



THE UNIVERSITY *of* EDINBURGH

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THE COURT OF THE COMMISSARIES OF EDINBURGH:
CONSISTORIAL LAW AND LITIGATION, 1559 – 1576

Based on the Surviving
Records of the Commissaries of Edinburgh

BY
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B.A., M.Th.

I hereby declare that I have composed this thesis, that the work it contains is my own and that this work has not been submitted for any other degree or professional qualification,

PhD Thesis, University of Edinburgh, 2010

Thy sons, Edina, social, kind,
With open arms the stranger hail;
Their views enlarg'd, their lib'ral mind,
Above the narrow rural vale;
Attentive still to sorrow's wail,
Or modest merit's silent claim:
And never may their sources fail!
And never envy blot their name!

ROBERT BURNS

ABSTRACT

This thesis examines the appointment of the Commissaries of Edinburgh, the court over which they presided, and their consistorial jurisdiction during the era of the Scottish Reformation. It is argued that the Commissaries of Edinburgh were appointed by Mary, Queen of Scots, in February 1563/4 as a temporary measure following the suppression of the courts of the Catholic Church in Scotland during the Wars of the Congregation. The Commissaries' jurisdiction was substantially that of the pre-Reformation Officials centralized into a national jurisdiction administered from Edinburgh. The Commissaries of Edinburgh's jurisdictional relations with the inferior Commissaries, the Lords of Council and Session, the suppressed courts of the Catholic Church and the Lords Interpreters of the Law of Oblivion are examined, whilst their relations with the tribunals of the Protestant Kirk are given particular attention. The thesis argues that despite the complex constitutional, legal and religious legacy of the spiritual jurisdiction in Scotland, the Commissaries and Kirk achieved a high degree of jurisdictional harmony, despite occasional conflicts.

The Commissaries continued to administer the Canon law of the medieval Church in consistorial matters, with the prominent exception of the innovation introduced into Scotland by the Protestant Kirk from 1559 concerning divorce and remarriage on the grounds of adultery. Through an analysis of sentences and decreets pronounced by pre-Reformation Officials, the Commissaries of Edinburgh, and the tribunals of the Protestant Kirk, it is argued that this reform was essentially a reform of divorce *a mensa et thoro* using concepts and formulas borrowed from pre-Reformation sentences of annulment. The result was a type of divorce unique to Scotland, where the innocent party was immediately freed to remarry, whilst the guilty party remained bound to the failed marriage until freed to remarry by the death of their innocent spouse.

An analysis of consistorial litigation before the Commissaries of Edinburgh is used to explain and illustrate the Romano-canonical procedure used in their court and the documentation generated during litigation. Litigants' gender, domicile and social status are also analysed, together with their use of procurators and the expenses incurred during litigation.

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Since I first began to make the long and occasionally arduous journey from history through historical theology and ecclesiastical history into the realm of Scottish legal history I have accrued a number of debts which I am pleased to acknowledge. In the dim and distant days of undergraduate study I was fortunate to have the privilege of being taught and encouraged by Michael Mullet, Marcus Merriman and Joseph Shennan of the History Department of Lancaster University, under whose guidance I developed interests in Reformation studies and constitutional theory. Upon my arrival at Edinburgh's School of Divinity, despite having been warned by Marcus in his characteristic manner that "New College is a bit cliquy and ingrown and is in some respects too theological even for one of your ecclesiastical bent"¹ (!) I had the good fortune to come under the influence of Jane Dawson, who opened up before me the world of Reformation Scotland. A study of pre-Reformation courts spiritual ensued, to be followed by casual mentions from Jane that the topic of the Commissaries of Edinburgh was much neglected and that the Stair Society could well be interested in funding doctoral research into the Commissaries' early history.

The effect of the involvement of the Stair Society and its members upon my research has been considerable. As a young post-graduate embarking upon a study of the "ecclesiastical history of the law"² in sixteenth-century Scotland, I felt keenly the lack of knowledge of the law I brought to the table. In this, John Cairns's generous offer to join Jane Dawson in the task of supervision has proved a great boon, and I am most grateful for his myriad explanations and patient corrections of many of the errors I have made. The goodwill of the Society also manifested itself in my unexpected inclusion in the learned company and conversations of many persons who would ordinarily have been out of reach. In this respect I am grateful to Peter McNeill, Athol Murray, Hector MacQueen, Mark Godfrey, David Sellar, Olivia Robinson, Winifred Coutts, Bill Gordon and Gero Dolezalek. Above all I am indebted to David Smith, by whose magnanimity my own endeavours have flourished.

¹ E-mail, 23 March 2004.

² Lord Clyde's phrase used in Thomas H Drysdale's 'The Stair Society: The Early Years' in *Miscellany V* (Edinburgh: The Stair Society, 2006), 247. Thanks are due to Tom Drysdale, who, in his capacity as treasurer and secretary of the Stair Society, has been rather like my very own Mr. Jaggars.

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Thomas Green,
at Crookston,
the Feast of St John Ogilvie, 2010.

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Thomas Green,
at Crookston,
19 October, 2010.

THE COURT OF THE COMMISSARIES OF EDINBURGH:
CONSISTORIAL LAW AND LITIGATION 1559 – 1576

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ABBREVIATIONS

- APS* *Acts of the Parliaments of Scotland*, eds. T.Thomson and C. Innes (Edinburgh, 1814-41), 12 volumes.
- Balfour's Practicks* *The Practicks of Sir James Balfour of Pittendreich*, ed. P.G.B. McNeill (Edinburgh: The Stair Society, 1962-3), 2 volumes.
- Concilia Scotiae* Joseph Robertson, *Concilia Scotiae Ecclesiae Scoticae Statuta tam Provincialia quam Synodalia quae Supersunt* (Edinburgh: Bannatyne Club, 1866), 2 volumes.
- Court of the Official* Simon Ollivant, *The Court of the Official in Pre-Reformation Scotland* (Edinburgh: The Stair Society, 1982).
- DOST* *Dictionary of the Older Scottish Tongue*, eds. W.A.Craigie et. al. (London: Oxford University Press, 1931-2002), 12 volumes.
- Fasti* *Fasti Ecclesiae Scoticae Medii Aevi ad annum 1638*, eds. D.E.R.Watt & A.L. Murray (Edinburgh: Scottish Record Society, 2003).
- Fraser, *Treatise* (1846) Patrick Fraser, *A Treatise on the Law of Scotland: as applicable to the personal and domestic relations; comprising husband and wife, parent and child, guardian and ward, master and servant, and master and apprentice* (Edinburgh: T. & T. Clark, 1846), 2 volumes.
- Fraser, *Treatise* (1876) Patrick Fraser, *Treatise on Husband and Wife, According to the Law of Scotland* (Edinburgh: T & T Clark, 1876-1878), 2 volumes.

- Helmholz, *Ecclesiastical Jurisdiction* Richard Helmholz, *The Oxford History of the Laws of England: Volume I, The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press, 2004).
- Lectures on Marriage* William Hay's *Lectures on Marriage*, trans. & ed. J.C. Barry (Edinburgh: The Stair Society, 1967).
- Liber Officialis* *Liber Officialis Sancti Andree*, ed. Cosmo Innes (Edinburgh: Abbotsford Club, 1845).
- ODNB *Oxford Dictionary of National Biography*, (Oxford University Press, <http://oxforddnb.com>).
- Riddell, *Inquiry* John Riddell, *Inquiry into the Law and Practice in Scottish Peerages: Before, and After the Union; Involving Questions of Jurisdiction, and Forfeiture: Together with an Exposition of our Genuine, Original Consistorial Law* (Edinburgh: Thomas Clark, 1842), 2 volumes.
- RPC *Register of the Privy Council of Scotland*, ed. J.H.Burton et al (Edinburgh, 1877-), 37 volumes.
- RPS *Records of the Parliament of Scotland*, eds. Keith Brown et al (St Andrews, 2007, www.rps.ac.uk).
- RSS *Registrum Secreti Sigilli Regum Scotorum*, eds. M. Livingstone et al (Edinburgh, 1908-), 8 volumes.
- St Andrews* *Register of the Minister, Elders and Deacons of the Christian Congregation of St Andrews*, ed. D.H.Fleming (Edinburgh: Scottish History Society, 1889-90), 2 volumes.

THESIS INTRODUCTION

[i] HISTORIOGRAPHY & SCOPE OF THESIS

The early history of the Commissaries of Edinburgh has been a relatively neglected aspect of the Scottish Reformation for many years. The charter by which they were appointed and the various instructions passed to them by the Lords of Council and Session have been long known from *Balfour's Practicks*, although the full meaning of these documents has not always been appreciated. Beyond these primary sources, nothing has been published concerning the organization of the Court of the Commissaries of Edinburgh and the procedure they used, nor has any statistical analysis of litigation before them been undertaken, despite being called for.¹ Where the early Scots consistorial law administered by the Commissaries has been concerned, various nineteenth-century authorities have ventured to try to establish the law through recourse to the Registers of Acts and Decrees of the earliest Commissaries. Most noteworthy among these attempts were those of the peerage lawyer John Riddell, who was the first pioneer in this respect, and Patrick Lord Fraser, whose own efforts yielded more ambiguous fruit. Yet despite these shortcomings, many aspects of the Commissaries' early law are now better understood, not through further research among their records, but through a greater appreciation during the last 50 years of the Canon law.²

The other major area of interest to nineteenth-century authors, including Riddell and Fraser, but also Joseph Robertson and David Hay Fleming, was the supposed jurisdiction conflict which arose between the tribunals of the Protestant Kirk and the first Commissaries of Edinburgh over the jurisdictional and legal legacy of the spiritual jurisdiction in Scotland, particularly in respect to the consistorial matters of marriage and divorce. The works of all these authors, it will be argued, nevertheless suffered from a faulty constitutional understanding of the position of the Commissaries of Edinburgh during the Reformation era and the personal reign of

¹ David Sellar has indicated that such analysis be undertaken (W.D.H. Sellar, 'Marriage, Divorce and the Forbidden Degrees: Canon Law and Scots Law' in W.N. Osborough (ed.), *Explorations in Law and History: Irish Legal History Society Discourses, 1988-1994* (Dublin: Irish Academic Press, 1995), 59-82, 74).

² The work of Riddell and Fraser is discussed in greater length in Chapter III, together with advances of knowledge during the 20th century.

Mary, Queen of Scots, which led them to misconceive relations between the Commissaries and the Kirk.

Chapter I will therefore offer a reconsideration of the constitutional circumstances within which the appointment of the Commissaries of Edinburgh was deemed needful by Mary, Queen of Scots, and many of her Privy Councillors during the winter of 1563/4. This task has been greatly aided by the only twentieth century scholar of the early Commissaries' records, Sheriff David B Smith, whose article concerning the fortunes of the spiritual jurisdiction from 1560-1564 has shed much light on the juridical revolution occasioned by the downfall of the Catholic establishment in Scotland. It will be argued that all the nineteenth-century authorities erroneously accepted an early Protestant narrative that the courts of the Catholic Church in Scotland were suppressed as a direct corollary of the abrogation of papal authority in Scotland, by Act of Parliament, 24 August 1560, and that this simplistic understanding has led to a failure to appreciate the complexity of the constitutional convulsions which occurred during the first phase of the Reformation. An alternative understanding of the suppression of the courts spiritual will be proposed, drawing upon previously overlooked or forgotten sources, from which basis a more historically accurate understanding of the appointment of the Commissaries and their place within the early modern Scottish polity will be set forth, drawing in particular upon the work of Gordon Donaldson, Peter McNeill, David Smith and Julian Goodare.

Chapter II will begin with an overview of the first four Commissaries and the court over which they presided, its personnel, organization and jurisdiction. Next, the Commissaries' relations with the 'new' inferior Commissaries will be considered and it will be argued that there was a high degree of continuity in the localities between the 'new' Commissariots and the old diocesan courts spiritual. The Commissaries' jurisdictional relations will then be considered with: the inactive courts spiritual, arguing that the Commissaries continued to acknowledge the validity of papal authority in Scotland down to December 1567; the Lords of Council and Session and the Lords Interpreters of the Law of Oblivion; and the tribunals of the Protestant Kirk, in respect of their activity from the time of the cessation of the courts spiritual in 1559 to the appointment of the Commissaries in February 1563/4. It will be argued that the Commissaries of Edinburgh were inclined towards accepting the consistorial decisions and sentences of the tribunals of the Kirk pronounced from 1559 until the appointment of the Commissaries, whilst at the same time carefully avoiding any

acknowledgement of the inherent authority of the tribunals of the Kirk to pronounce such sentences.

The remaining chapters of the thesis will consider the consistorial jurisdiction of the Commissaries of Edinburgh in considerable detail. Chapter III will consider the Scots consistorial law administered by the Commissaries, arguing that whilst traditional understandings of the retention of the Canon law prescriptions concerning the contracting of marriage are correct, reforms introduced by the Protestant Kirk in respect of divorce for adultery have been only partially understood. Through a close analysis of various sentences and decreets of annulment and divorce for adultery pronounced by pre-Reformation Officials, tribunals of the Protestant Kirk, and the Commissaries of Edinburgh, it will be argued that early Scottish Protestant divorce law was uniquely Scottish within the wider European context.

Chapter IV will consider the Romano-canonical procedure employed by the Commissaries of Edinburgh in consistorial litigation as a prelude to a full statistical analysis of such litigation. It will be argued that the plenary procedure of the Commissaries of Edinburgh was a slightly reformed and improved version of that employed in the pre-Reformation Courts of the Officials, and was in effect that of the Lords of Session. The Commissaries' 'popular' summary procedure will also be discussed, whilst examples from the English ecclesiastical courts will be used for comparative purposes. Having discussed the fixed procedural steps in any given action, the range of competent allegations and exceptions in consistorial actions will be considered, together with the standards of proof required to prove each relevant point and the range of competent remedies available to the Commissaries.

Chapter V will provide a full statistical analysis of actual consistorial litigation before the Commissaries of Edinburgh from 1564 down to the winter of 1576, including the frequency of litigation, the gender, social status and domicile of litigants, their use of procurators, and the time and expenses involved in pursuing consistorial actions before the Commissaries in Edinburgh. Within this context, an analysis of actions concerning solemnization will be used to argue that non-regular marriage should have been reformed in Scotland along the line of the suggestions of the Council of Trent in the interests of female litigants.

The final chapter will consider the ongoing relations between the Commissaries of Edinburgh and the tribunals of the Protestant Kirk from the time of

the appointment of the Commissaries until the winter of 1576/7.³ It will be argued that the kirk sessions of the Kirk tended to acknowledge the exclusive national competence of the Commissaries of Edinburgh in consistorial actions, whilst the court of the superintendent of Fife, Fotherick and Strathearn came into regular conflict with the Commissaries' jurisdictional claims. Nevertheless, it will be argued that the tribunals of the Kirk enjoyed a legitimate jurisdiction, arising substantially from their powers of excommunication, in disciplinary matters. This disciplinary jurisdiction was acknowledged by the Commissaries of Edinburgh, and obliged the Commissaries and the Kirk to seek to achieve a degree of jurisdictional co-operation in consistorial matters, involving both legal aspects regulated by the Commissaries and moral aspects regulated by the tribunals of the Protestant Kirk.

[ii] METHODOLOGY

The principal primary source material used in this thesis are the Registers of Acts and Decrees of the Commissaries of Edinburgh from the earliest extant entries in late April 1564 until the end of the eighth volume, which ends in January 1576/7, after which there is a complete break in the Registers until May 1580. The Registers for the clerkship of Sebastian Danelourt (August 1565 to August 1567) are missing.⁴ As such, of the first twelve years of the Court of the Commissaries of Edinburgh, ten years are extant, comprising 3000 folios.

For the period of the first three volumes (April 1564 to June 1569) a database for all diets in all consistorial actions has been compiled, regardless of whether some diets are missing, or whether an action was completed. The database contains the dates of each diet, the type of action, the names of the litigants, the sederunt of the judges, the names of the procurators in attendance (when their services were used), the domiciles and social status of individual litigants (when indicated), the details of any interlocutors and decreets pronounced, the expenses of the plea when recorded (although this was rare), and the details of any arguments used about jurisdiction.

³ The rationale for dividing the discussion of the Kirk into two sections (1559/60-1563/4 and 1563/4-1576/7) is explained below, page 38.

⁴ Discussed below, pages 50-52.

Digests and summaries of most of these various aspects of consistorial litigation are included in Appendix II, and form the basis of the analysis in Chapter V. §I of Chapter V explains the methodology used in that chapter in more detail.

The 186 consistorial decreets pronounced by the Commissaries of Edinburgh from their appointment down to the end of 1576 have been located and transcribed. The contents of these decreets will be used as the basis of arguments put forward concerning the early Scots consistorial law in respect of the contracting of marriage and the parameters of divorce law for adultery (Chapter III, §II, ‘Scottish Protestant Divorce for Adultery’, sets out the specific method of analysis used in that section). They will also be used to discuss the Commissaries’ relations with the Protestant Kirk, and problems arising from continued countenancing of the un-reformed Canon law concerning irregular and clandestine marriage.

[iii] CONVENTIONS

Years have been cited in conformity with pre-1600 conventions. Since the year then turned upon 25 March, dates for 1 January to 24 March have been given thus: i.e. “2 February 1563/4”, in this example the “3” referring to the pre-1600 reckoning, the “/4” denoting modern reckoning. Since the majority of unpublished source citations refer to mid-sixteenth-century material written in Old Scots, the original language has been retained, all such quotes being in Scots, with Scots spellings of place and personal names. The names of cases have likewise retained the original Scots spellings of the surnames of the litigants involved, whilst on occasions, when sixteenth-century place and personal names have been discussed in the text of the actual thesis, both have been modernized.

It should also be noted that the judgements pronounced by the Commissaries and tribunals of the Kirk were variously referred to in a manner which may seem imprecise to the modern reader. The standard label for the judgements of the pre-Reformation courts spiritual was and is ‘definitive sentence’. From this common source the judgments of both the Kirk and the Commissaries could be referred to as sentences, whilst the Commissaries’ decisions were also referred to as decreets.⁵ For

⁵ *St Andrews*, i, 26-27; *Balfour’s Practicks*, ii, 658, item xii.

the sake of clarity during the course of this thesis, the decisions of the pre-Reformation Officials and of the tribunals of the Protestant Kirk will be referred to as sentences, whilst the decisions of the Commissaries will be referred to as decreets. Various other terms of reference also need defining, particularly in respect of the jurisdiction of the medieval Church, of the post-Reformation Commissaries and of the Kirk, but these are discussed below.⁶

⁶ See below, pages 38-40.

CHAPTER I

CONSTITUTIONAL THEORY

§I

HISTORIOGRAPHY

An idea deeply engrained in Scottish historiography concerning the spiritual jurisdiction during the Scottish Reformation is that the abrogation of papal authority in Scotland by an Act of the Reformation Parliament of August 1560⁷ resulted in the abolition of the courts of the Catholic Church in Scotland. The seeds of this thesis may have had its origins in the Reformation era,⁸ but what is certain is that it has enjoyed considerable currency since at least the early nineteenth century. One of the earliest examples of this thesis was that proposed by John Connell in his *Treatise on the Laws of Scotland Respecting Tithes* (1815), wherein he asserted that “the jurisdiction of our bishops, during the subsistence of the Roman Catholic religion, flowed from the Pope. By an act of parliament of 24th August 1560... it was ordained ‘that the Bishop of Rome, called the Pape, have na jurisdiction nor authority within this realme in ony time coming’. With the power of the Pope, the jurisdiction of the bishops fell to the ground...”⁹ This thesis was re-iterated by Patrick Fraser in his *Treatises* of 1846 and 1876: “On the 24th August 1560, an Act of the Convention of the Estates passed, abolishing the authority of the Pope and all popish jurisdictions within this realm; and so closed the history of the courts of the Officials in Scotland, and appeals to the Court of Rome”.¹⁰ In 1866 Joseph Robertson linked the demise of the courts spiritual to the Reformation Acts of 1560, but emphasised the ‘establishment of the Kirk’ as the pivotal event.¹¹ In 1889 David Hay Fleming repeated the basic thesis, emphasising the importance of the abrogation of papal authority, in a footnote to his edition of the *St Andrews Kirk Session Register*.¹²

⁷ RPS, A1560/8/4 & presumably A1560/8/3.

⁸ As is discussed below, pages 29-30.

⁹ John Connell, *A Treatise on the Law of Scotland, Respecting Tithes and the Stipends of the Parochial Clergy* (Edinburgh, 1815), i, 196-197.

¹⁰ Fraser, *Treatise* (1846), i, 11; Fraser, *Treatise* (1876), i, 11.

¹¹ *Concilia Scotiae*, i, clxxiii – clxxiv.

¹² *St Andrews*, i, 268, n. 2, although he in fact misapplied John Riddell’s careful narrative, which had not explicitly linked the abrogation of papal authority to the demise of the courts spiritual.

During the twentieth century the same thesis linking the abrogation of papal authority to the suppression of the courts of the Catholic Church in Scotland has been rehearsed by A.E. Anton (1955),¹³ Ronald Ireland (1958),¹⁴ Simon Ollivant (1982),¹⁵ Roderick Phillips (1988),¹⁶ David Sellar (1995)¹⁷ and David B. Smith (1995).¹⁸ The editors of the *Fasti* mentioned the idea, though seemed sceptical.¹⁹ The idea was often mentioned in passing as a received orthodoxy, usually as a convenient introduction when discussing some aspect of the spiritual jurisdiction or Canon law in pre- and post-Reformation Scotland. For example, Simon Ollivant began his indispensable work by quoting the Act abrogating papal authority, but was of course pre-occupied with the Court of the Official.

Nevertheless, it is a striking feature of this received orthodoxy that those by whom it has been rehearsed often pointed out that it does not quite describe the phenomena it sought to explain. For example, back in 1866 Joseph Robertson had noted that after August 1560 “in rare and exceptional circumstances, trial was still taken, and sentence given, under authority of the ancient hierarchy”,²⁰ whilst Ollivant referred the reader to Gordon Donaldson’s objections as stated in his *Scottish Reformation* of 1960. Donaldson’s principle objection was that the abrogation of papal authority in Scotland ought not to have abolished the authority of the native Scottish episcopate, and that as such the Courts of the Officials should have been unmoved by the statute:

“at the time of the parliament of August 1560...the only statute bearing on the subject of ecclesiastical polity was one which forbade any bishop to exercise jurisdiction in virtue of authority derived from Rome. This did not

¹³ A.E. Anton, ‘Medieval Scottish Executors and the Courts Spiritual’ in *Juridical Review*, 67 (1955), 129-154, at 129.

¹⁴ Ronald Ireland, ‘Husband and Wife: Post-Reformation Law of Marriage of the Commissaries’ Court and Modern Common and Statute Law’ in *An Introduction to Scottish Legal History* (Edinburgh: The Stair Society, 1958), 82-89, 82.

¹⁵ *Court of the Official*, 1.

¹⁶ Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge: Cambridge University Press, 1988), 60.

¹⁷ Sellar, ‘Canon Law and Scots Law’, 60.

¹⁸ Sheriff David B. Smith, ‘The Spiritual Jurisdiction 1560-64’ in *Records of the Scottish Church History Society* (Edinburgh: Scottish Church History Society, 1995), 1-18, 1-2.

¹⁹ “the administration and judicial offices of deans of Christianity and officials were presumably included in the so-called abolition of ecclesiastical jurisdiction of August 1560” (*Fasti*, x).

²⁰ *Concilia Scotiae*, i, clxxiv.

make a very serious change in the *de facto* position, it went no further than the anti-papal clauses of an English act of supremacy, if, indeed, it went so far, and while it ought to have been fatal to the archbishop's legatine authority it did not – so at least it might have been argued – affect the normal episcopal powers”.²¹

Donaldson's distinction between papal and episcopal powers may have reflected his own Episcopalianism, yet the distinction is not only Anglican or Episcopalian, but also Roman Catholic, and is a distinction of ancient provenance which reoccurred throughout medieval constitutional and ecclesiological thought. The primitive origins of the idea of the apostolic succession and the idea of the Petrine commission are beyond the scope of this study, but the basic distinction was maintained by medieval canonists, however far they might have tried to promote the authority bestowed by one over the authority bestowed by the other. In Scotland, as in the rest of Christendom, the authority of the native episcopate was grounded in the doctrine that the authority bestowed by Christ upon his Apostles had in turn been bestowed by them upon their successors through the consecration of bishops to oversee regional churches. Yet over and above this general authority of oversight of the Church, it was maintained that Peter and his episcopal successors, the bishops of Rome, had been delegated extra-ordinary powers over the entire Church from Christ, as symbolized by the keys of heaven and earth. The precise authority and powers thus conferred, their jurisdiction and precedence have been long debated throughout the history of Christianity. But what has seldom if ever been maintained is the latent ecclesiology underpinning the traditional theory of the demise of the courts of the Catholic Church in Scotland: that *all* episcopal authority and jurisdiction is derived from the bishops of Rome.²²

The lack of clarity in the historiography on this subject is best illustrated by Ireland, when he stated that the abrogation of papal authority in Scotland in August

²¹ Gordon Donaldson, *The Scottish Reformation* (Cambridge: Cambridge University Press, 1960), 60.

²² The most sweeping claims for the extent of papal authority were made by Innocent III, who asserted that “the pope received plenitude of power directly from God, and was himself the source of all other authority in the Church” (Brian Tierney, *Church Law and Constitutional Thought in the Middle Ages* (Variorum, London, 1979), 2). Such claims were modified by conciliarist theories which argued for a more diffused distribution of authority within the Church. In Scotland it is noteworthy that Archbishop Hamilton's Catechism went so far as to maintain that the ‘power of the keys’ had been given not to Peter and his successors, but to the apostles collectively (Alec Ryrie, *The Origins of the Scottish Reformation* (Manchester: Manchester University Press, 2006), 99), and that in 1558 John Knox noted that the Scottish episcopate “in matters of religion claim all authority to appertain to them” (Roger Mason (ed.), *John Knox on Rebellion* (Cambridge: Cambridge University Press, 1994), 75).

1560 “destroyed not only the spiritual pre-eminence of the Roman church, but also the Officials’ Courts which had exercised the ecclesiastical jurisdiction of the bishops”.²³ Whilst Ireland correctly noted that the episcopate was the source of the authority and jurisdiction of the Officials,²⁴ it simply does not follow that the authority of the Scottish episcopate was automatically imperilled by any abrogation of papal authority. The continued validity of the episcopacy in constitutional thinking following the abrogation of papal authority in Scotland is central, in this thesis, to understanding both the approach taken to the spiritual jurisdiction by Mary, Queen of Scots, and her councillors and later by the British Stewarts.

In recent years a further problem has arisen which makes the accepted thesis concerning the demise of the courts spiritual in Scotland yet more untenable. It has been argued and illustrated most convincingly that the legislation of the Parliament of August 1560 cannot have been considered as legally binding by those who wished to uphold the rule of law, and that this was the position maintained by several leading members of the Scottish government during Mary’s personal reign and by at least two of the first Commissaries of Edinburgh.²⁵ The validity of the legislation of 1560 is of course a distinct issue from the survival of episcopal authority, particularly since there was no doubt that papal authority was finally and legally abolished in Scotland in December 1567, when the Act of 1560 was ratified.²⁶ Nevertheless, the timing of the valid abrogation of papal authority in Scotland is still a pertinent issue for this thesis, and helps explain some of the peculiarities surrounding the Commissaries of Edinburgh’s relations with the old courts spiritual in general and papal judges delegate in particular.²⁷

Finally there are several chronological problems with the old accepted orthodoxy. From as early as February 1559/60 the kirk session of St Andrews had begun to hear actions for divorce,²⁸ whilst by 18 August 1560, Archbishop Hamilton could remark to the Archbishop of Glasgow that “the eldaris callit of every town

²³ Ireland, ‘Husband and Wife: Post-Reformation’, 82.

²⁴ i.e. *Court of the Official*, 19 *et seq.*

²⁵ Discussed below, particularly pages 15-17.

²⁶ *RPS*, A1567/12/1; *APS*, iii, 14, c.3.

²⁷ Discussed below, pages 67-69.

²⁸ Smith, ‘Spiritual Jurisdiction’, 4 *et seq.*; Gordon Donaldson, ‘The Church Courts’, in *An Introduction to Scottish Legal History* (Edinburgh: The Stair Society, 1958), 363-373, 367 *et seq.*

takis all the causis of our ecclesiasticall jurisdiction and intrometis with our office”.²⁹
By 24 August 1560 when the first Act abrogating papal authority in Scotland was enacted, the revolution in the spiritual jurisdiction was already under way.

§II

HISTORICAL CONTEXT AND NEW UNDERSTANDINGS

Bishop Keith drew attention to what actually befell the courts of the Catholic Church in Scotland in his *History in the Affairs of Church and State in Scotland*, first published in 1735. During the Wars of the Congregation the Lords of the Congregation issued an ordinance proclaiming that any churchmen who presumed to convene any consistorial court would answer with their lives. This original ordinance is now lost, but the consistory of Brechin soon contravened it, which brought forth a solemn (and extant) reminder from the Lords of the Congregation that they had already forbidden such activities on pain of death. This second ordinance was issued from Dundee on 14 December 1559, which therefore dates the original ordinance suppressing of the courts of the Catholic Church to some point between the removal of the Regent on 21 October 1559 and the issue of this latter ordinance on 14 December 1559.

The latter ordinance opened:

“The Lords of the Council, in the names of Francis and Mary (understanding the hurt done in times past to Christ’s Church by maintaining the laws of Antichrist, and his Consistory, boasting (terrifying) the simple people with their cursings, gravatures, and such like other their threatenings, whereby they sat on the consciences of men of long time byegone,) have ordained that no Consistory should [be] afterwards holden...” and concluded “Certain persons, however, (as the Lords are informed,) within the city of Brechin, malevolent members of the said Antichrist, contemptuously disobey the said Ordinance, cease not still to hold Consistory, and execute the pestilent laws of the said Antichrist within the said city ; wherefore it is commanded that neither the commissary nor scribe of Brechin, nor any other member of the said Consistory, hold any Consistory or assist thereunto under pain of death. – Dundee, 14 Dec., 2 and 18 years”.³⁰

²⁹ Donaldson, ‘Church Courts’, 367.

³⁰ *Calendar of State Papers, foreign series, of the reign of Elizabeth*, ed. Joseph Stephenson et al (London: Longman, Roberts and Green, 1863-1950), ii, item 421; Robert Keith, *History of the Affairs of the Church and State in Scotland* (Edinburgh: Spottiswoode Society, 1844), i, 247-248.

The rhetoric was potent, and whatever the true intent of the threat, it may be supposed that Scottish clerics took it seriously: the last Protestant uprising had witnessed the murder of the Cardinal Archbishop of St Andrews.³¹ Clerical immunity, precedence and strongholds could not be relied upon by those who defied the pious wrath of the Protestant Kirk militant through the convocation of any court in any way associated with the authority and jurisdiction by which the Protestant faithful had been condemned to the flames. It is against this backdrop that the partial continuation of the courts spiritual can be seen for what they were, the last defiant gestures of an imperilled Church.³²

What is also striking is the sense of the members of the consistory being members of the Antichrist, enforcing the law of the Antichrist, which echoed John Knox's *Appellation to the Nobility and Estates* of 1558³³ and which also paralleled some aspects of the early stages of the Lutheran Reformation.³⁴ The whole idea of the Antichrist was a fluid one, emotive and polemic, and could be applied to any person or system which was opposed to the Protestant party. If the statute of the Parliament of August 1560 abrogating papal authority in Scotland can be considered as an attempt to further legitimize the earlier *de facto* suppression of the courts spiritual, its inaccuracy as a piece of legislation can perhaps be attributed to the fluid conception of what the Antichrist was. That is to say, if the canon law was the law of the Antichrist, and the members of a consistorial court were members of the Antichrist, abrogating the authority of the bishop of Rome, the Antichrist *sine qua non*, could have been intended to lend statutory validity to the *de facto* suppression of the consistories of the Catholic Church. This certainly seems to have been opinion of the General Assembly, when objecting to the restoration of Archbishop Hamilton's consistorial jurisdiction in 1566: "For in ane lawfull and most frie parliament that ever was in this realme before, was that odious beast depyv it of jurisdictioun, office,

³¹ Margaret H. B. Sanderson, *Cardinal of Scotland: David Beaton, c.1494-1546* (Edinburgh: John Donald, 1986), 226-228.

³² *Concilia Scotiae*, i, clxxiv, n.1.

³³ Knox appealed to the nobility and estates of Scotland against the sentence of "your false bishops and ungodly clergy" who had condemned him to death for maintaining heretical beliefs. He went on to describe the Scottish Catholic episcopate and clergy as "this pestilent generation of Antichrist", asserting the "kingdom of the pope to be the kingdom and power of Antichrist". In the appellation Knox asserted the right of inferior magistrates to reform religion and discipline the clergy (Mason, *Knox on Rebellion*, 74-75, xvii).

³⁴ The Lutheran perspective and its relevance to the appointment of the Commissaries of Edinburgh and the laws they administered are discussed below, pages 89-90.

and auctoritie within this realme”.³⁵ If the intention was to abrogate episcopal as well as papal authority, the execution was, in terms of contemporary constitutional accuracy, wide of the mark from the perspective of various members of Mary’s government: *Balfour’s Practicks* acknowledged the continued validity of episcopal authority in Scotland following 1560 and 1567.³⁶

In terms of the appointment of the Commissaries of Edinburgh, the principal perspective to appreciate is that of Mary’s government during her personal rule. There were two clear policies open to her when she returned to Scotland in 1561. The first option was to land in Aberdeen where it was proposed 20,000 men at arms would be assembled for the crushing of the Protestant faction and the reaffirmation of the Catholic establishment.³⁷ In the event, Mary declined this proposition, communicated to her by John Leslie, whilst still in France. Quite what Mary’s full reasons were are beyond the scope of this inquiry, but it would have been contrary to the conciliatory approach of her mother, and a troubling circumstance to visit upon the Scottish realm just as France herself slid into the horrors of its own wars of religion.

The second option was one of diplomacy, conciliation and compromise, which can reasonably be described as an insistence upon the collective observation of the ‘rule of law’ or of lawful government. This policy was in effect created by Mary’s arrival at Leith on 19 August 1561, without occupying forces, and her subsequent proclamation of 24 August that was effectively a moratorium upon the tumultuous affairs of the realm. The proclamation acknowledged the division in the realm “for the differens in materis of religioun” and warned that no-one should “tak upoun hand, privatlie or oppinlie, to mak ony alteratioun or innovatioun in the state of religioun, or attempt ony thing aganis the forme quhilk hir Majestie fand publict and universalie standing at hir Majesteis arrival in this hir realme, under the pane of deid”.³⁸ Mary’s proclamation gave the *de facto* religious situation which she found

³⁵ *Acts and Proceedings of the General Assemblies of the Kirk of Scotland*, ed. Thomas Thomson (Edinburgh: Bannatyne Club, 1839-45), i, 88-90; *Concilia Scotiae*, i, clxxviii-clxxx.

³⁶ *Balfour’s Practicks*, i, xlv; cf Donaldson, ‘Church Courts’, 366-7.

³⁷ Jane Dawson, *Scotland Re-formed, 1488-1587* (Edinburgh: Edinburgh Univeristy Press, 2007), 244; Rosalind Marshall, ‘Lesley, John (1527-1596)’ (*ODNB*, accessed 3 June 2009).

³⁸ *RPC*, i, 266-267.

upon her return legal validity.³⁹ The position of both the Protestant and the Catholic Churches as they stood on her return was given legal protection by the proclamation. The Protestants were not to be tried as traitors and heretics and driven from the land, but nor was the disestablishment of the Catholic Church in Scotland to proceed further. The policy was aimed at avoiding religious and civil war, buying time for Mary and her government, but could only really be considered temporary, depending in great measure upon Mary and the principle of her personal sovereignty for its success.

The conditions created by Mary's proclamation had a direct bearing upon the legal and constitutional circumstances surrounding the creation of the Court of the Commissaries of Edinburgh and its inferior commissariots. The *de facto* situation from the perspective of Mary and various members of her government was that the courts of the Catholic Church in Scotland had been suppressed during a rebellion, and that this *de facto* situation had no constitutional validity, and no legal validity beyond that provided by Mary's proclamation. That some members of Mary's government considered the Lords of the Congregations' actions as rebellious, even treasonable, seems beyond dispute.⁴⁰ The laws informing such judgements had been gathered together in the *Discours Particulier d'Escosse*,⁴¹ and such was the legal force of the position that an Act of Oblivion was required to grant immunity from prosecution for all illegalities committed between 6 March 1558/9 and 1 September 1561:⁴² the alternative was of course the enforcing of the law of treason by a Crown

³⁹ Julian Goodare, 'The First Parliament of Mary, Queen of Scots' in *The Sixteenth Century Journal*, 36 (2005), 55-75, 62-63; Peter McNeill, '“Our Religion, Established Neither by Law or Parliament”: Was the Reformation Legislation of 1560 valid?' in *Records of the Scottish Church History Society*, 35 (2005), 68-89, 74-75; cf David Baird Smith, 'The Reformers and Divorce: A Study in Consistorial Jurisdiction' in *Scottish Historical Review* (Glasgow: James Maclehose and Sons, 1912), vol. IX, 10-36, 25, wherein it has been noted that in response to the argument put forward in the action concerning Dalgleish and Wemyss led before the tribunals of the Kirk at St Andrews, that the Commissaries were only judges competent to hear their matrimonial dispute, the Kirk repelled the argument "on the strength of the Royal Proclamation of 25 August 1561, which maintained the *status quo* as it existed at the date of the landing of Queen Mary".

⁴⁰ The Lords of the Congregation maintained that the authority of the Regent, Mary of Guise, had devolved upon them 'by God's providence' and presumed to issue ordinances in the name of their lawfully sovereigns on the grounds that they were the Lords of Council 'that be Reformed' (Keith, *History*, i, 246). Nevertheless, in law they had presumed to remove a Regent who represented an adult sovereign, without recourse to that sovereign's authorization, which constituted an act of rebellion and treason. I am grateful to Amy Blakeway for explaining how the removal of Mary of Guise from the Regency differed from earlier, more legal instances of the removal of Scottish Regents.

⁴¹ Peter McNeill, 'Discours Particulier D'Escosse' in *Miscellany II* (Edinburgh: Stair Society, 1984), 86-131, at 87, 94-95, 123 *et seq.*

⁴² *RPS*, A1563/6/1; *APS*, ii, 535, c.1; McNeill, 'Discours Particulier', 98.

that could not be expected to carry the prosecution through without civil war. Given this perceived illegality of the ‘uproar for religion,’ the ordinances by which the consistories of the established Church in Scotland had been suppressed had no inherent legal validity.⁴³ Yet on the other hand, the restoration of the consistories, which a strict reading of the law still allowed, would involve the government in restoring what many Scottish Protestants commonly held to be instruments of the Antichrist.

Against this understanding it could be objected, that the abrogation of papal authority in August 1560 ought to have altered the situation. As had already been suggested, papal authority could not be considered the constitutional basis of the ordinary authority and legal jurisdiction of the native Scottish episcopate. More importantly, it is clear that various members of Mary’s government did not accept the statutes of August 1560 as legally valid in themselves.

There are numerous pieces of evidence which support this understanding of the validity of the statutes of August 1560. In the first place it is clear from Peter McNeill’s analysis of the Treaty of Edinburgh and other relevant documents that the statutes of the Parliament of August 1560 could not be accepted by various members of the government as legally binding: the treaty had reserved matters of religion to Mary and Francis; the statutes had not been ratified by Scotland’s lawful and universally acknowledged sovereigns.⁴⁴ Evidence that this recent reading of the legality of the statutes of August 1560 was current among leading jurists in Mary’s governments is plentiful. John Sinclair⁴⁵ is known to have argued openly that “the Reformation Parliament was invalid and that Protestantism had no sound legal basis”, a view which had sufficient currency by the time of Mary’s first parliament of 1563 to cause John Knox to make a characteristic public outburst, in which he accused Sinclair of committing “treason against God” for speaking such “malicious words” the proper punishment for which ought to be “the gallows”.⁴⁶ Despite Knox’s invective against the position, it was clearly shared by many other leading jurists. It

⁴³ McNeill, ‘Our Religion’, 68-69.

⁴⁴ McNeill, ‘Our Religion’, 71 *et seq.*

⁴⁵ Bishop of Brechin (1565-1566) and author of *Sinclair’s Practicks*, who succeeded his brother Henry as the Lord President of the College of Justice in 1565.

⁴⁶ Goodare, ‘First Parliament’, 68; John Knox is known to have stated “Yea, I hear that some say that we have nothing of our Religion established, neither by Law or Parliament” (*John Knox’s History of the Reformation in Scotland*, ed. W. C. Dickinson (London: Nelson, 1949), ii, 81).

is most probable that the view was held by John's bother, Henry Sinclair,⁴⁷ and was certainly held by James Balfour (as witnessed by his *Practicks*), and the compilers of the Black Acts of 1566, the statutes of August 1560 being omitted from both works. The compilers of the latter included John Leslie, John Spens of Condie,⁴⁸ James Balfour and Edward Henryson.⁴⁹ Balfour and Henryson were among the first Commissaries of Edinburgh.⁵⁰ There are also considerable indications in statutes and ordinances following 1560 which suggest that papal authority was still acknowledged in law. As Donaldson has pointed out, legatine powers were derived directly from the bishops of Rome. It is therefore striking to find the Act of Oblivion of 1563 discharging all judges whatsoever from hearing actions encompassed by the act, including all "legates, archbishops, abbots, commendators, priors and all uther judges".⁵¹

This acknowledgment of the continued constitutional validity of the judicial function of legates is further underlined by the document by which Archbishop Hamilton's consistorial jurisdiction was restored on 23 December 1566.⁵² Mary, by a writ under her sign-manual, restored and 'reponed' the "Archbisshop of Sanctandros, Primat and Legat of Scotland, to all and sindrie his jurisdictionis alsweill vpoun the south as the north sydis of the watter of Forth...". Hamilton's legatine authority was clearly still viewed as legally valid in 1563 and 1566 despite the statute of August 1560.⁵³ There are yet further examples which support this view,⁵⁴ whilst further evidence concerning the continued validity of papal authority in Scotland following August 1560 will be discussed in Chapter II.⁵⁵ For the present

⁴⁷ Henry Sinclair, Bishop of Ross (1558-1565), Lord President (1558-1565), appointed in December 1563 to the Commission for advising on the order to be taken anent the consistories (*RPC*, i, 252).

⁴⁸ See John Finlay, 'Spens, John, of Condie (*d.* 1573)' (*ODNB*, accessed 5 March 2010).

⁴⁹ McNeill, *Our Religion*, 73; John Cairns, 'Historical Introduction' in *A History of Private Law in Scotland* (Oxford: Oxford University Press, 2000), i, 14-182, at 95 for those appointed to "correct the laws of the realm".

⁵⁰ Discussed below, pages 43-44.

⁵¹ *RPS*, A1563/6/1; *APS*, ii, 535, c.1.

⁵² *Concilia Scotiae*, i, clxxviii – clxxix.

⁵³ Robertson discusses further examples (*Concilia Scotiae*, i, clxxiv, n. 1).

⁵⁴ For example, Hamilton dispensed the fourth earl of Bothwell and Lady Jane Gordon from the impediment of consanguinity (according to the Canon law prescriptions) by virtue of his legatine authority in 1565/6 (John Stuart, *A Lost Chapter in the History of Mary Queen of Scots Recovered* (Edinburgh: Edmonston and Douglas, 1874), 5).

⁵⁵ See below, pages 71-73.

it may finally be observed that the Protestant party felt the statutes of August 1560 sufficiently in doubt during Mary's personal reign to necessitate their ratification in December 1567.⁵⁶

Goodare has put the matter succinctly when he describes "the epoch-making but constitutionally questionable Reformation Parliament. The latter's acts, although it may have been hard to contravene them, were not actually valid".⁵⁷ Goodare goes on to demonstrate how any legal force the 'Reformation' statutes did enjoy were by virtue of Mary's proclamation of August 1561.⁵⁸ The most striking example is the prosecution of Archbishop Hamilton and 47 other priests for celebrating Mass on the grounds not that the Mass had been outlawed by the Reformation Parliament, but that they had contravened Mary's proclamation.⁵⁹ The government's desire to maintain what may be conceived as 'the rule of law' is again seen in the downfall of Huntly,⁶⁰ and in Henry Sinclair's co-operation with the legally valid requests of the Protestant Kirk.⁶¹

§III

CONSTITUTIONAL THEORIES ARISING FROM HISTORICAL CONTEXT

Within this legal and constitutional context the predicament of the spiritual jurisdiction and the old consistories may be appreciated more fully. In the first place the courts of the Catholic Church had been *de facto* suppressed in the autumn of 1559 by the Lords of the Congregation on the grounds that such courts were presided over by members of the Antichrist, and enforced the law of the Antichrist, an accusation based predominantly on Protestant experiences of heresy trials and persecution. Next, any attempt to give this situation statutory validity in August 1560

⁵⁶ *RPS*, 1567/12/1; *APS*, iii, 14, c.3.

⁵⁷ Goodare, 'First Parliament', 69.

⁵⁸ *Ibid.*, 56.

⁵⁹ *Ibid.*, 62-3.

⁶⁰ *Ibid.*, 58.

⁶¹ See Mark Dilworth, 'Sinclair, Henry (1507/8-1565)' (*ODNB*, accessed 23 January 2006). Despite his Catholicism Sinclair supplied bread and wine for the celebration of Protestant communion. In this entry Dilworth emphasises Sinclair's legal learning and his rule of law policy. See also *Knox's History of the Reformation*, ed. Dickinson, ii, 76 anent mass-mongers: Henry Sinclair, bishop of Ross commented to [Lethington the elder] in 1563 that Mary "must see her laws kept, or else she would get no obedience".

failed, the statute abrogating papal authority in Scotland being insufficiently accurate in terms of accepted constitutional theory and ecclesiology, and invalid in law as far as various members of Mary's government were concerned. Yet the *de facto* suppression of the courts spiritual could not be directly reversed since this would have been to alter the state of religion in Scotland as it stood in August 1561, thereby violating Mary's proclamation of that month, and also to invite the strongest possible reaction from the Protestant party *in re* the Antichrist.

It is therefore no surprise that quite what to do about the fact that a significant section of Scotland's courts could no longer be expected to convene took some time to resolve. Some of the old courts did occasionally pronounce judgments in spiritual matters, and as shall be seen those which appeared in litigation before the Commissaries of Edinburgh seem to have been accepted as legally valid by them.⁶² But it was one thing to accept a judgement as legally valid, quite another for the government actively to encourage the courts by which such a judgment had been pronounced to sit in judgement. The pressing problem was of course how the great mass of actions previously dealt with by the courts spiritual could be dealt with by the remainder of the legal system in Scotland. The rebel Lords of the Congregation had suggested that there were "enough civil ordinary judges, to whom recourse may be had in all actions",⁶³ a reasonable enough clause to insert among an ordinance fulminating against the Antichrist, but one which was not practical until the nineteenth century.⁶⁴

In the mean time it was universally acknowledged that some order had to be taken in respect of the spiritual jurisdiction. The work of Sheriff David B. Smith⁶⁵ demonstrates that litigants tried a number of creative ways to get their spiritual actions heard following 1559, but that the Lords of Council and Session provided the central focus to which recourse was had.⁶⁶ In the event the Lords of Council

⁶² Discussed below, pages 71-73 and 84-85.

⁶³ *Calendar of State Papers, foreign series, of the reign of Elizabeth*, ii, item 421.

⁶⁴ i.e. see below, pages 35-36, for John Nisbet's acknowledgement of the practical problems attendant upon absorbing the Commissary Courts into the civil legal system and the final deconstructions of the Commissary Courts.

⁶⁵ Not to be confused with David Baird Smith.

⁶⁶ Smith, 'Spiritual Jurisdiction'. The Lords of Council were clearly widely regarded by litigants as the "maist competent jugeis" (i.e. NAS, CS7/23, fos. 318r -319r, 20 March 1561/2). Lord Fraser has drawn attention to the "ingenuity of litigants" following the "annihilation of the ecclesiastical courts...without substituting anything in their room" (Fraser, *Treatise* (1846), i, 12).

proceeded to assume the spiritual jurisdiction, and as Smith points out, the constitutional basis upon which they presumed to assume the spiritual jurisdiction has been preserved in *Balfour's Practicks*. The earliest post-1559 spiritual action extant in the Acts of the Lords of Council and Session is *Chalmer v. Lumisden*, 19 December 1560,⁶⁷ although the Lords are known to have granted a commission to the kirk session of Edinburgh earlier than this to proceed to hear a spiritual action, *Hammyltoun v. Sclater*, the kirk session pronouncing sentence on 25 July 1560.⁶⁸ It seems probable that the Lords of Council had formulated some constitutional grounds upon which to administer the spiritual jurisdiction before granting the commission in *Hammyltoun v. Sclater*, but *Chalmer v. Lumisden*, the first spiritual action which they took to themselves, clearly stood out for James Balfour, in that he recorded the Lords' reasoning in his *Practicks*.

Before discussing this case, there is a useful distinction to make between the reasons given by litigants approaching the Lords of Council and Session as to why the Lords ought to hear spiritual actions, and the reason given by the Lords for proceeding to deal with such actions. This is an important distinction, since Smith has located all the relevant actions in the *Registers of the Acts and Decrees of the Court of Session* (NAS, CS7 series) where litigants approached the Lords between 1560 and the appointment of the Commissaries of Edinburgh, and the range of opinions given in these letters indicates a plurality of views as to quite what had befallen the courts spiritual.⁶⁹

Various terms were used by litigants to describe what precisely had ceased, including 'the office of spirituale Juge',⁷⁰ 'the consistorial law',⁷¹ 'the consistoriall jurisdiction',⁷² 'the consistorie',⁷³ and 'the consistoriall'.⁷⁴ In several cases it was

⁶⁷ Having read all the relevant CS7 volumes, *Chalmer v. Lumisden* was the first spiritual action located by David Smith (Smith, 'Spiritual Jurisdiction', 11; NAS, CS7/20, fo. 219r-v, 19 Dec 1560).

⁶⁸ NAS, CC8/2/1, fos. 323v-324v, 26 January 1564/5. It is of note that this is the earliest known instance of the involvement of the Lords of Council. The Treaties of Leith and Edinburgh had only been concluded on the 5th and 6th of July 1560 (McNeill, *Our Religion*, 69). It seems that only from this time was the authority of the Privy Council restored, following the usurpation of the same by the Lords of the Congregation.

⁶⁹ Smith, 'Spiritual Jurisdiction', 11-15.

⁷⁰ NAS, CS7/20, fo. 219r-v, 19 Dec 1560.

⁷¹ NAS, CS7/23 fos. 252v – 253v, 12 March 1561/2; CS7/26, fos. 232v -234r, 31 March 1563; CS7/27, fos. 202r – 203r, 19 July 1563.

⁷² NAS, CS7/23, fo. 307r-v, 19 March 1561/2; CS7/27.fo. 130r – 131r, 6 July 1563; CS7/29, fo. 258r-v, 15 April 1564.

⁷³ NAS, CS7/23, fo. 318r – 319r, 20 Mar 1561/2.

asserted that the spiritual jurisdiction had been abolished, most of them referring to the ‘consistorial jurisdiction’,⁷⁵ with one asserting that the ‘consistorie’ had been abolished.⁷⁶ One further action asserted ‘the consistorie do now obleist’.⁷⁷ Two main ideas are clearly discernible, that the spiritual jurisdiction had ceased, and that it had been abolished. The value of this latter position is that it suggests that at least some of the supplicants were of the opinion that the suppression of the consistories had been legally valid, and that they had therefore been abolished, which could well have been grounded in the Protestant insistence that the Reformation Parliament was valid and had somehow abolished the consistories.

Two final cases give a more narrative description of what had occurred to the spiritual jurisdiction and accord very well with the general tenor of the thesis put forward so far. In one case, the supplicant explained that she had sought an edict of executry from the sheriff and dean of Edinburgh “because of the alteratioun of the relogioun and lawis of this realm It wes dowsom quha had power to do the same...”.⁷⁸ In the other case, an appeal had been made against the sentence of the Official of Glasgow, and “Maisteris Johne Stevinsoun James Balfour thesourar and John Lang chantour of Glasgow” had been commissioned to hear the appeal “as the actis maid thairintill schawin to the saidis lordis is manifest and be ressoun of cummeris quhilkis raisis within the realm anent the religioun and the accelesticall [sic] Jurisdiction the pronounceing of ane decreit in the said caus of appellatioun hes ceissit and wes nocht gewin furth...”.⁷⁹ In all these examples the Lords proceeded to provide a remedy to the practical problems which attended the cessation of the consistories, either hearing the cases themselves or granting commissions.

In the letters purchased by the pursuer in *Chalmer v. Lumisden* (the first spiritual action the Lords took to themselves), it was argued that “because thair is na consistoreis instant and the office of the spirituale Juge quhilkis of befoir wes wont to cognosche in siclike causis now ceisis Thairfoir necessar it is that the lordis of

⁷⁴ NAS, CS7/27, fos. 324v-325v, 28 July 1563.

⁷⁵ NAS, CS7/23, fos. 307v-309r, 19 Mar 1561/2, *Bishop of Dumblane v. divers*; CS7/26, fos. 212v – 213r, 26 March 1563; CS7/28, fo. 306r - v, vltimo January 1563/4.

⁷⁶ NAS, CS7/29, fo. 64r-65r, 14 March 1563/4.

⁷⁷ NAS, CS/27, fo. 109r-v, 7 July 1563.

⁷⁸ NAS, CS7/26, fo. 255r-v, 3 April 1563.

⁷⁹ NAS, CS7/28, fo. 389r-v, 21 Feb 1563/4.

counsale put remeid thairto”.⁸⁰ The Lords proceeded to hear the action on the basis that “The Lordis of counsall hes powar to cognosce and decide upon spiritual causes, gif the consistorie, or ecclesiastical jurisdiction ceissis, or be stopt be civil wars or utherwayis”.⁸¹ The variation in wording is suggestive that the Lords’ reasoning was not simply copied from the letters purchased by the pursuer, but was their own considered response to the problem of the spiritual jurisdiction. It is noteworthy that in both narratives it was deemed that the courts spiritual had “ceissit,” since this was a concept carried through to the charter of constitution of the Commissaries of Edinburgh in the Latin “cessationem”.⁸²

The sense of the Lords’ reasoning in *Chalmer v. Lumsiden* was that the Lords could hear spiritual actions, but only in lieu of the consistories “if they be stopped by civil wars of utherwise,” a clear nod in the direction of what had occurred during the autumn of 1559. There was no suggestion that the consistories had been legally and permanently abolished, that papal and episcopal authority were lawfully abrogated, that the spiritual jurisdiction was now considered civil and therefore restored to the supreme civil judicature.⁸³ The sense was that this was a valid practical expedient, and that there was nothing in law to say that it was permanent, or the result of some permanent alteration in the constitution of the realm. As shall be shown presently, this understanding was evident in the constituting charter of the new court.

The granting of commissions by which the Lords of Council delegated their authority in particular spiritual actions was a needful device given the practical constraints upon their time and resources; “the lordis of council havand consideration of the multitude of actionis dependent befor thaim”.⁸⁴ The *ad hoc* granting of commissions to kirk sessions, Superintendents, sheriffs and advocates has two features of note for this thesis. The first, the involvement of the Protestant Kirk in spiritual actions, especially those of a strictly consistorial nature, will be considered

⁸⁰ Smith, ‘Spiritual Jurisdiction’, 11.

⁸¹ Smith, ‘Spiritual Jurisdiction’, 11; *Balfour’s Practicks*, i, 269. The words used by Balfour have not been simply copied from the Chalmer’s precept: it seems certain that, in keeping with the purpose of compiling practicks, that Balfour records the Lords opinion of why they should proceed in the matter.

⁸² See Appendix 1, clause [1]. This clause in the charter is discussed further below, pages 25-26.

⁸³ This last point being contrary to the theories of Riddell (*Inquiry*, i, 426), Fraser (*Treatise* (1876), i, 12), and Baird Smith (‘The Reformers and Divorce’, 15) and others.

⁸⁴ Smith, ‘Spiritual Jurisdiction’, 13-14; NAS, CS7/23, fo. 252v, 12 March 1561/2; cf Baird Smith, ‘The Reformers and Divorce’, 17.

in Chapter II.⁸⁵ The other, the granting of commissions to groups of advocates to sit in St Giles' or the Tolbooth and hear spiritual actions, is of immediate note here.

Sheriff Smith has drawn attention to these commissions and highlighted the fact that many of the advocates named in the commissions went on to be Commissaries of Edinburgh.⁸⁶ The first such commission was granted 12 March 1561/2 to "Masteris John Abircrumby, Clement Litill, John Marioribankis, Alexander Sym, Robert Creytoun, Eduart Henrisoun [and] Alexander Mauchane" to sit in the "kirk of sanctgeill".⁸⁷ The other such extant commission granted 20 March 1561/2 was to "Maister Alexander Sym, Maister Alexander Mauchane, Maister Henrie Kinross, Maister Edward Hendirsoun [i.e. Henrysoun], Maister John Scharp [and] Maister Richard Strang" "to sitt in the towbuth of Edinburgh".⁸⁸ The details are striking: Clement Litill and Edward Henrysoun were two of the first four Commissaries of Edinburgh appointed in February 1563/4, whilst Alexander Sym replaced James Balfour on the same bench in October 1565.⁸⁹ Of the others, Henry Kinross was the first Procurator Fiscal of the Court of the Commissaries of Edinburgh,⁹⁰ whilst Richard Strang and John Schairp regularly procured before the new Commissaries, with John Marjoribanks, John Abircrumby putting in occasional appearances.⁹¹ The locations are also to be expected, but it is noteworthy that the group met first in St Giles, then in the Tolbooth: the Official of Lothian had sat in St Giles; the Commissaries of Edinburgh were to sit in the Tolbooth.⁹² There can be no real doubt that the groups of advocates delegated to hear consistorial actions pre-figured the Court of Commissaries of Edinburgh. Beyond the similarities already noted, the entire concept of judges appointed to hear actions formerly pertaining to the courts spiritual of the Catholic Church and enjoying a jurisdiction delegated from

⁸⁵ Pages 80-88.

⁸⁶ Smith, 'Spiritual Jurisdiction', 13-14.

⁸⁷ CS7/23. fos. 252v-253v, 12 March 1561/2.

⁸⁸ CS7/23, fo. 318r-319r, 20 March 1561/2.

⁸⁹ Sym's presentation is extant in RSS, v, 2396, 27 October 1565 "and surrogateis him in the place and rowme of the said Maister James Balfour," Sym also getting Balfour's 400 marks *per annum*.

⁹⁰ Discussed below, pages 45-46.

⁹¹ See Appendix II, F (1) and (2) for examples of cases in which they appeared as procurators.

⁹² *Court of the Official*, 54 "the consistory aisle of St Giles"; cf John Finlay, *Men of Law in Pre-Reformation Scotland* (East Linton: Tuckwell Press, 2000), 59; for the Commissaries of Edinburgh see below, page 44. I am not clear when the Upper Tolbooth was built into the west end of St Giles; it may be, therefore, that the first Commissaries of Edinburgh sat in the Upper Tolbooth.

the Lords of Council and Session is that which underpinned the appointment of the Commissaries of Edinburgh in 1563/4.⁹³

Within the context of these remarkable circumstances, the Court of Commissaries of Edinburgh and its inferior commissariots were a very carefully conceived and deftly established system of courts. That some more permanent order had to be taken beyond the *ad hoc* solutions provided by the Lords of Council and Session was evident to all. The obvious solution was the restoration of the consistories, since, as has already been argued, they were still held to be a legally and constitutionally valid system of courts in Scotland, but this was politically impossible given the Protestant party's reasons for suppressing them. Another point to consider was how any sort of solution would sit with the policy of the 'rule of law' maintained by Mary and her government: the proclamation of August 1561 ought not to be contravened. Here there are two main points to consider. In the first place, when Mary returned to Scotland in 1561 the Lords of Council and Session had already presumed to administer the spiritual jurisdiction and as such no one could object to this in principle. In the second place, there is much evidence that the Protestant Kirk co-operated with the position adopted by the Lords of Council and Session, and that they wished for a more orderly solution to the problems attending the inactivity of the courts spiritual.

The example which will suffice for now is the petition given in by the General Assembly in July 1562 to the Lords of Council requesting that "either they give up universally the judgement of divorce to the kirk and their sessions, or else establish men of good lives, knowledge and judgment, to take order thereof".⁹⁴ The petition indicates that the Assembly considered this jurisdiction to pertain to the Lords, whilst the reference to giving it up "universally" indicated the many commissions granted by the Lords to various kirk sessions and superintendents to hear divorce actions. It is also clear that the Assembly was prepared to accept whichever decision the Lords deemed most fitting, and as such any possible accusations from the Kirk of a breach of the *status quo* could have been countered by

⁹³ Cf Baird Smith, 'The Reformers and Divorce', 18, wherein he defends his assertion that the Court of the Commissaries of Edinburgh was "to a large extent the creature of the Court of Session".

⁹⁴ Smith, 'Spiritual Jurisdiction', 16; *Acts and Proceedings of the General Assemblies*, i, 19.

the Lords by referring to the Assembly's petition: in effect the Assembly had indicated that the Kirk would not be against the Lords "taking order" of the situation without further recourse to the Kirk.

In December 1563 the Lords of Council duly proceeded to commission a number of distinguished jurists to consider the erection of jurisdictions in sundry parts of the realm which could discuss "the caussis quhilkis the prelattis of this realme had decidit in the consistories of befoir". The details of the new order were left to the members of the commission, it being explicitly stated that the Lords of Council could "nocht gudlie await upoun the devising of the hale ordour of the saidis jurisdictionis".⁹⁵

The first name on the list of commissioners was Henry Sinclair, Bishop of Ross, Lord President of the College of Justice, and brother of the equally distinguished John Sinclair, dean of Restalrig, author of Sinclair's *Practicks*, who succeeded his brother in the presidency in 1565. Both remained Catholics, both were leading jurists of their day,⁹⁶ and it seems reasonable that the opinions known to be held by John concerning the legality of the Reformation Parliament were shared by his brother. The other commissioners were Richard Maitland of Lethington and his son William, together with "the Clerkis of Register, Justiciare and Advocat".⁹⁷ At this time the Lord Clerk Register was James McGill of Nether Rankeillour,⁹⁸ the Lord Justice Clerk was Sir John Bellenden of Auchnoul⁹⁹ and the Queen's Advocate was John Spens of Condie.¹⁰⁰ All those appointed to the commission were Senators of the College of Justice by this date.¹⁰¹ Whilst William Maitland had been one of the principal Lords of the Congregation,¹⁰² he nevertheless became a central member of

⁹⁵ Smith, 'Spiritual Jurisdiction', 16-17; *RPC*, i, 252, 28 December 1563.

⁹⁶ Mark Dilworth, 'Sinclair, Henry (1507/8-1565)' (*ODNB*, accessed 23 January 2006); Athol Murray 'Sinclair, John (c.1510-1566)' (*ODNB*, accessed 23 January 2006); "They were both learned of the laws, and given to maintain the Popish religion, and therefore great enemies of the Protestants" (*Knox's History of the Reformation*, ed. Dickinson, ii, 185).

⁹⁷ *RPC*, i, 252.

⁹⁸ Michael Lynch, 'MacGill, James, of Nether Rankeillor (d. 1579)' (*ODNB*, accessed 5 March 2010).

⁹⁹ John Finlay, 'Bellenden, Sir John, of Auchnoul (d. 1576)' (*ODNB*, accessed 5 March 2010).

¹⁰⁰ John Finlay, 'Spens, John, of Condie (d. 1573)' (*ODNB*, accessed 5 March 2010).

¹⁰¹ i.e. see Brunton and Haig, *An Historical Account of the Senators of the College of Justice from its Institution in 1532* (Edinburgh: Thos. Clark, 1832), xii. I am grateful in particular to John Cairns for discussing who the members of the commission were.

¹⁰² Mark Loughlin, 'Maitland, William, of Lethington (1525x30-1573)' (*ODNB*, accessed 5 March 2010).

Mary's government. Most notably, however, was the fact that McGill and Bellenden were the authors of the *Discours Particulier*, whilst John Spens had been involved in its production.¹⁰³ As such, it seems clear that within this group of high officers of state and leading jurists were a number of persons who likely held that the suppression of the court of the Catholic Church had not been legal.

Whilst James Balfour was not appointed to the commission, it is difficult to believe that he was not involved in the deliberation of the commission at some level. As last Official of Lothian and one of the first Commissaries of Edinburgh, Habakkuk Bisset credited him with the composition of the instructions given to the first Commissaries of Edinburgh in 1563/4.¹⁰⁴

The constitutional position indicated by *Balfour's Practicks*, that the Lords administered the spiritual jurisdiction in lieu of the consistories, proved definitive in the devising of the new order. Since the Lords had already established a pattern of delegating the spiritual jurisdiction to groups of advocates to sit in Edinburgh, the idea of some sort of permanent delegation of this authority to a new bench was a reasonable progression. That the jurisdiction of all the regional Officials was thereby to be centralized under the administration of the Commissaries of Edinburgh is less predictable, and a significant development in the history of the administration of justice in Scotland. But this trend was not unique, and was already prefigured by the jurisdiction of the Lords of Council and Session: indeed the Commissaries of Edinburgh's national jurisdictions were a reflection of the constitutional provenance of their authority.

The charter of constitution of the Commissaries of Edinburgh confirmed the idea that the Commissaries enjoyed their new jurisdiction in lieu of the old consistories only. The charter began with a reference to the "inaction of the jurisdiction of the officials and the commissaries," with no mention of the abolition of the consistories or the abrogation of papal authority in Scotland.¹⁰⁵ The understanding upon which the Commissaries of Edinburgh were appointed seems clear: the old consistories were *de facto* suppressed, but not legally abolished; in such

¹⁰³ McNeill, 'Discours Particulier', 86.

¹⁰⁴ *Habakkuk Bisset's Rolement of Courts*, ed. Sir Philip Hamilton-Grierson (Edinburgh: Scottish Text Society, 1920-1926), ii, 57.

¹⁰⁵ See Appendix I, clause [1]; Donaldson, 'Church Courts', 368; McNeill, *Our Religion*, 74.

circumstances the spiritual jurisdiction devolved upon the Lords of Council and Session; from here the Lords had elected to delegate the major part of this jurisdiction to the Commissaries of Edinburgh so that order could be restored to the legal system, without restoring the old order to the outrage of Protestants and the breakdown of Mary's rule of law. Considering this within the wider context that papal authority had not been legally abolished, the Catholic Church suppressed but not disestablished and the Protestant Kirk *de facto* in the ascendancy, but not legally acknowledged beyond Mary's proclamation of August 1561 several interesting inferences may be drawn.¹⁰⁶

The first was that there is no sense of permanence about the Court of the Commissaries of Edinburgh:¹⁰⁷ it was in effect a surrogate, which existed only so long as the old consistories continued in abeyance. In this, the new system may be considered as an elegant hedge against the two futures facing Scotland in 1564, on the one hand the restoration of the Catholic Church, on the other the establishment of the Protestant Kirk. For the Catholics in Mary's government the strict constitutional understanding upon which the Commissaries of Edinburgh were appointed inclined towards the restoration of the Catholic hierarchy, since it was still established in law. For Protestants, the Court of the Commissaries of Edinburgh was inoffensive and raised none of their fears about heresy trials and the Antichrist. Indeed the name of the new court seems calculated to avoid such fears, for it could have more accurately been called, jurisdictionally speaking, the Court of the Officials of Scotland, but perhaps such strong episcopal connotations would have proved too much.

The ease with which the new consistorial order could be set aside was demonstrated by the restoration of Archbishop Hamilton to his consistorial jurisdiction in December 1566. The immediate reasons for the restoration of Hamilton's jurisdiction are well known,¹⁰⁸ and much has been made of the Queen's

¹⁰⁶ The sense of uncertainty created by this unique set of circumstances has been noted by Robert Hannay, who commented that "it was not in fact clear at the time (December 1564) how events were likely to turn" ('On the Church Lands at the Reformation' in *The Scottish Historical Review*, XVI (1919), 52-72, 60) and is generally discussed by Donaldson in *The Scottish Reformation*, 'Chapter III: An Unstable Situation, 1560-7'.

¹⁰⁷ This has been noted by Baird Smith in 'The Reformers and Divorce', 18: "This erection seems to have been a temporary expedient...".

¹⁰⁸ He was to annul the marriage then standing between the 4th earl of Bothwell and his countess, the Lady Jane Gordon, on the grounds of consanguinity, an impediment from which the couple had in fact been dispensed. The couple were also divorced by the Commissaries of Edinburgh on the grounds of the earl's adultery, although this decree of divorce is no longer extant. The divorces were a prelude to

subsequent marriage to Bothwell and its disastrous effects for her personal reign. Yet besides these details, the restoration of Hamilton's consistorial jurisdiction itself highlights many of the contextual themes already argued to have been of importance in understanding the precise manner in which the new consistorial order was created.

In the first place the writ by which Mary restored Hamilton "to all and sindrie his jurisdictionis alsweill vpoun the south as the north sydis of the watter of Forth" acknowledged him as "Legat of Scotland" a style which could not have been admitted had papal authority been abrogated in Scotland in August 1560. Next, there was clearly no legal bar to "dischairgeing be thir presentis all vtheris Commissaris clerkis and vtheris officiaris quhatsumeuir thairintill of thair offices forder in that part":¹⁰⁹ the new consistorial order could readily be put aside in favour of the old hierarchy.

Similarly, one of the features of the new order which might be expected to have inclined the Lords of Council and Session to argue for the permanence of the new order was explicitly addressed. As has been discussed at some length by R.K. Hannay in his *College of Justice*, one of the foremost features of interest to the Lords in the new Commissary enterprise had been financial.¹¹⁰ The levying of the quot on the dead's part of all moveable estates had been a lucrative feature of the old consistories' business, and the opportunity to channel some portion of these revenues into the coffers of the College of Justice was understandable, given the relative under-funding of that in many ways ecclesiastical foundation. With the Court of the Commissaries of Edinburgh confirming all the greater testaments of the realm and the new inferior Commissariots confirming the lesser testaments, those members of the Council who were also senators anticipated collectively £1600 a year for the College of Justice. This institutional aspect of the new order with its financial gain for the senators might suggest some desire on behalf of the Lords to perpetuate the new order, thus ensuring £1600 *per annum*. Nevertheless, when Archbishop Hamilton was restored to his jurisdiction to the detriment of the Commissaries of Edinburgh's national jurisdiction and the jurisdiction of the new inferior

the earl of Bothwell's marriage to Mary Stewart, and pleased neither the Catholic nor the Protestant factions (Stuart, *Lost Chapter in the History of Mary Queen of Scots*, 9 *et seq.*).

¹⁰⁹ *Concilia Scotiae*, i, clxviii-clxxxix.

¹¹⁰ R.K. Hannay, *The College of Justice* (Edinburgh: Wm. Hodge, 1933; reprinted by The Stair Society, 1991), chapter VI.

commissariot at St Andrews, the recently acquired rights of the senators were upheld: “Provyding all wayis that the Lordis of thair Sessioun be thankfullie payit of samekile of the reddiest of the cottis [sic] of the saidis testamentis as salcum to thair said traist counsalouris pairt *pro rata* yeirlye of the sowme of ane thousand sex hundreth pundis quhilk thai haue grantit of befoir to the saidis Lordis of Sessioun”.¹¹¹

It might be argued against this thesis that if the Court of the Commissaries of Edinburgh was impermanent why had the clerks of court and other such members of the Court had been appointed for life. Yet despite this appearance of permanence, in the month that Hamilton’s jurisdiction was restored, the Lords of Council were given a general supervision over the Commissary Courts. As part of this supervision, they were authorized to revoke any appointments made for life and directed to make appointments to commissary posts “only for as long as the senate wills it and considers them suitable for their offices”.¹¹² This alteration in the supervision of the new courts was ostensibly made as a prelude to the reform of the new courts on the narrative that various unsuitable persons had been appointed to them: but given the timing of this alteration to December 1566, it is reasonable to speculate that it was intended to presage a potentially more far reaching ‘reform’ of the new courts, namely their deconstruction and re-integration into the episcopal hierarchy of the Scottish Church.

In these respects it can be seen that the new consistorial order had been established so as not to preclude, and therefore possibly to anticipate, the restoration of the Catholic hierarchy in Scotland to their ancient jurisdictions. Yet as can be readily anticipated, the move to restore Archbishop Hamilton’s consistorial jurisdiction was deeply troubling to the Protestant party, since the original grounds upon which the Lords of the Congregation had suppressed the consistories had not subsided. On 27 December 1566 the General Assembly gave in a remonstrance to the Privy Council describing Hamilton as “that conjured enemy of Jesus Christ and cruel murderer of our brethren”.¹¹³ It continued “His ancient jurisdiction was, that

¹¹¹ *Concilia Scotiae*, i, clxxix.

¹¹² This ordinance was ratified by Parliament in November 1581 (see *Balfour’s Practicks*, ii, 673 *et seq* and *RPS*, 1581/10/84).

¹¹³ Hamilton was legally responsible for the execution of the aged Walter Myll (or Miln) for heresy in 1558 (John Herkless and Robert Kerr Hannay, *The Archbishops of St. Andrews* (Edinburgh & London: W. Blackwood, 1907-1915), v, 92), the last Protestant known to have been martyred in Scotland (Jane Dawson, ‘The Scottish Reformation and the Theatre of Martyrdom’ in *Studies in Church History*, 30 (1993), 259-270, 260, note 5).

he with certaine his collegues collaterals, might have dampnit of heresie as it pleasit him, and then to take all that were suspect of heresie... Our Queine belyke is not well informit; scho aucht not, nor may not justly break the lawes; and so consequently, scho may not sett up against us, not without our consent, that Romane Antichryst againe”.¹¹⁴

What is also of note in this statement was that the Assembly held Mary’s actions to have broken the law. This is central to a full understanding of why the restoration of Hamilton’s jurisdiction presaged Mary’s downfall, not in respect of the business transacted by Hamilton’s delegates in the action of *Bothwell v. Gordon* only, but in Mary’s violation of her own ‘rule of law’ policy. Even from the government’s perspective the restoration was surely a *de facto* alteration in the state of religion and therefore a violation of the proclamation of August 1561.¹¹⁵ Yet these were not the grounds cited by the Assembly. Rather, the Assembly insisted that Hamilton had been deprived of his jurisdiction in August 1560: “For in ane lawfull and most frie parliament that ever was in this realme before, was that odious beast depyvit of jurisdiction, office, and auctoritie within this realme”.¹¹⁶ The constitutional ineptitude of the statute and its illegality has already received full consideration. Yet what is striking is that this was clearly the Scottish Protestant understanding of the intention behind the statute abrogating papal authority in Scotland, namely the abrogation of papal and episcopal authority in Scotland. This not only suggests the Scottish Reformation in its earliest stages aimed at the eradication of papal and episcopal authority in the Kirk, but indicates the provenance of the thesis long maintained in Scottish historiography, that the courts spiritual were abolished by the statute abrogating papal authority.

Also of note is the recurrence of the theme of the consent of the Kirk, already noted where the erection of the Court of the Commissaries of Edinburgh was concerned. This too had been a kind of alteration in the state of religion, but as has

¹¹⁴ Robertson thought the remonstrance Knox’s work (*Concilia Scotiae*, i, clxxix-clxxx, n. 1)

¹¹⁵ Despite the fact that the ‘Act concerning religion’ 14 April 1567 maintained that “hir hienes, sen hir foirsaid arryvall, hes attemptit na thing contrar the estait of religioun, quhilk hir majestie fand publictlie and universallie standing at hir arryvale foirsaid, quhairby hir majestie is maist worthy to be servit, honourit and obeyit,” the error was clearly perceived by the government: the remainder of the act goes on to reassure the subjects of the realm, albeit in a roundabout way, that they cannot be tried for heresy and will be defended against all foreign authorities whatsoever (*RPS*, 1567/4/6).

¹¹⁶ *Acts and Proceedings of the General Assemblies*, i, 89; *Concilia Scotiae*, i clxxviii-clxxx.

been noted, the Assembly's petition of 1562 had consented to the Lords of Council 'taking some order' of the consistorial jurisdiction. Yet in the example of Hamilton's restoration, the Assembly explicitly stated that Mary "may not justly break the lawes... not without our consent".¹¹⁷ In this, Mary's failure to obtain the agreement of both Catholic and Protestant factions to an alteration of religion in Scotland was fatal not only to the order established by her own return to Scotland, but to her personal rule.

The restoration of Archbishop Hamilton's jurisdiction proved abortive, and Mary's forced abdication extinguished any realistic expectations of a Catholic restoration in Scotland. Her downfall also presaged the legally valid abrogation of papal authority in Scotland in December 1567.¹¹⁸ The remarkable events of 1566 and 1567 altered the constitutional context within which the new Commissary system had now to exist.

§IV

THEMES OF EPISCOPACY AND THE CONSISTORIAL JURISDICTION IN POST REFORMATION SCOTLAND

The enduring problem for the Court of the Commissaries of Edinburgh and its inferior commissariots from 1567 until the nineteenth century was that the original context in which they had been created and could be properly understood had perished. Not only had the original context been effaced, but the expectation against which the founders of the system had hedged, the termination of the new system in the restoration of the Catholic hierarchy, was no longer a constitutionally valid possibility. On the basis of this understanding, the subsequent constitutional history of the Commissary system can be viewed as a series of attempts to rationalize its continued existence within post-Catholic, Episcopalian and Presbyterian contexts.

¹¹⁷ Nevertheless it is unclear that the General Assembly was referring to its own consent exclusively; rather the phrase may have been a general protest against the arbitrary nature of Hamilton's restoration, without the 'consent of the commonweil' or the estates.

¹¹⁸ *RPS*, A1567/12/1; *APS*, iii 14, c.3. The fact that the ratification of the August 1560 statutes was deemed necessary by the Protestant Kirk triumphant following Mary's abdication bears further witness to the deep seated misgivings many had had concerning the legality of the statutes of August 1560.

The precise details of these various constitutional understandings are beyond the scope of this thesis, but in sketching later constitutional theories it is possible to indicate the provenance of various conceptions which have enjoyed some currency in recent historiography.

One of the earliest solutions to the constitutional limbo in which the Commissary system was placed by the second Protestant revolution was quite simple: the whole idea of the Commissary system and its organization ought to be re-considered. Whilst the Commissary system had not been reabsorbed by the Catholic Church, the sense that they had been a temporary measure awaiting some future re-ordering lingered on. On 10 June 1575, Morton and the Privy Council charged all Commissaries to appear before them, narrating that “eftir the abolishing of the papistical jurisdiction and religion within this realme, thair wes certane Commissaris constitute be the Quene, berand authoritie for the tyme for decisioun of beneficiall and matrimoniall caussis, confirmatioun of testamentis and utheris, quhill ane mair perfyte ordour mycht be providit for and establissit”.¹¹⁹ The distinctly retrospective elements of this narrative, that Catholicism had been legally abolished prior to the appointment of the Commissaries of Edinburgh conformed to the Scottish Protestant narrative of Reformation history. As it transpired, Morton made no headway with any proposed re-ordering (the proposed details of which are not known), but it illustrates the point in hand. It is clear also that the Protestant Kirk wished for some sort of re-evaluation of the Commissaries’ jurisdiction, the second Book of Discipline of 1578 attacking “the mingled jurisdiction of the commissaris in sa far as they mell with ecclesiasticall materis and have no commissioun of the kirk thairto bot war erectit in tyme of our soveranes moder quhen thingis wer out of ordour”.¹²⁰ Whatever the Kirk’s objections to the Commissary system during the latter sixteenth century, the system was not altered and remained part of the Scottish legal system into the seventeenth century.

During the seventeenth century, the weighting of the Commissary system towards the restoration of the old order found partial utilization and realization in the Episcopalian policies of the British Stewarts. In 1609 the consistorial jurisdiction was restored to the Scottish episcopal hierarchy. The precise constitutional basis

¹¹⁹ *RPC*, ii, 455-6.

¹²⁰ *Second Book of Discipline*, ed. James Kirk (Edinburgh: St Andrew Press, 1980), 228.

upon which this restoration proceeded is not entirely clear, but it would seem that the understanding of Mary's government in the 1560s no longer applied. Whilst Mary and her councillors had explicitly stated that the Commissaries authority to administer the spiritual jurisdiction was a corollary of Mary's *plena potestas*,¹²¹ they had also been careful to maintain that the Crown's involvement arose not out of some permanently altered constitutional basis, but out of expediency. During the reign of James VI the theoretical basis of the Scottish polity had certainly acquired a more Anglican colouring.

The Black Acts of 1584 had asserted that the sovereign's power and authority extended over all "statis alsweill spirituall as temporall within this realme" and that the sovereign and their successors were "juges competent to all personis...spirituall or temporal".¹²² As such, when the Act of 1609 asserted that the person of the monarch was the source of the Commissaries' jurisdiction, it did not automatically follow that the Commissaries' jurisdiction was therefore considered to be civil or temporal. Rather, the Act of 1609 restored "the archibischoppis and bischoppis of this realme to their former authoritie, dignitie, prerogative, privileges and jurisdictionis lauchfullie pertening and shall be knawin to pertene to thame (alwayes flowing frome his majestie alsweill as ony uther ordinar jurisdiction doth), and specialie to the jurisdiction of comissariatis and administratioun of justice by thair comissioneris and deputeis in all spirituall and ecclesiasticall causes".¹²³ In this, the sense that the spiritual jurisdiction pertained to the Crown in lieu of the courts spiritual was clearly negated; rather the jurisdiction of the Commissaries was considered to emanate from the Crown on the basis of Anglican and Episcopalian conceptions of monarchic spiritual authority.¹²⁴

Despite the altered constitutional basis upon which the Commissary Courts were now based, the latent principle that the Commissaries administered an episcopal jurisdiction became more pronounced. In March 1610/11 the restored Scottish episcopate proceeded to re-organize the jurisdiction of the Commissary Courts. The

¹²¹ See Appendix I, clause [4].

¹²² *RPS*, 1609/4/20; *APS*, iii, 292-293, c.2; Alan MacDonald, *The Jacobean Kirk, 1567-1625: Sovereignty, Polity and Liturgy* (Aldershot: Ashgate, 1998), 26.

¹²³ *RPS*, 1609/4/20.

¹²⁴ I am grateful to Alan MacDonald for discussing James VI's Episcopalian policies and the constitutional basis upon which they proceeded. The views expressed and any faults they contain are my own.

national jurisdictions of the Commissaries of Edinburgh were re-distributed to the inferior Commissariots, with the exception of actions for divorce on the grounds of adultery, which was reserved to Edinburgh. In this, the jurisdiction of the inferior Commissaries became closer to that of the pre-Reformation Officials,¹²⁵ whilst the Court of the Commissaries of Edinburgh suffered a loss of status.¹²⁶

The rationalization of the Commissary system through explicit re-association with the Scottish episcopal hierarchy proved problematic from 1638.¹²⁷ It was within the Presbyterian context of the first temporary overthrow of the Scottish episcopate that the enduring understanding of the Commissary system took shape. The precise provenance of the Presbyterian view requires further research, but a prominent role must have been played by the Presbyterian John Nisbet, later Lord Dirleton. Nisbet was one of the Commissaries of Edinburgh from 1641 to 1668 and it is probable that his constitutional understanding of the Commissary system was developed during this period.¹²⁸ His defence of the continued validity of the Commissary system within a Presbyterian establishment was published posthumously in 1698 in his *Some Doubts and Questions in the Law*, but it seems clear from the parliamentary debates about the future of the Commissaries¹²⁹ that his arguments must have enjoyed considerable currency during the 1680s and '90s, since it is clear that the arguments he put forward were accepted over and against more radical voices.

¹²⁵ See *Balfour's Practicks*, ii, 664 *et seq.* Research into the process of re-organization as it actually happened has yet to be undertaken. It would be particularly interesting to know if the episcopal Commissaries were authorized to use spiritual sanctions.

¹²⁶ Hector MacQueen, 'Two Visitors in the Session, 1629 and 1636' in *Miscellany IV* (Edinburgh: The Stair Society, 2002), 155-168. Christopher Lowther observed in 1629 that the Commissaries of Edinburgh "be, as I perceived, not much respected" (p.162).

¹²⁷ In 1638, during the Covenanting revolt, the General Assembly condemned episcopacy as contrary to the constitution of the Church of Scotland, whilst in the following year it condemned episcopacy as contrary to the law of God (Gordon Donadson, *Scotland: James V to James VII* (Edinburgh: Oliver & Boyd, 1971), 320-324).

¹²⁸ Nisbet died in 1688, and since the decisions of the Lords of Session upon which he commented were from the period 1665 to 1677 (A.J. Mann, 'Nisbet, Sir John, Lord Dirleton (1610-1688)' (*ODNB*, accessed 8 November 2008), it seems reasonable to suppose that his opinions concerning the commissary courts were formulated during his period as a Commissary of Edinburgh.

¹²⁹ See *APS*, ix, appendix, 87b-89a. An act was read for the abolishing of the Commissary Courts in Parliament 9 June 1693. The act envisaged the abolitions of the Commissary Courts and the dispersal of their civil jurisdiction to other courts. At the same time the 'goodmen of Air' petitioned Parliament for the abolition of the commissariot of Glasgow, which narrated the old Protestant understanding with some variations "during the time of popery, there was a spiritual jurisdiction in each diocye exerced by officials...this jurisdiction was suppressed by the abolishing of popery: but episcopacy shortly succeeding, the Bishops in their several dioceses, in place of their Officials, appointed Commissaris, whose jurisdiction was by them understood as spiritual...".

The Presbyterian assault upon prelacy had a considerable resonance with the earliest assaults upon the old courts spiritual during the Wars of the Congregation in 1559. Just as the Lords of the Congregation had suppressed the old consistories on account of their association with the Antichrist, so too prelacy was attacked by the Presbyterians as a remnant of the old Catholic order. The Jacobean association of the Commissary system with the Scottish episcopate therefore rendered it liable to attack as a “remnant of popery”.¹³⁰

Against this understanding, John Nisbet formulated the following defence, which in order to be convincing had to distance the Commissary Courts from any association with papal or episcopal authority. He argued that the jurisdiction of the Bishops and their Officials had consisted of two main components. The first had been a spiritual jurisdiction, usurped from the true Church, and which properly belonged to the Presbyterian Kirk.¹³¹ The second had been a temporal, civil jurisdiction, delegated to the episcopate from the Scottish Crown. The temporal jurisdiction enjoyed by the episcopate was for Nisbet the jurisdiction of the Commissary system, and as such, the Commissary system could not be attacked along with prelacy, since it was a system of courts “erected by Queen Mary in time of greatest Purity and Reformation,” the system’s jurisdiction being considered civil, emanating from the Crown.¹³² Nisbet’s theory was clearly predicated upon the Presbyterian assertions that the episcopate enjoyed no inherent authority and that the Crown was a source of temporal authority only. Whilst it would be difficult to argue that this idea was present in the thinking of those by whom the first Commissaries of Edinburgh were appointed or by the British Stewarts, the logical corollary of Nisbet’s thesis, that the jurisdiction of the post-Reformation Commissaries had been a civil jurisdiction, emanating from and delegated by the Crown, was consistently applied by nineteenth and twentieth century authors to the appointment of the first

¹³⁰ James Fergusson, *A Treatise on the Present State of the Consistorial Law in Scotland* (Edinburgh: Bell & Bradfute, 1829), xiv-xv.

¹³¹ “the Official’s jurisdiction was episcopal, ecclesiastical in both the former respects, and was continued as it had been in the Popish Church, the Bishop usurping the jurisdiction that belonged to Sessions, Prebyteries and Assemblies” (*Dirleton’s Doubts and Questions in the Law of Scotland* (Edinburgh: Hamilton & Balfour, 1762), 82).

¹³² Unlike Anglicanism, Presbyterianism could not consider the Crown as anything other than a source of temporal, civil authority. Dirleton read the Act of 1609 from the perspective necessitated by his Presbyterian views: “It is most evident from the Act of his [James VI’s] 20 Parliament, 1609, that the jurisdiction of Commissaries is a temporal jurisdiction, acknowledged in the Act to flow from his majesty” (*Doubts and Questions*, 81).

Commissaries of Edinburgh in 1563/4. This ‘Presbyterian’ understanding was clearly echoed in Riddell’s assertion that “at the epoch of the Reformation, which began on August 24, 1560, the jurisdiction of the Church in consistorial matters, on its suppression, returned to the Crown from whence, as described by our Acts of Parliament, it sprang originally”¹³³ and in David Baird Smith’s argument that the appointment of the Commissaries of Edinburgh “set the final seal on the theory of the civil origin of consistorial jurisdiction”.¹³⁴

The only question which Nisbet therefore had to answer was why the Commissary system should be maintained as a distinct system of civil courts. Two reasons were put forward. The first was a final, if faint, nod in the direction of the old spiritual jurisdiction in that the actions tried in the Commissary Courts were of such a quality as to recommend “a circumspect, and as it were, a religious handling of them”. On this ground, Nisbet maintained, the jurisdiction of the Commissaries had been “neither entrusted to the lowest Sort of Judges, neither to the Judges of the great Employment about the Decision of other Civil Actions, to be decided in a tumultuary Way, and promiscuously with other Causes, but by a considerate Choice of Judges, singled out for these Causes: It was provided, that neither the Meanness of the Judge, nor the Greatness, nor the Multitude of his other Employments, should prejudice Causes of so great Gravity and Importance”.¹³⁵

The second reason proposed by Nisbet for retaining the system as it stood was that the Commissary Courts could not be suppressed, for sheriffs were gentlemen of insufficient legal learning to hear consistorial actions,¹³⁶ whilst the Lords of Session were too busy. Practical considerations such as these had always had a place in the deliberations of those who had to deal with the consequences of the cessation of the old courts spiritual. In 1559 the Lords of the Congregation had maintained that “no consistory should afterwards be holden, there being enough of

¹³³ Riddell, *Inquiry*, 426.

¹³⁴ Baird Smith, ‘The Reformers and Divorce’, 17. It is clear that Baird Smith linked this understanding of the civil origin of the consistorial jurisdiction to Calvinist theories (Ibid., 15-16), thereby assuming a sixteenth-century source of this theory within the Scottish context. Nevertheless, this does not change the fact that the Calvinistic theories he discusses were not in the minds of those who appointed the Commissaries – Baird Smith made a similar error in arguing that Scottish Protestant divorce for malicious desertion was introduced into Scotland on the grounds of Calvinist theology (discussed below, page 141, including n. 210).

¹³⁵ *Doubts and Questions*, 77.

¹³⁶ “Sheriffs are known to be gentlemen who understand not the law” (*Doubts and Questions*, 80).

civil ordinary judges, to whom recourse may be had in all actions,” but the resultant disorder had proved intolerable.¹³⁷ Again in a Presbyterian context, the practical problems attending any serious attempt to efface any trace of the old courts spiritual in the organization of the Scottish legal system made it still untenable.

Yet despite the continued survival of the Commissary system in Presbyterian Scotland, there was no longer any constitutional bar to some future assimilation of the Commissary system. During Mary’s reign the idea of the spiritual jurisdiction had remained intact, the Commissaries enjoying their jurisdiction in lieu of the courts spiritual of the Catholic Church. Under the British Stewarts the principle that the Commissaries’ jurisdiction was derived directly and properly from the Crown had been firmly established, but at the same time the monarch was presented as a source of temporal and spiritual authority, whilst the Commissary Courts became more overtly episcopal. Under the Presbyterian settlement the Commissaries’ jurisdiction was determined to be temporal and civil, with only practical considerations arguing convincingly for its continued existence. By the nineteenth century, this remaining consideration was finally set aside, and the Commissary system was absorbed into the Scottish civil legal system, the jurisdiction of the inferior Commissariots passing to the Sheriffs in the localities, that of the Commissaries of Edinburgh to the Court of Session.¹³⁸

¹³⁷ *Calendar of State Papers, foreign series, of the reign of Elizabeth*, ii, item 421.

¹³⁸ See *Guide to the National Archives of Scotland* (Edinburgh: The Stationary Office & The Stair Society, 1996), 154 for a narrative of these alterations.

CHAPTER II
THE COURT OF THE COMMISSARIES OF EDINBURGH

§I

INTRODUCTION

It has been argued in the previous chapter that the Commissaries of Edinburgh were entrusted with the administration of the spiritual jurisdiction of the Scottish episcopate during a period of religious revolution and jurisdictional confusion. The primary focus of this thesis concerns one aspect of this jurisdiction, namely law and litigation involving marriage, divorce and legitimacy and the jurisdictional problems this occasioned between the Commissaries and the Kirk. Nevertheless it seems appropriate to first discuss the general practical significance of the appointment of the Commissaries against the backdrop of the pre-Reformation context. This is advisable for several reasons. On the one hand, very little has been published concerning the actual Court of the Commissaries of Edinburgh and its jurisdiction as a whole. When nineteenth-century antiquaries first took an interest in the old Courts of the Officials, their principal focus was upon actions of marriage, divorce and legitimacy and resulted in the publication of the *Liber Officialis Sancti Andrei* in 1845. But as Gordon Donaldson pointed out, this focus gave a “misleading” impression as the jurisdiction of the old Officials.¹³⁹ Whilst the Official’s competence in marriage, divorce and legitimacy actions has now been set in its proper context by Simon Ollivant,¹⁴⁰ it would be unfortunate to repeat the misleading impressions of the past in respect of the Commissaries of Edinburgh. On the other hand, since this thesis is also concerned with how the Commissaries of Edinburgh’s competence in matrimonial matters brought them into extensive and often confusing contact with the tribunals of the Protestant Kirk, it seems necessary to set this particular relationship within the broader context of the Commissaries of Edinburgh’s relations with other courts, principally the old episcopal courts and the ‘new’ inferior Commissariots.

¹³⁹ Donaldson, ‘Church Courts’, 365.

¹⁴⁰ *Court of the Official*.

There is also a general danger that discussions concerning the relations between the Commissaries and the Kirk could become too dominant a theme in this thesis, which would lead to excessive digression into the early history, theology, aims and objectives of the tribunals of the Protestant Kirk. In order to guard against this and to ensure a consistent focus on the Commissaries of Edinburgh and their consistorial jurisdiction, sections dealing with relations with the Kirk have been broken into two main chronological periods. The first period concerns how the Commissaries of Edinburgh treated the sentences of divorce and other ‘consistorial decisions’ pronounced by the tribunals of the Kirk from 1559 down to the appointment of the Commissaries of Edinburgh in February 1563/4. This first period in many ways represented a confused situation, which the Commissaries had to deal with both rationally, but also with a degree of expediency and pragmatism; after all, they were dealing with the aftermath of a complex revolution. This first period is discussed at the end of this present chapter along with the Commissaries’ relations with other courts. The second period concerns the ongoing and possibly more regularized relations between the Commissaries and the Kirk from 1563/4 down to the 1570s, during what will be argued to have been a search for jurisdictional harmony in a shifting and often unclear situation. This second period will be discussed in the final chapter of the thesis, having first discussed the consistorial law of the Commissaries of Edinburgh and the consistorial litigation brought before them. This will not only break the focus on the Kirk rather than on the Commissaries, but should also aid the reader, since the chapter on the ongoing relations between the Commissaries and the Kirk presupposes a firm grasp of the consistorial law and procedure of the Commissaries of Edinburgh. It should be emphasised that the involvement of the tribunals of the Kirk in ‘consistorial’ matters from 1559 onwards really was the complicating factor in the history of the spiritual jurisdiction in Scotland. Such problems did not arise for the comparable period of the English Reformation. In short, it has given this thesis as much trouble as it must have given the earliest Commissaries of Edinburgh!

On account of the relative jurisdictional disorder attending the Scottish Reformation, it is necessary to define a number of terms relating to the jurisdiction of the Commissaries and other courts, which will be used during the course of this thesis. The basic problem concerns the categorization of the jurisdiction of the medieval Catholic Church and how it related to the jurisdiction of the Commissaries of Edinburgh and the tribunals of the Protestant Kirk. In its broadest sense the

jurisdiction of the medieval Church in Scotland can be considered to have been a combination of the authority and jurisdiction of the bishops of Rome, the Scottish episcopate, and the religious orders of Scotland. As a whole, this can properly be called the spiritual jurisdiction of the medieval Catholic Church in Scotland. Within this, the distinction between papal and episcopal jurisdiction has already been discussed, and it is the episcopal jurisdiction with which the Commissaries were principally involved.¹⁴¹

The episcopal jurisdiction may be broken down into several categories of actions and business concerning: ‘marriage, divorce and legitimacy’, ‘benefices and teinds’, ‘executory business’, ‘defamation or slander’, the appointment of curators and tutors to minors, the breaking oaths, and deeds and obligations registered in the books of the episcopal courts.¹⁴² Marriage, divorce and legitimacy actions have come to be designated as *the* consistorial actions in Scots law,¹⁴³ and the term will be used during the course of this thesis. Benefice and teind business, or, more generally, actions involving the patrimony of the medieval Church, have often been designated ‘ecclesiastical’ actions,¹⁴⁴ and the term will be used during the course of this thesis. These two terms are of course potentially problematical. The term ‘consistorial jurisdiction’ has often been used to refer to the spiritual jurisdiction in general, whilst the same is true of the term ‘ecclesiastical jurisdiction’. To compound matters further, the jurisdiction of the tribunals of the Protestant Kirk has also been referred to as the ‘ecclesiastical jurisdiction’. For clarity, this thesis will use the term ‘episcopal jurisdiction’ to refer to the overall jurisdiction of the Commissaries of Edinburgh and the inferior, provincial Commissaries subject to them,¹⁴⁵ and within

¹⁴¹ It seems undisputable that the powers of the Commissaries of Edinburgh were “similar to those formerly exercised by the bishops” (Connell, *Treatise* (1815), 197).

¹⁴² See Cosmo Innes, *Lectures on Scotch Legal Antiquities* (Edinburgh: Edmonston & Douglas, 1872), 238-9 for further discussion of these and other aspects of the old episcopal jurisdiction.

¹⁴³ i.e. Riddell, *Inquiry*, i, 390 *et seq* being *An Exposition of our Genuine, Original Consistorial Law; Lord Hermand’s Consistorial Decisions, 1684-1777*, ed. F.P.Walton (Edinburgh: Stair Society, 1940).

¹⁴⁴ i.e. *Court of the Official*, 77 *et seq*.

¹⁴⁵ Quite how the jurisdiction of the post-Reformation Commissaries’ Courts ought to be categorized is of course a debateable point. David Sellar has noted that “at first they were in some sense spiritual courts” (‘Canon Law and Scots Law’, 61), and that Thomas Craig used the phrases *in curia christianitatis* and *in foro Ecclesiastico* to refer to them (‘Marriage by Cohabitation with Habit and Repute: Review and Requiem?’ in D L Carey Miller and D W Meyers (eds.), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (Edinburgh: The Law Society of Scotland, 1992), 117-136, 120). Litigants before the Commissaries of Edinburgh could

this general category will use the term ‘consistorial jurisdiction’ to refer to the jurisdiction concerning marriage, divorce and legitimacy actions, and the term ‘ecclesiastical jurisdiction’ to refer to the jurisdiction concerning the patrimony of the medieval Church. In addition, those aspects of the jurisdiction of the tribunals of the Protestant Kirk which involved the Commissaries of Edinburgh will be designated the ‘disciplinary jurisdiction’.

The complexity of the legacy of the pre-Reformation spiritual jurisdiction in post-Reformation Scotland demands that some further qualifications be made. In the first place the episcopal jurisdiction of the pre-Reformation episcopate, and the episcopal jurisdiction of the post-Reformation Commissaries, whilst substantially the same in many respects, was not identical, and the differences are discussed during the course of this chapter. In addition, the jurisdiction of the Protestant Kirk cannot have said to have consisted solely of a ‘disciplinary’ jurisdiction.¹⁴⁶ Nevertheless, it is beyond the scope of this thesis to discuss the entire jurisdiction of the Protestant Kirk, and the term ‘disciplinary’ jurisdiction is sufficient in the limited sense used above.

Finally, arguments which will be put forward in the next sections of the current chapter pre-suppose a knowledge of the organization of the administration of the episcopal jurisdiction in Scotland prior to the Reformation, which may be quickly rehearsed here. Prior to the Scottish Reformation, the spiritual jurisdiction of the Scottish episcopate was administered at the diocesan level. Each bishop appointed his own Official, who in turn could delegate all or some of their jurisdiction to Commissaries, who usually sat in the Official’s court.¹⁴⁷ Commissaries could also be appointed directly by bishops to exercise various aspects of the episcopal jurisdiction in more remote places, where a full Official’s court was not necessary, but where the local population could more readily avail themselves of the episcopal jurisdiction without travelling to the court of the main diocesan Official. This latter type of “territorial” Commissary could also be appointed by religious houses and by

describe them as “judge[s] ecclesiastical” (NAS, CC8/2/6, fos. 93v, 20 May 1573, *Dunbar v. Adair*) and protest that certain actions were not competent before the Commissaries, being “civile and profane” (NAS, CC8/2/1, fo. 253v, 28 November 1564, *Young v. Marchamstoun*).

¹⁴⁶ Indeed, it would be more accurate to say that they exercised a ‘Reformed spiritual jurisdiction’.

¹⁴⁷ *Court of the Official*, 49 *et seq.*

archdeacons.¹⁴⁸ Bishop's Officials, Official's Commissaries and episcopal territorial Commissaries were subject to the appellate jurisdiction of archiepiscopal Officials, or Officials principal, who exercised the archiepiscopal jurisdiction of the Archbishops of St Andrews and Glasgow. The dioceses of Dunkeld, Dunblane, Galloway (Whithorn) and Argyll (Lismore) were subject to Glasgow, whilst the dioceses of Aberdeen, Moray, Brechin, Ross, Caithness, The Isles (Sodor) and Orkney were subject to St Andrews.¹⁴⁹ In general terms, many of the 'territorial' Commissaries, together with the deans of Christianity dealt with many of the minor parochial aspects of the episcopal jurisdiction in Scotland, and these will be discussed below within the context of the inferior Commissaries subject to the Commissaries of Edinburgh. The more important aspects of the episcopal jurisdiction were administered primarily by each diocesan Official. Where a diocese was particularly large, it may have been traditionally divided into archdeaconries, each archdeaconry having its own Official. This was the case within the diocese of St Andrews, which was divided into the archdeaconries of St Andrews and Lothian, with an Official presiding over each.¹⁵⁰ These Officials tended to deal with the major aspects of the episcopal jurisdiction, including, among others, actions involving marriage, divorce and legitimacy, benefices, and the greater testaments. There are nevertheless so many exceptions to these general observations that the reader is referred to Ollivant's *Court of the Official*: bishops could take matters directly into their own hands, whilst 'territorial' Commissaries could enjoy unique jurisdictional privileges and customary rights which in effect derogated from the jurisdiction of some Officials. The situation was further complicated in Scotland (and indeed beyond) by the widespread exploitation of the idea of the pope as 'universal ordinary' and the attendant rise in first instance business directed to the Holy See and the proliferation of Scottish churchmen being appointed papal judges delegate to hear specific cases,¹⁵¹ in effect bypassing and indeed undermining the whole system of native Scottish episcopal courts. Various aspects of this complex pre-Reformation

¹⁴⁸ *Court of the Official*, 37-39.

¹⁴⁹ Dickinson, Donaldson and Milne (eds.), *A Source Book of Scottish History* (Edinburgh: Thomas Nelson and Sons, 1953), ii, 93,96; *Atlas of Scottish History to 1707* eds. P.G.B.McNeill and H.L.MacQueen (Edinburgh: The Scottish Medievalists and Department of Geography, University of Edinburgh, 1996), 338.

¹⁵⁰ The Official of Lothian sat in Edinburgh, the Official (in fact Official Principal) of St Andrews sat in the archiepiscopal city of St Andrews.

¹⁵¹ *Court of the Official*, 39-40.

system will be discussed in more detail below within the context of the re-organisation of many of these legal and jurisdictional functions under the post-Reformation dispensation.

§II

SITTING IN JUDGEMENT: THE COMMISSARIES OF EDINBURGH AND THEIR COURT

[i] THE JUDGES

The charter of constitution¹⁵² of the Commissaries of Edinburgh appointed four men of law to sit within the burgh of Edinburgh and administer the jurisdiction entrusted to them on account of the inactivity of the courts of the Officials and Commissaries of the Catholic Church in Scotland. They enjoyed a local jurisdiction within the sheriffdoms of Edinburgh and Stirling and the constabularies of Haddington, Peebles and Linlithgow in actions concerning the payment of tithes and other ecclesiastical revenues,¹⁵³ executry business relating to lesser testaments,¹⁵⁴ slander and defamation,¹⁵⁵ and the appointment of curators,¹⁵⁶ and many small debt actions.¹⁵⁷ They also enjoyed an exclusive national jurisdiction in actions concerning titles to Scottish benefices,¹⁵⁸ actions concerning legal aspects of marriage, divorce and bastardy,¹⁵⁹ and all executry business relating to greater testaments.¹⁶⁰ The Court

¹⁵² See Appendix I, n. 1 for details about which versions of the charter are extant and for an English translation.

¹⁵³ i.e. NAS, CC8/2/1, fo. 197r ; CC8/2/4, fos. 35r-36r; CC8/2/6, fos. 136v-138v.

¹⁵⁴ i.e. *Balfour's Practicks*, ii, 660, items xxv-xxvi.

¹⁵⁵ Discussed below, pages 228-235.

¹⁵⁶ i.e. NAS, CC8/2/1, fo. 77r-v, 23 June, 1564.

¹⁵⁷ *Balfour's Practicks*, ii, 658, items xiii-xv; The 'popularity' of small debt actions is discussed below, pages 207-210. For a summary of the local inferior jurisdiction of the Commissaries of Edinburgh see Appendix I, clause [4]; *Balfour's Practicks*, ii, 658, items xiv-xv.

¹⁵⁸ For an example of this see Thomas Green, 'Scottish Benefices and the Commissary Court of Edinburgh: the Example of *McGibbon v. Struthers*' in *Miscellany VI* (Edinburgh: The Stair Society, 2009), 45-61. It should be noted that this aspect of the Commissaries' jurisdiction has sometimes been overlooked, for example *Guide to the National Archives of Scotland*, 153 *et seq.*

¹⁵⁹ For a summary of the Commissaries of Edinburgh's national jurisdiction see Appendix I, clause [5]. The Commissaries consistorial jurisdiction also included dealing with the contractual

of the Commissaries of Edinburgh can therefore be understood to have been both a national court and a local inferior Commissariat.

The superior national jurisdiction of the Commissaries of Edinburgh in effect represented the centralization of the higher functions of the pre-Reformation episcopal courts. Certain qualifications need to be applied to this generalization. The Commissaries of Edinburgh did not inherit any of the episcopal functions relating to the sacrament of penance, that is to say, they could not hear confessions and grant absolution. Neither could the Commissaries presume to excommunicate those who failed to conform to their summonses and decreets, nor were they competent to decide the orthodoxy of religious beliefs.¹⁶¹ In this, many of the distinctly spiritual functions of the old episcopal courts were absent from the Court of the Commissaries of Edinburgh. It is therefore more accurate to say that the Commissaries of Edinburgh were entrusted with the administration of those legal functions of the old episcopal Officials and Commissaries which could be reasonably administered and enforced by the temporal or secular power, if circumstances dictated that this was a reasonable expedient.

The four men of law appointed as the first Commissaries of Edinburgh were distinguished lawyers in the own right. Master James Balfour, parson of Flisk, a graduate of Wittenberg, last pre-Reformation Official of Lothian, senator of the College of Justice (extraordinary Lord 1561, ordinary 1563), later Sir James Balfour of Pittendreich, author of the famous *Practicks* and Lord President of the College of Justice (1567-8) was the first named of the new judges, and it is often thought that he was the ‘chief’ Commissary, on account of the fact that he received a higher salary

consequences of divorce in making provision for the proper separation of a couples’ shared property and rights.

¹⁶⁰ See Appendix I, clauses [7], [12] and [13]. As well as granting the Commissaries of Edinburgh exclusive jurisdiction in respect of the greater testaments, note also that they were precluded from involvement with the lesser testaments throughout the realm, bearing in mind the earlier grant of jurisdiction over *testate bona* within the ‘commissariat of Edinburgh’. This arrangement was made explicit in the instructions passed to the Commissaries in 1563/4 (*Balfour’s Practicks*, ii, 660, item xxv).

¹⁶¹ It is noteworthy that the Lords of Council and Session assumed this latter aspect of the spiritual jurisdiction, which nevertheless did not pass to the Commissaries of Edinburgh. In 1561 the Lords had granted a commission to the “Superintendent and ministerie of Sanctandros” to take cognisance of Sir John Borthwick’s ‘precept of reduction’ raised against the sentence of Cardinal Beaton which had condemned him for heresy (*St Andrews*, i, 89-104).

than the other three Commissaries.¹⁶² Next named in the charter was Edward Henryson, doctor of laws, formerly professor of Roman law at Bourges¹⁶³ and royal lecturer in law and Greek under Mary of Lorraine,¹⁶⁴ and from 1566 senator of the College of Justice.¹⁶⁵ Henryson was to work with Balfour compiling the Black Acts.¹⁶⁶ Next named was Master Clement Litill, advocate, a law graduate of Leuven and a Protestant convert with a definite interest in theology, best remembered for founding the University of Edinburgh's library.¹⁶⁷ Last named was Master Robert Maitland, whose early career is obscure, but who was soon presented to the deanery of Aberdeen (a living which he resigned in favour of Aberdeen University around 1579¹⁶⁸) and appointed a senator of the College of Justice (1564).¹⁶⁹ There are good reasons to suppose that the bench was composed out of moderates, regardless of religious persuasion.¹⁷⁰

The Commissaries of Edinburgh elected to sit in the Tolbooth of Edinburgh¹⁷¹ where they sat from 'the morn'¹⁷² until some time after dinner,¹⁷³

¹⁶² *Balfour's Practicks*, i, xii-xv; Peter McNeill, 'Balfour, Sir James, of Pittendreich (c. 1525-1583)' (*ODNB*, accessed 12 December 2005); *Senators of the College of Justice*, 110-114. The normal salary for the Commissaries of Edinburgh was 300 marks (£200 Scots) per annum, but Balfour is known to have received 400 marks (*RSS*, v, 1633): the most senior judge on a bench could be distinguished by a higher salary.

¹⁶³ From around 1553 (Marie-Claude Tucker, 'Henryson, Edward [Henry Edourd] (1522-c.1590)' (*ODNB*, accessed 12 December 2005).

¹⁶⁴ John Durkan, 'The Royal Lectureships Under Mary of Lorraine' in *Scottish Historical Review*, 62 (1983), 73-78, 74.

¹⁶⁵ *Senators of the College of Justice*, 132-3.

¹⁶⁶ Cairns, *Historical Introduction*, 95

¹⁶⁷ Charles Finlayson, *Clement Litill and His Library: The Origins of the Edinburgh University Library* (Edinburgh: Edinburgh Bibliographical Society, 1980), 4-6.

¹⁶⁸ NAS, RH15/29/203; *Register of the Great Seal of Scotland*, ed. J.M. Thomson et al (Edinburgh, 1912-), iv, 2862; *Fasti*, 12.

¹⁶⁹ *Senators of the College of Justice*, 122-123. "Mr. 'Rober' M^lLand" was thought to be a Protestant in 1570 (*Calendar of the State Papers Relating to Scotland and Mary, Queen of Scots, 1547-1603*, ed. J. Bain et al (Edinburgh, 1898-1969), iii, no. 601).

¹⁷⁰ Balfour seems to have been a moderate Lutheran, Henryson a moderate Catholic (speculation in Marie-Claude Tucker, 'Henryson, Edward [Henry Edourd] (1522-c.1590)' (*ODNB*, accessed 12 December 2005), but note his time in the household of Henry Sinclair), and Litill a moderate Scottish Protestant, being a lifelong friend of Henry Sinclair (Finlayson, *Clement Litill*, 1). The links with Henry Sinclair, head of the commission appointed in December 1563, are of course noteworthy.

¹⁷¹ i.e. an edict was raised by one Margaret Dowglass on 27 February 1564/5 summoning several persons "to compeir befor the saidis commissaris in the tolbuyth of Edinburgh the xxvi day of februar instant" (NAS, CC8/2/1, fo. 364r-v); see also NAS, CC8/2/1, fo. 341v, 9 February 1564/5. On 24 October 1571 they were ordered to leave Edinburgh and sit in Leith on account of the civil war (*RPC*, ii, 85-87). By 'Tolbooth' it seems that the Over or Upper Tolbooth in St Giles was indicated (see MacQueen, 'Two Visitors in the Session', 160-162).

Monday to Saturday. The court was adjourned for two weeks at Christmas and for two months during the ‘harvest recess’ from mid-August to mid-October.¹⁷⁴ As the charter of constitution made clear, each judge had been personally entrusted with power from the sovereign for the administration of the jurisdiction entrusted to them, and accordingly the presence of one judge only was necessary for the court to convene, although the number of judges present was regularly two, three or four. Initially, the Commissaries were entitled to continue practising as advocates,¹⁷⁵ but this practice was forbidden in 1580.¹⁷⁶

[ii] THE PROCURATOR FISCAL

The pre-Reformation Courts of the Officials had tended to employ Procurators Fiscal, for the purposes of dealing with executry business, collecting fines, and “instigating judges to take cognisance of offences”. As Simon Ollivant has pointed out, all these functions were associated with Procurators Fiscal in the Scottish episcopal courts prior to the Reformation.¹⁷⁷ The first Procurator Fiscal of the Commissaries of Edinburgh was Master Henry Kinross, one of the advocates who had been appointed by the Lords of Council to hear spiritual actions in St Giles’

¹⁷² The Commissaries regularly assigned ‘the morn’ for the pronouncing of interlocutors, or for the productions of writs by parties or their procurators (i.e. NAS, CC8/2/2, fo 251v; CC8/2/3, fo 270r; fo 300r)

¹⁷³ i.e. in *Walker v. Kay* the pursuer referred the libel to the defender’s oath “quhome the saidis Commissaris ordanit tobe present eftirnone to be examinat,” dinner presumably having intervened (NAS, CC8/2/7, fo. 184r, 18 June 1575). When the Commissaries of Edinburgh were debarred from practicing as advocates before the Session and other courts in 1580, it was on the grounds that they often failed to attend the Commissary Court until the Session rose, by which point they were impelled by hunger “to pass to thair dennaris” (Finlayson, *Clement Litill*, 16).

¹⁷⁴ i.e. they did not sit between 21 August and 6 October 1564; 19 December 1564 and 6 January 1564/5 (NAS, CC8/2/1, fos 165r & 171r; fos 288r & 291v). They also presumably adjourned for Easter, and for holy days, in conformity with the practice of the Lords of Council and Session. The Lords were accustomed to sit in judgement Monday to Saturday, with vacations at Christmas, Easter and over the summer recess (see *RPS*, A1567/12/28; *APS* iii 32, c.29).

¹⁷⁵ Ireland, ‘Husband and Wife: Post-Reformation’, 82.

¹⁷⁶ Finlayson, *Clement Litill*, 16.

¹⁷⁷ Procurators Fiscal were found in most Scottish courts, civil, ecclesiastical and criminal “from the earliest times”. Ollivant has demonstrated that the ‘criminal’ role of Fiscals in prosecuting miscreants was a feature of pre-Reformation Fiscals, and not a French import dating from around 1560 as had previously been argued (*Court of the Official*, 54-55).

and the Tolbooth during March 1561/2.¹⁷⁸ Kinross received 80 marks a year¹⁷⁹ and had the power to appoint a deputy as he saw fit.¹⁸⁰ The fiscal was particularly active in pursuing actions for annulment¹⁸¹ and for solemnization,¹⁸² and from this it is clear that he was obliged to make inquiries and, if appropriate, pursue actions on the basis of information received concerning breaches of the law of the Commissaries.¹⁸³ In addition, the fiscal was heavily involved in executry business, particularly in issuing edicts against anyone with an interest in the moveable estate of a defunct for whom the Commissaries had no testament in their registers, so that either a testament might be produced and testamentary executors confirmed or, if the defunct had died intestate, executors dative might be given.¹⁸⁴ The fiscal also pursued those who deforced the officers and messengers of the Commissaries of Edinburgh.¹⁸⁵

Whilst Kinross's religious affiliations are not known, one of his fiscals-depute, Master Alexander Skene, continued to adhere to the old religion. His actions both before and after the appointment of the Commissaries of Edinburgh suggest that he was not a moderate intent on observing the rule of law: during the summer of 1561 he was imprisoned in the Tolbooth of Edinburgh for a short time for participating in a Mass the previous Easter, and whilst released on a promise of good behaviour, was nevertheless excommunicated by the Kirk in July 1569.¹⁸⁶

¹⁷⁸ Smith, 'Spiritual Jurisdiction', 13-14.

¹⁷⁹ Kinross received £26/13s/4d (40 marks) at Martinmas 1566 and Whitsunday 1567 (NAS, CS4/6, fos 6v-7r).

¹⁸⁰ For example, Master Alexander Skene appeared as 'procuratoure fiscall depute' on 21 March 1568/9 (NAS, CC8/2/3, fo. 239r). It is peculiar to note that one of the Commissaries, Clement Litill, appeared as Procurator Fiscal on 29 November 1569 (NAS, CC8/2/4, fo. 92v).

¹⁸¹ i.e. NAS, CC8/2/6, fos 428r-429r, 8 July 1574, *Fiscal v. Ogilvy, Fraser & Chisholme*; NAS, CC8/2/7, fo 243r, 21 July 1575, *Fiscal v. Patersoun & Johnestoun*.

¹⁸² Indeed, the fiscal was just as likely to bring an action to compel solemnization as a male litigant! (see below, Chapter V, §II, Table 1).

¹⁸³ Riddell described the Procurator Fiscal of the Commissaries of Edinburgh as *ensor, castigatorem morum* (Riddell, *Inquiry*, ii, 1003).

¹⁸⁴ A standard formula was employed by the clerks of court when an edict of executry had been raised by the Fiscal: i.e. "Anent the edict rait at the instance of maister henrie kinross procuratour fischale to oure Soverane Lady aganis the executouris testamentaris spouss and barnis gif ony be and intromettors with the gudis and geir of vmqle..." (NAS, CC8/2/2, fo 30r, 21 May, 1565). There are dozens of examples of such entries in the early registers of acts and decreets.

¹⁸⁵ i.e. NAS, CC8/2/1, fo. 138, *Fiscal v. Sympsoun*; fo. 227v, *Fiscal v. Maxwell*.

¹⁸⁶ Michael Lynch, *Edinburgh and the Reformation* (Edinburgh: John Donald Publishers Ltd, 1981), 292.

One of the principal administrative problems encountered by the Commissaries of Edinburgh concerning executry business was in ensuring that they were reliably informed of the deaths of those with moveable estate, especially when there was no testament. The old Officials and Commissaries of the Catholic Church had certainly relied upon the knowledge of the parish clergy within their jurisdictions.¹⁸⁷ Two principal problems faced the new administration. On the one hand the tenure of the Catholic clergy had been interrupted, and it was by no means clear that the ministry of the Reformed Kirk was in a position in 1564 to keep detailed registers of deaths for the assistance of the Commissaries. In addition, the interruption in the effective administration of justice in executry business occasioned by the ‘uproar for religion’ from 1559 left the new administration with the basic problem of re-asserting order.¹⁸⁸ On the other hand, whilst the Commissaries of Edinburgh’s jurisdiction in confirming lesser testaments within the constabularies of Haddington, Linlithgow and Peebles and the sheriffdoms of Edinburgh and Stirling was possibly manageable, it was a taller order to gather information from the entire realm concerning the death of any intestate persons whose dead’s part exceeded the sum of £50 Scots.¹⁸⁹ The old Officials, who had dealt with the greater testaments prior to the Reformation, had done so on the level of dioceses or archdeaconries: the Commissaries of Edinburgh were expected to do so for the whole of Scotland.

The confirmation of testaments, great and small, was one of the principal points of interest in the Commissary system, from the perspective of the senators of the College of Justice. As is well known, the quot silver levied each time a testament was confirmed¹⁹⁰ had been one of the most lucrative sources of the profits of justice for the medieval Church,¹⁹¹ and in the new order it was intended that the quot silver would help remunerate not only the Commissaries of Edinburgh, but provide £1600 a

¹⁸⁷ Donaldson, ‘Church Courts’, 366.

¹⁸⁸ Hannay, *College of Justice*, 82.

¹⁸⁹ *Practicks*, ii, 660, item xxv.

¹⁹⁰ Where the defunct was intestate, the quot was levied for the right to intromit with the defunct’s movable estate (*RPS*, v, 1633, note).

¹⁹¹ *Rentale Sancti Andree*, trans. & ed. R.K.Hannay (Edinburgh: Scottish History Society, 1913), 90, 105-106, 173-174, 207-208.

year to the senators of the College of Justice.¹⁹² The executry business of the Commissaries of Edinburgh and the inferior, territorial Commissariots, was therefore intended to generate revenues which could be centrally administered and collected in Edinburgh. As such the ‘Quot Collectory’ was part of the general inclination towards the centralization of the collection of revenues pertaining or formerly pertaining to the medieval Church, of which the Collectory of the Thirds of Scottish Benefices was the most ambitious example.¹⁹³

The organization of the Quot Collectory was clearly beyond the remit of the Procurator Fiscal of the Commissaries of Edinburgh and Duncan Livingston was accordingly appointed “collectoure and ressaure of the cottis of all testamentis of the commissariat and jurisdiction of Edinburgh, grete and small and all utheris jurisdictionis and commissariattis within hir hienes realme” on 28 March 1564, shortly after the appointment of the Commissaries of Edinburgh.¹⁹⁴ It would appear that Livingston was initially subject to the Commissaries of Edinburgh and that the senators of the College of Justice had intended to take no part in the organization of the Collectory, content to wait for their twice yearly payment of £800.

The Collectory was not initially a success. The basic problem already mentioned was that the Commissaries of Edinburgh and the territorial Commissaries were not in possession of the intimate parochial knowledge of death necessary for the enforcement of their jurisdiction in executry business. On this head, the Commissaries of Edinburgh petitioned the General Assembly,¹⁹⁵ whose minutes for 27 June 1565 recorded that “Tuiching the requeist of the Commissaries of Edinburgh, that everie Minister or Reader sould have a register of the names of the deceased of the place where they dwell, the day of the moneth and yeere, and deliver a copy thereof to the procurator fiscall, that pupils and creditors be not defrauded: It was answered, they could not lay suche a charge upon their brethren, in respect none or few of the Ministrie had manses and gleebes to make residence in; bot how soone

¹⁹² *The Acts of Sederunt of the Lords of Council and Session, from the 15th January 1553, to the 11th of July 1790* (Edinburgh: Elphinston Balfour, 1790), 6-7.

¹⁹³ See *Accounts of the Collectors of the Thirds of Benefices, 1561-1572* ed. G. Donaldson (Edinburgh: Scottish History Society, 1949).

¹⁹⁴ *RSS*, v, 1658/9.

¹⁹⁵ Conform to their initial instructions (*Balfour's Practicks*, ii, 660, item xxvii).

they obtained their manses, they sould exhort them, as they salbe required, to doe conforme to the said Request”.¹⁹⁶

Clearly some different order was required, but before the Commissaries of Edinburgh could take further order in the matter their powers were curbed. By the summer of 1566 no financial account of the Collector of the Quots had been rendered and the senators were frustrated of their remuneration. “The Chancellor and some others were now to have commission for a general reckoning since the late institution of the testamentary jurisdiction, with orders to pay the available balance to the lords according to their residence. In December [1566] a royal ordnance... gave the Chancellor and the senators of the College of Justice a general supervision of the commissary system... The ordnance was devised to improve the effective working of the recently established courts, and at the same time to bring in the money for the senatorial emoluments...”.¹⁹⁷ Accordingly, on 26 March 1567, the Lords of Council and Session passed new instructions to the Commissaries of Edinburgh and the inferior commissaries, all of which concerned testamentary business and the collection of the quots.

The instructions are printed in full in *Balfour's Practicks*,¹⁹⁸ but the principal features for the present discussion were as follows. Each inferior Commissary was to appoint a Procurator Fiscal. Each Fiscal was to “send the namis of all persounis that sall happin to deceis within thair jurisdictionoun, als weill of greit and small testamentis, to the Procurator-fiscal of Edinburgh” twice a year, as well as acting as executor dative in various cases, making compt and reckoning for their intromission to the Collector of the Quots. Inferior Commissaries were also to take a more active role, by regulating intromissions and ensuring the production of inventories, and by keeping registers of testaments. Copies of the latter were to be brought to Edinburgh once a year,¹⁹⁹ for production before the “Lords of Session and Commissaries of

¹⁹⁶ *Acts and Proceedings of the General Assemblies*, i, 63.

¹⁹⁷ Hannay, *College of Justice*, 82-83; cf *Balfour's Practicks*, ii, 673-676 (see *RPS*, 1581/10/84 for English translation); *Concilia Scotiae*, i, clxxix.

¹⁹⁸ *Balfour's Practicks*, ii, 662-664, but note the dating of them to MDLVII is a misprint. A contemporary copy of the instructions survives, dated 1567 (NAS, CC8/2/1, fos. 430v-434v).

¹⁹⁹ The original instructions given to the Commissaries of Edinburgh had insisted on the measure (*Balfour's Practicks*, ii, 659, items xxix and xxii), but presumably to no avail. It must have been rapidly apparent that the authority of the Commissaries of Edinburgh required more direct augmentation by the Lords of Session than had previously been envisaged.

Edinburgh” so that each inferior Commissary could be held liable for the payment of the quots recorded in their registers of testaments. Hannay has suggested that prior to 1566 some inferior Commissaries had been acting improperly.²⁰⁰ The keeping of registers of testaments (and inventories) was one of the essential services offered by the Commissary system, and since a record of the quot levied on the dead’s part was recorded in the margin next to each testament, the new arrangements allowed the Collector of the Quots to keep a close eye on the provinces.

[iv] THE CLERKS OF COURT

The principal clerk of the Commissaries of Edinburgh was John Johnston.²⁰¹ Johnston’s appointment was for life, although his tenure was interrupted between the harvest recess of 1565 and that of 1567, during which time the French courtier Sebastian Danelourt held the clerkship.²⁰² Those who consult the principal registers of the Commissaries of Edinburgh will note that the registers of acts and decreets, together with the register of deeds, are missing for the period of Danelourt’s office, whilst no registers of testaments are extant until Johnston’s return to office in 1567 following Mary’s abdication. The principal clerk was the only clerk whose source of income was made explicitly clear in 1563/4. He was to have one third of all “the profitis of all summondis, actis, contractis, obligatiounis, sentences, transumptis, confirmatiounis, and registering of testamentis and uther writingis quhatsumevir...[with] the profit of the signet, and seill thairof” and to provide his own “paper, ink, walx [*sic*] and writing chalmer”. Since the other two thirds were to be paid to the Commissaries of Edinburgh, it must be presumed that all other clerks who found employment in the court were remunerated by the principal clerk for their services.²⁰³

²⁰⁰ See below, pages 75-76.

²⁰¹ Certainly from at least 17 July 1564 (NAS, CC8/2/1, fo. 108v). See NAS, CC8/2/1, fo. 241v for his signature, and fos. 322v, 333r and CC8/2/2, fo.44v for his notorial sign. Johnston’s hand is the neatest in the registers of acts and decreets, and is the predominant hand for some time following CC8/2/2, fo. 139r, 14 October 1567.

²⁰² *RSS*, v, 2323: Johnston re-instated *RSS*, vi, 13.

²⁰³ *Balfour’s Practicks*, ii, 661, item xxxiii: the exception being the Keeper of the Seals, who received £10 every six months from the Collector of the Quots (NAS, CS7/6, fos. 6v-7r).

The evidence of the extant registers demonstrates that Johnston deputised from time to time, and the identities of some of these clerks-depute may have been Adam Wauchope²⁰⁴ and James Nicholson.²⁰⁵ Sebastian Danelourt's main deputy was Michael Majoribanks,²⁰⁶ who seems to have acted in a similar capacity for the last Official of Lothian.²⁰⁷ There were also a number of other clerks to whom specific functions were given. On 1 March 1564/5 William Cowry was named former of testaments,²⁰⁸ upon whose decease George Sinclair was appointed in his place on 16 October 1566.²⁰⁹ On 5 December 1566 John Broun was granted the office of 'Keeper of the Commissariat Seals of Edinburgh'.²¹⁰ These various clerks kept three principal registers: acts and decreets; testaments; deeds and obligations.²¹¹ They also prepared vast amounts of loose papers including summonses, copies of various process papers, sentences, instruments, transumptis and the like, very little of which is still extant for the period under study.

In contrast to the moderates on the bench, Johnston was one of the more active and radical members of the Court, whose strong Protestant convictions²¹² involved him directly in the Moray conspiracy against Mary and Darnley during the summer of 1565. Johnston, together with James Nicolson, acted as agents of the English ambassador Randolph, passing monies sent by Elizabeth to Moray.²¹³ When

²⁰⁴ NAS, CC8/2/2, fo. 138r, 18 August 1565.

²⁰⁵ NAS, CC8/2/2, fo. 135v.

²⁰⁶ NAS, GD16/41/28, extract copied 'furth of the bukis of causis of the said Commissariat [of Edinburgh] be me Michael Marioribankis clerk of the samyn...' dated 13 May 1566. Marjoribanks was clerk of the kirk session of Edinburgh in 1565 (Lynch, *Edinburgh and the Reformation*, 341).

²⁰⁷ i.e. Majoribanks was referred to as "kepar of the bukis of the consistorial jurisdiction of Edinburgh for the tyme" in an action before the Commissaries (NAS, CC8/2/2, fo 58r, *Borthwick v. Megot*).

²⁰⁸ RSS, v, 1936. Many testaments were written by persons other than the testator (especially when the testator was illiterate), and whilst this function could be carried out by notaries, the inclusion of a former of testaments among the clerks of court was most likely an attempt to regulate the production of authentic testaments.

²⁰⁹ RSS, v, 3095.

²¹⁰ RSS, v, 3119. The function of the keeper of the seals is discussed below, page 148.

²¹¹ For authorization to keep the latter see *Balfour's Practicks*, ii, 658, xiii. See the *Guide to the National Archives of Scotland*, 158, for further details of the registers which are extant.

²¹² Johnston was named by Knox as one of his most trusted contacts in Edinburgh in June 1559 (Lynch, *Edinburgh and the Reformation*, 282-283, citing *The Works of John Knox*, ed. D. Laing (Edinburgh: Bannatyne Club, 1846-1864), vi, 27).

²¹³ Lynch, *Edinburgh and the Reformation*, 110.

the Moray conspirators entered Edinburgh on 31 August 1565 and publicly attempted to rally the townsfolk to the “defence of the glory of God” and the Protestant religion with offers of money,²¹⁴ Johnston and Nicolson were almost certainly with them, having fled the town five days earlier.²¹⁵ The conspirators retreated from Edinburgh on 1 or 2 September²¹⁶ and Johnston and Nicolson fled into England, petitioning Elizabeth for support on the grounds that they had been “put to great extremity” by their pro-Protestant and pro-English actions, suffering the confiscation on their rents, houses and goods and the eviction of their families.²¹⁷ Whatever manner of support they may have received in England, both men presumably returned to Scotland, receiving remissions from Mary during the winter of 1565-6 for their involvement in the conspiracy.²¹⁸

[v] OFFICERS AND MESSENGERS

The Commissaries of Edinburgh also employed a number of officers and messengers both within the Commissariat of Edinburgh, and, where the Commissaries’ national jurisdiction was concerned, throughout the realm. The messengers were clearly men of at least basic literacy whose principal function was the serving of summonses and sentences, always executing such writs in the presence of witnesses, and having so served the writs, duly endorsing them.²¹⁹ On a national level, the *Accounts of the Collector of the Quots* for 1566-7 lists several men who were employed to serve edicts of executry throughout the realm. William Douglas was well remunerated for passing to Fife, Tweeddale, Clydesdale, Angus, Strathearn,

²¹⁴ *Knox’s History of the Reformation*, ed. Dickinson, ii, 161.

²¹⁵ Johnston and Nicolson fled Edinburgh and passed to the conspirators on 25 August 1565, having been “banist as is afoirsaid of our soueranis” (*A Diurnal of Remarkable Occurents that have passed within the country of Scotland since the death of King James the Fourth till the year 1575*, ed. T. Thomson (Edinburgh: Bannatyne Club, 1833), 81).

²¹⁶ *Knox’s History of the Reformation*, ed. Dickinson, ii, 163.

²¹⁷ *Calendar of the State Papers Relating to Scotland and Mary, Queen of Scots*, ii, no. 240.

²¹⁸ Nicolson’s remission was dated 23 December 1565 (*RSS*, v, 2508), Johnston’s 15 January 1565/6 (*RSS*, v, 2541).

²¹⁹ Prior to 1559 it had been common for priests to execute summonses issued by the episcopal courts (*Court of the Official*, 99), but there is no evidence that ministers of the Protestant Kirk assumed a similar function under the Commissaries of Edinburgh and the inferior Commissaries.

“langis the cost syd to Sanctandrois,” Dundee, Perth, Dunblane and Stirling serving edicts, whilst Thomas Wilke was similarly well remunerated for passing to East Lothian, “Lauderdaill & to the forest,” Teviotdale, “Lynlythgwschire” and “Ratho kirkliston and thairabout,” Peebles, Jedburgh, Selkirk and the Merse, Glasgow, Dumfries, Dalkeith, Lasswade and Newbattle serving edicts. John Kerse’s remuneration for similar work suggests he operated on a more local level.²²⁰

Officers on the other hand²²¹ were more involved in the pointing of goods for the payment of debts. Details of their duties and the risks they ran are revealed in the registers of acts and decreets on those occasions when they were deforced. One of the more vivid accounts concerned the “maisterfull deforcing and dinging of Robert Drummond ane of the saidis commissaris officiaris” whilst executing a precept of pointing and arresting brewing equipment from a private dwelling. Having been assaulted, Drummond returned with witnesses and formally broke his wand.²²² Other officers included John Dickson, whose appointment as an officer is narrated in the acts and decreets of the Commissaries of Edinburgh,²²³ and Alexander Leckprevick,²²⁴ whilst the same register contains a further example of deforcement, namely that of “James Falconer messenger”.²²⁵

Nevertheless, the Commissaries were not reliant upon their own messengers and officers alone, especially were the execution of sentences was concerned. The original instructions passed to the Commissaries of Edinburgh stated that “the Judges, gevar of the sentence, to direct his precept to his Officiaris, to be creatit be him for executing thairof, or to ony uther the Quene’s Grace’s Officiaris of armis, Schireffis, Stewartis, Baillies, thair deputis, Provestis and Baillies of burghis, and Baronis Officiaris, at the optioun of the partie obtenar of the decrete...”²²⁶ In

²²⁰ NAS, CS4/6, fos. 11r-v. Douglass and Wilke could be paid anything between 7 and 40 shillings per job. For example, Wilke’s passage to Glasgow and Dumfries cost 40 shillings, whilst Douglass received 30 shillings for serving edicts in Fife. For a vivid insight into what this kind of work could entail see Margaret Sanderson, *Mary Stewart’s People* (Edinburgh: James Thin, 1987), 135-148.

²²¹ Although it is not clear if a strict distinction was maintained in the Commissaries’ Court between messengers and officers.

²²² NAS, CC8/2/1, fos 227v, 250v-251r, *Fiscale v. Maxwell*.

²²³ NAS, CC8/2/1, fo. 410v, penult March 1565.

²²⁴ NAS, GD137/2210, precept of pointing issued by “Maister Robert Maitland, Dene of Abirdene, ane of the Commissaris of Edinburgh” and duly executed and endorsed by Alexander Leckprevick.

²²⁵ NAS, CC8/2/1, fo. 188v.

²²⁶ *Balfour’s Practicks*, ii, 658-9, item xvi.

addition, it was clearly intended from the beginning, that if subjects of the Crown failed to co-operate with the precepts of the Commissaries of Edinburgh, the authority of the Lords of Council of Session was to be invoked.²²⁷

[vi] PROCURATORS

Procurators were in effect self-employed members of the Court who only put in appearances when employed to do so by litigants. A great many procurators practised out of the luckenbooths on the High Street.²²⁸ There was no obligation on the part of litigants to employ their professional services, but they were nevertheless widely used, particularly in complex actions.²²⁹ Several famous sixteenth-century men of law acted as procurators before the Commissaries of Edinburgh, including Thomas Craig,²³⁰ John Shairp²³¹ and Alexander Sym.²³² There is also evidence that they were a closely knit group of professionals who were capable of acting in unison on occasion. This was certainly evident in the quite remarkable case of *Ruthven v. McCalzean* (1570), which provides several vivid insights into the procurators of the Courts of the Commissaries of Edinburgh.

The action was brought by Archibald Ruthven, brother of William Lord Ruthven against Thomas McCalzeane of Cliftonhall²³³ and his daughter Euphame McCalzeane,²³⁴ desiring that Euphame be compelled by the Commissaries to solemnize marriage with Ruthven. On 14 December 1570 Ruthven appeared before

²²⁷ See below, pages 74-75.

²²⁸ See Finlay, *Men of Law*, 94.

²²⁹ See below, pages 215-216.

²³⁰ See John W. Cairns, 'Craig, Thomas (1538?-1608)' (*ODNB*, accessed 24 Feb 2010).

²³¹ See Sanderson, *Mary Stewart's People*, 22-33.

²³² Alexander Sym was appointed a lecturer in "the lawis or ony utheris sciences" under Mary of Lorraine (Durkan, 'The Royal Lectureships', 73-74), and was Balfour's successor as a Commissary of Edinburgh from October 1565, who likewise received 400 marks a year (*RSS*, v, 2396). See Appendix II, F (1) and (2) for the names of all men of law known to have procured before the Commissaries of Edinburgh in consistorial actions, although these tables are arranged by 'action' rather than the surnames of procurators.

²³³ By the time of this action, McCalzeane had been admitted as Ordinary Lord of Session (*Senators of the College of Justice*, 149-151).

²³⁴ Euphame McCalzeane was executed for witchcraft in 1591 (L.A. Yeoman, 'North Berwick witches (act. 1590-1592)' (*ODNB*, accessed 24 February 2010).

the Commissaries “and producit ane act of the saidis Commissaris deulie execute & indorsate vpoun Maisteris Johne Schairp, Edmound Hay, Maister Johne Moscrope, Henry McCalzyn, Alexander King, Master Johne Frude, Thomas Westoun, Johne Logye, Henrye Kynross, Thomas Craig, Johne Abircrumby, berand that thai wer lauchfullie chargit be vertew thairof to anser & declare ane ressonable caus quhy thay will not procure in persute of the said Archibaldis actioun aganis the said Master Thomas & the said Eufame his dochter, with certificatioun to thame & thai falzeit thairin the saidis Commissaris wald discharge thame of all procuratioun befor thame”. King and Weston duly appeared, but when the Commissaries asked Ruthven if he wished them to procure for him, he declined their services, requiring instead that Kinross, Hay and Craig should act as his procurators. Both Hay and Craig objected, but the Commissaries ordained that Kinross and Craig were to procure for Ruthven “vpoun his Ressonable coistis vndir the pane of depriuatioun of thame of all maner procuratioun befor thame”.²³⁵

On the one hand this remarkable occurrence illustrates the fact that those men of law who practiced before the Commissaries of Edinburgh were formally admitted to do so by the Commissaries.²³⁶ On the other hand, there seems to be striking evidence that they were prepared to act in concert if faced with a litigant to whom they strongly objected.²³⁷ Whilst the character of Ruthven and the nature of relations between the litigants have not been researched here, there is more than a suggestion that even the Commissaries were not entirely against the procurators’ actions: Ruthven also alleged that one of the Commissaries had desired “the remanent of the men of law to have maid ane burs to send men to invade him in his persoun, saying with litle money and thair servandis he suld be compellit to Liepe the wallis of thair toun”!²³⁸

²³⁵ NAS, CC8/2/5, fos 26v-27r, 14 December 1570, *Ruthven v. McCalzen*.

²³⁶ This was clearly stated in the charter of constitution (see Appendix I, clauses [7] & [15]).

²³⁷ There is ample evidence that generally speaking Edinburgh’s men of law (many of whom practised before the Commissaries) were a close knit and often interrelated group of professionals who constituted a discrete component of Scottish society by the mid-sixteenth century (see Finlay, *Men of Law*, 58 *et seq*).

²³⁸ NAS, CC8/2/5, fos 26v-27r, 14 December 1570, *Ruthven v. McCalzen*.

The most disruptive event in the history of the Court of the Commissaries of Edinburgh during the period covered by this thesis occurred after Edinburgh fell under the control of the Marian lords during the course of March 1570/1 and April 1571. A struggle for the control of the administration of the central civil, criminal and ecclesiastical courts of justice in Scotland ensued between the rival factions of those still loyal to Mary in Edinburgh and of those loyal to her infant son and his regent, the Earl of Mar, in Leith. The Marian lords' gradual assertion of martial control over Edinburgh broke out into open hostilities on 29 April 1571, with a skirmish at the Netherbow port between the Marian and the king's men,²³⁹ setting in motion a sequence of events which forced the Commissaries and the members of their court to make their loyalties clear by either remaining in Edinburgh or repairing to Leith.

Three days after the skirmish at the Netherbow port, on 2 May 1571, the Commissaries sat in judgement in Edinburgh for the last time in the person of Edward Henryson,²⁴⁰ although evidence from the registers of deeds show that Clement Litill continued occasionally to register deeds down to 18 June.²⁴¹ By the time of the usual two month harvest recess from mid-August the business of the court had clearly ground to a halt, and before the court had reconvened in late October, the Regent Mar and his Privy Councillors at Leith had issued an ordinance ordering various judges and officers of the realm, including the Commissaries of Edinburgh and the Senators of the College of Justice, together with all advocates, procurators, clerks, scribes and writers to come to Leith "and nawyse depart without licence quhill the xx day of December nixt to cum".²⁴²

The Commissaries of Edinburgh duly conformed to the ordinance and sederunts at Leith began to be recorded from 2 November 1571.²⁴³ Whilst the

²³⁹ Lynch, *Edinburgh and the Reformation*, 130-131.

²⁴⁰ NAS, CC8/2/5, fo. 161v.

²⁴¹ Lynch, *Edinburgh and the Reformation*, 133.

²⁴² *RPC*, ii, 85-87.

²⁴³ NAS, CC8/2/5, fo. 162v.

sederunts often gave only the date and the location of the sittings, some sederunts reveal that Edward Henryson, Clement Litill and Alexander Sym were all present.²⁴⁴ The fourth Commissary, Robert Maitland, although not named in any of the Leith sederunts, was numbered among the king's men. When the Marian lords somewhat belatedly responded to this triumph for the Regent, issuing a proclamation at the market cross of Edinburgh on 28 April 1572, "Robert Maitland, dene of Abirdene" was listed along with Henryson, Litill and Sym as those who were "present at Leith partakaris with the king and rebellis to the quene and hir lieutennentis".²⁴⁵ The same proclamation also sheds considerable light upon the actions of the lesser members of the Commissaries' Court during the troubles. John Johnson, having been re-appointed to his clerkship in 1567, was listed among those present at Leith,²⁴⁶ together with George Sinclair, confirmer of testaments and Duncan Livingston, Collector of the Quots.

Events in Edinburgh were also revealing. Whilst James Balfour had ceased to sit as a Commissary of Edinburgh from October 1565, it is nevertheless worth noting that he was a queen's man, remaining in Edinburgh during the troubles and indeed being appointed provost of the 'Marian' town council of Edinburgh during October 1571.²⁴⁷ Adam Wauchope, sometime clerk-depute in the Court of the Commissaries was killed early on in the troubles, fighting for the king's men on 2 June 1571 at Edmonston Edge in "the first really serious skirmish of the wars".²⁴⁸ Michael Marjoribanks, Sebastian Danelourt's old clerk-depute, also remained loyal to the queen, being appointed clerk to the 'Marian Commissaries of Edinburgh,' who, despite being appointed in the proclamation of 28 April 1572, "gott aither litill or nathing adoe".²⁴⁹

Despite the Marian lords' attempt to appoint rival Commissaries to those sitting in Leith, it is clear that Maitland, Henryson, Litill and Sym retained

²⁴⁴ i.e. NAS, CC8/2/5, fos. 166r (20 December 1571), 178r (13 February 1571/2), 207r (13 June 1572).

²⁴⁵ *Diurnal of Remarkable Occurents*, 294-295.

²⁴⁶ An entry was made in the registers of acts and decreets in Johnston's hand on 8 January 1571/2 (NAS, CC8/2/5, fo. 168r).

²⁴⁷ Lynch, *Edinburgh and the Reformation*, 245.

²⁴⁸ Wauchope was servant to James McGill, Clerk Register, a king's man (Lynch, *Edinburgh and the Reformation*, 304-305 and 132).

²⁴⁹ *Diurnal of Remarkable Occurents*, 295.

possession of their registers of acts and decreets, presumably through the offices of John Johnston, who seems to have kept possession of 'his' registers on the earlier occasion of his flight into England. This was in contrast to the records of the Lords of Session, in that Maitland of Lethington had been able to boast that the king's party would struggle to "gar the session sit in ony part of Scotland, as we have stayit the clarkis thairof in Edinburgh, with the hail bukis, writtis & processes".²⁵⁰ Entries in the Commissaries' register for the period contained the Edinburgh sederunts recorded up to 2 May 1571 before immediately continuing with the Leith sederunts from 2 November 1571.²⁵¹ Whilst the Leith sederunts were sparse for November and December 1571, it is clear that by the middle of January 1571/2 the Commissaries at Leith were sitting fairly regularly. They continued to sit at Leith until 28 July 1572, being the last sederunt in NAS, CC8/2/5, immediately after which a clerk wrote "The Buke concludis with this decret. Quhen this buke tuke end the abstinence [i.e. truce] betuix the king his Regent and the partye of Edinburgh tuke begyningis".²⁵² By the next recorded sederunt on 16 August 1572 the Commissaries had returned from Leith and were once again sitting in judgement in Edinburgh.²⁵³

The various religious and political difficulties and divisions of the Reformation era were all to be found in the personal beliefs and loyalties of the members of the Court of the Commissaries of Edinburgh. Yet whilst the court was not without its more radical and active elements among the minor personnel, whether Catholic or Protestant, king's men or queen's, the fact remains that the court was presided over by deeply learned and moderate judges. As will be shown during the course of this thesis, the moderate approach of the Commissaries was manifested in the policies they developed in dealing with the legacy of the old courts spiritual, their personnel and the Canon law they had administered, and in dealing with the emergent and then established tribunals of the Protestant Kirk. This is no surprise: the very appointment of the Commissaries of Edinburgh proceeded upon a desire to

²⁵⁰ *Miscellaneous Papers principally illustrative of events in the Reigns of Queen Mary and King James VI*, ed. W.J. Duncan (Glasgow: Maitland Club, 1834), 66.

²⁵¹ See NAS, CC8/2/5, fos. 161v-162v.

²⁵² NAS, CC8/2/5, fo. 237r.

²⁵³ NAS, CC8/2/6, fo. 1r. This folio began with sederunts for 16 August and 23 September 1572, although little business was done. Regular sederunts began from 7 October.

protect and continue to administer many of those aspects of the spiritual jurisdiction imperilled by radical Protestantism, whilst at the same time acknowledging the role of the Protestant Kirk in Scottish life. The initial undertaking, reflecting Mary's own approaches whilst queen, did not seek to push either a radical Catholic or Protestant line, but by allowing aspects of both to be acknowledged under the new order, harnessed the hopes and motivations of both Catholics and Protestants in the common interest of order.

§III

THE INFERIOR COMMISSARIES

[i] JUDGES AND SEATS OF JUDGEMENT

A significant amount of information about the inferior Commissaries and their Commissariots has already been published. In the *Atlas of Scottish History to 1707* Sheriff David Smith has provided a map of the locations of the inferior Commissariots for the post-Reformation period, which has been set opposite a map of the locations of the pre-Reformation Courts of the Catholic Church in Scotland.²⁵⁴ In addition, the editors of the *Fasti Ecclesiae Scoticae Medii Aevi* have included some of the details of the of the post-Reformation Commissaries down to 1638, in acknowledgement of their continued administration of the functions of pre-Reformation episcopal judges.²⁵⁵ The compilation of data for the post-Reformation Commissaries in the *Fasti* is still ongoing.²⁵⁶ Whilst a comprehensive and authoritative study of the history and relations between the pre- and post-Reformation regional episcopal and Commissary Courts is still some way off, various themes can be at least partially explored here.

²⁵⁴ *Atlas of Scottish History*, 381 & 380.

²⁵⁵ *Fasti*, arranged by diocese, the Commissaries details appear after those of the deans of Christianity and the Officials.

²⁵⁶ Many of the references in the *Fasti* must have been provided by Sheriff David B. Smith, who is thanked by the editors in their preface. David Smith has allowed the present researcher full access to his own notes and research, upon which the maps in the *Atlas* are based, and which contained various additional references which have been passed to Athol Murray for inclusion in the *Fasti*: many of these have provided the references cited in this section.

That there were instances of the continuity of place and personnel between the pre- and post-Reformation episcopal and Commissary Courts in the localities has long been understood. As early as 1957 Gordon Donaldson had pointed out that in “the obscure matter of the transition of the subordinate commissariots... in Dunkeld the existing commissary, John Bertoun, seems simply to have received a fresh commission from the queen, and continuity is strongly suggested by the fact that sir Duncan McNair was appointed commissary clerk in succession to the late sir Robert McNair. It is known from other sources that the local commissaries appointed by the bishops did in fact sometimes retain their offices”.²⁵⁷ The reference to ‘other sources’ was amplified in Donaldson’s article on Church Courts in 1958 and is worth quoting at length:

“Local jurisdiction throughout the country remained after 1564 with the local commissaries. Those actually holding office (by episcopal appointment) were apparently authorised to continue to act: thus Archibald Menzies was commissary of Dumfries from about 1543 until 1579 and “usit that charge and office to the gude lykyn and contentment of the maist part” of the people of the district; in Glasgow, Archibald Betoun, official general in 1560, was still commissary in 1581; Hugh Craigie was commissary of Moray from 1559 to 1586; and James Duff seems likewise to have been commissary of Inverness before and after the Reformation. The manner of filling vacancies was not defined until 1566, when it was laid down that the Lords of Council and Session should present candidates for appointment by the crown. In practice there were twenty-three local commissariots, their boundaries based on those of the old dioceses and their subdivisions”.²⁵⁸

Further instances of continuity of personnel in the localities may be added in support of Donaldson’s general thesis, and there is also widespread evidence that post-Reformation commissaries continued to sit in the ‘consistory places’ of the pre-Reformation courts. In Aberdeen, Nicol Hay had sat in judgement prior to 1559 with John Leslie, Official of Aberdeen and Sir David Seton, his commissary: in the new system Hay enjoyed a long career as commissary of Aberdeen, sitting in judgement in “the consistorie place of auld Aberdeen”.²⁵⁹ In Brechin, continuity of judge is not clear, but what is clear is that the earliest post-Reformation commissary, Thomas

²⁵⁷ *RSS*, v(i), xvi-xvii.

²⁵⁸ Donaldson, ‘Church Courts’, 369.

²⁵⁹ Presumably in St Machar’s Cathedral (NAS, CC8/2/1, fo. 271r-v); *Fasti*, 33. Hay was also Civilist at King’s College from 1558 (David Stevenson, *King’s College, Aberdeen, 1560-1641* (Aberdeen: Aberdeen University Press, 1990), 49, 134, n.22).

Ramsay, sat in judgement in Brechin cathedral.²⁶⁰ In Dunkeld, continuity of place cannot be confirmed, and it is possible that Donaldson erred in asserting that John Barton had been commissary prior to the Reformation.²⁶¹ Nevertheless, Barton held benefices prior to the Reformation, and was presented to the deanery of Dunkeld in 1566.

Jurisdictionally speaking, it is noteworthy that the post-Reformation commissary Barton was a dean of Christianity.²⁶² This was also the case in Lauderdale where “Schir Williame Cranstoune vicar of Legertwod and Commissar of Laderdail,” sat in judgment “in Thirlsytane.”²⁶³ Whilst it is not clear if there was continuity of judge and court in the instance of Lauderdale (no information is included in the *Fasti*) it is clear that Cranston had enjoyed a considerable career as spiritual judge prior to the Reformation, as dean of Christianity in the Deanery of the Merse (1543-1559), Official of St Andrews, with general authority (1553-1558) and Provost of Seton collegiate church (1549-1562).²⁶⁴ The thread provided by the deans of Christianity is again found at Lanark. Whilst the Commissariat was not erected until 1574, the first Commissary, John Weir, was also the dean of Christianity, a position which possibly went back as far as 1561.²⁶⁵ The deans of Christianity had confirmed minor testaments and nominated executors when necessary and had been involved in the collection of various dues owed to the diocesan coffers:²⁶⁶ both these functions may be reflected in the inferior Commissaries’ jurisdiction concerning lesser testaments and the collections of teinds and other ecclesiastical dues.

In the West, as noted by Donaldson, Archibald Beaton, last pre-Reformation Official of Glasgow, became Commissary of Glasgow,²⁶⁷ and probably sat in judgement in the north tower of Glasgow Cathedral.²⁶⁸

²⁶⁰ “Curia commissariatus brechinensis tenta in ecclesia cathedrali eiusdem per magistrum Thomas Ramsay commissar” (NAS, CC3/1, fo. 3v, 9 March 1579/80).

²⁶¹ RSS, v, Donaldson’s Introduction, xvii. i.e. CC8/2/2, fo 2v, 1 May 1565.

²⁶² RSS, v, 3156.

²⁶³ NAS, GD16/41/27, at Thirlstane, 17 March 1564/5.

²⁶⁴ *Fasti*, 417,421,487; he was also Provost of St Salvator’s (*Court of the Official*, 52).

²⁶⁵ *Fasti*, 235; RSS, vi, 2579.

²⁶⁶ *Court of the Official*, 32.

²⁶⁷ *Fasti*, 246, 250.

²⁶⁸ Elizabeth Williamson, Anne Riches and Malcolm Higgs, *Glasgow* (Harmondsworth: Penguin, 1990), 113.

Within the deanery of Inverness it is certain that Sir James Duff had been Commissary in 1558, and became the first Commissary in those parts under the new regime, although it appears that there was no Commissary appointed there following the disruptions until 1577.²⁶⁹

In Orkney and Shetland it is well known that Adam Bothwell, Bishop of Orkney conformed to the Protestant Reformation, and in so doing continued to exercise some of his old consistorial jurisdiction throughout the 1560s.²⁷⁰ The earliest reference to a Commissary in Shetland is that for George Strang on 12 June 1560.²⁷¹ Whilst no claim can be established concerning continuity of personnel, what is clear is that the next named Commissary of Shetland, Jerome Chene,²⁷² was also Archdeacon of Shetland from 1554 to 1584.²⁷³ again the link between the deans of Christianity and the earliest Commissaries of the new order can be discerned.

In Ross the sense of continuity was again strong. Duncan Chalmer was Chancellor from 1526 until his death in 1571,²⁷⁴ sat as a pre-Reformation Official,²⁷⁵ and was appointed Commissary in 1561 by Mary, Queen of Scots, and again in 1566 by John, Bishop of Ross.²⁷⁶ In Moray, Donaldson has maintained that “Hugh Craige was commissary of Moray from 1559-1586”.²⁷⁷

Yet along with the sense of continuity, there must have been a sense of change. The Officials no longer sat in judgment, since their primary jurisdictions had been centralized and subject to the Commissaries of Edinburgh. For example, at St Andrews the Official principal had ceased to sit from 1559 and it is clear that there was no Commissary Court during the early 1560s. The first Commissary, William Skene, appointed in 1564 had no pre-Reformation role as a spiritual judge. Given the strength and organization of the Reformed Kirk in St Andrews, with its competent

²⁶⁹ *Records of Inverness*, eds. William Mackay and Herbert Cameron Boyd (Aberdeen: New Spalding Club, 1911), i, 26, 16 November 1558; NAS, CS1/2, fo. 50, 12 Jul 1577.

²⁷⁰ Discussed below, pages 84-85.

²⁷¹ *Fasti*, 345.

²⁷² NAS, CS1/2, fo 218v, 13 February 1583/4.

²⁷³ *Fasti*, 341.

²⁷⁴ *Fasti*, 362.

²⁷⁵ *Fasti*, 374

²⁷⁶ *Fasti*, 375; CC8/2/25, 29 May 1594.

²⁷⁷ It would be interesting to know if he sat in judgement in part of Elgin Cathedral, since although the lead was removed from the roofs following the Reformation, it may still have possessed some useable chambers.

kirk session and superintendent's court,²⁷⁸ it is not surprising that the appointment went to a judge who was involved with and well known to the kirk there.²⁷⁹ Yet even in St Andrews, Skene still retained strong links with the old order, being a canonist at St Mary's College²⁸⁰ and sitting in judgement in the "college kirk of Sanctsaluatour".²⁸¹

The sense of continuity and change must also have been marked in Edinburgh. Whilst Edinburgh was atypical, it is still worth noting that of the first commissaries Robert Maitland was a dean of Christianity,²⁸² whilst James Balfour had been the last Official of Lothian. Soon after the appointment of the Commissaries, Balfour was sat in judgement when Agnes Cranstoun raised a precept "to heir and se it be procedit in the caus of exoneratioun movit be hir... befor Maister James Balfour officiall of the spiritual jurisdiction within the archdenure of Lowthiane for the tyme, that is to say to hier and se the process thair of avysit and sentence gevin thairintill...". Thus whilst there must have been a sense of continuity from the perspective of litigants, the fact remained that the Officials had been overthrown.²⁸³

[ii] JURISDICTION OF THE INFERIOR COMMISSARIES

The inferior Commissaries of the new consistorial order were subject to the Commissaries of Edinburgh: precepts of reduction might be raised against any interlocutors or decreets²⁸⁴ pronounced by the inferior Commissaries before the Commissaries of Edinburgh,²⁸⁵ and in addition, the Commissaries of Edinburgh had the right to advocate to themselves any action pending before an inferior

²⁷⁸ i.e. see Linda Dunbar, *Reforming the Scottish Church: John Winram and the example of Fife* (Aldershot: Ashgate, 2002), 83-101.

²⁷⁹ *St Andrews*, i, 26, 38 (text and footnote).

²⁸⁰ John W. Cairns, 'The Law, the Advocates and the Universities in late eighteenth-century Scotland' in *Scottish Historical Review* 73, issue 2 (1994), 171-190, at 179-183.

²⁸¹ NAS, GD45/17/20; NAS, RH9/2/217.

²⁸² From 1565 (*Fasti*, 12).

²⁸³ CC8/2/1, fo. 11r, 5 May 1564.

²⁸⁴ This conformed to the general practice of appeals in the Court of the Official (*Court of the Official*, 119), and in the English episcopal courts (Helmholz, *Ecclesiastical Jurisdiction*, 349).

²⁸⁵ i.e. NAS, CC8/2/2, fo. 250r, 7 January 1567/8; CC8/2/3, fos. 96v-97r, *Pitcairne v. Guthrie*.

Commissary.²⁸⁶ The basic jurisdiction of the inferior Commissaries was presumably based on that of the inferior jurisdiction of the Commissaries of Edinburgh, namely executry business relating to the lesser testaments;²⁸⁷ ecclesiastical business relating to teinds and other revenues generated by the patrimony of the medieval Church;²⁸⁸ slander; curatory;²⁸⁹ the registration of deeds, contracts and obligations and small debt actions. Specific inferior Commissaries may have enjoyed additional powers in deference to the status of a pre-Reformation Commissary, or some local custom, whilst any inferior Commissary had the potential to be commissioned by the Commissaries of Edinburgh to take trial of individual cases, especially matrimonial actions.²⁹⁰

There is good evidence to suggest that the inferior Commissaries could hear actions concerning the staying of banns. An examination of actions arising from the staying of banns before the Commissaries of Edinburgh strongly suggest that only when banns were stayed in south-west Scotland did the Commissaries of Edinburgh hear the resulting action.²⁹¹ Such litigation was certainly competent before Andrew Hay, Commissary of Hamilton²⁹² and it therefore follows that inferior Commissaries may also have been authorized to pronounce declarators of freedom and putting to silence. Directly allied to this were actions for solemnization of marriage, which were likewise competent before Andrew Hay,²⁹³ yet it ought to be noted that there may have been variations between the jurisdictions of individual Commissaries in respect of the pre-Reformation provenance of some of the ‘new’ Commissariots. Ronald Ireland, seemingly on Baron Hume’s authority, also thought the inferior

²⁸⁶ NAS, CC8/2/7, fo 329r, 24 November 1575, *Dunbar (Leslie) v. Dunbar*. Precept of advocation raised by Grissell Leslie against a commission allegedly granted to the Commissary of Ross to take cognition in an action of divorce pursued by her husband. The precept alleged that the Commissary of Ross was a “iuge suspect” in the matter, given the formidable nature of Grissell’s husband, “ane grit clannit man in the partis of Ross,” who neither the judge nor witnesses dared to disobey. This was a distinct procedure from Leslie having made a dilatory exception (see *Court of the Official*, 108) before the Commissary of Ross, although this might already have been attempted but to no avail.

²⁸⁷ *Balfour’s Practicks*, ii, 660, item xxv.

²⁸⁸ NAS, CC10/1/1, fo. 3v, 24 April 1564 (teinds); fo. 53v, 11 August 1564 (vicar pensioner); fo. 131v (vicar pensioner); fo. 149r-v, 22 May 1565, *Vicar of Campsy v. Parochinaris of Campsy*.

²⁸⁹ NAS, CC10/1/1, fo. 131v, 5 March 1564/5 (curatory).

²⁹⁰ See Appendix I, clause [5].

²⁹¹ See below, pages 236-237.

²⁹² NAS, CC10/1/1, fo. 123v, 9 February 1564/5. *Zoung v. Richie*.

²⁹³ NAS, CC10/1/1, fo. 131r, 1 March 1564/5, *Walkynschaw v. Patersone*.

Commissaries were competent in actions of adherence, but there is as yet no direct evidence of this.²⁹⁴

Unfortunately, since “many aspects of the nature of the extent of [the pre-Reformation commissaries’] jurisdiction remains obscure”²⁹⁵ it is difficult to establish the extent to which regional variations in pre-Reformation jurisdictions survived into the post-Reformation situation, or to what extent the jurisdiction of ‘new’ inferior Commissaries was standardized. Since although there is scant evidence as to the jurisdiction or pre-Reformation ‘territorial’ commissariots, in the case of Stirling, the pre-Reformation Commissary’s competence consisted “almost entirely of acts of monition and the registration of contracts”, whilst other territorial commissaries may have enjoyed “a jurisdiction similar to, if more limited than the diocesan officials”.²⁹⁶ It is noteworthy that the pre-Reformation territorial Commissaries of Douglas, Lesmahagow and Kilbride could hear matrimonial causes,²⁹⁷ and that following 1564 Andrew Hay, as just discussed, clearly heard some matrimonial actions. Given the variations in the jurisdiction of pre-Reformation commissariots, it would be inadvisable to think that the evidence cited concerning Andrew Hay’s decreets are indicative of the jurisdictions of other inferior Commissaries in post-Reformation Scotland: such problems await the attention of further research.²⁹⁸

²⁹⁴ Ireland, ‘Husband and Wife: Post-Reformation’, 82; Ronald Ireland, ‘Husband and Wife: Divorce, Nullity of Marriage and Separation’ in *An Introduction to Scottish Legal History* (Edinburgh: The Stair Society, 1958), 90-98, 96.

²⁹⁵ *Fasti*, xiii.

²⁹⁶ *Court of the Official*, 37-38.

²⁹⁷ *Court of the Official*, 38.

²⁹⁸ The first ports of call in this respect would be NAS, CC10/1/1 and NAS, CC20/1/1-2.

§IV

RELATIONS WITH OTHER COURTS AND TRIBUNALS

[i] PRE-REFORMATION COURTS SPIRITUAL

Whilst something of the historical relationships between the post-Reformation Commissary system and the old episcopal courts has been sketched above, several procedural links continued to exist between the pre- and post-Reformation episcopal courts. The violent interruption of the courts of the Catholic Church in Scotland during the autumn of 1559 left a degree of jurisdictional and practical chaos in its wake.²⁹⁹ It was certainly clear to the Lords of Council and Session that the new order of the Commissaries of Edinburgh would have to include provision for the continuation of interrupted actions and appeals, together with the recovery of the various registers kept by the old courts, and the enforcement of the acts, sentences, deeds and obligations which they contained: in short, justice should not be frustrated through disorder in the realm.

Accordingly the charter of constitution empowered the Commissaries of Edinburgh to discuss and decide “all appellations interponed or depending from any other Commissary or Commissaries or other ecclesiastical judge whatsoever within this our realm in times gone by; also appellations or reductions interponed hereafter from any Commissary whatsoever within this our realm”.³⁰⁰ John Connell understood this clause to mean that “those processes which formerly depended before the bishop’s court were immediately transferred to the Commissaries” and there is ample evidence that this was the case in practice.³⁰¹ Yet there was also room for ambiguity in this clause, since mention was made only of appellations depending “within this our realm” and as such there seems to have been a studious avoidance of mentioning any appeal depending outwith the realm in Rome. Various cases from the

²⁹⁹ See Smith, ‘Spiritual Jurisdiction’. Some of these episcopal courts did nevertheless continue to function after 1559 (see *Concilia Scotiae*, i, clxxiv). The withering of the old episcopal courts in Scotland during the Reformation era has parallels with the fate of the English episcopal courts during the early 1640s (Helmholz, *Ecclesiastical Jurisdiction*, 297).

³⁰⁰ See Appendix I, clause [6].

³⁰¹ Connell, *Treatise* (1815), i, 200.

extant Registers of Acts and Decreets shed more light on the precise jurisdiction of the Commissaries of Edinburgh in respect of both the old episcopal courts and papal judges delegate.

The complexity of the situation occasioned by the early stages of the Scottish Reformation is well illustrated by one of the early cases in the Acts and Decreets, *Glen & Or v. Glen*. The case revolved around a sentence pronounced by the Official of Glasgow in 1556 against James Or for the payment of various sums of money. The sums had never been paid, and as such, following the appointment of the Commissaries, James Glen had sought to have the sentence enforced against Janet Glen and Thomas Or (presumably as executors of the late James Or) by the ‘new’ Commissary of Glasgow, Archibald Beaton. However, James Or had appealed against the sentence of the Official of Glasgow and had obtained “commissioun fra my lord of Sanctandrois as legat³⁰² to Maister Nichole Spittale provest of Fowlis juge delegat to cognosce in the said caus of his said appellatioun”. Unfortunately this appeal had run into difficulties since Nichole Spittal had had his commission revoked, and as such no decision had been pronounced. Since the original sentence had been appealed against, even though the judge delegated by legatine authority had had his commission revoked, the issue was not a sentence pronounced in the first instance by the Official of Glasgow, but an appellation against that sentence. On this reading, “be ressonne of the trouble and ceissing of the consistorial jurisdiction the said vmquhile James culd not persew and finische his said caus of appellatioun always the samyn is now [blank] be ressonne of the said appellatioun to be decydit *in tertia saltem*³⁰³ *secunda instantia* To the quhilk the saidis commissaris [of Edinburgh] be ressonne of thair commissioun ar onlie juges comptent and the said juge [i.e. ‘new’ Commissary] of Glasgow is na wyiss juge competent to the said pretendit translation. And thairfoir the samyn suld be remittit be the said commissar of Glasgow to the saidis commissaris [of Edinburgh] and the saidis commissaris inhibite fra further proceding thairintill in respect of the saidis appellatiounis instrumentis and act maid thairupoun befoir the said Maister Nichole and secund rescript schawin to the saidis commissaris thairupoun”. The Commissaries of Edinburgh duly called the action to themselves “as accordis with the law”.³⁰⁴

³⁰² The date of the commission is not stated.

³⁰³ *saltem* is not entirely clear in the MS.

³⁰⁴ NAS, CC8/2/1, fos. 401v-402r.

From this example it is clear that the terms of the charter of constitution were upheld in that, an appeal having been made against a pre-Reformation sentence, the Commissaries of Edinburgh were deemed sole judges competent to hear subsequent litigation. Yet what is less clear is whether or not the new Commissary of Glasgow was competent to enforce and transfer sentences pronounced by the old Official of Glasgow³⁰⁵ if no appeal had been made against them.

A more straightforward example of the Commissaries of Edinburgh's competence to hear appeals is found in *Marscheall v. Dikesoun* although many of the particulars together with the final outcome of the action are not known. It may be inferred that an initial sentence had been pronounced in Sir William Marshall's favour, and that Alan Dickson had appealed to the Official principal of St Andrews. Although the appeal had begun to be heard, no definitive sentence had been pronounced, and accordingly, following the interruption of the consistories, Marshall had instituted proceedings before the Commissaries of Edinburgh to have the appeal brought to a conclusion. The Commissaries duly ordained Dickson to "exhibite and produce befor thame the hale process led and deducit in the caus of appellatioun in the second instance dependand befor the officiale of Sanctandros principale betuix the said Alane and Schr William Marscheall" to which end Dickson had had "oure soverane ladeis letters deulie execute and indorsate [upon] Maister George Makesoun clerk and kepar of the consistoriall bukis of sanctandros" charging him "to extract draw furth and deliver to the Alane vpoun his ressonable expensis the autentik copy of all actis and proces deducit in the said caus of appellatioun".³⁰⁶ An extract of the process was duly produced at a subsequent diet "inclosit with the seill of the officialle of Sanctandros and vnder the subscirptioun of Maister George Makesoun clerk of the said auditorie for the tyme".³⁰⁷ The process was duly published³⁰⁸ by the Commissaries four days after its production.³⁰⁹

This action illustrates both the Commissaries' jurisdiction in this respect, together with one of the practical problems attending the chaotic manner in which the

³⁰⁵ Both posts were held by Archibald Beaton (*Fasti*, 246, 250)

³⁰⁶ NAS, CC8/2/1, fo. 148r, 10 August 1564.

³⁰⁷ NAS, CC8/2/1, fo. 217v, 10 November 1564.

³⁰⁸ That is to say, made available to parties with an interest, having satisfied themselves as to its authenticity.

³⁰⁹ NAS, CC8/2/1, fo. 222r, 14 November 1564.

spiritual jurisdiction had been interrupted. In this example one of the litigants had to go to the expense and trouble of compelling the keeper of the consistorial books of the Official of St Andrews to make a formal copy of the process of appellation. On other occasions Michael Marjoribanks was cited as the keeper of the consistorial books of the Official of Lothian and compelled to extract various entries contained therein.³¹⁰ As such, it seems reasonable to suppose that following the *de facto* suppression of the consistories from the autumn of 1559 many of the registers of those courts had been carried away by the clerks of court. This is in keeping with the situation which pertained after the clerkship of Sebastian Danelourt in the court of the Commissaries of Edinburgh: all the registers from his two year clerkship are missing and may be supposed to have been carried away by him.³¹¹

There are also various examples in the Registers of Acts and Decrets of litigants raising precepts of reduction against the sentences of the old episcopal courts. In *Leslie v. Oliphantis*, the pursuer sought to have a sentence of divorce pronounced against her by “Maister Andro Triall allegit Commissar Generale to the Officiale of Sanctandros Principale” reduced by the Commissaries.³¹² In *Gray v. Wod* a sentence had been pronounced in David Wod’s favour by Master William Cranston, Official of St Andrews principal in an action for the payment of teinds for the year of 1541. Gray now pursued before the Commissaries of Edinburgh, for the production of the process led before Cranston and its reduction.³¹³ The issue is not known, but the fact that the Commissaries deemed themselves competent to take trial of an action of reduction of a sentence of an Official principal clearly indicates that they were competent to reduce any sentence pronounced by any Commissary or Official within Scotland regardless of where appeal would have been previously made. In this respect it may be supposed that a sentence of the Official of Lothian, which would formerly have been reduced by the Official of St Andrews principal might now be reduced by the Commissaries of Edinburgh, and similarly that a

³¹⁰ In *Borthwick v. Criag & Megot*, Megot “producit diligence be deliuerance of the Lordis of Counsale chargeing Michaell Marioribankis kepar of the bukis of the consistoriall jurxoun of Edinburght for the tyme to extract and deliuer to him vpoun his expensis the autentik copy of certane actis etc within [blank] eftir the charge or ellis to compeir befor the Lordis of Counsale and schaw ane caus etc” (NAS, CC8/2/2, fo 58r, 19 June 1565).

³¹¹ See above, page 50.

³¹² NAS, CC8/2/2, fos. 382r-383v, 16 March 1567/8.

³¹³ NAS, CC8/2/1, fo. 384v, 10 March 1564/5; fo. 408v, 26 March 1565.

sentence of the Official of St Andrews principal, which would have previously been reduced by the *Rota Sacra Romana* might now be reduced by the Commissaries of Edinburgh. As such, whilst the issue here is distinct from appeals pending in Rome at the time of the interruption of the consistories, it seems clear that, where appeals had not yet been made, the Commissaries were sole judges competent for the reduction of all sentences pronounced by Commissaries and Officials even when appeal lay to Rome. What is not made entirely clear however is whether or not appeal could still have been made to Rome in preference to the Commissaries of Edinburgh, prior to the ratification in December 1567 of the Act abrogating papal authority in Scotland, 24 August 1560.

One final area of the Commissaries of Edinburgh's competence in respect of the old episcopal courts was in the transfer of deeds registered in the books of the old Officials and Commissaries. The need for this service was a common enough occurrence when the terms of a deed had not been fulfilled at the time of one of the parties' death. In these circumstances it was often needful for the legal obligations contained in the deed to be transferred by an act of the Commissaries to the executors of the defunct. The Commissaries of Edinburgh were petitioned principally concerning deeds and acts registered in the books of the Official of Lothian³¹⁴ and those of the Official of St Andrews.³¹⁵ This evidence strongly implies that inferior Commissaries were judges competent for the transfer of acts and deeds registered in the books of their consistorial predecessors. The inference is confirmed by a request made to the Commissary of Hamilton on 10 May 1564 that his authority be interponed to an act of the pre-Reformation [Commissary] of Kilbride regarding a debt of five pounds,³¹⁶ and by the action *Kincaid v. Striviling*, which concerned an act which "be consent of bayth parteis wes ordanit to be insert[it] in the Officiallis buikis of Glasgw for the tyme renunceand all vther jurisdictionis & submittand thame thairto, to the quhilk Officialrie the said Commissar of Glasgow succedis".³¹⁷

³¹⁴ i.e. NAS, CC8/2/1, fos. 109r, 18 July 1564; 116r, 22 July 1564; 154v, 14 August 1564; 246v, 24 November 1564; 302v, 12 January 1564/5; 333v, 5 February 1564/5; 334v, 5 February 1564/5; CC8/2/2 fos 33r, 24 May 1565 etc.

³¹⁵ i.e. NAS, CC8/2/1, fo. 113r-v, 21 July 1564; 25[1]r, 27 November 1564; 309r, 17 January 1564; 333r, 3 February 1564/5; 342v, 10 February 1564/5; 427v, 12 April 1565; CC8/2/2 fos 47r-48r, 4 June 1565 etc.

³¹⁶ NAS, CC10/1/1, fo. 9v.

³¹⁷ NAS, CC8/2/7, fos. 106r, 22 March 1574/5.

The distinction between papal and episcopal jurisdiction in respect of the authority of the pre-Reformation Courts of the Official and Commissaries has already been made at length in the introduction. An ancillary point concerns the legal validity of papal authority in Scotland prior to December 1567, in that it has been argued elsewhere that various leading men of law (including two of the first Commissaries of Edinburgh, James Balfour and Edward Henryson) did not consider the Acts of the Reformation Parliament of August 1560 to have legal force in the realm until they were ratified in December 1567. If this was the case, then it would be expected that the Commissaries of Edinburgh would still have countenanced sentences pronounced in Scotland by virtue of papal authority or decisions reached in appeals pending in Rome so long as such sentences were pronounced prior to December 1567.

There is some evidence that the status of decisions pronounced by virtue of papal rather than episcopal authority during the Reformation era had not been clear at the time. In 1581 a piece of legislation was passed in Parliament purported to ratify an Act maid “concerning the decisioun of appelatiounis maid be the court of Rome” on 24 August 1560. The alleged Act of 24 August 1560 was narrated to have ordained that litigants “havand pleis dependand in the saidis court of Rome, or consistoreis, or befor uthir judges callit delegatis or subdelegatis” were to pursue such actions “at thair optioun befor the lordis of oure soveranis sessioun, the schiref, stewart or baillie of regalite, baille of barony, provest or baillies of burrowis, or uthir temporall judges ordinaris within this realme”.³¹⁸

There is one case extant in the Registers of Acts and Decrees which seems to suggest that the alleged Act of 1560 was not known to the Commissaries of Edinburgh, and that they did in fact continue to consider papal authority to be valid prior to December 1567. On 23 January 1567/8, five weeks after the ratification of the Act abrogating papal authority in Scotland, “Stevin Kincaid secristane for the tyme of the college kirk of Thayne in Ross” petitioned the Commissaries of Edinburgh to decern to have been deserted an appeal made against a sentence given in his favour by “Maister Johne Carncorst chan[tor] of the cathedral kirk of Ross Juge Deligait of the paip”. The date of the original sentence pronounced by the papal judge delegate is not explicitly mentioned in the extant records, but the date of the

³¹⁸ *RPS*, 1581/10/39; *APS*, iii, 221, c.20.

appeal was stated as “befoir the feist of Witsunday the zeir of God jai vc lxx zeris”.³¹⁹

Several initial points arise. The first point concerns the date of the original definitive sentence against which an appeal had been made. Simon Ollivant has maintained that appeals made against definitive sentences, either to a Scottish Official principal, or to Rome, had to be commenced within 10 days of the giving of the original sentence according to canonical procedure.³²⁰ Assuming that such rules applied in this instance, the pronouncing of the definitive sentence of John Cairncross³²¹ must have been around the same time as the appeal was made, that is to say ‘before the feast of Witsunday 1565,’ which occurred on 10 June that year, thus suggesting a date for the giving of the original sentence of no earlier than spring 1565.

The second point concerns to which tribunal appeal had been made. It is of course conceivable that appeal could have been made to the Commissaries of Edinburgh, but this is unlikely on two grounds. In the first place, it was desired by Kincaid that the appeal be produced before the Commissaries of Edinburgh,³²² and as such it seems most unlikely that the appeal was contained in the Commissaries’ books. In the second place it seems far more likely that the appeal had been made to Rome, presumably the proper tribunal for the reduction of the decision of a papal judge delegate. This is at least suggested by that fact that Kincaid had been content for the appeal to be pending for the fairly long period of at least 2 years 7 months (being the time between Witsunday 1565 and the date of Kincaid’s petition given in to the Commissaries of Edinburgh) and that he had not decided to petition the Commissaries until after the ratification of the Act abolishing papal authority in Scotland.³²³

³¹⁹ NAS, CC8/2/2, fo. 283r, 23 January 1567/8, *Kinnaid v. Vduard*.

³²⁰ *Court of the Official*, 121-122. In the English episcopal courts “appeals were to be made within 10 days of the sentences or *gravamen*, lengthened to 15 days by virtue of a Henrican statute...appellants were normally given one year to prosecute the appeal...” (Helmholz, *Ecclesiastical Jurisdiction*, 350).

³²¹ For whose details see *Fasti*, 359.

³²² NAS, CC8/2/2, fo 283r.

³²³ The proper course of action in normal circumstance if an appeal lapsed was for the case to return to the judge *a quo* (Helmholz, *Ecclesiastical Jurisdiction*, 350). That this did not happen in this case therefore demonstrates that even if Kincaid had still wished to maintain the principle of papal authority in Scotland through his actions, by December 1567 he would have realised the futility of his stance and petitioned the Commissaries of Edinburgh.

Yet regardless of whether or not appeal had been made to Rome, the fact remains that no arguments were raised before the Commissaries of Edinburgh concerning the right of John Cairncross as a papal judge delegate in Scotland to pronounce a sentence in 1565. As such, whilst the final outcome of Kincaid's action to have the appeal decerned to have been deserted is not known,³²⁴ it would seem that the Commissaries of Edinburgh were prepared to countenance the sentence of the papal judge delegate, despite the fact that it was pronounced after the Act abolishing papal authority in Scotland, 24 August 1560.

[ii] THE LORDS OF COUNCIL AND SESSION

As Gordon Donaldson noted in 1958 “it appears to have been intended from the outset that appeal should lie from the inferior commissaries to the commissaries of Edinburgh, and thence to the Court of Session”.³²⁵ The superiority of the Session was reasonable given the context in which the Commissaries of Edinburgh were appointed, and the evidence of a proto- ‘Court of the Commissaries’ during the early 1560s.³²⁶ Whilst not mentioned in the charter of constitution, the instructions passed to the Commissaries of Edinburgh made the superiority of the Lords explicit: “the reducioun of ony sentence gevin be the Commissaris of Edinburgh, *in prima instantia*, or *secunda*, of appellatiounis or reduciounis interponit fra uther Commissaris, to be judgit be the hail Lordis of Sessioun, or ane part of thame, quhilk sall be appointit thairto be the remanent of the saidis Lordis, *usque ad sententiae definitivae prolationem exclusive*”.³²⁷

Two examples of appeals against the decreets of the Commissaries of Edinburgh to the Lords of Council and Session are known at present, both of them in ‘consistorial’ actions. One was made by Jane Stewart, divorced countess of the 5th earl of Argyll, against the Commissaries’ first known decret of divorce, pronounced against her, on the grounds of malicious desertion, and is discussed in detail

³²⁴ The Commissaries assigned *litteratorie* (NAS, CC8/2/2, fo. 345r) to pronounce their interlocutor, which does not appear to be extant.

³²⁵ Donaldson, ‘Church Courts’, 369.

³²⁶ See above, pages 22-23.

³²⁷ *Practicks*, ii, 659, item xix.

below.³²⁸ The other appeal was made by Euphame McConal against a decret of Scottish Protestant divorce for adultery pronounced by the Commissaries of Edinburgh on 29 July 1573 in favour of her husband John Stewart of Appin.³²⁹ The Lords reduced this decret on 26 March 1576.³³⁰

The Lords of Council and Session were also involved in the affairs of the Commissaries of Edinburgh on a more day-to-day basis. Whilst the Commissaries of Edinburgh exercised a special mandate and authority from the sovereign, and whilst the subjects of the realm were expected to co-operate with the summonses and decreets of the Commissaries, difficulties in the imposition of a new consistorial order by virtue of the authority of the Commissaries alone were anticipated from the beginning. One of the principal ways in which the authority of the Commissaries differed from that of the spiritual judges of the old consistories was that they lacked the authority to excommunicate those who failed to co-operate with their authority. Whatever the predicament of Roman Catholics following the Reformation crisis of 1559-1560, Protestants were subject to the tribunals of the Reformed Kirk in this respect.

Accordingly, the instructions passed to the Commissaries in 1563/4 stated that if subjects failed to compear on the strength of the Commissaries' precepts, litigants might "raise letteris be deliverance of the Lordis of Session, for compelling of thame to compear, under the pane of horning, as the Judge shall think expedient".³³¹ Similarly, if subjects failed to conform to decreets pronounced by the Commissaries within fifteen days, recourse could be had to the Lords of Council and Session so that the Lords might grant "letteris to charge the parties condemnit to fulfil the said sentence within sa mony dayis as the saidis Lordis sall think expedient, under the pane of rebellion, and thay failzeing, to put thame to the horn".³³² Likewise, if subjects failed to fulfil contracts and obligations which had been registered in the Commissaries' books, the Lords were "to give out letteris in the four formis, or of pouding, for fulfilling the samin, as wer sont to be gevin upon

³²⁸ Chapter III, §III.

³²⁹ NAS, CC8/2/6, fo. 157r-v, 29 July 1573, *Stewart of Appin v. McConle*.

³³⁰ NAS, CS7/63, part 1, fos. 24v-25r (ink), 26th March 1576, *Makcall v. Stewart*.

³³¹ *Practicks*, ii, 657, item viii.

³³² *Practicks*, ii, 658-9, item xvi.

persounis quilkis of befoir lay xl. dayis under cursing”.³³³ Finally, should the Commissaries’ officers happen to be deforced, the deforcer was to be “callit befoir the Lordis of Council, or Commissaris, as the partie persewar pleases” and punished “as gif the Quene’s Grace’s Officiar of armis wer deforcit in execution of hir Hienes letteris”.³³⁴

Despite the close involvement of the Lords of Council and Session in the augmentation of the authority of the Commissaries of Edinburgh,³³⁵ the Lords clearly wished for the Commissary system to be distinct from the Session as far as was reasonable practicable. Indeed, given the direct involvement of the Lords in the spiritual jurisdiction between 1560 and the appointment of the Commissaries, it is clear that had they so wished, the College of Justice could have appropriated the business of the old consistories directly into its own jurisdiction. It has been suggested that this was not done on the understanding that the spiritual jurisdiction, whilst in need of systematic administration during a period of revolution, might yet be restored to the Scottish episcopate. Yet on a more practical level, it may have been the case that the Lords had no desire to increase their own direct jurisdiction, since it is manifestly clear that they were already over burdened with litigation and under remunerated for their labours.³³⁶ Nevertheless, despite the constitutional and practical considerations moving the Lords to maintain a distance from the Commissaries, early shortcomings with the Commissary system clearly demanded greater involvement of the Lords from 1566. Problems with the Quot Collectory upon which a sizeable portion of the senatorial emoluments depended have already been discussed. In addition, it was held that “in the initial elevation of the said Commissaries, certain men who were unsuitable to and useless for these offices, perverted these high offices by fraud and cunning” and that “some of the commissaries have obtained such wide commissions of their jurisdiction - with widely scattered boundaries embracing various sheriffdoms - that neither they themselves are able to keep up with and on top of their offices, nor are our subjects able to pursue justice without

³³³ *Practicks*, ii, 658, item xiii.

³³⁴ *Practicks*, ii, 659, item xvii.

³³⁵ This augmentation of the authority of the Commissaries was similar to that enjoyed by the English episcopal courts (Helmholz, *Ecclesiastical Jurisdiction*, 283 and esp. 622) and the Scottish pre-Reformation episcopal courts (*Court of the Official*, 151,154).

³³⁶ i.e. Hannay, *College of Justice*, 81 *et seq*; Smith, ‘Spiritual Jurisdiction’, 13-14; *RPC*, i, 252.

very serious effort and expense, and the dangers of crossing firths, rivers and estuaries”.³³⁷ On account of these shortcomings the Chancellor, President and senators of the College of Justice were given the right to appoint to all positions within the Commissary system and “to study and investigate the jurisdictions of the commissaries of this realm, and reduce, expand, change and separate their limits and boundaries”. In addition they were given power to summon all commissary personnel to “bring and display the provisions and donations of their offices to be seen by the senate and explored. If they have been granted either to them themselves for the entire course of their lives, or to their children, friends or others to succeed them, forthwith by decision of the said senate they are to be abolished, revoked and nullified. As a result, those who afterwards seek that kind of office shall acquire it and perform it only for as long as the senate wills it...”.³³⁸ In this, it is plain that the original intention of entrusting the supervision of the Commissary system to the Commissaries of Edinburgh had been frustrated and that the direct involvement of the Lords of Council and Session in the ongoing organization and administration of the Commissary system became unavoidable. Given the original powers of the Lords in terms of superiority and the augmentation of the authority of the Commissaries, the enhancement of the Lords powers from December 1566 further blurred the lines of distinction between the bench of the Commissaries and of the Session. Three of the first four Commissaries were also senators of the College of Justice.³³⁹

[iii] THE LORDS INTERPRETERS OF THE LAW OF OBLIVION

The law of oblivion passed by Mary’s first parliament in 1563 had in effect granted immunity from due process of law to those involved in the legally dubious, if not treasonable, events of ‘the uproar for religion’ from 1559.³⁴⁰ The broad wording of the Act certainly required some future provision for interpretation.³⁴¹ Accordingly,

³³⁷ *RPS*, 1581/10/84; *APS*, iii, 240, c.65.

³³⁸ *RPS*, 1581/10/84; *Practicks*, ii, 673-676; Hannay, *College of Justice*, 82-83; cf *Concilia Scotiae*, i, clxxix-xxx.

³³⁹ See above, pages 43-44.

³⁴⁰ Connell, *Treatise* (1815), i, 199.

³⁴¹ *RPS*, A1563/6/1; *APS*, ii, 535, c.1.

Parliament immediately appointed a group of Lords Interpreters to whom actions might be remitted should “the partie persewit, be him self or his procuratouris... allege that the persewar sould not be hard in respect of the law of oblivion”.³⁴²

Whilst the legislation had cited civil or criminal actions as those encompassed by the Act of Oblivion, the fact that all “legattis, archibischoppis, bischoppis, abbottis, commendatouris, priouris and all uthers jugeis, magistratis and officiaris of quhatsumever estate, degre or conditioun thay be of” had also been discharged from proceeding to hear actions based upon wrongs committed during the period covered, it is reasonable to anticipate that actions before the Commissaries of Edinburgh might also be remitted to the Lords Interpreters.³⁴³

This was to prove to be the case, and various actions were remitted to the Lords Interpreters from both the Commissaries of Edinburgh and the inferior Commissaries. The evidence from the MS *Acts of the Lords Interpreters of the Law of Oblivion* indicates that the majority of such cases were ‘ecclesiastical’.³⁴⁴ Evidence from the Registers of Acts and Decrets of the Commissaries of Edinburgh confirm this picture. In *Annand v. Grahame*, it was objected that an alleged title to the “prebendary of the lady kirk of sanday within the boundis of Orknay... is daitit in the lx zeir of God, quhilk zeir is ane of the zeris comprehendit within the zeris of the law of oblivion and thairfoir aucht and suld be remitted to the Lordis Interpretatouris thair of Quhilk the saidis Commissaris remittis to the said Lordis to be decidit be thame as Juges competent thairto”.³⁴⁵ Meanwhile, in *Dennestoun v. Skene & Strachachin*, an action concerning the payment of a pension due to Sir George Strachan alleged vicar pensioner of Dysart for the years 1558 to 1563 had been begun before William Skene, Commissary of St Andrews. Skene had pronounced an interlocutor in the action pending before him, against which Dennistoun had raised a precept of reduction before the Commissaries of Edinburgh. Nevertheless the payment of the pension for the years 1559 and 1560 was exempted from discussion in Edinburgh, since this question had already been “remittit to the lords havand interpretatioun of the act of oblivion maid in oure Soverane ladies

³⁴² RPS, A1563/6/2; APS, ii, 536, c.2. The Lords Interpreters are all named in this act, and were not surprisingly the leading nobles and prelates of the realm.

³⁴³ RPS, A1563/6/1; APS, ii, 535, c.1.

³⁴⁴ NAS, PA9/1, fragments covering 14 March 1564 - 30 August 1569.

³⁴⁵ NAS, CC8/2/2, fo. 349r, *Annand v. Grahame*, 26 Feb 1567/8.

parliament”.³⁴⁶ From these two examples it is clear that discussions about rights and titles to Scottish benefices, the payment of ecclesiastical revenues, and actions pending before inferior Commissaries might all be remitted to the Lords Interpreters on the grounds that a presentation and collation, or a non-payment of monies, had occurred during the period comprehended by the Law of Oblivion.

What is perhaps more surprising is that marriage litigation could be remitted to the Lords Interpreters. A striking example of this was the action brought by Elizabeth Galbraith against her sometime husband Thomas McCalzean, later Lord Cliftonhall. A sentence of divorce had been pronounced against Galbraith in McCalzean’s favour, 9 August 1548 “be Maisteris Johne Guilterinj provest of Seytoun and William Meldrum vicar of Piterculter allegit commissaris in that part of the vicar generallis of Sanctandros for the tyme the sait thairof than vacund”,³⁴⁷ which sentence was presumably an annulment, or divorce *a vinculo*, since McCalzean had proceeded to marry Marion Ker. Yet on 4 April 1564 Galbraith raised a precept of reduction against the sentence of the Commissary General of St Andrews before the Commissaries of Edinburgh. The grounds are not clear, yet the danger for McCalzean was that should the pre-Reformation annulment be reduced, his subsequent marriage would be deemed null. McCalzean certainly argued against the precept of reduction at considerable length,³⁴⁸ but the litigation passed into Danelourt’s Registers, which are no longer extant. Nevertheless the *Acts of the Lords Interpreters of the Law of Oblivion* reveal that by 10 January 1567/8 the action of reduction had been remitted by the Commissaries of Edinburgh to the Lords Interpreters. The grounds of this peculiar development are obscure, but the arguments made before the Lords Interpreters are instructive. The Commissaries had certainly ceased from further proceedings, until the Lords pronounced whether or not some aspect of the litigation was comprehended by the Law of Oblivion. Galbraith argued that “the same actioun nowther meritit nor can cum vnder the act of obliuion, nor zit can the said act be interpretit or extendit thairto, specialie sen the same wes not maid to³⁴⁹ tak ony siclik actioun of reductioun standing betuix partiis concerning the band of matrimony, as be inspectioun of the said act cleirlye and

³⁴⁶ NAS, CC8/2/1, fo. 295r-v, 9 January 1564/5, *Dennestoun v. Skene & Strachauchin*.

³⁴⁷ NAS, CC8/2/1, fo 418r, 4 April 1565.

³⁴⁸ i.e. NAS, CC8/2/2, fos 9r, 5 May 1565; 37v, 26 May 1565.

³⁴⁹ [--- or] in MS, but cannot be made out due to staining of the paper

sufficientlie may appeir, and swa it is constant and manifest that the said allegiance is proponit fraudulentlie for delay of tyme and na vtherwayis”. The argument seems reasonable: surely the Law of Oblivion had not been passed to indemnify parties against the enforcement of the laws of marriage, and surely litigants were aware that a remit to the Lords Interpreters was an excellent stalling static. Nevertheless, the Lords Interpreters declared “that the said actioun sould cum and is comprehendit vnder the said Law of Oblivion and tobe extinct and expyrit for euir, and the said Elizabeth neur tobe hard to persew the samyn agane and thairfoir Discharges the saidis Commissaris and all vtheris iugeis spiritual or temporall within this realme Of all forder calling and proceding aganis the said Maister Thomas thairin in ony tyme heireftir”.³⁵⁰

One other marital action remitted to the Lords Interpreters deserves note, although their decision is not extant. On 3 April 1568 Isobell Semple, daughter of Robert Lord Semple, raised a precept of reduction before the Commissaries of Edinburgh against a Protestant sentence of divorce for adultery pronounced against her by the minister of Edinburgh on 31 September 1560. Nevertheless, the precept being raised, the defender’s procurator, Alexander King, alleged that he ought not to be compelled to produce the process led before the minister of Edinburgh for reduction “because the dait of the said decret is comprehendit within the zeris of the Law of Oblivion and thairfoir desiriit the said mater to be remittit to the Lordis Interpretouris thairof”.³⁵¹ The Commissaries took the allegation into their consideration and on 6 April 1568 “be thair interlocutour remittit the said mater to the Lordis Interpretouris of the Law of Oblivion tobe decydit be thame as juges competent thairto”.³⁵²

This cunning exploitation of the provisions of the Act of Oblivion in consistorial litigation before the Commissaries of Edinburgh is redolent of the oft-condemned abuses of the system of appeals found in the pre-Reformation courts spiritual.³⁵³ Whilst the opportunities afforded by papal involvement in the spiritual jurisdiction were gone, litigants and their men of law were clearly still willing and

³⁵⁰ NAS, PA9/1, fos 15v-16r, 10 January 1567/8, *Gawbrayth v. Makcalzeane*.

³⁵¹ NAS, CC8/2/2, fo. 419v, 3 April 1568, *Sympill v. Hammiltoun*.

³⁵² NAS, CC8/2/2, fo 422v, 6 April 1568.

³⁵³ See *Court of the Official*, 119-127, esp. 127; cf Helmholz, *Ecclesiastical Jurisdiction*, 349.

able to exploit the Indian summer of procedural ambiguities afforded by the jurisdiction of the Lords Interpreters.

§V

RELATIONS WITH THE PROTESTANT KIRK AND ITS TRIBUNALS ARISING FROM SENTENCES PRONOUNCED PRIOR TO THE APPOINTMENT OF THE COMMISSARIES OF EDINBURGH

Relations between the Commissaries of Edinburgh and the Protestant Kirk during the Scottish Reformation are of central interest in this thesis from the perspective of ecclesiastical history. The inactivity of the courts of the Catholic Church in Scotland and the emergence of the kirk sessions and superintendents' courts of the Protestant Kirk during the earliest stages of the Reformation had significant repercussions for the Commissaries of Edinburgh in that their very appointment was intended to bring order into a chaotic situation. There is no doubt that from as early as February 1559/60 tribunals of the Protestant Kirk began to hear what appear to be consistorial actions, most notably in the granting of divorce on the grounds of adultery with licence to the innocent party to remarry. At least part of the Kirk can be demonstrated to have had direct involvement in 'consistorial' matters somewhere in the region of 4 months after the ordinance of the Lords of the Congregation ordaining the consistories of the Catholic Church to cease to sit. This was prior to the definite assumption of the spiritual jurisdiction by the Lords of Council and Session in December 1560,³⁵⁴ and prior to Mary's proclamation of Leith in August 1561, which, as already discussed, was widely understood to have given legal validity to the *de facto* religious situation standing at the time of the Queen's return to Scotland. It may be therefore reasonably expected that the Commissaries of Edinburgh, upon being appointed to administer the consistorial jurisdiction of the old episcopal courts, by virtue of a delegation of authority from the sovereign, would nevertheless have been inclined to countenance the judgements pronounced by the tribunals of the Protestant Kirk from 1559/60 down to their appointment. But what is not clear, and what this section will seek to clarify, was to what extent and upon what

³⁵⁴ i.e. *Chalmer v. Lumisden* discussed above, pages 19-21.

actual grounds the Commissaries acknowledged and accepted the involvement of the tribunals of the Kirk in what appear to have been consistorial matters during a revolutionary stage of the Scottish Reformation.

Nineteenth-century scholars tended to assume that the appointment of the Commissaries of Edinburgh in February 1563/4, with their exclusive national jurisdiction in consistorial actions would have resulted in a conflict between the Commissaries and the Kirk. This was predicated upon their understanding that during the early stages of the Reformation, the tribunals of the Protestant Kirk had attempted to at least partially take over the functions of the courts of the Catholic Church, but had effectively been checked by the Crown through the appointment of the Commissaries. This narrative was rendered more coherent by a rigid insistence that the jurisdiction of the courts spiritual, the tribunals of the Kirk and the Commissaries had been one and the same. As this jurisdiction, as far as these nineteenth-century authorities were concerned, was ultimately a civil jurisdiction emanating from the Crown, it followed that the jurisdiction of the medieval episcopate had been either voluntarily delegated by the Crown to the ancient hierarchy, or usurped by that hierarchy at some point in Scotland's ancient past. At the Reformation, therefore, this jurisdiction properly reverted to the Crown and was granted to the Commissaries of Edinburgh, having been temporarily administered by the Lords of Council and Session. Within this constitutional context, the involvement of the tribunals of the Protestant Kirk was viewed as nothing other than a usurpation of the authority of the Crown.³⁵⁵ From this basis, it followed that the newly appointed Commissaries of Edinburgh would come into conflict with the usurping tribunals of the Kirk and strip them of their pretended consistorial jurisdiction.³⁵⁶

³⁵⁵ John Riddell imputed the Protestant clergy with an "encroaching, nay, usurping spirit" (Riddell, *Inquiry*, i, 443) in respect of the consistorial jurisdiction, insisting that the Kirk's brief ascendancy in consistorial matters occurred without "any proper sanction or authority – nay, latterly, in the face of the expressly constituted and legitimate tribunals [the Commissary Courts], [the 'Knoxite clergy'] actually did aspire to, and arrogate to themselves, the consistorial cognizance" (Riddell, *Inquiry*, i, 430). The theme of usurpation was rehearsed in the twentieth century by Ireland, 'Husband and Wife: Divorce', 95.

³⁵⁶ Lord Fraser opined that whilst the Reformation the Protestant kirkmen claimed "the jurisdiction of their Romish predecessors" the Commissaries of Edinburgh "checked the interference of the clergy, by reducing their sentences, and declaring that there was no court competent to take cognizance of such matters but themselves" (Fraser, *Treatise* (1846), i 13). Joseph Robertson added more detail to this picture by pointing out that the Charter of Constitution of the Commissaries of Edinburgh had granted them the power inhibit incompetent judges. Whilst this was a normative power for competent and indeed superior judges, Robertson, without any direct proof, opined that "this clause was, no doubt, aimed at the Reformed church" (*Concilia Scotiae*, i, clxxvi, footnote).

Interesting as this is, however, it has little to do with historical knowledge of the sixteenth-century Scottish Reformation, and much to do with the later ‘Dirletonian’ understanding of ecclesiology and polity alien to the era of the Reformation. Accordingly, the themes of usurpation, conflict and suppression, which predominated in nineteenth-century understanding of relations between the Commissaries and the Kirk, now seem an overly dramatic caricature.

There can now be no doubt that Scots prior to the Reformation understood the spiritual jurisdiction to be entirely distinct from the civil jurisdiction, and to emanate from a different quality of sovereignty to that of monarchs.³⁵⁷ What also seems plain is that the jurisdiction of the tribunals of the Protestant Kirk arose out of what was seen as one of the true hallmarks of the Christian community, namely the discipline of members of the Kirk and the regulation of their moral lives in accordance with the tenets of Scottish Protestant doctrine and practice.³⁵⁸ Finally, as has been argued above, the Reformation crisis did not seem to have occasioned an intellectual revolution in the way Scottish jurists considered the spiritual jurisdiction; rather there is every evidence that the jurisdiction of the Commissaries of Edinburgh was understood to emanate from the Scottish episcopate, to whom it should be restored at such time as the Commissaries’ temporary administration came to an end. In this, a proper understanding of the jurisdictional relations between the Commissaries and the Kirk should not proceed upon the nineteenth-century assumption that both were competing over the self-same jurisdiction and therefore in a state of conflict, but that both were seeking to exercise their own competent authority in the confused circumstances of the Scottish Reformation.

There is direct evidence that between 1559 and 1564 various tribunals of the Protestant Kirk heard actions of Scottish Protestant divorce on the grounds of adultery and indeed it is through the decisions of these tribunals that this legal innovation was introduced into Scotland.³⁵⁹ Sentences were pronounced by the kirk

³⁵⁷ “By my truth, there are two laws, the spiritual law and the temporal: the cure of the one pertaineth to the pope’s holiness and the spirituality; the other to kings princes and the temporality... as for the spiritual law, in good faith we take no regard therof, but commit that to the pope’s holiness, and other ordinary ministers of the kirk within our realm.” James V, 1539/40 (*The State Papers and Letters of Sir Ralph Sadler*, ed. Arthur Clifford (Edinburgh: Archibald Constable and Co., 1809), i, 27).

³⁵⁸ Discussed below, page 225.

³⁵⁹ Discussed further below, 114 *et seq.*

session of St Andrews and by the court of the superintendent of Fife, Fotherick and Strathern at St Andrews,³⁶⁰ by the superintendent, elders and deacons of the kirk of Glasgow,³⁶¹ by the minister, elders and deacons of the kirk of Edinburgh,³⁶² by the superintendent and minister of the kirk of Aberdeen,³⁶³ by the Bishop, minister, elders and deacons of the kirk of Orkney,³⁶⁴ by the minister, elders and deacons of the kirk of Jedburgh,³⁶⁵ and by the minister, elders and deacons of the kirk of Dundee with the superintendent of Angus.³⁶⁶

Of these sentences of divorce, six were produced in litigation before the Commissaries of Edinburgh, and the Commissaries' treatment of these sentences indicates that they employed a coherent policy towards those sentences of the Kirk's tribunals which had been pronounced prior to the appointment of the Commissaries of Edinburgh.³⁶⁷ Their approach may be broken down into three discernible rationales: accepting sentences pronounced by virtue of commissions from the Lords of Council and Session; accepting sentences pronounced by virtue of episcopal authority; accepting sentences the tenor of which either could be verified by some process of inquiry or seemed to be uncontested by the parties involved.

Concerning the first rationale, in *Hammyltoun v. Sclater* the pursuer sought to have the defender decerned to have 'tint her tocher *et donationes propter nuptias*'³⁶⁸

³⁶⁰ i.e. *Gudlawde v. Archbald* (St Andrews, i, 49-50); *Gedde v. Rantoun* (Ibid., i, 59-60); *Lathrisk v. Symson* (Ibid., i, 58-59); *Clerk v. Schevez* (Ibid., i, 62); *Calland v. Alexander* (Ibid., i, 70-72); *Thecar v. Martyn* (Ibid., i, 80-81); *Scrymgeor v. Dundas* (Ibid., i, 140); *Kaye v. Duncan* (Ibid., i, 141); *Philip v. Thomson* (Ibid., i, 150); *Hyllok v. Gyb* (Ibid., i, 155-156).

³⁶¹ Referred to in NAS, CC8/2/1, fos. 393v-394v, 16 March 1564/5, *Hammyltoun v. Maxwell & Lindesay*; NAS, CC8/2/2, fo. 86r-v, 11 July 1565, *Patersoun v. Stevinsoun & Pollock*.

³⁶² Referred to in NAS, CC8/2/1 fos. 323v-324v, 26 January 1564/5, *Hammyltoun v. Sclater*; NAS, CC8/2/2, fo. 419v, 3 April 1568, *Sympill v. Hammiltoun*; NAS, CC8/2/1, fo. 323r-v, 26 January 1564/5, *Westoun v. Ewart*.

³⁶³ NAS, CS7/25, fo 353, 19 February 1562/3, in which Janet Ogilvy was stated to have "ane actioun and caus of divorce dependant before the superintendent and minister of abirden".

³⁶⁴ Referred to in NAS, CC8/2/1, fo. 140r-v, 5 August 1564, *Tullocht v. Sinclair*.

³⁶⁵ NAS, CC8/2/1, fo. 425r-v, 11 April 1565, *Hardy v. Rutherford*. The kirk of Jedburgh actually remitted the process to the Commissaries of Edinburgh upon their appointment.

³⁶⁶ Referred to in NAS, CC8/2/1, fo. 46v, 6 July 1564, *Forrester v. Rollock*.

³⁶⁷ In contrast to David Baird Smith who argued that "the Commissary Court generally declined to recognize the validity of divorces granted by the small Reformed units" ('The Reformers and Divorce', 19).

³⁶⁸ That is to say 'to have forfeited her dowry together with those things given to her on account of the marriage'.

on the grounds that the litigants had been divorced by the “Ministeris eldaris and deacons of the burgh of Edinburgh” on 25 July 1560 on account of Elizabeth Sclater’s adultery with a named paramour. The Commissaries duly decerned Sclater to have tint her tocher *et donationes*, in part because she had failed to appear before the Commissaries and give her oath *de calumnia*, but also because Hamilton had proponed and proven that the kirk of Edinburgh “in respect of the wechtines of the caus had speciale licence gevin to thame be the Lordis of Secreit Counsale to proceed and do justice in the said mater”.³⁶⁹

Such granting of special commissions by the Lords of Council and Session during their administration of the spiritual jurisdiction from 1560 has already been discussed,³⁷⁰ and there is evidence beyond that of the records of the Commissaries of Edinburgh that various tribunals of the Kirk were regularly commissioned by the Lords. Joseph Robertson has highlighted the fact that a husband petitioned the Lords of Council on 22 December 1560 concerning his wife’s adultery, the Council requesting that “the ministeris and eldaris of Sanctandros” hear the case.³⁷¹ A similar commission was granted by the Lords of Council to the kirk session of Glasgow and then Edinburgh in the action of divorce brought by the Countess of Eglinton against her husband.³⁷² In addition the Lords also saw fit to grant the superintendent of Lothian, John Spottiswood, a commission on 19 March 1560/1 to hear all actions of divorce with the kirk sessions of Haddington, Edinburgh, Linlithgow and Stirling until the three estates were next convened.³⁷³ In this it is clear that many of the tribunals of the Protestant Kirk heard consistorial actions because commissioned to do so by the Privy Council and not out of any “encroaching, nay, usurping spirit” as Riddell had had it.

Concerning the second rationale, in *Tulloch v. Sinclair*, as in *Hammyltoun v. Sclater*, the pursuer James Tulloch petitioned the Commissaries to decern his wife to

³⁶⁹ NAS, CC8/2/1, fos 323v-324v (earlier diets at CC8/2/2, fos 72v-73r, 87v-88r, 92r, 300v and 314r). Discussed in *Concilia Scotiae*, i, clxxv; Riddell, *Inquiry*, i, 443; James Fergusson, *Reports of Some Recent Decisions by the Consistorial Court of Scotland* (Edinburgh: A. Constable and Co., 1817), 425-427; Fraser, *Treatise* (1876), ii, 1140.

³⁷⁰ See above, pages 21-23.

³⁷¹ *Concilia Scotiae*, i, clxxv, footnotes; and discussed in more detail in Smith, ‘Spiritual Jurisdiction’, 10.

³⁷² Smith, ‘Spiritual Jurisdiction’, 9.

³⁷³ Donaldson, *Scottish Reformation*, 122; Smith, ‘Spiritual Jurisdiction’, 10.

have ‘tint her tocher *et donationes propter nuptias*’ on the grounds that they had been divorced for adultery. To prove that they had been divorced, Tulloch appeared before the Commissaries of Edinburgh and “*producit tua decreitis of the Divorcement obtenit be him aganis the said Margaret, that ane befoir the bishop minister eldaris and deaconis of the kirk of Orkney, and the vther befoir the Superintendent of lowthiane minster eldaris and deaconis of the kirk of Edinburch*”.³⁷⁴ The Commissaries accepted the sentences as valid. On the one hand it may be supposed that the Commissaries were prepared to accept the sentence of the bishop of Orkney by virtue of his episcopal authority. On the other hand, the sentence pronounced at Edinburgh had proceeded upon an appeal against Orkney’s decret to the General Assembly. The Assembly in turn had “*committit*” the “*caus of appellatioun*” to the “*superintendent of lowthiane Ministeris eldaris and deaconis of the kirk of Edinburgh*”, who confirmed the first sentence on 27 April 1564 “*and sua decernand in effect the said pretendit appellatioun to haue bene iniustlie interponit*”.³⁷⁵ One of the members of the commission appointed by the General Assembly to hear the appeal was Clement Litill,³⁷⁶ who whilst an advocate only when the commission was chosen, had been appointed one of the Commissaries of Edinburgh by the time the commission had reached its decision. As such, the judgement of the appellate tribunal may have been accepted by the Commissaries on account of the fortuitous presence of one of their number among the judges.

These first two rationales suggest that the Commissaries may have been reluctant to acknowledge that the tribunals of the Kirk had an inherent right and authority to hear consistorial actions, or to acknowledge that the pronouncements of the tribunals of the Kirk were authoritative in themselves when used before the Commissaries of Edinburgh. This is also suggested by the third rationale. It would seem that if neither commission from the Lords of Council nor episcopal involvement was evident in the consistorial proceedings of the Kirk prior to the appointment of the Commissaries, the Commissaries were still generally inclined to accept any consistorial sentences which peradventure had been pronounced, but without granting the inherent authority of the Kirk to have pronounced such sentences.

³⁷⁴ NAS, CC8/2/1, fo 140r-v, 5 August 1564.

³⁷⁵ NAS, CC8/2/1, fo 140r-v, 5 August 1564.

³⁷⁶ *Acts and Proceedings of the General Assemblies*, i, 35, 27 June 1563.

Whilst the evidence for the precise basis of the Commissaries' acceptance of the sentences of the Kirk is scant for some cases, there is a suggestion of this third rationale. For example, in *Weston v. Ewart* the pursuer desired that the defender be decerned to have forfeited all things given to her (Ewart) in contemplation of marriage, on the grounds that the litigants had been divorced, for her adultery, by the minister elders and deacons of Edinburgh, 2 April 1562. The Commissaries, having first summoned and examined 8 witnesses, accepted this sentence of the Kirk, the clerk of court noting that the 'divorcement' of the litigants had been "lauchfully led".³⁷⁷ It is not entirely clear what line the Commissaries had taken, but there is at least a suggestion that they had vetted the sentence of the Kirk: yet what is certain is that they had not accepted the Kirk's sentences as the *sole* means of probation.³⁷⁸

Yet in the last example, it could have been just as reasonably argued that the Commissaries accepted the sentence of the Kirk because it possessed some inherent authority which the Commissaries were obliged to acknowledge and accept. This, however, seems untenable in view of the final example to be considered, the case of *Forbes v. Sandelands*, in which the Commissaries of Edinburgh went to considerable lengths to underline the fact that they did not consider the consistorial decisions of the tribunals of the Kirk to have an inherent authority in litigation brought before them.

Prior to the appointment of the Commissaries of Edinburgh, Barbara Sandilands had brought an action of adherence against her husband John Forbes before the court of the superintendent of Fife, Fotherick and Strathearn, John Winram.³⁷⁹ In his defence before the superintendent, Forbes had argued that he ought not to be compelled to adhere to his wife since she had committed adultery with one William Hunter. This peremptory exception, being relevant, was admitted to Forbes's probation. Some 20 witnesses were summoned and their depositions were

³⁷⁷ NAS, CC8/2/1, fo. 323r-v, 26 January, 1564/5, *Westoun v. Ewart*. This phrase echoes the phrase "iustlie procedit" used on occasion by the Lords of Session (see Mark Godfrey, *Civil Justice in Renaissance Scotland: the Origins of a Central Court* (Leiden: Brill, 2009), 190).

³⁷⁸ In another case, *Fiscal and Paterson v. Stevenson and Pollock* it is simply not clear why the sentence of the Kirk was accepted. The sentence was not a direct feature of the case, and some argument could be made for acceptance of the Kirk's sentence on the grounds that the parties divorced by them had consented to the Kirk's arbitration. The case is discussed in considerable detail below, but for other reasons (see pages 139-141).

³⁷⁹ *St Andrews*, i, 156-167, action commenced possibly 23 June 1563, sentence pronounced 8 December 1563.

recorded in the register of the kirk session.³⁸⁰ Barbara Sandilands's adultery with William Hunter was duly proven, because it was certain a child had been born to the adulterous couple. As such, the superintendent's court pronounced a sentence in which John Forbes was assoilized from the action of adherence on the grounds of Sandilands' adultery.

On 12 May 1564, shortly after the appointment of the Commissaries of Edinburgh, John Forbes brought an action of Scottish Protestant divorce before them, against his wife Barbara Sandilands, whom he alleged to have committed adultery with a named paramour, again William Hunter.³⁸¹ To prove his libel, Forbes produced the sentence of the superintendent of Fife in which it was explicitly stated that Sandilands had committed adultery with William Hunter.³⁸² Nevertheless, the Commissaries clearly did not accept the sentence of the superintendent of Fife as proving Forbes's libel. Rather, the Commissaries admitted Forbes's libel to probation, that is to say probation by witness. Of those witnesses who were summoned to Edinburgh and who actually appeared and deponed on oath, four had already given evidence before the superintendent of Fife. It seems clear from the depositions of these self-same witnesses recorded in the register of the kirk session of St Andrews³⁸³ that their evidence was sufficient to prove Forbes's libel.³⁸⁴ It is clear that the Commissaries of Edinburgh could have had the original depositions of several witnesses examined in St Andrews extracted from the register of the kirk session there and brought to Edinburgh, but they clearly decided to re-examine the same witnesses in Edinburgh. Moreover, several members of the superintendent's actual court were also summoned to Edinburgh, namely Master John Douglas, rector of the University of St. Andrews; Master William Ramsay, Master of St Salvator's and elder in the kirk; and Master James Wilkie, elder and prominent member of the

³⁸⁰ *St Andrews*, i, 160-167.

³⁸¹ NAS, CC8/2/1, fos. 18v-19r, 37r, 47v, 133v, 153v, 258v, 269r, 270v, 280r, 288r, 304v-305v (Decreet).

³⁸² NAS, CC8/2/1, fo. 133v, 2 August 1564.

³⁸³ David Ramsay of Brakmouth (NAS, CC8/2/1, fo 153v; *St Andrews*, i, 160, no. 1); John Vre (NAS, CC8/2/1, fo 258v; *St Andrews*, i, 161, no. 2); Master Robert Hamilton (NAS, CC8/2/1, fo 269r; *St Andrews*, i, 164, no. 12); George Levingstoun (NAS, CC8/2/1, fo 270v; *St Andrews*, i, 164, no. 13); note also that Michael Balfour of Burly had also deponed in St Andrews (*St Andrews*, i, 161-2, no. 8), and was summoned before the Commissaries, but he failed to compear (NAS, CC8/2/1, fo 258v).

³⁸⁴ It is noted that a further five witnesses were examined in Edinburgh, who had not been examined in Fife.

kirk of St Andrews.³⁸⁵ These men had not been witnesses in the original action before the superintendent of Fife, Fotherick and Strathearn but rather were leading members of the kirk of St Andrews who had appended their names to the sentence pronounced by the superintendent's court.³⁸⁶

It seems certain that the Commissaries were not willing to accept the sentence of the superintendent's court at St Andrews as the sole means by which Forbes's allegation of adultery could be proven. The re-examination of witnesses and the summoning of Douglas and his colleagues were undertaken deliberately by the Commissaries. Given these certainties, it seems probable that they were making a general jurisdictional and constitutional point, namely that the tribunals of the Protestant Kirk did not have an inherent authority by which they could pronounce consistorial decisions which would be accepted as legally binding and enforceable by the wider Scottish legal system. Nevertheless, important as this conclusion is, it would be a mistake to use it to argue that the Commissaries of Edinburgh considered the tribunals of the Kirk to have enjoyed *no* legitimate authority and jurisdiction within the Scottish realm. The contrary appears to have been the case and this will be discussed in chapter VI, within the context of the ongoing relations between the Commissaries and Kirk from 1564.

³⁸⁵ NAS, CC8/2/1, fo 269r, 5 December 1564.

³⁸⁶ "Pronounced in the parroche kyrk of the cite of Sanctandros, upon the viij of December *anno* 1563, being present Masteris Ihon Dowglas, Rector, Crostofer Gudman, minister; Masteris Wyliam Ramsaye, James Wylke, Alan Lawmonth and hol ministerie" (*St Andrews*, i, 168).

CHAPTER III

SCOTS CONSISTORIAL LAW DURING THE REFORMATION ERA

With the abrogation of papal authority in Scotland the inherent authority of the Canon law was called into question and its status, authority and continued validity in consistorial actions cannot have been entirely clear to the earliest Commissaries. However, in a number of ways it cannot be said that the Commissaries were in an unprecedented situation. It is quite likely, for example, that the first chief Commissary, James Balfour, would have had the example of the Lutheran Reformation before him as he resumed his administration of the episcopal jurisdiction in many senses where he had left off as last Official of Lothian. As a young man he had studied at Wittenberg,³⁸⁷ where he probably became aware of Lutheranism's initial rejection, and subsequent re-acceptance of the Canon law. Luther's fulminations against the "accursed papal law"³⁸⁸ or "holy canon law of unrighteousness"³⁸⁹ during "the heady days of the revolutionary defiance of Pope and Emperor in the 1520s"³⁹⁰ cannot have been without its parallels in Balfour's own mind. As last Official of Lothian, Balfour must have been acutely aware of the rebellion of the Lords of the Congregation and their strikingly Lutheran railings against the maintainers of the "laws of Antichrist", namely the courts of the Catholic Church, which the Lords had sought to overthrow. And like the early Lutheran reformers, radical Scottish reformers sought to abolish the Canon law.³⁹¹

These may well have been alarming parallels for Balfour, who despite the religious radicalism of his youth, had become conservative in his later years, and indeed a spiritual judge in the Catholic Church prior to the Reformation.³⁹² The

³⁸⁷ *Balfour's Practicks*, i, xii.

³⁸⁸ John Witte, 'The Transformation of Marriage Law in the Lutheran Reformation' in John Witte and F. S. Alexander (eds.), *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars Press, 1988), 57-97, 57.

³⁸⁹ John Witte, 'Canon Law in Lutheran Germany', in M. Hoeflich (ed.), *Lex et Romanitas: Essays for Alan Watson* (Berkeley, California: Robbins Collection Pub., 2000), 181-224, 197.

³⁹⁰ Witte, 'Canon Law in Lutheran Germany', 183.

³⁹¹ See references to the "laws of Antichrist" above, pages 11-13.

³⁹² Balfour had been "a fanatical Calvinist" in his youth and was numbered among the castillians following Cardinal Beaton's murder (Peter McNeill, 'Balfour, Sir James, of Pittendreich (c. 1525-1583)' (*ODNB*, accessed 12 December 2005). His change of attitude may have occurred during his time at the oars of French galleys with John Knox for company!

chaos which Lutheran Germany had experience as a result of its unworkable rejection of the Canon law³⁹³ must also have been known to Balfour. And as a student at Wittenberg in 1544 he may even have read a canon law textbook used there in teaching, for which Luther, despite his venomous attacks against the Canon law in the 1520s, had written a “commendatory preface”.³⁹⁴

It is therefore no surprise that when radical Protestantism imperilled the future of the Canon law in Scotland, Balfour emphasised the episcopal origins of the consistorial jurisdiction and involved himself intimately in the attempt to extricate the consistorial jurisdiction and its law from papal associations, and to continue its administration under the protection of the Crown and College of Justice until such time as it could be restored to the Scottish episcopate. And it is also no surprise that, this attempt proving successful, a great many aspects of the medieval Canon law were successfully transplanted into the law of the Commissaries of Edinburgh and all Scotland: a similar process had already proved successful in Lutheran Germany.³⁹⁵ The likely rationale used by the Commissaries in regulating this process has also survived in the works of Thomas Craig, himself a procurator before the earliest Commissaries of Edinburgh.³⁹⁶ Craig argued in his *Ius Feudale* that “although the authority of the Pope was rejected at the Reformation, the Canon law remained authoritative: ‘so much so, that where it differs from the Civil law...we follow the Canon law’”.³⁹⁷

Whilst the Canon law seems to have been adopted wholesale in executry business and in the regulation of Scottish benefices,³⁹⁸ the early consistorial law of the Commissaries of Edinburgh did witness considerable departures from the Canon law of marriage and divorce, and as such is of particular interest to this thesis. Yet even here, the continuity of the Canon law was pronounced in respect of the contracting of marriage, and even where new laws of divorce were introduced, the presence of concepts from the Canon law are still discernible. This section will therefore begin by considering the contracting of marriage and the continued

³⁹³ Witte, ‘Canon Law in Lutheran Germany’, 204-205.

³⁹⁴ *Ibid.*, 183.

³⁹⁵ *Ibid.*, 182.

³⁹⁶ For example, Craig famously represented the 5th earl of Argyll in his proceedings against his countess, Jane Stewart (discussed below, page 144).

³⁹⁷ Sellar, ‘Habit and Repute’, 117-136, 120, see also 123.

³⁹⁸ For benefice law see Green, ‘Scottish Benefices’.

enforcement of the Canon law, before turning to a detailed consideration of the two great alterations introduced by the Reformation, Scottish Protestant divorce for adultery and Scottish Protestant divorce for malicious desertion.

§I

REGULAR, IRREGULAR AND CLANDESTINE MARRIAGE

[i] REGULAR MARRIAGE

During the course of the twentieth century Scottish legal historians have become fully aware of the almost total continuity of the Canon law concerning the contracting of marriage in Scots consistorial law. This has been achieved not so much as a result of the development of a fuller understanding of Scots law, but from a greater appreciation of the Canon law. A renewal of interest in the pre-Reformation law of marriage may be traced to the publication of the *Liber Officialis Sancti Andree* in 1845, but it was not until the publication of *William Hay's Lectures on Marriage* in 1967 that Scottish legal historians were presented not just with “the Canon Law in isolation, but something much more illuminating – legal prescriptions set out within that framework of reference which alone gives them meaning, the intricate structure of Catholic theology”.³⁹⁹ The renewed appreciation of the intellectual basis of the Canon law of marriage in Scotland has been used to correct many of the misunderstandings which had arisen in Scotland.⁴⁰⁰

One of the principal sources of confusion in Scotland arising out a failure to grasp the principles of the Canon law concerned the contracting of marriage in post-Reformation Scotland arose out of the work of the nineteenth-century Lord of Session, Patrick Fraser. Whilst it is now well understood that Fraser's work was “marred”⁴⁰¹ on account of his “insistence that in the Middle Ages both England and Scotland had a national ecclesiastical law of their own, influenced by, but not

³⁹⁹ Quoted from I.D. Willock's apology offered by the Stair Society for publishing William Hay's *Lectures on Marriage*.

⁴⁰⁰ For example, David Sellar has corrected various errors concerning marriage by cohabitation with habit and repute by setting Scots law within its Canon law context ('Habit and Repute', 117-136); Sellar also notes that Hay's *Lectures on Marriage* and Ollivant's *Court of the Official* have added much to our knowledge of the Canon law in Scotland (Ibid., 119).

⁴⁰¹ Hector MacQueen, 'Fraser, Patrick, Lord Fraser (1817–1889)' (*ODNB*, accessed 5 March 2010).

identical with that of the church of Rome”,⁴⁰² Fraser’s writings still remain the only work in which extensive evidence from the early Registers of the Acts and Decrets of the Commissaries of Edinburgh is used to support arguments about the shape of early Scots consistorial law concerning the contracting of marriage. Whilst a greater understanding of the Canon law of marriage, together with a definite and certain knowledge of later Scots consistorial law⁴⁰³ has long laid Fraser’s errors to rest, the fact that he based his arguments upon an analysis of the early cases of the Commissaries of Edinburgh makes a degree of engagement with Fraser necessary: the same material has not been discussed in detail until now.

In addition, there still seems to be a persistent confusion in Scotland about the use of the terms ‘regular’, ‘irregular’ and ‘clandestine’ marriage, as highlighted in a recent article by Brian Dempsey. He has summarized the confusion thus:

“It is, however, accepted that there is a great deal of overlap between clandestine and irregular marriage in Scots law and that in many particular cases it would prove difficult to establish with any clarity whether the “confused happenings” in the records were either clandestine or irregular marriages or both. Notwithstanding the confusion, [Patrick] Fraser was at pains to keep separate the two types of marriage. On the other hand, Leah Leneman and Rosalind Mitchison...state that one can ignore the distinction and refer to ““irregular’, ‘disorderly’ or ‘clandestine’ marriage (the terms are synonymous)” ”.⁴⁰⁴

In the case of Leneman and Mitchison it will be shown that their conflation of the terms has been predicated upon a lack of understanding of the Canon law context. Dempsey himself nevertheless goes on to submit that “an attempt should be made where possible to differentiate between the two types of “non-regular” marriage”. The category ‘non-regular’ is undoubtedly useful. Dempsey has reserved his method of differentiation for “a later article”, but has suggested that the distinction between ‘irregular’ and ‘clandestine’ “is important in terms of understanding people’s motivation to marry other than according to the formally correct procedure”.⁴⁰⁵ Be that as it may, it will be argued here that the confusion has arisen out of the

⁴⁰² Sellar, ‘Habit and Repute’, 118.

⁴⁰³ The principal published source of which remains *Lord Hermand’s Consistorial Decisions* (Stair Society, 1940).

⁴⁰⁴ Brian Dempsey, ‘The Marriage (Scotland) Bill 1755’ in *Miscellany VI* (Edinburgh: The Stair Society, 2009), 75-119, 77.

⁴⁰⁵ Dempsey, ‘The Marriage (Scotland) Bill 1755’, 78.

conflation of two distinct perspectives of marriage law, namely the Canon law perspective and the Scots law perspective, which use the same vocabulary to designate different concepts.

The ideal to which the Church in western Christendom had been aspiring since the Fourth Lateran Council regarding the contracting of marriage was regular marriage. The Council, “extending the special custom of certain regions to other regions generally” decreed that “when marriages are to be contracted they shall be publicly announced in the churches by priests, with a suitable time being fixed beforehand within which whoever wished and is able may adduce a lawful impediment. The priests themselves shall also investigate whether there is any impediment”.⁴⁰⁶ All marriages contracted without a prior proclamation of banns were deprecated and deemed ‘clandestine’.

As has been noted by James Scanlon, the term ‘clandestine’ “could mean a marriage contracted without witnesses and therefore incapable of juridical proof; a marriage which could indeed be proved but was contracted without the prescribed solemnities; and lastly, after the 4th Lateran Council, a marriage without previous banns”.⁴⁰⁷ This is certainly accurate. Within the Canon-law context of Lateran IV, ‘clandestine’ was used in a broad sense to distinguish all ‘non-regular’ marriages, whilst simultaneously defining ‘clandestine’ marriages as all those not conforming to the new prescription that all regular marriages be prefaced by the proclamation of banns.⁴⁰⁸ On the other hand, within the Scots law context, the Canon law category ‘clandestine’ in the sense of ‘non-regular’ was broken down into ‘clandestine’ and ‘irregular’ marriages, in respect of the probation of marital promises. That is to say, if the promise was made in secret and could only be proven through recourse to an oath, the promise was ‘clandestine’ in Scots law. If, however, a promise had been made before witnesses, and possibly recorded by a notary, but went on to form the basis of a ‘non-regular’ marriage then it was deemed irregular in Scots law. Thus, when Lateran IV forbade priests to be present at ‘clandestine’ marriages it meant

⁴⁰⁶ *Decrees of the Ecumenical Councils*, ed N.P. Tanner, SJ, (London: Sheed & Ward, 1990), i, 258.

⁴⁰⁷ James D. Scanlon, ‘Husband and Wife: Pre-Reformation Canon Law of Marriage of the Officials Court’ in *An Introduction to Scottish Legal History* (Edinburgh: The Stair Society, 1958), 69-81, 73; see also *Lectures on Marriage*, 29.

⁴⁰⁸ *Decrees of the Ecumenical Councils*, i, 258; Cf Ireland, ‘Husband and Wife: Post-Reformation’, 84.

those not prefaced by banns (i.e. ‘non-regular’), rather than those that could only be proven by oath, since the presence of the priest provided a witness to the union.

The decrees of the Fourth Lateran Council were clearly accepted by the Scottish Church, with the “thrice-repeated proclamation” of banns on three separate Sundays becoming mandatory, whilst priests were prohibited from celebrating ‘clandestine’ marriages.⁴⁰⁹ Nevertheless, the problem with the Church’s attempted reform rested upon the fact that ‘non-regular’ marriages were still valid, if proven. The text-book problem was that attendant upon the giving in of a couples’ names to a priest to have their banns proclaimed. The giving in of names clearly implied, and indeed could only practically proceed upon *sponsalia per verba de futuro*. The danger here for the Church’s drive for regularity was that if *copula* preceded either the proclamation of banns or the solemnization of the marriage, an irregular marriage was contracted.

The Scottish Church sought at the least to limit the consequences of this weak point in proceedings, and at best to prevent it altogether, by ordaining that couples wishing to be betrothed “whether according to the formula for a union ‘at present’ or ‘in the future,’ contract the said espousals in the presence of a priest and of trustworthy witnesses”. In addition the Church enjoined that banns should be published as soon as possible thereafter, that any subsequent nuptial blessing be public and not private, and that those who had sexual intercourse following their espousals, but prior to the public celebration of their marriage, should be punished as fornicators.⁴¹⁰ Several distinct elements can be discerned in the Church’s policy. On the one hand the presence of “a priest and of trustworthy witnesses” when any promise of marriage was made was aimed at making probation easier in the event of a subsequent denial of the promise. On the other, the pragmatic step of having the banns proclaimed as soon as possible, was intended to limit the time-frame in which *copula* could occur. The final provision was to use the Church’s censures to deter couples from entering into sexual relations between initial promise and solemnization, by threatening to punish them ‘as fornicators’. This censure can be misleading if taken in the wrong sense. It was not meant to imply that irregular marriages were no marriages at all and therefore the couple involved were

⁴⁰⁹ *Statutes of the Scottish Church, 1225-1559*, trans. & ed. D. Patrick (Edinburgh: Scottish History Society, 1907), 39, 63, 71-72, 142-143.

⁴¹⁰ *Ibid.*, 72-73.

fornicators. Rather the sense was that those who disobeyed the Church's injunctions in this matter were to be punished *as if* fornicators, or with the same punishments as those meted out to fornicators. This sense was expressed by Andrew Forman, Archbishop of St. Andrews (1516-1521) when he condemned the "two evil customs" of clandestine espousals, and public espousals followed by *copula* prior to "the contracting of marriage and its solemnization in the face of the church..." in an attempt to rouse the clergy to instruct the people to cease to practice such customs.⁴¹¹ Following the Reformation, the Kirk continued to take a strong stance against such customs, describing them as "manifest fornication and huiridom",⁴¹² although it is unclear if the Kirk intended to actually make regular marriage the only lawful kind of marriage, as did the Council of Trent.

Regular marriage was therefore proclamation of banns followed by *sponsalia per verba de praesenti in facie ecclesiae*. But it must be pointed out that the banns were the essential element, since *sponsalia per verba de praesenti* could be contracted *in facie ecclesiae* without the proclamation of banns, but would be 'non-regular' or 'clandestine'. This arose from the definition of 'the face of the Church'. William Hay quotes the definition of Angelus that "marriage is said to be contracted in the presence of the Church when it is contracted before a number of witnesses, for by Church in this context is meant an assembly of the faithful".⁴¹³ In this, the presence of a priest at the celebration of the marriage was not a legal necessity until the Council of Trent's *Tametsi* which insisted on the presence of a priest for legal validity; as is well known, this decree did not become law in Scotland. In Scotland, whilst the presence of a priest was always preferable, but not legally essential, the key phrase in distinguishing clandestine from irregular marriages became the statement that a promise of marriage had been made "before famous witnesses".⁴¹⁴

⁴¹¹ *Statutes of the Scottish Church*, 267-268.

⁴¹² Quoted in Sellar, 'Canon Law and Scots Law', 62.

⁴¹³ *Lectures on Marriage*, 29.

⁴¹⁴ See below, page 174, n. 137.

[ii] IRREGULAR AND CLANDESTINE MARRIAGE⁴¹⁵

Concerning irregular and clandestine marriages, continuity between the pre-Reformation Canon law and the Scots consistorial law of the Protestant age was near total. Patrick Fraser's errors are most pronounced in this respect, since despite his erudition and interesting observations, his preconceptions concerning the pre-Reformation Scottish polity and Canon law gave rise to a series of interconnected errors when he sought to interpret and systematically arrange evidence from the early decreets of the Commissaries.

The basic error from which Lord Fraser's misconceptions arose concerned his understanding of the reception of the Canon law into Scotland prior to the Reformation. Lord Stair had asserted in his *Institutions* that the Canon law had no binding authority in Scotland, but was accepted by Scottish courts on its merits.⁴¹⁶ Whilst Stair's statement tenable during the post-Reformation period, Fraser applied this rule in an undifferentiated way to pre-Reformation Scotland. Accordingly, Fraser made a distinction between 'Roman' and 'Scotch' Canon law. The former was that promulgated by the bishops of Rome, the latter that received into Scotland by tribunals of the Scottish Church. For Fraser, Roman Canon law had no inherent binding force in Scotland either before or after the Reformation: only those elements of the Roman Canon law which had had the authority of a native Scottish tribunal interpolated upon them were binding. Whilst this conception provides a helpful model by which the post-Reformation reception of Canon law may be understood, it is entirely misleading regarding the pre-Reformation Scottish polity. The result for Fraser was that he did not believe that the *Corpus Iuris Canonici* was a valid source from which to infer the 'Scotch' Canon law. Rather 'Scotch' Canon law had to be demonstrated from the evidence of statutes of the Scottish Church and the extant records of the pre-Reformation Officials.⁴¹⁷

From the pre-Reformation Scottish material Lord Fraser deduced and inferred that the law of Scotland concerning contracting marriage was as follows. A promise of betrothal *per verba de futuro* on its own was a pre-contract, which whilst it

⁴¹⁵ The definitions used here are in terms of the distinctions of 'non-regular' marriage relative to the probation of the promise on which they were founded.

⁴¹⁶ Fraser, *Treatise* (1846), i, 27, quoting *Institutes*, I.1.16.

⁴¹⁷ Fraser, *Treatise* (1846), i, 30-35; *Treatise* (1876), i, 23-25.

impeded the contracting of another marriage, could nevertheless be dissolved by the decree of a competent court:⁴¹⁸ in this he was correct. His error arose from the extension of this concept of pre-contract to all other kinds of betrothal and subsequent *copula* which fell short of regular marriage⁴¹⁹. Two main pieces of evidence suggested this theory to Lord Fraser's mind. In the first place, there was clear evidence that the Scottish Church deprecated clandestine and irregular 'marriage' in the most vehement terms, denouncing it as 'fornication'. In the second place, Fraser noted how the Officials had always decerned couples so united to solemnize the band of marriage *in facie ecclesiae*. From this, Fraser deduced that without solemnization no marriage could be deemed to have been contracted, because otherwise the Officials would have pronounced a declarator of marriage rather than compel solemnization.⁴²⁰

Nevertheless, Fraser had fundamentally misunderstood the Church's position concerning irregular and clandestine marriage. The Church had always maintained that irregular and clandestine promises of marriage in the present tense, or in the future tense followed by copulation, formed the bond of marriage between a couple. The primary grounds for this position was the Church's understanding of marriage as a sacrament, and that consent in the present tense or its equivalent was all that was necessary to contract marriage, an understanding derived from a consideration of the marriage between Mary and Joseph.⁴²¹ The Church reasoned that since the marriage of two baptized Christians was a source of grace, all obstacles to the reception of such grace ought to be removed. Whilst the Church never altered this basic theological understanding, practical considerations obliged it to regulate the contracting of marriage through the Canon law enforced with ecclesiastical sanctions. As such, prior to the Tridentine reforms, the Church would still ultimately acknowledge the validity of clandestine marriages, but could fulminate against those who contracted such marriages on the grounds that they had violated the Canon law.⁴²²

⁴¹⁸ Fraser, *Treatise* (1876), i, 263 *et seq.*

⁴¹⁹ *Ibid.*, i, 322 *et seq.*

⁴²⁰ *Ibid.*, i, 331 *et seq.*

⁴²¹ See below, page 101.

⁴²² "The Church always reprobated clandestine marriages" (Scanlon, 'Husband and Wife', 73).

The Church's tightening of the regulations governing the contracting of marriage was a lengthy process which spanned the 350 year period between Lateran IV and Trent. A significant tightening of regulations within the Scottish context was that introduced by Archbishop Forman (1516-1521), who ordained that promises made in public without being prefaced by banns had to be made in front of a priest;⁴²³ in reality this became in effect before 'famous witnesses'. Even then, whenever Officials found a couple to have contracted an irregular (or indeed a clandestine) marriage, they would ordain that the couple proceed to have the banns proclaimed and their marriage celebrated with full solemnities *in facie ecclesiae*. This policy was aimed at continually enforcing in the minds of the laity the Church's desire that all marriages be regularly celebrated and contracted. As such, what Lord Fraser observed was not the Church's dismissal of clandestine and irregular marriages as *de facto* null, but rather the Church's attempt to reduce the number of such marriages and increase the proportion of marriages contracted in a regular manner through recourse to ecclesiastical censures and the courts spiritual.

The policies of the medieval Church, or at least the laws they gave rise to, were retained by the Commissaries of Edinburgh. Nevertheless, reforms introduced by the Council of Trent, which tightened marriage law yet further by declaring 'clandestinity' in the sense of 'non-regularity' to be an impediment to marriage in Canon law, thereby providing a handle by which all marriages proceeding without proclamation of banns could be annulled⁴²⁴ were not adopted in Scotland.

When discussing the valid contracting of marriage in Scotland Fraser allowed that "the direct legal authorities on the subject are very scanty, and one is compelled to illustrate what the law is by reference to practice, and custom, and usages found elsewhere than in direct decision of the Consistorial Court. Many of the latter will here be cited; but the labour of searching among the MSS. records must be the excuse for leaving so much learning in the obscurity in which it now lies buried".⁴²⁵ If Fraser been less occupied as a Lord of Session and had had more time to continue his researches among the Acts and Decrees he would found plentiful evidence among his cherished native Scottish sources that openly contradicted his opinion that

⁴²³ *Statutes of the Scottish Church*, 267-8.

⁴²⁴ *Decrees of the Ecumenical Councils*, ii, 755 *et seq.*, Council of Trent, session 24, chapter 1, *Tametsi*.

⁴²⁵ Fraser, *Treatise* (1876), i, 326.

only solemnized marriages were actual marriages, all other forms of betrothal being a pre-contract. The principal source of information for the illustration of this branch of the law are actions for solemnization of marriage. Decrees compelling solemnization were in effect declarators of marriage, albeit they conformed to the policy of the late medieval Church of channelling as many clandestine and irregular marriages as possible towards regularity.

[a] SPONSALIA PER VERBA DE FUTURO

This type of betrothal was a marital pre-contract in Scotland, both before and after the Reformation. It was nevertheless an impediment to entering into a subsequent marriage agreement with a third party. On a number of occasions during the 1560s and 70s the Commissaries of Edinburgh dealt with actions occasioned by these types of pre-contract. In *McWalter v. Galbraith*, the pursuer and defender had “contractit sponsalia per verba de futuro and euey ane of the saidis parteis maid faithfull promeis to vtheris for solempnizatioun of the band of mariage foirsaid,” yet the defender refused to compleit the promise and openly declared that she did not wish to be joined to the pursuer in marriage. The pursuer therefore sought to “be decernit fre of the promeis foirsaid and to haue als greit libertie in mariage as he had of befor the tyme of the promeis foirsaid and making thairupoun seing that thair hes na carnale deill followit thairupoun.” The Commissaries duly declared the pursuer free, since both parties, being sworn, made faith that there had been no ‘carnal conversation’ between them.⁴²⁶

The quality of the promise, in terms of whether it was made secretly or publicly, made no difference to its *de facto* validity, but rather gave rise to complications of proof, which are dealt with in the section on consistorial procedure and competent actions.⁴²⁷ It is also clear that the proclamation of banns following upon a promise of marriage *per verba de futuro* did not prevent the Commissaries from dissolving the pre-contract. Thus in *McWalter v. Galbrayth*, whilst the banns were not explicitly mentioned in the Commissaries’ decret, the *Buik of the Kirk of the Canagait* notes “Valter McValter, Bessie Cabreth, 1, 2, devorsment vith the

⁴²⁶ NAS, CC8/2/2, fo. 41, 30 May 1565.

⁴²⁷ See below, pages 173-177.

commissar” in its list of “the namis of all thois that ar cryit in our kirk”.⁴²⁸ This is of course a logical position for the Commissaries to have adopted: the giving up of names to a parish minister to be proclaimed was indicative of a promise *per verba de futuro* and nothing more. Thus, whilst banns were a helpful indicator of *sponsalia per verba de futuro*, without *copula* such promises remained pre-contracts.

[b] SPONSALIA PER VERBA DE FUTURO CUM COPULA SUBSEQUENTE

The pre-contract of *sponsalia per verba de futuro* became a binding contract of marriage if completed by subsequent *copula*. This Canon law doctrine was clearly retained in Scotland following the Reformation, despite Lord Fraser’s arguments.⁴²⁹ On several occasions, this doctrine was stated explicitly in principal precepts issued by the Commissaries of Edinburgh. In *Goddiskirk v. Tenent*, it was asserted that the litigants had “maid promeis of mariage ather to vther quhilk promeis wes alsua corroborat betuix thame be proclamatioun of thair bannis maid opinlie in the kirk of Calder of thair consentis in publict audience, and als be carnall daill and copulatioun had thaireftir quhairthrow in effect the mariage was consummat & finnist betuix thame”.⁴³⁰ In *Duncane v. Fairley*, it was alleged that the defender had sought the pursuer’s consent to fornicate together, but being rebuffed, promised to marry the pursuer, which promise was followed by *copula*. The pursuer thus asserted that the defender ought to be compelled to solemnize the band of marriage “sen it is of veritie that sik faythfull promes maid as said is makis matrimony carnale dale followand thairupoun”.⁴³¹ Similar statements were made in *Bartene v. Mowbray*,⁴³² *Crawfurde v. Makdill*,⁴³³ *Denis v. Brysoun*⁴³⁴ and *Quhitlaw v. Stewart*.⁴³⁵ Finally the matter was

⁴²⁸ *The Buik of the Kirk of the Canagait, 1564-1567* ed. A. B. Calderwood (Edinburgh: Scottish Record Society, 1961), 105.

⁴²⁹ For a summary of the confusion in Scots law from the 18th to the 20th centuries see Ireland, ‘Husband and Wife: Post-Reformation’, 87-88.

⁴³⁰ NAS, CC8/2/5, fos. 46v-47r, 12 Janaury 1570/1, *Goddiskirk v. Tenent*.

⁴³¹ NAS, CC8/2/3, fos. 52v-53r, 14 June 1568, *Duncane v. Fairley*.

⁴³² “quhilk promeis with carnall copulatioun followand makis matrimony in effect” (NAS, CC8/2/7, fo. 372v-373r, 9 January 1575/6).

⁴³³ “the said promeis and carnall daill following quhilk is mariage in the self” (NAS, CC8/2/8, fos. 145v-146r, 5 May 1576).

⁴³⁴ “be quhilk mutuale promeis and carnale copulatioun following thairvpoun thair is in effect matrimony perfite betuix the saidis partyis” (NAS, CC8/2/8, fos. 154v-155r, 15 May 1576).

put slightly differently in *McCerie v. Hunter*, in which it was alleged that the litigants had “promittit to Gode *per verba Defutur*”⁴³⁶ to tak vtheris in the holie band of matrimony,” and thereafter allegedly “gaif the vse of thair bodyis till vtheris, in respect quhairof be the law of God nather of thame can nor may seperat thame selffis fra vtheris & tak vther personis quhatsumevir in marriage”.⁴³⁷

[c] SPONSALIA PER VERBA DE PRAESENTI

In Scotland, both before and after the Reformation, promise of marriage in the present tense constituted marriage, and indeed was held to be the very essence of marriage. Prior to the Reformation the Church held that such a promise did not have to be consummated in order to constitute marriage. William Hay treated his students at Aberdeen to a substantial discourse on the matter under the heading “Whether there was a true and valid marriage between the glorious Virgin Mary and Joseph the just, notwithstanding their vows of chastity”: the answer was emphatically affirmative.⁴³⁸ Whilst it should be doubted that the Scottish Reformers maintained the doctrine of the perpetual virginity of Mary, the law which stemmed from this doctrine was retained in Scotland.⁴³⁹ This law was stated explicitly in *Makewin v. Stalker*, in which it was alleged that the couple had “contracti[t] mareage befor diuers famows wittneses bretheris of the kirk of God *per verba de presenti* with thair mutuall consentis ilk ane to vtheris be thair faithfull promeses *hinc inde* & j[un]ying thair rycht handis in takin of thair mut[u]all consentis, quhilk in effect matrimony completit”.⁴⁴⁰

⁴³⁵ “Nochtwithstanding the quhilk promeis and carnall daill following thairvpoun quhilk is mariage in the self” (NAS, CC8/2/6, fo. 172r-v, 20 October 1573).

⁴³⁶ Certainly no *o*, and possibly even *Defutire* in MS.

⁴³⁷ NAS, CC8/2/6, fo. 448v, 23 July 1574, *McCerie v. Hunter*.

⁴³⁸ *Lectures on Marriage*, 305-317.

⁴³⁹ I have made no study of the Reformers on this question, though I recall the late Professor David Wright explaining that the first generation of European Reformers did not treat upon the subject of Marian doctrine at length.

⁴⁴⁰ NAS, CC8/2/4, fos. 152v-153r, 20 January 1569/70.

CONCLUSION

Continuity between pre- and post- Reformation law in Scotland concerning regular, irregular and clandestine marriage was total. The essential principle remained that consent as expressed *per verba de praesenti* was the essence of marriage, regardless of subsequent *copula*. In the case of *sponsalia per verba de futuro*, such a promise remained a dissoluble pre-contract, unless completed by subsequent *copula*, such *copula* being taken as evidence of present consent to the proposed marriage,⁴⁴¹ thus tantamount to *sponsalia per verba de praesenti*. The distinction between clandestine and irregular marriage depended before whom the promises had been made. Thus, whilst the promises of marriage made between two parties free to consent were always *de facto* valid, they were clandestine if made in secret, and irregular if made before “famous witnesses”,⁴⁴² but without having been prefaced by the proclamation of banns. Yet the preferred manner of contracting marriage in Scotland, prescribed by positive law, remained the proclamation of banns and the solemnization of marriage *in facie ecclesiae*.

⁴⁴¹ See Sellar, ‘Canon Law and Scots Law’, 62.

⁴⁴² See below, page 174, n. 137.

§II SCOTTISH PROTESTANT DIVORCE FOR ADULTERY

The precise shape of the divorce law reforms introduced into Scotland by the tribunals of the Protestant Kirk from 1559 has been much discussed over the years. Prior to the Reformation, the competent remedy for adultery had been divorce *a mensa et thoro*, a divorce which allowed both parties to live separately, but which did not allow the remarriage of either the innocent or the guilty party. Such freedom was only bestowed following the death of one of the parties, at which stage the surviving party could usually remarry. The principal innovation of the Reformation was to allow a new kind of divorce which certainly allowed the immediate remarriage of the innocent party. Nevertheless, it remains a disputable point whether or not the guilty party was likewise entitled to remarry at once.

Later Scottish practice and opinion maintained that both parties were free to remarry. By the later seventeenth century Lord Stair summarized the law of divorce for adultery thus:

“It may be doubted, whether the adulterer, after the dissolution of the marriage upon his default may marry again. But though positive law, as a penalty upon adulterers, may hinder their marriage with the adulterers or others and declare such marriages, as to succession and civil effects void; yet can it not simply annul it. With us marriage betwixt the two committers of adultery is declared null, and the issue inhibitate to succeed to their parents (by an Act of Parliament passed in 1600). But otherwise even the person guilty may remarry again.”⁴⁴³

This kind of divorce was commonly known as divorce *a vinculo matrimonii* and has been defined by Lord Trayner as setting “the parties as free from each other as if they had never been married, and entitles each to remarry, even during the lifetime of the previous spouse”.⁴⁴⁴ Whilst there can be no doubt that this was indeed the law of Scotland from at least Stair’s time, doubts have persisted as to whether or not this was the law of Scotland during the sixteenth century from 1559. For this earlier

⁴⁴³ James Dalrymple, Viscount of Stair, *Institutes of the Laws of Scotland* (Edinburgh: Hamilton and Balfour, 1759), I.4.7.

⁴⁴⁴ *Trayner’s Latin Maxims* (Edinburgh: W. Green & Son, 1894), fourth edition, 6.

period, various authorities have questioned the applicability of Stair's observations. To quote an extract from Patrick Fraser's *Treatise* of 1846:

“even Lord Stair himself has been accused with being on this subject unusually obscure...and his doctrines are said to be inconsistent with our early practice, which he professed to elucidate. ‘In the whole of this section of his work,’ says Mr Gillies,⁴⁴⁵ ‘Lord Stair has not expressed himself with his usual perspicuity,’ and [John] Riddell has added, that ‘however great a lawyer, [Stair], as has been already observed, is not always a close or apt illustrator of our peculiar or original practice.’ ”⁴⁴⁶

The questioning of Stair's authority for the post-Reformation sixteenth century period left the questioners with a significant problem: how might the law be authoritatively understood? The first problem which has resulted in some obscurity on this matter arose from the veil of privacy which surrounded the proceedings of the Commissaries of Edinburgh and the decreets of divorce they pronounced during the majority of the two-hundred-and-fifty-year history of their court. From the time of the appointment of the first Commissaries during the winter of 1563/4 down to 1812, the Commissaries of Edinburgh held court behind closed doors, outwith the view of public observers, on account of the perceived sensitivity of many of the cases they dealt with, many of which involved the adultery of representatives of noble houses, or occasionally even more delicate matters such as the impotence of such representatives.⁴⁴⁷ This need for delicacy has been stated by one of the last Commissaries of Edinburgh, James Fergusson, as the reason why consistorial cases were never reported from the Commissary Court until the nineteenth century, and even then the details only of what were then current, not sixteenth-century cases were made available.⁴⁴⁸

⁴⁴⁵ Adam Gillies, a senator of the College of Justice from 1811 (J. A. Hamilton, ‘Gillies, Adam, Lord Gillies (1760–1842)’, rev. Eric Metcalfe, (*ODNB*, accessed 5 March 2010).

⁴⁴⁶ Fraser, *Treatise* (1846), i, 3.

⁴⁴⁷ In 1693 an Act was passed opening the Scottish courts of justice to public scrutiny, whilst making a provision for some cases to be tried privately in the old manner, with only the litigants and their procurators present, and with the judges deliberating in private. The Commissaries extended the exception for “some special cases,” allowed by the 1693 legislation, “to *all* causes in their department,” and thus for a further century of more, their deliberations continued to be in private, behind closed doors (Fergusson, *Present State of the Consistorial Law*, xxi- xxii).

⁴⁴⁸ Fergusson, *Present State of the Consistorial Law*, xviii-xxiii; a few handwritten ‘Practicks’ were compiled by individual Commissaries for their professional use from the 18th century onwards (see Fergusson, *Reports of Some Recent Decisions*, 249 for a summary of these. One of them went on to be published as *Lord Hermand's Consistorial Decisions* by the Stair Society in 1940).

Authorities which could have left no doubt as the precise shape of Scottish Protestant divorce law during the sixteenth century were silent on the matter, most notably the first chief Commissary of Edinburgh, Sir James Balfour of Pittendreich: As James Fergusson stated “even Balfour himself... has left only some reports of cases tried there [the Commissary Courts], among other precedents,” in his *Practicks*, reports which Lord Fraser deemed “of no great value or interest”.⁴⁴⁹ As to later Commissaries of note such as John Nisbet, later Lord Dirleton, whilst he devoted a separate article to the subject of the Commissary Courts in his *Doubts and Questions*, James Fergusson pointed out that “that too was merely a defence of the “Consistories,” when assailed as a remnant of Popery, at the final establishment of the Presbyterian Church in Scotland”.⁴⁵⁰

Given these problems, the only reasonable course left to nineteenth-century antiquaries was to establish what the law had been by recourse to the decisions of the earliest Commissaries of Edinburgh, preserved in their Registers of Acts and Decrees. During the early nineteenth century this approach was adopted first by the peerage lawyer John Riddell, then by Patrick Lord Fraser. The problems attending Fraser’s works have already been noted, but in contrast to Fraser’s misunderstanding of the pre-Reformation Scottish polity, Sir Walter Scott held that “among antiquaries, only Riddell and Thomas Thomson possessed a proper appreciation of pre-Reformation Scotland”.⁴⁵¹ Where the rights of the guilty party following divorce for adultery were concerned, it was Riddell who first suggested that the party guilty of adultery may have been impeded in post-Reformation Scotland from contracting marriage during the life-time of the innocent spouse. “It strikes me, after all,” wrote Riddell, “that the strict and maturer exposition of our law during the period, and before 1600, *may* be that divorced adulterers could... be precluded from marrying during the lifetime of the divorcing party”.⁴⁵² But he was not entirely sure, mainly on account of the fact that he had argued during the course of the peerage case *Duke of Roxburgh v. Ker*, that the guilty party had been entirely precluded from remarriage prior to the Act of 1600. Riddell’s argument was rejected by the Court of Session and

⁴⁴⁹ Fraser, *Treatise* (1846), i, 3.

⁴⁵⁰ Fergusson, *Present State of the Consistorial Law*, xiv – xv.

⁴⁵¹ Lionel Alexander Ritchie, ‘Riddell, John (1785-1862)’ (*ODNB*, accessed 3 February 2010).

⁴⁵² Riddell, *Inquiry*, i, 409. Whether or not conviction of adultery was an impediment to remarriage has also been briefly, but inconclusively discussed by Ireland, ‘Husband and Wife: Divorce’, 93-94.

again on appeal by the House of Lords, on the narrative that the need for the Act of 1600 forbidding the marriage of divorced adulterers to their paramours inferred that they had been free to do so prior to the Act.⁴⁵³ Whilst Riddell's inquiries did not prove entirely conclusive, it is the contention of this section of the thesis that Riddell's hesitant assertion was in fact correct, and that it can be demonstrated from the decisions of the Kirk and Commissaries from 1559-1576 that the party guilty of adultery was impeded from remarriage during the lifetime of the innocent spouse.

The first misunderstanding to lay to rest is that, contrary to most Scottish authorities,⁴⁵⁴ it is perhaps unhelpful to label the new kind of divorce for adultery introduced into Scotland from 1559 as 'divorce *a vinculo matrimonii*'. In the first place, as already noted, divorce *a vinculo* came to be understood in later Scottish practice as a kind of divorce which freed both parties to remarry immediately. In the second place, the label is problematic from the Canon law perspective, from which divorce *a vinculo* is in fact annulment.⁴⁵⁵ As has already been discussed in respect of 'clandestine' marriages, the Canon law and Scots law perspectives can apply the same term to two distinct concepts, which tends to result in a confusion of terminology and a conflation of distinct concepts. Since from the Canon law perspective divorce *a vinculo* means annulment, whilst in Scottish legal terminology it has come to mean a divorce for adultery which allows both parties to remarry, it seems unhelpful to apply the same label to a third kind of divorce, namely early Scottish Protestant divorce for adultery, which, it will be argued, had its own distinct and unique parameters. This need for a new label is further enforced by the fact no sentence or decret of divorce for adultery pronounced by the tribunals of the Protestant Kirk or the Commissaries of Edinburgh between 1559 and 1576 (the

⁴⁵³ *RPS*, 1600/11/42; *APS*, iv, 233, c.29; the basis of Riddell's arguments were rehearsed in Riddell, *Inquiry*, i, 395-402, which includes a discussion of the Act of 1600; see Fraser, *Treatise* (1876), i, 140-143 for a further discussion of Riddell's views, the Act of 1600 and *Roxburgh v. Ker*.

⁴⁵⁴ Riddell, *Inquiry*, i, 435 *et seq*; Fraser, *Treatise* (1876), ii, 1139; Ireland, 'Husband and Wife: Divorce', 90-91, & esp. 97.

⁴⁵⁵ "Et duplex est divorcium Unum scilicet quo ad mutuum cohabitationem vtz quo ad thorum mensam et redditionem debiti . Aliud est divorcium quo a vinculum matrimoniale Sic quod persone inter quas celebratum est divorcium licite possunt cum aliis matrimonium contrahere Et tale divorcium nunquam fit in matrimonio legitime contracto et consummato nisi per mortem naturalem alterius coniugum" (*Lectures on Marriage*, 58/59); *Liber Officialis*, No. 145 (annulment on the grounds of consanguinity) - "Propterea eosdem ab huiusmodi assidatione et vinculo matrimonii et mutual seruitute divorciamus...". See also Sellar, 'Canon Law and Scots Law', 70 and Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1974), 74.

chronological limit of the present study) used the label divorce *a vinculo* to designate the new type of divorce. As such, the label ‘Scottish Protestant divorce for adultery’ will be used to designate this ‘new’ type of divorce. It will be argued that this uniquely Scottish kind of divorce in post-Reformation sixteenth-century Scotland resulted from a modification of divorce *a mensa et thoro*, through an employment of the concept of ‘licence to remarry’ borrowed from pre-Reformation sentences of annulment.

The complicating factor in these discussions is the role of the Protestant Kirk. As has already been discussed, the Commissaries of Edinburgh were not appointed until February 1563/4, by which time Scottish Protestant divorce for adultery had already been introduced and established as the law of Scotland by the Protestant Kirk and its tribunals. The story is a complex one, and involves a wide range of constitutional and jurisprudential issues. The various theories explaining the Kirk’s extraordinary involvement in the consistorial jurisdiction from 1559 have already been put forward at the end of Chapter II.⁴⁵⁶ This section will argue that the Commissaries of Edinburgh accepted the divorce law reforms of the Kirk and retained the same legal formulas by which the Kirk had given expression to their new understandings of divorce for adultery. This continuity of legal formulas can be used to establish the probable continuity of intellectual and doctrinal understanding of the new divorce during the transition of competency between the Kirk and the Commissaries in consistorial matters, a transition, it has been argued, supervised by the overarching authority of the Lords of Council and Session. The assumption that continuity of legal formulas implies continuity of intellectual underpinning has its problems⁴⁵⁷ and as such the inference can only be considered probable, rather than certain. Nevertheless, since the deliberations of the Commissaries of Edinburgh are unknown, the ‘continuity of formulas’ argument is the only device by which the Commissaries’ understanding of the new divorce may be established with any degree of probability. As such, it will be necessary to understand the Kirk’s rationale for introducing the new type of divorce, analysing the legal clauses and formulas they appropriated to give legal expression to their new type of divorce, observing the

⁴⁵⁶ Chapter II, §V.

⁴⁵⁷ For example, the Canon law was retained in Scotland were the contracting of ‘non-regular’ marriage was concerned, whilst the theological basis of the Canon law in this respect, concerning the creation of a sacramental bond between a man and a wife was rejected.

transmission of these legal clauses and formulas to the Court of the Commissaries of Edinburgh and assuming that the Commissaries continued to understand the new type of divorce within the same intellectual and doctrinal constructs created by early Scottish Protestant reformers and judges. This common understanding of the new law as described in shared legal formulas will be further explored from the perspective of the provenance of the clauses and formulas used, which will be shown to have been the Courts of the Officials. Finally, it will be argued that this probable intellectual continuity can be demonstrated with reference to the unique case heard by the Commissaries of Edinburgh, *Procurator Fiscal & Paterson v. Stevinson & Pollock*, through which it will be conclusively demonstrated that those divorced for their own adultery were certainly impeded from remarriage during the lifetime of the their innocent spouse.

[i] METHODOLOGY

Any attempt to understand the shape of early post-Reformation Scots consistorial law is bounded by the limits of the source material. Neither the reformers of the Protestant Kirk, nor the Commissaries of Edinburgh wrote legal treatises on the alteration of the consistorial law in Scotland during the Scottish Reformation. The main sources of evidence upon which an understanding may therefore be based are the sentences and decreets pronounced by the tribunals of the Protestant Kirk and the Commissaries of Edinburgh. In addition, there are some fragments of information by which the evidence furnished by the tribunals of the Kirk may be supplemented, together with a comparison of the law reforms introduced in other Protestant countries during the sixteenth century. For the Commissaries of Edinburgh, there is almost no ancillary evidence available beyond the contents of the Registers of Acts and Decreeets of their court, with the exception of the pre-Reformation material summarized in *Liber Officialis*, which may be used for comparative purposes.

The dependence on judicial sentences and decreets necessitated by the extant source material requires the formulation and consistent application of a method for analysing the material. This is particularly the case since during the period under consideration there was a great deal of variation in the words and phrases employed in individual pronouncements; that is to say no standard wording of formulas was adopted and applied. Indeed, Ronald Ireland has maintained, in respect of the

contents of the *Liber Officialis* that “nothing is to be assumed simply from the words used to describe the process of divorce, as they do not seem to have been used with much precision”.⁴⁵⁸ Whilst the dangers of basing assumptions on the wording of judicial decisions alone have been demonstrated by Lord Fraser’s works, the reasonable meaning of legal clauses and formulas can be established by setting such formulas in their proper jurisprudential context, a method conspicuously botched by Fraser. Furthermore, within the relative linguistic disorder of the extant legal material, the formulation and application of suitable categories can aid the comparison of the pronouncements of different courts and tribunals. The proper application of such methods can be used to established what is at least probable, if not certain.

The principal category from which analysis of the material will proceed are what are here termed “clauses,” that is to say the principal clauses or phrases into which a sentence or decret may be broken. For example in *Wemis v. Dunbar*, the Commissaries decerned:

[1] “the said Margaret to be diuorciat separatit and cuttit of fra the said Johne

[2] and to haif tint and to tyne hir tocher gude gevin to the said Johne with hir in contemplioun of the said Mariage and all *donationes propter nuptias* grantit to hir

[3] and hir to be pvnist be the temporale magistrat Conforme to the lawis of the realme

[4] And the said Johne tobe fre to marie in the Lord quhair he pleises

[5] alsfrelie as he mycht haif done befor the contracting of the mariage with the said Margaret”⁴⁵⁹

Whilst there are no breaks in the original decret, five distinct “clauses” have been highlighted. The first will be termed the “divorce clause,” the second the “tyne and tint clause,” the third the “punishment clause,” the fourth the “licence clause” and the

⁴⁵⁸ ‘Husband and Wife: Divorce, Nullity of Marriage and Separation’, 90.

⁴⁵⁹ NAS, CC8/2/3, fos. 32v-33r, 25 May 1568.

fifth the “licence definition clause”. The second and third clause are relatively unimportant in deriving a valid understanding of early Scots consistorial divorce law from the extant material, but the “divorce clause” and the “licence clause” are central. Having defined these terms, each sentence or decret may be analysed in terms of the presence or absence of these clauses, whilst each type of clause may be considered in its own right. In this latter respect, the “divorce clause,” for example, may be compared in one type of decret with another and variations in actual “form,” that is to say the precise words and phrases employed to express a given clause, may be observed. In this way the variations within the same clause pronounced by the Commissaries of Edinburgh may be noted, and compared with those found in sentences of the Kirk, and indeed those of pre-Reformation Officials.

Having designated, analysed and compared various clauses and their forms conclusions may be drawn as to the importance each kind of clause (whether it was always included in sentences or decreets, or whether it was non-essential) and the meaning and function of each essential clause. From this basis, a precise legal understanding of what the new divorce for adultery was and was not may be proposed, and tested against known cases in which more obscure aspects of the law were raised.

[ii] PRE-REFORMATION DIVORCE A VINCULO

The *Liber Officialis* provides a useful digest of the extant pre-Reformation sentences of annulment pronounced in Scotland by the Officials of St Andrews and their Commissaries. Three principal clauses may be rapidly identified among the material: a “nullity” clause decerning a marriage to have been null *ab initio* (and which was usually followed by a narration of the grounds of the judgement), followed by a “divorce” clause divorcing the couple from each other, and finally a “licence” clause stating which of the divorced parties could remarry. Whilst the divorce clause used in the extant Scottish material rarely employed the words *a vinculo matrimonii* explicitly,⁴⁶⁰ it is clear that the culmination of the nullity, divorce

⁴⁶⁰ The phrase was explicitly used in *Sibbald v. Milis* (*Liber Officialis*, no. 145).

and licence clauses constituted what the medieval Canon law designated a definitive sentence of divorce *a vinculo matrimonii*.⁴⁶¹

The initial problem which may be posed is why, if the marriage bond was decerned to be null *ab initio* should it be necessary also to decern the couple to be divorced *a vinculo*, since the nullity clause has already established that no marriage bond existed between the parties? The answer lies in the distinction made almost constantly in the sentences of annulment, that marriages about to be annulled were marriages *de facto et non de jure*:⁴⁶² that is to say the marriage had occurred in outward form, but on account of some impediment had no sacramental character, and as such could not be acknowledged in law by a spiritual judge. On this basis such marriages were declared “de iure ab inicio Suisse et esse nullam et inuvalidam”,⁴⁶³ whilst the couples concerned were divorced *a vinculo* in so far as the marriage appeared *de facto* valid.⁴⁶⁴

The next problem is why, having declared a marriage *de jure* null, and having made it explicitly clear that the couple were divorced from the *de facto* marriage bond, was there any need for a “licence” clause. This problem is only a problem from the later Scottish legal history perspective, which, as already noted, tends to understand divorce *a vinculo matrimonii* as automatically conferring freedom on both parties. Within the context of the medieval Canon law however, annulment / divorce *a vinculo* carried an automatic connotation of potential fault on the part of one or both of the parties who had contracted marriage to which there was lawful impediment. As the following examples will illustrate, the potential freedom to remarry created by the “nullity” and “divorce” clauses was often regulated by the “licence” clause, which could limit the freedom bestowed on either party depending on the quality and circumstances of the fault upon which the marriage had been deemed null.⁴⁶⁵

⁴⁶¹ As already discussed, William Hay maintained that there were only two types of divorce, *a mensa et thoro* and *a vinculo matrimonii* the latter being pronounced on the grounds of nullity *ab initio* (*Lectures on Marriage*, 58 *et seq.*).

⁴⁶² i.e. *Liber Officialis*, nos. 3, 5, 12, 16, 45 etc; a particularly clear example is no. 94. Cf *Lectures on Marriage*, 46/47.

⁴⁶³ *Liber Officialis*, nos. 24; Cf nos. 7, 8, 13, 36, 41 etc.

⁴⁶⁴ This was implicit in the usual form of the nullity clause. In *Fiscal v. Patersoun & Johnstoun* the Commissaries of Edinburgh made this explicitly clear when they declared the defenders’ marriage to be null *ab initio* and divorce them “in so far as the same may appear to the effect of marriage” (NAS, CC8/2/7, fo. 243r, 21 July 1575).

⁴⁶⁵ This has been briefly noted by Ireland, ‘Husband and Wife: Divorce’, 90.

There are three main variants within the “licence” clauses found in the *Liber Officialis*, and range from granting both parties licence to remarry, granting one party only licence to remarry, and explicitly prohibiting a party from remarrying. Licence to remarry would typically be granted to both parties when both had been ignorant of the grounds of the subsequent annulment of their *de facto* marriage. For example in *Quhite v. Ewinson* the couples’ marriage was annulled on the grounds that they were within the second degree of affinity, the pursuer having slept with a relative of the defender prior to the contracting of the marriage in question. The ignorance of the defender may be presumed, whilst it was explicitly stated in the definitive sentence that the pursuer (whose fornication with his future wife’s relative had created the affinity between the litigants) had been entirely ignorant of the blood relation which had stood between his earlier lover and his wife at the time of contracting the marriage.⁴⁶⁶ Since the ignorance of both parties was accepted by the court, the issue of the marriage were decerned legitimate, and both parties granted licence *in domino* to remarry.⁴⁶⁷

On the other hand licence to remarry might be granted to one party only. For example in *Mailvill v. Hepburne*, the couples’ marriage was annulled on the grounds of the defender’s impotence, and licence was granted to the potent party only.⁴⁶⁸ This precise pattern was repeated in *Millar v. Watsoun*,⁴⁶⁹ whilst in *Myrtoun v. Forsyth* licence was granted to both parties, despite Forsyth’s impotence.⁴⁷⁰ Thus whilst impotence did not automatically preclude licence being granted to both parties, the examples illustrate that in certain circumstances the court could extend licence to one party only.

On other occasions, licence was explicitly withheld from a party whose marriage had been annulled, when it was clear that they had knowingly contracted a marriage which was forbidden by Canon law. For example, in *Aldinstoune v. Days*,

⁴⁶⁶ “ipso Willelmo tempore contractus huiusmodi pretensi matrimonii penitus ignorante” (*Liber Officialis*, no. 116).

⁴⁶⁷ “prolesque inter eosdem susceptas legitimas decernenetes ac alibi in domino nubendi licenciam impertimur” (*Liber Officialis*, no. 116). Cf *Liber Officialis*, nos. 3 (affinity); 24 (affinity); 41 (nonage); 117 (affinity); 121 (consanguinity) etc.

⁴⁶⁸ “et ex pro eo quia dicta Margareta est ita arcta quod non posit a prefato Dauid libellante cognosci propter arctitatem in membro secreto dicte Margarete et insufficientiam eiusdem Propterea dictos Dauid et Margaretam adinuincem diuorciandos fore prout diuorciamus licenciamque in domino dicto Dauid alibi nubendi impertimur” (*Liber Officialis*, no. 13).

⁴⁶⁹ *Liber Officialis*, no. 139.

⁴⁷⁰ *Liber Officialis*, no. 137.

the marriage was annulled on the grounds of the pursuer and the defender's first spouse being within the fourth degree of consanguinity. The defender had however been aware of this impediment at the time of the contracting of the parties' marriage, and as such, whilst the litigants were divorced, the defender was "to remain without the hope of marriage in the future".⁴⁷¹ Similar circumstances pertained in *Newtoun v. Liddall*, the couple's marriage being annulled on the grounds of affinity: whilst the couples' issue were deemed lawful (thus suggestive of the ignorance of the defender), the pursuer was ordained "absque spe coniugii in futurum remanere".⁴⁷²

Whilst the "licence" clause was not always employed in pre-Reformation sentences of annulment, it is clear that on many occasions the freedom to remarry conferred by the annulment of a marriage, with divorce *a vinculo*, could not automatically be presumed or inferred. The "licence" clause was clearly used to grant licence to remarry to one or both parties, or to prohibit a party from remarriage according to the circumstances of the annulment.⁴⁷³ As shall be shown, an appreciation of these distinct features of pre-Reformation sentences of annulment is prerequisite to a proper understanding of the divorce for adultery innovations introduced into Scotland from 1559.

⁴⁷¹ "absque spe coniugii in futurum remanere quoad dictam Elizabetham eo quod dicta Elizabetha scienter contraxit" (*Liber Officialis*, no. 5).

⁴⁷² *Liber Officialis*, no. 12. Cf nos. 94 (licence withheld from pursuer since she had married the brother of a man she had already slept with), 103 (licence withheld from pursuer since he had married the sister of a woman he had already slept with).

⁴⁷³ Cf Ireland, 'Husband and Wife: Divorce', 92.

[iii] THE INTRODUCTION OF SCOTTISH PROTESTANT DIVORCE
ON THE GROUNDS OF ADULTERY BY THE TRIBUNALS
OF THE PROTESTANT KIRK FROM 1559

William Hay, in his *Lectures on Marriage*, delivered at the University of Aberdeen during the 1530s, maintained the Canon law position on divorce for adultery: “divorce from the bond of marriage cannot be obtained for any sort of adultery once the marriage has been consummated”.⁴⁷⁴ This view was based upon the theologically grounded belief that marriage was a sacrament of the Catholic Church,⁴⁷⁵ and that once it had been formed validly, it could be dissolved only by death. As is well known, this theological position dictated that a validly married couple might be divorced *a mensa et thoro* only for adultery, that is legally separated, but forbidden to remarry until the sacramental bond between them was dissolved by the death of one of the parties, at which point the surviving spouse was usually free to remarry.⁴⁷⁶

As is well known, the Scottish reformers rejected the Catholic belief that marriage is a sacrament, on the grounds that the only sacraments are those instituted by Christ in the scriptures. In this, the Scottish Protestant position arose on account of its understanding of the authority of scripture, and was not primarily motivated by a consideration of marriage. Nevertheless, the Protestant insistence that marriage was not a sacrament undermined the central intellectual premise upon which the Canon law had maintained that adultery was grounds for a divorce *a mensa et thoro* only. Whilst this theological development did not necessitate innovations to the law,⁴⁷⁷ it certainly removed the principal objection to the reform of any perceived injustices in the Canon law. In this sense, the Scottish reformers do not appear to have set out to have rigorously defined a new theological understanding of marriage from which to derive a new law of marriage and divorce, but rather sought to correct what they perceived to be the principal injustice in the Canon law concerning divorce, adultery and remarriage.

⁴⁷⁴ *Lectures on Marriage*, 61.

⁴⁷⁵ “One first principle dominates the Canon law of marriage, namely, that the marriage of Christians is a sacrament” (Scanlon, ‘Husband and Wife’, 70).

⁴⁷⁶ Complications could occasionally arise concerning the right of the surviving spouse to remarry, for example if they had murdered their first spouse, especially with the collusion of a paramour whom they intended to marry.

⁴⁷⁷ As noted by Ireland, ‘Husband and Wife: Divorce’, 95.

It would appear that the reformers chose to reform divorce law not from the perspective of the husband, wife and children as a communal whole, but from the perspective of the innocent party only. It was from this perspective that the Canon law seemed most unjust: the innocent party would be bound to a failed marriage just as the guilty party was bound, and that since only the death of one of the spouses could free the other to remarry, there was an even chance that it would be the guilty, rather than the innocent party who would eventually be freed to remarry in the future. For the Scottish reformers, marriage was considered a ‘blessed ordinance of God,’ and whilst Ireland has noted that “the reformers were far from regarding marriage merely as a civil contract”,⁴⁷⁸ it is difficult to gauge what the reformers intended in terms of the positive relationship between reformed theology and marriage law. For example, pre-Reformation sentences of annulment addressed a marriage on two levels: on the one hand the sacramental bond between a couple was deemed to have never come into being; on the other, there being no inner reality to a couples’ marriage, they were divorced *a vinculo* in so far as their relationship had had an outward appearance of validity. The innovations introduced by the Scottish reformers do not appear to have maintained a distinction between the inner theologically defined realities of marriage, and the external, legally defined realities of marriage. That is to say, it is difficult to establish how they understood their religious beliefs about marriage to relate positively to matrimonial law.

These difficulties may be observed, for example, when the effect of adultery upon a marriage is considered. If the bond of marriage was considered to be something supra-legal by the Reformers, affected and altered by factors outside of the sphere of legal regulation and judgement, it could be suggested that they considered an act of adultery itself to break the bond of marriage.⁴⁷⁹ If this was held to be true, problems arose when mutual guilt of adultery, or recrimination, which was a valid defence to an action of Scottish Protestant divorce on the grounds of adultery,⁴⁸⁰ was considered: it would have been absurd to argue that one act of adultery broke the bond of marriage, whilst a subsequent act of adultery by the other

⁴⁷⁸ Ireland, ‘Husband and Wife: Divorce’, 95.

⁴⁷⁹ There is some evidence that Calvin countenanced this conception in his mature theology of marriage: “[I]f adultery is proven, even if no sentence is passed, a Christian church may proceed to marry those who can produce such hearings” (John Witte, *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition* (Louisville: Westminster John Knox Press, 1997), 102).

⁴⁸⁰ NAS, CC8/2/1, fos 393v - 394v, 16 March 1564/5, *Hammyltoun v. Maxwell & Lindesay*; Fraser, *Treatise* (1846), i, 672; Ireland, ‘Husband and Wife: Divorce’, 95.

spouse re-formed it. Yet if adultery were not considered to affect marriage in some *de facto* manner, then it followed that a competent authority would need to pass judgement on the effect of any adultery alleged, and on that basis, the existence of a bond of marriage between a couple would become dependent upon judicial decree alone. But if the vital moment in the divorce of a married couple with licence to remarry became the pronouncing of sentence, then the concept of marriage as a supra-legal reality could in some sense be compromised, and the legal conception of marriage regulated by due process of law would acquire the potential to become the dominant model.⁴⁸¹

In this scenario, the marriage bond might no longer have been understood as a supra-legal reality with its own parameters and inherent dynamics, which the law sought to describe and acknowledge. In this, the intellectual flaw in presuming that divorce *a vinculo matrimonii* automatically bestowed freedom on both parties is highlighted: rather the marriage bond came to be regulated by law alone, and the shape of the law of marriage, rather than the doctrine of marriage, became the primary perspective from which the post-1559 Scottish law of divorce was developed. This understanding accords well with the Scottish Reformers' treatment of the 'word or law of God' in relation to marriage law: it was used as a source of laws which were to be given precedence, rather than a source of doctrine upon which a new theology of marriage could be based.

[iv] ANALYSIS OF SENTENCES OF SCOTTISH PROTESTANT DIVORCE PRONOUNCED BY TRIBUNALS OF THE PROTESTANT KIRK

Around twenty sentences of Scottish Protestant divorce for adultery are known to have been pronounced by tribunals of the Protestant Kirk between 1560 and 1565, of which 12 are still extant in the *St Andrews Kirk Session Register*. All twelve contain what have already been defined as "divorce" clauses and "licence" clauses, and it will be argued that the "licence" clause was taken directly from pre-Reformation sentences of annulment pronounced by Scottish Officials and used to

⁴⁸¹ These ideas were much discussed by Fraser and Riddell: "It has sometimes been maintained, that adultery is in itself a virtual dissolution of the band of marriage, and equivalent to an act of divorce (Bishop Taylor's *Ductor Dubitantium*, b. i c. 5, rule 8). But this is a doctrine not recognised by the law of Scotland, which regards adultery and malicious desertion merely as handles whereby a competent court may dissolve the marriage (Stair, 1, 4, 7.)." (Fraser, *Treatise* (1846), i, 657).

give legal expression to the new law of divorce for adultery. Having studied these clauses, they will be discussed within the context of what is known of Scottish Protestant opinion during this period.

The first extant case is *Gudlawde v. Archibald*, 7 November 1560, in which the defender was found guilty of adultery, having left the pursuer and gone to Denmark 35 years earlier, contracting a second marriage with a Dane at some point thereafter. The kirk session of St Andrews held this second marriage to be in effect adultery, and on that basis divorced the couple: “be this our sentence we divorce and separate them simplie and perpetuallie; and libertie to the said Dauid [innocent party] in the Lord to contract and mary ony uthir lauchfull woman, as he micht haif done before he wes conjoined with the said Margaret [guilty party]”.⁴⁸² Here may be plainly seen the “divorce” clause, the “licence” clause and a “licence definition” clause trying to convey and further define the quality of the freedom so bestowed. As is obvious, only the innocent party was explicitly granted licence to remarry.

This pattern was repeated in 10 out of the remaining 11 sentences, but with the usual addition of a “punishment” clause explicitly addressing the future condition of the guilty party. For example, in *Elizabeth Gedde v. Williame Rantoun*, the kirk session pronounced “the said Williame ane perjured adulterar, and the said Elizabeth innocent divorced, and fre of the company and societie of the said Williame, with full power to hir according to the law of God to mary in the Lord; and the said Williame to be haldin and reputte ane dead man, worthy to want his lyfe by the law of God, quhen ever it sall pleas God to stirre up the heart of ane gude and godlie magistrate to execute the same with the civile sworde”.⁴⁸³

Each clause could take on a number of particular forms. As has already been seen, the “divorce” clause could “divorce and separate [the couple] simplie and perpetuallie” or merely decern the guiltless party “innocent divorced,” without making specific reference to the guilty party. Other forms ranged from “divorced, separated and divided”,⁴⁸⁴ and “cutted of, divorced, and separated”,⁴⁸⁵ to “seperated

⁴⁸² *St Andrews*, i, 50.

⁴⁸³ *St Andrews*, i, 60.

⁴⁸⁴ *Lathrisk v. Symsoun*, 9 January 1560/1, *St Andrews*, i, 58; cf *Hyllok v. Gyb*, 11 August 1563 (*St Andrews*, i, 156).

⁴⁸⁵ *Clerk v. Schevez*, 23 February 1560/1, *St Andrews*, i, 62; cf *Calland v. Alexander*, 14 May 1561 (*St Andrews*, i, 71) and *Thecar v. Martyn*, 23 July 1561 (*St Andrews*, i, 81).

and divorciat”.⁴⁸⁶ This general form was departed from on one occasion only, *Smyth v. Duplyn*, 12 December 1565. The couple had contracted marriage by promise (*de futuro* or *de praesenti* is not stated) with subsequent *copula*. On account of the fact that at this time the Kirk may have been agitating for the abolition of non-regular marriages as ‘fornication’,⁴⁸⁷ they did not divorce the couple, but rather “at [the innocent party’s] desyr decernit fred of hyr promys fra the said [guilty party]”.⁴⁸⁸ But this one exception aside, which proceeded upon a speciality of the Kirk, it can be seen that the “divorce” clause was variously and in a sense imprecisely expressed. From this it may be inferred that the divorce clause alone was not expected to provide the sole basis from which the freedom of the parties could be deduced.

The freedom of the parties was clearly regulated and defined by the “licence” clause. In the first case cited, the licence clause took the form “and libertie to the said Daid [innocent party] in the Lord to contract and mary ony uthir lauchfull woman” and was further defined by the clause “as he nicht haif done before he was conjoined with the said Margaret [guilty party]”.⁴⁸⁹ In the second case cited the clause took the form “with full power to hir according to the law of God to mary in the Lord,” with no further clause attempting to describe the quality of the freedom thus granted.⁴⁹⁰ Other forms ranged from “and libertie to the said Alexander to mary in the Lord”,⁴⁹¹ “to the said Alexander permitting agane newlie to mary quhome it sall pleass him, sa the same be lauchfullie in the Lord and according to the law of God”,⁴⁹² “with liberte to hyr in the Lord to mare ony other man, according to the law of God”,⁴⁹³ “and licence and libertie to the said Margaret to mary in the Lord with ony other lawfull husband according to the law of God”⁴⁹⁴ to “libertie to marye in the Lord with ony

⁴⁸⁶ *Scrymgeor v. Dundas*, 7 January, 1561/2 (*St Andrews*, i, 140 - first divorce pronounced by superintendent Winram); cf *Philip v. Thomson*, 20 Jan 1562/3 (*St Andrews*, i, 150).

⁴⁸⁷ See above page 95.

⁴⁸⁸ *St Andrews*, i, 254-255.

⁴⁸⁹ *St Andrews*, i, 50.

⁴⁹⁰ *St Andrews*, i, 60.

⁴⁹¹ *Lathrisk v. Symson* (*St Andrews*, i, 58).

⁴⁹² *Clerk v. Schevez* (*St Andrews*, i, 62); cf *Calland v. Alexander*, 14 May 1561 (*St Andrews*, i, 71); *Thecar v. Martyn*, 23 July 1561 (*St Andrews*, i, 81).

⁴⁹³ *Scrymgeor v. Dundas* (*St Andrews*, i, 140); cf *Philip v. Thomson*, 20 Jan 1562/3 (*St Andrews*, i, 150).

⁴⁹⁴ *Hyllok v. Gyb* (*St Andrews*, i, 156).

lawfull parte [sic]”.⁴⁹⁵ The basic clause took the same form as the “licence” clause in pre-Reformation sentences of annulment: “ac alibi in domino nubendi licenciam impertimur”.⁴⁹⁶ The provenance of the phrase “in the Lord” is therefore clearly not an innovation of the Protestant Kirk, but rather a Pauline phrase used in the Canon law.⁴⁹⁷ In all these cases, licence was extended to the innocent party only.

Nevertheless, one final case has yet to be discussed, namely *Leidhope, Russell & Kininmont*, 24 October 1565, in which may be observed an atypical case with unique outcomes. Cristine Kininmont had made a secret promise of marriage to Thomas Russell, slept with him, and was got with child. Kininmont’s father, not knowing this, wished her to make promise of marriage to another man, David Leidhope: she told her father about the secret promise, but fearing him concealed the fact, later granted, of the *copula*. It is probable that she did not know at this time that she was pregnant. At her father’s insistence she made promise of marriage to Leidhope, assuring Leidhope that she was a virgin. On the strength of the promise Leidhope slept with Cristine Kininmont, only to discover (presumably by the birth of a child, the timing of whose birth did not accord with his understanding of their union) that she had manifestly slept with Thomas Russell. In effect Kininmont had contracted a non-regular marriage with Russell secretly, and through dread of her father had contracted a second bigamous non-regular marriage with Leidhope. The superintendent of Fife, Fotherick and Strathearn, John Winram, held that Kininmont’s liaison with Leidhope was adultery, and therefore divorced Kininmont from Russell, granting Russell licence to remarry. Licence was also explicitly granted to Leidhope to remarry in the Lord, which was inconsistent, since his liaison with Kininmont had been classified as adultery, not an irregular marriage from which the parties might be freed. All three parties made satisfaction to the kirk of Dunino. Leidhope and Kininmont were subsequently reconciled “Dauid [Leidhope] remittit Cristen and resavit hyr in favor and solemnizat the band of mariaige wyth hyr, requirand and obtenand the consent of the kyrk tharto”. This of course was in effect the marriage of a divorced adulteress to her paramour, during the lifetime of her first

⁴⁹⁵ *Smyth v. Duplyn* (*St Andrews*, i, 254-255); this was the case were the innocent party was decerned free from the promise of marriage.

⁴⁹⁶ *Liber Officialis*, no. 116.

⁴⁹⁷ *Lectures on Marriage*, 66-67: “A woman is bound by the law as long as her husband liveth: but if her husband die she is at liberty. Let her marry to whom she will: only in the Lord”. John Barry clearly borrowed this English translation of 1 Corinthians, 7: 39 from the Douai-Rheims translation of the *Biblia Sacra Vulgata*.

innocent spouse. Nevertheless there are several extenuating circumstances. Leidhope had not knowingly committed adultery with Kininmont: he had not knowingly been her paramour, but rather thought he was contracting marriage with her, with her father's consent. Kininmont had contracted a bigamous marriage with Leidhope in the first place through fear of her father. Finally, Leidhope, an aggrieved party, was willing to forgive Kininmont, marry her as originally intended and presumably look after her child from her first marriage. But of course this was only possible because Kininmont had been divorced from her first husband on the grounds of what was construed as her adultery with Leidhope. There is evidence of considerable conceptual confusion resulting from the complexity of the case, with the additional difficulties introduced by Godly discipline and reconciliation, which may have caused Winram to seek a pastoral solution to the problems involved, at the expense of good law.⁴⁹⁸

Despite the curious and atypical example of *Leidhope, Russell & Kininmont*, the recurring pattern in normal actions for divorce, where the first marriage was openly known to exist, and adultery was knowingly committed, the remedy was clearly to grant divorce, and grant licence to the innocent party to remarry. Yet what is not immediately clear is what the status of the guilty party was. As the analysis of pre-Reformation sentences of annulment explained, parties could sometimes be explicitly prohibited from remarrying in the future. Yet no such clause was ever used by the tribunals of the Protestant Kirk when granting their divorces on the grounds of adultery. Since the innocent party was explicitly granted licence to remarry, yet the guilty party was not explicitly prohibited from remarriage, it could be argued that the status of the guilty party was unclear.

Nevertheless, the predicament, status and rights of the guilty party were usually made entirely clear. In *Gedde v. Rantoun* the kirk session of St Andrews asserted that the guilty party “be haldin and reputte ane dead man, worthy to want his lyfe by the law of God, quhen ever it sall pleas God to stirre up the heart of ane gude and godlie magistrate to execute the same with the civile sworde”.⁴⁹⁹ Other forms of the “punishment” clause ranged from “to be committed to the civill magistrates, to be punished as Goddis law praescryves”⁵⁰⁰ and “committing the [guilty party] to the

⁴⁹⁸ *St Andrews*, i, 252-254.

⁴⁹⁹ *St Andrews*, i, 60.

⁵⁰⁰ *Lathrisk v. Symsoun* (*St Andrews*, i, 58).

handis and punischment of the temporall power for the crym”,⁵⁰¹ to “to be committed in the handis of his magistrat quhom to [the guilty party] is subject”.⁵⁰²

Whilst the variations of form are considerable, the desire behind the “punishment” clause was that the party guilty of adultery ought to be executed. This was certainly the position maintained by the ‘law of God’ as far as the Reformers were concerned. Leviticus 20 v.10 held that “the man that committeth adulterie with another mans wife, because he hathe committed adulterie with his neighbours wife, the adulterer and the adulteres shal dye the death,” whilst Deuteronomy 22 v. 22 enjoined that “If a man be found lying with a woman married to a man, then they shal dye euen bothe twaine: *to wit*, the man that lay with the wife, and the wife: so thou shalt put away euil from Israel”.⁵⁰³ Accordingly, hard-line Scottish Protestant Reformers were eager to enforce the Levitical law, if executing those found guilty of adultery would appease God and ensure His blessings upon Scotland.⁵⁰⁴

The injunctions of the ‘law of God’ in this respect received statutory recognition in Scotland on 4 June 1563:

“Item, forsamekill as the abominabill and filthy vice and cryme of adulterie hes bene perniciouslie and wickitlie usit within this realme in tymes bygane be sindrie liegis thairof, havand na regaird to the commandementis of God bot to thair awin sensualitie and filthy lustis and plesoure thairof, and for eschewing of the samin in tymes cumming, it is statute and ordanit be the quenis majestie and thre estatis in parliament that all notoure and manifest committaris of adulterie in ony tyme tocum efter the dait heirof salbe punist with all rigour unto the deid, alsweill the woman as the man, doar and committar of the samin, efter that dew monitioun be maid to abstene fra the said manifest and notoure cryme; and for uther adulterie, that the actis and lawis maid thairupone of befoir be put to executioun with all rigour; and als declaris that this act on na wyse sall prejudge ony partie to persew for divorcement for the crymes of adulterie befoir committit conforme to the law”.⁵⁰⁵

⁵⁰¹ *Hyllok v. Gyb* (*St Andrews*, i, 156).

⁵⁰² *Scrymgeor v. Dundas* (*St Andrews*, i, 140); cf *Philip v. Thomson*, 20 Jan 1562/3 (*St Andrews*, i, 150).

⁵⁰³ Passages taken from *The Bible and Holy Scriptures conteyned in the Olde and Newe Testament* (Geneva: Printed by Rouland Hall, 1560). In the Geneva Bible, marginal notes referred the reader from Leviticus 20, verse 10 to Deuteronomy 22, verse 22.

⁵⁰⁴ John Witte notes that many European reformers called for the execution of those divorced for adultery, but that such a call “found little acceptance among the authorities, though many jurisdictions, in response, stiffened their penalties for adultery” (John Witte, Jr, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge, Cambridge University Press, 2002), 250).

⁵⁰⁵ *RPS*, A1563/6/10; *APS*, ii, 539, c.10.

It is likely that Parliament had sought to modify the full rigor of the Protestant party's desire, in that only notorious and manifest committers of adultery were to be executed.⁵⁰⁶ Whilst the statute was not a dead letter,⁵⁰⁷ the scope of its applications had been severely restricted.⁵⁰⁸ The failure of the civil magistrate to execute those found guilty of adultery, even when enjoined to do so by the Protestant Kirk and to some extent the Scottish Parliament, gave eventual rise to the problematic issue of the rights of the guilty party, since they usually *de facto* continued in life.

The Scottish Reformers' position appears to have been one of legal nicety. Their original vision of reformed divorce law had been of the execution of the guilty party and of the freedom of the innocent party to remarry. This could be argued to have been a minor modification of the pre-Reformation law only, in that it introduced the death penalty for the guilty party. In this respect, the Canon law of divorce would not actually have been modified, since the execution of the guilty party would have automatically ended their marriage, thereby bestowing freedom on the surviving innocent party to remarry.⁵⁰⁹ Curiously, faced with the *de facto* reality of the continued existence of the guilty party, the Scottish Reformers clung to the idea of the agency of death. *Gedde v. Rantoun* had already hedged against the possibility that the civil magistrate might not wish to be stirred up by God to execute those guilty of adultery, by holding and reputed the guilty party "ane dead man". This idea clearly found general acceptance among the Scottish Reformers. In its section on marriage, the *First Book of Discipline* outlined the following position:

"Mariage once lauchfullie contractit, may not be dissolved at manis pleasour, as oure maister Christ Jesus doeth witness, onles adulterie be committit; which being sufficientlie proven in presence of the Civil Magistrat, the innocent (yf thei so require) ought to be pronounced frie, and the offender aught to suffer the

⁵⁰⁶ Based on the evidence from *Pitcairn's Ancient Criminal Trials in Scotland*, it would seem that 'notour' came to be interpreted as including those who committed adultery, and then continued to do so having been admonished by the Kirk to desist. Thanks are due to feedback received at the Scottish Medievalists in 2010 for this and other points.

⁵⁰⁷ "although there were few executions, the statute [of 1563] was not a dead letter" (Sellar, 'Canon Law and Scots Law', 72).

⁵⁰⁸ In 1581 the Synod of Lothian cited the ambiguity of the word 'notour' as the root cause of the failure of the act to be enforced as originally envisaged (Baird Smith, 'The Reformers and Divorce,' 32).

⁵⁰⁹ This is given some support in that Baird Smith has argued that a sentence of divorce from the Kirk "was in fact an act of discipline which placed the injured wife in the position of a widow" ('The Reformers and Divorce', 23).

death as God hath commanded. Yf the Civile swerd foolischelie spair the lyeff of the offender, yit may not the Churche be negligent in thair office, which is to excommunicat the wicked, and to repute thame as dead membrs, and to pronounce the innocent partie to be at fredome, be thai never so honourabile befor the world”.⁵¹⁰

In this, the Scottish reformers followed John Calvin closely. Calvin had maintained that divorce for adultery was a substitute for the failure of civil magistrates to put to death those found guilty of adultery.⁵¹¹

The problem from the perspective of Scots consistorial law was that the guilty party nevertheless remained in life and their rights and status during the period under consideration were not immediately clear. Under the Canon law, adulterers who were free to remarry were initially prohibited from marrying their paramours, “but it was a rule from which dispensation was easy”. In time it became settled doctrine that an adulterous person might remarry their paramour, unless they had conspired to murder the innocent spouse, whose death was a precursor to the freedom of the guilty party to remarry under the Canon law.⁵¹² The right to remarry the paramour was an open question in Scots law until the Act of 1600 expressly forbade such unions. What remains an open question to this day, however, concerns the point at which a guilty party became free to remarry at all in post-1559 Scotland (be it to a paramour or to a third party). The problem which lies at the heart of this uncertainty concerns the rights possessed by the guilty party failing their execution.

The *First Book of Discipline* of 1560 had realized the practical implications of the failure of the civil sword to execute those found guilty of adultery. Reputing the guilty party as dead clearly meant their excommunication from the kirk, which excluded them from remarriage whilst excommunicate. But the question remained whether or not the guilty party could remarry once they had been received back into the fold of the Kirk. After all, marriage was understood in part to be a remedy for concupiscence, and who more in need of such a remedy as one who had already deviated from ‘the blessed ordinance of God’. The *First Book of Discipline* therefore held “that yf thai [those divorced for their own adultery] can not leve continent, and yf the necessitie be suche as that thai fear farther offence to God, we can not forbid

⁵¹⁰ *Works of John Knox*, II, 248; cf Smith, ‘Spiritual Jurisdiction’, 5.

⁵¹¹ Phillips, *Putting Asunder*, 53.

⁵¹² Scanlon, ‘Husband and Wife’, 80.

thame to use the remedy ordained of God”. To this the condition was added that if, however, the guilty party were reconciled to the innocent party, then the guilty party could remarry no one but the innocent party, in which case the couple could marry *in facie ecclesiae* without the proclamation of bans.⁵¹³

Interesting as this position is, there is no evidence that it went beyond a suggestion in the *First Book of Discipline*, and indeed the evidence suggests that this position was not acceptable to the General Assembly. On the 27 December 1566, the General Assembly, perceiving that the effectiveness of the Act of 1563 concerning adultery had been severely curtailed, provided that superintendents should “admonisch all ministers within ther jurisdictionous, that none joyne any partie separatit for adulterie in marriage, under paine of removeing from the ministrie,” whilst they considered the Kirk’s position.⁵¹⁴ Further clarity was clearly desired from the localities, since “on 14th October, 1568, the question of the right of an adulteress to remarry was remitted to the General Assembly” by the kirk at St Andrews.⁵¹⁵ By 1571, the General Assembly had “directed that the marriage of adulterers was unlawful”.⁵¹⁶ In 1575 the Assembly deprived Robert Graham, commissioner of Caithness of his office for having granted a divorced adulteress “such liberty as the kirk gives to others” and celebrating her remarriage.⁵¹⁷ Yet by 1576, the Assembly declined to “presently resolve the [general] question, whither if a man or a woman divorcit for adulterie, ought to be admitted to the second marriage; but inhibites all Ministers and Reidars to marie any sick persons”.⁵¹⁸ The evidence, at least as far as the General Assembly was concerned, suggests that the Protestant Kirk was far from certain what the law of Scotland ought to be, but whilst it continued to deliberate, it forbade the ministry to celebrate the remarriages of those divorced for their own adultery. The General Assembly’s unwillingness to grasp this nettle continued for some years, as is narrated at more length by David Baird Smith, until the statute of

⁵¹³ See *The First Book of Discipline* ed. J.K.Cameron (Edinburgh: Saint Andrew Press, 1972), 197-198.

⁵¹⁴ Baird Smith, ‘The Reformers and Divorce’, 30.

⁵¹⁵ *Ibid.*, 25.

⁵¹⁶ *Ibid.*, 30, although this decisions seems to have been reversed by the Privy Council in 1576 (*The Records of the Synod of Lothian and Tweeddale 1589-1596, 1640-1649*, ed. J.Kirk (Edinburgh: The Stair Society, 1977), xv).

⁵¹⁷ Baird Smith, ‘The Reformers and Divorce’, 31.

⁵¹⁸ *Ibid.*, 32.

1600 was enacted.⁵¹⁹ Nevertheless, even this Act did not resolve all the uncertainties surrounding those divorced for adultery. The Act of 1600 forbade those divorced for their own adultery from marrying their paramours, but no mention was made of the rights of the guilty party during the lifetime of the first innocent spouse.⁵²⁰

The example of other Protestant regimes provided a number of possibilities as to how the question of the guilty party's rights could have been resolved. In Germany, Luther had held that "in the case of adultery Christ permits divorce of husband and wife so that the innocent person may remarry",⁵²¹ whilst Philip Melancthon had held that divorce should be granted for adultery and that the innocent party ought to be permitted to remarry and "implied that the guilty party should not be permitted to remarry".⁵²² In Geneva, divorce for adultery with licence to both parties to remarry was introduced during Calvin's ministry,⁵²³ whilst his successor from 1564, Theodore Beza, maintained that the guilty party ought to be allowed to remarry, so as to limit promiscuity.⁵²⁴

In countries that adopted the Lutheran Reformation the legislature tended to allow only the remarriage of the innocent party when divorce was granted for adultery. This was the case in Norway, Denmark and Iceland and "even then the innocent spouse had to obtain royal consent to the remarriage".⁵²⁵ The law in Protestant Sweden was something of an exception, in that it allowed the remarriage of both the innocent and the guilty party when divorced for adultery: nevertheless the guilty party was not automatically entitled to remarry on account of the sentence of divorce, but had to be granted the right to remarry in court.⁵²⁶

⁵¹⁹ The main reason for their hesitancy would appear to be that rather than define the rights of those divorced for adultery, the Assembly's first preference was that they be put to death, the original and uncomplicated ideal of the Scottish reformers: only when it became absolutely clear that this would not occur were other measures taken (Baird Smith, 'The Reformers and Divorce,' 32-33).

⁵²⁰ *RPS*, 1600/11/42; *APS*, iv, 233, c. 29.

⁵²¹ Cited in Witte, *Law and Protestantism*, 247.

⁵²² Phillips, *Putting Asunder*, 49.

⁵²³ Robert Kingdon, *Adultery and Divorce in Calvin's Geneva* (Cambridge, Massachusetts: Harvard University Press, 1995), 175.

⁵²⁴ *Ibid.*, 171.

⁵²⁵ Phillips, *Putting Asunder*, 52.

⁵²⁶ *Ibid.*, 50-51.

Opinion and practice among the European Reformers was therefore divergent on the issue of whether or not those divorced for their own adultery should be allowed to remarry. Given that the guilty party was allowed to remarry in Reformed Geneva, it might be expected that the leading Scottish Reformers such as John Knox and Christopher Goodman, both of whom had spent prolonged periods in Geneva under Calvin's direct influence, would have introduced Genevan practices. Nevertheless, the evidence from the sentences of the tribunals of the Protestant Kirk at St Andrews suggests that only the innocent party was explicitly granted licence to remarry, whilst no positive statement was made of the guilty party's rights to remarry. But in the event the issue was not left to the Kirk to decide. By the time it was clear that Scottish adulterers were not to be routinely executed, a penalty which would have helped tidy up the Kirk's thinking on divorce by solving the problem of the guilty party, the Commissaries of Edinburgh had assumed sole competence in divorce actions for the whole of Scotland.

[v] ANALYSIS OF COMMISSARIES' DECREETS OF DIVORCE FOR ADULTERY

It is generally understood that the Scottish reformer's law of divorce for adultery was introduced and accepted in Scotland as a common law right,⁵²⁷ introduced "by judicial decision rather than by legislation".⁵²⁸ The alteration of the law was of course predicated upon the overthrow of the Catholic establishment, and the conversion of Scotland to Protestantism. Yet between 1559 and 1567 the fate of the Catholic establishment still hung in the balance, and as such the precise grounds upon which alterations in the law proceeded are not entirely clear. There is of course no doubt that the rise of the sessions of the Protestant Kirk provided the forum within which legal reform took place, but prior to the ratification of the legislation of the Reformation Parliament of August 1560 at the 'second' Reformation Parliament of

⁵²⁷ Charles Guthrie, 'The History of Divorce in Scotland' in *Scottish Historical Review*, VIII (1911), 42-43: "no statute authorising divorce for adultery was ever passed by the Scots Parliament, and the right to divorce in Scotland on that ground is still a common law right"; Fraser, *Treatise* (1846), i, 656; A.D.M. Forte, 'Some Aspects of the Law of Marriage in Scotland: 1500-1700' in Elizabeth Craik (ed.), *Marriage and Property* (Aberdeen: Aberdeen University Press, 1984), 104-118, 112; Phillips, *Putting Asunder*, 60.

⁵²⁸ Sellar, 'Canon Law and Scots Law', 71.

December 1567,⁵²⁹ it cannot be said that the Kirk had become the established Church of Scotland. It therefore follows that during the vital period 1559-1567 when Scottish Protestant divorce for adultery was introduced into Scotland and took root, its legality and permanence may well have been as uncertain as the future of the Protestant Kirk. In this, it may be argued that the new law was applicable only to those who choose to submit to the jurisdiction and doctrines of the Protestant Kirk.⁵³⁰ In a similar sense, it could be said that Catholics were still bound by the teachings and laws of their religion, even if these were no longer upheld by the legal system.⁵³¹

One of the immediate problems for the Commissaries of Edinburgh upon their appointment must have been to what extent and on what basis they ought to accept legal innovations introduced by the tribunals of the Protestant Kirk. The tribunals of the Kirk had presumed to hear consistorial actions and alter the law at a time when leading members of the government, including at least two of the first Commissaries of Edinburgh, considered that the courts of the Catholic Church were *de facto* inactive, but not abolished,⁵³² and that the Lords of Council were only judges competent in spiritual causes. A dilemma must therefore have arisen: the Commissaries were understood to exercise their jurisdiction in lieu of the consistories of the Catholic Church, but chose to uphold and enforce customs introduced by the new tribunals, whose primary function was the regulation of Protestant congregations.

In this complex and developing situation, the Commissaries may have held to two principal justifications for their actions. In the first place, the new *de facto* position enjoyed in Scotland by the word and law of God as the Protestants conceived of it authorised the reform of the law of marriage. In the first extant Scottish Protestant sentence of divorce, pronounced at St Andrews the judges included the clause “haiffand heirfore God onlie befoir our eis and the testimonie of his Word” immediately prior to pronouncing their sentence.⁵³³ This form was

⁵²⁹ *RPS*, A1567/12/1-3; *APS*, iii, 14.

⁵³⁰ David Baird Smith has noted that “there are indications that the consistorial jurisdiction of the Kirk Session was frequently based on the consent of the parties” (‘The Reformers and Divorce’, 26).

⁵³¹ See Riddell, *Inquiry* (1842), i, 443-444, n. 2 for a discussion of this theme.

⁵³² It could even be argued that the canon law still pertained in Scotland in 1566: Bothwell married Gordon on the 22 February 1565/6, having been dispensed from the impediment of consanguinity (as per the Canon law) on the 17 February 1565/6 (Sanderson, *Mary Stewart’s People*, 38).

⁵³³ *St Andrews*, i, 50.

repeated in a further two sentences pronounced at St. Andrews,⁵³⁴ whilst the majority included the clause “according to the law of God”,⁵³⁵ whilst the clause “according to the Word of God” was used on one occasion.⁵³⁶ Divorce for adultery with rights of remarriage was being granted by the tribunals of the Kirk in conformity with their understanding of the word and law of God. Yet on what basis did the Commissaries accept the authority of the law of God in this respect?

One possible angle would be to consider the effect of the legislation of the first Reformation Parliament in that it declared that all acts of Parliament “not agreeing with goddis word and now contrair to the confession of our fayth according to the said word publist in this parliament To be of nane avale force nor effect And decernis the saids actis and euery ane of thame to have na effect nor strength in tyme to cum”.⁵³⁷ The problems here are that in the first place many leading men of law, including James Balfour and Edward Henryson, did not consider this legislation to be legally binding, and that in the second place the statute annulled only statutes which failed to conform to the ‘word of God’: marriage law was of course not a subject of Scottish statute law, but of the Canon law. Nevertheless, as will be demonstrated, the Commissaries did accept the authority of the ‘word or law of God’ or at least allowed it to be cited as the grounds for the new kind of divorce in the processes led before them. In this, the exaltation of the ‘law of God’ should be understood as the direct result of a religious revolution which occurred outside of the legitimate structures of governance.

Whilst this understanding seems tenable as a general principle in the minds of the Commissaries, it lacks the degree of legal precision it has been presumed that the Commissaries of Edinburgh deemed necessary when dealing with novelty and revolution. This concern may be laid to rest by considering that a number of the sentences of divorce pronounced by the courts of the Protestant Kirk had proceeded upon commissions granted by the Lords of Council, being subsequently accepted by the Commissaries of Edinburgh as legally valid.⁵³⁸ In this it can be argued that the

⁵³⁴ *Thecar v. Martyn* (*St Andrews*, i, 80-81); *Hyllok v. Gyb* (*St Andrews*, i, 155-156).

⁵³⁵ *Gedde v. Rantoun* (*St Andrews*, i, 59-60); *Clerk v. Schevez* (*Ibid.*, i, 62); *Scrymgeor v. Dundas* (*Ibid.*, i, 140); *Kaye v. Duncan* (*Ibid.*, i, 141); *Philip v. Thomson* (*Ibid.*, i, 150); *Hyllok v. Gyb* (*Ibid.*, i, 155-156),

⁵³⁶ *Calland v. Alexander* (*St Andrews*, i, 70-72).

⁵³⁷ *RPS*, A1560/8/5; *APS*, iii, 535.

⁵³⁸ As shown in Chapter II, §V.

Lords of Council, whose competence in spiritual matters has already been discussed, validated and countenanced the innovations of the Protestant Kirk regarding divorce law. On this understanding, the Commissaries could well have accepted the contents of sentences of divorce pronounced by the Kirk by virtue of special commissions from the Lords of Council and Session as providing the legal basis of the law of divorce in Scotland.

[a] GENERAL ANALYSIS OF CLAUSES

During the twelve year period from the appointment of the Commissaries down to 1576, for which ten years of the Registers of Acts and Decrets are extant, the Commissaries pronounced 73 sentences of divorce for adultery, and one for malicious desertion.⁵³⁹ Whilst a number of processes for divorce on the grounds of adultery were led before the Commissaries during the first year following their appointment, the first extant decret or definitive sentence of divorce pronounced by them in such proceedings was in the action of *Forbes v. Sandelands*, 15 January 1564/5. The libel was duly proven and the Commissaries decerned the defender “to haue brokin the said band of mariage be committing of adulterie... and thairfoir to be and to haue bene sensyne na langer wyf to the said Johne [pursuer] and hir to be diuorcit simpliciter fra him And decernis the said Johne fre to marie in the Lord with sik libertie as he mycht befor the contracting of the mariage foirsaid, and thairfoir decernis the said Barbara to tyne and to haue tint hir tochir gude and all vther thingis gevin to hir in contemplioun of the [marriage]⁵⁴⁰ foirsaid”.⁵⁴¹

The first point of note is that the “divorce” clause and the “licence” clause found in the Kirk’s sentences of divorce with licence, together with the “licence” clause found in pre-Reformation sentences of annulment were employed by the Commissaries. The next is that at this stage in the development of the Commissaries’ jurisdiction, no mention was made of the ‘law or word of God,’ nor the punishment of the guilty party. Finally, it may be noted that, the alleged adultery having been

⁵³⁹ See Appendix II, C, for a list of these cases with references. The latter being the celebrated cause of the 5th Earl of Argyle against his first Countess. This is so unique a case that it will be discussed in the section concerning the introduction of divorce for malicious desertion into Scotland in 1573 (see Chapter III, §III).

⁵⁴⁰ *marioun* in the MS, but this is surely a clerical error.

⁵⁴¹ NAS, CC8/2/1, fos. 304v-305v, 15 January 1564/5, *Forbes v. Sandelands*.

proven, the Commissaries deemed the ‘band of marriage’ to have been ‘broken’ since the time of the adultery, and not from the time of the pronouncing of their decret. In this, the effect of the adultery on the marriage was considered to be at the time it was committed, not at the time of the Commissaries’ decret, a device which combines two elements of the post-Catholic situation already discussed above,⁵⁴² that the adultery did have some *de facto* effect on the marriage, but that it was not deemed to have had that effect in law until proven before a competent judge.⁵⁴³

Whilst the ‘law or word of God’ was not mentioned in *Forbes v. Sandelands* it was soon introduced into litigation before the Commissaries. The first sentence of divorce to have been pronounced by the Kirk and accepted by the Commissaries was *Hammyltoun v. Sclater*, and was produced before the Commissaries four days after the decret in *Forbes v. Sandelands* was pronounced, on 19 January 1564/5.⁵⁴⁴ From what is known from the contents of the extant sentences of divorce pronounced by the tribunals of the Kirk, it is probable that the sentence of divorce produced in *Hammyltoun v. Sclater* contained the clause “conform to the law of God” or some such. The next decret of divorce pronounced by the Commissaries of Edinburgh was *Dunlop v. Broun*, 14 March 1564/5, around two months after it is certain that the Commissaries had seen, considered and accepted a sentence of divorce pronounced by the Kirk. In *Dunlop v. Broun*, the Commissaries decerned the “said marriage betuix the saidis Hew and Elizabeth to be dissolvit for the cryme of adulterie foirsaid committit be hir as said is and scho and the said Hew to be divorcit and separatit thairfoir and libertie grantit to the said Hew to marie as he list in the lord according to the word of God”.⁵⁴⁵ The normative “word of God” clause used in sentences of the Protestant Kirk had been incorporated into the Commissaries’ decreets.

The third decret of divorce to be pronounced by the Commissaries of Edinburgh was in the action *Hardy v. Rutherford* and contained a much fuller statement of the grounds upon which the divorce proceeded. The process of divorce

⁵⁴² See above, pages 115-116.

⁵⁴³ There are six cases where the effect of the adultery was mentioned – i.e. ‘brokin [and violat] the bond of marriage’. In *Wrycht v. Drippis* and *Kincaid v. Ross* there was a suggestion that the divorce was effective from the time of the adultery rather than the time of the decret, though these clauses are rare.

⁵⁴⁴ NAS, CC8/2/1, fo. 314r.

⁵⁴⁵ NAS, CC8/2/1, fo. 388r, 14 March 1564/5.

had in fact been led before the kirk of Jedburgh, but was remitted to the Commissaries of Edinburgh upon their appointment.⁵⁴⁶ The Commissaries pronounced decret in conformity with the process led on 11 April 1564, and included what had presumably been part of the libel given in by Hardy to the kirk:

“and thairfoir sen the ward of God is now sinceirlie and treulie prechit and his trew kirk erectit in thir partis the said Patrik being ane member thairof and vnder the discipline of Chryst and his faithfull congregatioun aucht tobe separatit fra the societie and cumpany of the said Katherine And the said Patrik not permittit nor sufferrit being ane of the memberis of Chryst and his faithfull congregatioun to joyne his body with hir being ane hure and harlot according to his halie word and evangell... The saidis Commissaris decernis and ordanis the said Katherine to haif violat hir fayth and brokin the said band and promeis of matrimony, and thairfoir tobe cuttit of separatit and diuorcit fra the said Patrik simpliciter in tyme cumming, and decernis the said Patrik to marie at his avne plesour according to the word of the evangell: Becaus the said precept being be the saidis Minister eldaris and deaconis admittit to the said Patrikis probatioun previt the samyn sufficientlie as wes knawin to the saidis Commissaris”.⁵⁴⁷

This example suggests that the elevation of the ‘word of God’ in Scotland was accepted by the Commissaries as an acceptable basis upon which the new divorce proceedings were to proceed. The “divorce” and “licence” clauses are also of note, the couple being “cut off, separated and divorced” from each other “*simpliciter*” and Hardy being declared free “to marie at his avne plessour according to the word of the evangel”.

[b] ANALYSIS OF THE “DIVORCE” CLAUSE

Of all the extant actions brought for divorce for adultery during the period under study, 73 reached definitive sentence or decret,⁵⁴⁸ and of these all granted the remedy sought by the pursuer, saving one instance where the defender was assoilized.⁵⁴⁹ Of these 72 decreets of divorce 70 used the word “divorce” to describe separation of the parties,⁵⁵⁰ whilst none made use of the phrase “*a vinculo*

⁵⁴⁶ This aspect of the case is discussed below, pages 220-221.

⁵⁴⁷ NAS, CC8/2/1, fo. 425r-v, 11 April 1565, *Hardy v. Rutherford*.

⁵⁴⁸ Listed in Appendix II, C, pages 294-300.

⁵⁴⁹ NAS, CC8/2/6, fo 252r-v, *Stewart v. Murray*, 28 January 1573/4.

⁵⁵⁰ The exceptions being *Andersone v. Allasone* and *Garland v. Stewart*.

matrimonii". Of these 70 instances, 61 used the phrase "divorcit simpliciter" to describe the separation, and this was undoubtedly the predominant and more normative element when describing the separation of the couple.⁵⁵¹

Various other words were often used in conjunction with 'divorcit' and 'simpliciter'. In 34 of these 61 decreets the phrase "divorce simpliciter" was used alone,⁵⁵² whilst in a further 15 the phrases "cutt off" and "seperat fra" were also used,⁵⁵³ whilst a number of other decreets included one of these two additional phrases. Various other decreets used some combination of these terms, whilst omitting the word 'simpliciter'. The most full and typical divorce clause used in the decreets of divorce for adultery was therefore "divorcit cutt off and seperat fra simpliciter". Nevertheless, it is clear that this formula was not in fact essential to the libel or decret and that what would now be considered considerable imprecision was acceptable. In *Anderson v. Allasone* the couple were decerned to be "seperatit and cuttit fra" one another for the adultery libelled, whilst in *Mure v. McCullocht* the couple were simply "diuorcit fer" one another. As such it may be concluded that where the divorce of the couple was concerned one of more of the phrases 'cut off,' 'seperatit' and 'divorcit' was to be used, all or some of which could be further qualified by using the adverb 'simpliciter'.⁵⁵⁴ The variations observed in the divorce clauses underlines the fact that it is not possible automatically to infer the freedom bestowed on the divorced parties from the divorce clause alone, since it was too vague and imprecise; a "licence" clause was clearly required to lend clarity.

⁵⁵¹ i.e. *Forbes v. Sandelands, Hardy v. Rutherfurde, Murray v. Irwyng, Levingstoun v. Crawford, Ker v. Cranstoun, Small v. Moffett, Barnair v. Nychole, Wrycht v. Drippis, Makcanzie v. Makgillechallum, Wilsoun v. Creichtoun, Pawton v. Lindesay, Patersone v. Bernis, Flemyng v. Flemyng, Merschale v. Broun, Kincaid v. Ross, Provand v. Steill, Gourlay v. Crystie, Reid v. Osburne, Hay v. Quhyteheid, Levingstoun v. Kincaid, Diksoun v. Borthwick, Wylie v. Speir, Clerk v. Scott, Hendirsone v. Robesone*, etc. etc. (see Appendix II, C, for full citations).

⁵⁵² i.e. *Murray v. Irwyng, Levingstoun v. Crawford, Barnair v. Nychole, Wrycht v. Drippis, Pawton v. Lindesay, Patersone v. Bernis, Provand v. Steill, Gourlay v. Crystie, Reid v. Osburne, Levingstoun v. Kincaid, Diksoun v. Borthwick, Wylie v. Speir*, etc. etc. (see Appendix II, C, for full citations).

⁵⁵³ i.e. *Hardy v. Rutherfurde, Ker v. Cranstoun, Small v. Moffett, Makcanzie v. Makgillechallum, Wilsoun v. Creichtoun, Wemis v. Dunbar, Merschale v. Broun, Hay v. Quhyteheid, Clerk v. Scott*, etc. etc. (see Appendix II, C, for full citations).

⁵⁵⁴ Whilst *DOST* notes that 'simpliciter' may mean "without qualification or condition being placed upon the event described" it is difficult to think that it had this meaning in this context. On the one hand, the consequences of the divorce were immediately qualified by the "licence" clause. On the other, 'simpliciter' could also mean "simply", and this second meaning accords better with earlier sentences of the Kirk, wherein couples could be divorced "simple and perpetuallie" (*St Andrews*, i, 50).

[c] ANALYSIS OF THE “LICENCE” CLAUSE

In the 72 decreets of divorce for adultery pronounced by the Commissaries up to the winter of 1576/7, 71 of them contained a “licence” clause, whilst in the exception, *Grant v. Leslie*, licence to remarry was sought explicitly in the libel, and it is likely that the licence clause was simply omitted by the clerk in the actual decret.⁵⁵⁵ As with the other clauses analysed, the “licence” clause could be expressed in a number of different ways. In five out of the first ten decreets, the licence clause conformed to its pre-Reformation counterpart, granting the innocent party “licence in the Lord” to remarry as they pleased, but this formula seems to have soon fallen out of use.⁵⁵⁶ Rather, the predominant formula, used in 53 of the decreets, was that the innocent party was decerned or declared “free to marry in the Lord” where they pleased.⁵⁵⁷ A further six decreets granted “liberty in the Lord” to remarry,⁵⁵⁸ whilst in one instance the Commissaries granted “fre libertie in the Lord”.⁵⁵⁹ Despite this range of variation within the “licence” clause, its tenor was always the same: the innocent party was free to remarry. In twenty-nine of the decreets the quality of the freedom of the innocent party to remarry was further defined by the addition of the clause “as freely as they might have done before the contracting of the said marriage” or words to that effect.⁵⁶⁰

⁵⁵⁵ NAS, CC8/2/8, fos. 255r-257r, 30 July 1576. The decret is unusually long, which may account for the clerical oversight of not explicitly granting licence, having been explicitly required by the pursuer as part of the remedy desired in the libel.

⁵⁵⁶ i.e. *Murray v. Irwyng*, *McCrache v. Patersoun*, *Anderson v. Allasone*, *Ker v. Cranstoun*, *Barnair v. Nychole* (see Appendix II, C, for full citations).

⁵⁵⁷ i.e. *Forbes v. Sandelands*, *Levingstoun v. Crawford*, *Small v. Moffett*, *Wrycht v. Drippis*, *Wemis v. Dunbar*, *Pawton v. Lindesay*, *Patersone v. Bernis*, *Flemyng v. Flemyng*, *Merschale v. Broun*, *Kincaid v. Ross*, *Provand v. Steill*, *Gourlay v. Crystie*, *Reid v. Osburne*, *Hay v. Quhyteheid*, *Levingstoun v. Kincaid*, *Diksoun v. Borthwick*, *Wylie v. Speir*, *Clerk v. Scott*, *Garland v. Stewart*, *Mure v. McCullo(ch)t*, *Hendirson v. Robesone*, *Hopper v. Davidson*, *Wilsoun v. Mathy*, *Levingstoun v. Levingstoun*, *Sutherland v. Sinclair*, *Hammiltoun v. Caldwell*, *Forret v. Lyndesy*, *Vrquhart v. Lyoun*, *Cunyngham v. Hunter*, *Ross v. Cathcart*, etc. etc. (see Appendix II, C, for full citations).

⁵⁵⁸ i.e. *Dunlop v. Broun*, *Makcanzie v. Makgillechallum*, *Mortoun v. Robesoun*, *Leslie v. Betoun*, *Lamb v. Anderson*, *Gourlay v. McQueen* (see Appendix II, C, for full citations).

⁵⁵⁹ *Leslie v. Betoun* (NAS, CC8/2/7, fo. 164r-v, 2 June 1575).

⁵⁶⁰ i.e. *Forbes v. Sandelands*, *Levingstoun v. Crawford*, *Ker v. Cranstoun*, *Wrycht v. Drippis*, *Wilsoun v. Creichtoun*, *Wemis v. Dunbar*, *Pawton v. Lindesay*, *Patersone v. Bernis*, *Merschale v. Broun*, *Kincaid v. Ross*, *Provand v. Steill*, *Hay v. Quhyteheid*, *Levingstoun v. Kincaid*, *Wylie v. Speir*, *Clerk v. Scott*, *Garland v. Stewart*, *Hopper v. Duidsoun*, *Hammiltoun v. Caldwell*, *Hog v. Cutlar*, *Houstoun v. Adame*, *Caquhone v. Watsoun*, *Drummond v. Campbell*, etc. etc. (Appendix II, C, for full citations). The “licence” clause can also sometimes be found in actions concerning solemnization (i.e. NAS, CC8/2/8, fos. 123r-v, 5 April 1576, *Reid v. Ramonos*), declarators of freedom (i.e. NAS,

[d] EXCEPTIONS TO THESE GENERAL OBSERVATIONS

In the action of *Garland v. Stewart* the standard formulas were negated altogether. The couple had solemnized their marriage in the kirk of Kilwinning in December 1561 ‘in face of haly kirk’. The defender had committed adultery with a named paramour during the course of 1570, which adultery was proven. The language of the Commissaries’ decret, however, was not that usual to their decreets of divorce: “The saidis Commissaris be thair decret Decernis the said band of matrimony tobe dessoluit & tobe null & of nane avale force nor effect in tyme cuming and the said Thomas tobe fre of the said defender as gif the said band had neuir bene solemnizat betuix thame and him to marie in the Lord quhair he plesis”.⁵⁶¹ Whilst other decreets of divorce made use of the phrase “to be dissoluit”,⁵⁶² the phrase “to be null and of nane avale force nor effect” is strongly redolent of sentences of annulment (with the obvious difference that the marriage was not deemed null *ab initio*). Whilst it is tempting to interpret this unique formula as suggesting that adultery was somehow considered grounds for annulment, the conception is flawed. For this to be the case, adultery would have had to have been considered an impediment, which, since occurring after the contracting of marriage, could not be considered an impediment in any valid sense. In this curious example, therefore, the use of some of the language of nullity should be taken to indicate what has already been made clear, that the Kirk and the Commissaries pressed the vocabulary of annulment into the service of expressing the new and novel divorces they pronounced.⁵⁶³

In the action of *Goddiskirk v. Tenent*, the parties had promised to marry one another, had had the banns proclaimed, and proceeded to consummate their promise prior to solemnization, by which “the mariage was consummat & finnist”. Nevertheless, prior to any solemnization of the union, Isobell Tenant committed adultery, which was duly proven before the Commissaries. Yet rather than adopt the

CC8/2/7, fo. 3v, *Robesoun v. Liall*) and putting to silence (i.e. NAS, CC8/2/7, fo. 82[r], *Baxter v. Dun*).

⁵⁶¹ NAS, CC8/2/5, fo. 98r, 27 February 1570/1, *Garland v. Stewart*.

⁵⁶² i.e. *Dunlop v. Broun* (NAS, CC8/2/1, fos. 387v-388r, 14 March 1564/5).

⁵⁶³ Cf the analysis of post-1563 annulment decreets which follows: the decret of annulment pronounced in *Paislie v. Haistie*, which conceived of the annulment more as a Protestant divorce than an annulment.

normative “divorce” and “licence” clauses, the Commissaries decreed “the said Gilbert [Goddiskirk] to be fre of the said promeis of mariage maid be him to the said Isobell and to be fre siclik to marrye in the Lord as he sall pleis in tyme cuming”.⁵⁶⁴ This was the formula used in declarators of freedom, which were concerned with promises of marriage only, rather than marriages, regular or non-regular.⁵⁶⁵ No obvious explanation presents itself to this unique usage. The libel alleged clearly that “it is of veritie that the said Isobell hes sen the said promeis & carnall copulatioun following thairvpoun gevin the vse of hir body and had carnall copulatioun with the personis following” and as such it would seem that it cannot be argued that her illicit *copula* had occurred prior to the *copula* which “consummat & finnist” her promise to Goddiskirk. Yet despite this, the libel never called Isobell’s illicit *copula* “adultery” and argued elsewhere that her conduct “mad hir selff vnworthy to contract mariage with the said Gilbert he havand keipit him selff fer of the cumpany of ony vther woman sen the promeis forsaid”.⁵⁶⁶ Here the sense is that at least some of her illicit *copula* occurred after her promise of marriage, but prior to its consummation. As such, the Commissaries must have decided that the promise of marriage had not been validly consummated on account of some intervening unfaithfulness on Isobell’s part, which made the matter not one of divorce, but of freedom from a promise of marriage.

[vi] EXAMPLES OF THE “LICENCE” CLAUSE IN THE COMMISSARIES’ DECREETS OF ANNULMENT

It has been argued that Scottish Protestant divorce for adultery was given legal expression by both the Kirk and Commissaries through the borrowing of clauses and formulas from pre-Reformation sentences of annulment. Analysis of the post 1559 material indicates that only the innocent party was granted licence to remarry following the granting of Scottish Protestant divorce for adultery. Yet this conclusion pre-supposes that the Commissaries of Edinburgh remained alive to the fact that within the context of sentences of annulment, the licence clause could be

⁵⁶⁴ NAS, CC8/2/5, fos. 46v-47r, 12 January 1570/1.

⁵⁶⁵ i.e. NAS, CC8/2/2, fo. 41r, 30 May 1565, *McWalter v. Galbrayth*.

⁵⁶⁶ NAS, CC8/2/5, fos. 46v-47r, 12 January 1570/1.

used to bestow licence on one or both parties. The analysis of post-1563 decreets of annulment which follows demonstrates that the Commissaries were well aware of the full utility of the licence clause, and that as such, their employment of the clause in decreets of divorce was deliberate, and reflected the law of Scotland.

The first decret of annulment pronounced by the Commissaries of Edinburgh adopted a somewhat unusual conception of the case. The pursuer in the action was Margaret Paislie, and the defender her alleged husband John Haistie. The pursuer “beand ane pover simpill damisell” had “completit the band of matrimony in the face of halie kirk... as vse wes” with Haistie. Haistie was nevertheless already married to Janet Auchinlek who duly “come furth of Lanerk and clamit the said Johne”. As such, the second bigamous union was clearly null *ab initio*. These facts having been proven, the Commissaries decerned “the said Margaret to be separat and simpliciter diuorcit fra the said Johne and libertie tobe gevin to hir to maire in the lord quhome scho pleises And the said Johne to be pvneist [as] accordis of the law ffor the said filthie cryme of adulterie committit be him as said is”.⁵⁶⁷ This remedy conformed closely to the pursuer’s libel, and as such no “nullity” clause was explicitly employed, although nullity of the second union was implicit in the decret. Despite this omission, the rest of the decret was as expected, with a “divorce” clause and “licence” clause granting the ignorant party, Margaret Paislie, licence to remarry. Licence was obviously not granted to Haistie since he was already married elsewhere.

In *Newtoun v. Dalzell*, whilst the defender was assoilized, since the pursuer succumbed in probation, the action also concerned a bigamous union. The pursuer alleged that, being widowed, she married the defender in the belief that “he had bene frie persoun”. Nevertheless, the pursuer alleged that the defender was “na fre persoun the tyme of the solemnizatioun of the said mariege [between them],” claiming that the defender was already married to another, his first spouse “quha as zit on life”. The remedy sought by the pursuer was for the litigants’ marriage to be “decernit to haue bene null & of nane avall fer the begynning & in all tymes cuming with all that followit thairvpoun and the said Margaret [pursuer] decernit to be frie to marie in the Lord siclik and als friele as scho mycht haif done befor the solempnizatioun of the mariege foirsaid”.⁵⁶⁸

⁵⁶⁷ NAS, CC8/2/1, fo. 247v, 25 November 1564, *Paislie v. Haistie*.

⁵⁶⁸ NAS, CC8/2/5, fo. 16v-17r, 10 December 1570.

The decret of annulment pronounced by the Commissaries in *Gillaspene v. Marscheall* conformed more closely to pre-Reformation formulas in that a “nullity” clause was explicitly used. The litigants had contracted marriage *per verba de praesenti* when both aged nine, and having reached the age of 15 years sought to have the marriage annulled on the grounds of nonage and fear of their parents.⁵⁶⁹ The libel narrated that since the marriage was impeded by a diriment⁵⁷⁰ “the samyn pretendit band is of the self null of the law and aucht tobe decernit null and ilkane of the foirsaidis personis seperat and diuorciat simpliciter and Leif tobe gevin to euery ane of thame to marie in the Lord quhome thai pleis”. The libel was duly proven, and the Commissaries decerned “the said band of matrimony from the begynning and in all tyme tocum null betuix the foirsaidis personis and the said Cristiane tobe seperat and diuorcit simpliciter fra the said Henrie And decernis thame bayth euery ane of thame tobe seperat and diuorcit simpliciter ane fra ane vther And gevis leif to euery ane of thame to marie in the Lord quhome thai pleis”.⁵⁷¹ As may be clearly seen, the “licence” clause explicitly extended licence to both parties to remarry as they wished, and as such it is certain that the Commissaries were fully aware of the fact that the “licence” clause had a range of potential functions.

CONCLUSION

It therefore appears that two principal clauses were used to express the new Scottish Protestant divorce for adultery. The first was a “divorce” clause, which declared two parties to be separated and cut off from each other, because of the unfaithfulness of one of the parties, whilst the second was a “licence” clause which granted the party innocent of adultery the right to remarry as they so desired. Although it was initially anticipated by the Protestant Kirk that the party found guilty of adultery would be executed, in the majority of cases the guilty party avoided this penalty. Since the guilty party had not been granted licence to remarry it may be

⁵⁶⁹ Although *metus reverentialis* was not a grounds for annulment in its own right (Scanlon, ‘Husband and Wife’, 76).

⁵⁷⁰ A diriment impediment is one from which no dispensation can be obtained (Scanlon, ‘Husband and Wife’, 75).

⁵⁷¹ NAS, CC8/2/2, fos. 133v-134r, 5 August 1565.

reasonably inferred that they were prohibited from doing so by the law: an analysis of post-Reformation decrees of annulment has demonstrated that the Commissaries understood that the “licence” clause could be used to grant licence to one or both parties, depending of the circumstances of a given case.

Nevertheless, following the Reformation and prior to 1600, those divorced for their own adultery did sometimes marry again, even to their own paramours (and presumably third parties, although these unions do not seem to have been deprecated specifically).⁵⁷² These two points taken together suggest that whilst the guilty party was not granted licence to remarry, they became free to remarry at some point thereafter. Given the pre-Reformation background, it seems reasonable that since adulterers divorced *a mensa et thoro* under the Catholic dispensation were freed to remarry by the death of their innocent spouse it is reasonable to suppose that this principle continued to operate in post-Reformation Scotland. This conception of Protestant divorce, granting licence to the innocent party, but binding the guilty party to the marriage until the death of the innocent party accords well with the context within which the innovations to divorce law were introduced. That is to say, the Reformers’ principal problem with divorce *a mensa et thoro* had been the predicament of the innocent spouse, and since their law reforms were aimed at remedying this perceived injustice, it could be argued that the restrictions on the rights of the guilty party to remarry remained intact. This seems a more satisfactory perspective than the nineteenth-century insistence that Scottish Protestant divorce was some form of divorce *a vinculo*, that is to say some sort of reformed annulment.

Yet it still remains that whilst the shape of the law provisionally concluded above is reasonable given the extant evidence, it is desirable that the premise that those divorced for their own adultery might not remarry during the lifetime of their first innocent spouse should be shown to have been enforced by the Commissaries of Edinburgh. Thankfully, a series of cases concerning the marital problems of Janet Paterson and Constantine Stevenson, and involving the superintendent and elders of Glasgow, a group of arbiters and the Commissaries of Edinburgh, provide an extant example of the enforcing of this principle. Indeed, it was the final action of annulment in these series of cases which first led John Riddell to consider the

⁵⁷² i.e. see Riddell’s discussion of Dame Margaret Whytlaw and Sir John Ker; the validity of the marriage of that adulterous couple had been of considerable importance in *Roxburgh v. Ker (Inquiry, i, 395 et seq)*.

possibility that those divorced for their own adultery may have been impeded from remarriage during the lifetime of the innocent spouse.⁵⁷³ Within the context of the preceding analysis, his tentative assertions seem certain.

Janet Paterson and Constantine Stevenson had been lawfully married at an unknown point prior to the Reformation. Stevenson had subsequently committed adultery, although the name of his paramour is not known. Paterson subsequently pursued Stevenson before the superintendent and elders of Glasgow, desiring a Scottish Protestant sentence of divorce to be pronounced in her favour on the grounds of Stevenson's adultery. The couple were accordingly divorced by the superintendent and elders of Glasgow in 1560. This sentence of divorce was produced before the Commissaries and accepted by them, although the contents of the sentence are not known.

As with other sentences of divorce pronounced by the Kirk, it would appear that the question of tocher had not been addressed.⁵⁷⁴ Since the Commissaries of Edinburgh had not been appointed, Paterson and Stevenson appointed arbiters to come to an agreement over Paterson's tocher. It was settled that Stevenson should restore a sum of money to Paterson before the named arbiters "At McDokis Mure within the parrochin of Nelstoun the xxiiij day of Februar the zeir of God jai vc lxij zeris," by virtue of which she exonerated Stevenson and his heirs from all further claims. In addition, the arbiters presumed to grant Stevenson licence to remarry, decerning that he "may marie and tak to his wife quhatsumeuir vomen he plesis best without ony molestatioun preturbatioun or titill to be maid or done be the said Jonet or vtheris in hir name or behuif In tym to cum and that because the saidis juges findis the saidis Jonet and Constene lauchfullie seperatit and put sundrie be ane decrete and sentence gevin be the superintendent eldaris of Glasgw as said is".⁵⁷⁵ Whilst the arbiters were not competent to grant such a licence, the inclusion of this clause in the arbiters' judgement indicates that Stevenson was desirous that he should be declared

⁵⁷³ Riddell, *Inquiry*, i, 392.

⁵⁷⁴ For example the kirk session and superintendent's court at St Andrews did not presume to make settlements between divorced couples concerning their temporal goods, but rather oversaw the appointment of arbiters to decide these question (*St Andrews*, i, 38-39). There were three 'Tint' actions brought before the Commissaries of Edinburgh, were the pursuer desired them to decern the party guilty of adultery to have 'tint their tocher *et donationes propter nuptias*' by virtue by a sentence of divorce pronounced by the Kirk (see above Chapter II, §V).

⁵⁷⁵ NAS, CS7/29, fos. 42r-43r, 10 March 1563/4.

free to marry, and that Janet Paterson should in effect be put to silence. It is reasonable to assume that the sentence of the Kirk had granted licence to remarry to the innocent Paterson only, in conformity with all known extant sentences of divorce pronounced by the Kirk during this period, whilst this inference is confirmed by the fact that Stevenson's desire to be declared free by arbiters belies his lack of a licence from the Kirk, together with a perceived need of such a declaration. Janet Paterson was clearly unhappy with the arbiters' judgement, raising a precept of reduction against it before the Lords of Council on 10 March 1563/4, but the outcome of this action, if there was one, is not known at present.⁵⁷⁶

At some point during the summer of 1563 or thereabouts⁵⁷⁷ Constantine Stevenson contracted a marriage with one Agnes Pollock. On the 23 January 1564/5 Henry Kinross, Procurator Fiscal of the Court of the Commissaries of Edinburgh together with Janet Paterson instituted an action of annulment against Constantine Stevenson and Agnes Pollock. After due process had been led in the matter, the Commissaries annulled Stevenson and Pollock's marriage on the 11 July 1565 and declared the couple's cohabitation 'filthie and detestable'. The reason for the decision was given thus: "BECAUS it is of veritie that the said Jonet Patersone wes mariit lauchfullie with the said Constine Stevinsoun and he thaireftir divorcit and cuttit fra the said Jonet for the filthie adulterie committit be him As the decret gevin thairon be the Superintendent and elderis of Glasgw at mair lenth proportis of the dait the [blank] day of [blank] the zeir of God jaj vc/ lx zeris And als that thir tua zeris lastbipast the saidis Constine and Agnes hes on⁵⁷⁸ thair pretendit maner sen the said diuorcement contractit mariage togidder as mariit folkis in ane hous in [blank] havand carnale deill and copulatioun togidder the said Jonet zit being on lyfe and will not desist and ceiss fra thair sclanderous and detestable lyf foirsaid".⁵⁷⁹

The two main points made in this statement were that the Kirk's sentence of divorce had been pronounced for Stevenson's adultery, and that Stevenson had

⁵⁷⁶ NAS, CS7/29, fos. 42r-43r, 10 March 1563/4.

⁵⁷⁷ The Commissaries' decret of the 11 July 1565 stated that Stevenson and Pollock had been living together as supposed man and wife for "tua zeris lastbipast or thairby". It therefore seems most likely that Stevenson had obtained the dubious licence to remarry from the arbiters prior to attempting to contract a second marriage, and that Paterson had initially petitioned the Lords following the contracting of the second marriage. Although speculative, it seems likely that the Lords of Council would have requested that Kinross look into the matter.

⁵⁷⁸ *na* appears here in the MS, but is likely a clerical error.

⁵⁷⁹ NAS, CC8/2/2, fo. 86r-v, 11 July 1565, *Patersoun (& Fischale) v. Stevinsoun & Pollock*.

subsequently contracted marriage with another woman, his first innocent spouse “zit being on lyfe”.⁵⁸⁰ These were the only grounds given explicitly upon which the annulment of Stevenson’s second marriage proceeded.

Given the tenor of the decret there are only two theoretical grounds upon which Stevenson’s second marriage could have been annulled. The first, being the one given in the decret, was that those divorced for their own adultery were barred from remarriage during the lifetime of their first innocent spouse. The second and less likely is that Agnes Pollock may have been Stevenson’s paramour, but this was never stated in the extant material. But even if it were to be granted that Pollock was Stevenson’s paramour, there are two reasons why it seems unlikely that remarriage to a paramour were the grounds upon which the annulment proceeded. The first reason was that no indication is given that Pollock was Stevenson’s paramour,⁵⁸¹ which indicates either that she was not or, if she were, it was not deemed significant. The second reason is that the logic of the House of Lords’ ruling in *Roxburgh v. Ker*, that the need for the Act of 1600 must have arisen from the fact that such marriages were licit prior to the Act, would be difficult to contravene.⁵⁸² As such, the only tenable grounds of the annulment of the marriage of Stevenson and Pollock, both theoretically and in terms of the explicit evidence of the Commissaries’ decret is that the life of the innocent party was an impediment to the remarriage of those divorced for their own adultery.

Scottish Protestant divorce for adultery was therefore certainly a new kind of divorce which combined elements of both pre-Reformation divorces *a mensa et thoro* and divorces *a vinculo matrimonii*. Whilst under the new laws, married parties were divorced on the grounds of one of the parties’ adultery, the “divorce” clause used in these sentences and decreets carefully avoided the use of the phrase *a mensa et thoro* or *a vinculo matrimonii*. Rather, the language used was imprecise. The

⁵⁸⁰ It should be noted that this clause appeared in other consistorial decreets of the Commissaries, when the underlying concept was A may not remarry since married to B, and B is still alive, i.e. since the marriage between them still stands (i.e. NAS, CC8/2/5, fo. 16v-17r, 10 December 1570, *Newtown v. Dalzell*, which was a decree of annulment on the grounds of ‘bigamy’).

⁵⁸¹ Which is a contrary conclusion to that of David Baird Smith, whose attention having been drawn to the case by Riddell’s work, asserted that this annulment proceeded upon the grounds that “a divorced adulterer had married his paramour” (*The Reformers and Divorce*, 19). There is no evidence to support Baird Smith’s assertion.

⁵⁸² Discussed above pages 105-106.

guilty party in effect continued to be bound to the marriage until released by the death of the innocent party: in this sense the guilty party had been divorced *a mensa et thoro*. The innocent party was granted licence and freedom to remarry, through the employment of a “licence” clause borrowed from pre-Reformation sentences of divorce *a vinculo matrimonii* (that is to say annulment): in this sense, the innocent party was treated as if through no fault of their own the marriage to which they had been bound had in effect ceased to restrict their capacity to remarry, rather as if the marriage bond had been annulled. During the Scottish Reformation, therefore, distinct conceptual elements from both types of pre-Reformation divorce were employed to create a uniquely Scottish divorce law, unknown not only to the Canon law, but also to the divorce laws of other Reformations.

§III
SCOTTISH PROTESTANT DIVORCE FOR MALICIOUS DESERTION

On 30 April 1573 the three estates of the Scottish Parliament passed an Act “Anent thame that divertis fra utheris, being joynit of befoir in lauchfull marriage”.⁵⁸³ The Act narrated “that in all times bypast, sen the trew and Christiane religioun was publictlic preichit, awowit and establischt within this realme, namelie, sen the moneth of August, the yeir of God ane thousand five hundreth threscoir yeiris, it hes bene, is and in all tyme cumming salbe” lawful for “the malicious and obstinat defectioun of the partie offendar to be ane sufficient caus of divorce and the said partie offendar to tyne and loss thair tocher *et donationes propter nuptias*.” Whilst malicious desertion was elaborately defined by the Act, the precise quality of the divorce and licence to remarry which would be granted were not stated.

The Act clearly purported to be declaratory rather than prescriptive, and whilst the Commissaries of Edinburgh certainly accepted from 1573 that the law of Scotland had allowed divorce on the grounds of malicious desertion since August 1560, they did so on the grounds of the authority of the Scottish Parliament, not on the grounds that Parliament’s understanding of divorce law since 1560 was historically accurate. The historical veracity of Parliament’s narration was first doubted in print by Riddell in his *Inquiry* of 1842, when he discovered that the law of divorce for malicious desertion was unknown to the Commissaries of Edinburgh in 1571/2, and suggested that the statute had been enacted at the desire of the then Chancellor of Scotland, the 5th earl of Argyll.⁵⁸⁴ Whilst Riddell’s opinions were still considered as one of several possibilities until quite recently,⁵⁸⁵ recent work has elaborated and confirmed Riddell’s theory beyond reasonable doubt.⁵⁸⁶

⁵⁸³ *RPS*, A1573/4/2; *APS*, iii, 81, c.1.

⁵⁸⁴ Riddell, *Inquiry*, i, 546 *et seq.*

⁵⁸⁵ Forte has summarized the various options in ‘Some Aspects of the Law of Marriage’, 113. In 1995 David Sellar noted that “the statute [of 1573] narrated that divorce for desertion had been available since the Reformation, but it is not clear that this is so” (‘Canon Law and Scots Law’, 73); see also Ireland, ‘Husband and Wife: Divorce’, 96.

⁵⁸⁶ J.E.A. Dawson ‘The Noble and the Bastard: The Earl of Argyll and the Law of Divorce in Reformation Scotland’ in Julian Goodare and Alasdair MacDonald (eds.), *Sixteenth-Century Scotland: Essays in Honour of Michael Lynch* (Leiden: Brill, 2008), 147-168. I am grateful to Professor Dawson for providing me with her unpublished transcriptions of all the various stages of litigation involving the 5th earl and his first countess, Jane Stewart, and for various conversations about the legislation of 1573.

The evidence is as follows: Archibald Campbell, 5th earl of Argyle and one of the most powerful magnates in Scotland, Ireland and England had married Jane Stewart, natural daughter of James V of Scotland during April 1554.⁵⁸⁷ The marriage had not been particularly successful, and whilst Argyle had sired a number of natural children with various mistresses, his marriage produced no legitimate heir. The earl's marriage experienced various difficulties, and by August 1567 his countess had deserted him.⁵⁸⁸ Various attempts to entreat the countess to adhere to the earl proved unsuccessful⁵⁸⁹ and accordingly the earl instituted an action for adherence against the countess before the Commissaries of Edinburgh during November 1570, being the normal procedure following desertion. The Commissaries duly decreed the countess to adhere to her husband on 28 January 1571/2.

The countess failed to comply with the Commissaries' decret of adherence and was duly put to the horn on 23 February 1571/2.⁵⁹⁰ This was un-charted territory: few Scottish subjects would have had the capacity to defy the authority of the Commissaries of Edinburgh and the Lords of Council and Session. Jane Stewart's refusal to adhere to her lawful husband placed Argyle in a difficult and possibly unprecedented situation. He had no legitimate heir and was expected to pre-decease his lawful wife. His initial response to his wife's recalcitrance was to attempt to obtain a decret of Scottish Protestant divorce on the grounds of non-adherence, and to that end instituted further proceedings before the Commissaries of Edinburgh on 1 March 1571/2. Yet the Commissaries were unclear as to the law on this head, and accordingly assigned the earl's procurator, Thomas Craig, 10 March 1571/2 "to informe of the lawis allegeit that the caus libellit [i.e. malicious desertion] *est causa divortii*".⁵⁹¹ It must be presumed that Craig, one of the ablest men of law of his generation, was unable to demonstrate that Scots consistorial law held non-adherence to be a grounds for Scottish Protestant divorce, since the earl's action was not pursued further.

Having failed in his attempt to put away the countess, the earl pursued the only course left open to him and continued with his attempts to compel the countess

⁵⁸⁷ NAS, CC8/2/5, fo. 170v, 28 January 1571/2, *Argyll v. Countess*, decret of adherence.

⁵⁸⁸ NAS, CC8/2/5, fo. 170v, 28 January 1571/2, *Argyll v. Countess*, decret of adherence.

⁵⁸⁹ Dawson, 'Noble and Bastard', 160-161.

⁵⁹⁰ Dawson, 'Noble and Bastard', 163, n. 61.

⁵⁹¹ Riddell, *Inquiry*, i, 548; Dawson, 'Noble and Bastard', 163.

to adhere to him in conformity with the Commissaries' original decret of adherence. Since the countess had already proved unresponsive to the civil censures of the Lords of Council and Session, the earl availed himself of the ecclesiastical censures of the Protestant Kirk. The countess was first admonished privately to adhere to her husband, and not proving amenable was solemnly warned on three successive Sundays in the kirk of Leith to adhere to her husband on pain of excommunication. These warnings were ignored by the countess; yet an excommunicate, outlawed, non-adhering lawful wife was of no use to the earl in his increasingly overwhelming desire to secure his ancient and noble line. The excommunication was accordingly not effected, presumably in the hope that the countess would yet yield to the threat of ecclesiastical censure. Rather, the countess was again solemnly warned on three successive Sunday in the kirk of Edinburgh to adhere to her husband on pain of excommunication. She again proved defiant, and having in effect already called the Kirk's bluff once, obliged them to formally excommunicate her on 26 April 1573.⁵⁹²

Since the earl had now exhausted all possible means of coercion, both civil and ecclesiastical by which his wife could be made to adhere to him, his only remaining option was to authoritatively establish that the laws of Scotland permitted Scottish Protestant divorce on the grounds of malicious and obstinate desertion. His first recourse was to the General Assembly, but it demurred, "setting up a committee which recommended seeking the advice of other Reformed churches in Europe".⁵⁹³ Whilst this would occasion considerable delays, in other circumstances the earl might have patiently awaited the completion of the Kirk's deliberations, but the uncertain state of his health meant that he could not abide further delays in ridding himself of his wife, lawfully remarrying, and producing an heir.⁵⁹⁴

It is therefore certain that in the early 1570s neither the Commissaries of Edinburgh nor the General Assembly of the Kirk of Scotland could positively assert that malicious desertion was a competent ground for divorce with licence to remarry.

⁵⁹² Dawson, 'Noble and Bastard', 161-164.

⁵⁹³ Ibid., 164. It may be speculated that the Assembly's consultation would have been favourable to the earl's cause: see David Baird Smith, 'A Note on Divorce for Desertion' in *Juridical Review*, 51 (1939), 254-259. Although Smith was mistaken in attributing the introduction of divorce for malicious desertion into Scotland directly to Genevan influences, the connection is certainly valid: Genevan influences certainly played a direct role in the Dutch Reformed context (see Alan Watson, 'The Development of Marital Justifications for *Malitiosa Desertio* in Roman – Dutch Law' in *Law Quarterly Review*, 79 (1963), 87-97).

⁵⁹⁴ Dawson, 'Noble and Bastard', 162-4.

The only other course of action open to the earl was to have the three estates of Parliament declare that malicious desertion was a competent ground for divorce with licence to remarry. Moreover, it was imperative for the earl to establish that this was the law of Scotland, and indeed had been the law at the time of the failure of his marriage: it was not enough for the three estates to prescribe the law of Scotland by statute in this respect, rather they would have to declare that the laws favourable to the resolution of the earl's predicament had been effective from some date prior to his marital difficulties.

On 30 April 1573 the three estates duly obliged, and it has long been held that the earl used his powers as Chancellor of Scotland to secure the enactment of this statute.⁵⁹⁵ As has already been discussed, the Act was declaratory, asserting that divorce for malicious desertion had been competent in Scotland since August 1560, and as such, the earl's own marriage was encompassed by the terms of the Act. The Act also conveniently described that malicious desertion could only be proven if the deserter had been first privately admonished to adhere, then pursued for adherence before a competent judge, then compelled to conform to the ensuing decret of adherence by the Lords of Session, then put to the horn by the Lords, then privately admonished by the ecclesiastical authorities, then publicly admonished by the ecclesiastical authorities and then excommunicated.⁵⁹⁶ This of course was a blow-by-blow narration of the precise steps already taken by the 5th earl of Argyle against his countess.

The law of divorce having been declared to be favourable to the earl's first precept of divorce for malicious desertion raised before the Commissaries of Edinburgh on 1 March 1571/2, a second precept was raised on 9 May 1573.⁵⁹⁷ This time the Commissaries accepted the libel as competent in view of the recent parliamentary legislation, and admitted it to probation. Since the due diligence for establishing malicious desertion prescribed by the Act of 1573 had already been done, the libel was duly proven and the Commissaries pronounced their decret in the earl's favour on 22 June 1573. The Commissaries' decret employed the same

⁵⁹⁵ Riddell, *Inquiry*, 552; Dawson, 'Noble and Bastard', 164.

⁵⁹⁶ *RPS*, A1573/4/2; *APS*, iii, 81, c.1. The Act even included a narrative of the 'double' public admonitions in the kirks of Leith and Edinburgh: "in case thair be nane or that the minister will not execute, to the minister of the nixt adjacent kirk thairto, quha sall proceid aganis the said offender with publict admonitiounis".

⁵⁹⁷ *NAS*, CC8/2/6, fo. 90v, 9 May 1573.

“divorce” and “licence” clauses employed in their decreets of divorce on the grounds of adultery, decerning Jane Stewart “to be simpliciter Diuorcit fra the said noble Lordis cumpany for the said malitious & obstinat desertioun and / decernis / hir to have tynt hir tocher *donationes propter nuptias* with all vther thingis gevin to hir in respect of the said mariage And the said noble Lord tobe fre to marye quhair he pleises in the Lord”.⁵⁹⁸ In this it may be presumed that Jane Stewart was not free to remarry during the lifetime of the 5th earl.

Almost immediately the earl exercised the licence granted by the Commissaries’ decret, marrying Jean Cunningham, daughter of the 4th earl of Glencairn, in the first week of August 1573. The second countess was soon got with child, but on 12 September 1573 the 5th earl died, whilst his posthumous son died at birth.⁵⁹⁹

On 15 January 1573/4 the first countess raised a precept of reduction against the Commissaries’ decret of adherence and subsequent decret of divorce for malicious desertion. The central arguments in her precept of reduction were aimed at the decret of adherence, arguing that she ought not to have been compelled to adhere to the late earl on the grounds of just dread and fear, the 5th earl’s adultery, and the fact that no interim aliment had been modified to her during her separation from the earl, and as such she had not had the means by which to conform to the earl’s initial admonitions to adhere.⁶⁰⁰ Nevertheless, Jane Stewart does not appear to have argued that the Act of 1573 was only prescriptive, and therefore applied only to cases of non-adherence from 1573. The Lords of Council and Session referred the precept of reduction to Parliament on the grounds that “the samyn is ane novalte” and that they “will haif advyss of the princis and three estaitis lafulle convenit upon the interpretation of the act of parliament libellit and quhat may result thairupon”.⁶⁰¹ In the event, full process was not led in the first countess’s precept of reduction before the Lords, and no sentence was ever pronounced in the matter. Rather, this action was referred by Jane Stewart and the late earl’s successor, Colin, 6th earl of Argyll for arbitration to “My Lordis Regentis grace [Regent Mar] & haill Lordis of

⁵⁹⁸ NAS, CC8/2/6, fo. 122v.

⁵⁹⁹ Dawson, ‘Noble and Bastard’, 165.

⁶⁰⁰ A copy of the countess’s precept of reduction was located and transcribed by Professor Dawson in Oliver Colt’s Legal Style Book (NAS, RH13/2, fos 73v-77v), upon which this summary is based.

⁶⁰¹ NAS, CS7/63/2, fo. 243v, Professor Dawson’s transcription.

Counsale” on 24 June 1577, together with various other pieces of litigation pending between the parties,⁶⁰² consenting that “however the saidis Lordis Regentis grace & Lordis foresaid decidit thairintill ather of the saidis parties band & oblist them to abyd thairat”.⁶⁰³

The Lords of Council, presumably in their appointed capacity as amicable compositors, pronounced their final decret in the matter on 24 June 1577, ordaining that Jane Stewart “sall have frie and frie regres ingres and access in and to hir hail coniunctfie landis of Campbell Dolour Menstrie Mekill and Litill Pincartownis mainis of Fernwall lordschip of Lorne and to ye tak and teind schawis of ye said parochin and kirk of Dolour siclyk and in ye samen maner as yis pronuncit decret and decret of divorce writt above specifeit had nevir bein gevin”.⁶⁰⁴ This was clearly a compromise in which Jane Stewart’s action for reduction of the Commissaries’ decreets had been allowed to sleep in return for a handsome property settlement in her favour as if she had never been divorced from the 5th earl, and were still his widow. In a strict legal sense she nevertheless remained divorced for malicious desertion, but the fact that her property entitlements accorded with her claims to still be the countess dowager of Argyll very possibly reflected a general sense of unease within the government that her legal status was nothing more than the technical result of the late earl’s remarkable machinations.⁶⁰⁵

It is therefore clear that prior to the Act of 1573 neither the Commissaries of Edinburgh nor the Protestant Kirk had a clear understanding that divorce for malicious desertion was competent under the law of Scotland. Whilst legal clarity

⁶⁰² See Dawson, ‘Noble and Bastard’, 166-167.

⁶⁰³ NAS, CS15/22, Warrants of Decreets, bundle concerning Dame Jane Stewart and her lands of Menstrie and Campbell: “Apud Edinburt xxiiijto Junij Anno Dom etc lxxviij, The quhilk day in the presence of the Lordis of Counsale comperit personalie Coleyne Erle of Ergile for him self & as brother & air to vmqhile Archibald Erle of Ergile his brother that last decissit on that ane part And Dame Jene Stewart relict of the said vmqhile Archibald Erle of Ergile on that vther part And REFFERIT the decisioun of all actionis vnder writtin And spealie the actioun & caus of reducioun persewit be the said Lady aganis the said Erle & Dame Jane Cunnyghame siclik allegit spous to the said vmqhile Erle & the Commissaris of Edinburt Tuiching the productioun & reducioun of ane decret & sentence of diuorce [etc] / & adherence / obtenit be the said Erle aganis the said Lady befor the saidis Commissaris...”

⁶⁰⁴ NAS, GD16/41/42, *Airlie Muniments*, fos. 1r-2v (Professor Dawson’s transcription).

⁶⁰⁵ The 6th earl of Argyll felt particularly aggrieved “that the 1573 act had not been properly enforced...” (Dawson, ‘Noble and Bastard’, 167, n. 84).

was provided by Parliament, it seems that the Lords of Council were ultimately not prepared to deprive Jane Stewart of her property rights by virtue of the Commissaries' decreets of adherence and divorce for malicious desertion, the latter having been pronounced in conformity with the Act. This seems reasonable and just given that the Act of 1573 was manifestly passed to favour the 5th earl of Argyll. From a study of all the relevant extant records for the period from the start of the Scottish Reformation, it is clear that the 5th earl's actions of divorce on the grounds of malicious desertion were the first of their kind in Scotland. That the Kirk demurred on the question of whether this was part of the law of Scotland makes sense within the context of the arguments already put forward concerning Scottish Protestant divorce for adultery. On this head it is clear that the Kirk had introduced divorce for adultery on the understanding that the adulterous party would be executed, and as such, the Kirk's reasoning still conformed closely with the Canon law conception of the death of one spouse freeing the survivor to remarry. No such rationale could be brought to bear where malicious desertion was concerned; there was certainly no call for the death penalty. Rather, the innovation prescribed by the three estates in 1573 consolidated the discernible shift in Scottish thinking about marriage from law being informed and validated by theological reasoning, to law being a matter of legal authority, with couples being formally divorced by the authority of judicial decree conforming to statute law, thereby diverging from the Canon law approach that the judgements of courts in matrimonial matters should seek to recognize and accord with the theologically defined inner realities of the marriage bond. Yet at the same time, the co-ordination between the differing jurisdictions of the Commissaries and the Kirk witnessed during the Argyll affair, and finally enshrined in statute, bore testimony to a new process of convergence in matrimonial law and procedure: this process will be discussed in Chapter VI.

CHAPTER IV
CONSISTORIAL PROCEDURE AND LITIGATION

§I
CONSISTORIAL PROCEDURE

The Commissaries of Edinburgh, broadly speaking, employed the Romano-canonical plenary procedure developed by the courts spiritual of the medieval Church prior to the European Reformations. The same basic structure of procedure had been employed in the Scottish Court of the Official, continued to be employed in the English ecclesiastical courts following the English Reformation, and provided the basis of the procedure used by the Scottish Lords of Session. Yet despite the common provenance of the plenary procedure of all these courts, the procedure of the Commissaries of Edinburgh was in essence a slightly more streamlined version of the Romano-canonical procedure than that found in the English ecclesiastical courts, and the courts of the Scottish Officials. As the Officials before them, the Commissaries also made use of a summary procedure in straightforward matters, and this will be considered after the plenary procedure of the Commissaries has been discussed.

[i] PLENARY PROCEDURE

The choice of whether to use plenary or summary procedure in any given action before the Commissaries of Edinburgh was at the discretion of the bench.⁶⁰⁶ Plenary procedure was adopted by the Commissaries in actions which were expected to be difficult and arduous.⁶⁰⁷ The litigation began with the Commissaries issuing a libelled precept or summons to be served on the defender. Several distinctions in language were used by the Commissaries to denote the differences in the types of

⁶⁰⁶ “as the judges, be thair discretioun, thinkis expedient” (*Balfour’s Practicks*, ii, 655, item ii). Ollivant suspected that the same choice was at the judges’ discretion in the Official’s Court (*Court of the Official*, 114).

⁶⁰⁷ *Balfour’s Practicks*, i, 655-656, item ii.

summonses they issued. In summary procedure the pursuer made a verbal petition and the Commissaries issued a summons *ad instantiam*, which did not inform the defender what the specific points alleged against them were. In plenary procedure, the pursuer produced a written libel, the contents of which were incorporated into a ‘libelled summons’ (also often referred to as a ‘libelled precept’⁶⁰⁸), which was then served upon the defender.

The precise procedural relationship between bringing a complaint before the Commissaries of Edinburgh and the production of a libelled precept is not entirely clear. Prospective litigants were not obliged to employ the services of a man of law as a procurator before the Commissaries and were permitted to represent themselves. Within the English context, Richard Helmholz has noted that the plaintiff was permitted to make their initial complaint orally as was “sensible to do in situations where the parties were illiterate”.⁶⁰⁹ Ollivant has argued that Balfour distinguished between verbal “petitions” and written “libels”.⁶¹⁰ Such verbal and written approaches were competent before the old Officials, and were also valid in the English ecclesiastical courts.⁶¹¹ Since the “distinction of libelling or not libelling of the summons [wes] referred to the arbitrament of the Judge” in the Court of the Commissaries of Edinburgh,⁶¹² it seems reasonable to suppose that potential pursuers initially approached the bench with a verbal petition so that the form of procedure to be used might be selected by the judges. If an illiterate layperson without a man of law therefore made a verbal petition, on the basis of which the Commissaries decided that a libelled summons should be prepared, it is not clear whether the Commissaries directed the pursuer to a man of law to prepare a written libel, or whether a clerk of court prepared a libelled precept at once, setting down the allegations of the pursuer in writing for the first time directly into the libelled precept.⁶¹³ In contrast, it is

⁶⁰⁸ These labels seem to have been used interchangeably in the Court of the Commissaries, although ‘libellit summonsdis’ tended to be ‘direct furth’, whilst ‘principal preceptis’ tended to be ‘raisit’, a distinction which may have reflected the original provenance of the libel or petition?

⁶⁰⁹ Helmholz, *Ecclesiastical Jurisdiction*, 319.

⁶¹⁰ Based on Balfour’s phrase that a libel was “ane petition made in writ be the persewar” (*Court of the Official*, 101).

⁶¹¹ Helmholz, *Ecclesiastical Jurisdiction*, 322.

⁶¹² *Balfour’s Practicks*, ii, 656, item ii.

⁶¹³ Helmholz points out that in the English ecclesiastical courts the consensus seems to have been “that determining the citation’s contents was better left for decision by court officials on a case by case basis” (Helmholz, *Ecclesiastical Jurisdiction*, 320).

reasonable to suppose that potential pursuers familiar with the workings of the courts, and aware of the potential complexity of their action, would have had a formal libel prepared by a man of law prior to the initial approach to the bench. But the existence of a written libel as distinct from a libelled precept or summons cannot always be pre-supposed,⁶¹⁴ whilst there is ample evidence that the clerks of court often copied extracts from the libelled precept into the Register of Acts and Decrees.⁶¹⁵ Whilst the exact manner in which libelled summonses were compiled is unclear, it is certain that the written libelled summons was the foundational element in the Commissaries' plenary procedure.⁶¹⁶

In the English ecclesiastical courts, whilst the party who wished to begin a lawsuit first approached the judge, "most citations were issued by the person who kept the judge's seal, [which] usually meant the registrar".⁶¹⁷ Likewise, in the Court of the Commissaries, the clerks of court certainly dealt with the preparation of summonses,⁶¹⁸ whilst the keeper of the seals of the Commissariat presumably applied the wax impressed with the signet, under which all summons were to be given.⁶¹⁹ In light of this, it is most probable that the clerks of court also prepared the libelled summonses.

⁶¹⁴ But it is nevertheless certain that in plenary procedure, a verbal petition had to be reduced to writing, as had long been the practice in the Official's Court (*Court of the Official*, 100-101). What is in question is whether or not verbal petitions had to be set down in a libel, which was then incorporated into a libelled precept, or whether the clerks of court produced a libelled precept on the basis of both verbal petitions and written libels.

⁶¹⁵ Such copied extracts usually break off with the clause "As at mair lenth is contenit in the said precept" (NAS, CC8/2/8, fo. 259r, 31 July 1576, *Drummond v. Buchquhannane*) or "As the said precept beris" (NAS, CC8/2/2, fo. 275r, 19 January 1567/8, *Andersone v. Allasone*).

⁶¹⁶ In the procedure of the English ecclesiastical courts "the citation was regarded as the 'foundation of the *ordo iuris*'" (Helmholz, *Ecclesiastical Jurisdiction*, 317-318).

⁶¹⁷ Helmholz, *Ecclesiastical Jurisdiction*, 318.

⁶¹⁸ The clerk who prepared a summons was "to write his name and surname at length in all sic letteris" (*Balfour's Practicks*, ii, 656, item iii); for an example see NAS, GD137/2201, [Papers of the Scrymgeour Wedderburn of Wedderburn Family, Earls of Dundee c. 1166-1910], 19 May 1567 – in this instance the clerk was Michael Marjoribanks, the seal had been applied by John Brown (keeper of the seals), and had been executed and duly endorsed by Alexander Lekprevik.

⁶¹⁹ The Lords of Session directed that in the 'signet' of the office "sall be graven ane crownit thissel, with M.R. and in the circumspectioun, S. OFFICII COMMISSARIATUS, with the name of the place of the said commissariat; and the seill, beand of greiter form, berand siclike" (*Balfour's Practicks*, ii, 656, item iii). The keeper of the seal of the Court of the Commissaries of Edinburgh is briefly discussed above in Chapter II, under 'Clerks of Court'. For an example of the impress of the seal see Royal Commission on Historical Manuscripts, *Report on the Manuscripts of Colonel David Milne Home of Wedderburn Castle* (London: HMSO, 1902), 44.

The formulas employed by the clerks of court contained a high degree of variation, a fact that has already been discussed above.⁶²⁰ Within the context of the English ecclesiastical courts, Helmholz has noted the lack of standard formulas used in definitive sentences. Here the variations are explained within both the general context that “the jurists did not treat omission of formal language as a cause of nullity,” together with the fact that definitive sentences were actually prepared by litigants and their proctors and submitted to the judges.⁶²¹ Similarly, the ‘principal precepts’ or ‘libelled summons’ of the Commissaries contained a lack of standard formulas, a fact which is accounted for by the provenance of oral petitions and written libels: they were the at least semi-direct creation of litigants themselves (although often aided by men of law).

Yet despite the variation of formulas, the principal precepts tended to conform in layout to the classical pattern ‘*quis, quid, coram quo, quo jure petitione et a quo*’ of the canonists.⁶²² This is reflected in the entries made in the Registers of Acts and Decrees by the clerks in the first entry for a new case, the wording of which was usually repeated as a preamble to the entry recording the Commissaries’ final decision or decree, and which was based upon the actual libelled summonses before the clerks.⁶²³ Such entries contained the names of the litigants, made mention that the action proceeded by virtue of the Commissaries’ precepts and narrated the principal allegations of the pursuer. The allegations made by the pursuer could contain varying degrees of condescendence, and the libelled summonses accordingly cost two or three shillings depending on length.⁶²⁴ The idea was that the defender would be simultaneously summoned before the Commissaries and furnished with the specific allegations being made against them so that they could prepare a written response to bring with them on the day to which they had been summoned.⁶²⁵ In practice, the defender invariably appeared at the initial diet and was immediately

⁶²⁰ See above 108-109.

⁶²¹ Helmholz, *Ecclesiastical Jurisdiction*, 344.

⁶²² Cf *Court of the Official*, 100-101.

⁶²³ As mentioned elsewhere, the actual process papers for this period have perished, and as such, observations must be based upon the contents of the Registers of Acts and Decrees.

⁶²⁴ *Balfour’s Practicks*, ii, 661, ‘Prices’. A copy of the principal precept could be obtained by the defender for 6 d. (*Ibid.*, ii, 656, item iv).

⁶²⁵ *Balfour’s Practicks*, ii, 655-656, item ii.

assigned a new term at which to give in their defences to the libel in writing.⁶²⁶ This initial diet was recorded in the Registers of Acts and Decreets, and included an extract from the principal precept, the names of the parties present (with a note of anyone who had not compeared), together with the date of the term assigned for the defender to give in their answers.⁶²⁷

The defender usually appeared at the term assigned and gave in their defences in writing.⁶²⁸ However, if they did not they would be summoned with certification that if they failed to appear they would automatically succumb in their defence.⁶²⁹ As already noted, whilst there was no legal requirement for the involvement of men of law, even in those frequent instances where litigants represented themselves it is quite possible, and even likely, that the services of men of law had been procured for the preparation of such written documentation. The diet at which defences had been given in was recorded as an act in the Registers of Acts and Decreets, albeit briefly. The names of the litigants were recorded, the names of those present, and a brief note made that defences had been given in (without intimating their content) and a new term assigned⁶³⁰ for the pursuer to give in their answers to the defences.⁶³¹ Copies of the defences were certainly made, since both the pursuer and the Commissaries needed to know and preserve their contents.

⁶²⁶ Possibly because the pursuer had altered their libel, which they had the right to do at the first diet (*Balfour's Practicks*, ii, 657, item vi).

⁶²⁷ There are hundreds of such entries, for example NAS, CC8/2/1, fo 25r, 18 May 1564, *Dunlop v. Broun*.

⁶²⁸ Corresponding to the diet *ad respondendum libello* in the Court of the Official (*Court of the Official*, 102, 110).

⁶²⁹ i.e. their failure to contest the action would be taken *pro confesso*; cf. *Balfour's Practicks*, ii, 360, cxii. This was similar to the procedure of the Lords of Council and Session: when Euphame Nicole raised a precept of reduction against a decret of divorce pronounced by the Commissaries of Edinburgh, the decret was reduced on no other grounds than that the defender failed to compear (NAS, CS7/63, part 1, fos. 24v-25r (ink), 26 March 1576, *Makcall v. Stewart*).

⁶³⁰ The next terms and diets in any action were either assigned to a specific date (usually if both parties were present) or were assigned *litteratorie*. This latter designation was used when litigants were to be summoned by letter, and presumably when the court was not sure when the next diet could occur (for example if the harvest recess intervened), or, as is more likely, if one of the litigants had neither compeared personally, nor sent a procurator. Ollivant had noted that in the Official's Court *litteratorie citatis* was used when one of the parties concerned was absent from the court (*Court of the Official*, 99).

⁶³¹ i.e. NAS, CC8/2/1, fo 29r, 20 May 1564, *Dunlop v. Broun*.

At the next diet, the pursuer gave in their answers to the defender's defences in writing,⁶³² copies were presumably made, and again a brief act was entered into the Registers of Acts and Decreet, recording the litigants' names, those present, that answers had been given in (without intimating their contents), and recording the term assigned for the next diet.⁶³³

From this point onward the plenary procedure employed by the Commissaries of Edinburgh was "to be deducit efter the form usit befoir the Lordis of Session *usque ad sententiam definitivam inclusive*,"⁶³⁴ which was directly informed by Romano-canonical procedure, although as will be seen, the plenary procedure of the Commissaries (and by extension presumably the Session), was a somewhat reformed version of the procedure which had been used in the Court of the Official.⁶³⁵ Some of the obvious reasons why the Commissaries of Edinburgh were referred to the procedure of the Session rather than the procedure of the Officials included the fact that the bench of the Commissaries was in some respects an extension of the Session itself,⁶³⁶ and the fact that the Commissaries, unlike the Officials,⁶³⁷ were not permitted to employ excommunication or any other spiritual penalty for failure to conform to their acts and decreets. In addition, the Officials' Courts no longer sat, whilst the Session remained an active forum within which further developments of its own *stylus curiae*,⁶³⁸ albeit within the broader context of Romano-canonical

⁶³² Corresponding to the diets *ad articulandum* and *ad respondendum exceptioni* in the Court of the Official (*Court of the Official*, 108, 110).

⁶³³ i.e. NAS, CC8/2/1, fo 33v, 30 May 1564, *Dunlop v. Broun*.

⁶³⁴ *Balfour's Practicks*, ii, 657, item v. For a general discussion of Romano-canonical procedure see James Brundage, *Medieval Canon Law* (London: Longman, 1995), chapter 6; for a specific discussion of the procedure of the Session see Godfrey, *Civil Justice*, chapter 4 and for a discussion of the procedure used in the Courts of the Scottish pre-Reformation Officials see *Court of the Official*, chapter 6.

⁶³⁵ Ollivant reasonably draws parallels between the procedure of the Officials and the Lords of Session, stating that "there is good reason to believe that customary procedure did not differ greatly between the two jurisdictions," highlighting that from 1532 "it would be natural for the lawyers in the younger system [the Session] to look to the older system [the courts spiritual] for inspiration and example" (*Court of the Official*, 97).

⁶³⁶ As argued above, pages 21-22.

⁶³⁷ See *Court of the Official*, 100.

⁶³⁸ For a discussion of the unique "stile practik and consuetude" of the Session see Godfrey, *Civil Justice*, chapter 4, esp. 204 *et seq.*

procedure,⁶³⁹ could continue to develop: it was reasonable to peg the Commissaries' procedure to this ongoing Scottish process.

The next diet was normally that at which the Commissaries pronounced an interlocutor which constituted an act of litiscontestation.⁶⁴⁰ At this diet, but prior to the pronouncing of interlocutor, it was possible for either party to 'eik' or reform some aspect of the writs they had thus far given in.⁶⁴¹ This allowed scope for some minor adjustment of the libel and defences in light of either parties' arguments and positions. If one party 'eiked' their documents, a term was assigned for the other party to likewise adjust the contents of their documents.⁶⁴² This was an efficient way of introducing minor adjustments without having to abandon the action and start fresh proceedings because of an error of detail or wording.⁶⁴³ This minor deviation did not necessarily occur, but either way the Commissaries would eventually pronounce the pivotal interlocutor of the action. By this interlocutor, the Commissaries passed judgement on the allegations contained in the libel, the exceptions contained in the defences and the replies contained in the answers. Any points which were irrelevant or legally invalid were repelled, whilst those adjudged to have a bearing on the outcome of the action were found relevant and admitted to

⁶³⁹ For a discussion of how "the procedural tradition of the *ius commune* left room for variation among the courts" whilst retaining a common core of approaches to procedure see Helmholz, *Ecclesiastical Jurisdiction*, 313.

⁶⁴⁰ Stair defined an act of litiscontestation as an act by which "the points to be proved by either party are fixed and determined, that according as these points shall be proved or not proved, decret condemnatory or absolutor will follow, without any further dispute as to relevancy, unless some point emergent, or new come to knowledge", a definition which certainly holds good for the Commissaries' acts of litiscontestation (*Institutions of the Laws of Scotland*, IV.40.6). This diet corresponded to the term *ad interloquendum* in the Court of the Official (*Court of the Official*, 110). As in the English ecclesiastical courts "the *litis contestatio* became the event before which all matters preliminary to proof took place" (Helmholz, *Ecclesiastical Jurisdiction*, 326).

⁶⁴¹ i.e. NAS, CC8/2/1, fo. 40v, *Bikkesson v. Reid*, in which defences were given in "vnder protestatioun for eiking paring and reformyng of the samyn *ante interlocutoriam*".

⁶⁴² i.e. NAS, CC8/2/3, fo. 142v, 7 January 1568/9, *Giffert v. Dischingtoun*, at which the pursuer's procurator John Schairp, before interlocutor was pronounced, "eikit certane wordis to his libel"; at the next diet the defender's procurator Alexander King gave in answers in writ "togidder with ane reformat exceptioun" (NAS, CC8/2/3, fo. 150v, 14 January 1568/9).

⁶⁴³ In the Court of the Official it was normal that "the libel document reserved the right of the pursuer to make any addition, subtractions or alterations that he thought fit, and this privilege was probably designed to avoid the long delays that could result from objections on purely technical points" (*Court of the Official*, 101).

probation.⁶⁴⁴ The interlocutor was issued in writing, copies made for the litigants, and a record made of it in the Registers of Acts and Decrees.

It seems likely that each action generated at least three sets of process papers, one for the Commissaries and one for either of the litigants.⁶⁴⁵ Process papers generated thus far in an action would have included the principal precept, the defences, the answers, and the Commissaries' interlocutor, containing an act of litiscontestation. The apparent carelessness of some of the entries entered into the Registers of Acts and Decrees,⁶⁴⁶ strongly indicates that the Commissaries and the litigants before them placed primary reliance on the process papers generated during the course of litigation.

In the plenary procedure used by the Commissaries, recourse was seldom had to probation by oath, which tended to be the preserve of summary actions.⁶⁴⁷ Naturally, as was common practice in the Romano-canonical procedure, oaths *de calumnia* were routinely administered, but they were oaths whereby a party swore that they believed their libel or defence to be justly proponed in general terms.⁶⁴⁸ These oaths were not conclusive in terms of the probation of points and arguments put forward, but rather served to re-assure the court that time was not being wasted with known calumnies and spurious arguments, and as such can be viewed as a test of sincerity.⁶⁴⁹ In plenary procedure relevant points tended to be admitted to

⁶⁴⁴ i.e. NAS, CC8/2/3, fos. 307v-312r, 10 May 1569, *Dunbar v. Adair*. Cf *Court of the Official*, 102-103. Once an act of litiscontestation had been pronounced, the points thereby admitted to probation could not be proven by oath (*Balfour's Practicks*, ii, 361).

⁶⁴⁵ This seems likely, especially since litigants never "protested in despair" before the Commissaries, as they had been known to before the Official of Lothian, that they were "unable to propone any "contrary articles" on which to base [their] case since all [their] efforts to obtain copies of the pusuer's articles had been in vain" (*Court of the Official*, 103).

⁶⁴⁶ On occasion the clerks of court, when recording an initial diet for an action, could be cursory in the extreme, not even stating the type of action being brought, but referring any later reader of the Registers to the process papers. The majority of the process papers generated by the Court of the Commissaries of Edinburgh are no longer extant for the period under study.

⁶⁴⁷ They could be used in plenary procedure, but only if probation by witnesses and documents was not possible on a particular point: oaths 'of verity' as a primary means of probation are discussed below under summary procedure. As Ollivant has pointed out "it is perhaps not surprising that a litigant, who had expended much time and energy in formally contesting a suit would be reluctant to hazard it all on the honesty of his adversary, but it remained a useful recourse in actions where more substantial proof was in short supply" (*Court of the Official*, 104).

⁶⁴⁸ If a party declined to take the oath *de calumnia* on any point, it was taken *pro confesso* and they would concede their cause (*Court of the Official*, 103). Cf *Balfour's Practicks*, ii, 359.

⁶⁴⁹ These oaths, variously called 'ayths of fidelitie' and 'ayths de calumpnia' could be requested on any point in the libel, or subsequent exceptions and replies (i.e. NAS, CC8/2/1, fo. 176v, *Criehtoun*

probation by witness or writ or both,⁶⁵⁰ but not by oath. If points made both by the pursuer and the defender had been found relevant, the Commissaries sometimes admitted them to probation *hinc inde*, so that the probation of such points could be led simultaneously, presumably in order to reduce the time taken to resolve the action.

Concerning probation by witness, the party by whom probation was led had three principal terms of probation.⁶⁵¹ However, the total number of terms of probation could be considerably in excess of three. For example, if four witnesses were summoned to the first term of probation, and none appeared, there was clearly a need to do further diligence upon the absent witnesses. The next term to which they were summoned was not necessarily the second principal term of probation. This was because principal terms were essentially three separate opportunities for new witnesses to be summoned. So for example, A, B and C might be summoned at first, then D, E and F, and then G, H and I, but thereafter any witnesses not already summoned could not then be summoned. Nevertheless, those already summoned could be re-summoned any number of times until they appeared before the Commissaries, or until the party by whom probation was led renounced further probation.⁶⁵² There does not appear to have been an upper limit on the number of witnesses a party might summon, but the minimum number of witnesses required to prove a point accorded with the Canon law minimum of two.⁶⁵³

The three distinct opportunities to augment the number of witnesses summoned was of course quite reasonable: the depositions of the first witnesses

v. Chreichtoun; fos. 176v-177r, *Cheisholme v. Dikesoun*). Those who refused to give such oath lost their actions (*Balfour's Practicks*, ii, 359 *et seq*). The wordings of these oaths are not given in the Registers of Acts and Decrees, but see Brundage, *Medieval Canon Law*, 131. Such oaths originated in Roman civil procedure and were transmitted via the Canon law into the normative practice of Scottish courts, both spiritual and civil, from the fifteenth century onwards (see Michael Clancy, 'A Further Note on Juramentum Calumniae' in *Juridical Review* (1986), 170-176; David Baird Smith, 'A Note on Juramentum Calumniae' in *Juridical Review*, 51 (1939), 7-10).

⁶⁵⁰ Cf *Court of the Official*, 104-5, 'The Production of Evidence'.

⁶⁵¹ This was also general Romano-canonical procedure, used in the Court of the Official (*Court of the Official*, 108), and in the English ecclesiastical courts, although judges had the power to abbreviate them (Helmholz, *Ecclesiastical Jurisdiction*, 328).

⁶⁵² "na ma witnessis should be grantit to [the pursuer] than he warnis and summoundis at the first, second, or at the leist, at the third term" (*Balfour's Practicks*, ii, 373). Points in the libel and points in the exceptions could be admitted to probation at the same time, in which case probation would be led *hinc inde*, which was a regular occurrence, for example *Cunyngham v. Leky* for which there are ten extant terms of probation (NAS, CC8/2/1, fos 403v, 418v; CC8/2/2, fos 1v, 3v-4r, 32r-v, 58v, 76r, 100r, 117r, 125v).

⁶⁵³ Helmholz, *Ecclesiastical Jurisdiction*, 303.

could bring new witnesses to light. Yet the capping of the number of principal terms of probation provided a definite limit to prevent actions being disingenuously prolonged. The lesser terms of probation which theoretically had no limit were limited by an number of reasonable expedients. All witnesses were summoned under pecuniary pains.⁶⁵⁴ The pecuniary pains were increased incrementally from twenty shillings to five pounds to ten pounds.⁶⁵⁵ If a witness had still not appeared, recourse was had to the Lords of Session who interponed their own authority to the summons, threatening an obdurate witness with being put to the horn.⁶⁵⁶ This was repeated a further two times, and on the third time, the summons threatened putting to the horn, with certification that if the witness failed to appear before the Commissaries they really would be outlawed.⁶⁵⁷ The authority of the Crown could not be brought to bear to any greater extent in these matters than putting a witness to the horn and declaring their goods to be forfeit to the Crown. None of the spiritual censures employed by the old courts spiritual were at the disposal of the Commissaries. As has already been seen, the censures of the Kirk could be used to try to compell obedience to a decret of the Commissaries,⁶⁵⁸ but this was never done in respect of the summoning of witnesses. The other principal means by which the terms of probation were kept to an appropriate number was the right of the party by whom probation was being led to renounce further probation even if all those they had desired to be summoned had not appeared. This was a useful device, often employed when a party was confident that they had proven their points.⁶⁵⁹

Documents were produced before the Commissaries by summoning those in whose possession a document resided to either appear in court with the requisite document, or provide the original or an authentic copy to another party who would

⁶⁵⁴ This, of course, was a principal alteration from the Court of the Official, where witnesses (and it may be noted parties) were summoned under the pain of ecclesiastical sanctions, which also increased incrementally: after the first non-appearance, they were summoned under the pain of suspension, following which they were warned under pain of excommunication (*Court of the Official*, 100 (parties), 105-106 (witnesses)).

⁶⁵⁵ i.e. the terms of probation in *Forbes v. Sandelands* (NAS, CC8/2/1, fos. 153v, 258v, 269r, 270v).

⁶⁵⁶ *Balfour's Practicks*, ii, 657, item viii.

⁶⁵⁷ i.e. see some of the terms of probation in *Ker v. Dougall* (NAS, CC8/2/2, fo 370r, 10 March 1567/8; CC8/2/3, fo 30v, 20 May 1568).

⁶⁵⁸ See above, 144-145.

⁶⁵⁹ i.e. NAS, CC8/2/2, fo 271r, 16 January 1567/8, *Broun v. Blak*; CC8/2/3, fo 298v, 5 May 1569, *Cruik v. Hammiltoun*.

then produce it in court.⁶⁶⁰ The scale of pains used when summoning witnesses applied likewise to the ‘havers’ or possessors of documents.⁶⁶¹ Whilst probation by witness was more common than probation by writ, documentary evidence was a common feature of benefice litigation.⁶⁶²

In a great many actions witnesses appeared when summoned, whilst documents were duly produced. However, complications could arise if a witness or a document was objected to. Witnesses were sometimes the subject of protests by a procurator on the grounds that they were related to one of the litigants or were tenants of one of the litigants, as could reasonably occur when the litigants were landowners.⁶⁶³ The usual allegation concerning documentation was that it was false, an allegation which could necessitate a separate action for the improbation of the writ in question.⁶⁶⁴

The examination of witnesses had to take place in the presence of one of the Commissaries and a clerk of court.⁶⁶⁵ This was possibly a reform of pre-Reformation procedure, where notaries had often been used in the taking of depositions. In the English ecclesiastical courts, witnesses were examined not by the judge, but by an official appointed by the court, who examined the witnesses outside of the court. But in the Court of the Commissaries of Edinburgh, the judge had a central role in examining witnesses, although this did not have to take place in the court.⁶⁶⁶ Whilst

⁶⁶⁰ NAS CC8/2/1, fos 133r, 157v, 169v, 189r, 206v, *Sympil v. Montgudy*.

⁶⁶¹ Sometimes havers were summoned under the pain of rebellion in the first instance, without the preceding pecuniary pains used by the Commissaries (i.e. first term of probation in *McGibbon v. Struthers*, NAS, CC8/2/3, fo 273r, 20 April 1569).

⁶⁶² Helmholz, *Ecclesiastical Jurisdiction*, 333-334; cf Green, ‘Scottish Benefices’, 50-52, 55, n.51.

⁶⁶³ i.e. NAS, CC8/2/3, fos. 264v-265r, 2 April 1569, *Giffert v. Dischingtoun*; cf *Court of the Official*, 111; *Balfour’s Practicks*, ii, 377-378.

⁶⁶⁴ i.e. in *Carnis v. Kennedy* the pursuer’s procurator, Alexander King alleged that “tua instrumentis producit in process ar in the self fals and fenzeit and off[erit] to imprevre the same as law wald” (NAS, CC8/2/4, fo 42r, 30 July 1569). Cf *Balfour’s Practicks*, ii, 381 *et seq* ‘Anent improbatioun’.

⁶⁶⁵ *Balfour’s Practicks*, ii, 657, item ix.

⁶⁶⁶ This is delightfully illustrated by the following complaint concerning the intimidation of witnesses, brought before the Commissaries of Edinburgh in November 1564: “And Maister Eduard Henrysoun ane of the saidis commissaris being with Maister Johne Kene examinen the saidis witness in his chalmer eftir none the said viij day of Junij and the said Schir Thomas being than awating vpoun the examinatioun thair of the Saidis Thomas and Robert in hie contemptioun of the said commissaris come to the said Maister Eduardis stair and thair oppinlie iniurit the saidis witnes and callit thaime mainsuorne sinakis and said thai wald maynsuer thame selffis for ane testane and in lyke maner said to the said Schir Thomas that he wald hing alslang vpoun the gallows as he bure the cross and als fals huresoun papist and alsua said plainlie that thai suld cut his hochis fals loun knaif that he wes” (NAS, CC8/2/1, fo. 258r-v, 30 November, 1564, *Godwell v. Sandersoun & Broun*).

there is no direct evidence of the use of interrogatories they must have been used, being normal practice in the old Official's courts⁶⁶⁷ and the English ecclesiastical courts,⁶⁶⁸ as well as before the Lords of Session.⁶⁶⁹ The depositions of the witnesses were never recorded in the Registers of Acts and Decreets, but it is reasonable to suppose that depositions were written down, sealed, and set to one side until all the witnesses who had appeared had been examined. This was the normal Romano-canonical procedure, and guarded against the possibility of one witness's deposition being used to influence the subsequent depositions of other witnesses.⁶⁷⁰ What is certain is that when a deposition had been obtained as the result of a commission directed to one of the inferior Commissaries in the localities,⁶⁷¹ the deposition was sent to the Commissaries as a writ, sealed under the seal of the relevant Commissariat.⁶⁷² Such commissions were regularly granted on the grounds of a witness's inability to travel, either on account of poor health, poverty or distance,⁶⁷³ and were usually directed to inferior Commissaries, as had been the practice in the Court of the Official.⁶⁷⁴ It is also reasonable to suppose that the Commissaries

⁶⁶⁷ *Court of the Official*, 106. This was standard Romano-canonical procedure (Brundage, *Medieval Canon Law*, 132).

⁶⁶⁸ Helmholz, *Ecclesiastical Jurisdiction*, 339.

⁶⁶⁹ Godfrey, *Civil Justice*, 185.

⁶⁷⁰ *Court of the Official*, 106-107; Brundage, *Medieval Canon Law*, 133.

⁶⁷¹ Commissions are also known to have been directed to kirkmen: i.e. in *Dougalsoun v. Kirkpatrick* a commission was "direct furth to Patrick Vaus Commissar of Wigtoun and Maister Adame Foulis minister of Quhithorne" (NAS, CC8/2/1, fo. 272r, 7 December 1564), whilst in *Wemis v. Dunbar* a commission had been directed to the bishop of Orkney for the receiving of various depositions from witnesses (NAS, CC8/2/2, fo. 209r, 27 November 1567).

⁶⁷² "Anent the terme assignit be the saidis commissaris To Symone and James Marioribankis to report the commissioun direct be thame to the commissar of glasgow and Renfrew for ressavng of the depositions of Robert Spreule and Johne Patersone In the actioun and caus intentit and persewit be thame aganis Henry Wardlaw and Johne Weir The said Henrie being personalie present Comperit the said Symone and James Marioribankis and producit the said commissioun with the depositionis of the saidis witnes inclusit thairin vnder the saidis commissaris seillis Quhilk being producit The saidis Symone and James Renuncit forther probatioun The commissaris continewis the said mater to auisement and assignis littoratorie to pronounce thair decret thairin" (NAS, CC8/2/1, fo. 168v, 21 August 1564, *Marioribankis v. Wier & Wardlaw*).

⁶⁷³ Testimonials were sometimes required by the Commissaries of Edinburgh prior to granting a commission: "and als producit tua testimoniallis that ane direct frome the commissar of Glasgw that vther frome the commissar of Hammyltoun vnder the seillis of thair offices and subscriptionis of the clerkis thair of testifiand the inhabilitie of the saidis [witnesses] in thair bodies quhairthrow thai mycht not travale for obseruatioun of the terme and thairfore desyring ane commissioun to be direct to the saidis commissars for ressavng of the saidis personis depositionis..." (NAS, CC8/2/1, fo. 131v, *Marioribankis v. Wier & Wardlaw*).

⁶⁷⁴ *Court of the Official*, 106.

published such depositions in the court, in conformity with standard Romano-canonical procedure,⁶⁷⁵ although it should be noted that there are no indications in the Registers of Acts and Decrees of terms being assigned *ad publicandum producta* as was common in the Court of the Official.⁶⁷⁶ When depositions and other documents had been produced or published in court, copies could be made as requested, but when used as a means of probation their contents were seldom copied down into the Registers of Acts and Decrees.

These terms of probation were always recorded briefly in the Registers of Acts of Decrees. The names of witnesses summoned were recorded, sometimes their domicile given, and usually the pains under which they had been summoned. Similarly, the names of 'havers' were usually stated, and the type of document in their possession was often recorded, for example if it were a feu, or a marriage contract, or an instrument of institution and so forth.

Once the terms of probation had been concluded, the Commissaries assigned a term at which they would pronounce their decret in the matter. This direct progress from probation to decret seems to have been a reform of the procedure used before the Courts of the Officials. In those courts, following probation, terms could be assigned *ad opponendum* and *ad concludendum* prior to pronouncing definitive sentence.⁶⁷⁷ Such terms could be used by litigants to encourage a late flourishing of further litigation before the old Officials. Given that an act of liti-contestation had been pronounced and probation of relevant points led according to its terms, it seems perverse in all but the most extreme circumstances to have allowed further exceptions to be brought after probation had been led: the complete absence of such terms in the procedure of the Commissaries should therefore be regarded as a welcome reform.

When the Commissaries pronounced their decret, it seems likely that one of their number read out a pre-prepared document, rather than made an oral pronouncement which was then committed to writing by the clerk.⁶⁷⁸ Copies of

⁶⁷⁵ Helmholz, *Ecclesiastical Jurisdiction*, 339.

⁶⁷⁶ *Court of the Official*, 106.

⁶⁷⁷ *Court of the Official*, 107. The potential for similar terms seems to have existed in English ecclesiastical courts, although litigants were seemingly deterred from availing themselves of such terms by making them pay the costs incurred by such dilation if unsuccessful (Helmholz, *Ecclesiastical Jurisdiction*, 341-342).

⁶⁷⁸ See Brundage, *Medieval Canon Law*, 134.

decreets were certainly available to litigants, whilst the decret was copied into the Registers of Acts and Decreets. The decret included the names of the litigants, an extract of the libel from the principal precept, the names of those present, the Commissaries' judgement, and the reasons they had arrived at their judgement.⁶⁷⁹ This last section can sometimes be brief and relay little more than that certain points had been admitted to a party's probation and that they had succeeded or succumbed in probation. Nevertheless, the more interesting decreets go into considerable detail about the case, and it is on these occasions that the tenor of the defences, answers, depositions and any documents produced may be conveyed. The precise wording of documentary evidence was seldom recorded, and it is usually not possible to know what a specific witness had deponed,⁶⁸⁰ but it is usually clear which facts and events had been established by their testimony. Similarly, if a peremptory exception was made and found relevant, its tenor and content was often recorded. It is also clear that the central narrative of a decret, namely what grievance had been alleged and what remedy sought, was based on the principal precepts upon which an action had been founded. In this, whilst there is no evidence that litigants and their procurators actually prepared decreets for the judge to pronounce, as was the English practice,⁶⁸¹ the Commissaries were clearly prepared to rely on the wording used by litigants in formulating their judgements.⁶⁸² Once the Commissaries had pronounced their decret, it was to be executed "notwithstanding ony appellatioun, or summoundis of reduction" ⁶⁸³ and the losing party was to comply within 15 days⁶⁸⁴: this and any

⁶⁷⁹ For a printed example of a decret of the Commissaries, albeit pronounced in a benefice action, see Green 'Scottish Benefices', 53-61.

⁶⁸⁰ In contrast to the registers kept by the kirk session and superintendent's court at St Andrews, which could contain copies of depositions (*St Andrews*, i, 160-167).

⁶⁸¹ Helmholz, *Ecclesiastical Jurisdiction*, 344.

⁶⁸² This is illustrated by the general observation that an initial entry in the Registers of Acts and Decreets for an action usually included an extract from the principal precept, which was often repeated in the decret pronounced in the same action (unless the litigation had proved quite complex, and the original narration of facts had been greatly augmented during the course of litigation). It is likely that an action relied primarily on the process, parts of which were recorded in the Register of Acts and Decreets as a backup, and that many of the central aspects of the contents of a process were generated by litigants themselves, a situation with which the Commissaries and men of law seem to have been comfortable.

⁶⁸³ *Balfour's Practicks*, ii, 659, item xviii.

⁶⁸⁴ This was not unlike proceedings in the English ecclesiastical courts, where a losing party was given an opportunity to conform to a sentence pronounced against them prior to threats of excommunication or the invocation of the secular arm (Helmholz, *Ecclesiastical Jurisdiction*, 345).

subsequent procedural steps have already been discussed above.⁶⁸⁵ Of particular note, however, is that the Commissaries did not assign a term at which objections could be brought against the execution of a decret, as was the practice in the English ecclesiastical courts,⁶⁸⁶ which may have represented a further reform of procedure in the interests of avoiding disingenuous delays.

[ii] SUMMARY PROCEDURE

Summary procedure was employed by the Commissaries in simple actions at their discretion, especially where the pursuer was able to refer the matter to the defender's great oath,⁶⁸⁷ referred to by Ollivant as the oath "of verity",⁶⁸⁸ and by Helmholz as the "decisory oath".⁶⁸⁹ Summary process had been formally accepted by the Catholic Church as part of Romano-canonical procedure "in two constitutions issue at the start of the fourteenth century" in which "all the formal steps that were not essential for the doing of justice could be omitted" so that litigation could proceed "simply and plainly".⁶⁹⁰ Most notably, this meant that the act of litiscontestation was dispensed with.⁶⁹¹ Within the Scottish context, the Provincial Council of 1549 had directed Officials to employ summary procedure in actions where the issue did not exceed the sum of £20 Scots.⁶⁹² This reform was extended by the Lords of Session, in their first instructions to the Commissaries of Edinburgh, to include debts actions where the issue did not exceed the sum of £40 Scots.⁶⁹³ But in addition to debt actions, summary procedure was routinely used in actions which could only be resolved through probation by an oath 'of verity', most notably actions involving clandestine promises of marriage.⁶⁹⁴ Summary process before the

⁶⁸⁵ See above, pages 74-75.

⁶⁸⁶ Helmholz, *Ecclesiastical Jurisdiction*, 344, 346.

⁶⁸⁷ *Balfour's Practicks*, ii, 655-661, item ii.

⁶⁸⁸ *Court of the Official*, 103.

⁶⁸⁹ Helmholz, *Ecclesiastical Jurisdiction*, 335-336.

⁶⁹⁰ Helmholz, *Ecclesiastical Jurisdiction*, 314.

⁶⁹¹ This was certainly the case in the Court of the Commissaries of Edinburgh; cf Helmholz, *Ecclesiastical Jurisdiction*, 327.

⁶⁹² *Court of the Official*, 113-114.

⁶⁹³ The procedure for small debt actions and other such light and easy matters is relayed in *Balfour's Practicks*, ii, 656-7, item v.

⁶⁹⁴ Whilst debt and secret promise actions were routinely proven by oath, other forms of probation could be used if suitable witnesses and/or documents were thought to be worth consulting, in which case the terms of probation could be slightly longer. For probation by oath see *Duncane v. Fairley*

Commissaries was initiated by the Commissaries issuing a precept or summons to the defender. The libel was called a libel *ad instantiam*, which unlike the libelled summons, did not inform defenders of the allegation(s) made against them and was similar to the summons used to summon witnesses.⁶⁹⁵ The cost of the summons *ad instantiam* to the pursuer was 8 d.,⁶⁹⁶ and the defender could obtain a copy for 2 d.⁶⁹⁷ If the defender failed to compear, their absence could be taken *pro confesso*,⁶⁹⁸ whilst the Commissaries were also entitled to refer the petition to the pursuer's oath of verity without the absent defender's consent.⁶⁹⁹ If all went well and both parties appeared before the Commissaries on the appointed day, the pursuer proponed their petition verbally⁷⁰⁰ and the defender replied, or answered, verbally, as it were *statim in campo*.⁷⁰¹ Alternatively, the defender might move to refer the matter to the pursuer's oath.⁷⁰² In the unlikely event that the action proved to be more complicated than anticipated, recourse would be had to plenary procedure.⁷⁰³ But given that the type of procedure adopted in any action was directed at the Commissaries discretion,⁷⁰⁴ such occurrences were rare. All being well, the Commissaries would admit the relevant point (there were rarely points) to probation. The preferred method here was probation by oath.⁷⁰⁵ In this scenario the matter had to be referred to the defender's oath,⁷⁰⁶ but only with the consent of the pursuer.⁷⁰⁷ In a host of instances

(NAS, CC8/2/3, fos. 52v-53r, 14 June 1568); *Arniell v. Williamsone* (NAS, CC8/2/3, fo. 73v, 22 July 1568).

⁶⁹⁵ See *Balfour's Practicks*, ii, 655-661, item iii, which dictates the form to be used.

⁶⁹⁶ *Balfour's Practicks*, ii, 655-661, item iii.

⁶⁹⁷ *Balfour's Practicks*, ii, 655-661, item iv.

⁶⁹⁸ i.e. NAS, CC8/2/1, fo 324v, *Hammyltoun v. Sclater*. Cf Helmholz, *Ecclesiastical Jurisdiction*, 317; cf *Balfour's Practicks*, ii, 360, cxii.

⁶⁹⁹ But only when the defender had clearly failed to compear.

⁷⁰⁰ "purely oral petitions" were also "particularly frequent in debt litigation" brought before the English ecclesiastical courts (Helmholz, *Ecclesiastical Jurisdiction*, 322).

⁷⁰¹ *Balfour's Practicks*, ii, 656-7, item v.

⁷⁰² This was also the procedure before the Officials (*Court of the Official*, 115).

⁷⁰³ *Balfour's Practicks*, ii, 656-7, item v.

⁷⁰⁴ *Balfour's Practicks*, ii, 655-6, item ii.

⁷⁰⁵ The summons *ad instantiam* for summary procedure was to be used "specialie quhair the persewar is able to refer the samin to the aith of the defender, or to prove it *statim in campo*" (*Balfour's Practicks*, ii, 655-6, item ii).

⁷⁰⁶ Which was usually called a 'great oath' in the Registers of Acts and Decreets, whilst Ollivant called it the 'oath of verity' (*Court of the Official*, 103-104).

this was the only viable means of resolving the action: a promise made in secret, a sum of money loaned privately, the purchase on credit of a commodity and so on could often not be proven by writ or witness. When probation by oath was consented to by the pursuer, the defender was sworn by their great oath⁷⁰⁸ and obliged to make faith as to the truth or falsity of the relevant point of the petition: the Commissaries pronounced their decret accordingly. Whether or not this was given verbally in the first instance is not clear, but their decision was certainly committed to writing and copied down into the Registers of Acts and Decreets. The pursuer must normally have taken a copy away with them, since the cost to them of the decret in simple actions was set at 3s/4d.⁷⁰⁹ Whether the defender desired a copy was dependent upon circumstance, and it is not clear whether the Commissaries contented themselves with the copy of the decret in the Registers of Acts and Decreets,⁷¹⁰ or whether their court retained a loose paper copy also.⁷¹¹

⁷⁰⁷ i.e. NAS, CC8/2/6, fo. 259v, 5 February 1573/4, *Hamyltoun v. Heriot*: “the saidis Commissaris be thair decret assoilzeis the said Elene fra the contentis of the said precept simpliciter decernis hir quyt thairfra in tyme cumminge becaus the said precept being be the said George referrit simpliciter to the said Helenis aith and scho suorne be hir greit ayth and examinat declarit the same nocht to be of verritie”. Those who failed to give an oath or refer the allegations to the other party’s oath lost their actions (i.e. NAS, CC8/2/1, fo. 173v, *Gray v. Godrik*, “Becaus the said Williame [defender] being requirit to gif his ayth vpoun the said petitioun wald nowther depone thairupoun nor zit refer the samyn to the said Margaretis [pursuer’s] ayth”). Moreover, if the defender had been duly summoned, but failed to compare, it was lawful for the Commissaries to admit any allegations to the pursuer’s oath: the Commissaries were prepared to push matters along at considerable speed in these lighter matters (i.e. NAS, CC8/2/1, fo. 129r, *Brocas v. Sundrie Personis*. “[those lawfully summoned to this diet and not compeired] ...the said petition was referrit to the said [pursuer’s] ayth quha being suorne maid fayt...”). Cf *Balfour’s Practicks*, ii, 359 *et seq.*

⁷⁰⁸ The form of the great oath is not certain to the writer, but Professor Cairns has pointed out (*verbo*) that when used before the Session in later times it ran “I swear by almighty God and as I shall answer to God on the great Day of Judgement etc”: whatever the precise form of the oath administered by the Commissaries, it is likely that its tenor would have been along these lines.

⁷⁰⁹ This sum was the sentence silver paid: “For pronouncing of sentences in small actiounis, of the avail of xx *lib.* or within the samin, quhilk wer wount to be callit decreitis iii. s. iiij d.” (*Balfour’s Practicks*, ii, 662).

⁷¹⁰ Decreets were always entered into the Register, although the clerks occasionally failed to complete and entry (see NAS CC8/2/7, fo 265r, 30 July 1575, *Murray v. Torphichane*), which suggests that the writ from which they worked was retained in the court.

⁷¹¹ The expenses of this type of plea are discussed below, Chapter V, § IV [ii].

§II
THE PARAMETERS OF CONSISTORIAL LITIGATION

[i] COMPETENT ACTIONS

Litigation before the Commissaries of Edinburgh was controlled and ordered within the overarching framework of plenary procedure or its abbreviated summary form. This framework was concerned primarily in the opening stages with establishing what the relevant points of a given case were, which was authoritatively decided after due process by an act of litiscontestation. The stages of proof which followed were concerned with establishing which relevant points could be proven to the satisfaction of the judges. The definitive sentence or decret which was pronounced immediately following the terms of probation authoritatively decided which relevant points had been proven and ordained an apposite remedy to be applied. In this, the remedy applied by the Commissaries in any given action was primarily dependent upon the relevant points proven during litigation rather than the remedy desired in the pursuer's libel. The distinction is an important one and is at odds with the practice of later generations of Commissaries in Scotland and with the practice of the English ecclesiastical courts.⁷¹² As had already been mentioned in the discussion concerning the functions of the Procurator Fiscal of the Court of the Commissaries of Edinburgh,⁷¹³ the Commissaries had what they perceived to be a moral duty to provide justice, sometimes at the expense of what would now be considered due process. Several themes can be highlighted in order to explain the Commissaries' emphasis upon establishing relevant points as they arose in order to

⁷¹² In the English ecclesiastical courts it could be objected that "the sentence did not conform to the libel" (Helmholz, *Ecclesiastical Jurisdiction*, 346): English definitive sentences turned upon the *intentio* of the *actor*, namely whether or not the *intentio* had or had not been established (Helmholz, *Ecclesiastical Jurisdiction*, 343).

⁷¹³ See above, pages 45-46.

determine the remedy applied rather than forcing the outcome of the action to conform to the libel.

In the first place, the interaction between litigant and judge could be more direct in certain actions, that is to say less regulated by the intermediary of professional men of law. This was especially the case in summary proceedings where probation would often be by oath. In these circumstances the principal consideration in the outcome of an action was less the intention of the pursuer and more the discretion of the judges in the interest of justice and the due regulation of the lives of those whose circumstances were brought to the attention of the bench. For example, if banns were stayed, one of the persons whose banns had been stayed could pursue the stayer before the Commissaries, so that they might be put to silence. But if the stayer's objection, that they were already irregularly married to one of the persons whose banns had been stayed, was proven, the Commissaries would ordain the stayer and the person against whom they had made the objection, to solemnize their union. In later times, the first action would have been dismissed, and a new action of solemnization brought against the pursuer of the first action and the person to whom they were already irregularly married. But the Commissaries, in applying the remedy suitable to the established facts were prepared for the original action to be altered in mid-course into an action centred upon the peremptory exception. Whilst this would appear to later generations as a conflation of two separate actions, resulting in an unacceptable degree of procedural confusion, it was appropriate given the Commissaries' emphasis of remedy according to established facts, rather than remedy in strict accordance with the libel.

The Commissaries' emphasis was very much a prerequisite for a court which allowed actions to be raised and pursued by litigants themselves, essentially in an amateur capacity, without insisting upon the involvement of procurators. In this respect, the pursuer's libel could be treated as the means by which problematical disputes between various parties were brought to the Commissaries' attention, rather than a definitive outline of the precise outcomes which could or could not be applied by the Commissaries. In a court thus directly accessible to men and women without legal training, the judges and not the litigants had to be the definers of the potential remedies applicable to the problems and wrongs thrown up in any given action.⁷¹⁴

⁷¹⁴ The almost total absence of the relationship between the libel and remedy is noteworthy in many of the actions which arose out of the staying of banns (discussed below, Chapter VI, [v]).

The immediate problem this flexibility gives rise to in terms of analysis concerns how actions ought to be defined. In the majority of actions it is safe to define them according to the libel, since if the action succeeded the continuity between libel and remedy was maintained, or the action was such as the issue involved could only result in the granting or withholding of the remedy sought. Actions which were usually resolved by plenary procedure tended to be more complex, and therefore invariably required the expertise of procurators, a factor which tended to result in more precise libels and a more limited range of remedies. Yet in actions which were usually resolved by summary procedure, the direct verbal pleadings of litigants and a lesser degree of legal professionalism resulted in the continuity between libel and remedy being less important than the establishment of facts and the application of an appropriate remedy by the Commissaries. This latter type of action tended to be those involving allegations of pre-marriage contracts or clandestine and irregular marriages, a group of problems which could give rise to a considerable range of remedies.

In the following analysis, therefore, the focus is not upon competent libels and their probation, but rather upon competent allegations and exceptions (i.e those likely to be deemed relevant points, whether proponed by the pursuer or defender), the probation of relevant points, and the range of remedies that could be applied by the Commissaries.

[ii] COMPETENT ALLEGATIONS AND EXCEPTIONS

Since the focus here is on competent points in terms of being relevant and founded on sound legal grounds, without regard as to whether such points were subsequently substantiated or not, there will be no need to consider replies to exceptions. This is because replies did not tend to introduce fresh points in law, but rather pointed out why relevant exceptions were nevertheless inconclusive.⁷¹⁵ It should also be noted that there were different types of exceptions, which Balfour divided into dilatory and peremptory. Dilatory exceptions “prolongis and delayis the

⁷¹⁵ For example, although not a consistorial action, in *McGibbon v. Struthers*, McGibbon’s replies to Struthers’s relevant exceptions were admitted to probation, but they sought to prove that whilst Struthers’s exceptions were relevant in theory, they did not conform to the facts, such discrepancies having been highlighted by McGibbon’s replies (Green, ‘Scottish Benefices’, 49 *et seq*).

action or clame to a certain time” and were temporary, such as objecting to the judge hearing the case, or claiming that the action was already pending before another judge. Peremptory exceptions on the other hand were considered perpetual, in that if proven they would finally resolve the action: it was with these latter type of exceptions that the Officials had been primarily concerned, and this continued to be the case with the Commissaries.⁷¹⁶

The five principal allegations which could be made in any consistorial action were: allegation of promise of marriage (often, but not necessarily with *copula*);⁷¹⁷ allegation of desertion;⁷¹⁸ allegation of adultery;⁷¹⁹ allegation of non-adherence;⁷²⁰ allegation of illegitimacy.⁷²¹ The principal exceptions in consistorial actions concerned: promise of marriage (often, but not necessarily with *copula*),⁷²² adultery,⁷²³ reconciliation,⁷²⁴ cruelty and just dread⁷²⁵ or some sort of physical affliction (a party being either become grotesque or suffering from disease).⁷²⁶

When the principal allegation was of promise of marriage (often, but not necessarily with *copula*), the appropriate remedy was either solemnization,

⁷¹⁶ *Balfour's Practicks*, i, 343; *Court of the Official*, 108-110; cf Helmholz, *Ecclesiastical Jurisdiction*, 323-4.

⁷¹⁷ i.e. NAS, CC8/2/3, fo. 73v, 22 July 1568, *Arneill v. Williamsone*, (solemnization on the grounds of *sponsalia per verba de futuro* with subsequent *copula*); NAS, CC8/2/1, fo. 322r, 25 January 1564/5, *Auldinstoun v. McMyllane* (solemnization on the grounds of *sponsalia per verba de praesenti*).

⁷¹⁸ i.e. NAS, CC8/2/2, fo. 284r-v, 23 January 1567/8, *Crystesone v. Lindesay* (adherence).

⁷¹⁹ i.e. NAS, CC8/2/1, fos. 304v-305v, 15 January 1564/5, *Forbes v. Sandelands* (divorce with licence).

⁷²⁰ Which could only follow upon a decret of adherence: the only example being NAS, CC8/2/6, fos. 121r-122v, 22 June 1573, *Argyll v. Countess* (divorce with licence).

⁷²¹ i.e. NAS, CC8/2/4, fos. 76v-77v, 15 November 1569, *Mortoun v. Mortoun* (bastardy).

⁷²² A classic defence to an action for solemnization, i.e. prior promise of marriage to third party.

⁷²³ i.e. NAS, CC8/2/3, fo. 352r-v, 4 June 1569, *Flemyng v. Flemyng* (exception to action of divorce with licence i.e. recrimination or mutual guilty); NAS, CC8/2/2, fos. 331v-332r, 17 February 1567/8, *Hammyltoun v. Kirkpatrick* (exception to action of adherence).

⁷²⁴ i.e. NAS, CC8/2/1, fos. 393v-394v, 16 March 1564/5, *Hammyltoun v. Maxwell & Lindesay*.

⁷²⁵ i.e. NAS, CC8/2/3, fo. 293r-v, 2 May 1569, *Wallace v. Dowglass*: “And allegit he durst not adheire to the said Cristiane for feir of his lif”. It will be noted that during the period under study the Commissaries of Edinburgh did not hear any actions for divorce *a mensa et thoro* on the grounds of *saevitia* – although see Ireland ‘Husband and Wife: Divorce’, 97-98 for a discussion of later Scots law on this head.

⁷²⁶ i.e. NAS, CC8/2/2, fo. 251r, 7 January 1567/8, *Thorntoun v. Sandersone* (adherence) “that the said John on na wayis... be compellit to ressaue the said Margaret, scho being infectit and detestable haldin quhair scho is knawin and kend”. It may have been the case that Margaret Thornton had contracted a sexually transmitted disease.

adherence, adherence and solemnization, or annulment. In these instances, the principal defence was to deny the allegation,⁷²⁷ rather than to propone an exception.⁷²⁸ When this principal allegation was made outside of the context of a consistorial action, it was either made in response to the proclamation of banns or in some other context. In the former context, the allegations could form the basis of a consistorial action in its own right or, as was more commonly the case, could initiate an action before the Commissaries to have the maker of the allegations put to silence and the accused declared free of the promises made.⁷²⁹ The same basic parameters applied in the later context, but with the addition that the affair had the predominant sense of defamation and slander.⁷³⁰

When the principal allegation was of adultery, the appropriate remedy was Scottish Protestant divorce with licence to remarry. In this instance the valid exceptions were recrimination (or mutual guilt), that is to say the pursuer had also committed adultery, or reconciliation, that is to say the offender had been reconciled to the offended party.⁷³¹

When the principal allegation was of desertion, the appropriate remedy was adherence. In this instance the valid exceptions were that the litigants were not married, that adultery had been committed by the pursuer, or that cruelty had been committed by the pursuer or that they had given some cause for dread and fear, or that the pursuer had some insurmountable physical ailment or defect. Dread and fear do not seem to have been an absolute bar to an action of adherence, since the court would compel adherence upon the pursuer finding caution and surety for their future conduct towards the defender.⁷³²

⁷²⁷ The importance of the promise was well understood by litigants: the defender regularly granted the copula, but denied the promise on oath (i.e. NAS, CC8/2/4, fos. 318v-319r, 11 June 1570, *Barclay v. Ewiot*; CC8/2/6, fos. 120v-121r, 22 June 1573, *Andersoun v. Gudlad*; cf NAS, CC8/2/5, fo. 48r, 13 January 1570/1, *Wilsone v. Stowman*; NAS, CC8/2/6, fos. 10v-11r, 5 November 1573, *Wylie v. Stratharne*; NAS, CC8/2/6, fo. 182r-v, 2 November 1573, *Young v. Proudpute*). Alternatively, were the promise had been *per verba de futuro* denying the copula primed the Commissaries for declaring the litigant free from their pre-contractual obligations (NAS, CC8/2/3, fo. 238r, 21 March 1568/9, *Currye v. Stevin*)

⁷²⁸ If the promise was not denied, the principal exception was prior promise of marriage, by which the alleged promise was rendered null (NAS, CC8/2/1, fo. 250r, 27 November 1564, *Scott v. Robesoun* – Robesoun was in fact claimed by two women on the on the grounds of *sponslia per verba de futuro* with subsequent copula).

⁷²⁹ i.e. NAS, CC8/2/7, fos. 3v-4r, 15 October 1574, *Robesoun v. Liall*.

⁷³⁰ i.e. NAS, CC8/2/2, fos. 34v-35r, 24 May 1565, *Gibsoun v. Robesoun*.

⁷³¹ See citations give above in this chapter, §II, [ii], 2nd paragraph.

⁷³² See citations give above in this chapter, §II, [ii], 2nd paragraph.

When the principal allegation was of non-adherence, the appropriate remedy was Scottish Protestant divorce. This allegation was only made twice during the period under stood, both times by the 5th earl of Argyll. On the first occasion the appositeness of the remedy was doubted by the Commissaries, but on the second occasion the validity of the remedy had been confirmed by Act of Parliament. As the litigation involving the fifth earl and his first countess illustrated, it was better for exceptions from the defender to be directed towards the decret of adherence upon which the action for divorce on the grounds of malicious desertion had proceeded.⁷³³

When the principal allegation was of illegitimacy, the allegation was usually made outside of the context of a consistorial action, as an objection to a brieve of inquest.⁷³⁴ Depending on whether the accuser or the accused began proceedings before the Commissaries, the appropriate remedy was declarator of bastardy or declarator of legitimacy respectively.⁷³⁵ Exceptions to allegations of illegitimacy were those attendant upon any argument about whether or not a marriage had been duly contracted, since bastardy actions were a matter of establishing whether or not the accused was the issue of a couple validly married.⁷³⁶

⁷³³ The 5th earl of Argyll's actions have already been discussed above, Chapter III, §III.

⁷³⁴ All actions of bastardy before the Commissaries of Edinburgh from their appointment down to 1576 were remitted to them on account of allegations of illegitimacy following upon brieves of inquest. The normal procedure and rights of the Commissaries was aptly summarized in *Carnis v. Kennedy*: "Makand mentioun That quhair anent the brevis of oure Soverane Lordis derrest farder & moderis chapell purchest at the instance of Jonet Kennedy allegit dochter to vmquhile Elizabeth Carnis sister germane to the said Jonet Carnis quha was ane of the airis portionaris of the said vmquhile Williame for seruing of hir as air to the said vmquhile Elizabeth hir moder in the Steuart Court of Kirkcaldry¹ haldin in the towbuith thair of the xij day of Julij 1566 zeiris comperit the said Jonet quha being admittit for hir interest to obiect aganis the saidis brevis allegit that the said Jonet Kennedy purchessar thair of was in bastardie gottin & borne zit remand bastard & thair foir wes vnhabill to succed as air to hir said vmquhile moder, [in re]spect of the quhilk exceptioun the said stewart & his deputis decessit fra forder proces and remittit the said bastardie to be cognost be the Juge competent thairto and it is of verrete that be oure Soverane Lordis derest moder author[i]te the said Commissaris ar special constitute hir heineses Commissaris to all sic causes" (NAS, CC8/2/4 fos. 167v-168v, 31 January 1569/70).

⁷³⁵ i.e. NAS, CC8/2/4, fos. 76v-77v, 15 November 1569, *Mortoun v. Mortoun* (declarator of bastardy); also NAS, CC8/2/1, fo. 362v, 26 February 1564/5, *Marioribanks v. Wier & Wardlaw* which was actually an action which sought to have a gift of legitimation declared null on the grounds that the person so legitimated was actually *de facto et de jure* legitimate and therefore ought to be declared legitimate and so be allowed to test.

⁷³⁶ See below, this chapter, n. 160.

[iii] PROBATION OF RELEVANT POINTS IN CONSISTORIAL ACTIONS

The general categories into which consistorial actions can be grouped has been dealt with in the previous section. In this section the main concern is to consider all the relevant points⁷³⁷ made in consistorial actions and analyse the standards of proof required by the Commissaries of Edinburgh. Since, for example, allegations of various types of marriage could be made within the context of actions of freedom, silence and slander, of solemnization, of adherence, of annulment, and of bastardy it seems better to consider allegations of marriage in their own right, rather than considering them several times over at different points in the thesis within the context of types of actions.⁷³⁸

[a] CLANDESTINE PROMISES

Since clandestine or secret promises could by their very definition only be proven by oath, none of the external signs from which marital consent might be proven directly or indirectly were of relevance. Only the makers of the promise knew the intention of their mind and will at the time of the alleged promise and only their oaths could resolve the issue.⁷³⁹ The only possible exception to this case was when

⁷³⁷ The category ‘relevant points’ is taken to include exceptions to relevant allegations.

⁷³⁸ Some of the problems arising out of categorizing actions by libel have already been discussed.

⁷³⁹ i.e. *Reid v. Barclay*, wherein it was alleged that the defender had promised the pursuer “diueris tymes Mariage scho beand than ane virgine and at the leist be his continuale sute consentit to accomplishe and fulfill his desyre and had carnall copulatioun with hir vnder faithfull promes the said Alexander suld marie hir and tak hir to his wyfe and that befor he had any actuale daill with hir quhilk he than & diuers tymes sensyne faithfullie promittit be the faith and treuth of his body to do And scho belevand na fraude nore gile to haif followit submittit hir self to his desyre vnder the said promes like as he diueris tymes thaireftir promittit to do the samin And it is of verite that the said Jonet vnder the said promes hes first borne to him ane child and thaireftir ane vther & hes partit with the thrid all gottin vnder the said promes”; in the event the clandestine promise was “with consent of the said Jonet [pursuer] ferrit to his [the defender’s] aith and he being suorne be his greit aith maid faith he neur maid promes of Mariage to the said Jonet at any tyme” (NAS, CC8/2/3, fo. 72v, 17 July 1568).

the recalcitrant party had subsequently publicly admitted making the promise.⁷⁴⁰ Nevertheless, even in these circumstances, the admission was usually made in an informal context, and pursers would have been well advised to refer the matter to the defenders' oaths than hazard the action by subjecting their libel to higher standards of proof.⁷⁴¹

[b] PUBLIC PROMISES

Since *sponsalia per verba de futuro* was the normal prelude to the proclamation of banns, the promise was often made in a public and formal manner. The presence of a priest or minister was preferable, but not prerequisite in terms of the standards of proof. Indeed, a court which was prepared to tailor the standards of proof to the circumstances of the case, from a marriage contracted in a church before a minister or priest during divine service having been prefaced by the proclamation of banns, to a secret marriage made on a hillside and consummated in a barn, was not likely to turn down reasonable evidence simply because it did not conform to the desired ideal of the established religion. As such, the presence of 'famous witnesses' was the basic standard in Scotland which distinguished public promises from clandestine.⁷⁴² In addition to the presence of witnesses, a prudent couple or their family would procure the services of a notary to make a formal note of the promise in his protocol book. In addition, a marriage contract could be signed, although marriage contracts could precede actual betrothals.

⁷⁴⁰ i.e. *Brok v. Alexander*, wherein it was narrated that "quhair Daid Alexander in the moneth of November 1566 zeris come to the Dwelling hous of the said Jonettis fader and thair desirat hir in mariage and eftir lang talking and Ressoning thairvpoun the said Daid maid promeis of mariage to the said Jonat lik as scho mad alsua promeis of mariage to the said Daid the moneth & zeir forsaid and thaireftir be the persuasioun and intyement of the said Daid the said Jonet gaif the vse of hir body to him in the moneth & zeir abouewrittin lik as scho did Diuers vtheris monethis the zeir forsaid and in the zeir of God jai vc lxxvij and bure ane Man child to the said Daid in the moneth of Januar the zeir of God jai vc lxxvij lik as he diuers tymes sensyne hes confest in presence of diuers famous persounis that he had maid promeis of mariage to the said Jonet and that he had tane the vse of hir body be carnall copulatioun"; in the event the pursuer succumbed in probation (NAS, CC8/2/4, fos. 289v-290r, 10 June 1570).

⁷⁴¹ When clandestine promises had been repeated in public, the pursuer usually attempted (unsuccessfully) to prove the public admission of the promise without recourse to a great oath i.e. NAS, CC8/2/2, fo 67r, 27 June 1565, *Reid v. Porteous*; CC8/2/5, fo. 193r-v, 17 March 1571/2, *Ker v. Williamsoun*. Yet cf *Wod v. Hamilton*, wherein probation was successful (NAS, CC8/2/6, fo. 124r, 24 June 1573).

⁷⁴² Riddell argued that 'famous' was used "to denote persons holding high and public offices; not only "fide dignos" according to the ancient canon, but even clergymen, notaries and "Brethren of the Kirk of God"" (*Inquiry*, i, 480), but "not common domestics" (*Ibid.*, 486).

Naturally, promises which had been deliberately made in public before famous witnesses and duly recorded in a notarial instrument rarely came before the Commissaries within the context of actions for solemnization of marriage: such promises could not readily be denied.⁷⁴³ Rather, when allegedly public promises of marriage were disputed before the Commissaries, the usual means of probation was by witness.

Of the various facts to which a witness could testify, the most desirable and direct was a description of the words spoken by the parties involved. Such evidence of consent could be further augmented by outward physical indications of consent. Moreover, various physical gestures could be taken as tokens of consent, even in the event that no words were spoken. This idea originated from the Canon law's provisions for the contracting of marriage by mutes, since their inability to speak rendered other manifestations of consent necessary, and as such outward signs of consent were legally acceptable.⁷⁴⁴ Chief among these tokens of consent were the taking of hands,⁷⁴⁵ the exchange of a kiss,⁷⁴⁶ and the exchange of rings.⁷⁴⁷ The

⁷⁴³ Exceptions occurred in *Skirling v. Mairioribankis*, wherein promise of marriage had been "maid betuix the saidis Jane [Skirling] and Master Thomas [Mairioribankis] of baith thair mutuale consentis in presence of diueris famous witnes & ane notar speacialie requirit thairto and ane contract of Mariage than maid betuix thame subscriuit be thame Quhairby the said Master Thomas than oblist him to mar[i]e the said Jane in face of halie kirk betuix the dait of the said contract the tyme foresaid and the feist of beltyme nixthaireftir"; subsequent copula was likewise alleged, the Commissaries decerning solemnization (NAS, CC8/2/3, fo. 79r, 31 July 1568); and in *Skirling v. Wallace*, wherein promise had been made "in presence of Williame Barbour minister of Lessuaid notar publict & in presens of Diuers famous witnes... to marie and solemziat the halie band of matrimony with the said Helene betuix the day foirsaid & Sanct Luikis day nixt thaireftir and the said Helene than wes contentit & consentit thairto & ather of the saidis parties tuik instrumentis thairvpoun & the said Williame promisit be his God to fulfill & solemziat the band foirsaid"; the Commissaries decerned solemnization (NAS, CC8/2/4, fo. 42v, 30 July 1569).

⁷⁴⁴ i.e. *Lectures on Marriage*, 176/7 *et seq.*

⁷⁴⁵ i.e. *Scott v. Robesoun* "And than he in takin of his faythfull promeis maid to hir and that scho inlykewyis acceptit the samyn and inlykewyis promittit to him to tak him to hir spous ather of thame tuke vtheris be the hand" (NAS, CC8/2/1, fo. 250r, 27 November 1564), admitted to probation and proven; *Kincaid v. Fairholme* "the saidis parteis of thair mutuall consentis in presence of ane notar and diuers famous witnesses maid contract of mariage maid betuix thame obleisand thame *hinc inde* faythfullie to Solemnizat mariage with vtheris and than be vphalding of thair Rycht handis to vtheris tuke vtheris in spouses *per verba de futuro*" (NAS, CC8/2/5, fo. 56r, 19 January 1570/1), defender assoilized since no copula; *Makewin v. Stalker* "being baith solut personis contracti[t] Mareage befor diuers famows wittneses bretheris of the kirk of the kirk of God *per verba de presenti* with thair mut[u]all consentis ilk ane to vtheris be thair faithfull promeses *hinc inde* & J[un]ying thair Rycht handis In takin of thair mutuall consentis quhilk in effect matrimony compleit" (NAS, CC8/2/4, fos. 152v-153r, 20 January 1569/70).

⁷⁴⁶ i.e. *Murray v. Symson* "and than thay bayth of thair mutuall consentis acceptit and ressautit vtheris be wordis of the present as spous to vtheris and obleist thame to compleit marriage with vtheris in the face of the kirk and that be extentioun of thair rycht handis and than be outward synes kissing and drinking with vtheris eftir the promeis forsaid be wordis of the present grantit ather of thame tobe lauchfull spouses" (NAS, CC8/2/3, fos. 287v-288r, 28 April 1569), pursuer succumbed in probation.

exchange of rings can also be viewed within the context of a general giving of gifts, which are better considered as *donationes propter nuptias*,⁷⁴⁸ which are in turn best viewed within the context of tocher goods, liferents, conjunctfees and terces.⁷⁴⁹ Nevertheless, the giving of physical commodities such as gold, jewels and clothing, and the granting of legal privileges such as giving sasine to a property could all be construed as tokens of consent.

All these elements could be used as evidence of any kind of *sponsalia*, but *sponsalia per verba de praesenti*, when it occurred outside of the context of banns and solemnization, was *de facto* irregular, and, unlike *sponsalia per verba de futuro*, was not likely to have been said with a view to proceeding to the proclamation of banns. As such, promises of marriage *per verba de praesenti* could tend towards a greater degree of informality than that found in promises *per verba de futuro*.

Yet the formality of promises was also influenced by the status of those making the promise. Nobles, burgesses and the like, well aware of the pitfalls of marital agreements prior to actual solemnization tended to insist upon a greater degree of formality in the plighting of troth than those from humbler backgrounds. Indeed, there was undoubtedly a greater degree of frequency of *casual* promises *de futuro* with subsequent *copula* among couples from humbler backgrounds than was found among merchant families and the nobility. This is not to imply anything about

⁷⁴⁷ i.e. *McCerie v. Hunter* “the said Marioun Hunter Relict of the said vmqle Johne & the said Patrik promittit to Gode *per verba Defutur* to tak vtheris in the holie band of matrimony & in the mentyme in signe & takin of the said promeis the said Patrik gaif to hir ane Ring of gold quhilk scho than ressaut & exceptit the samin in contemplioun thairof” (NAS, CC8/2/6, fo. 448v, 23 July 1574), pursuer succumbed in probation; *Hamyltoun v. Heriot* “the said Helene Hammyltoun and the said George of thair mutuall consentis in presens of diuers famous witnes tuik athir vtheris mariag *per verba de praesenti* the said George sayand I tak zow to my wyfe and to haife nane vther during zour lyftyme And the said Helene siclik be word present tuik the said George to hir spous promesand to haue nane vther During his lyftyme quhairvpoun ather of thame tuik vther be the handis in takin thairof lik as thair wes diuers promises thairof befor the said moneth And ryngis of gold gevin be ather of thame to vtheris in takinge of marriage” (NAS, CC8/2/6, fo. 259v, 5 February 1573/4), although this action was resolved by oath.

⁷⁴⁸ i.e. *Thomsoun v. Wod* “sensyne the said Margaret in taikin of hir consent and faithfull promes hes ressaut fra the said Johne in name of Mariage and tabillat of gold with the said Johnis pictoure gravit in cristalling thairin on the ane syde with ane ruby on the vthersyde ane ring of gold ane pece of siluer of dens cunzie bo[w]it the tyme of the deliuerance thairof” (NAS, CC8/2/3, fo. 39r, 1 June 1568), admitted to probation and proven. Cf. *Balfour’s Practicks*, i, 101 *et seq.*

⁷⁴⁹ i.e. *Auldinstoun v. McMyllane* “throw quhais promeis the said Isobell belevand the said Robert to haue bene ane faythfull trew man and to haue keptit his faythfull promeis maid to hir in presence of god his avne conscience and famouss witnes causit hir to gif ovir hir maling and steding of certane landis in Tranent quhilk wald haue bene worth zeirlie to hir the soum of ane hundreth pundis money of this realme” (NAS, CC8/2/1, fo. 322r, 25 January 1564/5), admitted to probation and proven. Cf. *Balfour’s Practicks*, i, 99 *et seq.*

the relative promiscuity of different classes of Scots, but rather to point out that wealthy people tended to be fully aware of the legal security provided by contracts of marriage and the plighting of a couple's troth before a suitable group of family members, and preferably a notary. It tended to be people who seemed unaware of the normal workings of the law, or who were possibly more trusting or naïve, that tended to run into difficulties when forced to prove the existence of an irregular promise of marriage. Casual promises, whilst still public, were of course harder to prove. For example, a public promise *de futuro* made whilst stood on a table in an ale house at Leith docks could be hard to prove since the company were not 'famous' witnesses, were likely inebriated, and had possibly been subsequently dispersed across the Baltic and the Low Countries on the various vessels upon which they served.

[c] COPULA WITHIN THE CONTEXT OF CONTRACTING MARRIAGE

Within the context of contracting marriage, actual *copula* could usually only be directly established by referral to the oaths of those involved.⁷⁵⁰ Yet *copula* not infrequently produced a clear indicator of the act in the issue of children.⁷⁵¹ In a considerable number of cases, fathers had no wish to deny parentage, having their children baptized in their name, whether conceived within the context of a non-regular marriage, or entirely outside of the context of matrimony.⁷⁵² It was not

⁷⁵⁰ i.e. *Ewart v. Dryisdale* "The said petitioun and promes thairin contenit with consent of partie is referrit to the said James ayth quha being suorne grantit carnale copulatioun and maid fayth that he nevar promisit mariage to the said Margaret" (NAS, CC8/2/1, fo. 65v, 19 June 1564); cf *Currye v. Stevin*, NAS, CC8/2/3, fo. 238r, 21 March 1568/9 (copula denied oath); cf *Murray v. Barry*, NAS, CC8/2/3, fo. 350r-v, 4 June 1569, wherein the defender "maid fayth that he neuir maid ony promeis to hir of mariage nor neuir appointit with hir in word or writt thairanent nather befor he had vse of hir body nor thaireftir".

⁷⁵¹ *Forbes v. Sandelands*: defender "committit adulterie with Williame Huntar in Balcarrais quhilk wes thaireftir manifestit be procreatioun of ane man chyld borne in the moneth of Maij the zeir of God jaj vc/lxiiij zeris baptist in name of the Williame zit and continewalie sensyne brukand his surename reput and haldin tobe his"; adultery duly proven (NAS, CC8/2/1, fos. 304v-305v, 15 January 1564/5); *McCrache v. Patersoun* "Neuirthles the said Johne [defender] be intyisement of satan and lustis of his flesche hes left the said Margaret his lauchfull spouses and hes defilit his body and lauchfull bed of spousage in filthie and abhominable adulterie with Margaret Jak gevand the vse of his body to hir continewalie sen the moneth of Januar the zeir of God jai vc lx zeris And as zit continewis with the said Margaret Jak in the said detestable and horrible cryme of adulterie aganis the ordinancis and lawis of halie kirk quha hes borne to him ane maid bairn of ane zeir auld"; adultery duly proven (NAS, CC8/2/2, fo. 157r, 27 October 1567).

⁷⁵² i.e. in *Duncane v. Fairley* John Fairly had been assoilized from an action of solemnization, denying an alleged promise of marriage by his great oath (NAS, CC8/2/3, fos. 52v-53r, 14 June 1568); nevertheless, less than a fortnight later he agreed to pay Helen Duncan 8 marks in retrospective

uncommon for men who had granted that they were irregularly married, and who acknowledged their children, to have had no desire to solemnize their marriage *in facie ecclesiae*.

Where children were concerned the Kirk could be of considerable help to those engaged in consistorial litigation. On an informal level, those who acted in the station of mid-wife were instructed to insist that the father's name be given, when unclear, and if it was not forthcoming prior to labour, inquisition was permitted when the woman was less composed during delivery of the child. On an official level, those by whom baptisms were administered were obliged to make enquiry as to a child's parentage, when unclear, and parish kirks throughout Scotland were directed to keep registers of baptisms.⁷⁵³ In addition to the information which could be furnished by the Kirk, the local knowledge of the parish could also be drawn upon in order to establish whether or not a man was commonly held to be a child's father, and whether or not a child's material needs were being met by an alleged father.

Copula could thus readily be established by a number of means, particularly where issue were concerned. Yet *copula* was not the essential component in the formation of a marital bond. Possibly because this was readily understood, many men often granted *copula* as a matter of course, but took issue with the promise of marriage.⁷⁵⁴

[d] COPULA WITHIN THE CONTEXT OF ADULTERY

aliment and "to tak and ressaue the foirsaidis barnis vpbring treit and interteny and sustene thamin all tymis cuming as efferis according to his facultie and that of his avne consent." (NAS, CC8/2/3, fo. 82v, 26 June 1568); *Barnair v. Nychole*, wherein the defender was found guilty of begetting a bastard in adultery which he "requirit the ministeris Dauid Fergusoun minister of Dunfermline and Petir Blacader Minister of Abirdouer to haif baptizat the samyn barne in his name Quha refusit to do the samyn Becaus the samyn wes gottin in adulterie" (NAS, CC8/2/2, fo. 399v, 24 March 1567/8); *Pawtoun v. Lindesay*, wherein the defender was found guilty of "Manifest adulterie with Marioun Gemmill" having "begottin ane man barne callit [blank] Lindesay with hir baptisit in his name...commonlie repute and haldin his barne" (NAS, CC8/2/3, fo. 63r-v, 2 July 1568); *Small v. Moffett*, wherein the defender was found guilty of having "committit adulterie with Matho Fairar walker in Edinburgh quhilk wes thaireftir manifest be procuratioun to him of ane woman child borne in the moneth of September the zeir of God jai vc lxx zeris baptisit at the mess in the abbay of Halierudhous in the said Mathewis name" (NAS, CC8/2/2, fos. 294v-295r, 29 January 1567/8).

⁷⁵³ i.e. *Buik of the Kirk of the Canagait*, 14 (20 January 1564/5; inquiry as to parentage). For an example of an early register see *ibid.*, 76 *et seq.*

⁷⁵⁴ i.e. *Strang v. Auchinlek* (NAS, CC8/2/7, fos. 128v-129r, 23 April 1575); *Wilsone v. Stowman* (NAS, CC8/2/5, fo. 48r, 13 January 1570/1); *Young v. Proudpute* (NAS, CC8/2/6, fo. 182r-v, 2 November 1573); *Barclay v. Ewiot* (NAS, CC8/2/4, fos. 318v-319r, 11 June 1570).

Within the context of adultery, *copula* could be proven by any of the means outlined above. In addition the actual act could be proven either directly or indirectly in a number of ways. Of course, indirect proof was not confined exclusively to adultery, but was much more likely, since adulterous intercourse frequently aroused the suspicions of spouses, servants, the Kirk and the civil magistrate which resulted in close observation of those suspected of adultery or direct attempts to apprehend adulterers *in flagrante delicto*.

Concerning direct proof, there are several instances in which agents of a town's magistracy broke down doors and apprehended adulterous couples in the act.⁷⁵⁵ In other similar instances paramours were known to attempt to affect an escape when alerted to the possibility of detection, and although not apprehended in the act, were nevertheless accosted in circumstances which strongly implied adultery.⁷⁵⁶

⁷⁵⁵ i.e. *Hendirson v. Robesone*, wherein the defender was proven to have given her body "in filthie adultery to mony and diuers persouns lik as frenche men scottismen and dutche men in Leyth Edinburgh and in the Cannogait and in speciall vpoun the last day of Aprile last was in Johnesonis Clois in Edinburgh in ane bordell hous callit Margaret Abircumbyis hous with ane Dutcheman callit Ludkyn als Lucas Knotsoun skippar in Danskyne and Johne Thomsoun in Edinburgh Deprehendit with thame in the nycht nakit togidder in ane bed be the watche of the toun and careit on the morne to persone to the towbuith thairof quha immediatlie thaireftir viz vpoun the first day of Maij being ane commone mercat day at command of the magistratis thairof was be the ser[u]andis and hongman put to the heicht of the marcat croce buir heidit with ane tikket vpoun hir foirheid declaring panelie to the people that scho was and is ane adulterar quhilik is maist notour to this hailt toun and Inhabitantis thairof" (NAS, CC8/2/5, fo. 130r-v, 27 March 1571); *Anderson v. Allasone*, wherein the defender had "joynit hir body in filthie adulterie with Matho Cole indwellar in Linlithgow and hes had diuers and sundrie tymis at thair plesour carnale dale togidder in the said Johne Andersonis hous in Glasgw and diueris vtheris places in the saidis monethis and sensyne like as thai wer bayth togidder tane furth be the baillies of Glasgw at mydny^t out of the said Johne Andersonis hous as maist manifest and sclanderous adulteraris And upoun the xxiiij day of December last wes the zeir of God jai vc lxxvj zeris wer be command of the saidis baillies put vpoun the croce of the said burcht of Glasgw tobe ane spectacle to the hale peopill of thair maist notorius and sclanderous adulterie"(NAS, CC8/2/2, fo. 275r, 19 January 1567/8); *Ker v. Cranstoun*, wherein despite the fact that adultery had been proven without recourse to an oath of the defender, she nevertheless appeared for the pronouncing of decreet "and said scho had na thing [to say against proceedings] but wes ane synnar and come repentent thairof" in effect confessing, or at it were granting the libel, albeit a little late (NAS, CC8/2/2, fos. 275v-276r, 19 January 1567/8).

⁷⁵⁶ i.e. *Hopper v. Dauidsoun*, wherein the defender's paramour "was espyit to have past in the said hous at aucht houris at evin & the durris closit eftir him being suspectit to have had cumpanye with the said Jonet [defender] of befor the magistratis of this burt being aduerteis thairof come to the said hous to have serchit gif the samyn was of verite quhair thai knokkit about ten houris at evening at the zet thairof in the said clois desirend to have intres and was refusit to have intres ane lang space that in the meintyme the said Patrik mycht eschew lik as he feirand tobe apprehendit past furth of ane bak dur on the eist side of the said hous and langis ane spout or gutter quhair he bete[ki]t secreitlie to have eschaitit quhair na commone entres was quhair he wes apprehendit be the magistratis and put in the towbuith" The paramour was duly "callit befor the iustice generall of this Realme & his deputis for committing adultery with the said Jonet and wasting & consuming of the said George gudis and geir vpoun the xj day of Maij 1570 [and] wes convict criminally be assys of the same" (NAS, CC8/2/5, fos. 159v-160r, 27 April 1571); Cf. NAS, JC1/13, fos. 164r-165r, 11 May 1570, *Hopper v. Vrquhard*.

In less dramatic instances, the testimony of witnesses, usually servants, that a couple had been alone together in dubious circumstances (*solus cum sola in loco suspecto*), sometimes with the additional assertion that they had been in a state of undress (*nudus cum nuda*), provided sufficient grounds upon which to establish that *copula* had occurred.⁷⁵⁷ As Helmholz notes, this was not strictly speaking a form of proof, but rather a substitute for proof, categorized in the Canon law as a presumption.⁷⁵⁸ In addition, confessions of adultery before the Kirk could also be used as evidence before the Commissaries of Edinburgh.⁷⁵⁹

[e] REGULAR MARRIAGE

The principal aim of regular marriages was to address the dangers of probation inherent in non-regular marriages. Regular marriage, with its proclamation of bans and solemnization produced the most legally secure context within which to contract marriage. The sessions of the Reformed Kirk kept records of those whose names had been called, and the subsequent exchange of promises of marriage *per verba de praesenti in facie ecclesiae* were also noted in the record of banns.⁷⁶⁰ Yet where a written record was not made, or subsequently perished, the real strength of regular marriage was the exchange of promises *de praesenti* before the minister and parish within which at least one of the contracting parties was domiciled. Within the essentially static communities of the medieval and early modern period, the testimony of witnesses was regarded as a superior means of probation over written

⁷⁵⁷ i.e. *Vrquhart v. Lyoun*, wherein the defender was proven to have given “his body in adulterie as saidis to the said Issobell Murray & that in the said place of Hoppishill past oppinlie to bed with hir & war togidder in the said place *solus cum sola nudus cum nuda* the duiris closit vpoun thame diuers nytis within the said place beand than alreedy personis to commit addulterie & suspect thairof of befoir” (NAS, CC8/2/6, fos. 63r-64r, 10 March 1572/3); *Wemis v. Dunbar*, wherein it was prove that the defender had given “hir body in filthie adulterie to Johne Giffart thai then beand and as zit hable personis and monethlie sensyne hes joynit thame selfis in filthie adulterie being *solus cum sola nudus cum nuda* in suspect places” (NAS, CC8/2/3, fos. 32v-33r, 25 May 1568); see also *Merschale v. Broun* (NAS, CC8/2/3, fos. 373v-374r, 18 June 1569).

⁷⁵⁸ Helmholz, *Ecclesiastical Jurisdiction*, 331.

⁷⁵⁹ i.e. *Kincaid v. Ross*, wherein the defender was alleged to have committed adultery with various women, including one Margaret Muir “And for testificatioun of the said adulterie the said Margaret Mure within fourtie dayis thaireftir the said bairne was borne come in presence of halie congregatioun in the kirk of Glasgw in presence of Maister David Wemis minister and maid hir oppin and publict repentance of the said adulterie done and committit be the said Jhon[n]e Ross in Holingbus with hir”; the defender was proven to have committed adultery with one of the alleged paramours and so decreet of divorce was granted (NAS, CC8/2/4, fos. 18v-19r, 15 July 1569).

⁷⁶⁰ The only extant source for this seems to be the *Buik of the Canagait*, 105-108.

documentation.⁷⁶¹ The legal considerations surrounding regular marriage were clearly highly effective. This is seen most clearly in actions for adherence and divorce, a precondition of which was establishing whether or not the litigants were in fact married. There seem to be no recorded instances between 1563/4 and 1576 in which parties failed to grant and admit a regular marriage as a matter of course.

[f] ESTABLISHING MARRIAGE BY HABIT AND REPUTE

One final and special type of probation in establishing the validity of a marriage was probation by habit and repute.⁷⁶² This form of probation was intended to establish what was probable rather than what was certain,⁷⁶³ the clearer indicators of marriage having perished through lapse of time. The usual context in which this type of probation was employed was actions involving legitimacy. It goes without saying that legitimacy was entirely dependent upon the validity of the marriage of a child's parents, and as such the key element in bastardy actions involved establishing promise of marriage, since *copula* was granted by the very nature of the case. The problem was that actions of bastardy were usually remitted to the Commissaries of Edinburgh following allegations of illegitimacy made in response to briefs of inquest. Questioning the validity of an heir apparent was naturally based upon allegations about the heir's parents' marriage, which in turn could have been contracted forty or fifty years previously.⁷⁶⁴ The problem then was that even if the marriage had been regularly solemnized the celebrant and many members of the congregation who witnessed the exchange of consent could be dead, whilst those still alive might not be able to recall explicitly the solemnization of the union. As the basis of a marriage declined as it were through the various types of irregular

⁷⁶¹ i.e. *Court of the Official*, 104; cf Helmholz, *Ecclesiastical Jurisdiction*, 338 *et seq.*

⁷⁶² As David Sellar has correctly argued, habit and repute was not part of the constitution of marriage (as has sometimes been erroneously held in Scotland), but rather "has always been, and still remains, no more than a method of proof" (Sellar, 'Habit and Repute', 117, cf 122 for discussion of the Canon law in this respect).

⁷⁶³ Habit and repute has always been intended to set up a presumption in favour of the existence of a marriage which cannot be proven in other ways, placing the onus of proof on those who deny such a marriage (Sellar, 'Habit and Repute', 117). Cf Helmholz, *Ecclesiastical Jurisdiction*, 331.

⁷⁶⁴ As was the case in *Marioribanks v. Weir & Wardlaw* (see next n. below).

promises of marriage to clandestine promises of marriage, the likelihood of establishing the existence of a marriage with certainty diminished. In circumstances where recourse could not be had to documentary evidence, nor the explicit and detailed testimony of witnesses, the judges were prepared to allow the existence of the marriage to be established by habit and repute. This kind of proof was the lowest grade of probation the court was prepared to accept, and it was understood that only probability, not certainty, was achieved. Habit and repute therefore relied upon the general perception of a community that a couple had always been considered to be married, despite the fact that no one could testify explicitly to an exchange of promise.⁷⁶⁵

[iv] OTHER RELEVANT POINTS

It remains to consider those relevant points which were not directly concerned with promises of marriage, or with actual *copula*, be it fornication, adultery or the act by which a promise of marriage was made perfect. These remaining points may be considered as impediments to the contracting of marriage, either because of factors for which no dispensation, if lawful, had been obtained, such as consanguinity, affinity and impotence, and the life of the innocent spouse following divorce for adultery, or because of factors which invalidated consent, such as just dread and fear, and nonage. Naturally, impediments arising out of prior marital relations, among them sometimes affinity, often involved the probation of points already discussed above.

[a] CONSANGUINITY AND AFFINITY

⁷⁶⁵ i.e. *Marioribankis v. Weir & Wardlaw*, wherein it was proven that Janet Wier “wes lauchfull dochter to the said vmquhile Thomas quha wes begottin of him and vmquhile [blank] Montgumery his wyfe ane of the dochteris of the Lard of Scottistoun quhilk vmquhile Thomas and the said [blank] Montgumery father and mother to the said vmquhile Jonet wes mair nor fyftie zeris syne mariit at the leist haldin and repute as mariit folkis haldand hous togidder in the toun of Lanerk and vtheris places of Cliddisdale as mariit folkis And sua commonele repute and haldin in the hale cuntre quha begat the said vmquhile Jonet and diuers vtheris barnis Quhilk vmquhile Jonet and the remanent thair barnis Wes continualie without controuersie haldin and repute the lauchfull barnis and dochteris rexiue [i.e. respectively] of the said vmquhile Thomas” (NAS, CC8/2/1, fo. 362v, 26 February 1564/5).

The other major reform to Scots consistorial law during the Reformation occurred in the reduction of the forbidden degrees of consanguinity and affinity.⁷⁶⁶ As far as the contracting of marriage was concerned, the reform was in principle straightforward, reducing the forbidden degrees of consanguinity and affinity from four to two, according to the canonical computation, which reform was enacted by the Scottish Parliament on 15 December 1567, declaring all marriages contracted outside of the second degree or greater to have been lawful since 8 March 1558/9.⁷⁶⁷

This revision to the law was well illustrated in 1569 in an action of declarator of bastardy before the Commissaries of Edinburgh. It was alleged that Thomas Morton (born 1543) was illegitimate on the grounds that his parents had contracted marriage within the forbidden degrees according to the Canon law. Against this it was excepted peremptorily that although this was true, nevertheless since “the ordoure now takin sen the Reformatioun of the Religioun the saidis far greis makis na nullitie of mariage Conforme to the Law of God” and that Morton’s parents had “levit Diueris and mony zeris eftir the said Reformatioun of Religioun in continewall to the tyme of his said faderis deceis quha deceis in Januar lastwas and sua the said mariage was Ratifit be thair mutuall consent togidder”. The Commissaries found the peremptory exception relevant and admitted it to probation: it was duly proven and the Commissaries assoilized Morton.⁷⁶⁸

The post-Reformation forbidden degrees may also be illustrated by two actions of annulment. In the first, *Spalding v. Spalding*, the action never reached decret, or else it is no longer extant. Nevertheless, the libel alleged that the pursuer Elizabeth Spalding had married David Spalding, “hir gudschir bruther” on 12 April 1564 “in face of Halie Kirk”, which union was “contrair not onlie to the canone and ciuile law bot als to the law of God”. The Commissaries found the allegation relevant and admitted it to Elizabeth’s probation.⁷⁶⁹ That a woman could not marry her grandfather’s brother in post-Reformation Scotland seems at first peculiar, since according to the canonical computation such relations are in the third degree, and by

⁷⁶⁶ It should also be noted that *cognatio spiritualis* seems to have disappeared entirely at the Reformation.

⁷⁶⁷ *RPS*, A1567/12/15; *APS*, iii, 26, c.16. This development has already been fully discussed by David Sellar in ‘Canon Law and Scots Law’, 77 and by Ireland in ‘Husband and Wife: Divorce’, 93. The Act was prefigured by the ruling of the General Assembly, 21 December 1560 (*Acts and Proceedings of the General Assemblies*, i, 5).

⁷⁶⁸ *NAS*, CC8/2/4, fos. 76v-77v, 15 November 1569, *Mortoun v. Mortoun*.

⁷⁶⁹ *NAS*, CC8/2/2, fo. 24v (initial diet), 16 May 1565.

the civil law computations in the fourth.⁷⁷⁰ Yet this case suggests that in Scotland from the time of the Reformation a woman's grandfather's brother was reckoned to be in the second degree of consanguinity. This would appear to be confirmed by the definition of the forbidden degrees given by the Scottish Incest Act of 1649, which explained that "no person may marry or lie with those that are in the direct line ascending or descending; or with a brother or sister of one of those in the direct line".⁷⁷¹

The reformed degrees are again illustrated in an action of annulment brought by the Procurator Fiscal of the Commissaries of Edinburgh during 1575. It was alleged and duly proven that Thomas Paterson had married first one Janet Johnston, upon whose death he had married one Cristine Johnson. This second marriage was annulled on the grounds that Thomas's first wife had been the sister of the father of the second wife, and as such the second wife was "in first & second degrees of consanguinity" with the first wife, such affinity being "of the law of God & man" unlawful.⁷⁷²

Nevertheless, the reform of the forbidden degrees was not without its problems, since it coincided with the criminalization of incest. Whilst the Canon law had held relations in the first degree by either consanguinity or affinity to be incestuous and thus subject to ecclesiastical censures, it had not prescribed that such fault be punishable by death. The Scottish reformers' criminalization of incest, which prescribed the death penalty, failed to reform the distinction between relations established by consanguinity and affinity, and worse still, as Sellar has discussed at length, retained the Canon law principle that affinity was created by sexual intercourse, rather than by marriage. As such, a man who slept with a woman, and then the woman's sister, was liable to criminal prosecution for incest. Whilst the criminal prescriptions for adultery had in practice been limited, the incest act was enforced with full rigour, providing Scots law with "one of the blackest chapters in its history".⁷⁷³

⁷⁷⁰ See *Lectures on Marriage*, 241.

⁷⁷¹ Sellar, 'Canon Law and Scots Law', 81.

⁷⁷² NAS, CC8/2/7, fo. 243r, 21 July 1575, *Procurator Fiscal v. Patersoun & Johnestoun*.

⁷⁷³ Sellar, 'Canon Law and Scots Law', 76 *et seq* for a full discussion of this episode, with various examples from the justiciary records.

[b] IMPOTENCE

The physical inability in either party to consummate a marriage, or ‘render the marriage debt’ as the canonists had it, was grounds for annulment both before and after the Reformation in Scotland. Pre-Reformation instances have been discussed above,⁷⁷⁴ whilst there are no instances of such actions for the period under study. The earliest post-Reformation case was that brought by the “beautiful, attractive and dissolute” Dame Elizabeth Stewart against her second husband, Robert Earl of March, which ran from 5 March 1579/80 to 19 May 1581.⁷⁷⁵

[c] FORCE, FEAR, JUST DREAD AND NONAGE

Both before and after the Reformation in Scotland it was held that marital consent was invalid if given on account of force and fear⁷⁷⁶ or just dread. Similarly minors, or those of ‘less age’ were also held to be incapable of giving valid consent. Both impediments were raised in *Gillaspene v. Marscheall* in an action of annulment brought before the Commissaries of Edinburgh in 1565. The pursuer alleged that he had, when aged nine and under his father’s influence, “contractit mariage aganis his will with Cristiane Marscheall dochter to Isobell Aitkin scho than being within ix zeris of aige *per verba de praesenti* be the causing of hir foirsaid mother without bayth thair consentis, becaus of the law sik zoung personis being astrictit throw the feir of bayth thair parentis as said is being of sik tendir aige culd gif na consent to sik band”. The couple were both fifteen years of age at the time of the action, and “being suorne in presence of the saidis Commissaris ather of thame declarit that nane of

⁷⁷⁴ See above, pages 110-113.

⁷⁷⁵ The case was discussed at length by John Riddell in his *Inquiry*, i, 531 *et seq.* who stated it to be the earliest example of a full process for the Commissaries of Edinburgh. Proving impotence could involve trial *per septimam manum*, whereby a number of persons were found to testify to the trustworthiness of a party alleging impotence. This was the nearest the Commissaries came to using an inquest to establish a fact and has parallels with the practice in the English ecclesiastical courts (Helmholz, *Ecclesiastical Jurisdiction*, 337).

⁷⁷⁶ *Vis et metus* in the Canon law context is discussed in Scanlon, ‘Husband and Wife’, 76-77.

thame conuersit carnalie with vtheris at na tyme”,⁷⁷⁷ had their marriage duly annulled by the Commissaries.⁷⁷⁸

[d] LIFE OF THE INNOCENT SPOUSE

It has already been argued in the section concerning Scottish Protestant divorce for adultery that the guilty party was impeded from remarriage during the lifetime of the innocent spouse. It appears that in exceptional circumstances a dispensation from this impediment could be obtained from the person of the sovereign. As both Riddell and Baird Smith have noted, one Robert Duguid received a special remission and dispensation from James VI in 1592, having been divorced for his own adultery, and having remarried during the lifetime of his innocent spouse.⁷⁷⁹

[e] LEGITIMATION *PER SUBSEQUENS MATRIMONIUM* AND *IGNORANTIA ET BONA FIDES*

These two points were regularly alleged in bastardy actions in Scotland both before and after the Reformation. Legitimation *per subsequens matrimonium* allowed for the legitimation of illegitimate children if their parents married, and as such, whilst it was a relevant point unique to bastardy actions, it involved the usual standards of proof used in establishing the validity of marriages within the context of bastardy litigation.⁷⁸⁰ Whilst this principle was accepted in Scotland, it was rejected in England.⁷⁸¹ John Riddell has discussed the principle at some length, and it may be noted that couples sometimes employed the ‘cair claith’ while solemnizing their union, the groom placing the cloth over the heads of those children he acknowledged as his own.⁷⁸²

⁷⁷⁷ It was important for the Commissaries to establish that no copula had occurred between the parties after reaching puberty since the marriages of minors were not necessarily null “if the parties had homologated the union after reaching puberty” (Scanlon, ‘Husband and Wife’, 75).

⁷⁷⁸ NAS, CC8/2/2, fos. 133v-134r, 15 August 1565.

⁷⁷⁹ Riddell, *Inquiry*, i, 394; Baird Smith, ‘The Reformers and Divorce’, 20.

⁷⁸⁰ i.e. NAS, CC8/2/4, fos. 167v-168v, 31 January 1569/70, *Carnis v. Kennedye*.

⁷⁸¹ Sellar, ‘Habit and Repute’, 119.

⁷⁸² Riddell, *Inquiry*, 478-479, 451, 520 *et seq.*

Ignorance and good faith were relevant points by which those whose marriage was to be annulled sought to preserve the status of their children. If at least one of the parties to an invalid marriage could prove that they had married in ignorance of the impediment through which their marriage was to be annulled, the children were declared legitimate. Nevertheless, ignorance and good faith could be pleaded only when an invalid marriage had been regularly contracted. The law of Scotland held that those who failed to have the banns proclaimed had not made due inquiry into any impediments which may exist to their union, and as such were at sufficient fault, in that their ignorance could be considered to be at least partially intentional.⁷⁸³ This conformed to the Canon law, which in deprecating irregular married from 1215, sought to penalize the children of those who failed to conform to the Church's desire that marriage be contracted regularly.⁷⁸⁴

[v] COMPETENT REMEDIES

Whilst positive or explicit remedies were not always applied in consistorial actions, since it was sometimes sufficient for the Commissaries to assoilzie the defender from the allegations libelled against them,⁷⁸⁵ a range of competent remedies could be applied by the Commissaries of Edinburgh. In the first place they could declare parties free from a promise of marriage in those instances when the promise was proven to have been *per verba de futuro* only, with no subsequent *copula*.⁷⁸⁶ A related remedy was applied when the banns were stayed by what were proven to be groundless allegations of promise of marriage (sometimes with *copula*), in which cases the stayer was put to silence, that is to say forbidden from making such allegations in the future.⁷⁸⁷ This remedy could also be applied when such allegations

⁷⁸³ Riddell, *Inquiry*, 512 *et seq.*

⁷⁸⁴ *Decrees of the Ecumenical Councils*, i, 258, canon 51.

⁷⁸⁵ i.e. NAS, CC8/2/6, fo. 252r-v, 28 January 1573/4, *Stewart v. Murray*, wherein, uniquely for the period under study, the defender was assoilized from an action of divorce on the grounds of adultery since the pursuer succumbed in probation.

⁷⁸⁶ i.e. NAS, CC8/2/2, 41r, 30 May 1565, *McWalter v. Galbrayth*.

⁷⁸⁷ i.e. NAS, CC8/2/7, fos. 89v-90r, 5 March 1574/5, *Ramsay v. Myll*.

had been made publicly, although outside of the context of the proclamation of banns, which allegations constituted defamation.⁷⁸⁸

Where irregular marriage was proven to exist, the Commissaries ordained that the marriage be solemnized, that is to say regularized through the proclamation of banns and solemnization *in facie ecclesiae*.⁷⁸⁹ If an irregular marriage were proven to exist between parties not living together, the Commissaries would ordain adherence and solemnization.⁷⁹⁰ Adherence was also a remedy in its own right, applied in those cases where it was proven that one party from a regularly married couple had deserted their spouse without just cause.⁷⁹¹ In actions of adherence, the Commissaries could also modify interim aliment to the wife, for the maintenance of herself (and her children if dependent), since it was deemed reasonable that the wife was entitled to receive aliment from her husband so that she might meet the costs of pursuing or defending an action of adherence.⁷⁹² Aliment also could be modified by the Commissaries as a principal remedy for the maintenance of children by their father.⁷⁹³

The remedy of annulment could be applied by the Commissaries where marriages were proven to have been contracted in spite of some impediment.⁷⁹⁴ Where annulled marriages had nevertheless resulted in issue, the Commissaries would also pronounce on the legitimacy or illegitimacy of the issue, depending upon the parents' ignorance of the proven impediment.⁷⁹⁵ Declarators of legitimacy or illegitimacy were also applied by the Commissaries as the principal remedies in actions concerning allegations of bastardy.⁷⁹⁶

⁷⁸⁸ i.e. NAS, CC8/2/2, fos. 34v-35r, *Gibsoun v. Robesoun*.

⁷⁸⁹ i.e. NAS, CC8/2/3, fo. 42r-v, 2 June 1568, *Diksone v. Tod*.

⁷⁹⁰ i.e. NAS, CC8/2/5, fo. 157r, 26 April 1571, *Moffait v. Mertene*. It will be noted that there were no 'declarators of marriage' in the strict sense at this time, but of course a decret of adherence and/or solemnization proceeded upon what amounted to a declarator of marriage.

⁷⁹¹ i.e. NAS, CC8/2/3, fo. 340r-v, 26 May 1569, *Cruke v. Hammiltoun*.

⁷⁹² i.e. NAS, CC8/2/4, fos. 82v-84r, 19 November 1569, *Hammiltoun v. Dalmahoy* (very detailed interlocutor in which the defender was assoilized from paying interim aliment to his wife during an action of adherence since she was proven to be already in receipt of substantial incomes).

⁷⁹³ i.e. NAS, CC8/2/6, fos. 224v-225r, 9 January 1573/4, *Creich v. Bell*.

⁷⁹⁴ i.e. NAS, CC8/2/3, fo. 54r-v, 17 June 1568, *Cromartie v. Caddell*.

⁷⁹⁵ i.e. in the action of annulment brought by the Procurator Fiscal against Ogilvy, Fraser and Chisholm, Chisholm's procurator desired of the judges that "quhat euir be done heirin preiudice not the barnis" (NAS, CC8/2/6, fo. 429r, 8 July 1574).

⁷⁹⁶ i.e. NAS, CC8/2/6, fos. 93v-97v, 20 May 1573, *Dunbar v. Adair*.

The Commissaries could also apply the remedy of Scottish Protestant divorce with licence to the innocent party to marry forthwith where it was proven that the other spouse was guilty of adultery,⁷⁹⁷ or guilty of obstinate and malicious desertion.⁷⁹⁸ Such decreets also pronounced on the contractual consequences of divorce.⁷⁹⁹ In a number of atypical actions resulting from the involvement of the tribunals of the Protestant Kirk in consistorial actions from 1559, the Commissaries could also pronounce on the contractual consequences of a sentence of divorce pronounced by the Kirk. The Kirk had not seen fit to pronounce in these contractual matters, and as such, where sentences of divorce pronounced by the Kirk were accepted by the Commissaries, the Commissaries proceeded to pronounce on tocher, terce, conjunctfees, liferents and *donationes propter nuptias*.⁸⁰⁰

⁷⁹⁷ i.e. NAS, CC8/2/2, fos. 11v-12r, 7 May 1565, *Murray v. Irwyng*.

⁷⁹⁸ The only example of which being that brought by the fifth earl of Argyll against his first countess, which is discussed above Chapter III, §III.

⁷⁹⁹ i.e. *Ker v. Cranstoun*, wherein the defender was found guilty of adultery and decerned “to haue tint and to tyne hir tocher terce coniunctfee and liferent landis and quhat sumeuer vther thingis gevin and grantit be the said Schir Andro [pursuer] or ony vtheris in his name to hir, or ony vtheris in hir name to him in contemplatioun of the said Mariage with all donationis and vtheris thingis gevin be the said Schir Andro to hir in contemplatioun thair of” (NAS, CC8/2/2, fos. 275v-276r, 19 January 1567/8).

⁸⁰⁰ i.e. NAS, CC8/2/1, fo. 323r-v, 26 January 1564/5, *Westoun v. Ewart*, wherein, the couple already having been divorced by the kirk of Edinburgh (who proceeded by virtue of a commission from the Privy Council), the Commissaries decerned the defender to have “tyne and to haue tint hir tochir and all vther thingis gevin be hir or to hir in contemplatioun and in respect of the said mariage and specialie hir infetment of coniunctfee or lyfrent of all and hale the tenement of the landis abouespecificiit with thair pertinentis [i.e. ane tenement of land hous biggingis zard and well thair of with the pertinentis lyand in the said burgh vpoun the south part of the quenis streit of the kowgait betuix the arable lands of the nunnis callit the sisteris of the seinis beside the said burt on the south part and the foirsaid pertening to oure lady kirk of feild vpoun the north] gevin to hir be the said Johne [pursuer] and Marioun Scot his mother *ex causa donationis propter nuptias*”.

CHAPTER V
ANALYSIS OF EARLY CONSISTORIAL LITIGATION BEFORE THE
COMMISSARIES OF EDINBURGH

§I
INTRODUCTION & METHODOLOGY

David Sellar has rightly noted that “no one has yet searched through the commissary court records, still extant in manuscript in abundance, to determine the incidence of divorce at any particular time, or in any particular part of the country; to record the sorts and conditions of men and women who raised the actions; to distinguish between male and female pursuers; or to calculate the cost of litigation. Information on all these points would be of considerable interest”.⁸⁰¹ The source material generated by the Court of the Commissaries of Edinburgh during the Reformation era has already been analysed in order to gain on the one hand a fuller appreciation of early Scots consistorial law and on the other a better appreciation of the procedure of the Commissaries of Edinburgh. Yet in addition the source material may be analysed in a different way in order to draw out the information desired by Sellar. The entries made in the Registers of Acts and Decrees for any given case have the potential to provide a wealth of information and detail about actual consistorial litigation before the Commissaries. In order to draw together these various insights from the Commissaries’ Registers, data has been compiled from the first three volumes of Acts and Decrees.⁸⁰² These volumes cover the period from

⁸⁰¹ Sellar, ‘Canon Law and Scots Law’, 74.

⁸⁰² This data has been summarized in Appendix II. A list of contents for this appendix had been provided both in the contents pages at the beginning of this thesis, and on the second page of Appendix II. Further specific references to Appendix II for each category of data will also be given at appropriate points for each section and part of this chapter.

late April 1564 until the end of June 1569, and as such are unaffected by the later disruption of the Court during 1571 and 1572. Of the five year's worth of Registers, only 36 months are extant, on account of the fact that the Registers compiled during the clerkship of Sebastian Danelourt are missing.⁸⁰³ These 36 months fall into two periods: fifteen and a half months from late April 1564 until mid August 1565 and twenty and a half months from mid October 1567 until the end of June 1569. Beyond these two sample periods, which presented themselves fairly naturally, it would have been possible to extend further the chronological scope of the second sample, but this was increasingly difficult since earlier diets in litigation began to be recorded with more brevity from about this time and promised diminishing returns only. The following section is therefore based upon the two sample periods outlined above, and as such it differs in chronological scope from the chapter dealing with consistorial law. This earlier chapter covered the period 1564 to 1576, since it was based primarily upon consistorial decreets, all of which had been located and transcribed for this period. In contrast, this section on consistorial litigation focuses upon the 1560s only, although it has been possible to include some limited information for completed consistorial actions for the period 1564-1576.

A further point to be borne in mind is that several peculiar features of the extant Registers of Acts and Decrees affect some of the statistical elements that follow. The complete absence of 'Danelourt's Registers' has already been mentioned, but within the extant Registers there are several minor lacunae. The reason for these minor lacunae arises from the fact that some of the Registers of Acts and Decrees may be, in their present physical format, the creation of later generations.

The earliest clerks of the Court of the Commissaries of Edinburgh were responsible for providing, at their own expense, the paper, ink and wax necessary for the various tasks they undertook at the court, in addition to a writing desk and chair.⁸⁰⁴ The clerks clearly purchased quires of French paper in which they recorded the acts and decreets of the Commissaries of Edinburgh.⁸⁰⁵ The quires used by the

⁸⁰³ Discussed above, page 50.

⁸⁰⁴ see above, Chapter II, § II, [iv].

⁸⁰⁵ This may be inferred from the watermarks in some of the paper used (i.e. NAS, CC8/2/3, fo. 13; fo. 118).

clerks of the Court of the Commissaries of Edinburgh tended to number 16 folios.⁸⁰⁶ Whether or not the original intention was to bind a number of quires together into a single volume as occasion dictated is not entirely clear. What is clear is that many of the quires were numbered so as to keep them in order, though whether this was done at the time, or at a later date cannot be established with certainty. It is tenable that the numbering of the quires belongs to a later date, since the ink used and the style of the Arabic numerals does not appear to be contemporary, and it is certainly the case that many of the quires are not numbered.⁸⁰⁷ These facts suggest that some later attempt was made to bind the quires, and that those stacks of quires which may have become deranged were numbered in the correct order prior to binding.⁸⁰⁸

This theory accords with the fact that the first folios of various quires of paper, whether they occur at the beginning of a Register or not, show signs of soiling and damage, and in some instances are missing altogether. It is this damage to the quires that gives rise to several minor lacunae in the extant Registers. The most obvious damage is often at the beginning of the Registers. The first folio is often severely damaged, and is usually the first extant folio only, rather than the folio which must have once been the uppermost in the first quire. To give some examples, CC8/2/1 starts abruptly with a number of acts from the last day the Commissaries sat before 29 April 1564. The Commissaries had been appointed at the end of February 1563/4, and although the date from which the Commissaries began to sit in judgement is not known, they received instructions from the Session concerning the procedure they should adopt and the charges they should apply dated 12 March 1563/4,⁸⁰⁹ and they were certainly sitting in judgement by April 1564. It is certain that folios are missing from the beginning of the first Register, and that the level of damage decreases with each folio until only a minimal amount of conservation has been required. A similar declension of folio damage occurs at the beginning of

⁸⁰⁶ For example quire numbers 10, 11, 12 and 17 in NAS, CC8/2/4, fos 143-158, 159-174, 175-190, 260-275 respectively. Some quires had more folios than this, though a rigorous analysis has not been undertaken: presumably the clerks bought whatever was available over the years.

⁸⁰⁷ See NAS, CC8/2/4, fos. 143r, 159r, 175r, 260r for examples of this numbering.

⁸⁰⁸ Each volume of acts and decreets probably has its own particular history, but further inquiries have not been made for this thesis: it may be the case that the quires used by the clerks were sometimes bound into volumes during their clerkship (i.e. this is suggested by the end of NAS, CC8/2/5 where the clerk notes that the 'buke' has come to an end), and that others were not.

⁸⁰⁹ *Balfour's Practicks*, ii, 655-662.

CC8/2/2, and some of the early folios are certainly missing: CC8/2/1 ends on 14 April 1564, whilst CC8/2/2 begins on 1 May 1564.

These random gaps in the Registers have various consequences for the present analysis. Chief among them is that they render unreliable, or at the least conditional, any statements about the number of actions which failed to reach decret. It is not possible to establish which ‘incomplete’ cases were intentionally abandoned or resolved outside of the court, and the fact that the resolution of the action may have been recorded as a decret at the beginning of a damaged quire further compounds the problem and renders unknowable the outcome of ‘unfinished’ actions. The random gaps also interfere with some of the actions where statistics about the length of consistorial litigation can be obtained: in several instances, the decret for an action is extant, but there is no record of when the action started, despite the fact that various other diets from the same action were recorded.

Despite these shortcomings, various statistics have been compiled concerning the frequency of litigation, the gender of litigants,⁸¹⁰ the social status of litigants, the domicile of litigants, the length of litigation, the cost of litigation and the use of procurators. The raw data upon which following summaries are based have been included in Appendix II. The drawbacks of describing actions exclusively in terms of libels has already been noted, but in the following analysis of the frequency of litigation each action has been defined in terms of the intention of the pursuer as expressed in the libel. Actions concerning Freedom, Silence and Slander (when involving a promise of marriage) have been grouped together, whilst actions for Solemnization with Adherence have been included with those actions which sought Solemnization only. Where fractions are expressed as a percentage, the percentage has been rounded up or down to the nearest whole percentage, except in those instances when a fraction expresses itself precisely to a half percentage (i.e. 12.5%).

In §II, three main groups of data have been used for the statistics for frequency of litigation and gender of litigants. The first group is comprised of data from all consistorial litigation for April 1564 to June 1569, regardless of whether the action reached decret or not. The second group is comprised of data from all

⁸¹⁰ Where relevant, i.e. some actions did not necessarily fall in “woman v. man” or “man v. woman” categories, such as bastardy actions, where the gender of the defender had no bearing on the gender(s) of the pursuer(s).

consistorial decreets for the same period, whilst the third group is comprised of data from all consistorial decreets for the period from April 1564 to the winter of 1576/7.

The most striking features of the analysis in §II concerns the gender of litigants in actions for solemnization, and as such §III discusses some of the gender related features of these actions in more detail.

§IV considers the length of litigation of consistorial actions beginning between April 1564 and June 1569; draws together any evidence for the expenses of the plea from consistorial decreets pronounced between April 1564 and January 1576/7; and considers litigant's use of procurators for the period April 1564 to June 1569. §V considers the domicile and social status of litigants in consistorial litigation for the period April 1564 to June 1569.

§II

TABLE 1: FREQUENCY OF ALL CONSISTORIAL LITIGATION WITH GENDER OF LITIGANTS, APRIL 1564 – JUNE 1569.⁸¹¹

	frequency	GENDER OF PURSUER		
		female	male	proc. fisc. ⁸¹²
Freedom, Silence and Slander:	5	0	5	0
Solemnization ⁸¹³	27	23	2	2 ⁸¹⁴
Adherence:	19	14	4	1
Aliment:	3	2	1	0
Annulment:	11	6	3	2
Divorce for adultery:	57 ⁸¹⁵	28	29	0
Reduction of sentence of divorce:	8 ⁸¹⁶	5 ⁸¹⁷	2	1

⁸¹¹ Based on the data contained in Appendix II, A. Litigation over the fullfulment of the terms of marriage contracts (usually the payment of tocher goods) has not been analysed in this thesis.

⁸¹² i.e. those actions brought by the Procurator Fiscal of the Court of the Commissaries of Edinburgh.

⁸¹³ A few actions concerning solemnization *with* adherence have been included in this category.

⁸¹⁴ The two actions brought by the Procurator Fiscal were brought against men.

⁸¹⁵ *Thomsoun v. Lindesay* is not entirely certain.

⁸¹⁶ 5 pre-Reformation definitive sentences of divorce, 3 sentences of divorce pronounced by the Protestant Kirk.

⁸¹⁷ Note that the same woman brought the same action twice, since her opponent died, obliging her to pursue his heir.

Expenses ⁸¹⁸	1	1	0	0
Separation:	1	1	0	0
Tint:	3	0	3	0
Bastardy:	5	(n/a)		
Retrospective Declarator of Divorce:	1	(n/a)		
TOTAL:	141	80	49	6

TABLE 2: FREQUENCY OF CONSISTORIAL DECREETS WITH GENDER OF LITIGANTS, APRIL 1564 – JUNE 1569.⁸¹⁹

	frequency	GENDER OF PURSUER		
		female	male	proc. fisc. ⁸²⁰
Freedom, Silence and Slander:	5	0	5	0
Solemnization ⁸²¹	15	13	1	1
Adherence:	7	5	2	0
Aliment:	2	2	0	0
Annulment:	5	2	2	1 ⁸²²
Divorce for adultery:	18	10	8	0
Reduction of sentence of divorce:	2	2	0	0
Tint:	3	0	3	0
Bastardy:	1	(n/a)		
TOTAL:	58	34	21	2

⁸¹⁸ Which proceeded upon a decret of adherence.

⁸¹⁹ Based on the data contained in Appendix II, B.

⁸²⁰ i.e. those actions brought by the Procurator Fiscal of the Court of the Commissaries of Edinburgh.

⁸²¹ A few actions concerning solemnization *with* adherence have been included in this category.

⁸²² The action brought by the Procurator Fiscal was brought on behalf of a wife against her former husband.

TABLE 3: FREQUENCY OF CONSISTORIAL DECREETS WITH GENDER OF LITIGANTS, APRIL 1564 – JAN 1576/7.⁸²³

	frequency	GENDER OF PURSUER		
		female	male	proc. fisc. ⁸²⁴
Freedom, Silence and Slander: ⁸²⁵	16	2	14	0
Solemnization ⁸²⁶	52 ⁸²⁷	45	6	1
Adherence:	18	13	5	0
Aliment:	3	3	0	0
Annulment:	8	4	1	3 ⁸²⁸
Divorce for adultery:	73	38	35	0
Divorce for non-adherence:	1	0	1	0
Reduction of sentence of divorce:	2	2	0	0
Reduction of sentence of solemnization:	1	0	1	0
Tint:	3	0	3	0
Bastardy:	9	(n/a)		
TOTAL:	186	107	66	4

⁸²³ Based on the data contained in Appendix II, C.

⁸²⁴ i.e. those actions brought by the Procurator Fiscal of the Court of the Commissaries of Edinburgh.

⁸²⁵ 15 actions involving declarators of freedom and/or putting to silence; 1 action of slander involving an allegation of copula and promise of marriage.

⁸²⁶ A few actions concerning solemnization *with* adherence have been included in this category.

⁸²⁷ Including one action categorized as ‘solemnization and aliment’.

⁸²⁸ One of the actions brought by the Procurator Fiscal was brought on behalf of a wife against her former husband. The other two were brought against an allegedly married couple.

TABLE 4: FREQUENCY OF LITIGATION⁸²⁹

Action	All consistorial litigation 1564-1569	Consistorial Decrees 1564-1569	Consistorial Decrees 1564 - 1576/7
Freedom, Silence & Slander	05/141 (4%)	05/58 (9%)	16/186 (9%)
Solemnization (occasionally with Adherence)	27/141 (19%)	15/58 (26%)	52/186 (28%)
Adherence	19/141 (13%)	07/58 (12%)	18/186 (10%)
Aliment	03/141 (2%)	02/58 (3%)	03/186 (2%)
Annulment	11/141 (8%)	05/58 (9%)	08/186 (4%)
Divorce for adultery	57/141 (40%)	18/58 (31%)	73/186 (39%)

Table 4 above contains several obvious points of interest. Actions for Scottish Protestant divorce on the grounds of adultery were by far the most popular consistorial action brought before the Commissaries of Edinburgh. This type of action accounted for 40% of all actions pursued during the sample periods (1564-1569) and nearly 40% of all extant consistorial decrees pronounced between 1564-1576/7. Actions for solemnization of an irregular marriage were the next most frequent, accounting for almost a fifth of all actions pursued during the sample

⁸²⁹ The statistics offered in tables 1-3 are summarized in tables 4 & 5. Various miscellaneous actions have been excluded. Bastardy actions were of course an infrequent occurrence, actions for tint of tocher *et donations propter nuptias* were three a-typical actions which are discussed above, Chapter II § V. Similarly, actions for reductions of sentences of divorce pronounced by the medieval Church or the Protestant Kirk were dealt with in Chapter II, §IV, [i] & Chapter VI, [ii] respectively.

periods (1564-1569) and over a quarter of all extant consistorial decreets pronounced between 1564-1576/7. Actions for adherence were the next most frequent, accounting for around 15% of all actions pursued during the sample periods (1564-1569) and 10% of all extant consistorial decreets pronounced between 1564-1576/7. These three main types of action accounted for 73% of all consistorial litigation during the sample periods, and 77% of all extant consistorial decreets pronounced between 1564-1576/7. The three samples give a remarkably consistent picture.

TABLE 5: GENDER OF PURSUER

Action	All consistorial litigation 1564-1569		Consistorial Decreeets 1564-1569		Consistorial Decreeets 1564 - 1576/7	
	female	Male	female	male	Female	male
Freedom, Silence & Slander	0/5 (0%)	5/5 (100%)	0/5 (0%)	5/5 (100%)	2/16 (12.5%)	14/16 (87.5%)
Solemnization (occasionally with Adherence)	23/27 (85%)	2/27 (7%)	13/15 (87%)	1/15 (7%)	45/52 (86%)	6/52 (12%)
Adherence	14/19 (74%)	4/19 (21%)	5/7 (71%)	2/7 (29%)	13/18 (72%)	5/18 (27%)
Aliment	2/3 (67%)	1/3 (33%)	2/2 (100%)	0/2 (0%)	3/3 (100%)	0/3 (0%)
Annulment	6/11 (55%)	3/11 (27%)	2/5 (40%)	2/5 (40%)	4/8 (50%)	1/8 (12.5%)
Divorce for adultery	28/57 (49%)	29/57 (51%)	10/18 (56%)	8/18 (44%)	38/73 (52%)	35/73 (48%)

Table 5 above also provides several obvious insights. The statistics for actions for divorce for adultery are remarkably clear, with the pursuer in any given action just as likely to be female as male. This equality in Scots law has already been noted for a later period,⁸³⁰ and had its origins in the Canon law.⁸³¹ Scottish practice was in marked contrast to English: as Sellar has pointed out “only in 1923 were the sexes placed on an equal footing in English law”.⁸³²

⁸³⁰ The Lord Advocate, when pressed by a select committee in 1844 concerning the number of divorce actions brought by wives in Scotland stated that “I would say they are about as numerous as the others” [i.e. those brought by husbands] (Sellar, ‘Canon Law and Scots Law’, 74).

⁸³¹ Scanlon, ‘Husband and Wife’, 71.

⁸³² Sellar, ‘Canon Law and Scots Law’, 76.

Concerning actions involving promises of marriage it is clear that the pursuer was almost always male when it came to being declared free of a promise of marriage, or silencing a woman who was making allegations of promise of marriage. Conversely, the majority (85-87%) of actions for solemnization of irregular marriage, and a majority (71-74%) of actions for adherence were brought by women.

The statistics concerning promise of marriage are highly suggestive of the problems facing the late medieval Church and its policy of countenancing 'non-regular' marriage. Indeed, it was quite clear at the Council of Trent that the Catholic Church was in fact perpetuating a social custom which it no longer needed to countenance nor accommodate. Accordingly, the Tridentine fathers chose to make 'clandestinity', in the sense of 'non-regularity', an impediment to marriage, thereby giving the Canon law a strong propensity towards annulling all marriages contracted outside of the prescribed rituals of banns and solemnization. Yet in Reformation Scotland, the decrees of the Council of Trent were not accepted,⁸³³ and reasonably so from the Protestant perspective, given the various pronouncements of that Council concerning Protestant doctrine and indeed Protestant divorce.⁸³⁴ Yet nevertheless, the evidence concerning the gender of litigants in actions concerning 'non-regular' marriage at least *suggests* that the failure in Scotland to reform the law of marriage disadvantaged or failed to protect potentially vulnerable women. The extent to which this suggestion is true can be gauged by a more detailed consideration of actions for solemnization, where 86% of pursuers were female.

⁸³³ "unhappily for the simplicity of the Scots law of marriage" (Ireland, 'Husband and Wife: Post-Reformation', 86).

⁸³⁴ i.e. *Decrees of the Ecumenical Councils*, ii, 754-755.

§III
ANALYSIS OF ACTIONS FOR SOLEMNIZATION:
PROBATION AND OUTCOMES⁸³⁵

Between April 1564 and January 1576/7, the Commissaries of Edinburgh pronounced 52 decreets as a direct result of actions brought for the solemnization of marriage. Of these 52 actions 6 are sufficiently exceptional that they need to be excluded from a general analysis of the outcomes of the remaining 46 actions for solemnization. In two of the excluded cases, the clerk's entry in the Register of Acts and Decrees was wanting, and as such, whilst the tenor of the libel is known, the Commissaries' judgement was not recorded.⁸³⁶ *Ormiston v. Black* involved a strong likelihood of collusion, whilst *Dalmahoy v. Menteith* certainly involved perjury on the part of the defender.⁸³⁷ In *Kinross v. Loch & Weyland*, the Procurator Fiscal actually failed ('succumbed') in probation. Finally in *Goddiskirk v. Tenent* the action shifted into an action for divorce on the ground of adultery, despite that fact that the libel held good.⁸³⁸

Of the 46 actions thus remaining the pursuer was female in 41 instances (89%) and male in the remaining 5 (11%). This division of litigation between female and male can be further broken down into the means by which each action was resolved together with its outcome. In most cases, actions for solemnization could only be resolved by admitting the libel to the pursuer's probation. In these instances

⁸³⁵ Based on data in Appendix II, D (1), (2) and (3), which provides the full citations for the actions discussed below.

⁸³⁶ *Walker v. Kay* and *Danlielstoun v. Suyntoun*.

⁸³⁷ Both cases are discussed below presently.

⁸³⁸ This action is discussed in more detail above, Chapter IV, §II, [i].

the pursuer had two options only: either to attempt to lead probation themselves, through recourse to witnesses and written evidence, or to refer the libel to the oath of the defender. If the pursuer attempted to lead probation themselves, they could either succeed or succumb in probation, whilst if they referred the matter to the defender's oath, the defender could either grant or deny those points referred to them.

OUTCOME WHEN PURSUER MALE

Probation:	3	succeeded:	1	succumbed:	2
Oath:	2	granted:	0	denied:	2
Total:	5	solemnize:	1	assoilized:	4

OUTCOME WHEN PURSUER FEMALE

Three cases out of the 41 cases remaining where the pursuer was female need to be set aside. In *Greve v. Eclis* Katherine Greve failed to appear in court and pursue her action, leaving the Commissaries with no option but to assoilize the defender. In *Arneill v. Williamsons* the defender 'confessed' that the libel was true, seemingly before the libel was formally referred to his oath, the Commissaries decerning him to solemnize the union accordingly. In *Kincaid v. Fairholme* the pursuer libelled *sponsalia per verba de futuro* only, with no subsequent *copula*. The defender readily granted the promise, but intimated that he no longer wished to marry the pursuer, and the Commissaries duly assoilized him. The remaining 38 actions break down further as follows:

Probation:	20	succeeded:	8	succumbed:	12
Oath:	18	granted:	1	denied:	17
Total:	38	solemnize:	9	assoilized:	29

As can be seen, only in one action (*Richartsoun v. Aikin*) did the defender grant the promise (and as it happened the *copula*) when the matter was referred to his oath. Of the 17 denials of promise on oath, none of them can be demonstrated to have been perjury. Yet closer analysis of these instances as well as the 12 cases where the

pursuer succumbed in probation of the promise of marriage reveals an unhealthy inclination of the unreformed law against the interests of women which must have made a strong case for reform. Whilst there is direct evidence on one occasion only that the Commissaries were convinced that a male defender had committed perjury, they cannot have been reasonably satisfied that on the one hand so many woman tried to prove ‘non-regular’ marriages before them, and on the other hand so many failed. That this situation was allowed to continue suggests that the Commissaries believed that male Scottish litigants continued to take their great oaths seriously.

Those actions where a promise was denied on oath may be broken down further as follows:

Denied on oath: 17	<i>Copula</i> also libelled:	16	Issue libelled: 10
	<i>Copula</i> explicitly granted:	6 +1 ⁸³⁹	Issue libelled:
3+1			
	<i>Copula</i> explicitly denied:	1	Issue libelled: 1
	<i>Copula</i> not mentioned:	8	Issue libelled: 5
Succumbed: 12	<i>Copula</i> also libelled:	11	Issue libelled: 5

Quite clearly then, in only one instance (i.e. 1/17) where promise of marriage was denied on oath, was the promise *per verba de praesenti*.⁸⁴⁰ In every other instance (94%) the libel was *sponsalia per verba de futuro subsequente copula*, and in 62.5% of these cases it was libelled that the non-regular marriage had resulted in the procreation of children. Of course, it cannot be taken for granted that the children in the libel belonged to the defender,⁸⁴¹ and in many instances this point of the libel was not the subject of judicial pronouncement. In 6 cases the defender granted *copula* on oath, whilst denying the promise, in one case denied the *copula* explicitly, and in a further 8 cases no clear statement regarding the alleged *copula* was recorded. Of course, the material point was the promise of marriage, without which *copula* alone was fornication.

⁸³⁹ In 6 instances the copula was granted on oath, but in a seventh, the copula had already been granted by the defender before the Kirk (*Clerk v. Auchinlek*).

⁸⁴⁰ *Carpentyne v. Syme*.

⁸⁴¹ It is unlikely that the issue were fictitious, since the existence of children could readily be verified: the problem was one of proof of parentage.

In 3 of these 6 cases where irregular marriage with issue was libelled, the defender, whilst under oath, denied the promise but granted the *copula*. In two of these cases the alleged issue of the union had in fact been baptized in the name of the defender, which naturally inclined the defender to grant the *copula*, thereby acknowledging his children, since the verity of the oath could subsequently be verified by the Procurator Fiscal through recourse to the parish minister who had preformed the baptism(s). In *Barclay v. Ewiot* Helene Barclay plainly libelled that the defender had “begat vpoun hir ane sone baptezit in his name and at his command callit Robert Ewiot”. Similarly in *Andersoun v. Gudlad* Marion Anderson libelled that she and the defender had “had carnall daill togidder be the space of diuers zeiris be procreatioun of tua wemen children the ane thair of callit Helene Gudlad and the vther callit Katherine bayth baptizat in the said Daudis name”. On both occasions the women alleged that copulation had proceeded upon a promise of marriage *per verba de futuro*. The men, in denying the promises of marriage on oath, exposed their acknowledged lovers to the approbation of Kirk and community as whores, and compounded the precarious situation of their offspring by adding the stigma of illegitimacy. This seems at least dishonourable, since even if the promises of marriage were not of verity, the men could still have married the women they had procreated children with, saving them from the discipline of the Kirk, whilst legitimating their children *per subsequens matrimonium*. Similar conclusions apply in the third case, *Wilsone v. Stowman*, where, despite the absence of the mention of any public acknowledgement of the couples’ daughter by the defender at baptism, the defender nevertheless granted the *copula*. It seems somehow strange to grant *copula* with the subsequent issue, whilst simultaneously bastardizing that issue.

The cases where the pursuer succumbed in probation also yield further points of interest under closer scrutiny. In 8 of the 12 instances, it was libelled that the promise of marriage had been before ‘divers famous witnesses’ or the equivalent, or that the promise had subsequently been acknowledged before some such group of persons.⁸⁴² Naturally, the expectation was that the famous witnesses would be forthcoming and would depone on oath, and as such it was reasonable that the pursuers attempted to prove their libel without referring to the defender’s oath. Yet in 4 of the 12 instances, the libel makes no mention of witnesses to the promise, which

⁸⁴² For ‘famous witnesses’ see above, page 174, n. 137.

suggests that on these occasions the pursuer erred in not referring the matter to the defender's oath.⁸⁴³ In 2 of the 8 instances it seemed reasonable for the pursuer to have attempted probation by witnesses, since the baptism of the issue resulting from the couples' *copula* had been mentioned explicitly. Thus in *Ker v. Williamsoun* the defender had allegedly refused "to present his said barne to the kirk to be baptissat," which suggests that the defender had been alive to the legal consequences of such a public acknowledgment of parentage: the decret relays simply that the pursuer succumbed in probation without giving further particulars. In *Bischope v. Fynlaw* it was alleged that the promise of marriage had been made "in presence of diuers famous witneses" and that the issue of their *copula* "was baptest in his [the defender's] name at his desire callit Thomas Fynlaw". There must have been a reasonable chance of proving the non-regular marriage libelled, since if true, the pursuer's legal position could only have been augmented by the production of a marriage contract and an instrument made by a notary present at the exchange of promises. Nevertheless, the pursuer succumbed in probation, although it is unclear why.

Whilst it seems likely that early Scots consistorial law, in that it retained unreformed the medieval Canon law approach concerning 'non-regular' marriages, rendered woman more vulnerable to being abandoned by their alleged husbands, to the detriment not only of themselves but also their illegitimate children, there is only one case in which it is certain that a man perjured himself on oath by denying a promise of marriage, and one other in which a woman passed from her libel, the Commissaries suspecting collusion.

In the first case, *Dalmahoy v. Menteith*, the defender was assoilized from an allegation of promise of marriage with subsequent *copula* by "his declaratioun gevin thairupoun being with consent of the said Marioun [pursuer] referrit thairto". Nevertheless, the pursuer's procurator, Master Thomas Weston immediately "protestit that the said decret be nocht preiudiciall to oure souerane Lady anent the actioun quhilk hir grace may haue aganis the saidis parteis⁸⁴⁴ and requirit Maister Henrie Kinross procuratour fischale to oure soverane Lady to insist in persute thairof".⁸⁴⁵ Within a month, the Procurator Fiscal brought an action of adherence

⁸⁴³ *Bell v. Wardroper, Denis v. Brysoun, Reid v. Romanois, Reidho(ch)t v. Robesone.*

⁸⁴⁴ The earliest extant [but not the initial] diet is NAS, CC8/2/2, fo. 21v, 14 May 1565.

⁸⁴⁵ NAS, CC8/2/1, fo 424r, 7 April 1565 [note: 1564 in Register, but this is an error].

against the couple, appointing Master Thomas Weston as his deputy.⁸⁴⁶ As part of his defence against this second process, Menteth produced “ane decret absolutour fra the said Marionis libell of adherence”, by which may be understood the decret pronounced in the earlier action of solemnization.⁸⁴⁷ Unfortunately, the outcome of the action is not known, since if a decret was pronounced it has been lost in Danelourt’s Registers.⁸⁴⁸ Yet despite this frustration, the Commissaries of Edinburgh and their Procurator Fiscal must have had serious grounds for believing that Menteth had perjured himself.

In the second case, *Ormistoun v. Blak*, the pursuer alleged promise of marriage *per verba de futuro* following which, in a rare first person narration, Beatrix Ormiston alleged that “I gaif to the said John the vse of my bodie quhilk he hes possessit at all tymes at his pleser sensyn thairby hes begottin me with child”. Nevertheless, the Commissaries assoilized the defender from the allegation because having admitted the allegation to Beatrix’s probation, she compeared before the Commissaries and declared that “scho had na probatioun to deduce thairvpoun & wald pas to⁸⁴⁹ the said actioun”. The Commissaries suspected collusion between the litigants and therefore “refferrit the said promeis of mariage to the Johnnis⁸⁵⁰ aith quha being suorne denyit the same simpliciter as was cleirlie knawin to the saidis Commissaris”. Thus, whilst the defender was assoilized on the strength of his oath, the Commissaries suspected that the pursuer had been persuaded to connive at such an outcome.⁸⁵¹

The actions for solemnization brought before the Commissaries during the period under consideration illustrate one of the shortcomings of the late medieval Canon law and its continued countenance in early Scots consistorial law. Whilst

⁸⁴⁶ i.e. NAS, CC8/2/2, fo. 21v, 14 May 1565, *Procuratour Fischale v. Menteith & Dalmahoy*.

⁸⁴⁷ NAS, CC8/2/2, fo. 27r, 18 May 1565. Actions for solemnization could also be classed as actions for adherence, for example when the defender was also not only refusing to solemnize a union, but was refusing to live with the spouse to whom they were non-regularly married (see NAS, CC8/2/1, fo. 250r, 27 November 1564, *Scott v. Robesoun*, being a decret of solemnization next to which the clerk had written ‘Adherence’).

⁸⁴⁸ The two year lacunae occasioned by Danelourt’s clerkship began several folios after the last know interlocutor (NAS, CC8/2/2, fo 134v) pronounced in the action of adherence brought by the Procurator Fiscal.

⁸⁴⁹ *fra* would make more sense in the context, but is not in the MS.

⁸⁵⁰ No antecedent *said*.

⁸⁵¹ NAS, CC8/2/7, fo. 60v, 9 February 1574/5.

there are few explicit examples of defenders perjuring themselves or using other unjust means to extricate themselves from non-regular marriages, that fact that so many actions for solemnization were brought by women and that so many failed does suggest that the law required reform. That is not to say that the male litigants involved in these cases were necessarily knaves or that the women involved all were trying to ensnare innocent men into marriage. Rather, it is surprising that the Commissaries remained confident that justice was being done.

§IV
 LENGTH OF LITIGATION, EXPENSES OF THE PLEA
 AND EMPLOYMENT OF PROCURATORS

[i] LENGTH OF LITIGATION IN EXTANT CONSISTORIAL ACTIONS,
 BEGINNING BETWEEN APRIL 1564 AND JUNE 1569

From the data available, where both the date of the initial diet and the date of decret are known, the following statistics may be offered.⁸⁵² The length of litigation is given in days.⁸⁵³

Freedom and Silence	1,1,12
Solemnization	416 , 3, 1, 113, 1,1, 195 , 42, 47, 58, 90, 222, 218, 239, 43
Adherence	421, 300 , 676, 1
Aliment	1,1
Annulment	47, 547, 169, 113
Divorce for adultery	31, 698, 300, 310 , 248, 63, 72, 434, 107, 10, 374 , 31, 306
Bastardy	429
Tint of Tocher etc	218, 239, 43
Reduction of Kirk's sentence of divorce	121

⁸⁵² The data here summarized may be found in Appendix II, E.

⁸⁵³ Inclusive of the first and last day of the process; Scotland then using the Julian calendar, February having 29 days in 1564 (*Calendar of State Papers, foreign series, of the reign of Elizabeth*, vii, 67) and 1568. Actions highlighted in bold are those which encompassed the period of severe plague during the winter of 1568/9.

Reduction of pre-
Reformation sentence
of divorce 1406

What is at once clear is that actions involving freedom, silence, solemnization, adherence and aliment all had the potential to be resolved at a single diet. Where terms of probation were required, litigation could clearly take some time. Actions for solemnization of an irregular union took 113 days on average, or 83 days if the two actions affected by the plague during the winter of 1568/9 are excluded. Actions for Scottish Protestant divorce for adultery were only once resolved within a month, and took 230 days on average, or 209 days in the two ‘plague’ actions are excluded. For all the consistorial litigation above, the average number of days for a process to be led was 200,⁸⁵⁴ whilst the average excluding the action for the reduction of the pre-Reformation sentence of divorce (being somewhat atypical at 1406 days), was 174 days.⁸⁵⁵

Taken all together there were 47 actions during the sample period whose length of litigation is known. Of these the following may be said:

	total	cumulative total
Resolved in one day:	8 (17%)	8 (17%)
Resolved in 31 days or less:	5 (11%)	13 (28%)
Resolved in 3 months (92 days) or less:	9 (20%)	22 (47%)
Resolved in 6 months (183 days) or less:	5 (9%)	27 (57%)
Resolved in 1 years or less:	11 (24%)	38 (81%)
Resolved in two years or less	8 (17%)	46 (98%)

These statistics demonstrate that even for complex litigation the Commissaries of Edinburgh got through business at a reasonable rate. It is difficult to ascertain if this was an improvement on the record of the Officials’ Courts. Although Ollivant estimated “an average duration per contested action of between 14 and 35 days”, thereby bringing into question the accuracy of Lindsay’s satirical criticisms, he still

⁸⁵⁴ 9416 days/47.

⁸⁵⁵ 8013 days/46. If the five ‘plague’ actions are also excluded, the average is further reduced to 157 days (i.e. 6418 days/41).

thought these “academic figures should be treated with caution”.⁸⁵⁶ This caution is well advised, since the records had furnished Ollivant with very few examples of case where the initial and final diet were known. As such, he had had recourse to estimating the average number of diets per case and the average number of days between each diet, which method generates figures of limited value.

It is difficult to gauge popular attitudes towards the Commissaries of Edinburgh. Helmholtz has quite rightly drawn attention to “the grousing that is the common lot of lawyers in most ages” together with the fact that “it is rare for courts of any kind to be the object of affection among the populace”.⁸⁵⁷ As such, the question of popularity can be an awkward issue: in the British context the leaven of *Mr. Sentimentality*⁸⁵⁸ still may be regularly observed among the middle classes. Yet despite the fact that data concerning the length of litigation in consistorial actions before the Commissaries is not in itself conclusive, there is ample evidence from the Registers of the Acts and Decrets that the Commissaries of Edinburgh were indeed popular with litigants of humbler means where small debt actions were concerned. Thus a cursory analysis of CC8/2/1 demonstrates that fleshers, cordinars, baxters,⁸⁵⁹ cowpers, cutlers, “bonat” makers,⁸⁶⁰ listars,⁸⁶¹ tailors,⁸⁶² apothecaries,⁸⁶³ surgeons,⁸⁶⁴ merchants, burgesses, farmers, gardeners,⁸⁶⁵ smiths,⁸⁶⁶ and a mariner⁸⁶⁷ all used the

⁸⁵⁶ *Court of the Official*, 145.

⁸⁵⁷ Helmholtz, *Ecclesiastical Jurisdiction*, 301.

⁸⁵⁸ Trollope’s lampoon against Dickens.

⁸⁵⁹ NAS, CC8/2/1, fo. 285r, *Hog v. Wauchop*.

⁸⁶⁰ NAS, CC8/2/1, fo. 151r, *Young v. Litill*.

⁸⁶¹ That is to say dyers, NAS, CC8/2/1, fo. 211r-v, *Hoppringle v. Meldrum*;

⁸⁶² NAS, CC8/2/1, fo. 220r, *Broun v. Sundrie Personis*; fo. 269v, *Patersoun v. Sundrie Personis*.

⁸⁶³ NAS, CC8/2/1, fo. 175v, *Bog v. Sundrie Personis*; fo. 203r, *Diksoun v. Sundrie Personis*; fo. 231r-v, *Diksoun v. Sundrie Personis*; fo. 285r, *Diksoun v. Ramsay*.

⁸⁶⁴ NAS, CC8/2/1, fos. 188v-189r, *Libertoun (barbour) v. Sundrie Personis*, including three payments for mending and curing men’s legs (4 merks, 30s. and 10s. respectively) with 5s. for mending a fourth man’s arm; also CC8/2/1, fo. 192r-v, *Craig v. Sundrie Personis*, including sums for the “curing and mending of [a defender’s] wife” and also “for mending of ane boy”; fo. 228v, *Hardy (chirurgiane) v. Allaine*; fo. 268v, *Gray (chirurgiane) v. Falcone*, for £5 for mending and curing the defenders shoulder and fingers; fo. 382r, *Wentoun v. Walker* – Wentoun was not called a surgeon explicitly, but sought 19s. in total for “heling the heid of George Williamssonis”.

⁸⁶⁵ NAS, CC8/2/1, fo. 161v, *Methesoun v. Hammyltoun*.

⁸⁶⁶ i.e. NAS, CC8/2/1, fo. 213r, *Hendirsoun v. Sundrie Personis*, the pursuer being a “loksmyth”, one of the defenders being a “buke bindar” (Robert Lekprevik).

⁸⁶⁷ NAS, CC8/2/1, fo. 367v, *Skeith, mariner in Leyth v. Galloway*.

court regularly, seeking the delivery or return of, or payment for, items such as “quhingaris”,⁸⁶⁸ “ane hand aix”,⁸⁶⁹ a chain mail coat,⁸⁷⁰ “ane Jedbur^t staff”,⁸⁷¹ “daggis”,⁸⁷² oxen,⁸⁷³ sheep,⁸⁷⁴ cows,⁸⁷⁵ hens, rabbits,⁸⁷⁶ horses,⁸⁷⁷ wool and fleeces, meat, wine,⁸⁷⁸ ale,⁸⁷⁹ bread,⁸⁸⁰ cheese,⁸⁸¹ grains, cereals and legumes of all descriptions, timber,⁸⁸² bolls of “dung aik bark”,⁸⁸³ hides,⁸⁸⁴ gold,⁸⁸⁵ silver, “sylver spvnis”,⁸⁸⁶ francs,⁸⁸⁷ ducats, nobils, drugs,⁸⁸⁸ candles, coals, cloths, cloaks, bonnets,⁸⁸⁹ doublets,⁸⁹⁰ shoes, wainscot pannelling,⁸⁹¹ iron work,⁸⁹² and even the

⁸⁶⁸ NAS, CC8/2/1, fo. 120r, 25 July, 1564, *Ka v. Thomson*.

⁸⁶⁹ NAS, CC8/2/1, fo. 379r, *Megot v. Craig*.

⁸⁷⁰ NAS, CC8/2/1, fo. 121v, 26 July, 1564, *Cor v. Lo^{rs}*.

⁸⁷¹ NAS, CC8/2/1, fo. 23r-v, 16 May, 1564, *Auld v. Sundrie Personis*.

⁸⁷² NAS, CC8/2/2, fo. 221r, 5 December, 1567, *Freich v. Spens*. ‘Daggis’ were heavy pistols or hand guns.

⁸⁷³ NAS, CC8/2/1, fo. 28r, 19 May, 1564, *Chirnside v. Chirnsyde* for “ane litill black pleuch ox”. Also fo. 187v, *Moffett v. Frog* for payment for two oxen; fo. 401r, *Broun v. Hendirsoun*.

⁸⁷⁴ NAS, CC8/2/1, fo. 361v, *Craig v. Megot*, seeking monies owed for “iiij wedderis”.

⁸⁷⁵ NAS, CC8/2/1, fo. 327v, *Sam(per)soun v. Ingoun*.

⁸⁷⁶ NAS, CC8/2/1, fo. 395r, *Bellenden v. Auchmowtie*, “twentie tua schillingis for certane cunnynngis cost and ressavit”.

⁸⁷⁷ NAS, CC8/2/1, fo. 221v, *Duncane v Duncane*, 5 marks for “ane quhite meir”; fo. 232r, *Cuthill v. Patersoun*, 9 marks for “ane quhite horss”; fo. 236v, *Aitkin v. Andersone*; fo. 385r, *Aikman v. Wilsoun*, 30s. for “ane quhite meir”.

⁸⁷⁸ For example, NAS, CC8/2/1, fo. 190r, *Murdestoun v. Smyth*, for £13 owing for “sevin punscheonis of wyne”, immediately followed by *Smyth v. Murdestoun*, for delivery of “xij gallonis of wyne”, *Murdestoun* being assoilized since the 12 gallons were “lekcagewyne”; fo. 192v, *Gilbert v. Sundrie Personis*, makes mention of monies owed for the delivery of ane “punscheoun of dreggis”; fo. 202r, *Coway v. Mortoun*, “ane tvn of claret wyne”; fo. 361v, *Vduard v. Marioribankis*;

⁸⁷⁹ NAS, CC8/2/1, fo. 192v, *Cosair v. Hesalhop*.

⁸⁸⁰ NAS, CC8/2/1, fo. 194v, *Newtoun v. Sauchy & Hintoun*.

⁸⁸¹ NAS, CC8/2/1, fo. 271r, *Creichtoun, Vicar of Innerwik v. Sundrie Personis*.

⁸⁸² NAS, CC8/2/1, fo. 192v, *Gilbert v. Sundrie*.

⁸⁸³ Presumably for tanning, NAS, CC8/2/1, fo. 258r, *Godrell v. Sandersoun and Broun*. Indeed, fo. 266r, *Goss v. Sundrie Personis*, payment for “barkit leddr” was sought.

⁸⁸⁴ NAS, CC8/2/1, fo. 421v, *Huntar v. Michell* (cordinar), for £5/15s being the price of 14 “barkit hydys”.

⁸⁸⁵ i.e. NAS, CC8/2/1, fo. 215r, *Wilsoun v. Wilsoun*, desiring the delivery of “ane signet of gold”.

⁸⁸⁶ NAS, CC8/2/1, fo. 179r, *Stakar v. Fergusone*.

⁸⁸⁷ NAS, CC8/2/1, fo. 299r, *McGauchane v. Lindesay*.

⁸⁸⁸ NAS, CC8/2/1, fo. 175v, *Bog v. Sundrie Personis*; fo. 203r, *Diksoun v. Sundrie Personis*.

⁸⁸⁹ NAS, CC8/2/1, fo. 178v, *Dik v. Robesoun*. The “blak bonet” had cost 14 shillings. The litigants had registered an act to this effect in the “court buks of Edinburgh”, but it having been subsequently deleted, Robeson was still willing to pay the sum.

monies owing for the hire of “ane fedder bed”.⁸⁹³ Whilst these were not ‘consistorial’ actions, they occurred in the same court before the same judges and strongly suggest that the Court of the Commissaries of Edinburgh was not commonly held to be a hotbed of procrastinating judges and shysters, stringing out litigation for sordid gain.

Within this general context of ‘popularity’, the Commissaries’ record in lengthier actions appears more reasonable. Half of the consistorial actions analysed above were despatched within 3 months and the majority within a year. In addition, for every consistorial action that lasted over a year, one was despatched in one day (using summary procedure and relying on probation by oath, as was the case, it may be noted, in most small debt actions). It is interesting to note that 57% of consistorial actions were resolved within 6 months (183 days), whilst the average length of litigation was around six months (174 days, or 200 with the inclusion of the atypical action of reduction noted above). On the face of it these figures seem quite reasonable given that the Commissaries employed the high standards of proof required by the Romano-canonical procedure in the examination of witnesses and documents, and given that they had to summon and examine witnesses, litigants and ‘havers’ from all over the realm: the problems attending travel in early modern Scotland, especially during the winter months should not be underestimated.⁸⁹⁴ It should also be born in mind that the period under consideration included the winter of 1568/9 during which Edinburgh suffered one of the worst outbreaks of plague in its history.⁸⁹⁵ That the Commissaries of Edinburgh had been commissioned with a national jurisdiction in all consistorial matters was ambitious; that they administered it efficiently is remarkable.

⁸⁹⁰ NAS, CC8/2/1, fo. 326v, *Andersoun v. Hammyltoun*, defender to deliver “ane dowblat of poildany [cloth of high Dutchland, *DOST*, VI, 29, ‘Polonia’] extending to sex quarteris with ane frenche blak bonat” or else 30s.

⁸⁹¹ NAS, CC8/2/1, fo. 43v, 5 June, 1564, *Birny v. Gourlay*; fo. 281v, *Rynd v. Kinloch*, “wanscot burdis”.

⁸⁹² NAS, CC8/2/1, fo. 361r, *Smyth v. Danyelstoun*. £5/4s/6d for “irne wark”.

⁸⁹³ NAS, CC8/2/1, fo. 136v, 3 August, 1564, *Todrik v. M^cGawchane*. Also unusual was CC8/2/1, fo. 220r, *Jak v. Kiltra* for £12 owing for the fostering of a child for two years; fo. 268v, *Flakar v. Fergusoun*, for “ane pot of brass weyand half ane stane”.

⁸⁹⁴ In *Dougalsoun v. Kirkpatrick* the pursuer had the greatest difficulty reporting a commission which had been directed to the Commissary of Wigtown on account of the “continewale storme of wedder notourlie knawin to the saidis commissaris” on account of which the pursuer had not had “fair access to this burgh [i.e. Edinburgh]” (NAS, CC8/2/1, fo. 380r, 5 March 1564/5).

⁸⁹⁵ J.F.D. Shrewsbury, *A History of Bubonic Plague in the British Isles* (Cambridge: Cambridge University Press, 1971), 206-209.

[ii] EXPENSES OF THE PLEA

The instructions of 12 March 1563/4 given to the Commissaries of Edinburgh by the Lords of Council and Session stated “that all expensis be taxt and insert in the principal decrete, or sentence, and the precept to be direct out, for execution of the sentence, beirand to poind, als weill for the saidis expensis, as for the principal sowme”.⁸⁹⁶ Whilst this instruction was likely directed at decreets pronounced in small debt actions, it is frustrating that its principle was not regularly extended to consistorial decreets. Out of the 186 extant consistorial decreets pronounced between the appointment of the Commissaries and the winter of 1576/7 only eight (less than one in twenty) recorded the expenses of the plea, whilst a further two noted that a party had been assoilized from them.⁸⁹⁷ Among these eight actions three were actions for Scottish Protestant divorce on the grounds of adultery, four were actions of bastardy and one was an action for solemnization. In the three divorce actions the expenses of the plea (in Scots) were 10 marks (£6/13s/4d),⁸⁹⁸ £4⁸⁹⁹ and 40 marks (£26/13s/4d).⁹⁰⁰ In the four bastardy actions the expenses of the plea were £10,⁹⁰¹ £12,⁹⁰² £12⁹⁰³ and £60.⁹⁰⁴ In the action for solemnization the expenses of the plea were £5.⁹⁰⁵

Although the sample group is small, taken all together this data indicates that the average expense of plea was £17/-/1d Scots.⁹⁰⁶ If the atypical sum of £60 is

⁸⁹⁶ *Balfour's Practicks*, i, 658, item xii.

⁸⁹⁷ The latter two cases were NAS, CC8/2/3, fos. 287v-288r, 28 April 1569, *Murray v. Symson* and NAS, CC8/2/8, fos. 236v-237r, 21 July 1576, *Murray v. Bruce*. In the Courts of the Officials a diet *ad taxandum* could be set followed the pronouncing of sentence “but this does not always appear nor, when it does, do we always find that the actual sum was written down” (*Court of the Official*, 117).

⁸⁹⁸ NAS, CC8/2/3, fo. 25r-v, 5 May 1568, *Makcanzie v. Makgillechallum*.

⁸⁹⁹ NAS, CC8/2/3, fo. 9v, 27 April 1568, *Wrycht v. Drippis*.

⁹⁰⁰ NAS, CC8/2/6, fos. 445r-446v, 22 July 1574, *Drummound v. Campbell*.

⁹⁰¹ NAS, CC8/2/4, fos. 167v-168v, 28 February 1569/70, *Carnis v. Kennedye*.

⁹⁰² NAS, CC8/2/4, fos. 76v-77v, 15 November 1569, *Mortoun v. Mortoun*.

⁹⁰³ NAS, CC8/2/4, fos. 272r-273r, 27 April 1570, *Dury & Lummisden v. Cokburne*.

⁹⁰⁴ A summons of error had been raised before the Lords of Session for the reduction of a retour proceeding upon a breve of inquest, on the grounds of bastardy, that question being remitted to the Commissaries of Edinburgh (NAS, CC8/2/8, fos. 259v-260r, 31 July 1576, *Bartane v. Richesoun*).

⁹⁰⁵ NAS, CC8/2/8, fos. 154v-155r, 15 May 1576, *Denis v. Brysoun*.

⁹⁰⁶ i.e. £136/6s/8d divided into eight equals £17/0s/1d (with a bodle left over).

omitted, the more reasonable average of £10/18s/1d is arrived at.⁹⁰⁷ Yet near £11 was still a hefty sum by the standards of the day, and certainly not to be endured by poor litigants.⁹⁰⁸

Yet where the expenses of the plea were recorded for relatively complex litigation, they were usually substantial, even in non-consistorial actions. For example in an action for the reduction of a decret pronounced by the Commissary of Glasgow concerning a marriage contract, the pursuers were awarded £10 expenses of the plea,⁹⁰⁹ whilst in an action before the Commissaries of Edinburgh concerning the payment of a dowry, the defender was ordained to pay the tocher (£40) and 8 marks (£5/6s/8d) expenses of the plea.⁹¹⁰ These figures are similar to those mentioned above.

It is difficult to know if litigants felt overwhelmed by such costs. For contrast, it may be noted that the expenses of the plea in summary actions for small debts were often noted. Here the expenses of the plea clearly made the court accessible, being between 2 shillings⁹¹¹ and rising to around 8s/4d,⁹¹² with 4 to 6 shillings being very common.⁹¹³ On occasions when a number of persons were pursued in the same action the expense of plea could be divided between the defenders.⁹¹⁴ Since litigants

⁹⁰⁷ i.e. £76/6s/8d divided into seven equals £10/18s/1d (with one penny left over). This seems very high compared to the limited figures offered by Ollivant for the Officials Court in the 1540s and '50s, of between 19 to 50 shillings (*Court of the Official*, 147). Sellar has noted the cost of divorce actions in Scotland in 1843 (see 'Canon Law and Scots Law', 75).

⁹⁰⁸ £10 was the entire sum paid to John Brown, keeper of the seals of the commissariat of Edinburgh for his half-yearly stipend (NAS, CS4/6, 'Accounts of the Collectors of the Quots 1566-1567', fo. 6v).

⁹⁰⁹ NAS, CC8/2/7, fos. 106v-108v, 22 March 1574/5, *Kincaid v. Striviling*.

⁹¹⁰ NAS, CC8/2/1, fo. 165r, 21 August 1564, *Myllar v. Nicole*.

⁹¹¹ NAS, CC8/2/1, fo. 66r, *Inglis v. Wedderspyne*, 2s; fo. 72r-v, 21st June, 1564, *Andersoun v. Lowrestoun*, 32 d in this case.

⁹¹² NAS, CC8/2/1, fo. 72r, 21 June, 1564, *Smyth v. Bonkill*. 8 shillings or more was fairly unusual - this action had involved the production of an act registered between the litigants, which undoubtedly increased the costs incurred by the pursuer. NAS, CC8/2/1, fo. 66r-v, 19 June, 1564, *Hoppringle v. Hoppringle*, expense of pley 8 shillings; fo. 147r, 10 August 1564, *Myllar v. Drummound*, the exceptional sum of 13s/4d was awarded to the pursuer for the expense of pley, but the sum of £40 was involved and the defender had clearly defaulted payment several times and broken his pledge and oath. NAS, CC8/2/1, fo. 163 *Gibsoun v. Lauder*, defender ordained to pay £20 for the principal "togidder with threttene shillingis foure pennies for expenssis of the pley".

⁹¹³ i.e. NAS, CC8/2/1, fo. 42v, *Dewar v. Liddale*, 4s; fo. 53v, *Broun v. Howden*, 4s; fo. 58r, *Lauder v. Young*, 4s; fo. 66r, *Inglis v. Thomsoun*, 4s; fo. 74v, *Dowgall v. Howden*, 5s; fo. 64r, *Vduard v. Patersoun*, 6s; fo. 65v, *Seytoun v. Lady Yester*, 6s/8d.

⁹¹⁴ i.e. NAS CC8/2/1, fo. 145r, 9 August, 1564, *Thomson v. Sundrie Personis*, expense of plea split 3 shillings and 2 shilling.

would represent themselves and since the costs of the plea were reasonable,⁹¹⁵ the Commissaries of Edinburgh were readily accessible to those who brought grievances before them.⁹¹⁶ There is one piece of evidence which suggests that expenses of the plea in summary consistorial actions were about the same as those in small debt actions: in an action arising out of the staying of the banns, the stayer was ordained to pay 6s/8d expenses of the plea.⁹¹⁷

In the ‘consistorial’ actions mentioned above, the litigants seemed able to pay. In the divorce actions, those found guilty of adultery were “Gillechallum Makgillechallum of Rasar” (10 marks), “Johne Drippis tailzeour in Glasgow” (£4) and “Duncan Campbell of Glenlyon” (40 marks). Both Macgillichallum of Raasay and Campbell of Glenlyon were clearly lairds.⁹¹⁸ In the bastardy actions, all of which had been remitted to the Commissaries following objections to brieves of inquest, the expenses of the plea were to be paid by those who had made allegations of bastardy to those decerned legitimate by the Commissaries: they were “Jonet Carnis nevoy & air to vmquhile Williame Carnis of Orchartoun” (£10), “James Mortoun sone lauchfull to vmqle Alexander Mortoun of Randerstoun” (£12), “James Dury and Elizabeth Lumisden relict of vmquhile Johne Cokburne of Newtown” (£12) and “Helene Bartane and George Maw induallaris in Leith” (£60). The first three were all related to landholders or principal tenants. There are no indications of the social status of those involved in the action for solemnization.

The limited evidence from consistorial decreets suggest that when noted, the expenses of the pleas in plenary actions averages the substantial sum of nearly £11, but the evidence does suggest that the majority of those ordained to pay such sums were people with access to landed wealth. In addition, it should be noted that such expenses of the plea may not have borne a direct relation to the actual costs of the litigation. Rather, as Helmholz has argued for the English ecclesiastical courts,⁹¹⁹ expenses of the plea may have been employed by the Commissaries to correct and

⁹¹⁵ Sometimes the relatively trifling sums of five or six shillings could be sought, hardly suggestive that the expenses of such actions were high (i.e. NAS, CC8/2/1, fo. 177v, *Smyth v. Sprot*).

⁹¹⁶ Small debt actions are by far the most common entry in the Registers of Acts and Decrees, there being in excess of 500 such actions in CC8/2/1 alone.

⁹¹⁷ The entry comes from the ‘Hamilton and Campsie’ Acts and Decrees, NAS, CC10/1/1, fo 123v, 9 February 1564/5, *Zoung v. Richie*.

⁹¹⁸ ‘of such and such a place’ indicated that a person held land in free barony, whilst ‘in such and such a place’ indicated that a person was a principal tenant.

⁹¹⁹ Helmholz, *Ecclesiastical Jurisdiction*, 347-348.

punish wealthy litigants who made allegations they were subsequently unable to substantiate. In this respect, hefty expenses of the plea may actually have been a device by which litigants were discouraged from bringing frivolous actions or making spurious defences for the sake dragging out litigation. Conversely, the fact that more than 95% of consistorial decreets made no mention of the expenses of the plea may reflect the fact that the Commissaries did not award such costs if they felt the losing party had nevertheless had reasonable cause for litigating.⁹²⁰ Of course this does not alter the fact that litigating before the Commissaries did cost money at each stage, but in this respect it should be noted that a list of fixed prices was passed to the Commissaries shortly after their appointment.⁹²¹ Such lists were known in the Courts of the Officials⁹²² and must have been intended to limit the fees that could be paid at each step of litigation. Similar attempts to fix the cost of litigation can be found in the English ecclesiastical courts.⁹²³

The expenses of the plea for such plenary consistorial actions is in marked contrast to the relatively inexpensive⁹²⁴ 5 shillings or thereabouts regularly incurred in summary actions, the majority of which were resolved by great oaths. It is also clear that the poorest litigants were not expected to incur costs from the court in the first place. In an action of annulment it would seem that the sentence silver was waived for a poor litigant,⁹²⁵ whilst in an action for Scottish Protestant divorce for adultery the pursuer alleged “him self to be ane pover man not habile to insist in persute of his just actioun and thairfoir and in respect that the saidis personis and vtheris quha knawis best the veritie of the said mater duellis within the jurisdiction of Dunblane desiring ane commissioun to be direct to the commissar of Dunblane for the examiniatioun of the said personis”.⁹²⁶ The Commissaries duly granted the

⁹²⁰ As was the practice in English ecclesiastical courts (Helmholz, *Ecclesiastical Jurisdiction*, 348).

⁹²¹ *Balfour's Practicks*, ii, 661-662.

⁹²² The details of which do not survive, but which were certainly part of the Church reforms of 1549 (*Court of the Official*, 63).

⁹²³ Helmholz, *Ecclesiastical Jurisdiction*, 300.

⁹²⁴ To set the sum of 5 shillings in context, a witness who sought to be modified expenses for travelling to Edinburgh to depone, and who swore that he had no other business in the burgh, was awarded 6 shillings per day to cover the cost of maintaining himself, a horse and a boy for a total of 9 days of travelling (NAS, CC8/2/1, fos. 248v-249r, 25 November 1564).

⁹²⁵ The clerk wrote *gratis pauperula* in the margin (NAS, CC8/2/1, fo. 247v, 25 November 1564, *Paislie v. Haistie*).

⁹²⁶ NAS, CC8/2/1, fo 403r, 23 March 1564/5, *Malard v. Reid*.

commission in conformity with the charter of constitution by which they had been appointed.⁹²⁷

Whilst there can be no doubt that plenary actions before the Commissaries of Edinburgh could be complex and incur considerable costs for those pursuing and defending such actions, it does not appear that poor litigants were thereby excluded from seeking remedies for their grievances before the Commissaries of Edinburgh. On the contrary, the Commissaries' discretionary use of summary procedure provided a fast and cheap means of dispensing justice even to those who were poor, illiterate and unaided by men of law.

[iii] PURSUER'S AND DEFENDER'S USE OF PROCURATORS IN
CONSISTORIAL LITIGATION, APRIL 1564 TO JUNE 1569.

The frequency of consistorial litigation has already been summarized, but for those actions occurring between April 1564 and June 1569 the following statistics may be given concerning litigants' use of procurators. The statistics are based on those actions where a man of law was explicitly named in the Registers of Acts and Decreets as being a litigant's procurator for at least one diet in for any given case.

	frequency	pursuer ⁹²⁸	defender ⁹²⁹	both ⁹³⁰
Freedom, Silence and Slander:	5	1 (20%)	1 (20%)	-
Solemnization (occasionally with Adherence):	27	14 (52%)	11 (41%)	10 (37%)
Adherence:	19	13 (68%)	10 (53%)	9 (47%)
Aliment:	3	-	1 (33%)	-
Annulment:	11	5 (45%)	6 (55%)	4 (36%)
Divorce for adultery:	57	35 (61%)	20 (35%)	14 (25%)
Reduction of sentence of divorce:	8 ⁹³¹	6 (75%)	4 (50%)	3 (37.5%)

⁹²⁷ See Appendix I, clause [5].

⁹²⁸ The data upon which these figure are based is provided in Appendix II, F (1).

⁹²⁹ The data upon which these figure are based is provided in Appendix II, F (2).

⁹³⁰ That is to say, actions were it is known that both the pursuer and defender used at least one procurator at at least one diet. The names of such cases have been highlighted in Appendix II, F (1) by italicizing the relavant case names, and can be verified by searching for the corresponding case names in Appendix II, F (2).

⁹³¹ 5 pre-Reformation definitive sentences of divorce, 3 sentences of divorce pronounced by the Protestant Kirk.

Bastardy:	5	2 (40%)	1 (20%)	1 (20%)
Tint:	3	3 (100%)	2 (67%)	1 (33%)
Retrospective Declarator of Divorce:	1	1	1	-
Expenses having obtained decret of adherence:	1	1	1	1 (100%)
Separation:	1	-	-	-
TOTAL:	141	81 (57%)	58 (41%)	43 (30%)

Whilst the procurators of the Court of the Commissaries of Edinburgh have already been discussed in general terms in Chapter II,⁹³² these statistics allow a limited insight into their use by litigants in consistorial actions. The general totals show that procurators tended to be used by pursuers (57%) more than by defenders (41%), whilst procurators were used by both parties in less than a third of the actions heard by the Commissaries. Conversely, it may be said that in 43% of consistorial actions the pursuer never⁹³³ compeared before the Commissaries with a procurator whose name was recorded in the registers, and that in 59% of consistorial actions the defender never compeared before the Commissaries with a procurator. Of the main consistorial actions, actions for adherence seems to have involved the greatest use of procurators, whilst actions for solemnization and for Scottish Protestant divorce seem to have involved an average level of the use of procurators.

§V

DOMICILE AND SOCIAL STATUS

[i] DOMICILE OF LITIGANTS IN CONSISTORIAL LITIGATION, APRIL 1564 TO JUNE 1569

The map on the next page concerning the domicile of litigants has been based upon those entries in the Registers of Acts and Decrets for the sample period where the domicile of a litigant was explicitly stated and where the place-name given has been positively identified and located. As such, whilst the data upon which the map

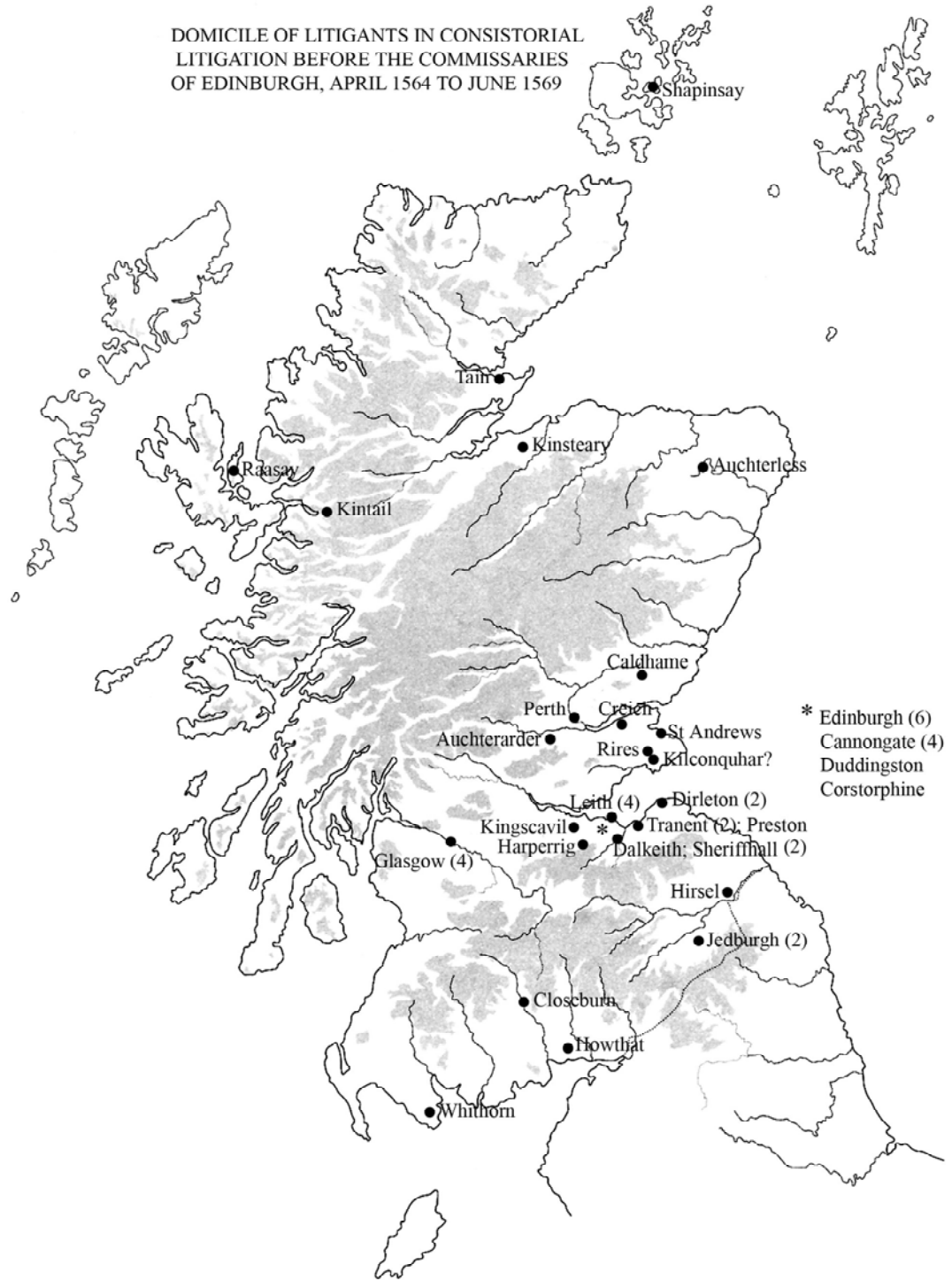
⁹³² See above, Chapter II, §II, [vi].

⁹³³ As far as the records note.

has been based is not exhaustive, it does provide a good idea of the practical reach of the Commissaries' national consistorial jurisdiction.⁹³⁴ Each place-name has been recorded for each pursuer or defender, whether in the same or different actions. Where several different litigants came from the same place, the frequency had been noted in brackets next to the place-name. A (2) next to a more unlikely place-name may only indicate a litigating couple from the same place.

⁹³⁴ The data is summarized in Appendix II, G (1) and G (2). It should be noted that further data could be collected from the consistorial decreets pronounced from April 1564 to the winter of 1576/7 for comparative purposes, but that this has not been undertaken for this thesis.

DOMICILE OF LITIGANTS IN CONSISTORIAL
LITIGATION BEFORE THE COMMISSARIES
OF EDINBURGH, APRIL 1564 TO JUNE 1569



[ii] SOCIAL STATUS OF PURSUERS AND DEFENDERS IN CONSISTORIAL
LITIGATION, APRIL 1564 TO JUNE 1569⁹³⁵

In general terms it is clear that the Court of the Commissaries of Edinburgh was used by persons from every kind of social background. The popularity of the court in the resolution of small debt actions has already been noted in detail. Added to this was the fact that executors of the greater testaments for the whole kingdom, as well as the lesser testaments within the Commissariat of Edinburgh regularly appeared in the court, whilst the Commissaries' national jurisdiction in disputes over rights and titles to Scottish benefices and their local jurisdiction relating to ecclesiastical revenues brought the full range of ecclesiastical dignitaries to the court.⁹³⁶ The cost of litigation was also clearly not prohibitive, being as little as 4 shillings, although in more complex actions the expenses of the plea could be in excess of £10 Scots.

In consistorial litigation for the period from the Commissaries' appointment to the summer of 1569, a range of relatively distinguished persons appeared before the Commissaries. Notable pursuers included four ladies, two daughters of earls, the daughter of a lady, a knight, the widow of a knight, the son of a knight, two daughters of knights, a Lord of Session, three burgesses (two of Edinburgh, one of "Cowpar"⁹³⁷), the daughter of a burges of Edinburgh, the daughter of a skipper living in Leith, a "fermorar to the quenis grace", a carpenter, two landowners and three sons, one widow and four daughters of persons styled "of such and such a place" thus denoting relatives of lairds.⁹³⁸

Notable defenders included one lord, the daughter of a lord, the daughter of a lady, a laird, a master,⁹³⁹ two burgesses (one from Edinburgh, one from Glasgow, the

⁹³⁵ Based on the data contained in Appendix II, H(1) and H(2).

⁹³⁶ Whilst the ecclesiastical jurisdiction of the Commissaries of Edinburgh has not been studied in detail, a preliminary survey of the Register of Act and Decrees in this respect reveals that churchmen from parsons and vicars (i.e. NAS, CC8/2/4, fos. 262v-264r; fos. 268v-269v) to deans (i.e. NAS, CC8/2/4, fos. 35r-36r, James Lauder, Dean of Restalrig) abbots (i.e. NAS, CC8/2/4, fo. 178v, George Abbot of Dunfermline) and bishops (i.e. NAS, CC8/2/5, fos. 186v-188r, Bishop of Orkney) litigated before the Commissaries (not always in person), as did ministers of the Protestant Kirk (Green, 'Scottish Benefices').

⁹³⁷ Either Coupar Angus (centre of the ecclesiastical barony pertaining to the Cistercian Abbey there) or Cupar Fife (royal burgh).

⁹³⁸ The data upon which this paragraph is based is contained in Appendix II, H (1).

⁹³⁹ As in the eldest son of a lord.

latter a tailor), the widow of a burghess of Dundee, the son of a burghess of Edinburgh, a sheriff (of Linlithgow), an advocate (who was also a burghess of Edinburgh), a writer, a lord's servant, the natural daughter of a parson, a tailor, a butcher, a weaver, two cobblers, a landowner and three daughters of persons styled "of such and such a place" thus denoting the daughters of lairds.⁹⁴⁰

Some statistics may be tentatively offered from these observations, but there are several factors which limit their value: there is often no indication of the social status of litigants, and where litigants may have had some noteworthy status, there is no guarantee that it was noted by the clerks of court in the Registers of Acts and Decrees. Nevertheless, out of the 141 actions from which the above observations have been drawn in 29 (21%) cases the pursuer had some kind of social status noted in the Registers, whilst in 23 (16%) cases the defender had some kind of social status noted in the Registers. This suggests that about one in five pursuers or defenders had some distinct social status worthy of note, usually a link with landownership, burghs or crafts. For the rest of the consistorial actions brought before the Commissaries of Edinburgh during the sample period it is difficult to differentiate the remaining litigants, although there is direct evidence that they were sometimes in a state of poverty.⁹⁴¹ Extensive reading among the Registers of Acts and Decrees leaves the impression that Scots from all walks of life brought their consistorial actions before the Commissaries of Edinburgh, and the fact that litigants could represent themselves, that sentence silver could be waived for poor litigants and that the judges tended to control litigation in terms of applying appropriate remedies according to the relevant points proven rather than the remedy sought in the libel suggests that the Court of the Commissaries of Edinburgh was accessible to all Scots.⁹⁴²

⁹⁴⁰ The data upon which this paragraph is based is contained in Appendix II, H (2).

⁹⁴¹ i.e. in *Malard v. Reid*, being an action for Scottish Protestant divorce on the grounds of adultery, the pursuer Robert Malard was described as "a pover man" (NAS, CC8/2/1, fo. 403r, 23 March 1564/5), whilst in *Paislie v. Hastie*, being an action for annulment on the grounds of bigamy, the guilty man's second wife had brought the action, and when the decret annulling this second marriage was entered in the Register, the clerk wrote "*gratis paupericula*" in the margin (NAS, CC8/2/1, fo. 247v, 25 November 1564).

⁹⁴² This accords well with David Sellar's statement that "I know of nothing to suggest that there was a bias in favour of men, or that the rules effectively excluded all but the very rich" which he based on evidence for the Commissaries of Edinburgh during the 17th to 19th centuries (Sellar 'Canon Law and Scots Law', 74-75).

CHAPTER VI
ONGOING RELATIONS WITH THE TRIBUNALS OF
THE PROTESTANT KIRK FROM 1564

At the end of chapter II the conclusion was drawn that the Commissaries did not consider the sentences of divorce pronounced by the tribunals of the Protestant Kirk from 1559 down to the appointment of the Commissaries of Edinburgh to possess an inherent authority in consistorial matters. Rather, it was argued that the Commissaries accepted such sentences on account of the legitimating involvement of the Lords of Council and Session or the Scottish episcopate. Yet it was also suggested that from this it did not follow that the Commissaries considered the tribunals of the Kirk to have had no competent authority and jurisdiction within the Scottish realm. Since the consistorial law and procedure of the Commissaries has now been discussed at some length, the ongoing relations of the Commissaries and the Kirk will be considered in this final chapter.

On the one hand, the Commissaries of Edinburgh considered themselves sole judges competent of the consistorial jurisdiction in Scotland, by virtue of their charter of constitution and the national jurisdictions it entrusted to them for administration. It may therefore be asked to what extent this opinion was shared by the tribunals of the Protestant Kirk. The answer would appear to be mixed, the actions of some tribunals of the Kirk seemingly conforming to this understanding, whilst the court of the superintendent of Fife, Fotherick and Strathearn seemingly maintaining that the Kirk enjoyed some inherent competence in consistorial actions. On the other hand, the disciplinary jurisdiction of the tribunals of the Kirk appears to have been both acknowledged and worked with by the Commissaries. In this, it would appear that the Commissaries and the Kirk sought to achieve a degree of jurisdictional co-operation between their respectively 'consistorial' and 'disciplinary' jurisdictions.

[i] CONFORMING TO THE COMMISSARIES

A remarkable divorce action involving both the minister, elders and deacons of the kirk of Jedburgh and the Commissaries of Edinburgh clearly illustrates that at least one tribunal of the Kirk conformed to the Commissaries' and various members

of the Scottish government's understanding of the administration of the consistorial jurisdiction in Scotland from 1559. During the early 1560s the kirk of Jedburgh had proceeded to hear an action of Scottish Protestant divorce for adultery, *Hardy v. Rutherford* "be verteu of ane commissioun grantit be the lordis of secreit counsale to thame thairupoun". The libelled adultery appears to have been "notourlie knawin to the hale burcht and parochie of Jedburgh" and having been "be the saidis Minister eldaris and deaconis admittit to the said [pursuer's] probatioun" was duly proven. Nevertheless the "actioun of diuorce being concludit befor the saidis Minister eldaris and deaconis, reddy to the avysing thairwith and geving furth of thair decret thairin, thai, in respect of the erecting of the jurisdiction of the said commissarie, on na wyis will pronounce the samyn, and thairfoir the saidis commissaris direct out thair precept to summond the said Katherine [defender] to compeir befor thame at ane certane day bipast To heir it be proceidit befor thame in the said actioun quhair it left befor the saidis minister eldaris and deaconis That is to say to heir sentence and decret gevin and pronuncit in the said mater *secundum allegata et probata* in the samyn".⁹⁴³ This remarkable case demonstrates that at least in Jedburgh, the kirk thought its competence in an action of divorce depended upon commission from the Lords of Council and Session, and that even this was a temporary expedient until such time as the Commissaries of Edinburgh might continue to administer the consistorial jurisdiction. This accords well with the thesis advanced in chapter I that the Lords administered the consistorial jurisdiction in lieu of the sitting of the episcopal consistories, which administration passed to the Commissaries upon their appointment.

No other case brought the jurisdictional relations between the Commissaries and the Kirk into such sharp focus and with such a clear resolution. Nevertheless other evidence discussed below,⁹⁴⁴ further suggests that following the appointment of the Commissaries other tribunals of the Kirk and individual ministers co-operated with the Commissaries' lawful jurisdiction.

⁹⁴³ NAS, CC8/2/1, fo. 425r-v, 11 April 1565, *Hardy v. Rutherford*.

⁹⁴⁴ Generally, see the discussion below concerning freedom, silence and slander (this Chapter, [iv]), but in particular see the discussion of the staying of banns (this Chapter, [v]).

[ii] DIVERGING FROM THE COMMISSARIES

The manifest conformity of the kirk session of Jedburgh to the authority of the Commissaries of Edinburgh was not repeated in Fife and St Andrews. These territories were subject to the powerful kirk of St Andrews and the superintendent of Fife, Fotherick and Strathearn, John Winram. The case of *Forbes v. Sandelands* was discussed at the end of chapter II, and it was concluded from that case that the Commissaries of Edinburgh were at pains to underline the fact that they did not consider the decisions of the court of the superintendent of Fife at St Andrews, acting upon its own authority, to be binding consistorial decisions. Further evidence suggests that the Commissaries' position went unheeded and occasioned some direct confrontation between Edinburgh and St Andrews.

This was certainly the case in the celebrated precept of reduction raised by Henry Morris before the Commissaries of Edinburgh against a sentence of solemnization pronounced by the superintendent of Fife, John Winram, 8 January 1571/2. The case was discussed by John Riddell in some detail, and was taken as evidence of the conflict between the Commissaries and the "usurping" tribunals of the Protestant Kirk during the Reformation era.⁹⁴⁵ Conflict there was, but as with *Forbes v. Sandelands*, *Moreis v. Johnesoun* was specifically concerned with the court of the superintendent of Fife. Winram's sentence of solemnization was reduced by the Commissaries of Edinburgh on 16 June 1572 because the Commissaries accepted Morris's argument "that the said decret is pronuncit & gevin be the said superintendent wranguslie, he na wayis being judge to cognosce or decerne thairintill or ony sik actioun, in respect mony zeris of befoir the pronunceing of the said pretendit decret thair was ane commissioun gevin be oure soverane for that tyme, with the advis of the lordis of secreit counsale, to the saidis commissaris to cognosce in all sik actionis as solemnizatioun of mariage adherence & dissolutioun of mariage lik as thai have bene in vse continewalie sensyne to cognosce thairintill and all vther consistoriall causes as only judge competent thairto; quhair foir the said decret being pronuncit and gevin as said is be the said superintendent *cumque per non suum judicem* aucht tobe reducit".⁹⁴⁶ It should be noted that the Commissaries could reduce the decreets of other courts on two grounds, either because they were the superior

⁹⁴⁵ Riddell, *Inquiry*, i, 431-432.

⁹⁴⁶ NAS, CC8/2/5, fo. 208r-v, 16 June 1572, *Moreis v. Johnesoun*.

judges (as was the case in respect of the inferior Commissaries), or because they could reduce the decrees of incompetent authorities. It was in this latter sense that the Commissaries reduced Winram's sentence: had they intervened in proceedings before Winram prior to the pronouncing of sentence, they would have inhibited Winram from proceeding, conform to their charter of constitution.⁹⁴⁷

Indeed the Commissaries seem to have deliberately avoided making any claims of direct superiority over the tribunals of the Protestant Kirk. In *Hammyltoun v. Maxwell & Lindesay* a precept of reduction was raised before the Commissaries, against a sentence of divorce that had been pronounced by the superintendent, elders and deacons of Glasgow, prior to the appointment of the Commissaries of Edinburgh. The sentence of the Kirk had divorced Elizabeth Hamilton and John Maxwell on the grounds on Hamilton's adultery. The adultery had been proven, but in defence Hamilton had alleged the mutual guilty of Maxwell, yet Maxwell's adultery had not been proven. Yet when Hamilton brought her action of reduction against the sentence of the Kirk, she had fresh and conclusive evidence that Maxwell had indeed committed adultery at such a time as to make her original defence valid.⁹⁴⁸ In the action for reduction, Maxwell's procurator Henry Kinross objected that the Commissaries "aucht not to proceid as juges competent in this mater being discussit befor be the kirk of befor". In response, Hamilton's procurator Richard Strang argued that the action of reduction was being brought not because of "ony iniquitie commitit be the kirk bot vpoun ane new emergent".⁹⁴⁹ The Commissaries accepted Strang's argument: the new evidence concerning Maxwell's recrimination was duly proven before the Commissaries and they accordingly reduced the Kirk's sentence of divorce.

Such issues were also directly addressed before the Commissaries in *Forrest v. Rollok & Gardin* wherein a precept of reduction was raised against a sentence of Scottish Potestant divorce on the gounds of adultery pronounced by "Cristofer Gudman Minister James Lavell Robert Kid Alexander Weddirburne and the remanent eldaris and deaconis of the burgh of Dundee and Johne Erskin of Dun

⁹⁴⁷ See Appendix I, clauses [7] and [8]. Robertson notes the Commissaries' right to inhibit incompetent judges (*Concilia Scotiae*, i, clxxvi).

⁹⁴⁸ Elizabeth Lindsay had borne Maxwell a child, whose time of conception, it was argued, proved Hamilton's allegation of recrimination.

⁹⁴⁹ NAS, CC8/2/1, fos. 222v-223r, 15 November 1564; fo. 248r, 25 November 1564; fos. 393v-394v, 16 March 1564/5.

Superintendent of Angus”. The defender’s procurator, John Shairp, alleged that such a sentence could only be reduced by the “general kirk” against which the pursuer’s procurator, Henry Kinross asserted that the Commissaries were judges competent for the reduction of the sentence. The Commissaries took the matter “to avysemen” and assigned *litteratorie* to pronounce their interlocutor upon the arguments: yet some alternative arrangement seems to have been made, since the case does not occur again in the Registers of Acts and Decrees.⁹⁵⁰ In both these instances, whether by chance or design, the Commissaries had avoided explicitly asserting a direct superiority over the tribunals of the Protestant Kirk.

From this evidence it is clear that whilst the Commissaries did not attempt to assert a direct superiority over the tribunals of the Kirk, they nevertheless explicitly rejected the superintendent of Fife’s claim of an inherent right to pronounce consistorial decreets, first in 1564 (i.e. *Forbes v. Sandelands*) and again in 1572 (i.e. *Moreis v. Johnesoun*). Such a conflict naturally raises the question of the grounds upon which Winram presumed to hear consistorial actions. Whilst this cannot be gone into in detail, there is a distinct possibility of some episcopal element. Winram’s superintendency certainly featured some episcopal functions. He held synods,⁹⁵¹ collated ministers to medieval benefices,⁹⁵² presided over a court which pronounced consistorial sentences involving adherence,⁹⁵³ solemnization⁹⁵⁴ and divorce for adultery,⁹⁵⁵ and was remembered in death as ‘Bishop of the Fife men’.⁹⁵⁶ Yet despite these episcopal functions, it is noteworthy that the Commissaries, who acknowledged the continued authority of the Scottish episcopate in the consistorial jurisdiction, did not acknowledge Winram’s authority in the same jurisdiction by virtue of his superintendency.

⁹⁵⁰ NAS, CC8/2/1, fo. 46v, 6 June 1564, *Forrest v. Rollok & Gardin*.

⁹⁵¹ See Linda Dunbar, ‘Synods and Superintendence: John Winram and Fife, 1561-1572’ in *Records of the Scottish Church History Society*, 27 (1997), 97-125 and Dunbar, ‘An early record from the Synod of Fife, c. 1570’ in *Records of the Scottish Church History Society*, 28 (1998), 217-238.

⁹⁵² Green, ‘Scottish Benefices’, 46-47.

⁹⁵³ *St Andrews*, i, 156-167.

⁹⁵⁴ i.e. *Moreis v. Johnesoun* as just discussed.

⁹⁵⁵ i.e. Dunbar, *Reforming the Scottish Church*, 89.

⁹⁵⁶ Dunbar, *Reforming the Scottish Church*, 193-194. There are other intriguing episcopal themes surrounding Winram’s superintendency: his court ceased to sit following John Douglas’s consecration as Archbishop of St Andrews (*Ibid.*, 83), at which Winram and superintendent Spottiswoode participated (Donaldson, *The Scottish Reformation*, 163-4).

[iii] JURISDICTIONAL CO-OPERATION

Whilst it has been shown that the kirk session of Jedburgh conformed to the authority and jurisdiction of the Commissaries, and that the court of the superintendent of Fife did not, the question of the inherent authority and competent jurisdiction of the tribunals of the Kirk and its relation to the Commissaries must now be discussed. As is well understood, the Scottish Reformers insisted that one of the three notes “of the trew kirk”, by which it might be differentiated from “the kirk malignant”, was “ecclesiasticall discipline uprightlie ministerit as Goddis words prescribis, quhairby vice is repressit and vertew nurisshit”.⁹⁵⁷ From the seventh head of the *First Book of Discipline*, which devoted itself to “ecclesiastical discipline” it is clear that the principal grounds of the Kirk’s authority in such matters was founded upon its right to excommunicate and re-admit Scots from the congregation of the Kirk.⁹⁵⁸ The principal tribunal through which discipline was enforced was the kirk session, which among other offences sought to correct fornication, adultery, and desertion. But as could be reasonably anticipated, such a competence in the correction of morals could involve the tribunals of the Kirk in the consistorial jurisdiction. It is easy to imagine how a kirk session’s attempt to punish fornicators could be countered by protestations that the couple had in fact secretly promised to marry each other, and as such were irregularly married: were this to be investigated ought not they to be compelled to marry regularly *in facie ecclesiae*? Similarly, as in the case above, if two members of a congregation had been publicly married before their congregation, was it not a scandal to the kirk for one of the parties to desert the other, and in such an event was the session not obliged to discipline the deserting party? And finally, if a married member of a congregation committed adultery, should they not be forced publicly to repent?

Within the context of Godly discipline, therefore, the tribunals of the Kirk regularly made pronouncements about fornication, marriage, adherence and divorce, all of which had legal consequences within the context of consistorial actions. That both moral and legal consequences arose from various actions in and around marriage and that both were no longer regulated by the unified authority of the courts

⁹⁵⁷ The Scots Confession as per *RPS*, A1560/8/3, under the heading “Of the notis by the quhilk the trew kirk is decernit fra the fals, and quha salbe juge of the doctrine”; cf *APS* ii 526, c.1.

⁹⁵⁸ *First Book of Discipline*, 165 *et seq.*

spiritual, but by the differentiated tribunals of the Kirk and the Commissaries, resulted in a complex situation whereby the enforcement of moral discipline by the Kirk could have similar outcomes to the enforcement of Scots consistorial law by the Commissaries of Edinburgh. Indeed, the community-based power of the Kirk, rooted in a theological understanding and emphasis on the Kirk as Christ's congregation, brought with it disciplinary powers which at times were almost indistinguishable from the legal authority of the Commissaries of Edinburgh, and suggests in the strongest way possible that the old spiritual jurisdiction had not relied on the force of law alone.

An excellent example of this was the way in which the Kirk, on the grounds of Godly discipline and through the working of its sessions, could compel a couple to contract a regular marriage *in facie ecclesiae* without the need to obtain a decret of solemnization from the Commissaries of Edinburgh, and indeed on the grounds of *copula* alone, without any prior promise to marry. In Dorothy Anderson's study of the decisions of the General Assembly of the Kirk of Scotland in relation to marriage between December 1560 and March 1573,⁹⁵⁹ attention has been drawn to the Assembly's discipline of ministers who were suspended from the ministry on the grounds of fornication. Where ministers were concerned, the Kirk's power was considerably amplified, since in addition to the power of excommunication which the Kirk could exercise over the faithful, ministers could be further controlled by exclusion from their office and its corresponding remuneration. Anderson draws attention to two ministers, Thomas Duncanson and Alexander Jardine, who had committed fornication with virgins.⁹⁶⁰

“Having performed their public repentance whilst suspended from office, the Assembly had to decide whether they could be readmitted. It deferred the decision to allow further enquiry to be made from the Superintendent but did state, in Duncanson's case, that “if the woman was a maiden with whom he had committed the said fornication, that he sall marie her if sho requyre the samein, in part satisfioun to the kirk”.⁹⁶¹ Jardine had pre-empted a similar decision in his case by having already married the virgin whom he had

⁹⁵⁹ Dorothy Anderson, *'The Blessed Ordinance of God': A Study in the Decisions of the General Assembly in Relation to Marriage, December 1560 – March 1573* (unpublished BD dissertation, School of Divinity, University of Edinburgh, 2004).

⁹⁶⁰ *Acts and Proceedings of the General Assemblies*, i, 44-45.

⁹⁶¹ *Acts and Proceedings of the General Assemblies*, i, 45

deflowered. At the ensuing meeting, in June 1564, the Assembly readmitted Jardine, but Duncanson's fate is not recorded".⁹⁶²

The idea that those who deflowered virgins ought to be compelled to marry them even though no promise of marriage had been made was set out in the *First Book of Discipline*,⁹⁶³ and it seems quite reasonable to conclude that had the Kirk assumed sole competence for compelling solemnization, this principle would have become part of the law of Scotland. The principle was certainly enforced by the kirk session of St Andrews in the affair of Robert Thomas and Gelis Moffat. Thomson had had the banns proclaimed for his marriage to another woman, but they were stayed by Moffatt's brothers on the grounds that Thomas had deflowered their sister Gelis, and as such ought to be compelled to marry her. Not only was the alleged impediment of deflowering found relevant for staying the banns, but the session decerned Thomas "for his transgression of the law of God and offence done in defloryng of the virginite of the said Gelis Moffatt, to marye and tak to his lawfull wyf the said Gelis Moffat, and solemnizat the band of matrimonye wyth hyr, according to the ordor of the kyrk..."⁹⁶⁴

The language used in this last case is worth discussing further. Robert Thomas had not transgressed the law and 'practick' of Scotland, but rather the moral 'law of God', for which offence he was considered bound to marry Gelis Moffat. The emphasis was clearly upon solemnization as a correction for a moral offence rather than solemnization as the legally enforceable conclusion of contracting an irregular marriage. The moral and the legal elements of marriage in post-Catholic Scotland are clearly delineated: the Kirk could compel solemnization as the remedy for moral wrong within the context of Godly discipline and the moral regulation of Christ's congregation; the Commissaries of Edinburgh could compel solemnization as the remedy for the contracting of a legally binding, but non-regular marriage.

Despite the Kirk's enforcement of the idea that the deflowerer ought to be compelled to marry the deflowered, it did not become part of Scots consistorial law. Nevertheless, the idea found occasional resonance in consistorial litigation before the Commissaries. In *Reid v. Barclay*, the pursuer alleged that Barclay had "promist hir diueris tymes marriage, scho beand than ane virgine, and at the leist be his continuale

⁹⁶² Anderson, *The Blessed Ordinance of God*, 22.

⁹⁶³ *First Book of Discipline*, 39 *et seq.*

⁹⁶⁴ *St Andrews*, i, 221.

sute consentit to accomplishe and fulfill his desyre and had carnall copulatioun with hir vnder faithfull promes”.⁹⁶⁵ Barclay was assoilized from the libel, denying the promise of marriage on oath, whilst the question of virginity was not discussed, since irrelevant in proceedings before the Commissaries of Edinburgh.

[iv] SLANDER, SILENCE AND FREEDOM

Nowhere was the potential for co-operation and co-ordination between the Kirk and the Commissaries more likely than in actions involving freedom, silence and slander, since these actions usually arose following the proclamation of banns by ministers of the Kirk or, in the case of slander, regularly involved some form of public repentance. Moreover, it so happens that two of the actions to be discussed in this section involved ministers of the Reformed Kirk. Slander ought to be considered in its own right before entering upon a discussion of freedom, silence and slander. This is not only on account of the fact that actions for slander introduce the central themes which reoccur throughout the remainder of this section, but also because slanderous allegations did not necessarily centre upon allegations of promise of marriage and *copula*, yet when they did, they could be caught up into a more specific piece of litigation concerning promise of marriage.

The first entry in the Register of Acts and Decrets of the Commissary of Edinburgh concerning slander is the public confession for slander made by George Wilkie before the Commissaries on 1 May 1564. Whilst the slander had occurred in St Andrews, Wilkie was domiciled in Edinburgh and as such it may be presumed that the domicile of the offender decided the Commissariat in which an action of slander was brought, although this is not certain.⁹⁶⁶ There was clearly a range of competent courts in St Andrews for hearing confessions of slander; the kirk session there, the superintendent of Fife, Fotherick and Strathearn’s court and the commissary court presided over by William Skene. The brief entry in the Acts and Decrets is as follows:

⁹⁶⁵ CC8/2/3, fo. 72v, 17 July 1568.

⁹⁶⁶ It may be that the action could have been brought before any competent authority in either St Andrews or Edinburgh.

“Anent the terme assignit to George Wilkie sclater in Edinburgh to compeir befor the saidis Commissaris to the effect vnderspecifiit. Compeirit the said George in presence of the saidis Commissaris sittand in jugement and of the haill auditoris (*sic*) and people thair assemblit and on his kneis confessit and grantit that he had first offendit God and syne Johne Hill thair present in calling of him commone theif vpoun the xj day of Aprile lastbipast in the abbay cloister of Sanctandros at the semze fair⁹⁶⁷ thairof. And thairfoir desyrit God to fogif him his offence and the said Johne Hill forgevante, quha in presence of the saidis Commissaris and people did the samyn and in takin thairof tuke him be the hand: Quhairupoun the said Johne askit intrumentis”.⁹⁶⁸

The religious elements in the confession are clearly pronounced and contain similar elements to an entry for the court of John Winram, superintendent of Fife, Fotherick and Strathearn. There, David Ballingall and Elizabeth Dury had been accused of adultery, which was described by the court as “the slander rased” against them. Dury was found innocent of any wrongdoing, whilst Ballingall confessed that he had desired to commit adultery with her. The entry narrates that Ballingall

“now (moved be the Spirit of God) he hes confessed and schawyn owtward signes of repentance, with humil submission of himself to disciplyn; and heirfor is decernit to compeir in the essemble of the congregacion of the kyrk of Kennowy, upon Sunday the xj of October instant, and thar in presens of God at the command of the minister humyll hymself upon his kneis, confes his offence and ask God mercy tharof and the congregacione forgyfnes. And of his occasion of sclander gevyn to tham, and for avoyding of all occasion of suspicion and sclander gevyn for the tym to cum, the said Dauid Ballingall is discharged and forbyddyn to accompany wyth the said Elizabeth Dwry in ony maner or sort, privatly or oppynlye, bot [to] absteyn fra talkyn eatyng drynkyn or other resortyng wyth hyr; to the quhilk he hes consented, and is oblest to keip the same under pane of bannesing hym the bowndis of Fyff for all the dayes of his lyftym...”.⁹⁶⁹

These two cases were not quite the same; whilst both arose as a response to slander, and involved confession whilst kneeling, and repentance, in the former instance Wilkie admitted the slander, whilst in the latter Ballingall confessed that he had desired to do that which had been slandered against him. Despite these variations, the themes of slander, confession in court and confession and repentance before the kirk occur severally, and quite unexpectedly, in actions of freedom, silence and slander before the Commissaries.

⁹⁶⁷ i.e. ‘synod fair’.

⁹⁶⁸ NAS, CC8/2/1, fo. 5v.

⁹⁶⁹ *St Andrews*, i, 173, 7 October 1562. Burgh magistrates could also hear actions for defamation and compel public penance. For a full discussion of such actions see Elizabeth Ewan, ‘“Tongue You Lied”: The Role of the Tongue in Rituals of Public Penance in Late Medieval Scotland’ in *The Hands of the Tongue: essays on Deviant Speech*, ed. E.D. Craun (Kalamazoo: Medieval Institute Publications, 2007), 115-136).

As part of the Commissaries' competence in actions of defamation, they could ordain that repentance and restitution be made at the place of slander, even if this was a Protestant kirk. This occurred in the next two actions to be considered, *Bennet v. Blythman* and *Gibsoun v. Robesoun*. In addition, these two cases illustrate the crossover between normal actions of slander, and those which involved allegations of promise of marriage and *copula* and therefore also involved freedom and silence.

The affair of Bennet and Blythman was composed of three distinct actions, two before the Commissaries of Edinburgh and one before the kirk session of Leith, all of which centred upon allegations of promise of marriage and *copula* made by Margaret Blythman against Master John Bennet, minister of the kirk of Leith. The precise order of the actions must be deduced from evidence to be given presently, but the order of decreets was: 20 December 1575, John Bennet was assoilized by the Commissaries of Edinburgh from an action for solemnization brought by Margaret Blythman; 22 December 1575, Margaret Blythman succumbed in probation before the kirk session of Leith following allegations of *copula* and promise of marriage; 26 January 1575/6, Margaret Blythman was decerned by the Commissaries of Edinburgh to make public repentance in the kirk of Leith for her slanderous allegations. Discussion of this affair is best facilitated by starting with the final decret, which is cited here in full:

“Anent the clame persewit be Maister Johne Bennet minister of Goddis word aganis Margaret Blythman; berand that scho callit and conventit him befor the ministeris eldaris and Deoconis of the kirk of Leith, alleging wickitlie that he had carnall copulation with hir in the house of Andro Burn in Leith, and that thairthrow scho consaut barne to him; and pairtit thairwith; and that the said Maister Johnne promittit the said Margaret mariage and that in the moneth of November 1575, quhilk being admittit be the said ministeris eldaris and Deoconis of the said kirk to hir probatioun, and diuers termes assignit to hir for preving thair of, failzeit thairin, as ane decrete pronuncit be thame the xxij day of December 1575 [beris]. And siklike in the samin moneth the said Margaret conventit him befor the Commissaris for the samin caus and referrit the same to his conscience, quhair vpoun in lykmaner he obtenit obsoluitour in respect of his aith, as the decrete thair of pronuncit the xx day of December lastbipast heir present proportis: be quhilk persuitis he being ane minister of Goddis word and ane publict persone is hevele sclanderit and diffamit be the said Margaret, quha maist vickitlie hes persewit the samin to his greit dishonour & schame with the saidis Commissaris provydit remeidit thairunto, as at mair lenth is contenit in the said clame. Bayth the saidis parteis being parsonnalie present, the saidis Commissaris be thair decret decernis & ordanis the said Margaret Blythman at tua seu(er)all sondayis nixt eftir scho be chairgeit heirto eftir preching to

stand at the pillar of repentance within the kirk of Leyth & thair in presence of the congregatioun thair assemblit humlie to confess hir offence done to the said Maister Johne & to craif God, his kirk & the said Maister Johne forgevinnis thair of: becaus the said clame being be the saidis Commissaris admittit to the said Maister Johnis probatioun & ane terme assignit to him for preving thair of he previt the samin sufficientlie, as wes cleirly knawin to the saidis Commissaris”.⁹⁷⁰

The narration of events contained in this decret suggests that although the kirk session of Leith pronounced its sentence or decret two days after the Commsaries pronounced theirs in the action of solemnization, Margaret Blythman’s first recourse had been to the kirk session, and she had been leading probation before them when she instigated the action of solemnization before the Commissaries of Edinburgh. It would appear that Blythman, realizing that she was going to succumb in probation before the kirk of Leith, brought the action of solemnization before the Commissaries. When the Commissaries admitted her libel to probation she referred the libel “simpliciter to his [John Bennet’s] aith & he [beand] suorne & examinat vpoun his gritt aith deponit he nevir maid promeis of mariage to hir”.⁹⁷¹ This rapid resolution of the action by oath is noteworthy: if the theory concerning her anticipation of succumbing in probation before the kirk session of Leith is correct, this was her only option, but since actions of solemnization resolved by the defender’s oath usually resulted in an immediate outcome (that is to say the actions usually lasted one day only) she could be fairly certain that the Commissaries’ decret would pre-empt that of the kirk session of Leith. If this was the case it was a most sophisticated exploitation of the consequences of the fragmentation of the old spiritual jurisdiction.

This theory is given some support by the wording of the allegations made by Blythman before the different courts. Interestingly, before the kirk session Blythman alleged *copula*, with issue, then promise of marriage,⁹⁷² whilst before the Commissaries in the action of solemnization she alleged that John Bennet “in the moneth of September or thairby the zeir of God Jai vc lxxiiij zeiris and in his awin chamber within Andro Burnes Close in Leith maid to the said Margaret ane faithfull

⁹⁷⁰ NAS, CC8/2/8, fos. 24v-25r.

⁹⁷¹ NAS, CC8/2/7, fo 367v, 20 December 1575.

⁹⁷² This order is known only from the narration of the kirk session’s sentence in the subsequent decret pronounced by the Commissaries. Yet although the kirk’s sentence is no longer extant, it was produced before the Commissaries and was before the clerk of court as he made this entry.

promeis of mariage promittand faithfullie to tak hir to his wyfe & to solemnizat the band of matrimony with hir & than in takin thairof gaif to hir his ryt hand lyke as scho than maid lykevayis promeis of mariage to him promittand faithfullie to tak him to hir husband and solempnizat the band of mariage with him: eftir the quhilk promeis the said Maister Johne had carnell deill with the said Margaret in his said chalmer & consaut with barne to him, with the quhilk the said Margaret partit in the moneth of November or thairby nixtthaireftir...”.⁹⁷³ This variation of the sequence of promise and *copula* is indicative of the differing functions of the kirk sessions and the Court of the Commissaries of Edinburgh.

The proceedings before the kirk session of Leith could not have been a strictly consistorial action belonging to the Commissaries of Edinburgh. This suggests that, as would be expected, Bennet was ‘callit and conventit’ before the ‘ministeris eldaris and deoconis of the kirk of Leith’ in order to be corrected for his alleged immoral conduct. If Blythman had been pursuing for solemnization according to Scots consistorial law, the libel would have been singularly loose, alleging promise after *copula*, and as such no grounds for solemnization before the Commissaries. Rather, the looseness of order suggests that Blythman anticipated that the minister of Leith would be disciplined in conformity with the line already adopted by the General Assembly and the courts of the Protestant Kirk sitting at St Andrews *in re* those who deflowered virgins: a minister who had sired a bastard and then promised marriage to the mother would surely be compelled by the Kirk to marry the woman in question, regardless of the order of events. By contrast, more care was taken over the libel in the action for solemnization, placing the order of events as promise then *copula*, which suggests that Blythman was alive to the requirements of consistorial litigation before the Commissaries. One final consideration suggests that the actions before the kirk session and the Commissaries were of different qualities: had the kirk session of Leith already been hearing the same case, John Bennet could surely have excepted that the action of solemnization before the Commissaries be sisted on the grounds of *lis alibi pendens*.

The final point of interest is the action brought before the Commissaries by John Bennet. The Commissaries’ decret from the action of solemnization and the kirk session of Leith’s sentence were produced before the Commissaries of

⁹⁷³ NAS, CC8/2/7, fo. 367r-v, 20 December 1575.

Edinburgh, and Bennet stated that on account of the two actions “he being ane minister of Goddis word and ane publict persone is hevele sclanderit and diffamit”. The Commissaries concurred and ordained that on two separate Sundays Margaret Blythman was “eftir preching to stand at the pillar of repentance within the kirk of Leyth & thair in presence of the congregatioun thair assemblit humlie to confess hir offence done to the said Master Johne & to craif God, his kirk & the said Maister Johne forgevinnes thairof”. It is striking that given that the slander was made against a Reformed minister, it was the Commissaries, rather than the Kirk, who ordained this public repentance. The reason for this is not clear: either the Commissaries were accepted as judges competent in all actions of slander within their local jurisdiction, or the kirk of Leith felt the need for some external court to vindicate the character of their minister. The former seems more likely, since had the latter pertained surely recourse could have been had to the General Assembly or some other superior tribunal of the Kirk. Either way, despite the close and overlapping involvement of the Commissaries of Edinburgh and the kirk session of Leith in the Bennet and Blythman affair, there is no evidence of a jurisdictional conflict between the two authorities.

The confluence of the jurisdictions of the Commissaries and the Kirk may be illustrated and explored further by the second case involving slander and allegations of non-regular marriage. This time, the accused was not a minister, but a senator of the College of Justice, and the kirk session involved that of Edinburgh rather than Leith. The events are known only from a decret pronounced by the Commissaries on 24 May 1565, which again merits and requires quoting in full:

“Anent the supplicatioun rasis at the instance of George Gibsoun ane of the memberis of oure Soverane Ladeis Sessioun aganis Isobell Robesoun relict of vmquhile Johne How, makand mentioun that quhair vpoun the fyft day of Aprile lastbipast the said Isobell gaif in ane sclanderous bill, to the greit infamitie of the said George[is] honour and dignitite of that rowme in the quhilk he is placit, befor the Minister elderis deaconis and rest of the kirk of Edinburch; berand in effect that the said George at my chalmer last [wes] or thairby maid faithfull promeis to hir to haue contractit the band of matrimony with hir and thairupoun to haue conuersit with hir carnalie to the greit contempt of God and sclander of his Kirk of the quhilk the said George confeses him self tobe ane member. Off the quhilk cryme the said George being innocent and the samyn being reportit to him within tua dayis thaireftir revokit the samyn as iniurie to his mynd lyke as he zit dois, Quhilk... the said George wald not beir with nor zit sustene for fyve hundreth crownis zea rather or the samyn had bene done to him he wald haif debursit of his avne geir samekle in respect of the circumstances aboue rehersit, as the said supplicatioun beris. Bayth the said parteis being personalie present, the said

Isobell producit the said complaint gevin in be hir befor the saidis Ministeris eldaris and deaconis befor the saidis Commissaris berand that the said George maid to hir the said faythfull promeis in maner foirsaid, ffor quhome it wes allegit be Maister Thomas Fermour hir prolecutoure that scho committit na iniuris aganis him in geving in of the said complaint befor thame, in respect that the promeis specifiit thairin wes of veritie and faithfullie maid be him to hir and conuersit carnalie with her as said is and abaid thairat; Quhilk being admittit be the saidis Commissaris to hir probatioun sche referrit the samyn to the said George ayth simpliciter. The saidis Commissaris assoilzeis the said George and Isobell *hinc inde* fra vtheris clames foirsaidis and decernis ather of thame quit thairfra in tyme cuming, and ordanis the said Isobell to desist and resist fra all speking or alleging of the making of the said promeis be the said George to hir owther in his presence or outwith the samyn without that scho call him befor the juge competent and preif that he maid the said promeis to hir sufficientlie as accordis, vnder the pane of fourtie pundis tobe payit [to] him [be] hir swift as scho cummis in the contrair thairof: Becaus the said George being takin be the saidis Commissaris alsweill vpoun the making of the said promeis as carnale copulatioun allegit had be him with the said Isobell declarit and deponit that he neuir did the samyn. And preceptis to be direct thairupoun as efferis”.⁹⁷⁴

The notion of slander is drawn upon twice during the decret. In the first place Robeson claimed that George Gibson’s alleged promise and *copula* was “to the greit contempt of God and sclander of his Kirk of the quhilk the said George confesses him self to be ane member”. Here the wording suggests the framework of Godly discipline, that those who belong to Christ’s congregation ought not to contract marriage in this fashion, and it was presumably on this understanding that Robeson petitioned the kirk session of Edinburgh for remedy. Nevertheless, the Senator of the College of Justice considered Robeson’s petition given into the kirk session to be “ane slanderous bill” and therefore moved to have her punished as a slanderer by the Commissaries of Edinburgh. It is quite clear that the Commissaries considered both Robeson’s allegation of promise and *copula*, as outlined in the bill given into the kirk session (which was produced before the Commissaries) as well as the senator’s allegation of slander at the same time and assoilized either party *hinc inde* from each others’ claims. What is also clear is that precedence had been given to the allegation of promise and *copula*, since this was referred to Gibson’s oath, on the strength of which he was assoilized. From this basis, it was clearly accepted that Robeson had made her allegations in good faith, and not from any malice towards Gibson. What is interesting is that Robeson was not actually put to silence in the

⁹⁷⁴ NAS, CC8/2/2, fos. 34v-35r, 24 May 1565.

normal manner: rather the Commissaries used a unique formula, decerning “the said Isobell to desist and reist fra all speking or allegeing of the making of the said promeis be the said George to hir owther in his presence or outwith the samyn without that scho call him befoir the juge competent and preif that he maid the said promeis to hir sufficientlie as accordis...”. This curiosity can be accounted for in the following manner: had Robeson pursued before the Commissaries in the first instance, she would have pursued for solemnization of marriage, and if unsuccessful would have in effect been silenced on the matter. Yet the Commissaries had given consideration to her allegations as per her complaint given into the kirk session of Edinburgh, which would have been framed in terms of Godly discipline rather than being strictly consistorial. As such, the Commissaries restrained her from making further allegations unless she call Gibson before “the juge competent” and prove her allegations. The “judge competent” was surely the Commissaries themselves, the action an action for solemnization, and the means of probation other than by oath, since this had already been used to resolve the complaint given into the kirk, but which through the complication of Gibson’s action of slander had been pronounced upon by the Commissaries rather than the kirk session of Edinburgh. Yet within the relative complexity of proceedings neither the litigants, nor the Commissaries, nor the session of Edinburgh appear to have questioned the involvement of both the Commissaries and the Kirk. The Commissaries had dealt with the actions arising from the overlap of the competent jurisdictions of the Kirk and the Commissaries, and directed that any subsequent litigation arising from the affair be led before them.

[v] THE STAYING OF BANNS

Having discussed those actions which fall under the general category of slander, it remains to discuss those actions involving allegations of promise of marriage (and sometimes *copula*) made either in direct response to proclamations of banns, or so as to pre-empt them. In such cases the local parish kirk was of course intimately involved: names had been given to the minister so that banns might be proclaimed, during which proclamation a public objection had stayed them. Yet since the normal objections to banns had potential consequences governed by the Commissaries and their laws, such objections could not be investigated by the minister, but had to be remitted to the Commissaries. In one case, *Carrik v. Gibsoun*,

the jurisdiction of the Commissaries was explicitly stated: the names of a couple had been given into the elders and deacons of the kirk of Musselburgh, but when the banns were called an impediment to the couples' marriage was alleged before the elders and deacons, who "on na wayis will proclame thair banes vnto the tyme the same wer first decydit befor the saidis Commissaries, juge competent in that behalf".⁹⁷⁵ In another case recorded in the *Buik of the Kirk of the Canagait*, one Christine Weddell appeared before the session there on 8 December 1565 "allegand promis of marriaig of Thomas Russall, cordinar, desiring the said Thomas to be no ferder proclamit with nane uthair": "The kirk avasing thairupon...remittis bothe the perteis to the commissaris, requyring the said Cristane to intend actioun befor thame quha wes juge competent".⁹⁷⁶ These examples demonstrate yet further that various tribunals of the Protestant Kirk were prepared to both acknowledge and co-operate with the lawful jurisdiction of the Commissaries of Edinburgh.

There are 15 cases in the Registers of Acts and Decrees between April 1564 and the winter of 1576/7 involving the staying of banns, 11 of which mention the kirk in which the proclamation of banns were stayed, whilst in one other case, *McWalter v. Galbrayth*, it is know from another source where their banns were proclaimed.⁹⁷⁷ The map on the following page shows the location of each kirk where the banns were stayed, whilst the number in brackets indicate the number of times this occurred for a given kirk.⁹⁷⁸ As can be seen, the majority of cases arose from banns stayed in Edinburgh or ports and villages close by, whilst none of them originate from south-west, west, highland or north-east Scotland, thereby strongly suggesting that the inferior Commissaries dealt with such actions in the provinces.

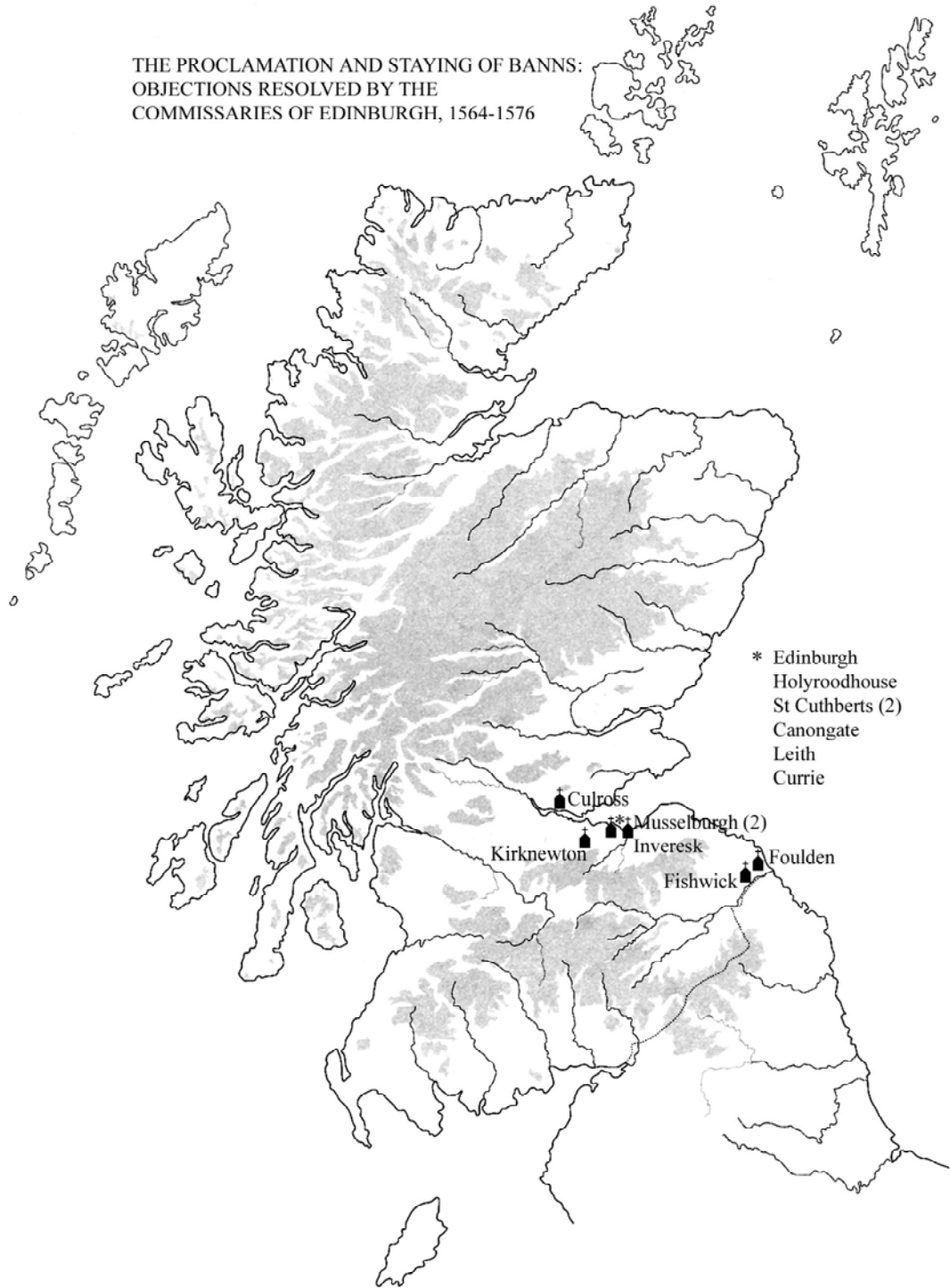
⁹⁷⁵ NAS, CC8/2/8, fos. 161v-162r, 21 May 1576.

⁹⁷⁶ *Buik of the Kirk of the Canagait*, 30.

⁹⁷⁷ *Buik of the Kirk of the Canagait*, 105.

⁹⁷⁸ The 15 cases upon which the map is based and upon which much of the following discussion is also based are listed with full references in Appendix II, J.

THE PROCLAMATION AND STAYING OF BANNS:
OBJECTIONS RESOLVED BY THE
COMMISSARIES OF EDINBURGH, 1564-1576



There are a considerable number of possible variations within all of these actions, variations which give each action a different emphasis and possible outcome. The general outcomes sought in these actions brought before the Commissaries were usually either to have one or more parties declared free from a promise of marriage, or for the party by whom the banns had been stayed to be put to silence, depending on circumstance. Yet they were all predicated upon the fact that whilst the parish kirk was the proper forum for the proclamation of banns and the celebration of marriage, the resolution of objections involving questions of consistorial law were the preserve of the Commissaries. As shall be seen, the relative complexity of some of the actions which arose out of the staying of banns may have on the one hand furnished ministers with good cause to avoid entanglement in such issues; but on the other, they again underline the manifest need for law reform which the Commissaries failed to take in hand.

The three cases where proclamation of banns were not explicitly mentioned, but may be inferred, are *McWalter v. Galbrayth*, *Currye v. Stevin* and *Robesoun v. Liall* and these will be discussed first. In *McWalter v. Galbrayth* it was libelled that the pursuer and defender had made promise of marriage *per verba de futuro* with faithful promise to solemnize marriage. Whilst not mentioned in the Register of Acts and Decrets, it is certain that the couple had given in their names to the minister of the Canongate kirk to be called on three separate Sundays, and that they had been proclaimed twice before Elizabeth Galbraith thought better of the union.⁹⁷⁹ Yet having had the banns proclaimed, the couple could not extricate themselves from the situation without recourse to the Commissaries of Edinburgh. There were two main points which had to be established before the Commissaries. The more pressing point was whether or not the couple had consummated their promise and therefore contracted an imperfect marriage, from which there would be no freedom. In this respect the couple were “suorne be thair greit aithis in presence of the saidis Commissaris [and] maid fayth that nane of thame had carnale conuerstaioun with vtheris”. Having satisfied the Commissaries that marriage had not been completed imperfectly between the couple, it nevertheless remained that they had entered a marital pre-contract which formed a bar to contracting marriage with other parties until it was set aside by judicial decree. Since it was MacWalter who was pursuing

⁹⁷⁹ “Valter McValter, Bessie Cabreth, 1, 2; devorsement vith the commissar” (*The Buik of the Kirk of the Canagait*, 105).

for declarator of freedom on the narrative that it was Galbraith who in fact not longer desired to marry, the Commissaries “inquirit gif scho wald fulfill the said promeis maid to the said Walter, for hir part declarit that scho wald not stand content thairwith and refusit to do the samyn”. The Commissaries accordingly declared McWalter “fre of the said promeis and to haue libertie in mariage notwithstanding the samyn”.⁹⁸⁰

In *Currye v. Stevin* the defender had “allegit & spokin opinlie in presence of diuers famous witnesses in the monethis of November December Januar and Februar last at the leist in diueris of thame that the said Johne [Currye] hes contractit mariage with the said Jonet [Stevin] and that scho is his lauchfull spous and thairby the said Johne is stoppit fra his vther gude purpossis of mariage and trublit thairfoir”. Since the proclamation of banns was not explicitly mentioned, and since Steven’s allegation of marriage seems to have occurred before famous witnesses rather than a Protestant minister (which made it slanderous, though the allegation was not explicitly called so) it seems reasonable to speculate that Steven had heard of Currie’s “other good purpose of marriage” prior to the actual proclamation of banns, and therefore made a public allegation of marriage, which in the probable circumstances was tantamount to staying the banns. Since Steven had not made the allegation before the Commissaries within the context of an action for solemnization of marriage, the onus was upon Currie to pursue Steven before the Commissaries in order to have her put to silence, so that she might not re-iterate her allegations when the banns were called once more. It transpired that there was no promise between the couple, nor any subsequent *copula* “bot only ane contract [for marriage] quhilk tuke na effect and was content of hir fre motive vnrequirit to past fra the samyn and mak na furder instance thairintel”. Since there was no actual promise of marriage, there was no need for Currie to be declared free, and so the Commissaries decerned “that the said Jonet on na wayis molest truble or inped the said Johne anent his marriage,” and so in effect put her to silence.⁹⁸¹

In *Robeson v. Liall* all three elements of slander, freedom and silence were present, and again the intention at least to have the banns called may be inferred. The pursuer, Isobel Robeson, libelled before the Commissaries that “scho is informit

⁹⁸⁰ NAS, CC8/2/2, fo. 41r, 30 May 1565.

⁹⁸¹ NAS, CC8/2/3, fo. 238r, 21 March 1568/9.

William Liall in Leyth wpoune sundrie and diuers dayis of the monethis of September and October the zeir of God Jai vc lxxiiij zeiris, vpoune quhat occasioun scho knawis not, maist wniustlie sclanderis hir alegand promes of marriage maid be hir to him and sua wpoun malice intendis to stope the said persewer of hir godlie purpois and to marie in the Lord as sall pleis hir”. In this instance, the purpose of the action before the Commissaries was a little muddled. Whilst Robeson was designated as the pursuer, the Commissaries had actually summoned Liall to appear before them so that he might be assigned a day on which to prove his allegations, with certification that if he failed to appear “he sall not be hard heirefter”. This was one of the many ways of dealing with those who made accusations of promise of marriage, but seemed unwilling to pursue for solemnization before the Commissaries. But without actually having the accuser in court it was difficult to establish the truth of the matter with any degree of certainty. If the accuser did appear, the Commissaries would refer the libel to their oath, thus availing themselves of the only means of probation left available to them. As shall be illustrated presently, it was sometimes felt to be unacceptable to resolve an action without any kind of probation and silence the accuser simply because they had not appeared when summoned. Yet on this occasion the Commissaries accepted that there was no marriage between the parties, and hedged against the possibility that there may have been a promise of marriage *per verba de futuro* by decerning Robeson “frie to marie in the Lord quhair scho pleses”.⁹⁸² This was a curious turn of phrase, since in the context it may be taken as a declarator of freedom, but the wording was actually that of the ‘licence’ clause used in annulment decreets, which was borrowed into Scottish Protestant divorce for adultery sentences and decreets pronounced from 1559 onwards.⁹⁸³

In the 11 cases remaining, it was stated explicitly that the banns had been stayed by an allegation of at least a prior promise of marriage, if not an imperfect marriage. The staying of the banns brought the jurisdictional schism between Kirk and Commissaries into sharp focus. Whilst a couple might give their names up to their parish minister, have them proclaimed on three separate Sundays during divine service and proceed to solemnize their union *in facie ecclesiae*, the moment any

⁹⁸² NAS, CC8/2/7, fos. 3v-4r, 15 October 1574.

⁹⁸³ This use of the “licence” clause has been discussed at more length above, i.e. Chapter III, §II, [v], [c] & [vi].

objection was made to this ecclesiastical procedure, the kirkmen were excluded from its resolution in favour of the Commissaries. The distinction was again one of the regulation of marriage by the community of the Protestant faithful, and the regulation of marriage by the consistorial law of Scotland.

Nevertheless this distinction was not an area of jurisdictional conflict, as far as the records show. This proviso is worth elaborating a little, and remains a condition of the conclusions reached in this section. Those cases coming before the Commissaries of Edinburgh as a direct result of the staying of banns suggest that these types of actions were not reserved to Edinburgh at the expense of the inferior Commissariots. As the map showing the geographical location of the kirks concerned suggests the Commissaries of Edinburgh's jurisdiction would appear to have been local in these matters.

From the period under discussion, only the Register of Acts and Decrets of the inferior Commissariot of Hamilton and Campsie survives, but its evidence indicates that inferior Commissaries could hear actions arising from the staying of banns, and that at least the kirk of Hamilton co-operated with the local Commissary's jurisdiction. In *Zoung v. Richie* the pursuer, Thomas Zoung, libelled that "he had contractit the band of matrymonie to be endit and celebrat in face of halie kirk with Isabell Stute and that he causit proclame the bannis oppinlie in the parochie kirk of Hammyltoun thre sundrie sabbboth dayis; nochttheles the said Bessie Riche allegand promit of mareage maid to hir be the said Thomas had malicuislie stoppit the solempnizatioun of the said mareage with the said Isabell quhairthrew the completing of the said band of matrimony cesit quhill cognitioun⁹⁸⁴ wes tane thairintill, be seikand the Juge to caus the said Bessie to preif hir allegeit promit of mareage." There is of course a suggestive phrase concerning jurisdiction here, and it must be presumed from the litigation which followed that 'seikand the Juge' meant instituting proceedings before the local Commissary.

When Master Andrew Hay, parson of Renfrew and Commissary of Hamilton examined Elizabeth Richie "scho affirmit the stopping of the said mareage and that the said Thomas promittit to hir mareage, and that in that name had carnall dail with⁹⁸⁵ hir and farther allegeit that the said Thomas in presens of the minister of

⁹⁸⁴ Actually *incognitioun*, although the *in* look more like *m*. Variation not in *DOST*.

⁹⁸⁵ *off* seems to have been overwritten by *w'* in the MS.

Ha(mmi)ltoun for the tyme promittit other to abstene fra carnale daill with hir or ellis in caice he abstenit nocht to compleit the said band of matrimonie eftir the quhilk promit before the said minister the said Thomas continuit in carnall daill with hir”. This second conditional promise of marriage before the minister is fairly unique. Whilst it is irrelevant in terms of the fact that the first promise followed by *copula* was marriage, the second promise was probably mentioned with an eye to probation. It is noteworthy that despite the fact that the second promise had allegedly been made before the minister of Hamilton, the minister had not sought to take cognition of the matter to himself.

The matter was admitted to Elizabeth Richie’s probation, but at the term assigned neither she nor her procurator appeared, nor had any diligence been done for proving of her allegations. As such, the Commissary of Hamilton “pute silence to the said Bessie and to hir farther probatioun. And inconsideratioun that the said Bessie failzeit in hir preif he could nocht find nor consider ony Lauchfull Impediment bot that the said Thomas mycht faythfullie contract and compleit the band of matrymonie in face of halie kirk with the said Isabell Stute and that the minister may proceid in the solempnizatioun of the said mariage betuixt the said Thomas and Isabell nochtwithstanding the said Besseis allegeance foirsaid”.⁹⁸⁶

Turning to the 11 remaining cases heard by the Commissaries of Edinburgh, it is worth beginning with a text book illustration of why these types of actions are categorized under the heading ‘freedom and silence’. This case was *Warno v. Craig* and it is perhaps significant that it did not occur until February 1570/1.⁹⁸⁷ The pursuer, Janet ‘Warno’, had given up her name along with William Taylor to Master John Burn, minister of the kirk of Musselburgh, that their banns might be proclaimed. The defender, Nicoll Craig, stayed the banns, alleging prior promise of marriage. When summoned before the Commissaries, Craig “grantit that he had na vther caus except onle ane promeis of mariage maid be hir [Janet Warno] to him”.

⁹⁸⁶ NAS, CC10/1/1, fo. 123v, 9 February 1564/5, *Zoung v. Richie*.

⁹⁸⁷ That is to say, the first textbook freedom and silence case which would have been readily recognized by later generations did not occur until nearly seven years after the appointment of the Commissaries of Edinburgh. This observation suggests that the established Scottish form emerged gradually out of the diverse array of disorganized forms thrown up by the fragmentation of the spiritual jurisdiction.

This promise was at most a pre-contract from which 'Warno' might be freed, and indeed the wording does not make explicit that Nicol Craig had actually responded to her promise of marriage: the Commissaries found accordingly and decerned "the said Jonet quit & fre of the said promeis & Inputtis silence to him [Craig] in tymes cuming and ordanis the said minister to proceed to the solemnizatioun of mariage betuix the said Jonet & William Tailzeour as efferis of the law".⁹⁸⁸ The employment of both declarator of freedom and putting to silence in this type of action was almost certainly unique.

This case also highlights a fundamental problem arising from the fragmentation of the spiritual jurisdiction. The initial allegation of prior promise was made in the kirk of Musselburgh, but the only course the minister could take was to suspend proceedings whilst the Commissaries of Edinburgh resolved the matter. Since the minister could not make use of the presence of the stayer and make further inquiries on the spot, the Commissaries were left with the potential problem of getting the stayer to subsequently appear before them so that further inquiries could be made. As shall be seen, many of those who stayed the banns seem to have been reluctant to pursue matters further before the Commissaries. This placed the onus on the person whose banns had been stayed to bring proceeding before the Commissaries. In *Warno v. Craig* the stayer actually appeared before them, but in many of the cases that follow, the Commissaries were forced to resolve the matter without the presence of the stayer, with various complications for the precise wording of the remedy applied.

From here on in, the cases conform less to the text book ideal and the full spectrum of possible combinations and outcomes must be described before some sense can be made of them. In *Warno v. Craig* it was unusual that both parties appeared before the Commissaries and that the alleged promise of marriage was not only true, but of such a quality as to allow the Commissaries to declare a person free from its obligations. The case was also unusual in that the Commissaries respected the direction of the case, given that it was brought by the party whose banns had been stayed against the party by whom the banns had been stayed, the normal outcome of which was putting to silence.

⁹⁸⁸ NAS, CC8/2/5, fo. 91r-v, 19 February 1570/1.

In one instance only, *Cunninghame v. Gillaspy*, did the objector to the banns actually start proceeding before the Commissaries. On this occasion, the alleged impediment was prior promise of marriage *per verba de praesenti*, but the pursuer succumbed in probation, the Commissaries accordingly assoilizing the defender and decerning them quit of the allegation in all times coming. Since the allegation had not been proven there was no place for a declarator of freedom and since the objector to the banns had succumbed in probation, there was no need to put them to silence explicitly. The action was conceived as seeking solemnization of marriage between the litigants on the grounds of *sponsalia per verba de praesenti* and as such, whilst it arose from the staying of the banns, it was not a matter for freedom and silence.

In the remaining cases the pursuer was always the person whose banns had been stayed, whilst the defender was the stayer of the banns. In 4 of these 9 remaining cases, the stayer of the banns appeared before the Commissaries, whilst the remaining 5 had to be resolved without the Commissaries having seen the stayer.

In the 3 of the 4 instances when the stayers appeared, the case was conceived as if the stayers had in fact started the proceeding themselves, and the case proceeded along the lines of *Cunninghame v. Gillaspy*. In *Williamson v. Stevinsone*, following the proclamation of banns in the kirk of Kirknewton for the marriage of James Williamson to a third party (Elizabeth Johnston), Janet Stevenson had stayed the banns on the grounds of prior promise of marriage with subsequent *copula*. Whilst Stevenson had clearly delayed in resolving the matter before the Commissaries, she appeared before the Commissaries when summoned and referred her accusations to James Williamson's great oath. Williamson denied the promise, and the Commissaries duly assoilized him from Stevenson's allegation of irregular marriage. As with *Cunninghame v. Gillaspy*, the action was essentially one which sought solemnization on the grounds of imperfect marriage, despite the fact that this was the desire of the defender rather than the pursuer. This being so, there was no call for Williamson to be declared free (no promise of marriage having been proven), nor for Stevenson to be put to silence.⁹⁸⁹ *Murray v. Barry* followed this exact same pattern,⁹⁹⁰ whilst in *Carrick v. Gibsoun*, the objection to the banns was promise of marriage only, and whilst the Commissaries provided the same remedy as these other

⁹⁸⁹ NAS, CC8/2/3, fo. 67r, 6 July 1568.

⁹⁹⁰ NAS, CC8/2/3, fo. 350r-v, 4 June 1569.

similar cases, they added that the marriage for which the banns had been proclaimed was to proceed.⁹⁹¹

The final case in this group does not conform to this pattern of construing the action as essentially one of solemnization. In *Pawton v. Davidson* the defender had stayed the banns of Walter Paton, alleging promise of marriage. Whilst Euphame Davidson did not appear before the Commissaries to hear them pronounce decret, she had “comperit personalie befoir the saidis Commissaris, and suorne declarit that the said Valter had mad na promeis of mariage to hir in ony tyme bigane”. In this, there is a suggestion of irregular procedure: had the defender appeared during the course of litigation, it would have been normal to admit the allegation to the defender’s probation, who would then have referred the matter to the pursuer’s oath, as with the other 3 cases in this group. However, there is a suggestion that the defender appeared before the Commissaries of her own accord and, prior to the matter being formally admitted to probation, made faith that she had no just cause to stay the banns. This might explain the unexpected wording of the Commissaries decret, since they decerned “the said Valter to be frie of the said Ewfame Daidisoun of the allegit promeis of mariage allegit maid to hir be the said Valter”.⁹⁹² This declarator of freedom was clearly inappropriate in the context: since it had been established that there was no promise of marriage, there was no call for Paton to be declared free from it. The question therefore is whether or not the Commissaries could have applied another remedy. Since the allegation had not actually been admitted to the defender’s probation, it follows that it would have been inappropriate for the Commissaries to assoilize the pursuer as they had done in the other 3 cases in this group. Similarly, since the defender had nevertheless admitted that the allegation was unfounded, there was no direct need to put the defender to silence, since it would have been reasonable to presume that the defender would not continue to make her allegations, having already admitted that she had no just cause. The problem of remedy would therefore seem to have arisen out of an irregularity of procedure, namely the failure of either party’s position to be formally admitted to probation. In this scenario, it would perhaps have been best for the Commissaries to positively decern the minister to proceed to solemnize the marriage for which the banns had

⁹⁹¹ NAS, CC8/2/8, fos. 161v-162r, 21 May 1575.

⁹⁹² NAS, CC8/2/8, fo. 290r-v, 8 November 1576.

been proclaimed, as was the case in *Carrik v. Gibsoun*. Nevertheless, the fact that the Commissaries elected to declare Paton free demonstrates that the various remedies which could be applied were tantamount to the same thing, and that in an atypical case, freedom, silence or decret authorizing solemnization would have had the same effect.

The relatively indiscriminate application of any of these three remedies may be seen in the final 5 cases which remain to be discussed. Before proceeding, a number of terms must be qualified. In the cases that follow the ‘stayer’ of the banns proved reluctant to pursue the matter further before the Commissaries of Edinburgh. The party whose banns had been stayed was therefore obliged to institute proceedings before the Commissaries themselves, and was often designated the ‘complainer’. Thus, in terms of the ensuing litigation, the ‘complainer’ was the pursuer, the ‘stayer’ the defender. Nevertheless, in the event that the ‘stayer’ appeared when summoned, the Commissaries were inclined to admit the stayer’s original accusations (by which the banns had been initially stayed) to probation, thus in effect making the stayer the pursuer, and their earlier accusations a formal libelled allegation.

For example, in *Ramsay v. Myll* the defender stayed the banns by making an accusation of promise of marriage, but when summoned to “tak ane day for persewing of the complener vpoun his allegit promeis and ony vther caus scho hes to lay to his charge” with certification that if she failed to appear the Commissaries would put her to silence, she failed to appear. The turn of phrase used here reveals the way in which the case could run against the grain of its initial conception: the pursuer became the ‘complainer,’ whilst the defender (the ‘stayer’) was invited to pursue them. Since Mill failed to appear when summoned, the Commissaries “imputtis silence to the said Christiane [Myll] in tyme cuming and ordanis the bannis & mariage to proceid, nochtwithstanding ony impediment opponit be hir thairaganis”.⁹⁹³ In this respect, the failure of the defender to take up the Commissaries offer to pursue the ‘complenar’ simplified the case, casting the ‘complenar’ in the role of a pursuer seeking the Commissaries to put a defender to silence.

⁹⁹³ NAS, CC8/2/7, fo. 89v-90r, 5 March 1574/5.

The resolution of this kind of action without the presence of the stayer of the banns was of course unsatisfactory in terms of formal probation. The allegation could only be referred to the complainer's oath with the permission of the stayer of the banns, and as such, when they failed to appear, the Commissaries were obliged to pronounce decret in lieu of any formal probation of whatever quality. In *Maistertoun v. Stobye* the case proceeded upon the same lines as *Ramsay v. Myll*, with the exception that when the defender failed to appear before the Commissaries, she was ordained "not to stop the proclamatioun of the saidis bannis nor mariage in tyme cuming nor to mak impediment thairto bot that the samyn salbe done as aucht of the law".⁹⁹⁴ This conditional putting to silence has already been noted in *Gibsoun v. Robesoun* where the discrepancy was accounted for by drawing attention to the atypical jurisdictional features of the case. But in the present case, it is difficult to understand why the silence was conditional, since it scarcely differed in particulars from *Ramsay v. Myll*. The answer may lie in the discretion of the Commissaries. Some of these cases did not readily lend themselves to the pronouncement of legally binding final decisions, and on occasion the Commissaries were clearly inclined to allow for the possibility that the stayer of the banns might have just cause to institute proceedings before them at a later date. This tentative approach may well have arisen out of the separation of ecclesiastical procedure and consistorial jurisdiction which the Reformation had occasioned. The Commissaries must have lacked the intimate parochial knowledge of the clergy which had aided the resolution of similar actions prior to the Reformation. The lack of certainty or finality in some of the Commissaries' decisions also suggests a more fundamental problem: the laws governing the contracting of marriage were ripe for reform.

Baxter v. Dun proceeded upon similar lines to the cases just discussed, but with a different remedy applied. Again the defender had stayed the banns of the pursuer, alleging prior promise of marriage, but failed to appear before the Commissaries when summoned with certification. In conformity with the certification, the Commissaries decerned "the said Patrik [Baxter] tobe fre of the said allegit promeis in tyme cuming & him to have libertie to marye the said Alesone [Strae] according to his said promeis".⁹⁹⁵ There is no clear indication of why on this

⁹⁹⁴ NAS, CC8/2/6, fo. 39v, 20 January 1572/3.

⁹⁹⁵ NAS, CC8/2/7, fo. 82r, 28 February 1574/5.

occasion the Commissaries chose the remedies of declarator of freedom and of authorizing solemnization over putting to silence.

Similar details pertained in *Quhytlaw v. Thomsoun* with the addition that the allegation was promise of marriage with subsequent *copula*. The alleged *copula* seems to account for the variation of remedy applied by the Commissaries in this instance: “The saidis Commissaris be thair decret decernis the said Jonet [Thomsoun] to have na actioun aganis the said Barthilmo [Quhitlaw] for the said promeis [& the same]⁹⁹⁶ gif ony wes maid tobe of nane avale force nor effect & him to be fre thairof in all tymes cuming”.⁹⁹⁷ This belt and braces approach makes sense in the circumstances. Since the allegation had not been admitted to probation, the Commissaries could not be certain the litigants were not imperfectly married. Accordingly, the Commissaries were required to annul the first promise of marriage, as a hedge against the possibility that it might actually have been made. Given that the promise was annulled, it seems inappropriate to have immediately declared Quhytlaw free from the annulled promise; but as has already been discussed, a declarator of freedom was tantamount to ordaining the ‘complainer’ to proceed to solemnize the marriage for which the banns had been proclaimed.

The final case to be discussed, *Johnestoun v. Kello*, has several peculiar features, but still falls within the ambit of the group under discussion. In the action pursued before the Commissaries, John Johnston of Ridhall libelled that “Cristiane Kello now Indwellar in Leyth vpoun hir pretendit maner maid allegience to the said minister [Master Adam Lytman Minister of Curry] that the said Johne Johnestoun had maid promeis of mariage vnto hir, quha thaireftir stayit the solempnizatioun of the said marriage sik as the said Minister yet dois, and on nawyis will nocht do the samin, howbeit the said Johnestoun maid na promeis of mariage to the said Cristiane; And als that scho is marreit sensyne with Johne Fin[c]al[t]ie indwellar in Leyth”. Kello was duly summoned before the Commissaries with certification that if she failed to appear “the saidis Commissaris will decerne the said mariage to be solempnizat betuix the said Johne Johnestoun and Jonet Stewart.” Kello failed to appear, the Commissaries duly decerning “the said marriage to be solempnizat betuix the said Johne Johnestoun & Jonet Stewart” in conformity with the banns

⁹⁹⁶ This is not at all clear, the ‘&’ being interfered with from an ‘f’ on the line below, followed by a blurred word, followed by what appears to be ‘same,’ but which is difficult to confirm.

⁹⁹⁷ NAS, CC8/2/6, fos. 207v-208r, 9 December 1573.

proclaimed.⁹⁹⁸ Given that it was libelled that Kello had in fact married a third party subsequent to the alleged promise of marriage on account of which she stayed Johnston's banns, it seems likely that despite the fact that this point was not admitted to probation, the Commissaries judged that there was no need to declare Johnston free from the promise, and that it was unlikely that Kello needed formally to be put to silence. In this situation, the Commissaries clearly deemed it best to decern the proposed solemnization to proceed in conformity with the banns proclaimed.

Several conclusions can be drawn from the evidence presented in this chapter. It has been seen that in strict jurisdictional terms the tribunals of the Protestant Kirk were prepared to both accept and resist the consistorial jurisdiction of the Commissaries of Edinburgh. Yet the complex nature of the legacy of the spiritual jurisdiction in post-Reformation Scotland led to more pragmatic co-operation in the more nebulous world of the day-to-day regulation of the personal lives of Scots by the Commissaries and the Kirk. Such co-operation occurred in an often confused and fragmented context. Whilst the differentiation of the old spiritual jurisdiction into consistorial and legal aspects on the one hand, and disciplinary and moral aspects on the other, was undoubtedly a prominent feature of the difficulties of the situation, this was only part of the problem facing the Commissaries and the Kirk from the mid-1560s. The analysis of the litigation and relations arising out of the staying of banns demonstrates that the failure in Scotland to simplify and reform the laws governing the contracting of marriage compounded the problems experienced by the Commissaries in trying to regulate the marital lives of early modern Scots. Yet within this confused situation, boundaries of a sort do appear to have been drawn as both the Commissaries and Kirk felt their way forward into new and in some ways subtly unfamiliar territory. The analysis of actions of slander involving an overlapping or confluence of the Commissaries' and Kirk's jurisdictions has demonstrated that far from being a source of conflict, such actions witnessed a mutual desire for order and co-operation from both sides. The formulation of precise jurisdictional boundaries between the two systems of courts and tribunals was not always achieved, but in a sense that was the nature of the case: the harmony of the

⁹⁹⁸ NAS, CC8/2/6, fos. 226v-227r, 11 January 1573/4.

medieval polity had taken centuries to develop; it could not be replaced in a few years in the midst of revolutions and civil wars.

THESIS CONCLUSIONS

The early history of the Commissaries of Edinburgh is one of the forgotten chapters in the history of the Scottish Reformation. The research and arguments put forward in this thesis have had both a general significance for Scottish Reformation studies, as well as a more particular significance for certain branches of legal and ecclesiastical history.

The Commissaries of Edinburgh seem to have been intimately involved at the very centre of the jurisdictional and legal disorder which the early stages of the Scottish Reformation occasioned. Indeed, it is really the disorder and revolutionary nature of events which make the history of the spiritual jurisdiction during the Scottish Reformation so unique: issues and ideas which normally remained latent, un-discussed or simply abandoned in other Reformations were often brought into sharp focus and directly addressed. From the very beginning the events surrounding the cessation of the old courts spiritual and the appointment of the Commissaries raised several major issues. It has been argued that for various members of Mary's government involved in the appointment of the Commissaries of Edinburgh, the actions of the Lords of the Congregation had indeed been rebellious and illegal, and had not been the just resistance of loyal subjects against the religious and political policies of unjust rulers. It has also been argued that in the same way the legality of the first Reformation Parliament and the constitutional basis of the Protestant Kirk were also not accepted by various jurists within Mary's government. These positions found direct expression both in the nuanced manner in which the Commissaries were appointed and in a number of practical problems the Commissaries had to deal with. Great care seems to have been taken not to grant the constitutional validity of the suppression of the courts spiritual and the statutes of the first Reformation Parliament, whilst at the same time dealing with the practical legal and jurisdictional consequences of the 'uproar for religion'.

From the perspective of Reformation ecclesiology the early history of the Commissaries has also proved significant. There are clear indications that the early stages of the Scottish Reformation were not only anti-papal but anti-episcopal, and that those who appointed the Commissaries were hard pressed to preserve the principle of episcopal jurisdiction and continue the administration of its legal functions. Yet at the same time the manifest conflict between the Commissaries of Edinburgh and John Winram, superintendent of Fife, Fotherick and Strathearn has suggested that the principle and authority of episcopal government were also present in the early Reformed organization of the Protestant Kirk.

The early history of the Commissaries has also proved significant in terms of legal history, contributing a further chapter in the history of the Canon law in Protestant lands. Given the initial violence expressed towards the Canon law by radical sections within Scottish Protestantism, it has been argued that the retention of so much of the Canon law in early Scots consistorial law avoided the mistakes of the early Lutheran Reformation, an achievement attributed in part to the skill and cunning of James Balfour. Yet this thesis's approval of the survival of the Canon law has not been uncritical, and the problems attending the continued enforcement of the un-reformed Canon law concerning the contracting of marriage have been deprecated, both within the context of actions for solemnization and of actions arising out of the staying of banns. Protestant reforms of the Canon law have also been considered, and it has been argued that Scottish Protestant divorce on the grounds of adultery was a uniquely Scottish divorce combining concepts from both Canon law divorces *a mensa et thoro* and *a vinculo matrimonii*. It has also been argued that such reforms were predicated in part upon the alteration of the relationship between theology and law, and that the direct interpolation of the Levitical law into Canon law bypassed the need for a thorough formulation of a new Scottish Protestant doctrine of marriage.

In terms of ecclesiastical history the early history of the Commissaries has also proved significant, re-visiting issues and ideas which were last discussed in the mid-nineteenth century. The various and often complex policies employed by the Commissaries towards the tribunals of the Protestant Kirk when dealing with the legacy of the years between the cessation of the courts spiritual and the Commissaries' appointment, and in the years following their appointment, suggest that the learning of the first Commissaries was well employed. The old nineteenth-century narrative of the conflict of two discrete systems competing over the same

jurisdiction has been placed within its proper constitutional and historical perspective. It has been argued that the Commissaries and the Kirk enjoyed their own respective jurisdictions, neither of which were considered at the time to be civil, and that whilst these jurisdictions touched and overlapped in many complex ways, the general approach of both authorities seems to have been one of mutual acknowledgement and a desire for co-operation. Yet at the same time the example of John Winram has provided a tantalizing glimpse of how the jurisdiction of the Kirk might have developed had the Commissaries not been appointed.

The actual Court of the Commissaries of Edinburgh has also proved interesting in its own right. The Court itself has been shown to have been well organized and well staffed, hearing a multitude of actions from all over Scotland. It has been argued that its Romano-canonical procedure was a slightly improved version of that employed in the Courts of the Officials, whilst its summary procedure, together with a willingness to allow even illiterate parties to litigate without the services of men of law, has been argued to have rendered the Commissaries accessible to Scots from all walks of life. The length and cost of litigation has been argued to have been reasonable and efficient within the ambitious context of the administration of national jurisdictions within early modern Scotland. On a local level, the 'Commissariat of Edinburgh' has been portrayed as a popular court, or at least a court which provided a number of useful legal functions in an accessible and reasonably priced manner. Indeed the Court of the Commissaries of Edinburgh has been shown to be a significant, even integral part of the wider Scottish legal system.

Finally, it has been maintained that the principle of episcopal authority and jurisdiction was central to the intellectual and constitutional coherence of the jurisdiction of the Commissaries of Edinburgh and the inferior Commissariots during the sixteenth and seventeenth centuries. This is despite the fact that many of the outward signs of episcopacy and episcopal jurisdiction were for a time obscured during the Reformation era. But it is clear that the principle survived in constitutional thought and was given fuller outward expression during the reign of James VI. This theme of episcopal authority and jurisdiction gives the Scottish history of the spiritual jurisdiction strong parallels with the English example. It is indeed truly remarkable that it was neither during the Scottish nor English Reformations that the medieval idea of the spiritual jurisdiction was in fact undermined, but rather during the rise of new religious forces and ideas during the troubled reign of Charles I.

If progress has been made in the history of the early Commissaries, at the same time there is still further work to be done at every point. The limits of the knowledge and understanding of the present researcher have undoubtedly led to a lack of awareness of the wider significance that this study may have for other branches of historical knowledge. The very nature of the subject has demanded the straddling of the disciplines of medieval and early modern history, together with legal and ecclesiastical history. In this, the limits of the study will be apparent to those whose specialize in each respective field. John Riddell's closing remark at the end of his own treatise on the Commissaries of Edinburgh and their consistorial law still seems remarkably apt: "I cannot at the same time bid adieu to this curious and interesting subject, which strikes me on the whole to have been but little canvassed, without hoping that, having thus far broken ground, it may be further investigated and matured by others in the manner I have attempted, from our pure native sources".⁹⁹⁹

⁹⁹⁹ Riddell, *Inquiry*, i, 554.

APPENDIX I

CHARTER OF CONSTITUTION OF THE COMMISSARIES OF EDINBURGH

*Carta constitutionis Commissariorum Edinburgi*¹

- [1] MARIA Dei gratia, Regina Scotorum, omnibus probis hominibus suis, ad quos praesentes literae pervenerint, salutem.² Noveritis, quod uti palam constat ob cessationem seu absentiam ecclesiasticae jurisdictionis Officialium & Commissariorum intra hoc nostrum regnum, omnes actiones & causae consistoriales cognoscendi & in consistoriis decidendi antea in usu fuerunt, per longam justitiae dilationem sic dampnificatae extiterunt, magna una pars nostrorum subditorum, quod ipsi qui dictas actiones occurrentes habent, mentisque existunt promptitudinem atque ad prosequendum haben' multimode per carentiam ordinis ejusdem postpositi existunt:
- [2] Et nos ingens gravamen, aut populi nostri laesionem per hujusmodi recepimus, ac indies recipimus, volentes eos inde relevare ; nec non per provisionis viam in hujusmodi locum, vulgo *Rowme*,³ bonum quendam ordinem stabilire, sic quod justitiam illis exacte, rationabiliter, & cum omni diligentia in posterum ministrari seu fieri poterit:
- [3] Quocirca, cum avisamento Dominorum nostri secreti consilii, fecimus, constituimus, & ordinavimus, ac facimus, constituimus, & ordinamus, per praesentes, dilectos nostros, consiliarium confisum, & clericos, Magistros Jacobum Balfour Rectorem de Flisk, Edwardum Henrysoun in juribus seu legibus Doctorem, Clementem Litill Advocatum, & Robertum Maitland, ac quemque eorum, conjunctim & divisim in modo sequenti, nostros Commissarios Edinburgi in hac parte ;

¹ as per *Balfour's Practicks*, ii, 670-673. Another version of this charter may be found in *RPC*, xiv, *Addenda AD 1545-1625*, 304-307: Masson notes of the version he worked from that "the Latin in this document is very bad, not only in the copy among the Miscellaneous Papers, but also in the two other and more complete copies with which that has been compared and which have supplied some defects in it: viz. (1) A copy in the Commissary Office of Edinburgh, (2) A copy in *Balfour's Practicks*...".

² *salutem* missing in *RPC* version.

³ *rowme* in *RPC* version.

*Charter of constitution of the Commissaries of Edinburgh*⁴

- [1] MARY by the grace of God, Queen of Scots, to all her good men, to whom this present letter⁵ shall come, greeting. Know,⁶ that since it is clearly known by reason of the inactivity or absence of the ecclesiastical jurisdiction of the Officials and Commissaries within this our realm, all consistorial actions and causes which used to be⁷ discussed and decided in the consistories have been thus damaged⁸ through long delay of justice, since a great part of our subjects have these said actions in dependence, and intentions in readiness, and also divers things to be prosecuted in different ways, which through a lack of order have been postponed:
- [2] And we have willingly undertaken, and do undertake, to relieve our people from the great damage and skaith which through these things has arisen; and also to establish certain good ordinance by way of provision in this Realm,⁹ so that justice may be ministered and done exactly, reasonably and with all due diligence hereafter to all those [subjects]:
- [3] On account of which, with the advice of our secret council, we have made, constituted and ordained, and make, constitute and ordain, by [these] presents, our trusted counsellor and well beloved clerks¹⁰ Masters James Balfour, parson of Flisk, Edward Henryson, doctor in the laws, Clement Litill, advocate and Robert Maitland, and any one of them jointly and severally, in manner following, our Commissaries of Edinburgh in this respect;

⁴ I am grateful to David B Smith, M.A., LL.B., formerly Sheriff of North Strathclyde at Kilmarnock for examining a draft of this translation and for offering various improvements in style and in the accurate use of current Scots legal phrases. Any inaccuracies and defects in this translation remain my own.

⁵ R.E. Latham's *Revised Medieval Latin Word List* (British Academy, 2004), 369 indicates that *praesentes* (pl.) has the sense of 'the present letter or document'.

⁶ lit. *lit. fut. perf. 2nd per. pl. nosco*, but seems to be rendered 'know' in *RPS* translations and church documents, i.e. 'noveritis, frater meus...' etc.

⁷ lit. 'which were formerly in the habit of being'.

⁸ i.e. *sic dampnificatae extiterunt*, 'they have stood out to such an injurious degree'.

⁹ "per provisionis viam in hujusmodi locum, vulgo *Rowme* [*rowme* in *RPC* version]". It is tempting at first glance to think this refers to Rome, but "by was of provision in this place, in the vulgar *rowme*", suggests *DOST*'s definition of "Roume, Rome, Rwme, n., A realm, as in *the rovme of Scotlande*". The presentation by which Alexander Sym was appointed a Commissary of Edinburgh stated that he had been 'surrogated' "in the place and rowme of the said Maister James Balfoure" (*RSS*, v, 2396).

¹⁰ lit. 'beloved clerics' but the form 'traist counsaloure and weilbelovit clerkis' is used at *RPC*, v, 2396.

- [4] dando, concedendo & committendo illis, illorumque cuique conjunctim & divisim, nostram plenam potestatem ac mandatum speciale intra burgum nostrum de Edinburgh, in quacunque conveniente parte ejusdem, sedendi, & ullo diei tempore, prout illis placuerit, coram eis omnes nostros ligeos infra bondas vicecomitatum nostrorum de Edinburgh principali, & intra constabulariam de Haddinton, Peblis, Linlithgow, & vicecomitatus nostri de Striveling, a Striveling orientaliter, in eisdem villam & parochiam de Striveling comprehendendo, atque omnes actiones concernentes decimas, testata bona, injurias, curatorum donationem, acto nostri parlamenti conformiter discutiendi, decernendi & decidendi: nec non omnes alias actiones & causas intentatas seu intentandas, coram illis per ullas personas intra bondas praedictas residentes, aut contra ipsas per quascunque alias, quae in consistorio perprius judicari & decidi solent;
- [5] una cum omnibus causis & actionibus beneficialibus, matrimonialibus, divortii & bastardiae, intentatis sive intentandis, per quascunque personam seu personas, infra ullas hujus nostri regni partes vel loca commorantes, aut materias matrimoniales inter partes procul residentes, quae ob paupertatem, longum placitum, seu justitiam prosequi minime valent, qualificatis personis in patria, vel locis proximioribus locis quibus ipsi commorantur sive resident committendi; pro quibus in causa illa respondere tenebuntur:
- [6] Omnibus quoque appellationibus interpositis seu dependentibus ab ullo alio Commissario, seu Commissariis, quoquoque alio iudice ecclesiastico hoc nostrum infra regnum retroactis temporibus; appellationes etiam sive reductiones interponendas postea ab alio quocunque Commissario infra hoc nostrum regnum:

- [4] by giving, granting and committing to them, and any of them jointly and severally, our full power and special commission within our burgh of Edinburgh, to sit in whichever convenient part of the same, and at whatever time of day it pleases them, for discussing, decerning and deciding before them all actions concerning teinds,¹¹ bequests of goods¹², defamation, [and] giving of curators, conforming to the act of our parliament,¹³ pertaining to our lieges within the bounds of our principal Sherifffdom of Edinburgh, and within the Constabulary of Haddington, of Peebles and of Linlithgow, and our Sherifffdom of Stirling, from east Stirling, including the same town and parish of Stirling: and also all other actions and causes brought or to be brought before them, by any persons residing within the bounds foresaid, or against them by whatsoever other person, which were formerly accustomed to be judged and decided in the consistory;
- [5] together with all benefice, matrimony, divorce and bastardry causes and actions, brought or to be brought by whatsoever person or persons within any parts or dwelling places of this our realm, or matrimonial matters between parties residing far distant, which on account of poverty, long plea¹⁴, or justice they are not able to pursue, by committing¹⁵ such matters to qualified persons in the district or places nearer the places where [the parties] themselves dwell or reside; for which they¹⁶ will be held to answer in these causes:
- [6] and also all appellations interponed or depending from any other Commissary or Commissaries or other ecclesiastical judge whatsoever within this our realm in times gone by; also appellations or reductions interponed hereafter from any Commissary whatsoever within this our realm:

¹¹ *decimas*.

¹² *testata bona*.

¹³ Presumably the Act “Anent the ordour for geving of curatouris to minouris” (*RPS*, A1555/6/9; *APS*, ii, 493, c.8).

¹⁴ *longum placitum*.

¹⁵ lit. *of committing* as in *with power... of committing*.

¹⁶ presumably the Commissaries of Edinburgh.

- [7] CUM POTESTATE praenominatis Magistris Jacobo, Edwardo, Clementi, & Roberto, ac ipsorum ulli, conjunctim & divisim,
- [8] omnes alios iudices incompetentes in illis causis, seu casibus, infra hoc nostrum regnum, inhibendi ad procedendum in causis dictorum Commissariorum nostrorum jurisdictioni pertinentibus five spectantibus; cum certificatione iis; si in hoc succubuerint, aut defecerint, sive processerint, quodcunque illis agere contigerit deposit, in se nullum nulliusque effectus declarabitur, cum omnibus quae desuper sequentur ; ipsique pro eorum inobedientia punientur:
- [9] Omnimodos contractus, obligationes, acta, aliave scripta per partes, vel notarios ad ipsorum mandata, subscript¹⁷ proportantes sive gerentes, quod ipsae partes eosdem in dictorum Commissariorum libris registrari contentae sunt, cum literis ad eorum¹⁸ nostrum positionis seu namationis desuper donandis, recipiendi, atque in eorum libris supradictis registrari causandi ;
- [10] Praecepta pro testium summonitione ad comparendum fidele testimonium perhibere in omnibus causis, motis movendisve coram illis, sub similibus pecuniariis poenis, ac si praelibatis noftris Commissariis, secundum qualitatem causae expediens visum fuerit, dirigendi ; & si testes summoniti existentes minime comparuerint, eorum Officiarios namare, & dictas poenas instructionibus sibi desuper exhibitis applicandas fore causandi:
- [11] Omnia deforciamenta, per quascunque personam, seu personas, super eorum Officiariis praescriptis commissa vocandi, discutiendi, ac coram illis decernendi, quorum poenae adeo graves erunt, ac si noster Officiarius armorum in executione nostrarum literarum deforciatus extitisset; ex eo quod eorum Officiarii executores nostrae justitiae, & respectu in hoc, nostri Officiarii existunt:

¹⁷ *subscripta* in *RPC* version.

¹⁸ [*cornu?*] inserted here in *RPC* version.

- [7] WITH POWER to the forenamed Masters James, Edward, Clement and Robert, or any of them jointly or severally,
- [8] of inhibiting all other judges not competent to these causes or cases, within this our realm, from proceeding in causes pertaining or belonging¹⁹ to the jurisdiction of our said Commissaries; with certification to them; if in this they should succumb or fail or continue proceedings, whatsoever falls to them to do afterwards will be declared null in the self and of no effect, with all that follows thereupon; and for their disobedience they themselves will be punished;
- [9] of receiving and causing to be registered all manner of contracts, obligations, acts and other deeds²⁰ signed by parties, or by notaries at their instruction, purporting or bearing that the parties themselves are content for the same to be registered in the books of the said Commissaries, with letters to be given to them thereupon of our fines or poindings.²¹
- [10] of directing precepts for the summoning of witnesses to compear to bear faithful witness in all causes, commenced or to be commenced before them, under similar pecuniary pains, as if [before] our aforementioned²² Commissaries,²³ according to the nature of the cause as will have seemed expedient; and of causing their Officers to poind,²⁴ if witnesses having been summoned do not compear,²⁵ poinding²⁶ the said pains by their own instructions thereanent, the said instructions having been first exhibited in court:²⁷
- [11] of calling, discussing and decerning before them all deforcements committed against their Officers' precepts, by whatsoever person or persons, the pains of which are as grave as if our Officers of Arms had been deforced in the execution of our letters; since their Officers are executors of our justice and so in this respect they are our Officers:

¹⁹ *spectantibus: specto ab* has the sense of 'to pertain, belong to' (Latham, 447).

²⁰ *scriptum* is noted as having the meaning 'deed, bond' (Latham, 426).

²¹ *cum literis ad eorum nostrum positionis seu namationis despuer donandis: namatio* can have the sense 'distraining' (Latham, 310) – thus *poinding*, whilst *position* can have the sense 'impost' (Latham, 361) – thus *fines*.

²² *praelibatis nostris*.

²³ *coram illis... ac si praelibatis nostris Commissariis*. The sense seems to be "before them [the new Commissaries]... as if before our aforementioned Commissaries [i.e. pre-Reformation]".

²⁴ *namare*, to distraint or attach (Latham, 310).

²⁵ *minime comparuerint*.

²⁶ *dictas poenas...applicandas*, from *applico* 'to attach'.

²⁷ lit. "by their own having been exhibited in court instructions".

- [12] Testamenta quarumcumque personae vel personarum infra bondas suae particularis jurisdictionis supradictas, cujusvis valoris & quantitatis cujuscunque sint : Nec non omnia alia testamenta quarumcumque²⁸ personarum infra ullam aliam partem hujus nostri regni residentium aut commorantium, quorum pars defuncti summam quinquaginta librarum excedet, confirmandi ;
- [13] praefata testamenta in libris ipsorum Commissariorum registrari causandi ; dativas, si opus fuerit, in forma juris sub cautione dandi sive deliberandi:
- [14] Qui quidem processus, ac quaecumque dicti Commissarii, ullive ipsorum conjunctim aut divisim, aut eorum Officiarii in actionibus & causis suprascriptis illorum nominibus agere seu perficere contigerint, cum omnibus incidentibus, emergentibus, annexis, connexis, & dependentiis desuper, adeo valide, legitime tantique grandis valoris, fortitudinis & effectus, veluti ullus processus seu sententiae, quae per quemcumque judicem aut judices consistoriales deductae, vel datae intra hoc nostrum regnum, quocumque²⁹ elapso tempore fuerunt:
- [15] Acta, decreta, & sententias pronunciandi: Procuratores coram illis, pro prosecutione defensioneque dictarum actionum admittendi; Ordinarios officarios pro executione suarum directionum faciendi, creandi & ordinandi; pro quibus respondere tenebuntur; & generaliter omnia alia & singula faciendi, exercendi & utendi, quae in similibus officiis de jure seu consuetudine sunt, aut ullo elapso tempore dignoscuntur pertinere:

²⁸ *quarumcumque* in *RPC* version.

²⁹ *quocumque* in *RPC* version.

[12] of confirming testaments of whatever person or persons within the bounds of our abovementioned particular jurisdiction, of whatever value and amount: and also all other testaments of whatever person or persons dwelling or residing within any other part of this our realm, of which the dead's part shall exceed the sum of fifty pounds;

[13] of causing the foresaid testaments to be registered in the books of the Commissaries themselves; and of giving or delivering datives, if it was needful, in the form of law under caution:

[14] Which proceedings³⁰ and whatever else the said Commissaries, or any of them jointly or severally, or their officers, will resolve certainly to do or perform in their names in the above written actions and causes, with all and sundry powers³¹ thereanent, [are to be] just as valid, lawful³² and of the same great worth, value, strength and effect as any proceedings or sentences which were deduced or given by whatever consistorial judge or judges within this our realm at any time past³³:

[15] of pronouncing acts, decreets and sentences: of admitting procurators before them for the prosecution and defence of the said actions; of constituting, creating and ordaining ordinary officers for the execution of their precepts; for whom they will be held to answer; and of making, exercising and using generally all other things³⁴ that are in similar offices according to law or custom, or are decerned to pertain [thereto] at any time hereafter.³⁵

³⁰ *processus* may have the sense of legal 'proceedings' (Latham, 374).

³¹ literally *with all appurtenances, emergents, annex, connex and dependencies*.

³² The sense of this clause seems to be "whatever the Commissaries now do is to enjoy the same strength, force and effect as anything done by the old consistorial judges": *sunt* or *erunt* has therefore been inferred as [are to be].

³³ *quocumque elapso tempore*, which might be better rendered in Older Scots 'at any time bipast'.

³⁴ *omnia alia et singula*, thus lit. 'all other and every things'.

³⁵ *ullo elapso tempore*.

- [16] Ratum et gratum habentes & habiturae totum & quicquid praenominati nostri Commissarii, aut eorum quicumque, suive officarii & ministri in praemissis rite duxerit seu duxerint faciendum. Ac volumus quod praesens nostra commissio jurisdictioni collegii nostri justitiae, Vicecomitum, Senescallorum, Balivorum regalium regalitatum Comitum, Dominorum, Baronum, & Liberetenentium, Praepositorum ac Balivorum, seu ullius alius temporalis judicis cujuscumque infra hoc nostrum regnum, in causis eorum jurisdictioni pertinentibus, nequaquam praejudicabit, neque derogationem faciet.
- [17] Quare, universis & singulis quorum interest, vel interesse poterit, stricte praecipimus & mandamus, quatenus supra specificatis nostris Commissariis, aut eorum cuilibet conjunctim & divisim, suisque officariis & ministris, in omnibus & singulis praemissa concernentibus prompte respondeant, pareant & intendant, sub omni poena quae competere poterit in hac parte:
- [18] Praesentibus, nostris bona voluntate & beneplacito, ac quousque ulterior ordo in praemissis capiatur, duraturis.
- [19] Datum sub testimonio nostri magni sigilli, apud Edinburgh octavo die mensis Februarii, anno Domini millesimo quingentesimo sexagesimo tertio, & regni nostri vicesimo secundo.

*Per signaturam manu S. D. N. R. Subscript.*³⁶

³⁶ *Per signaturam manu Supremae Dominae nostrae Reginae subscriptam in RPC version.*

[16] Regarding as established and approved, now and in the future, all this and whatever else our forenamed Commissaries, or whichever of them, or their officers and servants, will have duly caused to be done in these aforementioned things.³⁷ And we intend that our present commission will by no means prejudice nor cause derogation to the jurisdiction of our College of Justice, of Sheriffs, of Stewards, of Baillies' Regalities,³⁸ of Earls' Regalities,³⁹ of Lords, of Barons, and of Freeholders,⁴⁰ of Provosts and of Baillies, or any other temporal judges whatsoever within this our realm, in causes pertaining to their jurisdiction.

[17] Therefore to each and all persons of which it is of interest or will be of interest, we strictly enjoin and admonish that they promptly respond, obey and submit to our above specified Commissaries, or any of them⁴¹ jointly or severally, and their officers or servants, in each and every thing concerning the premises under every penalty which will be competent in this respect:⁴²

[18] by the present letter, to be confirmed at our good will and pleasure, and until such time as further order⁴³ may be taken.

[19] Given under the testimony of our great seal, at Edinburgh the eighth day of the month of February, in the year of the Lord one thousand five hundred and sixty three, and in the twenty-second of our reign.

Signed by the hand of our supreme lady the Queen.⁴⁴

³⁷ *in premissis* has the sense of 'premises, things mentioned before' (Latham, 368).

³⁸ *balivorum regalium*.

³⁹ *regalitatum comitum*.

⁴⁰ *liberetenentium*: 'liberetenentibus serviciis' had been translated as 'freeholders' services' in *RPS*, 1581/10/89.

⁴¹ *cuilibet eorum*, as per William of Ockham's *Dialogus*, part 3, tract 1, book 4, caput VII, as translated by John Scott (www.britac.ac.uk/pubs/dialogus/t31d4.html).

⁴² *in hac parte*.

⁴³ *ulterior ordo*: *ulterior* may have the sense 'further, additional' (Latham, 499).

⁴⁴ *Per signaturam manu S. D. N. R. Subscriptam* translated as per *RPS*, 1703/5/3 & 1706/10/3.

APPENDIX II

STATISITCAL DATA IN SUPPORT OF CHAPTER FIVE:
ANALYSIS OF CONSISTORIAL LITIGATION BEFORE
THE COMMISSARIES OF EDINBURGH, 1564 – 1576/7

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A: FREQUENCY OF LITIGATION, APRIL 1564 TO JUNE 1569¹

Tally	Case name	Volume	Date YYYY/MM/DD	Action	Pursuer	Defender
1	Abirnethy v. Moncur	CC8/2/1: 63v. CC8/2/3: 334r.	1564/06/16; 1569/05/24.	Adherence	Abirnethy, Janet	Moncur, Johne
2	Archibald v. Matho	CC8/2/3: 385v.	1569/06/27	Adherence	Archibald, Isobell	Matho, Andro
3	Bosuell v. Wemyss	CC8/2/2: 190r; 207v; 403r-v.	1567/11/15; 1567/11/26; 1568/03/26	Adherence	Bosuell, Robert	Wemys, Janet
4	Cristesone v. Lindesay	CC8/2/2: 151r; 167v; 215r; 216v; 225r; 237r; 249v; 251v; 256v; 262v; 266r; 274r; 284r-v.	1567/10/22; 1567/11/01; 1567/12/02; 1567/12/03; 1567/12/08; 1567/12/13; 1567-8/01/07; 1567-8/01/08; 1567- 8/01/09; 1567-8/01/10; 1567-8/01/14; 1567-8/01/19; 1567-8/01/24.	Adherence	Crystesoun, Williame	Lindesay, Isobell
5	Cruik v. Hammiltoun	CC8/2/3: 123r; 293r; 298v; 340r-v.	1568/07/30; 1569/05/02; 1569/05/05; 1569/05/26.	Adherence	Cruik, Mairiorie	Hammiltoun, Jherome
6	Grahame v. Buchquhanane	CC8/2/2: 351r.	1567-8/02/27	Adherence	Grahame, Marie	Buchquanane, George

¹ Those cases names shown in bold are known to have reached decret, but after June 1569: for references for these decreets, please consult Appendix II, C.

7	Hammiltoun v. Dalmahoy	CC8/2/2: 222v; 249r; 312v; 316r; 320r; 333r; 343v. CC8/2/3: 101v; 109v; 264r; 270r; 271v; 323r; 324v.	1567/12/05; 1567-8/01/07; 1567- 8/02/07; 1567-8/02/10; 1567-8/02/11; 1567-8/02/18; 1567-8/02/23; 1568/07/14; 1568/07/21; 1569/04/01; 1569/04/18; 1569/04/19; 1569/05/16; 1569/05/18.	Adherence	Hammiltoun, Agnes	Dalmahoy, Alexander
8	Hammyltoun v. Kirkpatrik	CC8/2/1: 428r; 428v; 428v. CC8/2/2: 1r; 9v- 10r; 15v-16r; 30v- 31r; 31r; 35r; 57r; 68r; 85v; 95r-v; 116r; 124v; 331v- 332r.	1565/04/12; 1565/04/13; 1565/04/14; 1565/04/30; 1565/05/07; 1565/05/10; 1565/05/22; 1565/05/23; 1565/05/25; 1565/06/19; 1565/06/27; 1565/07/10; 1565/07/16; 1565/07/28; 1565/08/06; 1567-8/02/17.	Adherence	Hammyltoun, Elizabeth	Kirkpatrik, Roger
9	Kinross v. Menteith and Dalmahoy	CC8/2/2: 21v; 27r; 31v; 134v.	1565/05/14; 1565/05/18; 1565/05/23; 1565/08/15.	Adherence	Kinross, Master Henry, Procurator Fiscal	Menteith, Williame
10	Lindesay v. Edmestoun	CC8/2/1: 182r; 188r; 192r.	1564/10/16; 1564/10/20; 1564/10/24.	Adherence	Lindesay, Janet	Edmestoun, Williame
11	Nesbett v. Blak	CC8/2/2: 334r; 353r; 372r.	1567-8/02/19; 1567-8/02/27; 1567- 8/03/11.	Adherence	Nesbett, George	Blak, Margaret
12	Ostlar v. Ramsay	CC8/2/2: 299v; 306r.	1567-8/01/31; 1567-8/02/04	Adherence	Ostlar, David als Andro	Ramsay, Helene

13	Pennycuke v. Richesoun	CC8/2/1: 35r; 39r; 111v.	1564/05/31; 1564/06/02; 1564/07/20.	Adherence	Pennycuke, Marioun	Richesoun, Walter
14	Robertsoun v. Ker	CC8/2/2: 80r; 81v; 84v.	1565/07/06; 1565/07/07, 1565/07/10.	Adherence	Robertsoun, Janet	Ker, George
15	Stewart v. Ross	CC8/2/1: 368r.	1564-5/03/01	Adherence	Stewart, Gellis	Ross, Williame
16	Sympill v. Hammiltoun	CC8/2/2: 253r; 263r; 267v.	1567-8/01/08; 1567-8/01/12; 1567-8/01/15.	Adherence	Sympill, Isobell	Hammiltoun, James
17	Thorntoun v. Sandersone	CC8/2/2: 251r.	1567-8/01/07	Adherence	Thorntoun, Margaret	Sandersone, Johne
18	Wallace v. Dowglass	CC8/2/3: 293r-v.	1569/05/02	Adherence	Wallace, Cristiane	Dowglass, Andro
19	Young v. Wilsoun	CC8/2/1: 115r.	1564/07/22	Adherence	Young, Janet	Wilson, Andrew
1	Hoppringle v. Gib	CC8/2/1: 196r-v.	1564/10/25	Aliment	Hoppringle, Janet	Gib, George
2	Gib v. Gib	CC8/2/1: [242v-243r].	[1564/11/23]	Aliment as per terms of pre-ref divorce <i>a mensa et thoro</i>	Gib, [George]	Gib, [James]

3	Duncane v. Fairley	CC8/2/3: 82v.	1568/06/26	Aliment and care of bastards	Duncane, Helene	Fairley, Duncane
1	Cromartie v. Caddell	CC8/2/3: 20r; 31v; 36v; 54r-v.	1568/05/01; 1568/05/24; 1568/05/31; 1568/06/17.	Annulment	Cromartie, Katherine	Caddell, Andro
2	Kinross v. Sanchy & Craig	CC8/2/2: 414r; 420r; 423v; 46v; 47v; 49v; 51v; 55r; 60v; 86r; 91r; 112v; 115v.	1568/04/02; 1568/04/05; 1568/04/07; 1568/06/08; 1568/06/09; 1568/06/10; 1568/06/12; 1568/06/17; 1568/06/25; 1568/06/30; 1568/07/05; 1568/07/26; 1568/07/27.	Annulment	Kinross, Master Henry, Procurator Fiscal	Sanchy, Alexander
3	Lummisden v. Maxwell	CC8/2/2: 125v. CC8/2/3: 381-382r.	1565/08/06; 1569/06/24.	Annulment	Lummisden, Jonet	Maxwell, Johne
4	Maxwell v. Flemyngis	CC8/2/3: 119r; 268r.	1568/07/29; 1569/04/18.	Annulment	Maxwell, Williame	Flemming, Thomas & Jonet
5	Newtoun v. Dalzell	CC8/2/3: 363r; 366v; 373r; 377v; 380v; 386v.	1569/06/11; 1569/06/14; 1569/06/18; 1569/06/22; 1569/06/24; 1569/06/29;	Annulment	Newtoun, Margaret	Dalzell, James
6	Sinclair v. Tulloch	CC8/2/1: 183v; 186v; 189v.	1564/10/16; 1564/10/18; 1564/10/23.	Annulment	Sinclair, Margaret	Tulloch, James
7	Spalding v. Spalding	CC8/2/2: 24v; 38v; 45v; 51r-v.	1565/05/16; 1565/05/28; 1565/06/04; 1565/06/07.	Annulment	Spalding, Elizabeth	Spalding, David

8	Stewart v. Dunlop & Broun	CC8/2/1: 30r; 71r; 87v.	1564/05/20; 1564/06/20; 1564/07/03.	Annulment	Stewart, William of Bultreis	Dunlop, Hew & Elizabeth Broun
9	Gillaspy v. Marshell	CC8/2/1: 46r. CC8/2/2: 133v- 134r.	1564/06/06; 1565/08/15	Annulment	Gillaspy, Henry	Marscheall, Cristiane
10	Kinross & Patersoun v. Stevinsoun & Pollock	CC8/2/1: 318v; 386r; 415r. CC8/2/2: 3v; 86r-v.	1564-5/01/23; 1564-5/03/13; 1565/04/03; 1565/05/02; 1565/07/11.	Annulment	Kinross, Master Henry, Procurator Fiscal	Stevinsoun, Constine
11	Paislie v. Haistie	CC8/2/1: 138r; 149v-150r; 247v.	1564/08/04; 1564/08/11; 1564/11/25.	Annulment	Paislie, Margaret	Haistie, Johne
1	Craufurd v. Craufurd	CC8/2/1: 48r-v; 71v; 92v; 108v; 137v; 148v; 171r.	1564/06/07; 1564/06/20; 1564/07/07; 1564/07/17; 1564/08/03; 1564/08/11; 1564/10/06.	Bastardrie	Craufurd, William	Craufurd, James & curators
2	Dunbar v. Adair	CC8/2/3: 300r; 300r; 306r; 307v- 312r; 368v-369r.	1569/05/06; 1569/05/07; 1569/05/10; 1569/05/10; 1569/06/15.	Bastardrie	Dunbar, Alisoun	Adair, Cristiane
3	Kennedy v. Mure	CC8/2/1: 288r.	1564/12/19	Bastardrie	Kennedy, Janet	Mure, Agnes
4	Oliphantis v. Oliphantis	CC8/2/3: 333v- 334r; 342r.	1569/05/24; 1569/05/27.	Bastardrie	Oliphantis, Margaret & Jonet	Oliphantis, Petir & Thomas

5	Mairioribanks v. Wier & Wardlaw	CC8/2/1: 74r; 97r; 99v; 131v; 168v; 362v.	1564/06/22; 1564/07/10; 1564/07/12; 1564/07/31; 1564/08/21; 1564-5/02/26.	Bastardrie / Declarator of Legitimacy	Marioribanks, Symone	Wier, Johne
1	Andersone v. Allasone	CC8/2/2: 142r-142v; 175v-175r; 239r; 265r; 275r.	1567/10/15; 1567/11/06; 1567/12/13; 1567-8/01/13; 1567-8/01/19.	Divorce for adultery	Andersoun, Johne	Allasoune, Alesoun
2	Bannatyne v. Aitkin	CC8/2/2: 55r-v.	1565/06/18	Divorce for adultery	Bannatyne, Donald	Aitkin, Marioun
3	Barnair v. Nychole	CC8/2/2: 339v; 367r; 379r; 399v.	1567-8/02/21; 1567-8/03/09; 1567-8/03/16; 1567-8/03/24.	Divorce for adultery	Barnair, Margaret	Nychole, Johne
4	Brocat v. Jaksoun	CC8/2/2: 100v; 127v; 134v.	1565/07/18; 1565/08/08; 1565/08/15.	Divorce for adultery	Brocat, James	Jaksoun, Elizabeth
5	Bunche v. Moncreif	CC8/2/3: 17v; 43r.	1568/04/30; 1568/06/03.	Divorce for adultery	Bunche, Williame	Moncreif, Isobell
6	Buntyne v. Heriott	CC8/2/2: 316r.	1567-8/02/10	Divorce for adultery	Buntyne, Richard	Heriott, Margaret
7	Carnegy v. Vaus	CC8/2/1: 1v; 17v - 18r; 31r. CC8/2/2: 92r-v; 115r; 132v-133r.	1564/04/28; 1564/05/12; 1564/05/29; 1565/07/13; 1565/07/28; 1565/08/14.	Divorce for adultery	Carnegy, Johne	Vaus, Margaret
8	Clerk v. Scott	CC8/2/3: 183v.	1568-9/02/14	Divorce for adultery	Clerk, Johne	Scott, Jonet

9	Cunyngham v. Leky	CC8/2/1: 84v; 113r; 119v; 277r-v; 278v; 283v; 395v; 403v; 418v. CC8/2/2: 1v; 2v; 3v-4r; 32r-v; 58v; 76r; 100r; 117r; 125v.	1564/06/30; 1564/07/21; 1564/07/24; 1564/12/11; 1564/12/11; 1564/12/15; 1564-5/03/17; 1564-5/03/24; 1565/04/05; 1565/04/30; 1565/05/01; 1565/05/02; 1565/05/24; 1565/06/20; 1565/07/03; 1565/07/18; 1565/07/30; 1565/08/06.	Divorce for adultery	Cunyngham, Agnes	Leky, Walter
10	Cunynghame v. Cathcart	CC8/2/1: 83r.	1564/06/29	Divorce for adultery	Cunynghame, David	Cathcart, Gelis
11	Deynis v. Patersoun	CC8/2/2: 236v; 310v.	1567/12/12; 1567-8/02/06.	Divorce for adultery	Deynis, Isobell	Patersoun, William
12	Dougalsoun v. Kirkpatrik	CC8/2/1: 241r; 241r; 256v; 272r; 321r; 380r; 387r.	1564/11/22; 1564/11/23; 1564/11/29; 1564/12/07; 1564-5/01/25; 1564-5/03/05; 1564-5/03/13.	Divorce for adultery	Dougalsoun, Cristane	Kirkpatrik, Johne
13	Drippis v. Wrycht	CC8/2/1: 391r; 410v.	1564-5/03/15; 1565/03/30.	Divorce for adultery	Drippis, Johne	Wrycht, Marioun
14	Dunlop v. Broun	CC8/2/1: 25 r; 29r; 33v; 330v; 309r; 383r; 387v-388r.	1564/05/18; 1564/05/20; 1564/05/30; 1564-4/01/31; 1564-5/01/17; 1564-5/03/09; 1564-5/03/14.	Divorce for adultery	Dunlop, Hew	Broun, Elizabeth
15	Fawlisdale v. Palmar	CC8/2/3: 54r.	1568/06/16	Divorce for adultery	Fawlisdale, George	Palmar, Jonet

16	Flemyng v. Flemyng	CC8/2/3: 119r; 171v; 199v-200r; 202v; 210v; 267v; 270v; 274v-275r; 306v; 330r; 352r-v.	1568/07/29; 1568-9/02/04; 1568- 9/02/28; 1568-9/03/01; 1568-9/03/05; 1569/04/18; 1569/04/19; 1569/04/21; 1569/05/10; 1569/05/21; 1569/06/04.	Divorce for adultery	Flemyng, Thomas	Flemyng, Jonet
17	Forbes v. Sandelands	CC8/2/1: 18v-19r; 37r; 47v; 133v; 153v; 258v; 269r; 270v; 280r; 288r; 304v-305v.	1564/05/12; 1564/05/31 (ultimo); 1564/06/07; 1564/08/02; 1564/08/14; 1564/11/30; 1564/12/05; 1564/12/06; 1564/12/13; 1564/12/19; 1564- 5/01/15.	Divorce for adultery	Forbes, Johne	Sandelands, Barbara
18	Giffert v. Dischingtoun	CC8/2/3: 132v - 133v; 133v; 135r; 137v; 139v; 142v; 150v; 154v; 199v; 246v-247r; 264v- 265r; 280r-v; 294v; 306v-307r; 318v; 329v; 336v.	1568/11/12; 1568/11/22; 1568/12/10; 1568/12/24; 1568-9/01/04; 1568- 9/01/07; 1568-9/01/14; 1568-9/01/19; 1568-9/02/28; 1568-9/03/23; 1569/04/02; 1569/04/25; 1569/05/03; 1569/05/10; 1569/05/14; 1569/05/21; 1569/05/25.	Divorce for adultery	Giffert, James	Dischingtoun, Helene
19	Glendonyng v. Grahame	CC8/2/2: 60r; 116r; 134r.	1565/06/21; 1565/07/28; 1565/08/15.	Divorce for adultery	Glendonyng, Symone	Grahame, Janet
20	Gordoun v. Leslie	CC8/2/1: 269v.	1564/12/06	Divorce for adultery	Gordoun, Elizabeth	Leslie, Robert

21	Hardy v. Rutherfurde	CC8/2/1: 425r-v.	1565/04/11	Divorce for adultery	Hardy, Patrik	Rutherfurde, Katherine
22	Heriot v. Methven	CC8/2/1: 1v; 27r; 40r; 50r.	1564/04/28; 1564/05/19; 1564/06/02; 1564/06/08.	Divorce for adultery	Heriot, James	Methven, Isobel
23	Johnesoun v. Johnesoun	CC8/2/2: 8v; 24r; 62r; 63v-64r.	1565/05/05; 1565/05/16; 1565/06/22; 1565/06/25.	Divorce for adultery	Johnesoun, Marioun	Johnesoun, James
24	Ker v. Cranstoun	CC8/2/2: 159r-v; 174r; 211r; 220r; 228v; 275v-276r.	1567/10/28; 1567/11/05; 1567/11/18; 1567/12/04; 1567/12/09; 1567- 8/01/19.	Divorce for adultery	Ker, Sir Andrew of Hirsale, knycht	Cranstoun, Margaret
25	Ker v. Dougall	CC8/2/2: 155r; 158v; 157r; 161r; 167r; 175v; 181r; 186r-v; 246r-v; 262r; 370r; 375r. CC8/2/3: 30v; 126r.	1567/10/25; 1567/10/27; 1567/10/27; 1567/10/29; 1567/11/01; 1567/11/06; 1567/11/10; 1567/11/13; 1567/12/18; 1567-8/01/10; 1567-8/03/10; 1567- 8/03/13; 1568/05/20; 1568/07/31.	Divorce for adultery	Ker, Isobell	Dowgall, Johne
26	Kincaid v. Ross	CC8/2/3: 318r; 384v-385r.	1569/05/13; 1569/06/27.	Divorce for adultery	Kincaid, Grissell	Ross, Johne
27	Langmuir v. Wylie	CC8/2/1: 133v; 153r-v.	1564/08/02; 1564/08/14.	Divorce for adultery	Langmuir, Elizabeth	Wylie, Johne
28	Leslie v. Betoun	CC8/2/2: 429v.	1568/04/10	Divorce for adultery	Leslie, Beatrice	Betoun, Daudid

29	Levingstoun v. Crawford	CC8/2/2: 160v; 185r; 195r; 261r.	1567/10/29; 1567/11/12; 1567/11/19; 1567-8/01/09.	Divorce for adultery	Levingstoun, Elizabeth	Crawfurd, Williame
30	Levingstoun v. Hammiltoun	CC8/2/2: 372v; 388r; 413v. CC8/2/3: 14r.	1567-8/03/11; 1567-8/03/19; 1568/04/02; 1568/04/29.	Divorce for adultery	Levingstoun, Agnes	Hammiltoun, Harie
31	Levingstoun v. Kincaid	CC8/2/3: 326r; 328r.	1569/05/18; 1569/05/20.	Divorce for adultery	Levingstoun, Margaret	Kincaid, James (younger)
32	Lindesay v. Crystesone	CC8/2/2: 320v; 347v; 372r; 401v; 421r. CC8/2/3: 16r.	1567-8/02/12; 1567-8/02/26; 1567-8/03/11; 1568/03/15; 1568/04/05; 1568/04/30.	Divorce for adultery	Lindesay, Isobell	Cristesoun, Williame
33	Makcanzie v. Makgillechallum	CC8/2/2: 412v. CC8/2/3: 25r-v.	1568/04/01; 1568/05/05	Divorce for adultery	McCanzie, Isobell	Makgillechallum, Gillechallum
34	Malard v. Reid	CC8/2/1: 328r; 403r. CC8/2/2: 2v.	1564-5/01/30; 1564-5/03/23; 1565/05/01.	Divorce for adultery	Malard, Robert	Reid, Helene
35	McCrache v. Patersoun	CC8/2/2: 157r.	1567/10/27	Divorce for adultery	McCrache, Margaret	Patersoun, Johne
36	McGie v. McNauche	CC8/2/2: 132r.	1565/08/13	Divorce for adultery	McGie, Marioun	McNauche, Johne
37	Michell v. Broun	CC8/2/3: 205v; 373v-374r.	1568-9/03/03; 1569/06/18.	Divorce for adultery	Michell, Elizabeth	Broun, Andro
38	Murray v. Irrwin	CC8/2/1: 90r-v; 153r. CC8/2/2: 11v-12r.	1564/07/05; 1564/08/14; 1565/05/07.	Divorce for adultery	Murray, Margaret	Irrwin, Herbert

39	Patersone v. Bernis	CC8/2/3: 109v; 113r; [79v-80r]	1568/07/21; 1568/07/26; [1568/07/31].	Divorce for adultery	Patersone, Cristiane	Bernis, Robert
40	Pawtoun v. Lindesay	CC8/2/2: 312v. CC8/2/3: 46r; 63r-v.	1567-8/02/07; 1568/06/07; 1568/07/02.	Divorce for adultery	Pawtoun, Katherine	Lindesay, Rankene
41	Provand v. Steill	CC8/2/3: 117v; 118v-119r; 125v; 343v.	1568/07/28; 1568/07/29; 1568/07/31; 1569/05/28.	Divorce for adultery	Provand, James	Steill, Isobell
42	Reid v. Ker	CC8/2/1: 226r; 256r.	1564/11/16; 1564/11/29.	Divorce for adultery	Reid, Isobell	Ker, Johne
43	Ross v. Reid	CC8/2/1: 29v; 83r.	1564/05/20; 1564/06/29.	Divorce for adultery	Ross, Nicholas	Reid, Marioun
44	Russale v. Howy	CC8/2/1: 132v-133r	1564/08/02	Divorce for adultery	Russale, Isobell	Howy, James
45	Sched v. Archibald	CC8/2/1: 5v. CC8/2/2: 107v.	1564/05/02; 1565/07/23.	Divorce for adultery	Sched, Alexander	Archibald, Margaret
46	Small v. Moffett	CC8/2/2: 289r; 294v-295r.	1567-8/01/26; 1567-8/01/29.	Divorce for adultery	Small, Johne	Moffett, Isobell
47	Speir v. Tuedy	CC8/2/1: 275r; 281r; 283v; 368v; 392v. CC8/2/2: 8r; 28r; 41v; 50r; 53r-v; 59r; 63r.	1564/12/09; 1564/12/14; 1564/12/15; 1564-5/03/02; 1564-5/03/16; 1565/05/05; 1565/05/19; 1565/05/30; 1565/06/06; 1565/06/08; 1565/06/20; 1565/06/25.	Divorce for adultery	Speir, Janet	Tuedy, Williame

48	Symsone v. Pryde	CC8/2/3: 315v; 366r.	1569/05/12; 1569/06/14.	Divorce for adultery	Symsone, Johne	Pryde, M(ar)riory
49	Tailzeseir v. Luddous	CC8/2/2: 266v; 282r; 305r; 330r.	1567-8/01/14; 1567-8/01/23; 1567-8/02/03; 1567-8/02/17.	Divorce for adultery	Tailzeseir, Johne	Luddous, Marioun
50	Turnbull v Turnbull	CC8/2/2: 377v; 392v.	1567-8/03/15; 1567-8/03/22.	Divorce for adultery	Turnbull, Andro als Daid	Turnbull, Janet
51	Wemis v. Dunbar	CC8/2/2: 209r; 219v; 246r. CC8/2/3: 32v-33r.	1567/11/27; 1567/12/05; 1567/12/18; 1568/05/25.	Divorce for adultery	Wemis, Johne	Dunbar, Margaret
52	Wemys v. Boiswall	CC8/2/2: 5v; 23r; 30v.	1565/05/03; 1565/05/15; 1565/05/22.	Divorce for adultery	Wemys, Janet	Boiswell, Robert
53	Wilsoun v. Creichtoun	CC8/2/2: 424r. CC8/2/3: 12r; 28v-29r.	1568/04/07; 1568/04/28; 1568/05/08.	Divorce for adultery	Wilsoun, Beatice	Creichtoun, James
54	Wilsoun v. Scot	CC8/2/1: 50r; 94r.	1564/06/08; 1564/07/08.	Divorce for adultery	Wilsoun, Thomas	Scot, [Mir]abill
55	Wrycht v. Drippis	CC8/2/2: 403v. CC8/2/3: 9v.	1568/03/27; 1568/04/27.	Divorce for adultery	Wrycht, Marioun	Drippis, Johne
56	Murray v. Chalmer	CC8/2/2: 109r.	1565/07/24	Divorce for adultery	Murray, Cuthbert	Chalmer, Christiane
57	Thomsoun v. Lindsay	CC8/2/2: 297r.	1567-8/01/30	Divorce for adultery (inferred)	Thomsoun, Janet	Lindsay, Harbert

1	Ross v. Oliphant	CC8/2/3: 280v; 292v; 302r; 322v.	1569/04/25; 1569/05/02; 1569/05/09; 1569/05/16.	Expenses since she obtained decret of adherence against her husband	Ross, Helene (called Katherine on one occasion)	Oliphant, William
1	Currye v. Stevin	CC8/2/3: 238r.	1568-9/03/21	Freedom & Silence	Currye, Johne	Stevin, Jonet
2	Gibsoun v. Robesoun	CC8/2/2: 34v-35r.	1565/05/24	Freedom & Silence	Gibsoun, George	Robesoun, Isobell
3	McWalter v. Galbrayth	CC8/2/2: 26v; 41r.	1565/05/18; 1565/05/30	Freedom & Silence	McWalter, Walter	Galbrayth, Elizabeth
4	Murray v. Barry	CC8/2/3: 350r.	1569/06/04	Freedom & Silence	Murray, Robert	Barry, Helene
5	Williamsone v. Stevinsone	CC8/2/3: 67r.	1568/07/06	Freedom & Silence	Willsiamsoun, James	Stevinsone, Jonet
1	Forrest v. Rollok & Gardin	CC8/2/1: 46v.	1564/06/06	Reduction of Kirk's sentence of divorce	Forrest, Johne	Rollock, Maragret
2	Hammyltoun v. Maxwell & Lindesay	CC8/2/1: 222v-223r; 248r; 263v; 274v; 291v; 307r; 319r; 339r; 358r; 368r; 393v-394v.	1564/11/15; 1564/11/25; 1564/12/02; 1564/12/08; 1564-5/01/06; 1564-5/01/15; 1564-5/01/23; 1564-5/02/07; 1564-5/02/22; 1564-5/03/01; 1564-5/03/16.	Reduction of Kirk's sentence of divorce	Hammyltoun, Elizabeth	Maxwell, Johne

3	Sympill v. Hammiltoun	CC8/2/2:419v; 422v.	1568/04/03; 1568/04/06.	Reduction of Kirk's sentence of divorce	Sympill, Isobell	Hammiltoun, James
4	Dempstar v. Fraser & Buchane & Seytoun	CC8/2/1: 160v; 271r-v.	1564/08/17; 1564/12/07.	Reduction of pre-Ref sentence of divorce	Dempstar, James	Fraser, Janet et al
5	Galbrayth v. McCalzean	CC8/2/1: 418r. CC8/2/2: 1r; 6r; 9r; 37v.	1565/04/04; 1565/04/30; 1565/05/03; 1565/05/05; 1565/05/26.	Reduction of pre-Ref sentence of divorce	Galbrayth, Elizabeth	McCalzean, Maister Thomas
6	Kinross & Drippis v. Jaksoun, Levmax, Bromside & Wrycht	CC8/2/2: 52v; 57v; 75v.	1565/06/07; 1565/06/19; 1565/07/02.	Reduction of pre-Ref sentence of divorce	Kinross, Master Henry, Procurator Fiscal	Jaksoun, Schir William
7	Leslie v. Oliphant	CC8/2/1: 16v-17r ; 70r; 89v; 123r; 123r. CC8/2/2: 152r; 174v; 175v; 199v; 223v; 263r; 280r; 382r-383v.	1564/05/10; 1564/06/20; 1564/07/04; 1564/07/26; 1564/07/26; 1567/10/22; 1567/11/05; 1567/11/06; 1567/11/21; 1567/12/06; 1567-8/01/12; 1567- 8/01/22; 1567-8/03/16.	Reduction of pre-Ref sentence of divorce	Leslie, Katherine	Ollipant, Laurence Lord and Katherine Olliphant

8	Leslie v. Oliphant II	CC8/2/3: 24v-25r.	1568/05/05	Reduction of pre-Ref sentence of divorce	Leslie, Katherine	Oliphant, Laurence Lord (younger?)
1	Forrester v. Abirnethy	CC8/2/1: 193v- 194r; 202r; 202r; 211r.	1564/10/24; 1564/10/29; 1564/10/30; 1564/11/04.	Retrospective Declarator of Divorce	Forrester, Margaret	Abirnethy, Janet
1	Bannatyne v. Hammyltoun	CC8/2/2: 330v; 348v. CC8/2/3: 4v.	1567-8/02/17; 1567-8/02/26; 1568/04/26.	Separation	Bannatyne, Janet	Hammiltoun, Stevin
1	Alane v. Kincaid	CC8/2/1: 349v; 353r.	1564-5/02/15; 1564-5/02/19	Solemnization	Alane, Janet	Kincaid, Johne
2	Andersone v. Edmund	CC8/2/2: 334r; 354v; 376v; 398r; 421v. CC8/2/3: 11r-v.	1567-8/02/19; 1567-8/03/01; 1567- 8/03/15; 1567-8/03/24; 1568/04/05; 1568/04/28.	Solemnization	Andersoun, Marioun	Edmund, Adame
3	Arneill v. Williamsone	CC8/2/3: 73v.	1568/07/22	Solemnization	Arneill, Jonet	Williamsoun, Stevin
4	Auldinstoun v. McMyllane	CC8/2/1: 64v; 69r; 73r; 218r; 222v; 246v; 322r.	1564/06/17; 1564/06/19; 1564/06/22; 1564/11/10; 1564/11/15; 1564/11/24; 1564-5/01/25.	Solemnization	Auldinstoun, Isobell	McMyllane, Robert

5	Carmichell v. Calderwod	CC8/2/3: 152v; 162v; 199v; 217v.	1567-8/01/18; 1568-9/01/27; 1568-9/02/28; 1568-9/03/09.	Solemnization	Carmichell, Alesoune	Calderwod, Williame
6	Cathcart v. Cunnynghame	CC8/2/1: 52r; 55v-56r; 62v-63r.	1564/06/09; 1564/06/12; 1564/06/16.	Solemnization	Cathcart, Gelis	Cunnynghame, David
7	Clerk v. Auchinlek	CC8/2/3: 60r; 61r.	1568/06/25; 1568/06/28	Solemnization	Clerk, Jonet	Auchinlek, George
8	Dalmahoy v. Menteith	CC8/2/1: 424r.	1565/04/07	Solemnization	Dalmahoy, Marioun	Menteith, William
9	Diksoun v. Tod	CC8/2/2: 314v; 327v; 336v; 351r; 365v. CC8/2/3: 42r-v.	1567-8/02/09; 1567-8/02/16; 1567-8/02/20; 1567-8/02/27; 1567-8/03/08; 1568/06/02.	Solemnization	Diksoun, Cristiane	Tod, Alexander
10	Duncane v. Fairley	CC8/2/3: 52v-53r.	1568/06/14.	Solemnization	Duncane, Helene	Fairley, Duncane
11	Ewart v. Dryisdale	CC8/2/1: 65v.	1564/06/19	Solemnization	Ewart, Margaret	Dryisdale, James
12	Flemyng v. Steill	CC8/2/1: 238v; 265v.	1564/11/21; 1564/12/04.	Solemnization	Flemyng, Mariorie	Steill, Archibald
13	Haw v. Watt	CC8/2/3: 240v.	1568-9/03/21	Solemnization	Haw, Cristia(ne)	Watt, Johne
14	Kinross v. Cunnynghame & Russale	CC8/2/1: 391v	1564-5/03/16	Solemnization	Kinross, Master Henry, Procurator Fiscal	Cunnynghame, James

15	Kinross v. Loch & Weyland	CC8/2/1: 48v-49r	1564/06/07	Solemnization	Kinross, Master Henry, Procurator Fiscal	Loch, Patrick
16	Malysoun v. Aytoun	CC8/2/2: 79v; 80r.	1565/07/05; 1565/07/06.	Solemnization	Malysoun, Alisoun	Aytoun, Alexander
17	Medowfield v. Rankin	CC8/2/2: 72v; 80v-81r; 83v.	1565/06/30; 1565/07/06; 1565/07/09.	Solemnization	Medowfield, Elizabeth	Rankin, James
18	Murray v. Symsonne	CC8/2/3: 131r-v; 131v; 132r-v; 134r; 134r-v; 135r; 150v; 152v; 160v-161r; 253v; 268r; 287v-288r.	1568/10/15; 1568/10/19; 1568/11/12; 1568/11/28; 1568/12/04; 1568/12/08; 1568-9/01/14; 1568-9/01/17; 1568-9/01/25; 1569/03/28; 1569/04/18; 1569/04/28.	Solemnization	Murray, Katherine	Symsonne, Laurence
19	Myluif v. Foirman	CC8/2/2: 342v; 357r; 367r; 379r.	1567-8/02/23; 1567-8/03/02; 1567-8/03/09; 1567-8/03/16.	Solemnization	Myluif, Malie	Foirman, David
20	Reid v. Barclay	CC8/2/3: 72v.	1568/07/17	Solemnization	Reid, Jonet	Barclay, Alexander
21	Reid v. Portuous	CC8/2/2: 24r; 28v; 32v; 67r.	1565/05/16; 1565/05/21; 1565/05/24; 1565/06/27.	Solemnization	Reid, Janet	Portuous, Robert
22	Scot v. Robesoun	CC8/2/1: 177v; 179v; 185v; 194r; 202v; 250r.	1564/10/11; 1564/10/12; 1564/10/18; 1564/10/24; 1564/10/30; 1564/11/27.	Solemnization	Scot, Margaret	Robesoun, William

23	Skirling v. Mairioribanks	CC8/2/3: 43v; 47v; 50r; [112r]; 79r.	1568/06/03; 1568/06/09; 1568/06/10; [1568/07/24]; 1568/07/31.	Solemnization	Skirling, Jane	Mairioribankis, Maister Thomas
24	Steill v. Auld	CC8/2/3: 159v.	1568-9/01/24	Solemnization	Steill, Jonet	Auld, Richard
25	Thomsoun v. Wod	CC8/2/2: 358r; 364r; 366v; 376v; 386v; 393v; 403v; 411r. CC8/2/3: 39r.	1567-8/03/03; 1567-8/03/08; 1567-8/03/09; 1567-8/03/15; 1567-8/03/18; 1567-8/03/23; 1567-8/03/27; 1568/03/31; 1568/06/01.	Solemnization	Thomsoun, Johne	Wod, Margaret
26	Watsoun v. Wanis	CC8/2/2: 334r; 338v; 346r; 357v; 360r; 364r.	1567-8/02/19; 1567-8/02/21; 1567-8/02/25; 1567-8/03/03; 1567-8/03/04; 1567-8/03/08.	Solemnization	Watsoun, Margaret	Wanis, George
27	Dawling v. Burgane	CC8/2/1: 236v; 244r.	1564/11/21; 1564/11/24.	Solemnization and Infetment	Dawling, Petir	Burgane, Elizabeth
1	Hammyltoun v. Sclater	CC8/2/1: 72v-73r; 87v-88r; 92r; 300v; 314r; 323v-324v.	1564/06/22; 1564/07/03; 1564/07/07; 1564-5/01/10; 1564-5/01/19; 1564-5/01/26.	Tint	Hammyltoun, Jherome	Sclater, Elizabeth
2	Tulloch v. Sinclair	CC8/2/1: 140r-v; 334r; 336v; 346r; 357r; 377v-378r; 390v; 397r; 399r; 411r-v.	1564/08/05; 1564-5/02/05; 1564-5/02/06; 1564-5/02/13; 1564-5/02/16; 1564-5/03/02; 1564-5/03/15; 1564-5/03/19; 1564-5/03/21; 1565/03/31.	Tint	Tulloch, James	Sinclair, Margaret
3	Westoun v. Ewart	CC8/2/1: 281v; 299r; 323r-v.	1564/12/14; 1564-5/01/10; 1564-5/01/26.	Tint	Westoun, Johne	Ewart, Katherine

B: FREQUENCY OF CONSISTORIAL DECREETS, APRIL 1564 TO JUNE 1569

Tally	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Pursuer	Defender
1	Bosuell v. Wemyss	CC8/2/2	403r-v	1568/03/26	Adherence	Bosuell, Robert	Wemys, Janet
2	Cristesone v. Lindesay	CC8/2/2	284r-v	1567-8/01/24	Adherence	Crystesoun, Williame	Lindesay, Isobell
3	Cruik v. Hammiltoun	CC8/2/3	340r-v	1569/05/26	Adherence	Cruik, Mairiorie	Hammiltoun, Jherome
4	Grahame v. Buchquhanane	CC8/2/2	351r	1567-8/02/27	Adherence	Grahame, Marie	Buchquanane, George
5	Hammyltoun v. Kirkpatrick	CC8/2/2	331v- 332r	1567-8/02/17	Adherence	Hammyltoun, Elizabeth	Maxwell, Rodgair
6	Thorntoun v. Sandersone	CC8/2/2	251r	1567-8/01/07	Adherence	Thorntoun, Margaret	Sandersone, Johne
7	Wallace v. Dowglass	CC8/2/3	293r-v	1569/05/02	Adherence	Wallace, Cristiane	Dowglass, Andro
1	Hoppringle v. Gib	CC8/2/1	196r-v	1564/10/25	Aliment	Hoppringle, Janet	Gib, George
2	Duncane v. Fairley	CC8/2/3	82v	1568/06/26	Aliment and care of bastards	Duncane, Helene	Fairley, Duncane

1	Cromartie v. Caddell	CC8/2/3	54r-v	1568/06/17	Annulment	Cromartie, Katherine	Caddell, Andro
2	Lummisden v. Maxwell	CC8/2/3	381r- 382r	1569/06/24	Annulment	Lummisden, Jonet	Maxwell, Johne
3	Gillaspene v. Marscheall	CC8/2/2	133v- 134r	1565/08/15	Annulment	Gillaspene, Henry	Marscheall, Cristiane
4	Kinros & Patersoun v. Stevinsoun & Pollock	CC8/2/2	86r-v	1565/07/11	Annulment	Patersoun, Janet; Kinross, Henrie	Stevinsoun, Constine
5	Paislie v. Haistie	CC8/2/1	247v	1564/11/25	Annulment	Paislie, Margaret	Haistie, Johne
1	Marioribanks v. Wier & Wardlaw	CC8/2/1	362v	1564-5/02/26	Bastardrie / Declarator of Legitimacy	Marioribanks, Symone	Wier, Johne
1	Andersone v. Allasone	CC8/2/2	275r	1567-8/01/19	Divorce for adultery	Andersoun, Johne	Allasoune, Alesoun
2	Barnair v. Nychole	CC8/2/2	399v	1567-8/03/24	Divorce for adultery	Barnair / Barnard, Margaret	Nychole, Johne
3	Dunlop v. Broun	CC8/2/1	387v- 388r	1564-5/03/14	Divorce for adultery	Dunlop, Hew	Broun, Elizabeth
4	Flemyng v. Flemyng	CC8/2/3	352r-v	1569/06/04	Divorce for adultery	Flemyng, Thomas	Flemyng, Jonet
5	Forbes v. Sandelands	CC8/2/1	304v- 305v	1564-5/01/15	Divorce for adultery	Forbes, Johne	Sandelandis, Barbara

6	Hardy v. Rutherford	CC8/2/1	425r-v	1565/04/11	Divorce for adultery	Hardy, Patrik	Rutherford, Katherine
7	Ker v. Cranstoun	CC8/2/2	275v- 276r	1567-8/01/19	Divorce for adultery	Ker, Sir Andrew of Hirsale, knycht	Cranstoun, Margaret
8	Levingstoun v. Crawfurd	CC8/2/2	261r	1567-8/01/09	Divorce for adultery	Levingstoun, Elizabeth	Crawfurd, Williame
9	Makcanzie v. Makgillechallum	CC8/2/3	25r-v	1568/05/05	Divorce for adultery	McCanzie, Isobell	Makgillechallum, Gillechallum
10	McCrache v. Patersoun	CC8/2/2	157r	1567/10/27	Divorce for adultery	McCrache, Margaret (surname spelt divers ways)	Patersoun, Johne
11	Merschale v. Broun	CC8/2/3	373v- 374r	1569/06/18	Divorce for adultery	Marchall, Elizabeth	Broun, Andro
12	Murray v. Irrwin	CC8/2/2	11v-12r	1565/05/07	Divorce for adultery	Murray, Margaret	Irwyng, Herbert
13	Patersone v. Bernis	CC8/2/3	79v-80r	1568/07/31	Divorce for adultery	Patersone, Cristiane	Bernis, Robert
14	Pawtoun v. Lindesay	CC8/2/3	63r-v	1568/07/02	Divorce for adultery	Pawtoun, Katherine	Lindesay, Rankene
15	Small v. Moffett	CC8/2/2	294v- 295r	1567-8/01/29	Divorce for adultery	Small, Johne	Moffett, Isobell

16	Wemis v. Dunbar	CC8/2/3	32v-33r	1568/05/25	Divorce for adultery	Wemis, Johne	Dunbar, Margaret
17	Wilsoun v. Creichtoun	CC8/2/3	28v-29r	1568/05/08	Divorce for adultery	Wilsoun, Beatice	Creichtoun, James
18	Wrycht v. Drippis	CC8/2/3	9v	1568/04/27	Divorce for adultery	Wrycht, Marioun	Drippis, Johne
1	Currye v. Stevin	CC8/2/3	238r	1568-9/03/21	Freedom & Silence	Currye, Johne	Stevin, Jonet
2	Gibsoun v. Robesoun	CC8/2/2	34v-35r	1565/05/24	Freedom & Silence	Gibsoun, George	Robesoun, Isobell
3	McWalter v. Galbrayth	CC8/2/2	41r	1565/05/30	Freedom & Silence	McWalter, Walter	Galbrayth, Elizabeth
4	Murray v. Barry	CC8/2/3	350r	1569/06/04	Freedom & Silence	Murray, Robert	Barry, Helene
5	Williamsone v. Stevinsone	CC8/2/3	67r	1568/07/06	Freedom & Silence	Williamsoun, James	Stevinsone, Jonet
1	Hammyltoun v. Maxwell & Lindesay	CC8/2/1	393v-394v	1564-5/03/16	Reduction of Kirk's sentence of divorce	Hammyltoun, Elizabeth	Maxwell, Johne
2	Leslie v. Oliphant	CC8/2/2	382r-383v	1567-8/03/16	Reduction of pre-Ref sentence of divorce	Leslie, Katherine	Oliphant, Laurence Lord
1	Arneill v. Williamsone	CC8/2/3	73v	1568/07/22	Solemnization	Arneill, Jonet	Williamsoun, Stevin
2	Auldinstoun v. McMyllane	CC8/2/1	322r	1564-5/01/25	Solemnization	Auldinstoun, Isobell	McMyllane, Robert
3	Carmichell v. Calderwod	CC8/2/3	217v	1568-9/03/09	Solemnization	Carmichell, Alesoune	Calderwod, Williame

4	Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Solemnization	Clerk, Jonet	Auchinlek, George
5	Dalmahoy v. Menteith	CC8/2/1	424r	1565/04/07	Solemnization	Dalmahoy, Marioun	Menteith, William
6	Diksoun v. Tod	CC8/2/3	42r-v	1568/06/02	Solemnization	Diksoun, Cristiane	Tod, Alexander
7	Duncane v. Fairley	CC8/2/3	52v-53r	1568/06/14	Solemnization	Duncane, Helene	Fairley, Duncane
8	Ewart v. Dryisdale	CC8/2/1	65v	1564/06/19	Solemnization	Ewart, Margaret	Dryisdale, James
9	Kinross v. Loch & Weyland	CC8/2/1	48v-49r	1564/06/07	Solemnization	Kinross, Maister Henry, Procurator Fiscal	Loch, Patrick
10	Murray v. Symsonne	CC8/2/3	287v- 288r	1569/04/28	Solemnization	Murray, Katherine	Sympsonne, Laurence
11	Reid v. Barclay	CC8/2/3	72v	1568/07/17	Solemnization	Reid, Jonet	Barclay, Alexander
12	Reid v. Portuous	CC8/2/2	67r	1565/06/27	Solemnization	Reid, Janet	Portuous, Robert
13	Scot v. Robesoun	CC8/2/1	250r	1564/11/27	Solemnization	Scot, Margaret	Robesoun, William
14	Skirling v. Mairioribankis	CC8/2/3	79r	1568/07/31	Solemnization	Skirling, Jane	Mairioribankis, Maister Thomas
15	Thomsoun v. Wod	CC8/2/3	39r	1568/06/01	Solemnization	Thomsoun, Johne	Wod, Margaret

1	Hammyltoun v. Sclater	CC8/2/1	323v- 324v	1564-5/01/26	Tint	Hammyltoun, Jherome	Sclater, Elizabeth
2	Tulloch v. Sinclair	CC8/2/1	411r-v	1565/03/31	Tint	Tulloch, James	Sinclair, Margaret
3	Westoun v. Ewart	CC8/2/1	323r-v	1564-5/01/26	Tint	Westoun, Johne	Ewart, Katherine

C: FREQUENCY OF CONSISTORIAL DECREETS, APRIL 1564 TO JANUARY 1576/7

Tally	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Pursuer	Defender
1	Abirnethy v. Moncur	CC8/2/4	326v- 327r	1570/07/19	Adherence	Abirnethy, Jonet	Moncur, Johne
2	Archibald v. Matho	CC8/2/4	4v-5r	1569/07/03 [frag]	Adherence	Archibald, Isobell	Matho, Andro
3	Argyll v. Countess	CC8/2/5	170v- 171r	1571-2/01/28	Adherence	Argyll, Archibald Campbell, Earl of	Steuart, Dame Jane
4	Bosuell v. Wemyss	CC8/2/2	403r-v	1568/03/26	Adherence	Bosuell, Robert	Wemyss, Janet
5	Cristesone v. Lindesay	CC8/2/2	284r-v	1567-8/01/24	Adherence	Crystesoun, Williame	Lindesay, Isobell
6	Cruik v. Hammiltoun	CC8/2/3	340r-v	1569/05/26	Adherence	Cruik, Mairiorie	Hammiltoun, Jherome
7	Grahame v. Buchquanane	CC8/2/2	351r	1567-8/02/27	Adherence	Grahame, Marie	Buchquanane, George
8	Grantoun v. Russell	CC8/2/5	9r	1570/11/23	Adherence	Grantoun, Helene	Russell, Thomas
9	Hammyltoun v. Kirkpatrick	CC8/2/2	331v- 332r	1567-8/02/17	Adherence	Hammyltoun, Elizabeth	Maxwell, Rodgair

10	Moffet v. Quhit	CC8/2/8	208r-v	1576/07/04	Adherence	Moffet, Symont	Quhit, Katherine
11	Murray v. Bruce	CC8/2/8	236v- 237r	1576/07/21	Adherence	Murray, Margaret	Bruce, Robert
12	Murray v. Lord Torphichane	CC8/2/7	265r	1575/07/30	Adherence	Murray, Jonet	Torphichane, James Lord
13	Roger v. Boyd	CC8/2/8	343r-v	1576-7/01/10	Adherence	Boyd, Christiane	Roger, Johnne
14	Rollok v. Balmano(ch)t	CC8/2/4	306v- 307r	1570/06/28	Adherence	Rollok, Katherine	Balmanocht, Alexander
15	Thorntoun v. Sandersone	CC8/2/2	251r	1567-8/01/07	Adherence	Thorntoun, Margaret	Sandersone, Johne
16	Wallace v. Dowglass	CC8/2/3	293r-v	1569/05/02	Adherence	Wallace, Cristiane	Dowglass, Andro
17	Wallace v. Sprot	CC8/2/5	207v	1572/06/14	Adherence	Wallace, Jonet	Sprot, Henrye
18	Watsoun v. Bell	CC8/2/4	330v	1570/07/24	Adherence	Watsone, Thomas	Bell, Jonet
1	Creich v. Bell	CC8/2/6	224v- 225r	1573-4/01/09	Aliment	Creiche, Alesone	Bell, Thomas
2	Hoppringle v. Gib	CC8/2/1	196r-v	1564/10/25	Aliment	Hoppringle, Janet	Gib, George
3	Duncane v. Fairley	CC8/2/3	82v	1568/06/26	Aliment and care of bastards	Duncane, Helene	Fairley, Duncane
1	Cromartie v. Caddell	CC8/2/3	54r-v	1568/06/17	Annulment	Cromartie, Katherine	Caddell, Andro
2	Kinross v. Ogilvy, Fraser & Chisholme	CC8/2/6	428r- 429r	1574/07/08	Annulment	Kinross, Maister Henrie, Procurator Fiscal	Ogilvy, Thomas

3	Kinross v. Patersoun & Johnestoun	CC8/2/7	243r	1575/07/21	Annulment	Kinross, Maister Henrie, Procurator Fiscal	Patersoun, Thomas
4	Lummisden v. Maxwell	CC8/2/3	381r- 382r	1569/06/24	Annulment	Lummisden, Jonet	Maxwell, Johne
5	Newtoun v. Dalzell	CC8/2/5	16v-17r	1570/12/10	Annulment	Newtoun, Margaret	Dalzell, James
6	Gillaspene v. Marscheall	CC8/2/2	133v- 134r	1565/08/15	Annulment	Gillaspene, Henry	Marscheall, Cristiane
7	Kinross & Patersoun v. Stevinsoun & Pollock	CC8/2/2	86r-v	1565/07/11	Annulment	Patersoun, Janet; Kinross, Henrie	Stevinsoun, Constine
8	Paislie v. Haistie	CC8/2/1	247v	1564/11/25	Annulment	Paislie, Margaret	Haistie, Johne
1	Bartane v. Richesoun	CC8/2/8	259v- 260r	1576/07/31	Bastardrie	Bartane, Helene	Richartsoun, Henrie
2	Carnis v. Kennedy	CC8/2/4	167v- 168v	1569-70/02/28	Bastardrie	Carnis, Jonet	Kennedy, Jonet
3	Dunbar v. Adair	CC8/2/6	93v- 97v	1573/05/20	Bastardrie	Dunbar, Alesone	Adair, Cristiane
4	Dury & Lummisden v. Cokburne	CC8/2/4	272r- 273r	1570/04/27	Bastardrie	Dury, James	Cokburne, Williame

5	Lauder v. Lauder	CC8/2/7	245v- 246v	1575/07/23	Bastardrie	Lauder, Maister James	Lauder, Johne
6	Mortoun v. Mortoun	CC8/2/4	76v- 77v	1569/11/15	Bastardrie	Mortoun, James	Mortoun, Thomas
7	Oliphant v. Oliphantis	CC8/2/4	335r- 336v	1570/07/27	Bastardrie	Oliphant, Petir	Oliphantis, Margaret & Jonet
8	Sibbald v. Sibbald	CC8/2/7	2v-3r	1574/10/[14]	Bastardrie	Sibbald, Patrik	Sibbald, Daid
9	Marioribanks v. Wier & Wardlaw	CC8/2/1	362v	1564-5/02/26	Bastardrie / Declarator of Legitimacy	Marioribanks, Symone	Wier, Johne
1	Andersone v. Allasone	CC8/2/2	275r	1567-8/01/19	Divorce for adultery	Andersoun, Johne	Allasoune, Alesoun
2	Ballenden v. Hammiltoun	CC8/2/6	334r-v	1574/04/01	Divorce for adultery	Ballenden, Margaret	Hammiltoun, Robert
3	Barnair v. Nychole	CC8/2/2	399v	1567-8/03/24	Divorce for adultery	Barnair / Barnard, Margaret	Nychole, Johne
4	Caquhone v. Watsoun	CC8/2/6	274v- 275v	1573-4/02/17	Divorce for adultery	Caquhoune. Thomas	Watsoun, Violat
5	Cellare v. Hagye	CC8/2/5	182v- 183r	1571-2/02/26	Divorce for adultery	Cellare, Andro	Hagye, Eufame
6	Clerk v. Scot	CC8/2/5	46r-v	1570-1/01/12	Divorce for adultery	Clerk, Johne	Scot, Jonet
7	Cunyngham v. Hunter	CC8/2/6	130r-v	1573/07/02	Divorce for adultery	Cunyngham, Marioun	Hunter, William

8	Dalmahoy v. Hammiltoun	CC8/2/7	33v-34r	1574-5/01/11	Divorce for adultery	Dalmohoy, Alexander	Hammiltoun, Agnes
9	Diksoun v. Borthwick	CC8/2/4	335r-v	1570/07/27	Divorce for adultery	Diksoun, Adame	Borthuik, Jeane
10	Drummound v. Buchquhannane	CC8/2/8	259r	1576/07/31	Divorce for adultery	Drummound, Matthy	Buchquhannan, Archibald
11	Drummound v. Campbell	CC8/2/6	445r-446v	1574/07/22	Divorce for adultery	Drummound, Margaret	Campbell, Duncan
12	Ducharis v. Cowtis	CC8/2/8	244r-v	1576/07/25	Divorce for adultery	Ducharis, Johnne	Cowtis, Mairiorie
13	Dunlop v. Broun	CC8/2/1	387v-388r	1564-5/03/14	Divorce for adultery	Dunlop, Hew	Broun, Elizabeth
14	Flemyng v. Flemyng	CC8/2/3	352r-v	1569/06/04	Divorce for adultery	Flemyng, Thomas	Flemyng, Jonet
15	Forbes v. Sandelands	CC8/2/1	304v-305v	1564-5/01/15	Divorce for adultery	Forbes, Johne	Sandelands, Barbara
16	Forret v. Lyndesy	CC8/2/6	41r-v	1572-3/01/23	Divorce for adultery	Forret, Kathrene	Lindesay, David
17	Fraser v. Gordoun	CC8/2/6	429r-v	1574/07/08	Divorce for adultery	Fraser, Elizabeth	Gordoun, Williame
18	Garland v. Stewart	CC8/2/5	98r	1570-1/02/27	Divorce for adultery	Garland, Thomas	Stewart, Kathrene
19	Gourlay v. Crystie	CC8/2/4	257r	1570/04/15	Divorce for adultery	Gourlay, Kathrene	Cristie, Thomas
20	Gourlay v. McQuene	CC8/2/8	116v-117r	1576/04/02	Divorce for adultery	Gourlay, Margaret	McQuene, William

21	Grant v. Leslie	CC8/2/8	255r- 257r	1576/07/30	Divorce for adultery	Grant, Elizabeth	Leslie, Johne
22	Hammiltoun v. Caldwell	CC8/2/6	27r	1572/12/12	Divorce for adultery	Hammiltoun, Marioun Lady Hammiltoun	Cladwell, Thomas
23	Hardy v. Rutherfurde	CC8/2/1	425r-v	1565/04/11	Divorce for adultery	Hardy, Patrik	Rutherfurde, Katherine
24	Hay v. Quhyteheid	CC8/2/4	330v- 331r	1570/07/24	Divorce for adultery	Hay, Robert	Quhyteheid, Jonet
25	Hendirsonne v. Robesone	CC8/2/5	130r-v	1571/03/27	Divorce for adultery	Hendirsonne, Johne	Robesoun, Alesone
26	Hepburne v. Sinclair	CC8/2/7	217v- 218v	1575/07/09	Divorce for adultery	Hepburne, Dame Jane	Sinclair, Johne
27	Hereis v. Welsche	CC8/2/8	223r- 224r	1576/07/12	Divorce for adultery	Hereis, Mathow	Welsche, Issobell
28	Herring v. Skrymgeor	CC8/2/6	177r-v	1573/10/22	Divorce for adultery	Herring, Elizabeth	Skrymgeor, Johne
29	Hog v. Cutlar	CC8/2/6	147v- 148r	1573/07/22	Divorce for adultery	Hog, Johne	Cutlare, Jonet
30	Hopper v. Daidisoun	CC8/2/5	159v- 160r	1571/04/27	Divorce for adultery	Hopper, George	Daidisoun, Jonet
31	Houstoun v. Adame	CC8/2/6	183v- 184v	1573/11/04	Divorce for adultery	Houstoun, William	Adame, Jonet
32	Innes v. Innes	CC8/2/7	26r-v	1574/11/19	Divorce for adultery	Innes, Maragret	Innes, Robert

33	Ker v. Cranstoun	CC8/2/2	275v- 276r	1567-8/01/19	Divorce for adultery	Ker, Sir Andrew of Hirsale, knycht	Cranstoun, Margaret
34	Kincaid v. Ross	CC8/2/4	18v-19r	1569/07/15	Divorce for adultery	Kincaid, Grissell	Ross, Johne
35	Lamb v. Andersoun	CC8/2/7	266v- 267r	1575/07/30	Divorce for adultery	Lamb, Margaret	Andersoun, Gilbert
36	Leslie v. Betoun	CC8/2/7	164r-v	1575/06/02	Divorce for adultery	Leslie, Beatrix	Betoun, Daid
37	Levingstoun v. Crawfurd	CC8/2/2	261r	1567-8/01/09	Divorce for adultery	Levingstoun, Elizabeth	Crawfurd, Williame
38	Levingstoun v. Kincaid	CC8/2/4	331v- 332r	1570/07/26	Divorce for adultery	Levingstoun, Margaret	Kincaid, James (younger)
39	Levingstoun v. Levingstoun	CC8/2/5	175r-v	1571-2/02/05	Divorce for adultery	Levingstoun, Cristiane	Levingstoun, Harye
40	Levingstoune v. Gordoune	CC8/2/6	417v- 418r	1574/06/30	Divorce for adultery	Leuingstoune, Alexander	Gordoune, Jonet
41	Lyndsay v. Betoun	CC8/2/7	91r-v	1574-5/03/08	Divorce for adultery	Lyndsay, Margaret	Betoun, Daid
42	Maister of Forbes v. Gordoun	CC8/2/6	321v- 322v	1573-4/03/22	Divorce for adultery	Master of Forbes, Johne	Gordoun, Margaret
43	Makcanzie v. Makgillechallum	CC8/2/3	25r-v	1568/05/05	Divorce for adultery	McCanzie, Isobell	Makgillechallum, Gillechallum
44	Martyne v. Foulir	CC8/2/6	431r-v	1574/07/09	Divorce for adultery	Martyne, Alexander	Foulis, Alisoun

45	Maxwell v. Maxwell	CC8/2/7	8r-v	1574/10/23	Divorce for adultery	Maxwell, Edwarte	Maxwell, Jenny
46	McCrache v. Patersoun	CC8/2/2	157r	1567/10/27	Divorce for adultery	McCrache, Margaret (surname spelt divers ways)	Patersoun, Johne
47	Merschale v. Broun	CC8/2/3	373v- 374r	1569/06/18	Divorce for adultery	Marchall, Elizabeth	Broun, Andro
48	Mortoun v. Robesoun. Folio incorrectly bound: initial diet CC8/2/6, fo. 318r, 1573- 4/03/19	CC8/2/4	210r	date unknown	Divorce for adultery	Mortoun, Agnes	Robesoun, Leonard
49	Mowbray v. Wod	CC8/2/7	160r	1575/05/30	Divorce for adultery	Mowbray, George	Wod, Issobell
50	Mure v. McCullo(ch)t	CC8/2/5	114v- 115r	1570-1/03/12	Divorce for adultery	Mure, Gilbert	McCullocht, Elizabeth
51	Murray v. Irrwin	CC8/2/2	11v-12r	1565/05/07	Divorce for adultery	Murray, Margaret	Irwyng, Herbert

52	Ogilvy v. Strachane	CC8/2/6	171r-v	1573/10/17	Divorce for adultery	Ogilvy, Margaret	Struachane, Duncane
53	Patersone v. Bernis	CC8/2/3	79v-80r	1568/07/31	Divorce for adultery	Patersone, Cristiane	Bernis, Robert
54	Pawtoun v. Lindesay	CC8/2/3	63r-v	1568/07/02	Divorce for adultery	Pawtoun, Katherine	Lindesay, Rankene
55	Porter v. Neill	CC8/2/7	122v-123r	1575/04/16	Divorce for adultery	Porter, Jonet	Neill, Daud
56	Provand v. Steill	CC8/2/4	44v-45r	1569/08/06	Divorce for adultery	Provand, James	Steill, Isobell
57	Reid v. Osburne	CC8/2/4	327v-328r	1570/07/20	Divorce for adultery	Reid, James	Osburne, Kathrene
58	Ross v. Cathcart	CC8/2/6	141r-142r	1573/07/15	Divorce for adultery	Ross, Agnes	Cathcart, Johne
59	Russell v. Wylie	CC8/2/8	225r-v	1576/07/13	Divorce for adultery	Russell, Issobell	Wylie, Alexander
60	Setoun v. Buquhanane	CC8/2/7	154v-155r	1575/05/19	Divorce for adultery	Setoun, Elizabeth	Buquhanane, Johne
61	Small v. Moffett	CC8/2/2	294v-295r	1567-8/01/29	Divorce for adultery	Small, Johne	Moffett, Isobell
62	Souter v. Duncce	CC8/2/6	358r-359r	1574/05/03	Divorce for adultery	Souter, Daud	Douce, Jonet
63	Stewart of Appin v. McConle	CC8/2/6	157r-v	1573/07/29	Divorce for adultery	Stewart, Johne	Nicole, Ewfame
64	Stewart v. Murray	CC8/2/6	252r-v	1573-4/01/28	Divorce for adultery	Stewart, Robert	Murray, Eufame

65	Sutherland v. Sinclair	CC8/2/5	212v-213r	1572/06/30	Divorce for adultery	Sutherland, Alexander Earl of	Sinclair, Dame Barbara
66	Vrquhart v. Ley	CC8/2/6	335v-336r	1574/04/02	Divorce for adultery	Vrquhart, Alexander	Ley, Elizabeth
67	Vrquhart v. Lyoun	CC8/2/6	63r-64r	1572-3/03/10	Divorce for adultery	Vrquhart, Mariorie	Lyoun, Alexander
68	Wallace v. Carmichell	CC8/2/6	313r-314r	1573-4/03/12	Divorce for adultery	Wallace, Jane	Carmichell, Johne
69	Wemis v. Dunbar	CC8/2/3	32v-33r	1568/05/25	Divorce for adultery	Wemis, Johne	Dunbar, Margaret
70	Wilsoun v. Creichtoun	CC8/2/3	28v-29r	1568/05/08	Divorce for adultery	Wilsoun, Beatice	Creichtoun, James
71	Wilsoun v. Mathy	CC8/2/5	168r	1571-2/01/07	Divorce for adultery	Willsoun, Alexander	Mathy, Elizabeth
72	Wrycht v. Drippis	CC8/2/3	9v	1568/04/27	Divorce for adultery	Wrycht, Marioun	Drippis, Johne
73	Wylie v. Speir	CC8/2/5	37r	1570/12/19	Divorce for adultery	Wylie, Agnes	Speir, Arthoure
1	Argyll v. Countess	CC8/2/6	121r-122v	1573/06/22	Divorce for non-adherence	Argyll, Archibald Campbell, Earl of	Stewart, Dame Jane
1	Baxter v. Dun	CC8/2/7	82r	1574-5/02/28	Freedom & Silence	Baxter, Patrik	Dun, Marioun
2	Carrik v. Gibsoun	CC8/2/8	161v-162r	1576/05/21	Freedom & Silence	Carrik, Walter	Gibsoun, Margaret
3	Cunninghame v. Gillaspay	CC8/2/4	4r-v	1569/07/03 [frag]	Freedom & Silence	Cunninghame, Mathow	Gillaspay, Jonet
4	Currye v. Stevin	CC8/2/3	238r	1568-9/03/21	Freedom & Silence	Currye, Johne	Stevin, Jonet

5	Gibsoun v. Robesoun	CC8/2/2	34v-35r	1565/05/24	Freedom & Silence	Gibsoun, George	Robesoun, Isobell
6	Johnestoun v. Kello	CC8/2/6	226v-227r	1573-4/01/11	Freedom & Silence	Johnestoun, Johne	Kello, Cristiane
7	Maist(er)toun v. Stobye	CC8/2/6	39v	1572-3/01/20	Freedom & Silence	Maist(er)toun, Patrik	Stobye, Margaret
8	McWalter v. Galbrayth	CC8/2/2	41r	1565/05/30	Freedom & Silence	McWalter, Walter	Galbrayth, Elizabeth
9	Murray v. Barry	CC8/2/3	350r	1569/06/04	Freedom & Silence	Murray, Robert	Barry, Helene
10	Pawtoun v. Daudsoun	CC8/2/8	290r-v	1576/11/08	Freedom & Silence	Pawtoun, Waltir	Daudsoun, Eufame
11	Quhytlaw v. Thomsoun	CC8/2/6	207v-208r	1573/12/09	Freedom & Silence	Quhitlaw, Bartilmo	Thomsoun, Jonet
12	Ramsay v. Myll	CC8/2/7	89v-90r	1574-5/03/05	Freedom & Silence	Ramsay, Patrik	Mill, Christiane
13	Robesoun v. Liall	CC8/2/7	3v-4r	1574/10/15	Freedom & Silence	Robesoun, Isobell	Liall, Willaime
14	Warno v. Craig	CC8/2/5	91r-v	1570-1/02/19	Freedom & Silence	Warno, Jonet	Criag, Nicoll
15	Williamsone v. Stevinsone	CC8/2/3	67r	1568/07/06	Freedom & Silence	Willsiamsoun, James	Stevinsone, Jonet
1	Bennet v. Blythman	CC8/2/8	24v-25r	1575-6/01/26	Slander	Bennet, Mr Johne	Blythman, Margaret
1	Hammyltoun v. Maxwell & Lindsay	CC8/2/1	393v-394v	1564-5/03/16	Reduction of Kirk's sentence of divorce	Hammyltoun, Elizabeth	Maxwell, Johne

2	Leslie v. Oliphant	CC8/2/2	382r- 383v	1567-8/03/16	Reduction of pre-Ref sentence of divorce	Leslie, Katherine	Oliphant, Laurence Lord
1	Moreis v. Johnesoun	CC8/2/5	208r-v	1572/06/16	Reduction of Kirk's sentence of solemnization	Moreis, Robert	Johnestoun, Barbara
1	Arneill v. Williamsone	CC8/2/3	73v	1568/07/22	Solemnization	Arneill, Jonet	Williamsoun, Stevin
2	Auldinstoun v. McMyllane	CC8/2/1	322r	1564-5/01/25	Solemnization	Auldinstoun, Isobell	McMyllane, Robert
3	Barclay v. Ewiot	CC8/2/4	318v- 319r	1570/07/11	Solemnization	Barclay, Helene	Ewiot, Patrik
4	Bartene v. Mowbray	CC8/2/7	372v- 373r	1575-6/01/09	Solemnization	Bartene, Issobell	Mowbray, Robert
5	Bell v. Wardroper	CC8/2/7	246v	1575/07/23	Solemnization	Bell, Margaret	Wardroper, Johne
6	Bischope v. Fynlaw	CC8/2/6	346r	1574/04/21	Solemnization	Bischope, Helene	Finlaw, Johne
7	Blythman v. Bennett	CC8/2/7	367r-v	1575/12/20	Solemnization	Blythman, Margaret	Bennett, Maister Johne
8	Brok v. Alexander	CC8/2/4	289v- 290r	1570/06/10	Solemnization	Brok, Jonet	Alexander, Daid
9	Broun v. Gardnare	CC8/2/7	68v-69r	1574-5/02/18	Solemnization	Broun, Jonet	Gardnare, Patrik

10	Carmichell v. Calderwod	CC8/2/3	217v	1568-9/03/09	Solemnization	Carmichell, Alesoune	Calderwod, Willieme
11	Carpentyne v. Syme	CC8/2/6	299v- 300r	1573-4/03/03	Solemnization	Carpentyne, Jane	Syme, Michell
12	Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Solemnization	Clerk, Jonet	Auchinlek, George
13	Cokburne v. S[in]eberd	CC8/2/7	7v-8r	1574/10/22	Solemnization	Cokburne, Isobell	S[in]eberd, Cuthbert
14	Crawfurde v. Makdill	CC8/2/8	145v- 146r	1576/05/05	Solemnization	Crawfurde, Roger	Makdill, Margaret
15	Creichtoun v. Thomsoun	CC8/2/7	290r-v	1575/10/27	Solemnization	Creichtoun, Marioun	Thomsoun, Alexander
16	Cunninghame v. Hoige	CC8/2/7	25r-v	1574/11/18	Solemnization	Cunynghame, Robert	Hoige, Agnis
17	Dalmahoy v. Menteith	CC8/2/1	424r	1565/04/07	Solemnization	Dalmahoy, Marioun	Menteith, William
18	Danielstoun v. Suyntoun	CC8/2/5	183v- 184r	1571-2/02/28	Solemnization	Danielstoun, Jane	Suyntoun, Johne
19	Denis v. Brysoun	CC8/2/8	154v- 155r	1576/05/15	Solemnization	Denis, Alesoun	Brysoun, Adame
20	Diksoun v. Tod	CC8/2/3	42r-v	1568/06/02	Solemnization	Diksoun, Cristiane	Tod, Alexander
21	Duncane v. Fairley	CC8/2/3	52v-53r	1568/06/14	Solemnization	Duncane, Helene	Fairley, Duncane
22	Ewart v. Dryisdale	CC8/2/1	65v	1564/06/19	Solemnization	Ewart, Margaret	Dryisdale, James

23	Goddiskirk v. Tenent	CC8/2/5	46v-47r	1570-1/01/12	Solemnization	Goddiskirk, Gilbert	Tenent, Isobell
24	Greve v. Eclis	CC8/2/7	199v	1575/06/29	Solemnization	Greve, Katherine	Eclis, Johne
25	Hammyltoun v. Heriot	CC8/2/6	259v	1573-4/02/05	Solemnization	Heriot, George	Hammyltoun, Helene
26	Ker v. Williamsoun	CC8/2/5	193r-v	1571-2/03/19	Solemnization	Ker, Issobell	Williamsoun, Johne
27	Kincaid v. Fairholme	CC8/2/5	56r	1570-1/01/19	Solemnization	Kincaid, Margaret	Fairholme, Andro
28	Kay v. Broun	CC8/2/6	186r	1573/11/09	Solemnization	Kay, Elizabeth	Broun, Thomas
29	Kinross v. Loch & Weyland	CC8/2/1	48v-49r	1564/06/07	Solemnization	Kinross, Maister Henry, Procurator Fiscal	Loch, Patrick
30	Liddell v. Boge	CC8/2/7	201v	1575/07/01	Solemnization	Liddell, Beatrix	Boge, Thomas
31	Makewan v. Stalker	CC8/2/4	152v-153r	1569-70/01/20	Solemnization	Makewin, Jonet	Stalker, Williame
32	McCrierie v. Hunter	CC8/2/6	448v	1574/07/23	Solemnization	McCrierie, Patrik	Hunter, Marioun
33	Moffait v. Mertene	CC8/2/5	157r	1571/04/26	Solemnization	Moffait, Jonet	Mertene, Johne
34	Murray v. Symsonne	CC8/2/3	287v-288r	1569/04/28	Solemnization	Murray, Katherine	Sympsonne, Laurence
35	Ormistoun v. Blak	CC8/2/7	60v	1574-5/02/09	Solemnization	Ormistoun, Beatrix	Blak, Johne
36	Quhitlaw v. Stewart	CC8/2/6	172r-v	1573/10/20	Solemnization	Quhitlaw, Helene	Steuart, Henry

37	Reid v. Barclay	CC8/2/3	72v	1568/07/17	Solemnization	Reid, Jonet	Barclay, Alexander
38	Reid v. Portuous	CC8/2/2	67r	1565/06/27	Solemnization	Reid, Janet	Portuous, Robert
39	Reid v. Romanois	CC8/2/8	123r-v	1576/04/05	Solemnization	Reid, Issobell	Romanous, Archibald
40	Reidho(ch)t v. Robesone	CC8/2/4	307v-308r	1570/06/28	Solemnization	Reidho(ch)t, Agnes	Robesoun, Williame
41	Richartsoun v. Aikin	CC8/2/5	203r	1572/05/13	Solemnization	Richartsoun, Marioun	Aikin, George
42	Scot v. Robesoun	CC8/2/1	250r	1564/11/27	Solemnization	Scot, Margaret	Robesoun, William
43	Skirling v. Mairioribankis	CC8/2/3	79r	1568/07/31	Solemnization	Skirling, Jane	Mairioribankis, Maister Thomas
44	Skirling v. Wallace	CC8/2/4	42v	1569/07/30	Solemnization	Skirling, Helen	Wallace, William
45	Strang v. Auchinlek	CC8/2/7	128v-129r	1575/04/23	Solemnization	Leirmond, Jonet	Auchinlek, Maister Andro
46	Thomsoun v. Wod	CC8/2/3	39r	1568/06/01	Solemnization	Thomsoun, Johne	Wod, Margaret
47	Walker v. Kay	CC8/2/7	184r	1575/06/18	Solemnization	Walker, Agnes	Kay, Petir
48	Wilsone v. Stowman	CC8/2/5	48r	1570-1/01/13	Solemnization	Stowman, Agnes	Wilsone, Mungo
49	Wod v. Hamiltoun	CC8/2/6	124r	1573/06/24	Solemnization	Wod, Cristiane	Hamiltoun, Daid

50	Wylie v. Stratharne	CC8/2/6	9r-10v	1572/11/05	Solemnization	Wylie, Margaret	Stratharne, Alexander
51	Young v. Proudfute	CC8/2/6	182r-v	1573/11/02	Solemnization	Young, Marioun	Proudfute, Jamis
52	Andersoun v. Gudlad	CC8/2/6	120v- 121r	1573/06/22	Solemnization and Aliment	Andersoun, Marioun	Gudlad, Daid
1	Hammyltoun v. Sclater	CC8/2/1	323v- 324v	1564-5/01/26	Tint	Hammyltoun, Jherome	Sclater, Elizabeth
2	Tulloch v. Sinclair	CC8/2/1	411r-v	1565/03/31	Tint	Tulloch, James	Sinclair, Margaret
3	Westoun v. Ewart	CC8/2/1	323r-v	1564-5/01/26	Tint	Westoun, Johne	Ewart, Katherine

D (1): OUTCOMES OF ACTIONS FOR SOLEMNIZATION (MALE AND FEMALE PURSUERS),
APRIL 1564 TO JANUARY 1576/7

Tally	Case name	Volume	Folio	Date YYYY/MM/DD	Pursuer	Defender	Probation	grant promise	grant copula	Outcome	issue?
1	Andersoun v. Gudlad	CC8/2/6	120v- 121r	1573/06/22	Andersoun, Marioun	Gudlad, Daudid	OATH (defender)	denied	granted	assoilized	lib
(x) 2	Arneill v. Williamsons	CC8/2/3	73v	1568/07/22	Arneill, Jonet	Williamsoun, Stevin	confession	granted	lib	solemnize	
3	Auldinstoun v. McMyllane	CC8/2/1	322r	1564- 5/01/25	Auldinstoun, Isobell	McMyllane, Robert	PROBTN	proven de praesenti	n/a	solemnize & adhere	
4	Barclay v. Ewiot	CC8/2/4	318v- 319r	1570/07/11	Barclay, Helene	Ewiot, Patrik	OATH (defender)	denied	granted	assoilized	lib
5	Bartene v. Mowbray	CC8/2/7	372v- 373r	1575- 6/01/09	Bartene, Issobell	Mowbray, Robert	PROBTN	proven	proven	solemnize	lib
6	Bell v. Wardroper	CC8/2/7	246v	1575/07/23	Bell, Margaret	Wardroper, Johne	succumbed in probation	lib	lib	assoilized	lib
7	Bischope v. Fynlaw	CC8/2/6	346r	1574/04/21	Bischope, Helene	Finlaw, Johne	succumbed in probation	lib	lib	assoilized	lib
8	Blythman v. Bennett	CC8/2/7	367r- v	1575/12/20	Blythman, Margaret	Bennett, Maister Johne	OATH (defender)	denied	lib	assoilized	lib

9	Brok v. Alexander	CC8/2/4	289v-290r	1570/06/10	Brok, Jonet	Alexander, Daud	succumbed in probation	lib	lib	assoilized	
10	Broun v. Gardnare	CC8/2/7	68v-69r	1574-5/02/18	Broun, Jonet	Gardnare, Patrik	OATH (defender)	denied	lib	assoilized	
11	Carmichell v. Calderwod	CC8/2/3	217v	1568-9/03/09	Carmichell, Alesoune	Calderwod, Williame	succumbed in probation	lib	lib	assoilized	lib
12	Carpentyne v. Syme	CC8/2/6	299v-300r	1573-4/03/03	Carpentyne, Jane	Syme, Michell	OATH (defender)	denied de praesenti	n/a	assoilized	
13	Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Clerk, Jonet	Auchinlek, George	OATH (defender)	denied	had granted before Kirk	assoilized	lib
14	Cokburne v. S[in]eberd	CC8/2/7	7v-8r	1574/10/22	Cokburne, Isobell	S[in]eberd, Cuthbert	OATH (defender)	denied	denied	assoilized	lib
15	Crawfurde v. Makdill	CC8/2/8	145v-146r	1576/05/05	Crawfurde, Roger	Makdill, Margaret	succumbed in probation	lib	lib	assoilized	
16	Creichtoun v. Thomsoun	CC8/2/7	290r-v	1575/10/27	Creichtoun, Marioun	Thomsoun, Alexander	succumbed in probation	lib	lib	assoilized	
17	Cunningham e v. Hoige	CC8/2/7	25r-v	1574/11/18	Cunynghame, Robert	Hoige, Agnis	OATH (defender)	denied	n/a	assoilized	
(x)18	Dalmahoy v. Menteith	CC8/2/1	424r	1565/04/07	Dalmahoy, Marioun	Menteith, William	Declaration (presumably OATH) (defender)	unclear though lib	unclear though lib	assoilized PERJURY (couple pursued by fiscal-adherence)	

(x)19	Danielstoun v. Suyntoun	CC8/2/5	183v-184r	1571-2/02/28	Danielstoun, Jane	Suyntoun, Johne	Confessed before Regent	lib	lib	presumably solemnize - clerk's entry wanting	
20	Denis v. Brysoun	CC8/2/8	154v-155r	1576/05/15	Denis, Alesoun	Brysoun, Adame	succumbed in probation	lib	lib	assoilized	
21	Diksoun v. Tod	CC8/2/3	42r-v	1568/06/02	Diksoun, Cristiane	Tod, Alexander	PROBTN	proven	proven	solemnize	
22	Duncane v. Fairley	CC8/2/3	52v-53r	1568/06/14	Duncane, Helene	Fairley, Duncane	OATH (defender)	denied	lib	assoilized	lib
23	Ewart v. Dryisdale	CC8/2/1	65v	1564/06/19	Ewart, Margaret	Dryisdale, James	OATH (defender)	denied	granted	assoilized	
(x)24	Goddiskirk v. Tenent	CC8/2/5	46v-47r	1570-1/01/12	Goddiskirk, Gilbert	Tenent, Isobell	a-typical	a-typical	a-typical	libel true, but action changed into divorce for adultery	
(x)25	Greve v. Eclis	CC8/2/7	199v	1575/06/29	Greve, Katherine	Eclis, Johne	pursuer fails to appear	lib	lib	assoilized	
26	Hammyltoun v. Heriot	CC8/2/6	259v	1573-4/02/05	Heriot, George	Hammyltoun, Helene	OATH (defender)	denied de praesenti	n/a	assoilized	
27	Ker v. Williamsoun	CC8/2/5	193r-v	1571-2/03/19	Ker, Issobell	Williamsoun, Johne	succumbed in probation	lib	lib	assoilized	lib

(x)28	Kincaid v. Fairholme	CC8/2/5	56r	1570-1/01/19	Kincaid, Margaret	Fairholme, Andro	Defender granted promise	de futuro	n/a	assoilized since defender no longer minded to marry	
29	Kay v. Broun	CC8/2/6	186r	1573/11/09	Kay, Elizabeth	Broun, Thomas	OATH (defender)	denied	lib	assoilized	lib
(x)30	Kinross v. Loch & Weyland	CC8/2/1	48v-49r	1564/06/07	Procurator Fiscal	Loch, Patrick	succumbed in probation (fiscal)	lib (including banns)	lib	assoilized	
31	Liddell v. Boge	CC8/2/7	201v	1575/07/01	Liddell, Beatrix	Boge, Thomas	OATH (defender)	denied	lib	assoilized	
32	Makewan v. Stalker	CC8/2/4	152v-153r	1569-70/01/20	Makewin, Jonet	Stalker, Williame	succumbed in probation	lib	n/a	assoilized	
33	McCrierie v. Hunter	CC8/2/6	448v	1574/07/23	McCrierie, Patrik	Hunter, Marioun	succumbed in probation	lib	lib	assoilized	
34	Moffait v. Mertene	CC8/2/5	157r	1571/04/26	Moffait, Jonet	Mertene, Johne	PROBTN	proven	proven	solemnize & adhere	
35	Murray v. Symsonne	CC8/2/3	287v-288r	1569/04/28	Murray, Katherine	Sympsonne, Laurence	succumbed in probation	lib	lib	assoilized	
(x)36	Ormistoun v. Blak	CC8/2/7	60v	1574-5/02/09	Ormistoun, Beatrix	Blak, Johne	OATH (defender) - required by Commissaries	denied	lib	assoilized (pursuer passed from libel, Com's suspected collusion)	lib
37	Quhitlaw v. Stewart	CC8/2/6	172r-v	1573/10/20	Quhitlaw, Helene	Steuart, Henry	OATH (defender)	denied	lib	assoilized	

38	Reid v. Barclay	CC8/2/3	72v	1568/07/17	Reid, Jonet	Barclay, Alexander	OATH (defender)	denied	lib	assoilized	lib
39	Reid v. Portuous	CC8/2/2	67r	1565/06/27	Reid, Janet	Portuous, Robert	succumbed in probation	lib	lib	assoilized	lib
40	Reid v. Romanois	CC8/2/8	123r-v	1576/04/05	Reid, Issobell	Romanous, Archibald	succumbed in probation	lib	lib	assoilized	
41	Reidho(ch)t v. Robesone	CC8/2/4	307v-308r	1570/06/28	Reidho(ch)t, Agnes	Robesoun, Williame	succumbed in probation	lib	lib	assoilized	
42	Richartsoun v. Aikin	CC8/2/5	203r	1572/05/13	Richartsoun, Marioun	Aikin, George	OATH (defender)	granted	granted	solemnize	
43	Scot v. Robesoun	CC8/2/1	250r	1564/11/27	Scot, Margaret	Robesoun, William	PROBTN	proven	proven	solemnize & adhere	
44	Skirling v. Mairioribankis	CC8/2/3	79r	1568/07/31	Skirling, Jane	Mairioribankis, Maister Thomas	PROBTN	proven	proven	solemnize	
45	Skirling v. Wallace	CC8/2/4	42v	1569/07/30	Skirling, Helen	Wallace, William	PROBTN	proven	proven	solemnize & adhere	
46	Strang v. Auchinlek	CC8/2/7	128v-129r	1575/04/23	Leirmond, Jonet	Auchinlek, Maister Andro	OATH (defender)	denied	lib	assoilized	lib
47	Thomsoun v. Wod	CC8/2/3	39r	1568/06/01	Thomsoun, Johne	Wod, Margaret	PROBTN	proven	proven	solemnize	

(x)48	Walker v. Kay	CC8/2/7	184r	1575/06/18	Walker, Agnes	Kay, Petir	incomplete	incomplete	incomplete	Clerical entry wanting	
49	Wilsone v. Stowman	CC8/2/5	48r	1570- 1/01/13	Stowman, Agnes	Wilsone, Mungo	OATH (defender)	denied	granted	assoilized	lib
50	Wod v. Hamiltoun	CC8/2/6	124r	1573/06/24	Wod, Cristiane	Hamiltoun, Dauid	PROBTN	proven	proven	solemnize	
51	Wylie v. Stratharne	CC8/2/6	9r- 10v	1572/11/05	Wylie, Margaret	Stratharne, Alexander	OATH (defender)	denied	granted	assoilized	
52	Young v. Proudfute	CC8/2/6	182r- v	1573/11/02	Young, Marioun	Proudfute, Jamis	OATH (defender)	denied	granted	assoilized	

D (2): OUTCOMES OF ACTIONS FOR SOLEMNIZATION (MALE PURSUERS),
APRIL 1564 TO JANUARY 1576/7

Tally	Case name	Volume	Folio	Date YYYY/MM/DD	Pursuer	Defender	Probation	grant promise	grant copula	Outcome	issue?
1	Cunninghame v. Hoige	CC8/2/7	25r-v	1574/11/18	Cunnynghame, Robert	Hoige, Agnis	OATH (defender)	denied	n/a	assoilized	
2	Hammyltoun v. Heriot	CC8/2/6	259v	1573- 4/02/05	Heriot, George	Hammyltoun, Helene	OATH (defender)	denied de praesenti	n/a	assoilized	
3	Crawfurde v. Makdill	CC8/2/8	145v- 146r	1576/05/05	Crawfurde, Roger	Makdill, Margaret	succumbed in probation	lib	lib	assoilized	
4	McCrierie v. Hunter	CC8/2/6	448v	1574/07/23	McCrierie, Patrik	Hunter, Marioun	succumbed in probation	lib	lib	assoilized	
5	Thomsoun v. Wod	CC8/2/3	39r	1568/06/01	Thomsoun, Johne	Wod, Margaret	PROBTN	proven	proven	solemnize	

D (3): OUTCOMES OF ACTIONS FOR SOLEMNIZATION (FEMALE PURSUERS),
APRIL 1564 TO JANUARY 1576/7

Tally	Case name	Volume	Folio	Date YYYY/MM/DD	Pursuer	Defender	Probation	grant promise	grant copula	Outcome	issue?
1	Andersoun v. Gudlad	CC8/2/6	120v- 121r	1573/06/22	Andersoun, Marioun	Gudlad, Daudid	OATH (defender)	denied	granted	assoilized	lib
2	Barclay v. Ewiot	CC8/2/4	318v- 319r	1570/07/11	Barclay, Helene	Ewiot, Patrik	OATH (defender)	denied	granted	assoilized	lib
3	Blythman v. Bennett	CC8/2/7	367r- v	1575/12/20	Blythman, Margaret	Bennett, Maister Johne	OATH (defender)	denied	lib	assoilized	lib
4	Broun v. Gardnare	CC8/2/7	68v- 69r	1574- 5/02/18	Broun, Jonet	Gardnare, Patrik	OATH (defender)	denied	lib	assoilized	
5	Carpentyne v. Syme	CC8/2/6	299v- 300r	1573- 4/03/03	Carpentyne, Jane	Syme, Michell	OATH (defender)	denied de praesenti	n/a	assoilized	
6	Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Clerk, Jonet	Auchinlek, George	OATH (defender)	denied	had granted before Kirk	assoilized	lib
7	Cokburne v. S[in]eberd	CC8/2/7	7v-8r	1574/10/22	Cokburne, Isobell	S[in]eberd, Cuthbert	OATH (defender)	denied	denied	assoilized	lib

8	Duncane v. Fairley	CC8/2/3	52v-53r	1568/06/14	Duncane, Helene	Fairley, Duncane	OATH (defender)	denied	lib	assoilized	lib
9	Ewart v. Dryisdale	CC8/2/1	65v	1564/06/19	Ewart, Margaret	Dryisdale, James	OATH (defender)	denied	granted	assoilized	
10	Kay v. Broun	CC8/2/6	186r	1573/11/09	Kay, Elizabeth	Broun, Thomas	OATH (defender)	denied	lib	assoilized	lib
11	Liddell v. Boge	CC8/2/7	201v	1575/07/01	Liddell, Beatrix	Boge, Thomas	OATH (defender)	denied	lib	assoilized	
12	Quhitlaw v. Stewart	CC8/2/6	172r-v	1573/10/20	Quhitlaw, Helene	Steuart, Henry	OATH (defender)	denied	lib	assoilized	
13	Reid v. Barclay	CC8/2/3	72v	1568/07/17	Reid, Jonet	Barclay, Alexander	OATH (defender)	denied	lib	assoilized	lib
14	Strang v. Auchinlek	CC8/2/7	128v-129r	1575/04/23	Leirmond, Jonet	Auchinlek, Maister Andro	OATH (defender)	denied	lib	assoilized	lib
15	Wilsone v. Stowman	CC8/2/5	48r	1570-1/01/13	Stowman, Agnes	Wilsone, Mungo	OATH (defender)	denied	granted	assoilized	lib
16	Wylie v. Stratharne	CC8/2/6	9r-10v	1572/11/05	Wylie, Margaret	Stratharne, Alexander	OATH (defender)	denied	granted	assoilized	
17	Young v. Proudpute	CC8/2/6	182r-v	1573/11/02	Young, Marioun	Proudpute, Jamis	OATH (defender)	denied	granted	assoilized	
18	Richartsoun v. Aikin	CC8/2/5	203r	1572/05/13	Richartsoun, Marioun	Aikin, George	OATH (defender)	granted	granted	solemnize	
19	Bartene v. Mowbray	CC8/2/7	372v-373r	1575-6/01/09	Bartene, Issobell	Mowbray, Robert	PROBTN	proven	proven	solemnize	lib

20	Diksoun v. Tod	CC8/2/3	42r-v	1568/06/02	Diksoun, Cristiane	Tod, Alexander	PROBTN	proven	proven	solemnize	
21	Skirling v. Mairioribankis	CC8/2/3	79r	1568/07/31	Skirling, Jane	Mairioribankis, Maister Thomas	PROBTN	proven	proven	solemnize	
22	Wod v. Hamiltoun	CC8/2/6	124r	1573/06/24	Wod, Cristiane	Hamiltoun, Daudid	PROBTN	proven	proven	solemnize	
23	Auldinstoun v. McMyllane	CC8/2/1	322r	1564-5/01/25	Auldinstoun, Isobell	McMyllane, Robert	PROBTN	proven de praesenti	n/a	solemnize & adhere	
24	Moffait v. Mertene	CC8/2/5	157r	1571/04/26	Moffait, Jonet	Mertene, Johne	PROBTN	proven	proven	solemnize & adhere	
25	Scot v. Robesoun	CC8/2/1	250r	1564/11/27	Scot, Margaret	Robesoun, William	PROBTN	proven	proven	solemnize & adhere	
26	Skirling v. Wallace	CC8/2/4	42v	1569/07/30	Skirling, Helen	Wallace, William	PROBTN	proven	proven	solemnize & adhere	
27	Bell v. Wardroper	CC8/2/7	246v	1575/07/23	Bell, Margaret	Wardroper, Johne	succumbed in probation	lib	lib	assoilized	lib
28	Bischope v. Fynlaw	CC8/2/6	346r	1574/04/21	Bischope, Helene	Finlaw, Johne	succumbed in probation	lib	lib	assoilized	lib
29	Brok v. Alexander	CC8/2/4	289v-290r	1570/06/10	Brok, Jonet	Alexander, Daudid	succumbed in probation	lib	lib	assoilized	

30	Carmichell v. Calderwod	CC8/2/3	217v	1568-9/03/09	Carmichell, Alesoune	Calderwod, Williame	succumbed in probation	lib	lib	assoilized	lib
31	Creichtoun v. Thomsoun	CC8/2/7	290r-v	1575/10/27	Creichtoun, Marioun	Thomsoun, Alexander	succumbed in probation	lib	lib	assoilized	
32	Denis v. Brysoun	CC8/2/8	154v-155r	1576/05/15	Denis, Alesoun	Brysoun, Adame	succumbed in probation	lib	lib	assoilized	
33	Ker v. Williamsoun	CC8/2/5	193r-v	1571-2/03/19	Ker, Issobell	Williamsoun, Johne	succumbed in probation	lib	lib	assoilized	lib
34	Makewan v. Stalker	CC8/2/4	152v-153r	1569-70/01/20	Makewin, Jonet	Stalker, Williame	succumbed in probation	lib	n/a	assoilized	
35	Murray v. Symsonne	CC8/2/3	287v-288r	1569/04/28	Murray, Katherine	Sympsonne, Laurence	succumbed in probation	lib	lib	assoilized	
36	Reid v. Portuous	CC8/2/2	67r	1565/06/27	Reid, Janet	Portuous, Robert	succumbed in probation	lib	lib	assoilized	lib
37	Reid v. Romanois	CC8/2/8	123r-v	1576/04/05	Reid, Issobell	Romanous, Archibald	succumbed in probation	lib	lib	assoilized	
38	Reidho(ch)t v. Robesone	CC8/2/4	307v-308r	1570/06/28	Reidho(ch)t, Agnes	Robesoun, Williame	succumbed in probation	lib	lib	assoilized	

E: LENGTH OF EXTANT CONSITORIAL LITIGATION,
BEGINNING BETWEEN APRIL 1564 AND JUNE 1569 ²

Case name	Volume	Folio	Date YYYY/MM/DD	Action	Term / Diet	Duration (days)
Abirnethy v. Moncur	CC8/2/3	334r	1569/05/24	Adherence	initial	
Abirnethy v. Moncur	CC8/2/4	326v – 327r	1570/07/19	Adherence	Decreet	421
Cruik v. Hammiltoun	CC8/2/3	123r	1568/07/30	Adherence	initial	
Cruik v. Hammiltoun	CC8/2/3	340r - v	1569/05/26	Adherence	Decreet	300
Hammyltoun v. Kirkpatrick	CC8/2/1	428r	1565/04/12	Adherence	intial	
Hammyltoun v. Kirkpatrick	CC8/2/2	331v - 332r	1567-8/02/17	Adherence	Decreet	676
Thorntoun v. Sandersone	CC8/2/2	251r	1567-8/01/07	Adherence	Decreet (initial and final)	1
Hoppringle v. Gib	CC8/2/1	196r - v	1564/10/25	Aliment	Decreet (initial and final)	1
Duncane v. Fairley	CC8/2/3	82v	1568/06/26	Aliment and care of bastards	Decreet (initial and final)	1

² Those cases highlighted in bold encompassed the period during which Edinburgh experienced a severe outbreak of plague during the winter of 1568/9.

Cromartie v. Caddell	CC8/2/3	20r	1568/05/01	Annulment	initial	
Cromartie v. Caddell	CC8/2/3	54r - v	1568/06/17	Annulment	Decreet	47
Newtoun v. Dalzell	CC8/2/3	363r	1569/06/11	Annulment	initial	
Newtoun v. Dalzell	CC8/2/5	16v – 17r	1570/12/10	Annulment	Decreet	547
Kinross & Patersoun v. Stevinsoun & Pollock	CC8/2/1	318v	1564-5/01/23	Annulment	initial	
Kinross & Patersoun v. Stevinsoun & Pollock	CC8/2/2	86r-v	1565/07/11	Annulment	Decreet	169
Paislie v. Haistie	CC8/2/1	138r	1564/08/04	Annulment	initial	
Paislie v. Haistie	CC8/2/1	247v	1564/11/25	Annulment	Decreet	113
Oliphantis v. Oliphantis	CC8/2/3	333v - 334r	1569/05/24	Bastardrie	initial	
Oliphantis v. Oliphantis	CC8/2/4	335r – 336v	1570/07/27	Bastardrie	Decreet	429
Barnair v. Nychole	CC8/2/2	339v	1567-8/02/21	Divorce for adultery	initial	
Barnair v. Nychole	CC8/2/2	399v	1567-8/03/24	Divorce for adultery	Decreet	31
Clerk v. Scot	CC8/2/3	183v	1568-9/02/14	Divorce for adultery	initial	
Clerk v. Scot	CC8/2/5	46r – v	1570-1/01/12	Divorce for adultery	Decreet	698
Dunlop v. Broun	CC8/2/1	25 r	1564/05/18	Divorce for adultery	intitial	
Dunlop v. Broun	CC8/2/1	387v - 388r	1564-5/03/14	Divorce for adultery	Decreet	300
Flemyng v. Flemyng	CC8/2/3	119r	1568/07/29	Divorce for adultery	initial	
Flemyng v. Flemyng	CC8/2/3	352r - v	1569/06/04	Divorce for adultery	Decreet	310
Forbes v. Sandelands	CC8/2/1	18v - 19r	1564/05/12	Divorce for adultery	initial	
Forbes v. Sandelands	CC8/2/1	304v - 305v	1564-5/01/15	Divorce for adultery	Decreet	248

Kincaid v. Ross	CC8/2/3	318r	1569/05/13	Divorce for adultery	initial	
Kincaid v. Ross	CC8/2/4	18v – 19r	1569/07/15	Divorce for adultery	Decreet	63
Levingstoun v. Crawford	CC8/2/2	160v	1567/10/29	Divorce for adultery	initial	
Levingstoun v. Crawford	CC8/2/2	261r	1567-8/01/09	Divorce for adultery	Decreet	72
Levingstoun v. Kincaid	CC8/2/3	326r	1569/05/18	Divorce for adultery	initial	
Levingstoun v. Kincaid	CC8/2/4	331v – 332r	1570/07/26	Divorce for adultery	Decreet	434
Michell v. Broun	CC8/2/3	205v	1568-9/03/03	Divorce for adultery	initial	
Michell v. Broun	CC8/2/3	373v - 374r	1569/06/18	Divorce for adultery	Decreet	107
Paterson v. Bernis	CC8/2/3	109v	1568/07/21	Divorce for adultery	initial & first probation of libell	
Paterson v. Bernis	CC8/2/3	79v - 80r	1568/07/31	Divorce for adultery	Decreet	10
Provand v. Steill	CC8/2/3	117v	1568/07/28	Divorce for adultery	initial	
Provand v. Steill	CC8/2/4	44v – 45r	1569/08/06	Divorce for adultery	Decreet	374
Wilsoun v. Creichtoun	CC8/2/2	424r	1568/04/07	Divorce for adultery	initial	
Wilsoun v. Creichtoun	CC8/2/3	28v - 29r	1568/05/08	Divorce for adultery	Decreet	31
Murray v. Irrwin	CC8/2/1	90r - v	1564/07/05	Divorce for adultery	initial	
Murray v. Irrwin	CC8/2/2	11v - 12r	1565/05/07	Divorce for adultery, Aliment and Tint	Decreet	306
Currye v. Stevin	CC8/2/3	238r	1568-9/03/21	Freedom & Silence	Decreet (initial and final)	1
Gibsoun v. Robesoun	CC8/2/2	34v - 35r	1565/05/24	Freedom & Silence	Decreet (initial and final)	1

McWalter v. Galbrayth	CC8/2/2	26v	1565/05/18	Freedom & Silence	initial	
McWalter v. Galbrayth	CC8/2/2	41r	1565/05/30	Freedom & Silence	Decreet	12
Hammyltoun v. Maxwell & Lindsay	CC8/2/1	222v - 223r	1564/11/15	Reduction of Kirk's sentence of divorce	intial	
Hammyltoun v. Maxwell & Lindsay	CC8/2/1	393v - 394v	1564-5/03/16	Reduction of Kirk's sentence of divorce	Decreet	121
Leslie v. Oliphant	CC8/2/1	16v - 17r	1564/05/10	Reduction of pre-Ref sentence of divorce	initial	
Leslie v. Oliphant	CC8/2/2	382r - 383v	1567-8/03/16	Reduction of pre-Ref sentence of divorce	Decreet	1406
Auldinstoun v. McMyllane	CC8/2/1	64v	1564/06/17	Solemnization	intial	
Auldinstoun v. McMyllane	CC8/2/1	322r	1564-5/01/25	Solemnization	Decreet	222
Carmichell v. Calderwod	CC8/2/3	152v	1567-8/01/18	Solemnization	initial	
Carmichell v. Calderwod	CC8/2/3	217v	1568-9/03/09	Solemnization	Decreet	416
Clerk v. Auchinlek	CC8/2/3	60r	1568/06/25	Solemnization	initial	
Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Solemnization	Decreet	3
Dalmahoy v. Menteith	CC8/2/1	424r	1565/04/07	Solemnization	Decreet (initial and final)	1
Diksoun v. Tod	CC8/2/2	314v	1567-8/02/09	Solemnization	initial	

Diksoun v. Tod	CC8/2/3	42r - v	1568/06/02	Solemnization	Decreet	113
Duncane v. Fairley	CC8/2/3	52v - 53r	1568/06/14	Solemnization	Decreet (intial and final)	1
Ewart v. Dryisdale	CC8/2/1	65v	1564/06/19	Solemnization	Decreet (intial and final)	1
Murray v. Symson	CC8/2/3	131r - v	1568/10/15	Solemnization	initial	
Murray v. Symson	CC8/2/3	287v-288r	1569/04/28	Solemnization	Decreet	195
Reid v. Portuous	CC8/2/2	24r	1565/05/16	Solemnization	initial	
Reid v. Portuous	CC8/2/2	67r	1565/06/27	Solemnization	Decreet	42
Scot v. Robesoun	CC8/2/1	177v	1564/10/11	Solemnization	intial	
Scot v. Robesoun	CC8/2/1	250r	1564/11/27	Solemnization	Decreet	47
Skirling v. Mairioribankis	CC8/2/3	43v	1568/06/03	Solemnization	initial	
Skirling v. Mairioribankis	CC8/2/3	79r	1568/07/31	Solemnizioun	Decreet	58
Thomsoun v. Wod	CC8/2/2	358r	1567-8/03/03	Solemnization	intitial	
Thomsoun v. Wod	CC8/2/3	39r	1568/06/01	Solemnization	Decreet	90
Hammyltoun v. Sclater	CC8/2/1	72v - 73r	1564/06/22	Tint	intitial	
Hammyltoun v. Sclater	CC8/2/1	323v - 324v	1564-5/01/26	Tint	Decreet	218
Tulloch v. Sinclair	CC8/2/1	140r-v	1564/08/05	Tint	initial	
Tulloch v. Sinclair	CC8/2/1	411r-v	1565/03/31	Tint	Decreet	239
Westoun v. Ewart	CC8/2/1	281v	1564/12/14	Tint	intial	
Westoun v. Ewart	CC8/2/1	323r - v	1564-5/01/26	Tint	Decreet	43

F (1): PROCURATORS REPRESENTING PURSUERS IN CONSISTORIAL ACTIONS
BEFORE THE COMMISSARIES OF EDINBURGH, APRIL 1564 TO JUNE 1569³

Tally	Pursuer's Procurator	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Pursuer	Defender	Defender's Procurator
1	Fermour, Master Thomas	<i>Cristesone v. Lindsay</i>	CC8/2/2	167v	1567/11/01	Adherence	Crystesoun, Williame	Lindsay, Isobell	Kinross, Master Henrie
1	King, Alexander	Cristesone v. Lindsay	CC8/2/2	215r	1567/12/02	Adherence	Crystesoun, Williame	Lindsay, Isobell	Kinross, Master Henrie
2	Buquhanan, Master Thomas	Cruik v. Hammiltoun	CC8/2/3	298v	1569/05/05	Adherence	Cruik, Mairiorie	Hammiltoun, Jherome	
3	King, Alexander	<i>Grahame v. Buchquhanane</i>	CC8/2/2	351r	1567-8/02/27	Adherence	Grahame, Marie	Buchquanane, George	Kinross, Master Henrie
4	Kinross, Master Henrie	<i>Hammiltoun v. Dalmahoy</i>	CC8/2/2	222v	1567/12/05	Adherence	Hammiltoun, Agnes	Dalmahoy, Alexander	
5	Kinross, Master Henrie	<i>Hammyltoun v. Kirkpatrik</i>	CC8/2/1	428r	1565/04/12	Adherence	Hammyltoun, Elizabeth	Kirkpatrik, Roger	Schairp, Master John; Gaw, Master

³ The first entry for each case which also occurs in Appendix F(2), had been highlighted in *italics*, denoting that the pursuer and defender both used a procurator at at least one diet during the same case, even if this was not the same diet.

									David
5	Hay, Master Edmund	Hammyltoun v. Kirkpatrik	CC8/2/1	428v	1565/04/13	Adherence	Hammyltoun, Elizabeth	Kirkpatrik, Roger	Scharpe, Master John
5	Kinross, Master Henrie & Hay, Master Edmund	Hammyltoun v. Kirkpatrik	CC8/2/2	30v - 31r	1565/05/22	Adherence	Hammyltoun, Elizabeth	Kirkpatrik, Roger	Schairp, Master John & Gaw, Master David
6	Westoun, Master Thomas	<i>Kinross v. Menteith and Dalmahoy</i>	CC8/2/2	21v	1565/05/14	Adherence	Kinross, procurator fiscal	Menteith, Williame	
7	King, Alexander	Lindesay v. Edmestoun	CC8/2/1	188r	1564/10/20	Adherence	Lindesay, Janet	Edmestoun, Williame	
8	Abircrumby, Master Johne	<i>Ostlar v. Ramsay</i>	CC8/2/2	306r	1567-8/02/04	Adherence	Ostlar, David als Andro	Ramsay, Helene	Westoun, Master Thomas
9	Cowlis, Johne	<i>Pennycuke v. Richesoun</i>	CC8/2/1	39r	1564/06/02	Adherence	Pennycuke, Marioun	Richesoun, Walter	Marioribank, Michael
10	Strang, Master Richard	<i>Robertsoun v. Ker</i>	CC8/2/2	81v	1565/07/07	Adherence	Robertsoun, Janet	Ker, George	Moscrope, Master Johne
10	King, Alexander	Robertsoun v. Ker	CC8/2/2	84v	1565/07/10	Adherence	Robertsoun, Janet	Ker, George	Moscrope, Master Johne
11	Logy, Master John	Stewart v. Ross	CC8/2/1	368r	1564-5/03/01	Adherence	Stewart, Gellis	Ross, Williame	

12	Kinross, Master Henrie	<i>Sympill v. Hammiltoun</i>	CC8/2/2	253r	1567-8/01/08	Adherence	Sympill, Isobell	Hammiltoun, James	King, Alexander
13	King, Alexander	Wallace v. Dowglass	CC8/2/3	293r - v	1569/05/02	Adherence	Wallace, Cristiane	Dowglass, Andro	
1	Moscrope, Master Johne	<i>Maxwell v. Flemyngis</i>	CC8/2/3	268r	1569/04/18	Annulment	Maxwell, Williame	Flemming, Thomas & Jonet	Inglis, Master Thomas
2	King, Alexander	<i>Newtoun v. Dalzell</i>	CC8/2/3	363r	1569/06/11	Annulment	Newtoun, Margaret	Dalzell, James	Kinross, Master Henrie
3	King, Alexander	<i>Sinclair v. Tulloch</i>	CC8/2/1	183v	1564/10/16	Annulment	Sinclair, Margaret	Tulloch, James	Schairp, Master Johne
4	Gaw, Master David, Advocate & Kinross, Master Henrie, Advocate	<i>Spalding v. Spalding</i>	CC8/2/2	24v	1565/05/16	Annulment	Spalding, Elizabeth	Spalding, David	
4	Harvy, Master Thomas	Spalding v. Spalding	CC8/2/2	45v	1565/06/04	Annulment	Spalding, Elizabeth	Spalding, David	Scharpe, Master Johne
5	Gaw, Master David	Stewart v. Dunlop & Broun	CC8/2/1	30r	1564/05/20	Annulment	Stewart, William of Bultreis	Dunlop, Hew	
1	Schairp, Master Johne	<i>Dunbar v. Adair</i>	CC8/2/3	300r	1569/05/06	Bastardrie	Dunbar, Alisoun	Adair, Cristiane	Skene, Master Alexander
2	Harvy, Master Thomas	Kennedy v. Mure	CC8/2/1	288r	1564/12/19	Bastardrie	Kennedy, Janet	Mure, Agnes	

3	Kinross, Master Henrie	Oliphantis v. Oliphantis	CC8/2/3	342r	1569/05/27	Bastardrie	Oliphantis, Margaret & Jonet	Oliphant, Petir	
1	Balfour, Master Henrie	Bunche v. Moncreif	CC8/2/3	43r	1568/06/03	Divorce for adultery	Bunche, Williame	Moncreif, Isobell	
2	Hay, Master Edmund	Bannatyne v. Aitkin	CC8/2/2	55r-v	1565/06/18	Divorce for adultery	Bannatyne, Donald	Aitkin, Marioun	
3	Sym, Master Alexander	<i>Carnegy v. Vaus</i>	CC8/2/1	1v	1564/04/28	Divorce for adultery	Carnegy, Johne	Vaus, Margaret	
4	Moscroip, Master Johne	<i>Cunnyngnam v. Leky</i>	CC8/2/1	84v	1564/06/30	Divorce for adultery	Cunnyngnam, Agnes	Leky, Walter	Kinross, Master Henrie
4	Schairp, Master Johne	Cunnyngnam v. Leky	CC8/2/2	32r-v	1565/05/24	Divorce for adultery	Cunnyngnam, Agnes	Leky, Walter	Kinross, Master Henrie
5	Gaw, Master David	<i>Cunnyngname v. Cathcart</i>	CC8/2/1	83r	1564/06/29	Divorce for adultery	Cunnyngname, David	Cathcart, Gelis	Craig, Master Thomas
6	Gaw, Master David	Deynis v. Patersoun	CC8/2/2	310v	1567-8/02/06	Divorce for adultery	Deynis, Isobell (in this act 'Denis')	Patersoun, William	
7	Kinross, Master Henrie	<i>Dougalsoun v. Kirkpatrik</i>	CC8/2/1	241r	1564/11/22	Divorce for adultery	Dougalsoun, Cristane	Kirkpatrik, Johne	Harvy, Master Thomas
8	Hay, Master Edmund	<i>Dunlop v. Broun</i>	CC8/2/1	33v	1564/05/30	Divorce for adultery	Dunlop, Hew	Broun, Eliz	
9	Schairp, Master Johne	<i>Flemyng v. Flemyng</i>	CC8/2/3	119r	1568/07/29	Divorce for adultery	Flemyng, Thomas	Flemyng, Jonet	Craig, Master Thomas

9	King, Alexander	Flemyng v. Flemyng	CC8/2/3	274v - 275r	1569/04/21	Divorce for adultery	Flemyng, Thomas	Flemyng, Jonet	Craig, Master Thomas
10	Schairp, Master Johne	<i>Giffert v. Dischingtoun</i>	CC8/2/3	132v - 133v	1568/11/12	Divorce for adultery	Giffert, James	Dischingtoun, Helene	
11	Harvy, Master Thomas	Gordoun v. Leslie	CC8/2/1	269v	1564/12/06	Divorce for adultery	Gordoun, Elizabeth	Leslie, Robert	
12	Marioribankis, Michael	<i>Johnesoun v. Johnesoun</i>	CC8/2/2	8v	1565/05/05	Divorce for adultery	Johnesoun, Marioun	Johnesoun, James	Harvy, Master Thomas
12	King, Alexander	Johnesoun v. Johnesoun	CC8/2/2	24r	1565/05/16	Divorce for adultery	Johnesoun, Marioun	Johnesoun, James	Harvy, Master Thomas
13	King, Alexander	Ker v. Cranstoun	CC8/2/2	159r - v	1567/10/28	Divorce for adultery	Ker, Sir Andrew of Hirsale, knycht	Cranstoun, Margaret	
14	King, Alexander	<i>Ker v. Dougall</i>	CC8/2/2	155r	1567/10/25	Divorce for adultery	Ker, Isobell	Dowgall, Johne	
14	Strang, Master Johne	Ker v. Dougall	CC8/2/2	157r	1567/10/27	Divorce for adultery	Ker, Isobell	Dowgall, Johne	Kinross, Master Henrie
14	Marioribankis, Master Johne	Ker v. Dougall	CC8/2/2	158v	1567/10/27	Divorce for adultery	Ker, Isobell	Dowgall, Johne	Kinross, Master Henrie
14	Schairp, Master Johne	Ker v. Dougall	CC8/2/2	175v	1567/11/06	Divorce for adultery	Ker, Isobell	Dowgall, Johne	Kinross, Master Henrie
15	King, Alexander	Kincaid v. Ross	CC8/2/3	318r	1569/05/13	Divorce for adultery	Kincaid, Grissell	Ross, Johne	

16	King, Alexander	Levingstoun v. Crawford	CC8/2/2	160v	1567/10/29	Divorce for adultery	Levingstoun, Elizabeth	Crawfurd, Williame	
17	Kinross, Master Henrie	<i>Levingstoun v. Hammiltoun</i>	CC8/2/2	388r	1567-8/03/19	Divorce for adultery	Levingstoun, Agnes	Hammiltoun, Harie	Schairp, Master Johne
18	Kinross, Master Henrie	<i>Lindesay v. Crystesone</i>	CC8/2/2	320v	1567-8/02/12	Divorce for adultery	Lindesay, Isobell	Cristesoun, Williame	
19	Harvy, Master Thomas	Makcanzie v. Makgillechallum	CC8/2/2	412v	1568/04/01	Divorce for adultery	McCanzie, Isobell	Makgillechallum, Gillechallum	
20	Harvy, Master Thomas	McGie v. McNauche	CC8/2/2	132r	1565/08/13	Divorce for adultery	McGie, Marioun	McNauche, Johne	
21	Kinross, Master Henrie	Michell v. Broun	CC8/2/3	205v	1568-9/03/03	Divorce for adultery	Michell, Elizabeth	Broun, Andro	
22	Gaw, Master David	Murray v. Chalmer	CC8/2/2	109r	1565/07/24	Divorce for adultery	Murray, Cuthbert	Chalmer, Christiane	
23	Harvy, Master Thomas	Murray v. Irrwin	CC8/2/1	90r - v	1564/07/05	Divorce for adultery	Murray, Margaret	Irrwin, Herbert	
24	King, Alexander	Patersone v. Bernis	CC8/2/3	109v	1568/07/21	Divorce for adultery	Patersone, Cristiane	Bernis, Robert	
24	Mairioribankis, Michael	Patersone v. Bernis	CC8/2/3	79v - 80r	1568/07/31	Divorce for adultery	Patersone, Cristiane	Bernis, Robert	
25	King, Alexander	Provand v. Steill	CC8/2/3	118v - 119r	1568/07/29	Divorce for adultery	Provand, James	Steill, Isobell	

26	Westoun, Master Thomas	Reid v. Ker	CC8/2/1	226r	1564/11/16	Divorce for adultery	Reid, Isobell	Ker, Johne	
26	Harvy, Master Thomas	Reid v. Ker	CC8/2/1	256r	1564/11/29	Divorce for adultery	Reid, Isobell	Ker, Johne	
27	Kinross, Master Henrie	Ross v. Reid	CC8/2/1	83r	1564/06/29	Divorce for adultery	Ross, Nicholas	Reid, Marioun	
28	Fowlis, Master Alexander	<i>Sched v. Archibald</i>	CC8/2/2	107v	1565/07/23	Divorce for adultery	Sched, Alexander	Archibald, Margaret	King, Alexander
29	Gaw, Master David	<i>Speir v. Tuedy</i>	CC8/2/1	275r	1564/12/09	Divorce for adultery	Speir, Janet	Tuedy, Williame	Weddale, Master Thomas
30	Frude, Master John	Thomsoun v. Lindesay	CC8/2/2	297r	1567-8/01/30	Divorce for adultery (inferred)	Thomsoun, Janet	Lindesay, Harbert	
31	Gaw, Master David	Turnbull v Turnbull	CC8/2/2	392v	1567-8/03/22	Divorce for adultery	Turnbull, Daudid	Turnbull, Janet	
32	Kinross, Master Henrie	<i>Wemis v. Dunbar</i>	CC8/2/2	219v	1567/12/05	Divorce for adultery	Wemis, Johne	Dunbar, Margaret	Gaw, Master David
33	Gaw, Master David	Wemys v. Boiswall	CC8/2/2	5v	1565/05/03	Divorce for adultery	Wemys, Janet	Boiswell, Robert	
34	Gaw, Master David	Wilsoun v. Creichtoun	CC8/2/3	28v - 29r	1568/05/08	Divorce for adultery	Wilsoun, Beatice	Creichtoun, James	
35	Westoun, Master Thomas	Wrycht v. Drippis	CC8/2/2	403v	1568/03/27	Divorce for adultery	Wrycht, Marioun	Drippis, Johne	

1	Kinross, Master Henrie	<i>Ross v. Oliphant</i>	CC8/2/3	302r	1569/05/09	Expenses having obtained decret of adherence	Ross, Helene	Oliphant, William	McCalzean, Master Henrie
1	Kinross, Master Henrie	<i>Currye v. Stevin</i>	CC8/2/3	238r	1568-9/03/21	Freedom & Silence	Currye, Johne	Stevin, Jonet	
1	Strang, Master Richard	<i>Hammyltoun v. Maxwell & Lindesay</i>	CC8/2/1	248r	1564/11/25	Reduction of kirk's divorce	Hammyltoun, Elizabeth	Maxwell, Johne	
2	Harvy, Master Thomas	<i>Dempstar v. Fraser & Buchane & Seytoun</i>	CC8/2/1	271r-v	1564/12/07	Reduction of pre-Ref divorce	Dempstar, James	Fraser, Janet et al	
3	Fermour, Master Thomas	<i>Galbrayth v. McCalzean</i>	CC8/2/1	418r	1565/04/04	Reduction of pre-ref divorce	Galbrayth, Elizabeth	McCalzean, Maister Thomas	
3	Kinross, Master Henrie	<i>Galbrayth v. McCalzean</i>	CC8/2/2	1r	1565/04/30	Reduction of pre-ref divorce	Galbrayth, Elizabeth	McCalzean, Maister Thomas	
3	Kinross, Master Henrie & Fermour, Master Thomas	<i>Galbrayth v. McCalzean</i>	CC8/2/2	6r	1565/05/03	Reduction of pre-ref divorce	Galbrayth, Elizabeth	McCalzean, Maister Thomas	
4	Sym, Master Alexander	<i>Leslie v. Oliphant</i>	CC8/2/1	70r	1564/06/20	Reduction of pre-ref process of divorce	Leslie, Katherine	Ollipant, Laurence Lord and Katherine Olliphant	Kinross (presumably), but called 'Master Henrie' only

4	Strang, Master George; Sym, Master Alexander	Leslie v. Oliphant	CC8/2/1	16v - 17r	1564/05/10	Reduction of pre-Ref sentence of divorce	Leslie, Katherine	Oliphant, Laurence Lord	Kinross, Master Henrie
4	Balfour, Master Henrie	Leslie v. Oliphant	CC8/2/2	152r	1567/10/22	Reduction of decree of divorce	Leslie, Katherine	Oliphant, Laurence Lord	Kinross, Master Henrie
5	Gaw, Master David	Kinross & Drippis v. Jaksoun, Levmax, Bromside & Wrycht	CC8/2/2	52v	1565/06/07	Reduction of decree of divorce	Kinross, Maister Henrie, procuratoure fischale to our soverane lady	Jaksoun, Schir William	
6	Kinross, Master Henrie	<i>Forrest v. Rollok & Gardin</i>	CC8/2/1	46v	1564/06/06	Reduction of kirk's divorce	Forrest, Johne	Rollock, Maragret	Schairp, Master Johne
1	Fermour, Master Thomas	Forestar v. Forestar	CC8/2/1	202r	1564/10/30	Retrospective Declarator of Divorce	Forrester, Margaret	Abirnethy, Janet	Hervy, Master Thomas
1	Kinross, Master Henrie	<i>Andersone v. Edmound</i>	CC8/2/2	334r	1567-8/02/19	Solemnization	Andersoun, Marioun	Edmound, Adame	Marioribankis, Michael
2	Weddale, Master Thomas	<i>Auldinstoun v. McMyllane</i>	CC8/2/1	246v	1564/11/24	Solemnization	Auldinstoun, Isobell	McMyllane, Robert	King, Master Alexander
3	Marioribankis, Master Johne	Carmichell v. Calderwod	CC8/2/3	162v	1568-9/01/27	Solemnization	Carmichell, Alesoune	Calderwod, Williame	
4	Craig, Master Thomas	<i>Cathcart v. Cunnyngame</i>	CC8/2/1	55v - 56r	1564/06/12	Solemnization	Cathcart, Gelis	Cunnyngame, David	Gow, Master David
5	Westoun, Master Thomas	Dalmahoy v. Menteith	CC8/2/1	424r	1565/04/07	Solemnization	Dalmahoy, Marioun	Menteith, William	

6	King, Alexander	<i>Diksoun v. Tod</i>	CC8/2/2	327v	1567-8/02/16	Solemnization	Diksoun, Cristiane	Tod, Alexander	
7	Fermour, Master Thomas	<i>Haw v. Watt</i>	CC8/2/3	240v	1568-9/03/21	Solemnization	Haw, Cristia(ne)	Watt, Johne	Logye, Master Johne
8	Fermour, Master Thomas	Medowfield v. Rankin	CC8/2/2	83v	1565/07/09	Solemnization	Medowfield, Elizabeth	Rankin, James	
9	Ballender, Master Thomas	<i>Murray v. Symson</i>	CC8/2/3	132r - v	1568/11/12	Solemnization	Murray, Katherine	Sympson, Laurence	Foulis, Master Adame
9	Schairp, Master Johne	Murray v. Symson	CC8/2/3	134r	1568/11/28	Solemnization	Murray, Katherine	Sympson, Laurence	Foulis, Master Adame & King, Alexander
9	Kinross, Master Henrie	Murray v. Symson	CC8/2/3	150v	1568-9/01/14	Solemnization	Murray, Katherine	Sympson, Laurence	King, Alexander
10	Gaw, Master David	<i>Reid v. Portuous</i>	CC8/2/2	28v	1565/05/21	Solemnization	Reid, Janet	Portuous, Robert	
11	King, Master Alexander	<i>Scot v. Robesoun</i>	CC8/2/1	202v	1564/10/30	Solemnization	Scot, Margaret	Robesoun, William	
12	Balfour, Master Henrie	<i>Skirling v. Mairioribankis</i>	CC8/2/3	47v	1568/06/09	Solemnization	Skirling, Jane	Mairioribankis, Maister Thomas	
13	Mairioribankis, Michaell	Steill v. Auld	CC8/2/3	159v	1568-9/01/24	Solemnization	Steill, Jonet	Auld, Richard	

14	King, Alexander	<i>Thomsoun v. Wod</i>	CC8/2/2	386v	1567-8/03/18	Solemnization	Thomsoun, Johne	Wod, Margaret	Schairp, Master Johne
1	Schairp, Master Johne	Hammyltoun v. Sclater	CC8/2/1	92r (300v , 314r, 323v- 324v)	1564/07/07	Tint	Hammyltoun, Jherome	Sclater, Elizabeth	
2	Schairp, Master Johne	<i>Tulloch v. Sinclair</i>	CC8/2/1	336v	1564-5/02/06	Tint	Tulloch, James	Sinclair, Margaret	King, Alexander
3	Westoun, Master Thomas	Westoun v. Ewart	CC8/2/1	281v	1564/12/14	Tint	Westoun, Johne	Ewart, Katherine	

**F (2): PROCURATORS REPRESENTING DEFENDERS IN CONSISTORIAL ACTIONS
BEFORE THE COMMISSARIES OF EDINBURGH, APRIL 1564 TO JUNE 1569**

Tally	Defender's Procurator	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Defender	Pursuer	Pursuer's Procurator
1	Gaw, Master David	Bosuell v. Wemyss	CC8/2/2	190r	1567/11/15	Adherence	Wemys, Janet	Bosuell, Robert	
2	Kinross, Master Henrie	Cristesone v. Lindesay	CC8/2/2	151r	1567/10/22	Adherence	Lindesay, Isobell	Crystesoun, Williame	left blank
3	Kinross, Master Henrie	Grahame v. Buchquhanane	CC8/2/2	351r	1567-8/02/27	Adherence	Buchquanane, George	Grahame, Marie	King, Alexander
4	Schairp, Master Johne	Hammiltoun v. Dalmahoy	CC8/2/2	333r	1567-8/02/18	Adherence	Dalmahoy, Alexander	Hammiltoun, Agnes	Kinross, Master Henrie
5	Schairp, Master Johne	Hammyltoun v. Kirkpatrik	CC8/2/1	428v	1565/04/13	Adherence	Kirkpatrik, Roger	Hammyltoun, Elizabeth	Hay, Master Edmund
5	Schairp, Master John & Gaw, Master David	Hammyltoun v. Kirkpatrik	CC8/2/2	30v - 31r	1565/05/22	Adherence	Kirkpatrik, Roger	Hammyltoun, Elizabeth	Kinross, Master Henrie & Hay, Master Edmund
5	Gaw, Master David	Hammyltoun v. Kirkpatrik	CC8/2/2	31r	1565/05/23	Adherence	Kirkpatrik, Roger	Hammyltoun, Elizabeth	Kinross, Master Henrie

6	Cowy, Master William	Kinross v. Menteith & Dalmahoy	CC8/2/2	31v	1565/05/23	Adherence	Menteith, Williame	Kinross, Master Henrie	Westoun, Maister Thomas (Fiscal's substitute)
7	Westoun, Master Thomas	Ostlar v. Ramsay	CC8/2/2	306r	1567-8/02/04	Adherence	Ramsay, Helene	Ostlar, David als Andro	Abircrumby, Master Johne
8	Marioribank, Michael	Pennycuke v. Richesoun	CC8/2/1	39r	1564/06/02	Adherence	Richesoun, Walter	Pennycuke, Marioun	[Row]tis, Johne
9	Moscrope, Master Johne	Robertsoun v. Ker	CC8/2/2	81v	1565/07/07	Adherence	Ker, George	Robertsoun, Janet	Strang, Master Richard
10	King, Alexander	Sympill v. Hammiltoun	CC8/2/2	253r	1567-8/01/08	Adherence	Hammiltoun, James	Sympill, Isobell	Kinross, Master Henrie
1	King, Alexander	Duncane v. Fairley	CC8/2/3	82v	1568/06/26	Aliment and care of illigitimate children	Fairley, Duncane	Duncane, Helene	
1	Gaw, Master David	Kinross v. Sanchy & Craig	CC8/2/2	414r	1568/04/02	Annulment	Sanchy, Alexander	Kinross, Master Henrie	
1	Craig, Master Thomas	Kinross v. Sanchy & Craig	CC8/2/3	46v	1568/06/08	Annulment	Sanchy, Alexander & Marioun Craig	Kinross, Master Henrie	

2	Schairp, Master Johne	Maxwell v. Flemyngis	CC8/2/3	119r	1568/07/29	Annulment	Flemming, Thomas & Jonet	Maxwell, Williame	
2	Inglis, Master Thomas	Maxwell v. Flemyngis	CC8/2/3	268r	1569/04/18	Annulment	Flemming, Thomas & Jonet	Maxwell, Williame	Moscrope, Master Johne
3	Kinross, Master Henrie	Newtoun v. Dalzell	CC8/2/3	363r	1569/06/11	Annulment	Dalzell, James	Newtoun, Margaret	King, Alexander
4	Schairp, Master Johne	Sinclair v. Tulloch	CC8/2/1	183v	1564/10/16	Annulment	Tulloch, James	Sinclair, Margaret	King, Alexander
5	Schairp, Master Johne	Spalding v. Spalding	CC8/2/2	38v	1565/05/28	Annulment	Spalding, David	Spalding, Elizabeth	Gaw, Master David & Kinross, Master Henrie
6	Gaw, Master David	Kinross & Patersoun v. Stevinsoun & Pollock	CC8/2/1	318v	1564-5/01/23	Annulment	Stevinsoun, Constine	Kinross, Master Henrie	
1	Skene, Master Alexander	Dunbar v. Adair	CC8/2/3	300r	1569/05/06	Bastardrie	Adair, Cristiane	Dunbar, Alisoun	Schairp, Master Johne
1	Skene, Master Alexander & King, Alexander	Dunbar v. Adair	CC8/2/3	307v - 312r	1569/05/10	Bastardrie	Adair, Cristiane	Dunbar, Alisoun	Schairp, Master Johne

1	Skene, Master Alexander & Moscroip, Master Johne & King, Alexander	Dunbar v. Adair	CC8/2/3	368v - 369r	1569/06/15	Bastardrie	Adair, Cristiane	Dunbar, Alisoun	Schairp, Master Johne
1	Balfoure, Master Henrie	Andersone v. Allasone	CC8/2/2	175v - 175r	1567/11/06	Divorce for adultery	Allasoune, Alesoun	Andersoun, Johne	
1	Gaw, Master David	Andersone v. Allasone	CC8/2/2	265r	1567-8/01/13	Divorce for adultery	Allasoune, Alesoun	Andersoun, Johne	
2	Hay, Master Edmond	Carnegy v. Vaus	CC8/2/1	17v - 18r	1564/05/12	Divorce for adultery	Vaus, Margaret	Carnegy, Johne	Sym, Master Alexander
3	Kinross, Master Henrie	Cunyngham v. Leky	CC8/2/1	84v	1564/06/30	Divorce for adultery	Leky, Walter	Cunyngham, Agnes	Moscroip, Master Johne
4	Craig, Master Thomas	Cunynghame v. Cathcart	CC8/2/1	83r	1564/06/29	Divorce for adultery	Cathcart, Gelis	Cunynghame, David	Gow, Master David
5	Harvy, Master Thomas	Dougalsoun v. Kirkpatrik	CC8/2/1	241r	1564/11/22	Divorce for adultery	Kirkpatrik, Johne	Dougalsoun, Cristane	Kinross, Master Henrie
6	Gaw, Master David	Dunlop v. Broun	CC8/2/1	330v	1564-4/01/31	Divorce for adultery	Broun, Elizabeth	Dunlop, Hew	
6	Gaw, Master David	Dunlop v. Broun	CC8/2/1	383r	1564-5/03/09	Divorce for adultery	Broun, Elizabeth	Dunlop, Hew	
7	Craig, Master Thomas	Flemyng v. Flemyng	CC8/2/3	119r	1568/07/29	Divorce for adultery	Flemyng, Jonet	Flemyng, Thomas	Schairp, Master Johne

7	Craig, Master Thomas & Moscroip, Master Thomas	Flemyng v. Flemyng	CC8/2/3	199v - 200r	1568-9/02/28	Divorce for adultery	Flemyng, Jonet	Flemyng, Thomas	Schairp, Master Johne
8	Gaw, Master David	Forbes v. Sandelands	CC8/2/1	18v - 19r	1564/05/12	Divorce for adultery	Sandelands, Barbara	Forbes, Johne	
9	Abircrumby, Master Johne	Giffert v. Dischingtoun	CC8/2/3	133v	1568/11/22	Divorce for adultery	Dischingtoun, Helene	Giffert, James	Schairp, Master Johne
9	King, Alexander	Giffert v. Dischingtoun	CC8/2/3	142v	1568-9/01/07	Divorce for adultery	Dischingtoun, Helene	Giffert, James	Schairp, Master Johne
9	Strang, Master Richard & King, Alexander	Giffert v. Dischingtoun	CC8/2/3	264v - 265r	1569/04/02	Divorce for adultery	Dischingtoun, Helene	Giffert, James	Schairp, Master Johne
9	Strang, Master Richard & Abircrumby, Master Johne	Giffert v. Dischingtoun	CC8/2/3	280r - v	1569/04/25	Divorce for adultery	Dischingtoun, Helene	Giffert, James	Schairp, Master Johne
9	Abircrumby, Master Johne & King, Alexander	Giffert v. Dischingtoun	CC8/2/3	294v	1569/05/03	Divorce for adultery	Dischingtoun, Helene	Giffert, James	Schairp, Master Johne
10	King, Alexander	Glendonyng v. Grahame	CC8/2/2	116r	1565/07/28	Divorce for adultery	Grahame, Janet	Glendonyng, Symone	
11	Harvy, Master Thomas	Johnesoun v. Johnesoun	CC8/2/2	8v	1565/05/05	Divorce for adultery	Johnesoun, James	Johnesoun, Marioun	Marioribankis, Michael

12	Kinross, Master Henrie	Ker v. Dougall	CC8/2/2	158v	1567/10/27	Divorce for adultery	Dowgall, Johne	Ker, Isobell	Marjoribankis, Master Johne
12	Fermour, Master Thomas	Ker v. Dougall	CC8/2/3	30v	1568/05/20	Divorce for adultery	Dowgall, Johne	Ker, Isobell	King, Alexander
13	Skene, Master Alexander	Leslie v. Betoun	CC8/2/2	429v	1568/04/10	Divorce for adultery	Betoun, Daid	Leslie, Beatrice	Schairp, Master Johne
14	Schairp, Master Johne	Levingstoun v. Hammiltoun	CC8/2/2	372v	1567-8/03/11	Divorce for adultery	Hammiltoun, Harie	Levingstoun, Agnes	
15	Bucquhanan, Master Thomas	Levingstoun v. Kincaid	CC8/2/3	328r	1569/05/20	Divorce for adultery	Kincaid, James (younger)	Levingstoun, Margaret	
16	King, Alexander	Lindesay v. Crystesone	CC8/2/3	16r	1568/04/30	Divorce for adultery	Cristesoun, Williame	Lindesay, Isobell	
17	King, Alexander	Sched v. Archibald	CC8/2/2	107v	1565/07/23	Divorce for adultery	Archibald, Margaret	Sched, Alexander	Fowlis, Master Alexander
18	Weddale, Master Thomas	Speir v. Tuedy	CC8/2/1	275r	1564/12/09	Divorce for adultery	Tuedy, Williame	Speir, Janet	Gaw, Master David
19	King, Alexander	Tailzeseir v. Luddous	CC8/2/2	282r	1567-8/01/23	Divorce for adultery	Luddous, Marioun	Tailzeseir, Johne	
20	Gaw, Master David	Wemis v. Dunbar	CC8/2/2	209r	1567/11/27	Divorce for adultery	Dunbar, Margaret	Wemis, Johne	
20	Balfoure, Master Henrie	Wemis v. Dunbar	CC8/2/2	246r	1567/12/18	Divorce for adultery	Dunbar, Margaret	Wemis, Johne	

1	McCalzean, Master Henrie	Ross v. Oliphant	CC8/2/3	280v	1569/04/25	Expenses since she obtained decret of adherence against her husband	Oliphant, William	Ross, Helene	
1	Fermour, Master Thomas	Gibsoun v. Robesoun	CC8/2/2	34v - 35r	1565/05/24	Freedom & Silence	Robesoun, Isobell	Gibsoun, George	
1	Kinross, Master Henrie	Hammyltoun v. Maxwell & Lindsay	CC8/2/1	263v	1564/12/02	Reduction of kirk's divorce	Maxwell, Johne	Hammyltoun, Elizabeth	Strang, Master Richard
2	Kinross, Master Henrie	Leslie v. Oliphant	CC8/2/1	16v - 17r	1564/05/10	Reduction of pre-Ref sentence of divorce	Oliphant, Laurence Lord	Leslie, Katherine	Strang, Master George; Sym, Master Alexander
3	Kinross, Master Henrie	Leslie v. Oliphant II	CC8/2/3	24v - 25r	1568/05/05	Reduction production of [the] pre-Ref sentence of divorce	Oliphant, Laurence Lord (younger?)	Leslie, Katherine	Master Henrie [likely Balfour, but page missing]
4	Schairp, Master Johne	Forrest v. Rollok & Gardin	CC8/2/1	46v	1564/06/06	Reduction of kirk's divorce	Rollock, Maragret	Forrest, Johne	Kinross, Master Henrie

1	Harvy, Master Thomas	Forrester v. Abirnethy	CC8/2/1	193v - 194r	1564/10/24	Retrospective Declarator of Divorce	Abirnethy, Janet	Forrester, Margaret	
1	Marioribankis, Michael	Andersone v. Edmond	CC8/2/2	334r	1567-8/02/19	Solemnization	Edmond, Adame	Andersoun, Marioun	Kinross, Master Henrie
2	Harvy, Master Thomas	Auldinstoun v. McMyllane	CC8/2/1	73r	1564/06/22	Solemnization	McMyllane, Robert	Auldinstoun, Isobell	Weddell, Master Thomas
2	King, Master Alexander	Auldinstoun v. McMyllane	CC8/2/1	246v	1564/11/24	Solemnization	McMyllane, Robert	Auldinstoun, Isobell	Weddale, Master Thomas
3	Gaw, Master David	Cathcart v. Cunnynghame	CC8/2/1	55v - 56r	1564/06/12	Solemnization	Cunnynghame, David	Cathcart, Gelis	Craig, Master Thomas
4	Moscroip, Adame	Diksoun v. Tod	CC8/2/2	365v	1567-8/03/08	Solemnization	Tod, Alexander	Diksoun, Cristiane	King, Alexander
5	Logye, Master Johne	Haw v. Watt	CC8/2/3	240v	1568-9/03/21	Solemnization	Watt, Johne	Haw, Cristia(ne)	Fermoure, Master Thomas
6	Foulis, Master Adame	Murray v. Symsonne	CC8/2/3	131v	1568/10/19	Solemnization	Sympsonne, Laurence	Murray, Katherine	
6	Foulis, Master Adame & King, Alexander	Murray v. Symsonne	CC8/2/3	134r	1568/11/28	Solemnization	Sympsonne, Laurence	Murray, Katherine	Schairp, Master Johne
6	King, Alexander	Murray v. Symsonne	CC8/2/3	150v	1568-9/01/14	Solemnization	Sympsonne, Laurence	Murray, Katherine	Kinross, Master Henrie

7	King, Master Alexander	Reid v. Portuous	CC8/2/2	32v	1565/05/24	Solemnization	Portuous, Robert	Reid, Janet	Gaw, Master David
8	Schairp, Master Johne	Scot v. Robesoun	CC8/2/1	194r	1564/10/24	Solemnization	Robesoun, William	Scot, Margaret	
9	Mairioribankis, Michael	Skirling v. Mairioribankis	CC8/2/3	43v	1568/06/03	Solemnization	Mairioribankis, Master Thomas	Skirling, Jane	
10	Schairp, Master Johne	Thomsoun v. Wod	CC8/2/2	358r	1567-8/03/03	Solemnization	Wod, Margaret	Thomsoun, Johne	
11	Mairioribankis, Michael	Watsoun v. Wanis	CC8/2/2	334r	1567-8/02/19	Solemnization	Wanis, George	Watsoun, Margaret	
11	Westoun, Master Thomas	Watsoun v. Wanis	CC8/2/2	360r	1567-8/03/04	Solemnization	Wanis, George	Watsoun, Margaret	
1	King, Master Alexander	Hammyltoun v. Sclater	CC8/2/1	72v - 73r	1564/06/22	Tint	Sclater, Elizabeth	Hammyltoun, Jherome	
2	King, Alexander	Tulloch v. Sinclair	CC8/2/1	334r	1564-5/02/05	Tint	Sinclair, Margaret	Tulloch, James	

G (1): PURUSER'S DOMICILE IN CONSISTORIAL LITIGATION, APRIL 1564 TO JUNE 1569

Plotted on map as:	Pursuer	Domicile	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Defender
Auchterarder	Malard, Robert	"parochinar of ochterardoure in Stratherne"	Malard v. Reid	CC8/2/1	328r	1564-5/01/30	Divorce for adultery	Reid, Helene
Auchterless	Dempstar, James	Auchtr[o]less	Dempstar v. Fraser & Bouchane	CC8/2/1	160v	1564/08/17	Reduction of pre-ref divorce	Fraser, Janet, pretendit spous of pursuer
Caldhame	Glendonyng, Symone	Caldame	Glendonyng v. Grahame	CC8/2/2	60r	1565/06/21	Divorce for adultery and Tint	Grahame, Janet
Canongate	Makwalter, Walter	Canogait	Makwalter v. Galbrayth	CC8/2/2	26v	1565/05/18	Declarator of Freedom	Galbrayth, Elizabeth
Canongate	Hammyltoun, Jherome	Cannogait	Hammyltoun v. Sclater	CC8/2/1	72v - 73r	1564/06/22	Tint	Sclater, Elizabeth
Dirleton	Diksoun, Cristiane	dochter to vmql Johne Dikkesoun in Dirletoun	Diksoun v. Tod	CC8/2/2	314v	1567-8/02/09	Solemnization	Tod, Alexander
Edinburgh	Duncane, Helene	dochter of vmquhile Alexander Duncane burgess of Edinburgh	Duncane v. Fairley	CC8/2/3	52v - 53r	1568/06/14	Solemnization	Fairley, Duncane

Edinburgh	Murray, Katherine	relict of Nicolas Murray burges of Edinburgh, [see decret also - her hous in within the burgh of Edinburgh]	Murray v. Symsons	CC8/2/3	131r - v	1568/10/15	Solemnization	Sympsons, Laurence
Edinburgh	Reid, Jonet	Edinburgh	Reid v. Barclay	CC8/2/3	72v	1568/07/17	Solemnization	Barclay, Alexander
Edinburgh	Thomsoun, Johne	son of Thomas Thomsoun apothecare burges of Edinburgh	Thomsoun v. Wod	CC8/2/3	39r	1568/06/01	Solemnization	Wod, Margaret
Glasgow	Andersoun, Johne	owned a house in Glasgow, and his wife punished for adultery by baillies of Glasgow	Andersone v. Allasone	CC8/2/2	275r	1567-8/01/19	Divorce for adultery	Allasone, Alesoun
Glasgow	Buntyne, Richard	Glasgow	Buntyne v. Heriott	CC8/2/2	316r	1567-8/02/10	Divorce for adultery	Heriott, Margaret
Glasgow	Reid, Isobell	indwellar of glasgow	Reid v. Ker	CC8/2/1	226r	1564/11/16	Divorce for adultery	Ker, Johne
Harperig	Clerk, Johne	Harperig	Clerk v. Scott	CC8/2/3	183v	1568-9/02/14	Divorce for adultery	Scott, Jonet

Hirsel	Ker, Sir Andrew of Hirsale, knycht	Hirsale	Ker v. Cranstoun	CC8/2/2	159r - v	1567/10/28	Divorce for adultery	Cranstoun, Margaret
Howthat	Murray, Cuthbert	Houchquhat qithin the parish of Mowswald	Murray v. Chalmer	CC8/2/2	109r	1565/07/24	Divorce for adultery	Chalmer, Christiane
Jedburgh	Hardy, Patrik	Jedburgh	Hardy v. Rutherfurde	CC8/2/1	425r-v	1565/04/11	Divorce for adultery	Rutherfurde, Katherine
Kintail	McCanzie, Isobell	dochter to Kinzeoch McKenzie of Kintail	Makcanzie v. Makgillechallum	CC8/2/3	25r - v	1568/05/05	Divorce for adultery	Makgillechallum, Gillechallum
Perth	Bunche, Williame	Burgess of Perth	Bunche v. Moncreif	CC8/2/3	17v	1568/04/30	Divorce for adultery	Moncreif, Isobell
Rires	Forbes, Johne	apperand of reses	Forbes v. Sandelands	CC8/2/1	270v	1564/12/06	Divorce for adultery	Sandelands, Barbara
Shapinsay	Tulloch, James	schapinshaw	Tulloch v. Sinclair	CC8/2/1	411r-v	1565/03/31	Tint	Sinclair, Margaret
Sheriffhall	Giffert, James	Scheriffhall (mansion at)	Giffert v. Dischingtoun	CC8/2/3	132v - 133v	1568/11/12	Divorce for adultery	Dischingtoun, Helene
St Andrews	Small, Johne	Sanctandr[ois]	Small v. Moffett	CC8/2/2	294v - 295r	1567-8/01/29	Divorce for adultery	Moffett, Isobell

Tain	Ross, Nicholas	Tane / Tain, toun of	Ross v. Reid	CC8/2/1	29v	1564/05/20	Divorce for adultery	Reid, Marioun
Tranent	Clerk, Jonet	Tranent	Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Solemnization	Auchinlek, George

G (2): DEFENDER'S DOMICILE IN CONSISTORIAL LITIGATION, APRIL 1564 TO JUNE 1569

Plotted on map as:	Defender	Domicile	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Pursuer
Cannongate	Hammiltoun, Herome ot Jherome	Cannogait	Cruik v. Hammiltoun	CC8/2/3	123r	1568/07/30	Adherence	Cruik, Mairiorie
Closeburn	Maxwell, Rodgair	Laird of Cloisburne	Hammyltoun v. Kirkpatrick	CC8/2/2	331v - 332r	1567-8/02/17	Adherence	Hammyltoun, Elizabeth
Corstorphine	Mairioribankis, Maister Thomas	Corstorphine	Skirling v. Mairioribankis	CC8/2/3	79r	1568/07/31	Solemnizatioun & Adherence	Skirling, Jane
Creich	Betoun, Daid	of Creich	Leslie v. Betoun	CC8/2/2	429v	1568/04/10	Divorce for adultery	Leslie, Beatrice
Dalkeith	McMyllane, Robert	Dalkyth	Auldinstoun v. McMyllane	CC8/2/1	64v	1564/06/17	Solemnization	Auldinstoun, Isobell
Dirleton	Tod, Alexander	son to George Tod thair (Direltoun)	Diksoun v. Tod	CC8/2/2	314v	1567-8/02/09	Solemnization	Diksoun, Cristiane

Duddingston	Robesoun, William	indwellar of duddingstoun	Scot v. Robesoun	CC8/2/1	177v	1564/10/11	Solemnization	Scot, Margaret
Edinburgh	Fairley, Duncane	burgess and merchand of Edinburgh	Duncane v. Fairley	CC8/2/3	52v - 53r	1568/06/14	Solemnization	Duncane, Helene
Edinburgh	Wod, Margaret	relict of vmquhile Alexander Moreis burges thairof [pres. Edinburgh, which has just been mentioned anent Thomsoun's father]	Thomsoun v. Wod	CC8/2/3	39r	1568/06/01	Solemnization	Thomsoun, Johne
Glasgow	Drippis, Johne	burgess of Glasgow	Wrycht v. Drippis	CC8/2/2	403v	1568/03/27	Divorce for adultery	Wrycht, Marioun
Jedburgh	Rutherfurde, Katherine	Jedburgh	Hardy v. Rutherfurde	CC8/2/1	425r-v	1565/04/11	Divorce for adultery	Hardy, Patrik
Kilconquhar	Leslie, Robert	of ky(n)m()noquhn	Gordoun v. Leslie	CC8/2/1	269v	1564/12/06	Divorce for adultery	Gordoun, Elizabeth
Kingscavil	Hammiltoun, James	Kincavill	Sympill v. Hammiltoun	CC8/2/2	253r	1567-8/01/08	Adherence	Sympill, Isobell
Kinsteary	Ross, Williame	Kinstarie	Stewart v. Ross	CC8/2/1	368r	1564-5/03/01	Adherence	Stewart, Gellis
Leith	Richesoun, Walter	indwellar in leyt	Pennycuke v. Richesoun	CC8/2/1	39r	1564/06/02	Adherence	Pennycuke, Marioun
Leith	Ker, George	in Leyth	Robertsoun v. Ker	CC8/2/2	80r	1565/07/06	Adherence and Aliment	Robertsoun, Janet

Leith	Loch, Patrick	indwellar in Leyth	Kinross v. Loch & Weyland	CC8/2/1	48v - 49r	1564/06/07	Solemnization	Kinross, Maister Henrie
Leith	Ramsay, Helene	Leyth	Leirmoth v. Ramsay	CC8/2/2	250r	1567-8/01/07	unclear but marital	Leirmonth, Barthilmo
Preston (East Lothian)	Auchinlek, George	Prestoun	Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Solemnization	Clerk, Jonet
Raasay	Makgillechallum, Gillechallum	Rasar (Rasaay off the east coast of Skye)	Makcanzie v. Makgillechallum	CC8/2/3	25r - v	1568/05/05	Divorce for adultery	McCanzie, Isobell
Scheriffhall	Dischingtoun, Helene	clearly also Scherifhall	Giffert v. Dischingtoun	CC8/2/3	133v	1568/11/22	Divorce for adultery	Giffert, James
Whithorn	Kirkpatrik, Johne	Quhitherne	Dougalsoun v. Kirkpatrik	CC8/2/1	387r	1564-5/03/13	Divorce for adultery and Tint	Dougalsoun, Cristiane

H (1): PURSUERS' SOCIAL STATUS IN CONSISTORIAL LITIGATION, APRIL 1564 TO JUNE 1569

Pursuer	Social status	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Defender
Hammyltoun, Elizabeth	Lady Cloisburne	Hammyltoun v. Kirkpatrick	CC8/2/2	331v - 332r	1567-8/02/17	Adherence	Maxwell, Rodgair
Kincaid, Grissell	Lady Baltarroche	Kincaid v. Ross	CC8/2/3	318r	1569/05/13	Divorce for adultery	Ross, Johne
Ross, Helene	Lady S[t]rowyn	Ross v. Oliphant	CC8/2/3	280v	1569/04/25	Expenses since she obtained decreet of adherence against her husband	Oliphant, William
Hammyltoun, Elizabeth	Lady Calderwod	Hammyltoun v. Maxwell & Lindesay	CC8/2/1	222v - 223r	1564/11/15	Reduction	Maxwell, Johne
Leslie, Beatrice	lawfull dauchter to the late George Erle of Rothes	Leslie v. Betoun	CC8/2/2	429v	1568/04/10	Divorce for adultery	Betoun, Dauid
Grahame, Marie	lauchfull dauchter to the Erle of Mentieth	Grahame v. Buchquanane	CC8/2/2	351r	1567-8/02/27	Adherence	Buchquanane, George

Kennedy, Janet	dauchter Lady Culzene	Kennedy v. Mure	CC8/2/1	288r	1564/12/19	Bastardrie	Mure, Agnes
Ker, Sir Andrew of Hirsale, knycht	knight	Ker v. Cranstoun	CC8/2/2	159r - v	1567/10/28	Divorce for adultery	Cranstoun, Margaret
Leslie, Katherine	relict of the late Sir Alexander Oliphant of Kelly, Knycht	Leslie v. Oliphant	CC8/2/1	16v - 17r	1564/05/10	Reduction of pre-Ref sentence of divorce	Oliphant, Laurence Lord
Carnegy, Johne	lauchful son to Sir Robert Carnegy of Kynnard, knyt	Carnegy v. Vaus	CC8/2/1	1v	1564/04/28	Divorce for adultery	Vaus, Margaret
Oliphantis, Margaret & Jonet	lauchfull daughters to vmqle sir Alexander Oliphant of Kellie, knyt	Oliphantis v. Oliphantis	CC8/2/3	333v - 334r	1569/05/24	Bastardrie	Oliphantis, Petir & Thomas
Gibsoun, George	"ane of the membris of our Soverane Ladeis sessioun"	Gibsoun v. Robesoun	CC8/2/2	34v - 35r	1565/05/24	Freedom & Silence	Robesoun, Isobell

Andersoun, Johne	burgess of edinburgh	Andersone v. Allasone	CC8/2/2	275r	1567-8/01/19	Divorce for adultery	Allasoune, Alesoun
Westoun, Johne	burgess of edinburgh	Westoun v. Ewart	CC8/2/1	281v	1564/12/14	Tint	Ewart, Katherine
Crystesoun, Williame	burgess of cowpar	Cristesone v. Lindesay	CC8/2/2	284r - v	1567-8/01/24	Adherence	Lindesay, Isobell
Ker, Isobell	lawful daughter to the late William Ker burgess of Edinburgh	Ker v. Dougall	CC8/2/2	155r	1567/10/25	Divorce for adultery (inferred)	Dowgall, Johne
Robertsoun, Janet	daughter of the late Andro Robertsoun skippar indwellar of leyth	Robertsoun v. Ker	CC8/2/2	80r	1565/07/06	Adherence and Aliment	Ker, George
Heriot, James	fermorar to the quenis grace	Heriot v. Methven	CC8/2/1	1v	1564/04/28	Divorce for adultery	Methven, Isobel
Symson, Johne	carpentair	Symson v. Pryde	CC8/2/3	315v	1569/05/12	Divorce for adultery	Pryde, M(ar)jory
Giffert, James	Fear of Scherifhall	Giffert v. Dischingtoun	CC8/2/3	133v	1568/11/22	Divorce for adultery	Dischingtoun, Helene

Ross, Nicholas	Nicholas Ross of D[un]skeyt	Ross v. Reid	CC8/2/1	29v	1564/05/20	Divorce for adultery	Reid, Marioun
Dunlope, Hew	sone and apparend heir to Alexander Dunlop of Crawfield	Dunlop v. Broun	CC8/2/1	25 r	1564/05/18	Divorce for adultery	Broun, Elizabeth
Flemyng, Thomas	sone lauchfull to Williame Flemyng of Burruchane	Flemyng v. Flemyng	CC8/2/3	119r	1568/07/29	Divorce for adultery	Flemyng, Jonet
Stewart, Williame	sone and apperand air to Johne Stewart of Bultreis	Stewart v. Dunlop & Broun	CC8/2/1	71r	1564/06/20	Declarator of Marriage?	Dunlop, Hew
Wemys, Janet	relict of vqle Thomas Clepane apperand of Carslogy	Wemys v. Boiswall	CC8/2/2	5v	1565/05/03	Divorce for adultery	Boiswell, Robert
Johnesoun, Marioun	lawful daughter of Thomas Johnesoun of Cragoburne	Johnesoun v. Johnesoun	CC8/2/2	8v	1565/05/05	Divorce for adultery	Johnesoun, James

Levingstoun, Agnes	dochter to vmqle Alexander Levingstoun of West Quarter	Levingstoun v. Hammiltoun	CC8/2/2	388r	1567-8/03/19	Divorce for adultery	Hammiltoun, Harie
Michell, Elizabeth	dochter lauchfull to Niniane Mitchell of Pa()nall	Michell v. Broun	CC8/2/3	205v	1568-9/03/03	Divorce for adultery	Broun, Andro
Cunningham, Agnes	dochter to vmquhile Williame Cunnynhame of Glengarnok	Cunningham v. Leky	CC8/2/1	84v	1564/06/30	Divorce for adultery	Leky, Walter
Malard, Robert	a pover man	Malard v. Reid	CC8/2/1	403r	1564-5/03/23	Divorce for adultery	Reid, Helene

H (2): DEFENDERS' SOCIAL STATUS IN CONSISTORIAL LITIGATION, APRIL 1564 TO JUNE 1569

Defender	social status	Case name	Volume	Folio	Date YYYY/MM/DD	Action	Pursuer
Oliphant, Laurence Lord	Lord Oliphant occupier of the lands and barony of Kelly in Fyfe	Leslie v. Oliphant	CC8/2/1	16v - 17r	1564/05/10	Reduction of pre-Ref sentence of divorce	Leslie, Katherine
Lindesay, Isobell	lawful daughter to the late Johne Lord Lindesay of the Byris	Cristesone v. Lindesay	CC8/2/2	284r - v	1567-8/01/24	Adherence	Crystesoun, Williame
Broun, Elizabeth	daughter to Elizabeth Sempill Lady Bultres	Dunlop v. Broun	CC8/2/1	387v - 388r	1564-5/03/14	Divorce for adultery	Dunlop, Hew
Kirkpatrik, Roger	Laird of Cloisburne.	Hammyltoun v. Kirkpatrik	CC8/2/2	85v	1565/07/10	Adherence	Hammyltoun, Elizabeth
Edmestoun, Williame	called 'meister creichtoun'	Lindesay v. Edmestoun	CC8/2/1	188r	1564/10/20	Adherence	Lindesay, Janet
Dowgall, Johne	burgess in Edinburgh	Ker v. Dougall	CC8/2/2	186r-v	1567/11/13	Divorce for adultery	Ker, Isobell

Drippis, Johne	talzeoure, burgess of Glasgow	Wrycht v. Drippis	CC8/2/2	403v	1568/03/27	Divorce for adultery	Wrycht, Marioun
Rollock, Maragret	relict of the late George Lovell burges of Dundee	Forrest v. Rollok & Gardin	CC8/2/1	46v	1564/06/06	Reduction of kirk's divorce	Forrest, Johne
Dowgall, Johne	son and air to the late Johne Dowgall burgess of Edinburgh	Ker v. Dougall	CC8/2/2	155r	1567/10/25	Divorce for adultery (inferred)	Ker, Isobell
Hammiltoun, James	scherif of Linlithgow	Sympill v. Hammiltoun	CC8/2/2	419v	1568/04/03	Reduction of Kirk's sentence of divorce	Sympill, Isobell
McCalzean, Maister Thomas	burgess of edinburgh, advocate before the Lords of Session	Galbrayth v. McCalzean	CC8/2/1	418r	1565/04/04	Reduction of pre-ref divorce	Galbrayth, Elizabeth
Wier, Johne	Henrie Wardlaw writtar	Marioribanks v. Wier & Wardlaw	CC8/2/1	362v	1564-5/02/26	Bastardrie / Declarator of Legitimacy	Marioribanks, Symone
Creichtoun, James	servitoure to Eduard Lord Sancquhair	Wilsoun v. Creichtoun	CC8/2/3	28v - 29r	1568/05/08	Divorce for adultery	Wilsoun, Beatice

Galbrayth, Elizabeth	natural daughter to the late Maister Adame Galbrayth, parson of Mordingtoun	McWalter v. Galbrayth	CC8/2/2	41r	1565/05/30	Freedom & Silence	McWalter, Walter
Auchinlek, George	tailzeoure	Clerk v. Auchinlek	CC8/2/3	61r	1568/06/28	Solemnization	Clerk, Jonet
Foirman, David	flescheour	Myluif v. Foirman	CC8/2/2	342v	1567-8/02/23	Solemnization	Myluif, Malie
Nychole, Johne	Wobster	Barnair v. Nychole	CC8/2/2	339v	1567-8/02/21	Divorce for adultery	Barnair, Margaret
Wilson, Andrew	Cordinar	Young v. Wilsoun	CC8/2/1	115r	1564/07/22	Adherence	Young, Janet
Haistie, Johne	cordinar	Paislie v. Haistie	CC8/2/1	138r	1564/08/04	Annulment	Paislie, Margaret
Moncur, Johne	heretable possessoure of all and hale landis of the Month with the pertinentis liand within the scheriffdome of Fyf	Abirnethy v. Moncur	CC8/2/1	63v	1564/06/16	Adherence and Aliment	Abirnethy, Janet

Vaus, Margaret	lauchful dochter to Johne Vaus of [erany]	Carnegy v. Vaus	CC8/2/1	1v	1564/04/28	Divorce for adultery	Carnegy, Johne
Sandelandis, Barbara	dauchter of vmql James Sandelandis of Sanct Monanis	Forbes v. Sandelands	CC8/2/1	304v - 305v	1564-5/01/15	Divorce for adultery	Forbes, Johne
Dischingtoun, Helene	dochter of vmqle Williame Dischingtoun of Ardress	Giffert v. Dischingtoun	CC8/2/3	132v - 133v	1568/11/12	Divorce for adultery	Giffert, James

APPENDIX J: PROCLAMATION AND STAYING OF BANNIS

Case name	Volume	Folio	Date YYYY/MM/DD	Action	Term / Diet	Pursuer 1	Defender 1	Kirk in which Bannis called
Baxter v. Dun	CC8/2/7	82r	1574-5/02/28	Freedom & Silence	Decreet	Baxter, Patrik	Dun, Marioun	not stated
Carrik v. Gibsoun	CC8/2/8	161v- 162r	1576/05/21	Freedom & Silence	Decreet	Carrik, Walter	Gibsoun, Margaret	Musselburgh and Inveresk
Cunninghame v. Gillaspy	CC8/2/4	4r-v	1569/07/03 [frag]	Freedom & Silence	Decreet	[Cunninghame], Mathow	Gillaspy, Jonet	St. Cuthberts
Cunninghame v. Hoige	CC8/2/7	25r-v	1574/11/18	Freedom & Silence	Decreet	Cunninghame, Robert	Hoige, Agnis	St. Cuthberts
Currye v. Stevin	CC8/2/3	238r	1568-9/03/21	Freedom & Silence	initial & Decreet	Currye, Johne	Stevin, Jonet	not stated
Johnestoun v. Kello	CC8/2/6	226v- 227r	1573-4/01/11	Freedom & Silence	Decreet	Johnestoun, Johne	Kello, Cristiane	Currie
Maist(er)toun v. Stobye	CC8/2/6	39v	1572-3/01/20	Freedom & Silence	Decreet	Maist(er)toun, Patrik	Stobye, Margaret	Culross
McWalter v. Galbrayth	CC8/2/2	26v; 41r	1565/05/18; 1565/05/30	Freedom & Silence	intial; Decreet	McWalter, Walter	Galbrayth, Elizabeth	[Canongate]

Murray v. Barry	CC8/2/3	350r	1569/06/04	Freedom & Silence	Decreet	Murray, Robert	Barry, Helene	Edinburgh
Pawtoun v. Daidoun	CC8/2/8	290r-v	1576/11/08	Freedom & Silence	Decreet	Pawtoun, Waltir	Daidoun, Eufame	Leith and Holyroodhouse
Quhytlaw v. Thomsoun	CC8/2/6	207v-208r	1573/12/09	Freedom & Silence	Decreet	Quhytlaw, Bartilmo	Thomsoun, Jonet	Fishwick
Ramsay v. Myll	CC8/2/7	89v-90r	1574-5/03/05	Freedom & Silence	Decreet	Ramsay, Patrik	Myll, Christiane	Fouldon
Robesoun v. Liall	CC8/2/7	3v-4r	1574/10/15	Freedom & Silence	Decreet	Robesoun, Isobell	Liall, William	not stated
Warno v. Craig	CC8/2/5	91r-v	70-1/02/19	Freedom & Silence	Decreet	Warno, Jonet	Craig, Nicoll	Musselburgh
Williamsone v. Stevinsone	CC8/2/3	67r	1568/07/06	Freedom & Silence	Decreet	Williamsoun, James	Stevinsone, Jonet	Kirknewton

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