (SCRC Report 1991; Civil Judicial Statistics 1995) and in general, no continuation of the options hearing would be permitted (Neilson 1993). Sheriffs were provided with guidance by members of the Sheriff Court Rules Council prior to implementation of the rules as to the proactive approach they were to take (Johnston 1995a: 5).

As the rules were implemented, it became apparent, perhaps not surprisingly, that parties, (or more correctly their advisors) were failing to meet the time limits imposed by the rules. A particular problem was the failure by parties to comply with OCR 9.11 (the lodging of the record before the options hearing) which hindered the sheriff discharging his pro-active duty. Although in theory, every case turns on its own merits, the courts, principally the appellate courts of the Sheriffs Principal, sought to establish parameters and to give guidance and clarification as to the practical approach to be adopted. This originally led to a bifurcated approach as to the sanctions which fell to be imposed for default. The following interpretation came to be known as the 'strict or hard approach.'

The 'Strict' or 'Hard' Approach

The courts noted that the Ordinary Cause Rules 1993 provide that the sheriff's function at the options hearing is to 'seek to secure the expeditious progress of the cause' and it was therefore essential that the options hearing operated efficiently to secure this objective (D.T.Z. Debenham Thorpe). The sheriff's role is a pro-active one, and to discharge this, the sheriff must firstly prepare for the options hearing by reading the record prior to the hearing. Therefore, it is 'crucial' or 'vital' that the record is lodged with the court to permit the sheriff the necessary time to prepare (Welsh; Group 4; D.T.Z. Debenham Thorpe; Morran). Default in not lodging the record timeously affects not only the parties, but also the court and cannot be disposed of by granting more time or by making a finding of expenses (D.T.Z. Debenham Thorpe), nor can the sheriff merely continue the options hearing to accommodate the late record as firstly he has no information before him to permit such a course and secondly, this would be a corruption of the procedure (Group 4). Continuations will only be granted if parties provide a persuasive reason for requiring further continuation, which does not include a submission that the parties are agreed as to further continuation (Mahoney; Welsh).

If the record has not been lodged then the party is in default and the sheriff may grant decree of dismissal by default at the options hearing. Granting decree of dismissal however does not cause substantial injustice as a party may return to court and re-raise the action (Mahoney). Decree of Absolvitor is normally a sanction wholly disproportionate to the default (Group 4).

However, the sheriff always has a discretion as to whether he grants decree (D.T.Z. Debenham Thorpe). The sheriff may excuse the default by exercising the 'dispensing power' in provided in Rule 2.1. If his decision is appealed, the question for an appellate court in reviewing the exercise of that discretion is whether the sheriff has misdirected himself in law, or has failed to take into account a material and relevant factor or has reached a wholly unreasonable result (D.T.Z. Debenham Thorpe).

The 1993 Rules differ from the previous ordinary cause rules in that a party must show that a failure to comply with the rules was due to 'mistake, oversight or other *excusable* cause.' Whether the explanation given is 'excusable' must be interpreted within the framework and philosophy of the 1993 rules (Morran). An unfamiliarity with the rules does not amount to a satisfactory excuse for a failure to lodge a record (De Melo), but may be sufficient to excuse failures to meet other time limits.

In considering whether to relieve the party from the consequences of default, the sheriff must also consider the consequences of dismissal. If it is not in the interests of justice to dismiss the action (e.g. because the action becomes timebarred)

or the action is not a simple or is an unusual one (D.A. Baird) the sheriff may grant relief. A balance must be struck between the gravity of the default and the consequences of granting decree of dismissal (Price).

A strict approach to the interpretation of the 1993 Rules is necessary as excuses can easily be found for failure to comply and if they are accepted in one case, in equity they must be accepted in other cases. Hard decisions are sometimes necessary if the rules are to operate properly. Failure to lodge a record is not a trivial matter, nor is it lightly excused, nor excused as a matter of course (Group 4).

This 'strict or hard approach' embraced a Procrustean attitude adopted by the appellate courts in their interpretation of the provisions of the 1993 Rules may have been informed by a fear that the new rules would be interpreted in practice in such a way as to incorporate many of the bad practices which had existed under the previous rules. The rules were formulated, as has been seen, to prevent the use (or misuse) of procedure to hinder the expedition of cases through the court. The overriding concern has been the retention of control of the pace of litigation by the court. As Mays (1997) has noted, the dismissal of actions for procedural defaults appears *prima facie* incongruous with the declared intention of the rules to expeditiously progress cases and to eliminate delay and it is questionable whether overall expedition and substantive justice is served by the enforcement and rigorous application of the procedure. Further, the dismissal of cases normally results in the penalisation of the parties themselves as opposed to their legal advisors. Such considerations informed an alternative interpretation of the 1993 Rules relating to the default of failing to lodge a record for an options hearing.

The 'Soft' or 'Lenient' approach

In the initial flurry of decisions following implementation, a 'softer' or more 'lenient' approach was expounded by the Sheriff Principal of South Strathclyde, Dumfries and Galloway (Burtonport; Strathclyde Business Park) incorporating a 'bird's eye view' of the expeditious progress of a cause. The Sheriff Principal considered that the unjustified dismissal of cases did not expedite them and incurred expense as well as delay in the resolution of a dispute by bringing the pursuer back to the start (Strathclyde Business Park). He considered that a dismissal would have to be justified in accordance with conventional principles. In Burtonport, the Sheriff Principal held that dismissal of the action for a failure to lodge a record was unreasonable as again the pursuer would have to start again resulting in further delay in the resolution of the dispute which was not the object of the 'new' rules. He considered that the court should have adjourned the hearing for the record to be lodged.

This soft or lenient approach was subsequently criticised by other sheriffs principal on three grounds: firstly, it is founded conceptually in the position which existed before the 1993 Rules and does not take account of the change of emphasis in the 1993 Rules (D.A. Baird); secondly, an adjournment would be a continuation within the meaning of OCR 9.12 and would preclude further continuation for a 'legitimate purpose' (Group 4); and thirdly, it fails to impose an effective sanction for failure to obtemper OCR 9.11 (Group 4). However, as seen below, although this approach has been discredited theoretically, there are suggestions it is more readily adopted at a practical level.

The 1993 Rules in Practice and Associated Problems

Practitioner Attitudes and the Culture of Reception

Reflecting on Lord Woolf's proposed changes to English civil procedure, Scott has observed:

'The impact that they will have on the way civil cases develop cannot accurately be predicted. Further, the ways in which parties, and more particularly litigation lawyers will adjust to this remains to be seen. Their resourcefulness and their capacity for good reasons and bad, to undermine the best laid plans should not be underestimated.' (I.R. Scott in Zuckermann & Cranston (1995): 29)

Remarking on the 1993 Rules, the pro-active role imposed on the sheriff, and attitudes to the rules Mays has said:

'It is debatable to what extent the options hearing has truly transformed civil litigation in sheriff court ordinary actions. Anecdotal evidence would suggest that the options hearing has not revolutionised practitioner attitudes to the process of litigation but rather that many old attitudes and approaches are now accommodated within the confines of the new procedure.' (Mays 1997: 97)

The absence of published research makes it difficult to assess to what extent the 1993 Rules have achieved in practice the objectives which underpinned their creation. Their success was always likely to be dependent on the attitudes of the bench and profession. Observations by sheriffs principal, sheriffs and solicitors in the literature and reported cases, however, would seem to suggest that the Rules have not been as successful as the Rules Council might have envisaged. This might partly be explained by the fact that radical reforms usually produce unexpected, unwelcome results (Zander 1995), but it is of greater importance that the changes to the Ordinary Cause Rules were not initially universally welcomed by the profession. As Mays has commented: 'at the time of implementation, and for a period thereafter, the new ordinary cause procedure proved substantially unpopular' (Mays 1997: 96). The reasons for this unpopularity are probably varied. It may have resulted from the novel proposition that it was no longer possible for parties to dictate the pace of litigation. Another plausible explanation for the 1993 Rules being unpopular may be that a perception existed that there had been little wrong with the old procedure. The Edinburgh Bar Association, after the 1993 Rules had been in force for one year, canvassed the views of its civil litigation members as to the changes and noted:

'While many representatives appeared to take a relatively neutral view as to whether the new rules represented a change for the better, significantly not one single respondent expressed a view that the system was operating more smoothly than was previously the case and several senior practitioners wholeheartedly condemned the rules as being a backward and retrograde step' (Recommendations of Edinburgh Bar Association 1995: 1).

The imposition of time limits for the completion of parts of procedure also caused concern (c.f. views expressed by practitioners prior to implementation. Headrick and Morris 1995: 13-14). The view amongst some practitioners was that the rules had become a 'procedural minefield' (Mays 1997: 97); making the lives of sole practitioners a misery (Vocational Training Unit Seminar: Discussion) and in general, failing to take account of the practicalities of the day-to-day running of solicitors' offices operating within a commercial environment. The requirement to lodge a record two days before the options hearing under pain of possible dismissal was criticised in particular on the basis that it put solicitors and their staff under 'intolerable strain' (Recommendations of Edinburgh Bar Association 1995: 3).

It had been thought that the 1993 Rules would encourage parties in the early preparation of their case. Last minute preparation had been not unusual under the previous procedure. As the Hughes Commission noted 'There is a human tendency for even the most responsible professionals, if they are busy men, to put off work which can wait' (Hughes Commission 1980: 205). 'The natural human tendency to leave everything to the last minute' (Deutsch 1996: 10), however, has probably continued to have an effect on the 1993 Rules in practice and it is open to question whether the aim of early preparation has been achieved.

Shrieval Interpretation, Substantive Justice and Procedural Compliance

Any approach taken by a sheriff will be according to his vision of the ethos and underlying principles of the 1993 Rules. The rules enjoin the sheriff to 'secure the expeditious progress of the cause' (OCR 9.12). Further, he has fairly broad powers under Chapter 2 to relieve parties from the consequences of failures and defaults. In both these respects the sheriff will act according to his personal perception of how the rule should be applied. Necessarily his approach will be tempered by any approach taken by his sheriff principal as well as by similar decisions of the Court of Session which he is bound to follow. He may acknowledge the persuasiveness of approaches adopted by other sheriffs principal (which are not binding on him). In practice, however, the sheriff will have a wide latitude, perceived or otherwise, to act according to the principles underlying the rules as he thinks best in all the circumstances. As Sheriff Kelbie has noted, as the operation of (options hearings) depends on the approach of the sheriff, 'it is not surprising that there appear to be differences, even among sheriffs principal, in the decisions' (Kelbie 1995: 7). Implicit in the introduction of the 1993 Rules was the idea that a new approach would harmonise the conduct of litigation in the sheriff court throughout Scotland (Dailly 1993: 180), and that the 'pro-activity' imposed on the sheriff, whilst allowing a beneficial degree of flexibility, would be used to ensure the efficient and expeditious progress of cases through the ordinary court. In practice, there would appear to be some variation of practice among sheriffs principal, sheriff courts and sheriffs.

Predictably perhaps, this has reached it's zenith (or nadir) at the point in the procedure where the sheriff has greatest discretion, i.e., at the options hearing. Whilst 'idiosyncrasies are part and parcel of the sheriff court' (Johnston 1995: 5), if the approaches of sheriffs lack consistency, collectively they will also lack predictability and a justifiable complaint among practitioners has been that it is now important to 'know your sheriff' (Johnston 1995: 5). Sheriffs take differing approaches at options hearings in the situation where the pursuer has failed to lodge the record timeously and this has frustrated the objects of the rule. The 'strict approach' would require the sheriff to dismiss the case unless the party moves him to exercise the dispensing power, and the sheriff, in all the circumstances, considers

it justifiable to do so. A study conducted by the writer (illustrative rather than representative), found that whilst the incidence of failures to lodge records following the implementation of the 1993 Rules has remained relatively consistent, the incidence of dismissal has remained relatively low, sheriffs preferring if possible to accommodate the late record and impose a sanction other than dismissal. This was of course part of the (discredited) 'soft' approach.

Administrative Discrepancies

Discrepancies have arisen administratively as to whether the record can be received after the period for lodging has elapsed. The Rules provide that the record must be lodged two days before the options hearing and a shrieval decision (Maersk) confirmed that this meant two 'clear' days after which the party is deemed to be in default. It is understood that some sheriff courts have therefore refused to accept the record if the time limit has expired. Other sheriff courts however have taken a more lenient approach and have received the record, placing it with the papers for the sheriff but marking it as 'tendered' as opposed to 'lodged' (i.e. marking that there has been a failure to obey the rule as to timeous lodging but the record is still placed with the rest of the papers). The sheriff is therefore alerted to the fact that there has been a default in terms of the rules as the record is marked by the sheriff clerk as 'tendered'. This approach permits him the opportunity of preparing for the options hearing by reading the late record and thereafter addressing the default at the options hearing.

It is understood that some sheriff courts have considered that the record can competently be lodged *on* the second day prior to the options hearing. The issue was muddied when it arose before the Inner House in *D.T.Z Debenham Thorpe*. The approach in *Maersk* was followed but the Inner House considered that a degree of latitude is permissible when the rule operates in practice.

Aberration and Innovation

It has been argued that there has also been reluctance on the part of sheriffs to act according to the principles of the strict approach which has led at best to straining the interpretation of the provisions of the 1993 Rules and at worst innovation in their application. Although Sheriff Principal Risk considered that the continuation of the options hearing for the accommodation of a late record was a clear aberration of procedure (Group 4), in seeking to act expeditiously, anecdotal evidence would suggest that some sheriffs have on occasion adopted such a course. Further, at the continued options hearing, in some cases the hearing has been continued again to a 'third options hearing' (e.g. Letter to the Editor, *Greens Civil Practice Bulletin* Issue 10: 11) or the court has engaged in the fiction of 'discharging and re-assigning' the options hearing (e.g. Johnston 1996c: 5). The writer's research suggests that this is not a common practice. However, the inherent danger in such courses being adopted is that they are an implicit condonation of aberrations in procedure. Such considerations were responsible for the frequent continuations of cases under pre-1993 procedure (e.g. continuations not on 'cause shown' but on joint motion). It may be that in some circumstances, the interests of justice require aberration or innovation but these instances should be exceptional. Difficulties will always arise for a sheriff in marrying substantive justice and procedural compliance.

The Return of the Procedure Roll

An unfortunate addition to the 1993 Rules in some sheriff courts has been a re-creation of the 'old' Procedure Roll. This was the Roll under the old procedure which had been a contributory factor to delay endemic at the time. As has been noted, the 1993 Rules do not provide for one. Commenting on an interlocutor which continued a cause to the 'Additional Procedure Roll', Sheriff Principal Maguire Q.C. said:

'This is not a creature with which I am familiar.....While I accept that not all cases can proceed as smoothly as is envisaged in the Ordinary Cause Rules 1993 and there is on occasion necessary continuation to hearings to consider Minutes of Amendments and the like, I would discourage the setting up of Additional Procedure Rolls or Miscellaneous Procedure Rolls. If the Court provides a haven, cases will inevitably seek shelter there. This will generally be of benefit to the incompetent, inefficient or the merely idle. The courts would then gradually revert to the pre 1993 attitudes. This should not be allowed to happen. It is for Sheriffs to take charge of the cases so far as they can, and ensure that the case proceeds as expeditiously as possible.' (Smart v. Tullis Russell Ltd. Unreported 18th June 1996)

A very different view, however, was promulgated by the Edinburgh Bar Association:

'it has been noted that Glasgow Sheriff Court has instituted a Miscellaneous Procedure Roll which appears to be quite inconsistent with anything in the new rules, and it is understood that Dundee Sheriff Court now has a Procedure Roll. That may be inconsistent with the content of the new rules but it is utterly consistent with logic and pragmatism.' (Edinburgh Bar Association 1995:10)

The writer is not aware of the number of 'procedure rolls' which have been re-created in all the sheriff courts. It would follow, however, that if they are in existence, there is some force in Sheriff Principal Maguire's argument, especially if the adjustment period is not utilised effectively.

Adjustment and Amendment and Delay Displacement

The 1993 Rules provide that for a minimum of six weeks adjustment takes place between the parties and must conclude fourteen days before the options hearing. Further adjustment is permitted between the options hearing and any continuation of it but again must be completed fourteen days before the continued options hearing (in essence permitting a continued period of adjustment of two weeks).

It would appear that in some courts, parties are increasingly intimating adjustments on, or near the last day permitted for adjustment (Deutsch 1996: 8; Johnston 1996: 6-7). This might be due to genuine last minute developments requiring last minute incorporation or as a result of last minute preparation or tactical decisions taken by one party seeking further continuation (Deutsch 1996: 8-9). Whatever the motive, if the adjustments made by one party are significant and are made on the last day permitted prior to a continued options hearing, the sheriff is faced with the difficulty of either refusing a party the opportunity of answering matters raised by an opponent (by legitimate means) and progressing the action to its next natural step or seeking to accommodate within the time frame the opportunity to answer the adjustments by amendment after the record is closed at the continued

options hearing and fixing a diet of final procedure. The first approach is difficult to reconcile with the interests of justice and with the second approach, the decision as to final procedure may ultimately be frustrated by the dynamics of parties altering their respective cases. After minutes of amendment and answer, parties are sometimes permitted further 'adjustment' in light of them. OCR 18.3 provides that where the sheriff allows adjustment to the minutes he shall fix a date for hearing the parties on the minutes and adjustments. Both must be lodged with the court prior to the hearing (Bryson) It is open to question whether the sheriff has the same pro-active powers at such a hearing The sheriff held that he retained similar powers in the decision of Bryson on the basis that the whole procedure under the 1993 Rules could be called into question by parties lodging minutes of amendment.

An analogy with the practice under the previous procedure is apposite. With the pre-1993 rules, delay was caused by lengthy adjustment and by the fixing of debates which were then discharged and re-assigned or discharged and the pleadings amended. Under the 1993 Rules, the period for adjustment is limited, but a party may still attempt to amend. It would appear that the practice of amending after the options hearing is becoming more widespread - at least in some sheriff courts. One sheriff has commented:

'A guess - educated perhaps - suggests that no case ever comes to proof now without at least one minute of amendment. Indeed it is not unusual to be met at proof with a pile of papers which includes the third amended closed record. One of the consequences of the new rules has been a greater reliance on amendment and amendment procedure' (Johnston 1997: 4-5).

Morris and Headrick (1995: 14) found that sheriffs would sometimes permit repeated adjustment on the continued adjustment roll under the old procedure because they appreciated that to close the record when parties had not completed adjustment to their satisfaction only resulted in the problem of further alteration being taken to the amendment stage, which resulted in considerable additional expense.

It may be that the imposition of time-limited adjustment by the 1993 Rules has resulted in the increasing use of amendment which ultimately usurps the court's interventionist management function at the options hearing and authoritative guidance is still required as to whether the sheriff retains similar powers in relation to a rule 18.3 hearing on minutes of amendment and answers. It could be argued that the limiting of adjustment has resulted in problem displacement - delays now build up after the options hearing before the case reaches final adjudication.

Sanctions for Default

A significant problem for sheriffs has been selecting an appropriate sanction, if any, to apply to parties who have defaulted. This has been particularly so where the pursuer has failed to lodge a record for the options hearing. It is a matter for the sheriff's discretion. The 'hard' interpretation would suggest that the sheriff should dismiss the action unless persuasive reasons or the 'interests of justice' dictate that he exercises his dispensing power. However, the counter argument is that if the rules were partly designed to reduce delay and expense for litigants, adopting such a course does not necessarily achieve that objective. Such considerations informed the 'lenient' interpretation of the rules. If the action is dismissed the pursuer has expenses awarded against him. Further, an award of expenses as a sanction will often be ultimately relayed to the party unless the solicitor is found personally liable

in the expense occasioned by the default, or he undertakes to pay the expenses awarded against his client.

Prior to the 1993 Rules, in considering an adverse award of expenses for procedural default, the court would often give consideration to the question of whether the conduct resulting in the default was that of the party or the solicitor. In considering decree of dismissal by default, it was usually considered inappropriate if there had been no default on the part of the litigant himself (Macphail 1987: paras 5-112; 14-08,14-09). Although the cases following the 1993 Rules have considered that prejudice to the court is a consideration it is suggested that some sheriffs are reluctant to indirectly penalise the party nor directly penalise the agent. No distinction has been drawn in the case law between the actings of a pursuer and the actings (or lack of them) of his agent although this distinction has been drawn regarding the converse situation with defenders (Ellis).

Conclusion

Due to the unavailability of published research into the operation of the 1993 Rules, the conclusions articulated in this paper are necessarily premised on the observations of practitioners published in the literature, the writer's research and observations and anecdotal evidence. One may induce, however that the 1993 Rules have been only partially successful in obtaining the five policy objectives of the Sheriff Court Rules Council. Mays (1997) has suggested that old attitudes and approaches are accommodated in the new rules. It is submitted that he is correct. The 1993 Rules attempted to revolutionise the conduct of litigation in the sheriff's ordinary court. However, revolutions tend to return to an old order if they do not have the support of the majority. As Main and Wadia have argued, changes to systems of civil justice are dependent on the reaction of the culture they seek to alter. Cultures alter gradually and it was perhaps optimistic to expect that among practitioners, a Damascene attitudinal conversion would follow the implementation of rules. Those responsible for enforcing the Rules, however, initially took a firm line. Just as revolutions can be sustained by force, by and large, sheriffs and Sheriffs Principal considered that they had a responsibility to make the 1993 Rules work in practice. The strict approach elucidated through case law during the year following the introduction of the 1993 Rules was a radical departure from the pre-1993 position. As Foulis has noted, prior to implementation, practitioners probably did not anticipate the consequences of their failure to comply with the time limits imposed by the rules. However, the sanctions for non-compliance imposed by the courts in terms of the strict approach were not designed to punish or stimulate solicitors to improve their performance by a system of reward and punishment. Although sheriffs had been enjoined to take a firm approach to sanctioning non-compliance prior to the rules coming into force, the 'hard approach' (e.g. by dismissing cases) was said to be part of the duty of the court to do justice between the parties, (Sheriff Principal Risk Q.C.: 1996 S.C.L.R. 'Quotations' 1173B). In accordance with previous theory, the courts did not exist and had never existed for the sake of discipline (Macphail 1987 15-114). The courts have continued to maintain that the strict approach should not be employed to cut the Gordian knot.

Although the 'strict' approach came to be acknowledged as the proper approach to be employed, it is uncertain to what extent it was and is universally applied in practice. If the strict approach is being eroded in practice by aberrations in procedure and 'mischievous' interpretations of the 1993 Rules, this should be having

an effect on 'access to justice'. Assuming the 1993 Rules expedite cases on route to adjudication or settlement and delay and expense is reduced, then superficially there has been increased access to justice. However, if sheriffs view their expeditious powers 'mischievously' as opposed to 'literally', whilst the instant interests of substantive justice may be served, does arising inconsistency in approach lead to a lack of predictability and Sheriff Johnston's 'know your sheriff' argument? Any system of justice must be clear and predictable, procedural justice included. Balancing these considerations will always be problematic. The scope for inconsistency has increased in line with increased discretion. There are multifarious interpretations of the 'expedition of the cause'.

If inconsistency in approach is an unwelcome element in sheriff court civil practice, a solution may lie with sheriffs receiving additional training as to the exercise of the pro-active power. There are two problems with this however. Firstly, it might be perceived as curbing traditional judicial independence and secondly, more fundamentally, it is extremely difficult to give guidance as to the exercise of discretion and pro-activity. They are inherently substantive. Although sheriffs received training prior to the implementation of the 1993 Rules, the training was restricted to guidance as to acting expeditiously. It is understood that training has not been continuous following the induction course. It may be a solution can be found by the new Judicial Studies Committee.

There is also uncertainty as to the current attitude of practitioners to the 1993 Rules. Although there was an initial scepticism and perception that the procedure had not required alteration, it is difficult to assess whether the rules are now accepted and complied with as envisaged by the Rules Council. The number of cases appealed has dropped drastically which might indicate that this is so. However, observations by the writer and articles by the profession in the literature seem to indicate that practitioners have devised methods of avoiding, for whatever reason, the most draconian interventionist aspects of the rules. There would appear to be increased use of minutes of amendment on route to final determination. Adjustments are intimated immediately prior to or on the last day permitted for adjustment. Motions are made for innovative steps in procedure. Whilst these approaches may not be calculated to delay final resolution, very often that is their effect. In addition, before the introduction of the 1993 Rules, solicitors were urged to use the procedures to compel their opponents to meet their case (Neilson 1993: 426). This would not appear to have happened. As Sheriff Johnston has remarked, solicitors are 'extremely forbearing with their colleagues' and are reluctant to do so. If the writer's propositions are correct, the initial hostility found within some elements of the profession would be expected to abate if methods are now used to wrest from the court some control over the progress of litigation.

The 1993 Rules have been in existence now for nearly four years and have been subsequently amended twice. The amendments have been primarily clarificatory (dealing with anomalies raised in case law) and corrective (spelling mistakes etc.) (although changes were made to motion procedure). The thrust of the 1993 Rules has remained unaltered and by inference the Sheriff Court Rules Council would appear satisfied that they are working in practice. The perception amongst Sheriffs Principal, sheriffs and court staff would appear to be that the rules have been a success 'on the whole' and in any event a considerable improvement on their predecessors.

Surrendering the progress of litigation to the control of the court may be seen as a potential solution to the interminable problems of delay which have traditionally been found in Scottish civil procedure. However, as sheriff court procedure has shown, there are inherent difficulties with the exercise of judicial inquisitorial powers. Lord Cullen's proposals for reform of the Court of Session incorporate powers of judicial interventionism which go beyond that which has been tried in the sheriff court. The Faculty of Advocates has expressed reservations preferring the retention of the traditional judicial role. If Lord Cullen's proposals are to operate as envisaged, the Court of Session may look to lessons that are being learned in the sheriff court. Current proposals for reform of civil procedure in the Court of Session will be dependent for their success on a number of factors. Firstly, if the culture of reception is wholly or in part hostile to the proposed reform, then the likelihood of successful implementation is diminished. If those practising under new rules are not fully agreeable to them, mechanisms will be devised and tried in an attempt to undermine the effectiveness of reforms and to return to the old order. The history of civil procedure is littered with similar examples. Secondly, (a point acknowledged by Lord Cullen), the judiciary must be fully supportive of any proposals that are implemented. If aberration or innovation is condoned, the interests of natural justice entail universal application in all similar cases. This will invariably result in a decrease in efficacy. Thirdly, pro-active powers, increased judicial discretion and interventionism may be useful in the expedition of cases through the courts and a reduction in expense and delay, but if these powers are exercised inconsistently, the end result may be decreased predictability and a diminution in the coherence of the civil justice system as a whole. Fourthly, the traditional safety net of appeal is compromised by the very nature of the exercise of discretion. The appellate courts have traditionally been reluctant to intervene with the exercise of judicial discretion. Fifthly, it is difficult to give guidance to the judiciary as to the exercise of powers designed to progress actions through the courts. The exercise of these powers will always be dependent on substantive considerations and may ultimately be seen as a threat to judicial independence.

The argument that the introduction of case management and increased judicial discretion is the solution to the problems of delay and expense would appear to have gained credence in recent years. Any civil justice system will involve some delay and will involve some complexity. This does not mean that better systems of civil justice cannot be devised. However, altering the roles of parties and judges and incorporating elements of foreign procedure in the face of indigenous scepticism is not necessarily the panacean solution. If the propositions expounded in this article are correct, the sheriff court has shown that there are problems with such an approach. The Court of Session should look to and learn from lessons currently being learned following the introduction of 1993 Rules in the sheriff court.

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