

Scots burghs, 'Privilege', and the Court of Session in the Eighteenth Century

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ABSTRACT: A striking feature of the history of the Scots burgh in this period, and of bodies within it, was their readiness to resort to legal redress in the Court of Session, Scotland's leading civil court. The law was a regular and often intrusive presence in burgh life, a means by which burghs, guildries and trades incorporations defended their privileges. This paper will explore this propensity in relation to what it can tell us both about urban identity and the constitution of urban community in this period, but it will also begin to examine the role which the law may have played in the re-constitution and re-shaping of urban community. In other words, it will consider the law and judgements made in the Court of Session as active forces in a wider process of governance. We know relatively little, in fact, about this dimension of urban governance, but the surviving record is a rich one and demands much more systematic examination.

Records of eighteenth-century Scottish towns reveal that the Court of Session periodically loomed large in the lives and calculations of their magistrates and inhabitants, on occasion in surprising ways. Take, for example, Dumfries and its public meal market: by the end of the eighteenth century, Dumfries barely had such a thing, and the poorer townspeople were forced to rely on what one contemporary described as 'hucksters and small dealers' for their supplies of meal.¹ The reason was that local farmers were no longer regularly supplying the market. This was almost certainly owing to a number of factors – the ever deepening and widening commercialization of grain markets in Scotland, the growing practice of farmers 'selling by sample' rather than in

¹ Bryce Johnston, *General View of the Agriculture of the County of Dumfries* (London, 1794), 9-10.

public markets, or indeed in the field to those merchants who organized the supplies and circulation of grain that kept many of the country's towns supplied with the main staple.² But it was also a direct consequence of a judgment handed down by judges of the Court of Session in 1782.³ In the previous year, a neighbouring farmer, John Johnston, had challenged the right of the town's executioner to exact a duty of a ladle of meal from every sack of meal brought to the public meal market. On 1 August 1781, Johnston, who had been selling meal in Dumfries for many years, came to the market with two sacks of meal. When the executioner appeared to levy his customary dues, Johnston questioned his authority to do so. This led to an intervention by the Dean of Guild, who told Johnston that the executioner was entitled to his payment, in response to which Johnston asked now to see proof of the town's right to levy the due. The Dean of Guild gave Johnston a further hour to reconsider, before committing him to the town gaol. A few hours later, he was released. There are hints that behind Johnston's recalcitrance were political divisions within the burgh arising from the 1780 general election; and nine days after his arrest the public market was the scene of what was clearly a concerted demonstration by individuals refusing to pay the executioner's dues, one in which burgh officers were prevented forcibly from executing warrants to secure those involved. A few days later several of these individuals were arrested and placed under bail. Johnston's

² On developments within the Scottish grain market in this period, see C. A. Whatley, 'Roots of 1790s radicalism: reviewing the economic and social background', in *Scotland in the Age of the French Revolution*, ed. Bob Harris (Edinburgh, 2005), 23-48; idem., 'Custom, commerce and Lord Meadowbank: the management of the meal market in urban Scotland, c.1740-c.1820', *Journal of Scottish Historical Studies*, 32 (2012), 1-27.

³ Advocates' Library (AL), Court of Session Papers (CSP), Hume Collection, Vol. 93, *Memorial for John Johnston Tenant in Laigh Auchinane, in the Parish of Tinwald, Pursuer; Against William Clark and John Key Merchants, and late Bailies of the Borough of Dumfries, Nichol Shaw Merchant, and late Dean of Guid, Roger Wilson, Common Executioner, and William Ferguson, Keeper of the Public Jail of the said Borough, and the Magistrates, Dean of Guild, and Treasurer, and Town Council, as representing the Community of the Borough*. 11 Nov. 1782; *Memorial for William Clark et al ... Against John Johnston, Tenant in Laigh Auchinane, in the parish of Tinwald, pursuer*.

case was lodged in court several days after that, and the defenders who included the Dean of Guild and local magistrates, argued that these events were closely related, and that Johnston was, in fact, only the 'nominal pursuer'. Behind him was a wider conspiracy to destroy the capacity of the executioner to levy the payment. Johnston's case against the burgh authorities was one of wrongful imprisonment. What the defenders had to prove was that the executioner's right to his ladle of meal, while not based on a charter or specific legal document, was sanctioned by 'prescription' or 'immemorial practice', and that this was sufficient legal basis to support this levy. This they managed to do, at least to the satisfaction of the judges.⁴ The effect of the judgement, however, was further to erode the role of the public meal market in the provisioning of the burgh.

The litigiousness of the Scots burghs

These kinds of legal battles over the rights of burgh authorities, and those possessed of particular privileges within the 'burgh community', were commonplace, and they often, as in the Dumfries example referred to above, also highlight the close interdependencies of the burghs and those who inhabited their rural hinterlands. They could involve different kinds of property rights which formed the 'common good', that bundle of dues and properties which constituted the burgh's revenue stream, or the particular privileges, including monopolies, of bodies such as the guildry or trades incorporations (where these existed). They could involve political rights of various kinds, for example, in relation to the composition or powers of the council and magistrates, or indeed the rights of other burgh officers, such as, in the case cited above, a lowly executioner. Burgh magistrates went to law to defend their jurisdictional autonomy and to resist encroachments of other

⁴ In the course of their defence, it was claimed that, with the exceptions of Edinburgh and Glasgow, where executioners were paid a salary, in most other burghs where there were executioners and regular meal markets, the practice of levying this kind of duty 'continues in full observance at this hour'. Most burghs do not seem, however, to have had an executioner.

sorts by neighbouring landowners or over-mighty inhabitants. There were cases that involved the rights of magistrates and burgh councils to regulate activities (carters and carriers, the activities of butchers etc.) as part of their responsibility for the 'police' of the burgh, or the nature of their responsibilities in meeting mostly unwanted burdens, such as, most obviously, the billeting of soldiers. Burgh authorities also pursued a variety of other, less easily categorized matters; so, for example, Paisley magistrates, in a case which went before the Court in 1790, successfully defended the legality of the burgh court in issuing acts of warding and letters of horning against small debtors. 'In a Town so very populous as Paisley', it was argued on their behalf, 'and composed so much of weavers, and other manufacturers, who have frequent claims against each other for small sums, it is of the utmost consequence to have a court, where at an inconsiderable expence, and without delay, they can obtain justice.'⁵ Were such individuals to depend on the sheriff court, this might undermine a crucial support for local credit relationships.

That the Court of Session, Scotland's highest civil court, at times featured conspicuously in the fortunes of the Scots burghs is perhaps unsurprising, mirroring developments and realities elsewhere in this period. One might see it simply in terms of the importance of the law in arbitrating disputes about property and the rights that were attached to it or the nature of contractual obligations, areas that gave rise to near-constant dispute, but which were given further prominence in this period by economic change and development, and related transformations to the way property was managed and defined.⁶ More specifically, burghs were communities defined by their privileges, and those of particular bodies within them. As in other parts of Europe in this period, there is a sense in which politics at this level was precisely about regimes of privilege and challenges to this; the courts were

⁵ AL/CSP, Hume Collection, Vol. 33, paper no. 28, 12 Nov. 1790, *Memorial for the Magistrates of the Burgh of Paisley, and for John Adam, Manufacturer in Paisley*.

⁶ See esp. E. P. Thompson, *Customs in Common* (London, 1991).

key sites of contest in these battles. Nevertheless, there were elements that may make Scottish experience distinctive in this context, at least within Britain, albeit the differences were ones of degree. The importance of judge-made law to the governance of Scotland in this period has been emphasized elsewhere, for example, in the spheres of poor relief, labour relations, and, a bit less obviously, the murky, arcane business of electoral politics.⁷ This is sometimes viewed in terms of the political and social dominance of a singularly powerful landed elite, and of the landed classes more generally, as they secured a tight grip on the law and its agencies. In the case of the burghs, it might also be seen in terms of the relative *unimportance* of Westminster and parliamentary legislation, compared to many towns south of the border. While this was beginning to change by the later eighteenth century, as an increasing number of the Scots burghs began to seek legislative authority with which to pursue various schemes of improvement, many continued to seek change through agreement and existing structures of authority. By contrast, in England regular parliaments after 1689 powerfully aided the spread of urban improvements, leading to a proliferation of statutory improvement commissions in towns, which were better equipped than the unreformed town councils to expedite and manage programmes of urban change. By 1799, there were 160 such commissions in England, but only a handful in Scotland by that date and relatively few twenty years or so later.⁸ Questions remain, nevertheless, about the nature of Scots experience in this context, and not merely about the ways in which judges chose to interpret the law as it

⁷ R. Mitchison, *The Old Poor Law in Scotland: The Experience of Poverty, 1574-1845* (Edinburgh, 2000); W. Hamish Fraser, *Conflict and Class: Scottish Workers 1700-1838* (Edinburgh, 1988); William Ferguson, 'Electoral law and procedure in eighteenth and early nineteenth century Scotland', (unpublished University of Glasgow Ph.D. thesis, 1957). See more generally on Scots law in this period, David M. Walker, *A Legal History of Scotland, volume v, the eighteenth century* (Edinburgh, 1998).

⁸ Paul Langford, *Public Life and the Propertied Englishman, 1689-1798* (Oxford, 1991), 222-32; Bob Harris and C. A. McKean, *The Scottish Town in the Age of the Enlightenment, 1740-1820* (Edinburgh, 2014), 120-8.

affected different urban groups and bodies. For the litigiousness of the burghs, especially the burgh authorities, casts valuable light back on the nature of the burghs and contemporary urban order, but also how towns responded and adapted to the strengthening currents of economic, social, and commercial change in the eighteenth century.

This is a large topic, and one for which, given the current state of research, we can only here sketch a few of the main patterns that suggest themselves in this context. The first part of this article looks at the role of the burgh authorities and their propensity to defend their interests in the civil courts. In the second part the focus shifts to explore in greater detail one important area of litigation – that concerning the monopoly privileges of the guildries and, more especially, the trades incorporations. The discussion that follows considers the burghs as a whole; it thus quickly passes over the quite significant differences that could exist between them in terms of size, character, and indeed legal status. It does so, however, on the grounds that such differences do not undermine a general account.

The Court of Session and the independence of the burghs

Let's start, however, with the willingness of burgh magistrates to take cases to, or to defend burgh interests as they interpreted them in, the Court of Session. Worth underlining is how ready they were on occasion to do this, despite the fact that generally they had very little spare money. The resources simply had to be found; and for small burghs, such as several burghs in the borders, entanglement in legal battles could mean a very considerable strain on their finances. Given the often rather rudimentary state of contemporary burgh accounting, no simple way exists of quantifying this; but the key points may be that the gap between normal income and expenditure (salaries, basic maintenance etc.), which was usually very small, so any additional expenditure, such as that arising from fighting legal cases, had to be met usually through borrowing. Secondly, the costs of legal action were hard to control since cases could go on for several years, if not rather longer than that,

and might involve appeals to the House of Lords. It appears, for example, that a significant part of Hawick's public debt in the early nineteenth century was accrued through the burden of fighting protracted legal battles in the 1760s and '70s regarding the division of the town's commons.⁹

Encroachments by landowners on burgh lands or other burgh properties - for example, fisheries, as in the case of Perth or Stirling - were one kind of threat that seems to have quite frequently led to legal action. In the case of the former, use of the law was often but one element of a repertoire of responses, as in the example of the magistrates and councillors of Crail, who by 1719 had evidently become so irritated at the encroachments onto the burgh moor by Colonel Philip Anstruther that they threatened to send out the townspeople to 'throw doune ... [the] dykes & ditches' which he had erected.¹⁰ As Professor Christopher Whatley has emphasized, inspection of Convention of Royal Burgh papers discloses 'a series of often long-running contests' over such lands and stretching across 'most parts of lowlands'.¹¹ These types of dispute seem to have been particularly prevalent in the early eighteenth century, probably because behind them very often lay serious political divisions, although they continued to be a feature of later decades. In 1761 Dundee's magistrates entered into a dispute with James Guthrie of Craigie over their rights of servitude on the Muir of Craigie, although this was eventually settled by agreement five years later, one element of which was Guthrie making over to the town absolute control of an area of the moor. This was partly done to prevent the escalation of expenses that would be entailed by pursuing the dispute further in the courts.¹² Conflict over access to and encroachments on Brechin's Trinity Muir was longer lasting and more

⁹ Robert Wilson, *A Sketch of the History of Hawick* (Hawick, 1825), 17.

¹⁰ Christopher A. Whatley, *Scottish Society 1707-1830: Beyond Jacobitism, towards industrialization* (Manchester, 2000), 155.

¹¹ *Ibid.*

¹² Dundee Archives and Records Centre, Dundee, Dundee town council minutes, 10 Nov. 1761, 21 Jan. 1766.

disruptive, coming to a head in the late 1760s. By this period, part of the town lands to the north of the burgh had been feued to heritors, presumably as a means of raising income. On the moor the council had in 1768 created a plantation of 38,000 trees, which they carefully fenced off, as part of a scheme of improved management. Such schemes, which might involve enclosure, feuing of parts of lands, their levelling and clearance, and quite often planting of trees, were increasingly implemented in the second half of the eighteenth century, as burghs sought to enhance the profitability, utility, and, at the same time, orderly appearance of town lands. In Brechin, however, several of the neighbouring landowners, for reasons that at this distance are somewhat unclear, although political divisions may again have been the underlying cause, engaged in measures to destroy the plantation, including during the occasion of a cattle market on the moor, breaking the fences in two places and driving cattle into the enclosure. On the following day, during a horse market, Thomas Fullarton of Galry and several other local landowners attacked the provost, who was struck by Fullarton with a cane or switch. Fullarton and one other then launched a pre-emptive legal action in the sheriff court in which they alleged that the town's new plantation interrupted a public road.¹³ The case was then removed by legal process by the Brechin magistrates to the higher court, the Court of Session. As already alluded to, Hawick's magistrates became embroiled in the third quarter of the century in a long-running battle with the duke of Buccleuch over the division of the town's common. This began in 1760 and dragged on for just over twenty years, becoming linked with a political dispute over the constitution of burgh government. It was only finally settled by a judgment of the Court of Session in 1781, which also significantly re-modelled the town's government, and in

¹³ University of Dundee, Archives and Special Collections, Forfarshire Topographical Collections, vols. 1 & 4, material relating to dispute involving destruction of a plantation of trees on Brechin common moor, 1768-9

so doing gave the whip hand to the self-electing part of the council. To this extent, it was decision decisively in favour of oligarchy.¹⁴

From the middle of the eighteenth century, there were a growing number of cases involving county or other schemes of road improvement. Such schemes were typically devised by county gentry meeting as commissioners of supply, and they involved the commutation of statute labour and the creation of turnpike trusts. Sometimes, these were kept separate, but frequently they were parts of a single package. The passage of turnpike or road acts for Scotland commenced very slowly in the central decades of the eighteenth century, but accelerated quite sharply in the final two decades. A common concern of burgh magistrates was that townspeople might have to bear an undue portion of the financial burdens and responsibilities such measures entailed, or that the erection of tolls on roads to and from their burghs would deter trade or again impose further, unwanted financial burdens on those they represented. In some cases arising from road building and repair, such as one involving the chief magistrate of the tiny burgh of West Wemyss in 1805, what was issue was rather more simple, however: namely, the right of General Wemyss of Wemyss to shut an existing road leading to the burgh and replace it with a new one.¹⁵

On a good number of occasions, such matters were sorted out in the process of contriving or implementing these measures, and there was much politicking behind them as different interests, including the burghs, jostled for

¹⁴ Borders Regional Archives, Hawick, TD 5/3/5, Hawick town council minutes, 1774-94; Wilson, *Sketch of the History of Hawick*, 16-7.

¹⁵ David Hume, *Decisions of the Court of Session, M.DCC.LXXXI-M.DCCC.XXII, In the From of a Dictionary* (Edinburgh and London, 1839), 496. A bill of suspension had been filed in the Court of Session, questioning this right, but a criminal prosecution against the chief magistrate and two others had also been launched following direct action by these individuals, supported by a 'mob or crowd' from the burgh, to prevent attempts to close the old road.

advantage.¹⁶ If this were to fail, however, magistrates could well end up taking the matter to court. In 1757, for example, Paisley's magistrates resisted attempts by a set of road trustees to impose a duty of statute labour on the burgh's inhabitants, arguing that 'Burghs are Incorporations in themselves' and as such subject to government and policy distinct from that of landward areas.¹⁷ One year later, they were protesting an action of the inhabitants of the Sneddon district, which sat on the opposite bank of the River Cart from the burgh. With the approval of the County JPs, they had constructed a new bridge over the river to afford them better access to the town. There were several grounds on which the magistrates sought redress against this development: the supposed threat that the JPs' presumption of jurisdiction posed to the autonomy and integrity of their jurisdiction within the burgh; the likely damage to burgh revenues, through the loss of toll income on their bridge; and the effects on the navigability of the Cart.¹⁸ In 1792, they were again fighting a body of road trustees, this time over financial liability for the repair of turnpike roads within the burgh.¹⁹ Turnpike acts involving large towns tended explicitly to exclude the area within the towns from their operation, but this was not the case with respect to smaller burghs. Rather like today, where new roads simply increase road use, turnpiking of roads in the eighteenth century often coincided with very substantial increases in the traffic passing along them, which, in turn, increased wear and tear, and thus the costs of maintaining and repairing them, including periodic repaving. Burgh authorities, already facing climbing debt burdens as a result of implementing various improvements to their towns, were eager to ensure that they would not have to bear the full financial burden that this imposed.

¹⁶ See Bob Harris, 'Landowners and urban society in eighteenth century Scotland', *Scottish Historical Review*, 92 (2013), 231-54.

¹⁷ AL/CSP, Campbell Collection, Vol. 6, *Magistrates of Paisley v. Road Trustees* (1757).

¹⁸ AL/CSP, Campbell Collection, Vol. 8, *Inhabitants of Sneddon v. Magistrates of Paisley* (1758).

¹⁹ AL/CSP, Hume Collection, Vol. 42, *Magistrates of Paisley v. Road Trustees* (1792).

The preparedness of magistrates to pursue these sorts of cases, on occasion over a good number of years, often reflected their potentially serious implications for the economic and financial fortunes of councils and the burghs. Perth magistrates, for example, engaged in a decade-long fight in the 1740s and '50s with Lord Gray of Kinfauns over fishing rights on the Tay, a battle which ended up being decided on appeal in the House of Lords.²⁰ The fisheries were a crucial source of revenue to the burgh, which almost certainly explains their determination in this case. It was for the same reason that burgh authorities were willing to defend other rights, such as those regarding thirlage – the right of town mills to grind all grain within their 'thirl' or area of monopoly and collect a portion of the product (multure) – or the imposition of particular financial levies (i.e. customs). Cases involving both were numerous, and no doubt indicative of the well-known reluctance of eighteenth-century Scots to pay taxes, although in the case of thirlage this was increasingly viewed as an unreasonable restraint on trade.²¹ In 1754, the magistrates and town council of Lauder took one Thomas Brown to the Court of Session for his refusal to pay a toll of 2 shillings Scots on each load cart belonging to him that passed through the burgh.²² Since collection of customs was usually contracted out by burgh councils to the highest bidder, very often it was this person who brought the issue to the notice of magistrates and pushed for them to take action. The precise motivations and dynamic varied,

²⁰ John Craigie, John Shaw Stewart, and Thomas Paton, *Reports of Cases Decided in the House of Lords, upon Appeal from Scotland, From 1726 to 1822*, 6 vols. (Edinburgh and London, 1849-56), i, 645-49, *Right Hon. Lord & Lady Gray, appellants v. Magistrates and Town Council of Perth* (30 Mar. 1757); National Records of Scotland, Court of Session Papers, CS181/4709, *Magistrates of Perth v. Lord Gray and others* (1747).

²¹ Many of the local customs rights were leased by the burghs. For thirlage and growing opposition to it within certain burghs, see eg. National Records of Scotland (NRS)/Court of Session Papers (CSP), Court of Session, CS138/4495, *Magistrates of the Burgh of Perth v. Richardson and others* (1767).

²² *Decisions of the Court of Session, from the Beginning of February 1752, to the end of the Year 1756* (Edinburgh, 1760), 171.

however, case-by-case. In 1761 the litigious Paisley magistrates were once again involved in a legal dispute in the Court, this time over their right to a monopoly over possession of a mort-cloth for hiring in the burgh. In defence of this right, they had even gone to the extent of seizing a mort-cloth hired from the Wrights Incorporation from a corpse being carried through the streets of the burgh. The essence of their case was that monies arising therefrom were part of the 'Common-good of the Town'; they were also an important source of money used to defray the costs of local poor relief.²³

However, this habit of going to law also reflects the degree to which magistrates saw their role as being defenders of burgh privileges and rights, and more broadly the independence of the burghs. It is sometimes suggested that Scots burghs in this period were basically subordinate bodies, dominated over by powerful landed elites. The records, however, of the Court of Session suggest a rather different picture, one in which burgh authorities were determined and quite frequently prepared to resist the power, influence, and indeed deep pockets of the landowners. Landowners could (and did) gain considerable influence in the burghs, especially (but not exclusively) in burghs of barony. The earl of Galloway was frequently in the later eighteenth and early nineteenth century the provost of Wigtown. The dukes of Roxburgh had a very strong influence in Kelso, as did the dukes of Buccleuch in Hawick; and so on. Usually, however, this influence did not come at the expense of ignoring the interests and traditions of the burghs, or their very marked sense of themselves as communities with distinct privileges.²⁴ In the mid eighteenth century, Kelso's authorities fought a long-running battle with the dukes of Roxburgh over a range of privileges, including the right to admit burgesses, levy dues and customs and have these applied to the common

²³ AL/CSP, Campbell Collection, Vol. 11, *Paisley Incorporation of Wrights v. James Kibble, Procurator Fiscal of the Town of Paisley* (1761). For another similar case, involving the right to levy a duty on ale imported into Brechin, see NRS/CSP, CS237/B/9/42, *Magistrates of Brechin v. Lindsay* (1802).

²⁴ See more generally, Harris, 'Landowners and urban society'.

good of the burgh, and their right to use the island of Ana on the Tweed for bleaching and drying of linen. Henry Home, Lord Kames in the Court of Session judged in the burgh's favour, a decision that was upheld in the House of Lords in 1757.²⁵ In 1800, the factor to the superiors of Peterhead, The Merchant Maiden Hospital in Edinburgh, was evidently surprised when plans for a new church in the town led to a Court of Session case involving the town, on one side, and the superiors, on the other:

A law suit is a very serious matter and is but ill adapted to promote cordiality. Of all improbable cases I should lately have thought it most improbable that the good Folks of Peterhead should have been in Parlia[ment] Houses [i.e. the Court of Session] with their Superiors. But this is an age of Surprises.²⁶

Perhaps he would have been somewhat less surprised had he been familiar with other burghs, and how 'cordiality' in these kinds of contexts did not usually mean meek subservience.

The ready recourse of the privileged orders, urban as well as rural, to the law gave 'old regime' Scottish society considerable flexibility, as well as capacity to absorb challenge. This broad, increasingly diverse social stratum may have very sharply closed ranks in 1792, in the face of the conjoined challenges of the rise of domestic radicalism, the impact of the French Revolution, and, from early 1793, the French revolutionary wars, but this was partly because the law served to set strict limits to landed hegemony, and to protect urban privileges and autonomy. This is not the full explanation for their striking cohesion in defence of the existing social and political order in the 1790s and early 1800s, but it is an important part of a wider picture of convergence *and* accommodation.

²⁵ Craigie et al., *Reports of Cases*, i, 632-39, *duke of Roxburgh, appellant v. Jeffrey and others* (18 Mar. 1757).

²⁶ Edinburgh City Archives, Merchant Maiden Hospital Letter Books, TD92/9/30, Alexander Elles, Peterhead, 29 Aug. 1800.

The law and the 'order' of the burgh

If burgh authorities went to law, therefore, to resist 'outsiders' and 'outside' encroachments on burgh privileges and interests, they might equally well find themselves engaged in battles with factions, groups and individuals within their burghs. Some of the most bitter of the struggles again involved the disposition of common land, over which burgesses often had important rights of usage – pasturing a cow, gathering fuel and so on. In several of the burghs, burgesses fought either the feuing or enclosure of common lands. In 1788 in Ayr, for example, the magistrates took a decision to enclose and improve part of the common near to the burgh in order to turn it into a 'good pasture field' for cows belonging to the freemen, although there was a further ambition since in its unimproved state this part of the common was a disgrace to the town and its management. In order to defray the costs, the council proposed to feu several acres of the common. It was this aspect of the scheme which was resisted by the trades incorporations, who, in arguing for a bill of suspension in the Court of Session, urged that the ground concerned was used for bleaching and drying linen. Interestingly, there was no opposition to the idea that the enclosure of the common would be advantageous. The Court, as in other similar cases involving Irvine (1750) and Cupar (1787), sided with the magistrates in respect of their powers to dispose of these assets as they saw fit for the interests of the burgh.²⁷

Magistrates were drawn into other kinds of legal disputes with corporate bodies within the burgh - the trades incorporations, guildry, or indeed kirk session. Between 1759 and 1761 the Nine Incorporated Trades of Dundee pursued a case against the magistrates and town council designed to fight back against their growing subordination and marginalisation in burgh governance from the later seventeenth century. The incorporations claimed that the magistrates and council had in recent years very deliberately

²⁷ NRS/CSP, CS271/43546, *William Stewart (convenor, corporations of Ayr) v. Magistrates of Ayr* (1788); CS231/IJ/1/17, *Magistrates of Irvine v. Trades of Irvine* (1750); CS231/39767, *David Wilson & others (Trades of Cupar) v. Magistrates of Cupar* (1787).

encroached on their rights and privileges in relation to the appointment of ministers, the election of town clerks, and the management and disposal of town lands. The magistrates in response claimed; 'It is apparent that the intention of this process [is] entirely to *new model* the constitution of the burgh, by taking the legal and just powers out of the hands of the council, at least to establish a council upon a model entirely new, by associating to it the nine Deacons, and thereby indeed lodging the power in the hands of the trades'²⁸ It is not quite clear what the outcome was, although there were attempts to reach an agreed resolution; and it appears that the magistrates were prepared to make some concessions, although equally these were evidently less than those for which the trades were looking.²⁹ The magistrates were also involved at around the same time in a dispute with the local kirk session about their respective powers; and these cases may have been related, albeit there is no direct evidence for this.³⁰ In Perth in 1774, the magistrates were compelled to defend their management of the all-important Tay salmon fisheries in the Court, partly against accusation that they had been favouring their friends with leases on these at unduly favourable (i.e. low) rates. Twenty years later, it was the Perth magistrates who were the pursuers and the guildry the defenders, with magistrates alleging that 'certain persons of the guildry or merchant calling in the town of Perth have lately under the specious colour of Reformation attempted to overturn the Established Sett & Constitution of the Burgh'.³¹ Two specific issues were under dispute: who possessed right to elect the dean of guild and his council; and rights and

²⁸ NRS/CSP, *Dundee Corporations v. Dundee Magistrates* (1759).

²⁹ Dundee Archives and Records Centre, Dundee town council minutes, 5 Jan., 2 Feb. 1761.

³⁰ NRS/CSP, CS271/25303, *Kirk Session Dundee v. Town of Dundee* (1760).

³¹ NRS/CSP, CS271/27447, *James Morrison & others (inhabitants of Perth) v. Magistrates of Perth* (1774); CS271/26557, *Magistrates of Perth v. Guildry of Perth* (1794).

practice regarding the admission of honorary burgesses, or rather what privileges such individuals should have access to and for what sums.³²

With such cases in mind, the rise of burgh reform in the 1780s – the campaign for more open, accountable forms of burgh government, as well as reformed burgh representation in parliament – may seem less surprising. It may well be that we also need to revise our view of the political culture of Scots burghs in this period as being essentially stifled by the tight webs of patronage and connection from which contemporary political interest was created. The Court of Session was an important site of periodic contest between the different bodies that made up the burgh community, and the real story may well lie in the interactions between these different layers of politics.³³ And, just as the burgh magistrates could be prickly defenders of their privileges, so were trades incorporations and merchant guilds, and within this context these bodies could act as repositories of political memory about privileges and rights that provided a basis for contesting the narrow custodial form of burgh governance that generally prevailed in this period. In the early 1780s, it is striking how readily trades incorporations and merchants' guilds in many burghs joined the burgh reform campaign. In Perth, the trades incorporations drew up their own plan for 'forming a new set of the Burgh', also defraying the cost of sending delegates to Edinburgh to a convention of burgh reforms in the spring of 1784.³⁴ More simply, the campaign for burgh reform was fought in the courts, as well in the form of seeking change through parliamentary legislation, a pattern that would be repeated when burgh reform re-emerged as a major cause in the second

³² See also AL/CSP, Campbell Collection, Vol. 102, *Incorporated Trades of Perth v. The Guildry* (1800), for further details on the tussles taking place between the magistrates, guildry and incorporated trades in Perth in the later eighteenth century.

³³ See also Alexander Murdoch, 'Politics and the people in the burgh of Dumfries, 1758-1760', *Scottish Historical Review*, 70 (1991), 151-71.

³⁴ Perth and Kinross Council Archives, Records of the Incorporation of Fleshers of Perth, MS122/1/1, Minutes, 1761-1795, entries for 15 Jan., 20 Jan., 11 Mar. 1784.

decade of the nineteenth century.³⁵ If a modern history of burgh reform is ever written, it will need to pay as much attention to these cases in the Court of Session as it does to petitioning of Westminster.

The Courts and monopolistic privileges

Turning to the role of the Court in relation to the maintenance (or otherwise) of monopolistic privileges, and their place in the burghs: the picture in respect of the extent and influence of these privileges was a notably diverse one, as emerges very clearly from the 1835 parliamentary report on municipal corporations in Scotland.³⁶ Broadly speaking, the report distinguished between large and smaller towns; the latter were represented as sites of tenacious monopolistic tendencies. There were of course also very important differences between burghs in respect of the existence and privileges of the trades incorporations. In several burghs, these either did not exist (e.g. Greenock and Port Glasgow) or claimed no privileges whatsoever (e.g. Paisley and Hawick). In some smaller and indeed medium sized towns, there was no guildry and the burgess-ship carried no particular privilege (e.g. Annan, Stranraer, Nairn, Wick, Campeltown). In Kilmaronock, where there was no guildry, all who wished to trade, including members of the craft incorporation, had to become burgesses, and the power of admitting these rested with the burgh magistrates.³⁷

The purpose of the 1835 report was to support the case for the abolition of privileges, and it has to be read in this light. The main theme, nevertheless, was one of growing cracks in the regime of privilege and the growing irrelevance of powers of control. To legislate for their abolition was thus

³⁵ See esp. NRS/CSP, CS235/D/6/5, *Burgesses of Dumbarton v. The Magistrates* (1786), a case which concerned methods of accounting for public funds in the burgh.

³⁶ House of Commons Papers, Command Papers, Reports of Commissions, General Report of the Commissioners Appointed to Inquire into the State of Municipal Corporations in Scotland, 1835 [30], [31].

³⁷ See AL/CSP, Campbell Collection, Vol. 12, *Kilmaronock Magistrates v. Kilmaronock Incorporation* (1761).

uncontroversial; it was merely to endorse and universalize existing trends: or so it was implicitly claimed. In respect of the exclusive privileges of commerce belonging to the burghs, the authors of the report saw little necessity for lengthy argument because, since, as they wrote, '[this] privilege has already ceased to exist and to be acted upon'. By contrast, the monopolistic ambitions of craft guilds were acknowledged, as was the 'vexatious' exercise of powers by merchant guilds in various towns.

A further important theme of the report – one based firmly in reality – was that the late seventeenth century had marked an important moment or phase in the weakening of monopolistic powers in urban economic life. The privileges of foreign trade had, for example, been extended from royal burghs to include burghs of barony and regality. The most important pieces of legislation in this context had been passed by the Scottish Parliament in 1672 and 1690, conferring the benefits of communication of trade on the latter sorts of burgh in return for their assuming responsibility for 10% of the cess payment for which the royal burghs were liable in lieu of the land tax. Legislation passed in 1660, under which joint stock companies were encouraged, effectively and openly infringed the privileges of the crafts guilds in the burghs.

The legislation of the later seventeenth century appears to have been partly a form of clearing up long standing problems and issues of economic control, or lack thereof; and to this extent the monopolistic powers in urban economic life had already been eroded considerably by this period. These measures were also part of, to borrow Richard Saville's term, a new 'economic politics', which aimed to regenerate the Scots economy in an era of stiffening international challenge and in the 1690s, domestic setbacks, and by growing consciousness of economic backwardness, especially when measured against the Dutch Republic and its neighbour to the south.³⁸ Liberalization in this

³⁸ Richard Saville, 'Scottish modernisation prior to the industrial revolution, 1688-1763', in *Eighteenth Century Scotland: New Perspectives*, eds. T. M. Devine and J. R. Young (East Linton, 1999), 6-23, esp. 7.

context did not mean antipathy to economic regulation, but the royal burghs exclusive monopoly of foreign commerce and the privileges of the craft guilds could be and were seen as impediments to economic progress and the development of the skills required to place the Scottish economy on an internationally competitive basis.

The existing privileges of the royal burghs were explicitly reserved in the Treaty of Union, although equally it decreed that the whole of the United Kingdom were to enjoy the same privileges. (Goods brought from England were, from 1707, not deemed to be foreign, and so fell outside the exclusive privilege of trade belonging to the burghs.)

This is not the place to pursue in great detail the question of what happened to the merchant guilds and trades incorporations in the decades that followed the Union, although as the 1835 report indicates, they retained an important influence in many burghs well after 1800. In burghs of long standing, these institutions were also simply too well entrenched to be quickly eroded in significance and power; and they were partly what defined the 'burgh community', the distinctive sense of civic identity. It for this reason, and continuing attachment to a particular conception of the order of the burgh, that burgh magistrates tended to support some at least of the privileges of these bodies. To a significant extent, and for much of the eighteenth century, they remained bodies to which the magistrates looked for support in moments of strain and crisis, and they continued to occupy a key place in civic life and ceremony. The financial condition of the incorporations appears to have remained quite healthy in many cases, as reflected in the construction of new trades halls (Dundee (1778) and Dumfries (1804)), trades chapels or kirks in several places, or in their lending money on occasion to burgh councils. The incorporations had other important 'police' functions in relation to their own trades, for example, as inspectors of markets and the quality of goods; they were part of regulatory mechanisms that were well entrenched and which were viewed as being of benefit to townspeople.

Guildries and trades incorporations also, however, had crucial welfare functions in a society where there was no compulsory poor relief, in contrast to England and Wales. This was partly why new incorporations were formed and chartered on occasion in burghs in the eighteenth century, such as the Society of Sailors in Dunbar in 1730.³⁹ In Peterhead, there were no incorporations, but there was a Society of Trades, which was essentially a welfare body for its members. In a fascinating case involving journeymen woolcombers in Aberdeen, who at the beginning of the 1760s had attempted to form a society, the journeymen argued that, unlike in England, where the poor were 'sufficiently provided for by the public law ... The Tradesmen in most towns in Scotland are incorporated, and out of their common stock are enabled to assist the poor'. Since woolcombing was a new activity, it was not covered by the incorporations. In response the local woollen manufacturers were proposing, if the Court of Session were to find that the 'proposed intention' of the journeymen could be put into operation, that they would establish a charitable society for their benefit.⁴⁰ One key welfare role played by the incorporations and indeed some merchants guilds was the purchase of meal for their members, especially in periods of high prices and shortage; and discussions of Scottish poor relief which omit this role are seriously deficient.⁴¹ In 1794 the Ayr Incorporation of Fleshers, following the example of the local Tailors Incorporation, established a permanent fund for the support of widows, children and 'distressed brethren' of the corporation.⁴²

³⁹ NRS, Papers of the Society of Sailor of Dunbar, B18/51/1/1-2, copies of the Charter of the Society, presented as a petition, 15 Sept. 1730. The society went on to lend significant sums to the burgh.

⁴⁰ AL/CSP, Campbell Collection, Vol. 14, *Journeymen Woolcombers v. Magistrates of Aberdeen* (1762). The magistrates were the defenders since at issue was whether they ought to give recognition to the society. The Court came down on the side of the manufacturers.

⁴¹ A recent example is Michael Fry, *A Higher World: Scotland 1707-1815* (Edinburgh, 2014), ch. 7.

⁴² NRS, Records of the Incorporation of Fleshers of Ayr, E870/6/2, Minutes, 1774-1821, 9 Jan. 1794.

Even where trades incorporations did not possess monopolistic privileges, for example, in Paisley, or the weavers' incorporations in all burghs after 1751, they were or remained very important bodies, suggesting that they had practical functions, in respect of protection of interests, training, and maintenance of the reputation of crafts, as well as welfare, that continued to be seen as valuable. In the linen manufacturing town of Dunfermline, for example, membership of the corporation of weavers was four times the size of any other craft guild. This was also presumably why there were some agreements reached to allow craftsmen in some suburbs to join burgh trades incorporations.

Hamish Fraser has suggested that the courts in eighteenth century Scotland 'were prepared to uphold exclusive privilege much later than they were in England.'⁴³ He also hints that burgh magistrates tended to support the rights of the incorporations against interlopers. There is plenty of evidence that policing actions were periodically taken against unfree traders, either by the relevant incorporations, burgh magistrates or dean of guild courts.⁴⁴ But the position of the courts seems to have been more ambiguous than Fraser's comments imply. The Court of Session was fairly consistent in its judgements in this area. The legality of exclusive privileges was irrefutable, and judges saw themselves as bound to enforce these where they could be shown to have been in regular use. On the other hand, the effect of many of their decisions was to reduce their sphere of operation, or to provide ready ways of circumventing them.

This can be seen, in the first place, by how narrowly the Court interpreted the privileges of the incorporated trades. They had the power to regulate their own members; but their key monopolistic privilege was one of manufacture for sale *locally*. Where goods were being manufactured for

⁴³ Fraser, *Conflict and Class*, 21.

⁴⁴ In Ayr, for example, lists of unfree traders were being compiled on an annual basis at the end of the eighteenth century. The Perth dean of guild seems to have taken fairly regular action against unfree traders in the same period.

export the writ of the incorporations did not run. Here the Court was making a distinction which related back to the legislation of the later seventeenth century which had liberalized the right to export, but where legislation and its earlier judgments had been much more tentative and ambiguous in relation to the regulation of domestic consumption. The judgments in this context were made despite the reasonable argument put on behalf of the incorporations that this left their powers of control on local manufacturing essentially nugatory. Merchant burgesses could, therefore, employ labour for manufacturing of goods for export. The Court reiterated the importance of the distinction in a case relating to Stirling in 1762, which involved the establishment of a 'factory' (meaning place of manufacture) for making shoes, which employed a workforce of around 100. The owner had a contract from government for the supply of shoes, presumably for the army. Fearing for the position of its members, the Incorporation of Shoemakers took this individual to court for infringing their rights. The judges determined that he could fulfil the contract, but not supply shoes to the inhabitants.⁴⁵ The power of monopoly in Stirling seems to have been especially strong before the later eighteenth century, which may be one reason why it lost out economically to nearby Falkirk. The Court also consistently argued that individuals had the right to purchase goods from producers beyond town boundaries, and to have them delivered within the town. Given the continuing growth of settlements beyond the boundaries of burghs – such as Maxwelltown and Dumfries, or Ayr and Newton of Ayr – or their expansion beyond their regalities, this was potentially of very considerable significance to the operation of burgh economies.

Several cases can stand as proxy for the general pattern of the Court's decisions. In 1756, the Perth Incorporation of Tailors were unsuccessful in gaining the support of the Court for preventing mantua makers exercising their craft without becoming members of the incorporation. The Court's ruling hinged on their being viewed as entirely separate trades. Whether

⁴⁵ *A General History of Stirling* (Stirling, 1794), 62-3.

these decisions produced change more broadly probably depended on local willingness to challenge restrictions. Thus, in Dumfries until the end of the eighteenth century, the arrangement was that mantua makers paid fees to the local tailors incorporation for each apprentice that they employed. The right, however, of the incorporation to insist on these fees was resisted in the early 1790s, which led to a case coming to the Court in which the judges came down again on the side of the mantua makers.⁴⁶ In Stirling in 1766, a watchmaker successfully defended himself against attempts to make him become a full member of the Incorporation of Hammermen because he was able to show that watchmaking had never fallen within the control of the incorporation. What gave the game away, in the watchmaker's favour, was that when he was asked by the Incorporation to provide a 'piece' – an example of his craft skill – it was for a device that watches did not include!⁴⁷

The Court thus appears in general to have sought to interpret the monopolistic privileges of the trades in the narrowest possible fashion. Incorporations had to show not only that they possessed a particular privilege, but also that it had been customarily exercised. Given that one of the features of the Scottish urban economy in the later eighteenth century was the multiplication of new trades, the effects of such a stance were potentially far-reaching.

Just how far judges were prepared to extend these principles or limitations by the early nineteenth century is illustrated in a series of cases regarding the operation of so-called bread societies.⁴⁸ These appear to have

⁴⁶ NRS/CSP, CS234/T/1/12, *Tailors of Perth v. Mantua Makers* (1756); A.L., Campbell Collection, Vol. 102, *Incorporation of Tailors v. E. Maxwell, mantuamaker, Dumfries* (1801).

⁴⁷ NRS/CSP, CS235/3/3/2/1, *Corporation of Hammermen in Stirling v. Joh Goodfellow, watchmaker, there* (16 July 1766). It turned out that the error in relation to the essay piece was in the spelling of the item, although as one of the judge's derisively commented: 'Who is it that must try the qualifications of the watchmaker? – 'they who cannot spell the name of the essay-piece!'

⁴⁸ NRS/CSP, CS271/22785, *The Incorporation of Dundee Bakers v. Patrick Hunter* (1804); William Maxwell Morison, *The Decisions of the Court of Session: from its First Institution to the Present*

first emerged in 1795-6 when meal prices soared due to a spike in demand caused by food shortages south of the border, and then spread more widely during the food crisis of 1799-1801. The societies were basically cooperative ventures, formed primarily, one assumes, given the subscription cost was a minimum of a guinea, from the middling ranks. The founders of a Dundee bread society were a merchant, an upholsterer, and a hosier. Members clubbed together to establish bakeries outside towns, supplying bread to their members on a non-profit basis. This latter aspect was crucial: article 3 of the articles of agreement of the Perth Wheaten Bread Society declared: 'Any member disposing of his bread, or any part of it, at an advanced price, so soon as the same can be proved, shall forfeit his right and claim to the society.' This was self-help on the part of the middling sort, and the societies operated as subscriber democracies, being managed by a committee elected on an annual basis. They could operate on a pretty sizeable scale. One Dundee society had 200 members, and between 1 March 1803 and 26 May 1804 baked a total of 63,973 loaves of bread at a profit of around £466. Such societies may well have existed in most Scots towns; and some towns had more than one; Perth, for example, had two.⁴⁹

Incorporations of bakers argued, predictably, that they were a direct infringement of their exclusive privilege of selling bread within the burghs; that they were, in fact, a combination designed explicitly to destroy this monopoly, or rather the economic benefit that thereby accrued to the members of the trade. The Court found against the bakers. This was on the grounds that their mode of operation was entirely consistent with the principles about the limits of trade privileges already laid down by the Court. In other words, the societies could be seen as an exercise in self-provisioning, and they were not producing bread for sale within the towns. One can detect new, more pragmatic attitudes beginning to be aired towards regulation and

Time, 38 vols. (Edinburgh, 1801-1808), Appendix, Part 1, burgh royal, 37-44, *Bakers of Perth v. James Gloag, James Stewart, and others* (3 July 1808).

⁴⁹ *Ibid.*

privileges in these cases, ones in which the argument of utility rather than custom was urged in defence of regulation. As it was argued on behalf of the bread societies:

As to the duty of the inhabitants to the burgh, in regard to corporations, they are bound to respect corporate rights, whether expedient or not, so far as they go, but they are not bound by any duty to sacrifice their own convenience, and allow the general interest to suffer in order to give the incorporations advantages which their rights were insufficient to secure to them.⁵⁰

In other words, unless very specifically established, the rights of the incorporations should not be extended or interpreted in ways which damaged the 'public interest' which might well *not* be coterminous with the interests of the incorporations and guildry. Interestingly, there was a division of opinion among the judges on the legality of the bread societies arising from how one interpreted the purposes of the societies - whether they could be seen as being expressly designed to destroy the profits of the bakers. This was a matter of course of interpretation; but it illustrates very nicely the tensions inherent in their position.

These cases were symptomatic of a wider, strengthening antipathy from the later eighteenth century to monopolies and a growing conviction regarding the merits of economic liberalisation, one which would see in the opening decades of the subsequent century the destruction of various powers of paternalistic intervention in the economy, beginning with a landmark decision in 1801 in relation to the rights of magistrates to interdict supplies of grain with the aim of safeguarding supply to local markets in periods of shortage.⁵¹ In claiming exclusive privileges the trades were increasingly on the defensive, and they recognized this. As it was argued on behalf of the Perth bakers in 1808:

⁵⁰ Morison, *Dictionary*, Appendix, Part 1, burgh royal, 43.

⁵¹ Whatley, "'Custom, commerce, and Lord Meadowbank'". And, for a wider discussion by the same author, see *idem.*, *Scottish Society*, 263-93.

The privileges of corporate trades undoubtedly form part of the law of the land. The political expediency of that part has been of late called in question by speculative men ... But ... [if] the rights of corporate trades exist in our law, they are entitled to a fair interpretation, and a sufficient protection. They are not to be annihilated by flimsy pretexts, as if they existed no objection to destroying them, but a mere difficulty in form.⁵²

There was a parallel process of attack on the practice of thirlage as attached to town mills, a form of servitude that was dismantled in the rural economy by parliamentary legislation passed in 1799. Ironically, in this case it was the bakers who were contesting a monopolistic privilege that imposed an additional financial burden on their business, and the magistrates and councils who were seeking to defend an important source of burgh revenue. Things were rarely straightforward in this murky world of privilege and interests. More generally, what was under increasing attack was not so much the regulation of the economy or market place *per se*, but the type and ends of regulation, and indeed whose interests were served by their continuation or abolition.

The law, governance, and the rise of a new urban order

The Court of Session was, therefore, an important actor in a number of the far-reaching changes occurring in urban life in the long eighteenth century. This partly reflected the relative unimportance of parliamentary legislation as a agent of change in many Scots burghs before the 1830s, although this began to change from the final quarter of the eighteenth century as more burghs resorted to legislation in pursuit of measures of improvement and, in still rather few cases, the establishment of police commissions as new instruments of urban governance. It may also have reflected an enduring pattern in Scottish urban governance – a preference for and acceptance of locally specific authority – which also reflected the deep historic roots of much of Scotland's

⁵² Morison, *Dictionary*, Appendix, Part 1, burgh royal, 39.

urban network. As we have seen, records generated by the Court of Session contain much relevant evidence about the burghs themselves and about the constitution of authority within them, about civic identity, and the capacity and readiness of burgh authorities, and indeed other corporate bodies within towns, to resist challenges to their independence, interests and privileges. The record is of course a partial one; and it should not be read simply as reflecting the general character of relationships between, say, the towns and the landed elites. The deeper story in this case may well be one where they were frequently able to work together in pursuit of common interests, or to reach agreements about things such as property boundaries. The dukes of Roxburgh may have fought with the Kelso burgh magistrates in the 1750s, but their role in the burgh remained a significant one. In Dumfries, at the end of the eighteenth and early nineteenth century, the duke of Buccleuch played an important part in contests that arrayed on one side the town council and on the other the influential local trades. But the relationships were not one-sided, as the disputes that did reach the Court illustrate very clearly. Nor was the rule of the narrow merchant oligarchies that prevailed in urban government in this period uncontested. Their supremacy may by the early eighteenth century have become pretty much universal, but memories of older conflicts and lost rights lay just underneath the surface, and the trades incorporations and guildries were well placed to support strong challenges to this form of governance from the later eighteenth century. These challenges typically invoked the idea of restoration, of privileges that had been unfairly lost, but this partly simply reflects the legal framework within which these disputes were being pursued; and in the later eighteenth century languages of liberty, including the idea of natural rights, took their places alongside this consciously backward-looking perspective, especially in debates in the press about burgh reform, patronage and attempts to promote police bills, without any sense of contradiction.

As far as the place of exclusive privileges within urban society is concerned, viewed from the perspective of the decisions of the Court, what is

underlined is how these further narrowed in operation in this period in a variety of ways. That said, while this may have been the long-term picture, from another perspective it may be their resilience that stands out. It is a pattern and process that remains partly hidden from view, although the general outlines are pretty clear. The 1835 parliamentary report contained a hint of surprise that more legislative action had not been taken to dismantle the privileges of the merchants and trades guilds. Parliament did, in fact, pass several acts which did this in relation to the latter, although for reasons which were not focused on the fortunes of the towns, but rather other goals – namely, providing a stimulus to the linen industry in the aftermath of the final major Jacobite rebellion of 1745-6 and re-integrating into society demobilized soldiers after the ends of major wars.⁵³ These had the effect, moreover, of significantly diminishing the scope of exclusive privilege in burgh life, since there were numerous artisans who fell within their ambit. The report also implied that those privileges that did survive had not been serious impediments to economic progress. It was a fair point, and, if Michael Lynch is correct, such had been the story for a long time.⁵⁴ If incorporations and merchant guilds insisted too rigorously on their privileges, manufacturing might simply relocate elsewhere or to areas beyond burgh boundaries, which is exactly what happened in quite a few places. It was often a balancing act, therefore, and corporations and merchant guilds might grant licenses to ‘strangers’ to operate for a payment which was less than the cost of full membership, as occurred in Edinburgh, Aberdeen, Banff, Dunfermline and Dumbarton. No doubt, the fact that many burgh economies were experiencing quite rapid growth and development in this period, at least

⁵³ 22 Geo II. c. 31, which abolished the privileges of linen weavers and other linen workers.

Under statutes passed at the end of every war, all persons who had been in the army and navy were entitled to exercise any craft, without belonging to a corporation. This was extended to wives and children, and from 1802 to former members of the militia and fencible corps.

⁵⁴ Michael Lynch, ‘Introduction: Scottish towns 1500-1700’, in *The Early Modern Town in Scotland* ed. M. Lynch (Edinburgh, 1987), 1-35.

from the later 1730s, aided the process of adaptation. A strict division between the merchants and the trades could not be, and was not, maintained in practice, although in 1793 the Court of Session denied craftsmen the right to import manufactured goods within their field of manufacture from England for sale locally.⁵⁵ In 1823 the judges dismantled even this restriction. The picture presented, in sum, is of one of protracted, uneven, and cumulative transformation, of opening up by stealth and by degree, as well as by confrontation and open challenge. The rise of a new urban order in the nineteenth century, which retained elements of older structures, habits, and mentalities, was the result of a very protracted pattern of change and adaptation; and the law as interpreted by the judges of the Court of Session played a significant role in this process.

⁵⁵ AL/CSP, Hume Collection, Vol. 42, *Aberdeen Magistrates v. Incorporated Trades of Aberdeen* (1793). What emerges very clearly from the evidences presented in this case is that both guild members and craftsmen were manufacturing as well as trading.