

The composition and distribution of the legal profession, and the use of law in Britain and Ireland, c.1500-c.1850*

The geography of the legal profession and legal culture, and the possibility that there were major regional differences in the use of law and legal institutions across historic Europe have been little studied by historians. This article compares England and Wales (which had a shared legal system from c.1540) with Scotland, whose private law was (and remains to this day) quite different, and Ireland, where English common law sat alongside traditional ‘brehon’ law, a composite of native, Roman, and canon law traditions. Lawyers can be divided at a simple level between those who pleaded and those who prepared documents, but the nomenclature and professional development of men of law also differed within the component parts of Britain and Ireland. English barristers and attorneys or solicitors were paralleled by advocates and writers to the signet in Scotland, but their organisation was not the same and Scotland had a much stronger notarial tradition, comparable with continental Europe. Finally, the component parts of the British Isles had distinctive social structures, economic compositions, religious emphases, and cultural forms, which meant that the place of law and lawyers in their societies varied considerably. The article brings out these differences and, in so doing, hopes to provide a framework for comparing the place of the legal profession and the use of law over space and time. It is in two parts. The first explores the numbers of different sorts of legal practitioner over time in England and Wales, Scotland, and Ireland. From an early date, England and Wales had many more lawyers per head of population than other parts of what became, in 1801, the United Kingdom of Great Britain and Ireland. The second part seeks to explain this difference, by examining how different societies related to the formal practices of law and to alternative forms of dispute resolution. The argument is that, as well as having different legal institutions and professional structures, Scottish and Irish people used the law more selectively than their English (and perhaps also Welsh) equivalents.

The starting point for the article is the pioneering work of Chris Brooks and of Wilf Prest, along with those who have followed their lead since the 1970s. Together, they have

shown that England and Wales in 1640 had 2500-3000 legal practitioners (barristers and attorneys or solicitors) in a population of 5 million: about one for every 1600 inhabitants.¹ Around 1730 England and Wales had perhaps 4600 attorneys for 5.5 million people or a ratio of 1:1200. This figure is skewed by the intense concentration of lawyers in and around London; the provincial figure was about 1:1600. Indeed, the imbalance was probably even greater when the 400 or more barristers, benchers, and serjeants (and the handful of judges) are taken into consideration, most of them practising in London during the law terms; the ratio of legal practitioners as a whole to population in the early eighteenth century was 1:1100.² In 1802 the national ratio for attorneys was 1:1700 and the provincial 1:2300. Combining barristers and attorneys at the start of the nineteenth century gives a national ratio of about 1:1500. Wales was an extreme version of the English provincial ratio with figures of 1:2100 and 1:2900 for attorneys at the two dates.³

Ireland, another example, like Wales, where English common law was imposed on native traditions, is even more distinctive. It had about 700 attorneys and 300 barristers in the 1760s, among a population of over 3 million, giving a ratio of one attorney per 4300 inhabitants and one legal practitioners of any kind per 3000 people.⁴ Around 1800 there were 400 barristers and 900 attorneys and other qualified legal practitioners in a population then approaching 5 million, meaning the ratios had dropped to roughly 1:5500 and 1:3800.⁵ Though formal lawyers seldom appeared in them, Ireland's local courts faded in importance from the seventeenth century onwards, leaving the law even more highly centralised than in England, this time in Dublin.⁶ Before continuing, we might note the very different ratios of barristers to attorneys and solicitors in eighteenth century Ireland, compared with England and Wales: very roughly 2:5 against 1:10.

All these figures include only common lawyers, but there were also civil and canon lawyers practising as 'proctors', 'advocates', or 'doctors' in the 300 or so English church courts, and in the High Court of Admiralty. Their ranks thinned from the sixteenth century onwards.⁷ The numbers of elite civilians licensed to practise before the highest ecclesiastical jurisdictions and the court of appeal of the Archbishop of Canterbury, the Court of Arches, shrank by two-thirds between late Tudor and early Georgian times.⁸ Civilians withered under the attacks of both common lawyers and Puritans in Elizabethan and early Stuart times, while the decreasing volume of work of many consistory and archdeaconry courts

from the Restoration onwards also contributed to a reduction in the number of civil, canon, and ecclesiastical lawyers.⁹ Yet even in the early eighteenth century there were over 150 courts across England and Wales where civil law dominated proceedings, served by between 300 and 400 practitioners.¹⁰

Civil law was much more important to the development of Scots law, alongside Anglo-Norman, canon, and native (Celtic and Norse) elements. This is not the only difference. It is plain that early modern Scotland was under-lawyered when compared with the south and east of England - and indeed the whole of England. At the date which most interested Brooks (c.1640) Scotland had many fewer practitioners: about 70 working writers to the signet (like attorneys and, in the eighteenth century, solicitors) and perhaps 100 advocates in a population of about 1 million.¹¹ Advocates were like English barristers, with the right of audience before any court in Scotland, but usually to be found pleading in the central courts.¹² Adopting a strict comparison of advocates and WS against barristers and attorneys, based on formal training and functions, gives a ratio of one for every 5900 people in Scotland c.1640.¹³ There were about 200 advocates in Scotland in 1714, 242 in 1764, and about 300 in 1810. In 1789 there were 176 WS, 262 in 1799, and 295 by 1803.¹⁴ The first national census of 1801 showed Scotland had 1.6 million people, meaning that there was only one lawyer for nearly 2700 people. Numbers of WS continued to soar and the Scottish legal profession grew to more or less its present day size during the late eighteenth and early nineteenth century, on the back of litigation over succession, entails and bankruptcy. Even at the start of Queen Victoria's reign, when Scotland had 2.6 million inhabitants and when the number of WS in their 'Society' (founded in 1594) reached its nineteenth-century peak (in 1838, with 703 members; there were still about 300 advocates), the ratio of legal practitioners per head of population had only reached 1:2600.¹⁵

The comparison just given is the closest that can be made. Despite the different titles by which they were known in different jurisdictions, there was, as John Finlay notes, 'a strong element of functional equivalency across western Europe in the respective roles carried out' by advocates and procurators, counsellors and solicitors.¹⁶ Much wider than between barristers and attorneys, there was a clear social and professional divide between advocates and WS, with little crossover between them.¹⁷ In the central courts, for example, an advocate could not simultaneously hold office as a WS.¹⁸ These broad categories, based

on legal substance compared with legal process, representation compared with instruction, and pleading rather than preparing, give a robust framework for comparison. Having said that, there are issues of comparability because the Faculty of Advocates (their professional association, dating from 1532) did not provide legal training and even the ideal of collegiality was absent; it was a professional organisation unlike the Inns of Court or Chancery.¹⁹ There was no clear agreement on the qualifications for entry to the Faculty until the mid-eighteenth century. The Lords of Session (the judges in Scotland's highest court) decided on who should be allowed to plead before them, whereas the inns had sole power to admit to practise at the bar.²⁰ In neither Scotland nor England was it possible to take a native law degree until the nineteenth century.²¹ The supply of lawyers was, however, potentially elastic because, as with medical education before the eighteenth century, students could study abroad and bring back what they had learned of Roman and canon law, to practise in Scotland.²² Law student numbers mushroomed in Scotland in the first quarter of the nineteenth century.

The difference between the inns and the 'societies' of advocates and WS may, however, be less than it appears. WS (and notaries, discussed below) seem to have learned on the job (only writers took on formal apprentices), though this did not preclude some having a formal legal training. The Protestant reformer John Knox, for example, trained as a canon lawyer and worked as a notary, coming from a tradition where the emergence of lay notaries public in fifteenth and sixteenth century Scotland had been based on the church's existing notarial practice, in England and Scotland alike, since the late thirteenth century.²³ Notaries had to pass a test from 1563 onwards in order to be registered by the Lords of Session; they will be discussed more fully below.²⁴ Early Scottish advocates too may well have received an important part of their training on the job, judging by the existence of 'auditors' or 'expectants' who listened in court, to learn procedures or 'practick' prior to trial and admission to the bar.²⁵ After the Restoration the Faculty developed a formal admission examination in civil law, which became the normal pathway, but one quite distinct from England.²⁶

The figures given above are for lawyers practising in Scotland, an important point when many of the figures found in the literature on this topic for Scotland, Ireland, and England and Wales are of admissions.²⁷ Not all of those admitted to the profession

practised, especially in the upper branch. With the feather of admission in their cap, some Scottish advocates retired to private life on their estates.²⁸ The lawyer and jurist William Forbes estimated that in 1710 roughly 15% of those who had been admitted to the Faculty were not practising.²⁹ His figure seems low and must refer to those who did no court or chamber work at all, because there were others who took on very little of the former. Of 47 advocates who stood before the Session in the year 1600, 20 did so on less than 30 occasions, compared with 16 who appeared 100 times or more, the most active individual putting in 418 appearances.³⁰ Writing in the 1770s, the English traveller Edward Topham commented on the many apparently idle gentlemen advocates in Edinburgh and the small number of active (if very successful and accomplished) practitioners.³¹ Looking into the 1840s, just over a quarter of all the living advocates on the Faculty's books can be found in Post Office directories for Edinburgh.³² The superior density of practitioners per head in England and Wales compared with other regions of Britain and Ireland could be because they were over-supplied, meaning that most lawyers were under-employed. To the contrary, there seems to have been plenty of work in a system where costs were generally low and demand for legal services high; it is in Scotland and Ireland that costs were high, demand low, and opportunities for litigation limited.³³

Mortality too thinned the ranks of those admitted, reducing the number of practitioners at any one time. In the seventeenth century the expectation of life at age 30 for both advocates and WS was about 25 years, rising to about 32 years in the second half of the eighteenth century.³⁴ Combined with a falling age at entry, this explains why admissions to the Faculty dropped by half between the 1680s and 1740s, yet the number of advocates increased.³⁵ The mean age at entry to the Society of WS was 30 years before 1750, falling to an average of 26 during the last quarter of the eighteenth century and the first quarter of the nineteenth century. As with the advocates, age at entry fell over time, though the WS were generally older than advocates when they joined their association.³⁶ Early eighteenth-century notaries were roughly 25 years old when admitted.³⁷

If some factors reduced the number of working lawyers, others may have swelled the number of those who had sufficient working knowledge of the law to practise it. Other things being equal, for example, improving life expectancy meant the profession filled up, making it less attractive to potential entrants. It may, however, also be necessary to adjust

the figures for practitioners or ‘men of law’, to encompass a broader group of legally capable individuals working in Scotland, including the notaries just mentioned.³⁸ For one thing, terminology was not consistent until the seventeenth century. Until then, and sometimes after, the same individual could be called a notary, procurator, prolocutor, ‘forespeaker’, or advocate in different records and contexts.³⁹ Originating from practice before the post-1563 Commissary Courts, there were small local societies or associations of procurators in Aberdeen, Glasgow, and other court towns from the late sixteenth century and also individual notaries, who may or may not have been members of the Society of WS or the Faculty of Advocates.⁴⁰ Procurators were local law agents whose remit included appearing before (or at least being present in) the inferior courts which recognised them, working around the fringes of cases involving the senior courts, and commercial agreements. The Sheriff Principal of Aberdeen, for example, authorised 16 procurators to practise as ‘advocates’ before his court in October 1633.⁴¹ This figure is towards the upper end of the wide range found, at different periods of the seventeenth and eighteenth centuries, in the 33 Scottish sheriffdoms (27 after 1748); it should be treated as a pool of eligible rather than active procurators.⁴² Taxation records show that from 1604 until 1727 there were between 9 and 16 men of law in Aberdeen at any one time, though the number rose to 26 in 1759 and 45 in 1795.⁴³ In Glasgow after 1748, procurators gravitated to the Sheriff Court as it gradually took over all but the consistorial business of the Commissary Court, where their separate ‘faculty’ had originated after the Restoration.⁴⁴

For his part, the function of a notary was to draw up ‘instruments’ certifying the time and place of an event or transaction, and the names of those present; by statute only he could draw up and authenticate certain types of legal documents. Notaries had to be impartial, honest, and accurate in drafting, copying, and recording documents; lawyers only had to be accurate in what they did. By the mid-sixteenth century most notaries’ work was conveyancing (registering ‘sasines’) along with drafting wills (‘testaments’) and marriage contracts, judging by the content of their formal written records (‘protocol books’).⁴⁵ More than 230 examples of these registers of transactions are held by the National Records of Scotland alone.⁴⁶ Such books, also widespread on the continent, seem to have been much less common in England.⁴⁷ Both ‘country procurators’ (as the Edinburgh lawyers called them) and notaries had become less important by the mid-seventeenth century, before re-

emerging in the late seventeenth and early eighteenth century to take some of the work traditionally done by writers to the signet. The WS, for their part, grew in status and in 1754 the Lords of Session formally acknowledged their right to practise as law agents before the Court of Session.⁴⁸ The temporary reduction in the importance of notaries was partly because of the introduction of a centralised register of sasines in 1617. The 66 royal burghs maintained their own registers of sasines from the seventeenth to the twentieth century, the burgh clerk (often a notary) generally holding the monopoly of registration. Notaries also remained important in mercantile matters into the nineteenth century. They are an example of people who could not litigate in their professional capacity prior to 1873, but who were at least as much involved as lawyers in conflict-prevention and conflict-resolution through a formalisation of social relations constituted, in part, by a proliferation of legal documents.⁴⁹ Yet the depth and breadth of their competence should not be exaggerated. An early nineteenth century legal digest observed that notaries had only to be ‘possessed of a reasonable knowledge of law’ pertaining to the exercise of their office.⁵⁰ And the editor of the first Statistical Account of Scotland observed in 1826 that ‘The inferior agents of the law are sometimes of an exceptionable description’.⁵¹

So far, this article has covered the composition and size of the legal profession in Britain and Ireland, though difficult issues remain about exact numbers and how or what to compare. Taxation schedules may help us get a picture of who was practising, at least in indicating the number of men following an occupation at one point in time and residing in a specific location, who were sufficiently successful (or willing) to pay. An Edinburgh tax roll of 1565 (actually a loan to the crown) shows that there were just 26 ‘men of law and scribes’ who were burgesses of the city and evidence from other sixteenth and seventeenth century towns suggests that the number of legal practitioners of any kind (including notaries) was small.⁵² Some 88 professionals are listed in the Edinburgh annuity tax roll of 1635, these ‘mainly lawyers of one kind or another’.⁵³ Numbers continued to grow. The Edinburgh poll tax records of the 1690s offer a reliable and inclusive snapshot of a rich and varied legal profession. The schedules include 36 advocates, 49 WS, 38 notaries, 15 procurators, 22 messengers at arms (deliverers of summons), and fully 179 writers (legal clerks or scriveners who mostly did copying rather than preparing documents, though some may have been regarded as trainee notaries).⁵⁴ The total of 317 is impressive, representing the largest

single collection (and probably the majority) of legal men in Scotland. By the 1770s this number had more than doubled to 653, according to an early city directory.⁵⁵

It is, however, almost certainly wrong to include messengers and ordinary writers in a comparison with England, because their role was clerical: they could neither act as notaries nor conduct litigation.⁵⁶ In the sixteenth and seventeenth century ability to litigate was an important distinguisher of the upper echelons of the legal profession. Thus John Baker is adamant for England and Wales that those who were not members of the Inns of Court or Chancery were mostly ‘not lawyers at all’, but instead ‘courtholders’, scriveners, and notaries who were ‘on the fringes of the law’.⁵⁷ Sixteenth and seventeenth century terminology also suggests a clear distinction in Scotland between ‘men of law’ and ‘scribes’.⁵⁸ Yet the significance of Baker’s criterion for inclusion may have altered over time because the conduct of litigation was not the sole or even necessarily the predominant role of English and Welsh lawyers by the mid-eighteenth century, thanks to its sharp decline since the Restoration.⁵⁹

Even if we assume that there were as many notaries and procurators as advocates across Scotland, we are only talking about one legal man per 3700 inhabitants in the mid-seventeenth century. If there were as many notaries and procurators as advocates and WS together the ratio only falls to 1:2900. John Finlay’s excellent work on the eighteenth century provides some support for the latter assumption. He shows that roughly 2.3 notaries were admitted every decade for each advocate and Writer to the Signet combined.⁶⁰ If this ratio obtained for practitioners in the mid-seventeenth century there would have been a total of about 560 men of law or a ratio of one for every 1800 people: at least a third lower than England. However, this ratio is based on admissions and it may be misleading because it does not tell us how many living and active practitioners there were at any point in time. There is double counting too because in the seventeenth century those who wished to become a WS had to qualify as a notary first; the difference in age at admission noted above is a function of this. In the eighteenth century it was only thought advisable to pre-qualify, but this remained the normal course.⁶¹ In the same way, the majority of licensed ‘country procurators’ had already qualified as notaries. In 1708, for example, John M’Ure, writer in Glasgow and keeper of the register of sasines there, appeared before the Justices of Peace of Lanarkshire to take an oath of office as a notary

public and procurator.⁶² Nor is including notaries a strict comparison because they were never an important part of the English common law landscape.⁶³

Scriveners and mere writers can be more closely compared between the two countries. Both may have come to act more like attorneys in local and central courts, advising on law as well as preparing documents; in England they worked as manorial stewards or town clerks, for example.⁶⁴ Yet assessing numbers is difficult and defining the boundaries between English notaries, scriveners, clerks, solicitors, and attorneys as problematic as it is for Scotland. As Wilf Prest has written, the early modern legal profession comprised ‘a fairly solid core of institutionally affiliated lawyers, surrounded by a very broad fringe of more or less marginal practitioners’, who one seventeenth-century lawyer characterised as ‘empirics of the law’.⁶⁵ The latter could perform many of the functions that only came to be reserved for attorneys and solicitors during the nineteenth century, such as conveyancing, though in reality English scrivening was seriously undermined by legal changes in the second quarter of the eighteenth century and had virtually disappeared by 1800. From the Restoration onwards practitioners turned into money-lenders or brokers. Notaries continued to prosper on the back of commercial work and until the reform of the English church courts in the nineteenth century.⁶⁶

In concluding this tricky discussion of the composition and size of the legal professions in different parts of the British Isles, it might be noted that it is not only the Scottish numbers that are open to augmentation. By including clerks and scriveners, Gregory King’s famous ‘Scheme’, describing the ‘ranks, degrees, titles and qualifications’ of England’s people in 1688, put the number of ‘persons in the law’ at 10000 and Joseph Massie proposed adding another 2000 in 1759.⁶⁷ If we split the difference to allow for 11000 legal men (and a small number of women) in a population of about 5.5 million in 1730, we get an astonishingly high ratio of the total of ‘persons in the law’ per head of population of 1:500. This is still nearly twice what can be reached for Scotland, even if we make the most preferential of assumptions.

Convergence came very late, if at all. The 1851 census of population allows a more-or-less systematic comparison of lawyers and law-related professionals because it used standard occupational classifications and aggregations. According to the census England and Wales had 16000 lawyers and 16400 law clerks and officers in a population of 18.0 million.

Scotland, with 2.9 million people, had figures of about 2450 and 2750 respectively, Ireland 3350 and 2200 among 6.6 million inhabitants. The ratios of persons in the law per head of population are about 1:550 for both England and Wales, and Scotland, but still only 1:1200 for Ireland.⁶⁸ Yet we need to be careful in embracing the apparent security of census schedules, because the enumerators asked about occupations rather than employment, which again raises the problem of numbering active practitioners. There is indeed no evidence that the number of Scottish advocates and WS more than doubled between 1838 and 1851 – which would be necessary to square with what was shown above about working ‘men of law’ at the earlier date. The issue is clearer still when the 1841 census of Ireland listed 2572 solicitors, but the Law Society of Ireland thought less than two-thirds that number were actually practising.⁶⁹

Despite the many ambiguities and uncertainties of measuring and comparing legal provision across both space and time in the early modern period, it is clear that England was better served with lawyers than Scotland and Ireland (and possibly Wales too), probably by a factor of two for the former and three for the latter.⁷⁰ Discussion of the reasons for the disparity between different parts of the British Isles will occupy the remainder of the article.

One immediate possibility is that law in Scotland was the preserve of the litigious (upper) classes. As John Simpson notes, ‘The rights and privileges of landed men were the staple of litigation’.⁷¹ An English visitor observed in 1580: ‘Of lawyers there are but few, and those about the Court of Session, in Edinburgh, for in the shires all matters are ordered after the great men’s pleasures’.⁷² The Court of Session itself was mainly used by landowners. Just 8% of 2200 separate cases before the court in the calendar year 1600 were brought by or against merchants and 12% involved craftsmen.⁷³ Advocates were expensive. Douglas Watt estimates that it would have taken an Edinburgh craftsman of that era nearly two months of work to earn what an advocate made from a single consultation.⁷⁴ More than two centuries later a ruined merchant, quoted in an Edinburgh newspaper of 1808, ruefully remarked that, while the form of process before the Court of Session ‘might answer well for settling differences among a few countra’ lairds [country lords] about the mosses and muirs [moors], it is unfit for the business of a commercial nation’.⁷⁵ In the same year John Ramsay of Ochtertyre, a minor Perthshire landowner, remarked on the ‘perpetual brawls’ at law in

which his class habitually engaged.⁷⁶ Among ‘the litigious classes’ themselves, partiality seems to have been taken for granted, even in the senior courts where parties thought ‘interest’ essential to successful litigation.⁷⁷ Into the nineteenth century, advocates came predominantly from the same classes they represented and regarded themselves as almost an estate of gentlemen lawyers, culturally and socially removed from the middling and lower ranks of society.⁷⁸

By 1700 in Ireland too, formal processes of law seem to have been used by a particular class in society, but this time it was primarily merchants and the landowning Protestant minority.⁷⁹ In England, by contrast, 70% of litigants who used the services of the lower branch of the legal profession came from the middling ranks of society and below.⁸⁰ The composition of litigants in a highly stratified society, along with the nature of litigation, may help to explain the much higher proportion of formal lawyers accounted for by members of the bar in Scotland (and Ireland) compared with England and Wales.⁸¹ In the early seventeenth century advocates actually outnumbered WS, who did not become a majority of formal lawyers until the end of the eighteenth century. Scotland looks much more like Ireland than England and Wales, when it comes to the numerical significance of the bar. Other than at their inception, the most rapid increase in the number of advocates took place during the century after c.1580, that of WS from c.1790-1840. This may be because a wider social range came to use the processes of law during the later period, in contexts where a practitioner from the lower branch of the legal profession could act. The late eighteenth and early nineteenth century was a period of urbanization, industrialization, and agrarian change, which transformed Scotland’s economy and society much more rapidly and decisively than that of England. To the extent of encompassing the increasingly prosperous commercial and professional as well as the traditional landed classes, access to the formal processes of law may have become more socially inclusive in Scotland, at a time when it was becoming less so in England.⁸² A similar, if less pronounced late eighteenth- and early nineteenth-century surge in the number of lawyers occurred in Ireland.

For their part, some sixteenth- and seventeenth-century Scottish communities seem to have regarded the intervention of non-local professional lawyers as potentially disruptive of local power structures and decision-making processes, and therefore sought to limit their involvement as procurators. For example, the burgh of Peebles ordered in July 1555 that ‘na

nychtbouris of the toun solist [solicit] nor caus men of law to cum to procure [represent] ane aganes ane uther in tyme cuming for quhatsumeuery actioun, except it be on brevis [brieves or writs] raisit of heritage [land descended by succession] alanerlie under the pane of forfalting of thair fredome [of the burgh] for evir'.⁸³ Some other burghs like Lanark had similar regulations, excluding anyone who was not a freeman of the burgh from representing themselves or another inhabitant before the burgh court.⁸⁴ Early modern Scotland seems to have belonged to one family of European legal cultures, which was sceptical about the value of professionalizing certain aspects of the civil law until quite late on.⁸⁵ Into the sixteenth century many procurators who appeared alongside a litigant did so only once, suggesting they were selected for their personal familiarity and persuasiveness, rather than for any professional qualifications.⁸⁶ Practitioners like these expressed 'the living legal sense of the people' rather than some consistent version of law.⁸⁷ Scots law was based on more or less easily comprehensible principles, and did not require the same knowledge of cases and the minutiae of procedure as did English common law. Until quite late – perhaps even the early seventeenth century – formally trained lawyers did not monopolise providing legal advice or representation in Scotland's lower courts; any educated and eloquent person could do so. In 1590, for example, John Broune, burgess of Lanark, made Mr Robert Lindsay, the burgh's minister, 'his procuratour in all actiounis pertaining to him other [either] to persew [prosecute] or defend'.⁸⁸ The same might happen before the early seventeenth century High Court of Justiciary, the highest criminal court in Scotland.⁸⁹ Even women can be found arguing their own cases before town courts of the fifteenth century and occasionally acting as procurators for others.⁹⁰ Few Scottish courts obliged litigants to use a procurator and self-represented or 'party' litigants remained common until the second half of the sixteenth century.⁹¹ By the middle of the seventeenth century it is likely that legal matters were largely handled by legal professionals of one kind or another, at least in the senior courts, but this development came about only slowly.⁹² As late as the 1750s William Blackstone could single out 'the northern parts of our own island, where ... it is difficult to meet with a person [gentleman] of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights, and the rule of his civil conduct'.⁹³

There is also evidence that men and women in Scotland preferred to avoid judicial process altogether. They turned instead to ‘embedded forums’ for conflict resolution, using mechanisms that were part of the social setting which created the dispute.⁹⁴ There was a legally plural infrastructure that helped reduce recourse to litigation, by resorting instead to arbitration, mediation, and negotiation.⁹⁵ These mechanisms may have been particularly important in some regions such as the Highlands and Islands, which in 1600 provided hardly any of the 2200 processes before the Lords of Council and Session.⁹⁶ Landowners were important in resolving disputes between their dependants in this part of Scotland and indeed more widely in rural society, as the English visitor of 1580 observed. Notaries too engaged in preventing and settling conflict.⁹⁷

Embedded forums emphasised reconciliation. Though not necessarily at the expense either of formal legal process or the involvement of a legal practitioner, alternative means and a different emphasis on the ends of dispute resolution rendered it less likely. All these processes were, of course, imbricated in English society, but (while hard to measure) perhaps not to the extent that they were in the societies of Scotland, Ireland, and perhaps Wales.⁹⁸ Post-Reformation Scots law was much more pervasively influenced by the law of the medieval church than was English common law, even if all lawyers in Scotland were formally laymen from the 1560s. The universal church had preached the need for love and reconciliation, and the desirability of avoiding litigation, on both moral and prudential grounds.⁹⁹ For their part, secular courts of the late Middle Ages sought to defer judgements, in the hope that the parties would achieve an resolution by themselves ‘freindfullie’ (amicably).¹⁰⁰ The post-Reformation Scottish Kirk did likewise, insisting that those taking communion be in charity with their neighbours. It also emphasised the rule of law and proper judicial procedure over feuding and informal process. The Kirk promoted the idea that justice should come from an impersonal body (a secular or religious court) informed by a standard principle (sin and its avoidance) rather than from the manipulation of society through the workings of personal bonds. During the late sixteenth and seventeenth century Presbyters worked to supersede kinship, coerce community, and enforce neighbourly harmony, gradually acquiring legitimacy and providing those in conflict with an alternative to baronial or even royal courts.¹⁰¹ The Kirk’s courts (Kirk Sessions, Presbyteries, Synods, and General Assembly) could adjudicate, but they preferred repentance and reconciliation, as

had those of their predecessor church (the courts of the official and commissary). They could act to resolve disputes before former recourse to law became necessary and, through preaching and pastoral efforts, actively prevent conflict.

Thus the seventeenth-century Kirk helped to ‘legalise’ or ‘juridify’ Scottish society as much as did the professionalization of law around the College of Justice (later the Court of Session) in the sixteenth century, familiarising people with courts and with forms of law as a way of ordering their lives. Yet it did not do so to such an extent that Scottish society needed as many lawyers as English. Before its own tribunals, for example, it forbade proxies and insisted on personal appearance by the accused unless s/he was ill.¹⁰² One might then hypothesise that the diminishing ability of the Kirk to enforce attendance and judgements on both willing and unwilling subjects alike, which occurred over the course of the eighteenth century, was one reason behind the growing number of legal practitioners in Scotland from the century’s end. Similarly, rapid agrarian change deracinated many rural dwellers from the embedded forums of lord, village, and Kirk, which they had previously used to prevent or resolve disputes. Just 3% of Scots lived in large towns in 1650, compared with 30% in 1841.

The Kirk’s position on proxies offers an interesting contrast with representation in criminal cases before the royal courts. Indeed the limited use of formal lawyers for many civil matters needs to be set alongside the much greater role played by counsel in criminal trials in Scotland from the sixteenth century onwards. In England representation in ordinary trials only dates from the 1730s and counsel was not normal for defendants until a century later.¹⁰³ This suggests that lawyers were used for different purposes in Scotland and England. Because they spent more time defending those accused of crimes than their English counterparts, it would appear that the use of legal professionals in a wide range of civil matters was even less extensive north of the Border than the simple ratios given earlier would indicate.¹⁰⁴

One final explanation for the disparity in ratios is that Scotland was not an especially professionalized society at any level. With only 1000 parishes, post-Reformation Scotland had many fewer clergy per head of population than England, which had nearly 10000 parishes (Scotland’s population was roughly a fifth that of England during early modern times). Despite the rapid growth of university medical education in the eighteenth century,

Scottish society was slow to medicalise. This lack of vocational specialisation may have been especially true of the economically underdeveloped Highlands and Islands where, as late as the mid-nineteenth century, resident medical men were thin on the ground.¹⁰⁵ In the early nineteenth century it was difficult to find men sufficiently qualified to serve as sheriffs substitute (judges) on the Isles of Lewis and Skye.¹⁰⁶ The professionalization of the law itself happened centuries later than in England; starting in the mid-fifteenth century, it was not complete until the seventeenth. The legal profession may have restricted the supply of lawyers. After all (as Nicholas Phillipson implies), the Faculty and Society were bodies similar to early modern guilds or incorporations: cartels that existed to protect their members' interests.¹⁰⁷ Judges restricted the number of advocates allowed to plead before the College of Justice. At its foundation in 1532 they permitted just ten, though this limit was soon surpassed (probably by the 1550s) and the formal bar was raised to 50 in 1590; even this maximum was again quickly exceeded thanks to the professionalization of pleading and the growing volume of litigation.¹⁰⁸ Indeed Phillipson (following Simpson) only feels able to call the early modern advocates a 'professional corporation' rather than a true profession, because the Faculty's exact legal status was unclear, its right to exist as an autonomous body merely prescriptive.¹⁰⁹

These findings reinforce some other indicators that the place of law in the component societies of the British Isles was significantly different. This is especially true of the extent of 'popular legalism', the socially diverse knowledge of jurisprudence and judicial procedure.¹¹⁰ A published study of peasant petitions in different parts of Britain and Ireland between 1600 and 1850 has shown that English petitioners readily invoked the language of the law, reflecting a propensity to know and use its mechanisms to resolve disputes.¹¹¹ On the Cumberland estate I studied the most striking feature of the petitions is their rule-based and contractual language, mediated by a culture of law that gave legal terms real substance. Words like 'right', 'wrong', 'justice', 'equity', and 'law', along with a host of technical legal terms, pepper the north-western English petitions, expressing a different basis for claims than simple favour or discretion.¹¹² For example, petitioners protested against encroachments and other alleged abuses 'contrarie to all right and equitie' and they insisted on the need to 'be righted'.¹¹³ Two men asked the Earl of Northumberland's steward to let them off an onerous guardianship for 'Justice Equitie and good conscience'.¹¹⁴ Aware and

assertive of their legal rights, Cumberland tenants also knew where they sat in a hierarchy of lordship; they used both the language of law and the leeway within lordship confidently and skilfully. They employed the institutions of law and lordship, particularly the manor courts, to further their interests. When resorting to litigation in other courts such as those of the church, English people more generally were active in instructing their proctors and creative when giving testimony.¹¹⁵

The bulk of these Cumberland petitions come from the period of the great English litigation explosion and after. The other two series I studied are from later in time. The language of law also permeates Ulster petitions in the late-eighteenth and early-nineteenth century, both the threat and use of litigation a constant currency. Yet these northern Irish petitions have a legalistic element that sits uneasily with the selective, opportunist, even cavalier approach that some inhabitants had towards law and its enforcement.¹¹⁶ We do not have to accept the colonialist judgement of John Revans, Secretary of the Poor Law Commission in Ireland during the 1830s, when he observed that ‘the population has no sense of public justice. In Ireland almost all justice is extra-legal’, because the native (Catholic) Irish agreed.¹¹⁷ Two centuries earlier, in 1615, Sir John Davies, an English barrister knowledgeable about Ireland, wrote of preferences there while promoting rational legal (common law) forms and processes as a way of civilizing the native Irish and revivifying the old English.¹¹⁸ Others, like his contemporary Edmund Spenser, went further to argue that the Irish were impervious to the benign effects of English law because of the way their society, morality, and mentality worked.¹¹⁹ Eighteenth and early nineteenth century petitioners from the north of Ireland knew and used the law, but they had a keen sense of para-, infra-, or quasi-judicial forms – and of opportunities to achieve their ends by entirely extra-legal means. This use of the law may have been particularly related to Ulster and perhaps to Protestantism because local courts persisted longer in the north of Ireland and most Catholic Irish seem to have been enduringly diffident about cooperating with English legal institutions.¹²⁰ The practice of courts too was different from what was normal in England in the eighteenth and early nineteenth century; informal, irregular, and at times inchoate, it was indicative of ‘an essentially different legal culture’.¹²¹

In contrast, petitions from the Breadalbane estate in Perthshire (on Scotland’s Highland margin) in the second half of the eighteenth century deployed legal language and

the law sparingly. They carefully avoided references to specific legalities in favour of appeals to broader notions of morality and equity. Words like ‘right’ and ‘wrong’, which were bread and butter to Cumberland petitioners, are all but absent from Breadalbane, where petitions appealed overwhelmingly to the lord’s grace. Supplicants appealed to the lord’s sense of justice rather than that of a court of law, statute, or legal text. Breadalbane supplicants mentioned the law either because another person had resorted to it or because the petitioner complained about someone other than the earls of Breadalbane or their officials acting ‘contrary to all law and equity’.¹²² They thought it better to profess reluctance to use the courts, rather than to threaten litigation, and indeed actively condemned others who used formal process of law rather than the resources of neighbourhood and estate.¹²³

All this reflects the different place of law in the constituent parts of what became Britain and Ireland. With its Romano-canonical procedures, legal processes in Scotland worked differently from England. South of the Border there was a greater role for laypersons as jurors, JPs, and prosecutors in judicial proceedings, which were generally open to the public and largely conducted by oral vernacular argument and witness testimony, rather than via representatives who presented written documents within an inquisitorial framework.¹²⁴ Early modern English criminal prosecutions were largely driven by victims until the police took over responsibility in the nineteenth century, whereas Scotland, from no later than the sixteenth century, had legal professionals such as ‘procurators fiscal’, who conducted prosecutions in the public interest. While procedurally rigid and technically complex, law in England was, in a sense, more informal and participative, allowing people to gain a greater familiarity with it.¹²⁵ For ordinary people, participation in Scotland occurred at a lower level than in England. Kirk Sessions operated at parish level and were much closer to day to day life than were the courts of English archdeacons. Along with estate-based bodies such as baron and ‘birlaw’ courts, they exemplify embedded forums which allowed laymen a measure of participation in decision making and law enforcement, without putting them into contact with much substantive law or many formal lawyers.¹²⁶ Such courts were broadly concerned with maintaining ‘good neighbourhood’ in day-to-day economic and social life. In Ireland too formal participation in legal processes was socially restricted and, for ordinary people, pushed down to the everyday level of local courts.¹²⁷

Many pieces of evidence other than the disparate ratios of legal practitioners per head of population point towards differences in the place of law within the cultures and societies of different parts of Britain and Ireland. Law texts were, for example, part of English national identity.¹²⁸ The same was not true of Scotland, Wales, and Ireland. Scots did appeal to ‘old laws’, but in order to validate their quality rather than describe their antiquity. While the English generally assumed the long-term continuity and insularity of the common law, Scottish jurists of the sixteenth and seventeenth century, such as Thomas Craig, recognized and sought to explain their law’s compound origin and contingent development as part of a family of European law.¹²⁹ The tension between deeply rooted native brehon law (drawing on Celtic, Norse, Roman, and canon law traditions) and imported English common law remained a motif in Irish social and political relationships for centuries. Early results from an analysis of Scottish ballads, broadsheets, and chapbooks strongly suggests that legal or legalised discourses played a much more limited role than in English popular literature. I began this project because I had become convinced that the extent to which the law permeated wider culture cannot be answered solely by analysing legal sources or even those which are specific to formal legal situations.¹³⁰ I had become wary about the nature, or even the existence of what English medievalist Paul Hyams has called a ‘shared national legal culture’.¹³¹ Only by systematically exploring the spatial dimensions of legal culture will we be able accurately to gauge the nature and extent of a shared legal culture, and the permeation of law within society. My sense is that, when complete, my project will reinforce the findings of this article: that legal cultures differed greatly according to the historic ‘nation’ to which the component peoples of the British Isles belonged, and probably also to different time periods.

ENDNOTES

* Professor of Modern History, School of History, University of St Andrews, St Katharine's Lodge, The Scores, St Andrews, KY16 9BA, United Kingdom. rah@st-andrews.ac.uk. I am grateful to Toby Barnard, Alan Cromartie, John Finlay, John Harrison, Michael Lobban, Wilf Prest, and David Sugarman for their helpful comments on an earlier draft of this piece, which grew out of a short paper at a conference in the University of Durham on 19 March 2016, celebrating the life and work of Chris Brooks.

¹ C. W. Brooks, *Lawyers, litigation and English society since 1450*, London 1998, p. 21, 130, 182-5, shows 1 attorney for every 20000 in 1560, 1:4000 in 1606, 1:2500 in 1640, and 1:1500 in 1732. In addition there were perhaps 100 barristers in 1480 and 450 in 1640. Brooks drew on his earlier book *Pettyfoggers and vipers of the commonwealth. The 'lower branch' of the legal profession in early modern England*, Cambridge 1986, p. 112-14, 264. W. Prest, *Lawyers*, in: The professions in early modern England, ed. W. Prest, London 1987, p. 64-89.

² W. R. Prest, *The rise of the barristers: a social history of the English bar, 1590-1640*, Oxford 1991, p. 7. Prest summarises what the 'upper branch' of the legal profession did on p. 12-20. D. Lemmings, *Gentlemen and barristers: the Inns of Court and the English Bar, 1680-1730*, Oxford 1990, p. 123-4, estimates a minimum of 424 counsel in 1680 and 338 in 1720, though his figures exclude those who practised solely as chamber counsel. Growing opportunities in this latter area, thanks to commercial expansion, may attenuate the apparent decline in barrister numbers, which continued until the late eighteenth century. D. Lemmings, *Professors of the law: barristers and English legal culture in the eighteenth century*, Oxford 2000, p. 37-43. Chamber practice was also possible in Scotland – and increasingly important for advocates from the mid-eighteenth century onwards. J. H. Begg, *A treatise on the law of Scotland relating to law agents*, Edinburgh 1873, p. 13. J. Finlay, *Legal practice in eighteenth-century Scotland*, (Leiden 2015, p. 2, 59-61. In Ireland too there was a shadowy group of Catholics who practised as chamber counsel throughout the eighteenth century. I owe this information to Toby Barnard.

³ P. Aylett, *A profession in the marketplace: the distribution of attorneys in England and Wales, 1730-1800*, Law & History Review, 5, 1 (1987), p. 2, 5, 15, 28-9. Aylett's figures are higher than those given by Brooks, *Lawyers* (*supra*, n.1), p. 184. See also G. Holmes, *Augustan England. Professions, state and society, 1680-1730*, London 1982, p. 5-6, 115-65.

⁴ D. Hogan, *The legal profession in Ireland 1789-1922*, Dublin 1986, p. 1-28. T. C. Barnard, *Lawyers and the law in later seventeenth-century Ireland*, Irish Historical Studies, 28, 111 (1993), p. 256-82. *Brehons, serjeants and attorneys: studies in the history of the Irish legal profession*, eds D. Hogan and W. N. Osborough, Dublin 1990. C. Kelly, *King's Inns and the kingdom of Ireland: the Irish 'inn of court', 1541-1800*, Dublin 1992. P. J. Corfield, *Power and the professions in Britain, 1700-1850*, London 1995, p. 30, gives a figure of nearly 1400 from the Dublin directory of 1784, which may include clerks and scriveners. Corfield's table on p. 91, comparing barristers and attorneys in Britain and Ireland, contains many blanks and estimates; even the 1851 figures do not seem to accord with those given by her on p. 32. Irish population estimates can be found in C. O'Grada, *The population of Ireland 1700-1900: a survey*, Annales de Démographie Historique, (1979), p. 283.

⁵ R. B. McDowell, *Ireland in 1800*, in: A new history of Ireland. Vol. IV, Eighteenth century Ireland, 1691-1800, eds T. W. Moody and W. E. Vaughan, Oxford 1986, p. 707-8.

⁶ McDowell, *Ireland in 1800* (*supra*, n. 5), p. 708-9. T. C. Barnard, *Local courts in seventeenth-and eighteenth-century Ireland*, in: The laws and other legalities of Ireland, 1689-1850, eds M. Brown and S. P. Donlan, Farnham 2011, p. 33-45.

⁷ B. P. Levack, *The civil lawyers in England, 1603-1641: a political study*, (Oxford 1973. C. I. A. Ritchie, *The ecclesiastical courts of York*, Arbroath 1956, p. 52-64. R. B. Outhwaite, *The rise and fall of the English ecclesiastical courts, 1500-1860*, Cambridge 2006, p. 1, notes an estimate of more than 250 church courts in the early seventeenth century and a parliamentary report of 1832 that claimed as many as 372. H. L. MacQueen, *Common law and feudal society in medieval Scotland*, Edinburgh 1993, p. 76, notes that the Scottish term procurator originated in canon law.

⁸ B. P. Levack, *The English civilians, 1500-1700*, in: Lawyers in early modern Europe and America, ed. W. R. Prest, London 1981, p. 108-28. Prest, *Lawyers* (*supra*, n. 1), p. 66, 76. Outhwaite, *English ecclesiastical courts* (*supra*, n. 7), p. 54 and n. 65.

⁹ Outhwaite, *English ecclesiastical courts* (*supra*, n. 7), p. 72-3, 97-8.

¹⁰ Holmes, *Augustan England* (*supra*, n. 3), p. 147-8, sees more life in post-Restoration civilians than some allow. P. Polden, *The courts of law*, in: The Oxford history of the laws of England. Volume XI, 1820-1914: English Legal System, eds W. Cornish, J. S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith, Oxford 2010, p. 692-756. Many of the courts only had occasional business and were served by the same lawyers.

¹¹ *A history of the Society of Writers to Her Majesty's Signet with a list of the members of the society from 1594 to 1890 with an abstract of the minutes*, Edinburgh 1890, p. xi- xii, 51; *The Faculty of Advocates in Scotland, 1532– 1943*, ed. F. J. Grant, Edinburgh 1944. Holmes, *Augustan England* (*supra*, n. 3), p. 119-20, 151-4.

¹² *The laws and customs of Scotland in matters criminal by Sir George Mackenzie*, ed. O. F. Robinson, Edinburgh 2012, p. xxii, 333-6.

¹³ J. H. Baker, *The Oxford history of the laws of England. Vol. 6, 1483-1558*, Oxford 2003, p. 442-3. N. T. Phillipson, *Lawyers, landowners and the civic leadership of post-Union Scotland*, Juridical Review, new series 21 (1976), p. 104, groups together advocates and WS as bodies 'which could guarantee a minimum level of legal competence' among members.

¹⁴ Finlay, *Legal practice* (*supra*, n. 2), p. 17. N. Wilson, *The Scottish bar: the evolution of the Faculty of Advocates in its historical social setting*, Louisiana Law Review, 28 (1968), p. 236. Where other procurators required a mandate to act as an agent, advocates did so by virtue of their gowns from 1455 onwards.

¹⁵ Even this figure may be too high because the Faculty roll of 1823 had 374 names, of whom only two-thirds may have been practising. A. C. Chitnis, *The Scottish Enlightenment: a social history*, London 1976, p. 77.

¹⁶ J. Finlay, *Lawyers and the early modern state: regulation, exclusion, and numerus clausus*, Canadian Journal of History, 44, 3 (2009), p. 388-9. R. L. Kagan, *Lawsuits and litigants in Castile, 1500-1700*, Chapel Hill 1981, p. 52-77. J. S. Amelang, *Barristers and judges in early modern Barcelona: the rise of a legal elite*, American Historical Review, 89, 5 (1984), p. 1264-

84. Unfortunately he only gives figures for the number of lawyers per 1000 population of towns, rather than provinces or kingdoms as a whole. It is difficult to offer comparisons with the number of lawyers per head of population in mainland Europe, because the profession was much more fragmented than the centralized English model. I wish to thank Professor Amelang for corresponding with me on this topic. As will be shown during the article, Scotland was half-way between these poles because the Faculty of Advocates and Society of Writers to the Signet were both national in scope, as was the licensing of notaries after 1563, but procurators were licensed for specific courts and they did not always join with colleagues in formal groups.

¹⁷ J. S. Shaw, *The management of Scottish society 1707-1764: power, nobles, lawyers, Edinburgh agents and English influences*, Edinburgh 1983, p. 35-6. In the century after the Act of Union had permitted WS to become Lords of Session, only a single member did so. University education in the civil and canon law, claimed by two-thirds of those admitted 1575-1608, made early advocates much more socially exclusive than English barristers, who came from a wide range of backgrounds. R. K. Hannay, *The College of Justice: essays on the institution and development of the Court of Session*, Edinburgh 1933, p. 145. Prest, *Barristers* (*supra*, n. 2), p. 95. Only in the early eighteenth century were English barristers' claims to gentility realised. By that stage the dividing line between attorneys and solicitors had become blurred, as shown by the foundation in 1729 of the 'Society of Gentlemen Practisers in the Courts of Law and Equity' (the forerunner of the Law Society). Holmes, *Augustan England* (*supra*, n. 3), p. 116-20. M. Miles, 'A haven for the privileged': recruitment into the profession of attorney in England, 1709-1792, *Social History*, 11, 2 (1986), p. 197-210.

¹⁸ Finlay, *Legal practice* (*supra*, n. 2), p. 1. Advocates were also exempt from jury service.

¹⁹ John Baker characterizes the Renaissance Inns of Court providing 'a comprehensive professional structure'. J. H. Baker, *The English legal profession, 1450-1550*, in: The legal profession and the common law, ed. J. H. Baker, London 1986, p. 75-8. Other scholars such as Wilf Prest believe that most sixteenth-century barristers actually learned their trade in the same way as attorneys – via apprenticeship, observation of more senior practitioners, and private study of printed and manuscript manuals, reports, and treatises. Prest also questions whether the inns provided any legal training worth mentioning after the mid-seventeenth century civil wars. He sees Sir George Buc's *The Third Vniuersitie of England* (1615) as a description of the London educational experience as a whole, not just the inns. W. Prest, *Legal education of the gentry at the Inns of Court, 1560-1640*, Past & Present, 38 (1967), p. 20-39. The King's Inns in Dublin seem never to have provided any formal legal training until Victorian times. C. Kenny, *Tristram Kennedy and the revival of Irish legal training, 1835-1885*, Blackrock 1996, p. 1-3.

²⁰ Where English judges were chosen from among the top barristers, the Scottish judiciary was a distinct set of crown appointees who were chosen, until the late seventeenth century, from lawyers and non-lawyers alike, including an element of appointment by heritage. Prest, *Barristers* (*supra*, n. 2), p. 265. J. M. Simpson, *The advocates as Scottish trade union pioneers*, in: The Scottish tradition: essays in honour of Ronald Gordon Cant, ed. G. W. S. Barrow, Edinburgh 1974, p. 166. G. Donaldson, *The legal profession in Scottish society in the sixteenth and seventeenth centuries*, Juridical Review, new series 21 (1976), p. 10-11. A. Murdoch, 'The people above': politics and administration in mid-eighteenth-century Scotland, Edinburgh 1980, p. 53-62. J. Finlay, *James Henryson and the origins of the office of King's Advocate in Scotland*, Scottish Historical Review, 79, 1, no. 207 (2000), p. 17-38.

²¹ S. D. Girvin, *Nineteenth-century reforms in Scottish legal education: the universities and the bar*, *Journal of Legal History*, 14, 2 (1993), p. 127-8. D. Lemmings, *Blackstone and law reform by education: preparation for the bar and lawyerly culture in eighteenth century England*, *Law & History Review*, 16, 2 (1998), p. 211-55. V. T. H. Delany, *Legal studies in Trinity College, Dublin, since the foundation*, *Hermathena*, 89 (1957), p. 3-16. Some of those who became lawyers in Scotland during the sixteenth and seventeenth centuries had arts degrees, though in contrast with the continent there was no formal requirement of a degree, for those wishing to plead before superior courts. J. Finlay, *Men of law in pre-Reformation Scotland*, East Linton 2000, p. 54. A 1565 tax schedule for Edinburgh lists 26 'men of law and scribes', 16 of whom had the addition 'Mr' for magister artium. M. Lynch, *Edinburgh and the Reformation*, Edinburgh 1981, p. 377. Nearly all the advocates practising before the Lords of Council and Session in the calendar year 1600 had this addition. W. K. Coutts, *The business of the College of Justice in 1600*, Edinburgh 2003, p. 7.

²² Hannay, *College of Justice* (*supra*, n. 17), p. 146-7. Two-fifths of those admitted to the Faculty of Advocates between 1661 and 1750 had studied in the Netherlands. R. Feenstra, *Scottish-Dutch legal relations in the seventeenth and eighteenth centuries*, in: *Scotland and Europe 1200-1850*, Edinburgh 1986, p. 133.

²³ *Protocol book of John Foular 1528-1534*, ed. J. Durkan, Edinburgh 1985, p. ix. *Oxford Dictionary of National Biography*. For a much earlier example of a lay notary see W. W. Scott, *William Cranston, notary public, c 1395-1425, and some contemporaries*, in: *Miscellany VII* by Various Authors, Edinburgh 2015, p. 125-32. C. R. Cheney, *Notaries public in England in the thirteenth and fourteenth centuries*, Oxford 1972, p. 33-4.

²⁴ *Acts of the Parliaments of Scotland*, 1563 c. 16, 17. The requirement was facility in Latin and experience of working under a practising lawyer.

²⁵ C. Lowther, R. Fallow and P. Mauson, *Our journall into Scotland, anno domini 1629, 5th of November from Lowther*, Edinburgh 1894, p. 32. Hannay, *College of Justice* (*supra*, n. 17), p. 36, 140. J. A. Henderson, *History of the Society of Advocates in Aberdeen*, Aberdeen 1912, p. 53-4. M. H. B. Sanderson, *Mary Stewart's people: life in Mary Stewart's Scotland*, Edinburgh 1987, p. 25.

²⁶ J. W. Cairns, *Advocates' hats, Roman law and admission to the Scots bar, 1580-1812*, *Journal of Legal History*, 20, 2 (1999), p. 24-61.

²⁷ See, for example, Hogan, *Legal profession in Ireland* (*supra*, n. 4), p. 158-64. The same is true of most continental studies of this topic. See, for example, Kagan, *Lawsuits* (*supra*, n. 16), p. 57, 63-4, 216-17.

²⁸ Finlay, *Lawyers and the early modern state* (*supra*, n. 16), p. 387. Phillipson, *Civic leadership* (*supra*, n. 13); *The social structure of the Faculty of Advocates in Scotland, 1661-1840*, in: *Law-making and Law-makers in British History*, ed. A. Harding, London 1980, p. 145-56. There is a similar issue with judging who actually practised among the English (and Irish) barristers who were called, the proportion not remaining constant over time. Holmes, *Augustan England* (*supra*, n. 3), p. 136-8. Prest, *Lawyers* (*supra*, n. 1), p. 75-6. Lemmings, *Professors of the law* (*supra*, n. 2), p. 62-70. Those troubled by the imprecision of early modern estimates might care to note the broad parameters of the Victorian profession: between 450 and 1010 practising barristers in 1835, and 660-1450 in 1885. P. Polden, *The legal professions*, in: *The Oxford history of the laws of England. Volume XI, 1820-1914*:

English Legal System, eds W. Cornish, J. S. Anderson, R. Cocks, M. Lobban, P. Polden, and K. Smith, Oxford 2010, p. 1018. Practising certificates for solicitors allow more precision about numbers, which grew from more than 5000 c.1800 to more than 9000 c.1830. *Ibid.*, p. 1113-14.

²⁹ *A journal of the Session. Containing the decisions of the Lords of Council and Session, in the most important cases, heard and determin'd from February 1705, till November 1713: and the acts of sederunt made in that time. With a preface, containing an historical account of the Session, and the form of proceeding therein; ... Observed and compiled by William Forbes advocate, ..., Edinburgh 1714*, p. vii.

³⁰ Coutts, *College of Justice in 1600* (*supra*, n. 21), p. 5-6. Some of those with few appearances in civil cases or who made none at all may have been doing criminal work or practising in chambers. Sanderson, *Mary Stewart's people* (*supra*, n. 25), p. 22-32, gives a vivid portrait of the life and work of John Shairp of Houston, an active advocate and landowner who died in 1607. Shairp appeared before the Session 242 times in 1600 alone. Coutts, *College of Justice in 1600* (*supra*, n. 21), p. 6, 11.

³¹ [E. Topham], *Letters from Edinburgh; written in the years 1774 and 1775: containing some observations on the diversions, customs, manners, and laws, of the Scotch nation, during a six months residence in Edinburgh*, London 1776, p. 121.

³² I owe these figures to Professor Richard Rodger of the University of Edinburgh. He confirms that, based on tests for doctors and clergymen, where it is clear that the occupational listing is fewer in number than actually live in the city (as given either in the census, or in the registers for both professions and in the directories) then the logical conclusion is that the smaller number excludes those who have retired and/or are not practising.

³³ Even members of the power branch such as Scottish procurators may have struggled to make a living. National Records of Scotland GD113/4/210.

³⁴ R. A. Houston, *Mortality in early modern Scotland: the life expectancy of advocates*, Continuity and Change, 7, 1 (1992), p. 47-69; *Writers to the Signet: estimates of adult mortality in Scotland from the sixteenth to the nineteenth century*, Social History of Medicine, 8, 1 (1995), p. 37-53.

³⁵ Volumes of civil litigation before the Court of Session again rose after 1760, nearly doubling between then and 1830. Phillipson, *Social structure* (*supra*, n. 28), p. 147-8. Finlay, *Lawyers and the early modern state* (*supra*, n. 16), p. 404, 408.

³⁶ Mean age at entry to the Faculty was 27 years during the sixteenth and seventeenth century, falling to 23 in the second half of the eighteenth century. Houston, *Mortality* (*supra*, n. 34), p. 50. Elizabethan and early Stuart barristers were about 19 when they entered an inn of court and 28 when they were called to the bar. R. A. Houston and W. R. Prest, 'To die in the term': the mortality of English barristers, 1560-1640, *Journal of Interdisciplinary History*, 26, 2 (1995), p. 237.

³⁷ Finlay, *Legal practice* (*supra*, n. 2), p. 372.

³⁸ MacQueen, *Common law* (*supra*, n. 7), p. 75-82. 'The Man of Law's Tale' is the fifth of Geoffrey Chaucer's late fourteenth-century *Canterbury tales*, but the descriptive phrase 'man of law' rarely appears in English legal records thereafter. E. W. Ives, *The common*

lawyers, in: *Profession, vocation, and culture in later medieval England essays dedicated to the memory of A.R. Myers*, Liverpool 1982, p. 95. It is common in Scottish records of the sixteenth and seventeenth century. See for example National Records of Scotland GD38/1/288. GD103/1/75. GD112/39/31/1. GD112/39/40/21. GD124/15/586/1. In all of these the description applies to advocates.

³⁹ Finlay, *Men of Law* (*supra*, n. 21), p. 3. S. Ollivant, *The court of the official in pre-Reformation Scotland*, Edinburgh 1982, p. 57-62. MacQueen, *Common law* (*supra*, n. 7), p. 76, finds that forespeakers or prelocutors spoke for a client when he was there, procurators or advocates when he was absent.

⁴⁰ Begg, *Law agents* (*supra*, n. 2), p. 13-21. D. Murray, *Legal practice in Ayr and the west of Scotland in the fifteenth and sixteenth centuries: a study in economic history*, Glasgow 1910. *Acts of the lords of council in civil causes*, vol. 2, eds G. Neilson and H. Paton, Edinburgh 1918), p. xlvi-xlix. J. S. Muirhead, *The old minute book of the faculty of procurators in Glasgow, 1668-1758*, Glasgow 1948. R. D. Carswell, *The origins of the legal profession in Scotland*, American Journal of Legal History, 11, 1 (1967), p. 41-56. J. Durkan, *The early Scottish notary*, in: *The Renaissance and Reformation in Scotland*, eds I. B. Cowan and D. Shaw, Edinburgh 1983, p. 22-40. Aberdeen and Perth lawyers also joined the merchant guild, unlike those in Edinburgh. Conversely, Stirling's Fraternity of Writers had members who were not lawyers. Finlay, *Legal practice* (*supra*, n. 2), p. 260-6. *The Perth Kirk Session books, 1577-1590*, ed. M. Todd, Woodbridge 2008, p. 18n. The Aberdeen procurators called themselves 'advocates', but theirs was a society of solicitors that also included notaries and writers, not one of advocates proper.

⁴¹ *Records of the Sheriff Court of Aberdeenshire*, 3 vols, ed. D. Littlejohn, Aberdeen 1904-7, vol. 2, p. 338.

⁴² Finlay, *Legal practice* (*supra*, n. 2), p. 17-22, 226-8. A. E. Whetstone, *The reform of the Scottish sheriffdoms in the eighteenth and early nineteenth centuries*, Albion, 9, 1 (1977), p. 61-71. There were in addition 22 Commissary Courts, but it is likely that there was considerable overlap between procurators in these and the Sheriff Courts.

⁴³ M. Lynch and H. M. Dingwall, *Elite society in town and country*, in: *Aberdeen before 1800: a new history*, eds E. P. Dennison, D. Ditchburn and M. Lynch, East Linton 2002, p. 193.

⁴⁴ *Local law societies*, Journal of the Law Society of Scotland, 14 (1969), p. 295. In 1823 all inferior Commissary Courts were abolished and their business transferred to the Sheriff Courts.

⁴⁵ *Protocol book of John Foular, 9th March 1500-1 to 18th September 1503*, ed. M. Wood, Edinburgh 1930, p. viii, xix-xx. *Protocol book of James Young 1485-1515*, ed. G. Donaldson, Edinburgh 1952, p. viii-x. *Protocol book of John Foular* (*supra*, n. 23), p. x. *Selkirk protocol books, 1511-1547: the protocol books of John Chepman, 1511-36 and 1545-47, Sir John Chepman, 1536-43, John and Ninian Brydin and other notaries, 1526-36, and John Brydin, 1530-37*, eds T. Maley and W. Elliot, Edinburgh 1993, p. xiv-xx. *The St Andrews portion of the protocol book of William Gray, 1553-59*, ed. R. Smart, Edinburgh 2015, p. ix. *An introductory survey of the sources and literature of Scots laws*, Edinburgh 1936, p. 290-300. *An introduction to Scottish legal history*, ed. G. C. H. Paton, Edinburgh 1958, p. 23. *The Practicks of Sir James Balfour of Pittendreich, reproduced from the printed edition of 1754*, ed. P. G. B. McNeill, Edinburgh 1962-3, p. 297-300, 367-72.

⁴⁶ These are only those in the ‘NP’ series: others can be found in burgh records since many notaries were also burgh clerks. The burgh of Perth alone has 21 surviving protocol books covering 1544-1682. National Records of Scotland B59/1/1-21.

⁴⁷ For late medieval examples see *John Lydford's book*, ed. D. M. Owen, London 1974, and R. N. Swanson, *A Canon Lawyer's Compilation from Fifteenth-Century Yorkshire*, Journal of Ecclesiastical History, 63, 2 (2012), p. 260-73.

⁴⁸ Begg, *Law agents* (*supra*, n. 2), p. 10-12. Finlay, *Lawyers and the early modern state* (*supra*, n. 16), p. 404-5. J. Finlay, *Pettyfoggers, regulation, and local courts in early modern Scotland*, Scottish Historical Review, 87, 1 (2008), p. 42-67. A number of sixteenth-century Scots procurators were also notaries and the roles were not always distinct: see, for example, Finlay, *Men of Law* (*supra*, n. 21), p. 52, 215. For an example of a man who called himself ‘publict noter and ordiner procuratour’ in 1611 see *Extracts from the Records of the Burgh of Glasgow, A.D. 1573-1642*, ed. J. D. Marwick, Glasgow 1876, p. 322. The man, James Duncan, was also a publican ‘quha usis change and ostlarie’. For an earlier Edinburgh example of a merchant, notary, and tavern keeper see *Protocol book of John Foular* (*supra*, n. 23), p. viii. The revival of notaries is marked by the publication of *Ars notariatus: or, The art and office of a notary-publick, as the same is practiced in Scotland. : In two parts ... To which is added, by way of conclusion, an advice to notaries, touching the right discharging of their office ...* Edinburgh 1740. It went through six editions between then and 1821.

⁴⁹ Begg, *Law agents* (*supra*, n. 2), p. 47. 36/37 Vict. c. 63, allowed any enrolled law agent to act as a notary. J. C. Murray, *The law of Scotland relating to notaries public*, Edinburgh 1890, p. 16-27.

⁵⁰ W. Bell, *A dictionary and digest of the law of Scotland; with short explanations of the most ordinary English law terms*, Edinburgh 1838, p. 678.

⁵¹ J. Sinclair, *Analysis of the statistical account of Scotland; with a general view of the history of that country, and discussions on some important branches of political economy*, London 1826, p. 216. This may be unfair because, from the later eighteenth century, most apprentice notaries and writers were expected to attend a law class for a year at a Scottish university. I owe this information to Professor John Cairns.

⁵² Lynch, *Edinburgh* (*supra*, n. 21), p. 377. The list has 31 named lawyers, but 5 were deleted. At the end of the following decade the burgh council encompassed the whole ‘profession’ when soliciting contributions to ministers’ stipends from ‘the lordis of sessioun, men of law, and scribes’. *Extracts from the records of the Burgh of Edinburgh. A.D. 1573-1589*, ed. J. D. Marwick, Edinburgh 1882, p. 99. Even quite important fifteenth and sixteenth century towns like Aberdeen had no more than a handful of notaries active at any one time and mid-seventeenth-century Elgin was unusual in having about a dozen. H. W. Booton, *John and Andrew Cadiou: Aberdeen notaries of the fifteenth and sixteenth centuries*, Northern Scotland, 9 (1989), p. 17-20. J. E. Thomas, *Elgin notaries in burgh society and government, 1540-1660*, Northern Scotland, 19 (1999), p. 22-23. ‘A list of the wrytters stents. 1694’ for Glasgow (produced in a 1695 Court of Session case) names 26 individuals, of whom 15 were probably notaries. Most towns allowed legal men exemption from local taxation, but on this instance the burgh council wanted to tax everyone, meaning that the list included all its lawyers, who were members of the Faculty of Procurators; the Faculty won the case. The figure of 15 is not much larger than the 13 Glasgow notaries who presented themselves for

registration following a statute of 1563. Muirhead, *Faculty of procurators in Glasgow* (*supra*, n. 40), p. 18-19, 36, 241. Scott, 'William Cranston', 130-1, suggests there were roughly 50-60 known notaries in Scotland in the early fifteenth century, found mainly in the east central Lowlands. Much later the thinness of provincial legal coverage remains plain. The small town of Annan in Dumfriesshire had just three writers in 1801 and no other legal men (population 2570), just one in 1811 (3341) and four in 1821 (4486); two of the four were not householders, but young men lodging in someone's house. *Annan parish censuses, 1801-1821*, ed. J. Gilchrist, Edinburgh 1975, p. 13, 14, 47, 68, 71, 75, 78.

⁵³ W. Makey, *Edinburgh in the mid-seventeenth century*, in: The early modern town in Scotland, ed. M. Lynch, London 1987, p. 208.

⁵⁴ H. M. Dingwall, *Late seventeenth-century Edinburgh: a demographic study*, Aldershot 1994, p. 216. Dingwall also includes 22 clerks, 5 commissioners (judges), the keeper of the signet, the Secretary of War, 2 senators of the College of Justice (judges), and 3 sheriffs to reach a figure of 349 members of 'the legal profession'. *Ibid.*, p. 133, 219. A collection to relieve indigent fellow practitioners and their dependants, made from members of the Commissary Courts of Glasgow and Hamilton in 1668, showed two commissioners and their two clerks, 25 procurators, 6 messengers, and 15 apprentices and servants. Of the 27 members of the Faculty of Procurators at that date, 20 seem to have been notaries. Muirhead, *Faculty of procurators in Glasgow* (*supra*, n. 40), p. 36, 61-2. Finlay, *Legal practice* (*supra*, n. 2), p. 2, notes that some agents merely claimed legal ability rather than being authorised by any public authority. Known as doers, law agents, men of business, or solicitors, they became increasingly common during the eighteenth century. Appendix 10 of Finlay's book is a vivid description of a writer's chambers in 1816, using character sketches. *Ibid.*, p. 407-10.

⁵⁵ Williamson's directory, for the city of Edinburgh, Canongate, Leith, and suburbs, from the 25th May 1773, to 25th May 1774, Edinburgh 1773.

⁵⁶ A Court of Session decision in 1825 held that being a messenger was incompatible with being a procurator in a Sheriff Court. Bowhill v. Sheriff of Berwick, 2 June 1825, 4 Shaw & Dunlop 61. *An institute of the laws of Scotland in civil rights: with observations upon the agreement or diversity between them and the laws of England. In four books. After the general method of the Viscount of Stair's Institutions. By Andrew McDouall [Lord Bankton]*, 3 vols, Edinburgh 1751-3, IV.IV.11, nevertheless recognised the importance of 'other writers' who prepared the securities and conveyances, which constituted the bulk of business for this branch of the law during the eighteenth century.

⁵⁷ Baker, *Oxford history* (*supra*, n. 13), p. 442-3. Prest, *Lawyers* (*supra*, n. 1), p. 75, takes a more inclusive stance for Elizabethan and early Stuart times.

⁵⁸ Shaw, *Management of Scottish society* (*supra*, n. 17), p. 35-6, equates 'lawyer' with 'advocate' for the 18th century.

⁵⁹ Holmes, *Augustan England* (*supra*, n. 3), p. 157-9. H. Horwitz, *Changes in the Law and Reform of the Legal Order: England (and Wales) 1689-1760*, Parliamentary History, 21, 3 (2002), p. 301-24. Catholic conveyancers undertook fully legal work, even if they could not litigate; they were a world away from copyists or clerks. I owe this point to Michael Lobban. The work of Scottish advocates changed too in the eighteenth century, though more subtly: they came to be less involved in verbal pleading and more in the preparation of documents

for pleading. D. R. Parratt, *The development and use of written pleadings in Scots civil procedure*, Edinburgh 2006, p. 35.

⁶⁰ J. Finlay, *The Community of the College of Justice: Edinburgh and the Court of Session, 1687-1808*, Edinburgh 2013, p. 9-10. This uses his *Admission register of notaries public in Scotland, 1700-1799*, 2 vols, Edinburgh 2012. It may be significant that the figure of 2.3 is similar to Prest's conjecture about the need to more than double the number of 'sworn practitioners' to encompass 'the unofficial fringe' of the law. Prest, *Lawyers (supra, n. 1)*, p. 75.

⁶¹ Finlay, *Admission register of notaries public (supra, n. 60)*, p. 24, notes that only a fifth of eighteenth-century notaries went on to become WS. From 1680 sheriff clerks had to be notaries.

⁶² *The minutes of the justices of the peace for Lanarkshire, 1707-1723*, ed. C. A. Malcolm, Edinburgh 1931, p. 31.

⁶³ Cheney, *Notaries public in England (supra, n. 23)*, p. 52-4. C. W. Brooks, R. H. Helmholz, and P. G. Stein, *Notaries Public in England since the Reformation*, Norwich 1991. While notaries were important in the church courts and Admiralty, English common law did not allow for lay/civil documents authenticated by notaries, whose number was consequently quite small. The City of London (admittedly only part a conurbation of nearly 200,000) had 16 notaries in 1574. For comparison, contemporary Norwich (the second largest city in England with about 15,000 inhabitants) had 18 scriveners and York 25 scriveners (it was the third city, numbering about 12,000). *Ibid.*, p. 15, 77.

⁶⁴ N. Ramsay, *Scriveners and notaries as legal intermediaries in later medieval England*, in: Enterprise and individuals in fifteenth-century England, ed. J. I. Kermode, Stroud 1991, p. 118-31. For a detailed study of one early modern practitioner see K. Wrightson, *Ralph Tailor's summer: a scrivener, his city and the plague*, London 2011. There was a Scriveners' Company in London, membership of which was closely regulated, but there were fewer controls in the provinces and there were no formal qualifications for writing documents such as wills in England and Wales; even women did so. J. Craig, *Margaret Spittlehouse, female scrivener*, Local Population Studies, 46 (1991), p. 54-7. W. R. Prest, 'One Hawkins, A Female Sollicitor': Women Lawyers in Augustan England, Huntington Library Quarterly, 57, 4 (1994), p. 353-8.

⁶⁵ Prest, *Lawyers (supra, n. 1)*, p. 69. Holmes, *Augustan England (supra, n. 3)*, p. 151-4. Barnard, *Lawyers and the law (supra, n. 4)*, p. 259-60, 271-2, makes a similar point about the personnel involved in Irish 'legal services' and the role of 'legal amateurs' c.1700, as does R. McMahon, *Manor courts in the west of Ireland before the Famine*, in: Mysteries and solutions in Irish legal history, ed. D. S. Greer and N. M. Dawson, Dublin 2001, p. 150-2, for early nineteenth century local courts.

⁶⁶ Holmes, *Augustan England (supra, n. 3)*, p. 118-19, 160. Brooks, Helmholz and Stein, *Notaries Public in England (supra, n. 63)*, p. 108. K. L. Bevan, *Clerks and Scriveners: Legal Literacy and Access to Justice in Late Medieval England*, University of Exeter Ph.D., 2013. D. Sugarman, *Simple Images and Complex Realities: English Lawyers and Their Relationship to Business and Politics, 1750-1950*, Law and History Review, 11, 2 (1993), p. 257-301.

⁶⁷ Holmes, *Augustan England (supra, n. 3)*, p. 154.

⁶⁸ Corfield, *Professions (supra, n. 4)*, p. 32, 91.

⁶⁹ Hogan, *Legal profession in Ireland (supra, n. 4)*, p. 8.

⁷⁰ The Welsh seem to have been as litigious as the English in the sixteenth and seventeenth centuries. Prest, *Barristers (supra, n. 2)*, p. 49-53, 95-8. R. Suggett, *A history of magic and witchcraft in Wales*, Stroud 2008, p. 135; *Slander in early modern Wales*, The Bulletin of the Board of Celtic Studies, 39 (1992), p. 119-53. Priorities and practices of law may, however, have been different in Wales from much of England. P. King and R. Ward, *Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery*, Past & Present, 228, 1 (August 2015), p. 159-205.

⁷¹ Simpson, *Advocates (supra, n. 20)*, p. 167. Phillipson, *Social structure (supra, n. 28)*, p. 150. Late fifteenth century legislation envisaged all substantial landowners in Scotland sending their sons to school to learn Latin, and then on to study arts and law at one of the three universities. Shaw, *Management of Scottish society (supra, n. 17)*, p. 29-30.

⁷² W. K. Boyd (ed.), Calendar of the state papers relating to Scotland and Mary, Queen of Scots, 1547-1603, preserved in the Public Record Office, the British Museum and elsewhere vol. 5 (Edinburgh, 1907), no. 638. A. Murdoch, *The advocates, the law and the nation in early modern Scotland*, in: *Lawyers in early modern Europe and America*, ed. W. R. Prest, London 1981, p. 148. D. A. Watt, *Chiefs, lawyers and debt: a study of the relationship between Highland elite and legal profession in Scotland c.1550 to 1700*, University of Edinburgh PhD thesis 1998.

⁷³ Coutts, *College of Justice in 1600 (supra, n. 21)*, p. 55. Some 6% of cases involved clergymen. Dr Coutts does not provide a full occupational breakdown, but has confirmed in a personal communication the predominance of land as the reason for litigation. Sanderson, *Mary Stewart's people (supra, n. 25)*, p. 23-6, provides a feel for the business and clientele of one successful sixteenth-century advocate. Similar socially stratified use of the law can be found on the continent. Even a cheap and accessible local court like Leiden's vredemakers kamer was used primarily by social elites; two-thirds of the population seem to have relied mainly on non-judicial means of dispute resolution. G. Vermeesch, *The social composition of plaintiffs and defendants in the Peacemaker court, Leiden, 1750-1754*, Social History, 40 (2015), p. 208-29. Vermeesch reports other examples of socially restricted court usage in continental Europe, alongside ones which were more inclusive. *Ibid.*, p. 210-15.

⁷⁴ D. Watt, 'The labyrinth of thir difficulties': the influence of debt on the Highland elite c. 1550-1700, Scottish Historical Review, 85, 1, no. 219 (2006), p. 35n. Lowther, Fallow and Mauson, *Our journall into Scotland (supra, n. 25)*, p. 31-2.

⁷⁵ Quoted in Phillipson, *Social structure (supra, n. 28)*, p. 156.

⁷⁶ *Letters of John Ramsay of Ochtertyre, 1799–1812*, ed. B. L. H. Horn, Edinburgh 1966, p. 238. The son of a WS, Ramsay's literary editor claims he became an advocate in 1753 (he cannot then have been any older than 17 years), but he is not listed in among Faculty members and he does not seem to have practised law.

⁷⁷ Phillipson, *Social structure (supra, n. 28)*, p. 154-5. M. Wasser, *Defence counsel in early modern Scotland: a study based on the High Court of Justiciary*, Journal of Legal History, 26 (2005), p. 185-6. Finlay, *Legal practice (supra, n. 2)*, p. 394-401.

⁷⁸ Phillipson, *Social structure* (*supra*, n. 28), p. 148-53. Shaw, *Management of Scottish society* (*supra*, n. 17), p. 35-6, describes the advocate as the equal of his client: 'a form of legal second self'. WS were less socially elevated in origin: more than half in the period 1690-1829 came from professional or lesser landowning families, the former becoming more important over time, the latter less so. T. C. Smout, *A history of the Scottish people, 1560-1830*, London 1970, p. 375. For a similar finding, that the twentieth century Chicago legal profession was structured by the character of its clients, see J. Heinz and E. Laumann, *Chicago lawyers. The social structure of the bar*, Chicago 1994. D. Sugarman, *Bourgeois Collectivism, Professional Power and the Boundaries of the State - The Private and Public Life of the Law Society, 1825 to 1914*, Journal of the Legal Profession, 3, 1-2 (1996), p. 81-136, shows that the solicitor's profession in England and Wales was highly stratified, exhibiting major differences in work, culture, and clientele, between London-based and provincial practitioners.

⁷⁹ Barnard, *Lawyers and the law* (*supra*, n. 4), p. 263-4, 268-70. M. O'Dowd, *Women and the Irish Chancery Court in the late sixteenth and early seventeenth centuries*, Irish Historical Studies, 31, 124 (1999), p. 474-6, finds that the Irish Court of Chancery was used largely by the landed gentry or urban merchants. Local courts were, of course, more socially inclusive, if less legally professionalized. McMahon, *Manor courts* (*supra*, n. 65), p. 153-7.

⁸⁰ Brooks, *Pettyfoggers* (*supra*, n. 1), p. 57-61, 264, 281. C. Muldrew, *Credit and the courts: debt litigation in a seventeenth-century urban community*, Economic History Review, 46, 1 (1993), p. 23-39. Even before Star Chamber, which is usually seen as a gentleman's court, half the litigants were from classes below the gentry. T. G. Barnes, *Star Chamber litigants and their counsel, 1596-1641*, in: Legal records and the historian, ed. J. H. Baker, London 1978, p. 10. Chancery had a similar social profile of litigants, which was quite different from its Irish equivalent. H. Horwitz and P. Polden, *Continuity or change in the Court of Chancery in the seventeenth and eighteenth century?*, Journal of British Studies, 35, 1 (1996), p. 42-53.

⁸¹ In Scotland advocates actually outnumbered WS in the mid-seventeenth century and the branches did not reach parity until c.1800. In 1838 the ratio was about 2:5, the same as in late eighteenth century Ireland. The ratio for early nineteenth century England and Wales was much more skewed towards attorneys. Polden, *The legal professions* (*supra*, n. 28), p. 1114. Some contemporaries remarked on the balance in continental Europe, suggesting that France had a higher ratio of barristers to other lawyers than Spain. Amelang, *Barristers and judges* (*supra*, n. 16), p. 1267.

⁸² W. Prest, *The experience of litigation in eighteenth-century England*, in: The British and their laws in the eighteenth century, ed. D. Lemmings, Woodbridge 2005, p. 133-54. Courts of requests and summary jurisdiction, where parties did not need formal legal representatives, handled a great many civil matters between the mid-eighteenth and mid-nineteenth centuries. H. W. Arthurs, 'Without the law': *the courts of local and special jurisdiction in nineteenth century England*, Journal of Legal History, 5, 3 (1984), p. 130-2, 142. P. King, *The summary courts and social relations in eighteenth-century England*, Past & Present, 183, 1 (2004), p. 126-7.

⁸³ *Charters and documents relating to the Burgh of Peebles, with extracts from the records of the burgh, A.D. 1165-1710*, ed. W. Chambers, Edinburgh 1872, p. 215-16. The town's worthies plainly did not like any outsider having sway in the town or even those on the jury of the burgh court talking about their deliberations. *Ibid.*, p. 293, 297. The legal background

to the 1555 ruling is that since the thirteenth century actions concerning the recovery of land from intruders had to be raised by pleadable brieves. Yet these had fallen into desuetude in the first half of the sixteenth century and the king's council had come to have jurisdiction in fee and heritage, albeit through the newly constituted Session and its professional lawyers. Writers to the signet prepared and signed the writs that succeeded brieves. H. L. MacQueen, *The brieve of right in Scots Law*, *The Journal of Legal History*, 3, 1 (1982), p. 52-70. A. M. Godfrey, *Civil justice in Renaissance Scotland: the origins of a central court*, Leiden 2009, p. 268-312. Balfour's mid-sixteenth century legal compendium explicitly states that litigants may use a procurator, in actions of heritage. *The Practicks of Sir James Balfour* (*supra*, n. 45), p. 297.

⁸⁴ *Extracts from the records of the Royal Burgh of Lanark, with charters and documents relating to the burgh, A.D. 1150-1722*, ed. R. Renwick, Glasgow 1893, p. 57. The rural barony of Glenluce in Wigtownshire had a similar regulation. National Records of Scotland RH11/33/2, f. 1.

⁸⁵ P. Letto-Vanamo, *On the history of assistance in conflict resolution in Finland: the emergence of the profession of advocate in the 17th century*, *Scandinavian Journal of History*, 19, 3 (1994), p. 193-200. G. R. Rutgers, *Verplichte Procesvertegenwoordiging - Een Onderzoek Naar de Verplichte Procesvertegenwoordiging in Het Burgerlijk Geding, in Nederland in de Periode 1795-1838*, *Legal History Review*, 47, 2 (1979), p. 129-63. G. Vermeesch, *Reflections on the relative accessibility of law courts in early modern Europe*, *Crime, Histoire et Sociétés*, 19, 2 (2015), p. 53-76.

⁸⁶ Begg, *Law agents* (*supra*, n. 2), p. 4-5. Donaldson, *Legal profession* (*supra*, n. 20), p. 1-4.

⁸⁷ M. T. Clanchy, *Remembering the past and the Good Old Law*, *History*, 55 (1970), p. 172.

⁸⁸ *Extracts from the records of the Royal Burgh of Lanark* (*supra*, n. 84), p. 98. MacQueen, *Common law* (*supra*, n. 7), p. 77-80. Donaldson, *Legal profession* (*supra*, n. 20), p. 7-9, points out that clerics were prominent among amateur pleaders before a variety of courts in the early sixteenth century. Even an amateur could make a business from being a procurator. John Bunye or Bunzie, elder, portioner (a minor landowner) in Newstead near Melrose acted before the burgh court for seven separate litigants during 1659 and 1660, two of whom he sued for non-payment of his fee. He claimed to have appeared on all court days for a full year on behalf of one and on 34 days for the other. *Selections from the records of the regality of Melrose, 1605-1661*, ed. C. S. Romanes, Edinburgh 1914, p. 212, 216, 220, 221, 231, 278, 330. He was not a rich man, assessed at only a single hearth in a later tax schedule. National Records of Scotland, E69/21/1/131.

⁸⁹ Wasser, *Defence counsel* (*supra*, n. 77), p. 185-6.

⁹⁰ E. Ewan, *Scottish Portias: women in the courts in medieval Scottish towns*, *Journal of the Canadian Historical Association*, 3 (1992), p. 27-43. J. Finlay, *Women and legal representation in early sixteenth-century Scotland*, in: *Women in Scotland 1100-1750*, East Linton 1999, p. 165-75. Finlay's main source is Court of Session cases from the early sixteenth century.

⁹¹ Begg, *Law agents* (*supra*, n. 2), p. 1-5. *Extracts from the records of the Royal Burgh of Lanark* (*supra*, n. 84), p. 27, 57. Coutts, *College of Justice in 1600* (*supra*, n. 21), p. 8-9. Finlay, *Lawyers and the early modern state* (*supra*, n. 16), p. 405, 406. Those who appeared without a named procurator may nevertheless have had one, or at least have received legal advice

as part of their preparation. Begg also notes that, from the late fifteenth century, personal appearances in civil actions were only necessary if there was a chance the defender might be declared an 'outlaw' (execution of caption in cases of debt). Begg, *Law agents (supra, n. 2)*, p. 4.

⁹² J. R. Dickinson and J. A. Sharpe, *Courts, Crime and Litigation in the Isle of Man, 1580-1700*, Historical Research, 72, no. 178 (1999), p. 157-8, note a similar emphasis on non-professional representation on the Isle of Man in the late sixteenth and early seventeenth century. The word 'attorney' seems to have been used not of a professional lawyer, but of anyone representing another in court (rather like the Scottish 'procurator').

⁹³ W. Blackstone, *Commentaries of the laws of England*, 4 vols, Oxford, 1765-9, p. 4.

⁹⁴ M. Galanter, *Reading the Landscape of Disputes - What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, UCLA Law Review 31, 1 (1983), p. 17. S. R. Anleu and W. Prest, *Litigation: historical and contemporary dimensions*, in: *Litigation: past and present*, eds W. Prest and S. R. Anleu, Sydney 2004, p. 8.

⁹⁵ *The Practicks of Sir James Balfour (supra, n. 45)*, p. 411-17. P. S. M. Symms, *Social control in a sixteenth-century burgh: a study of the burgh court book of Selkirk 1503-1545*, University of Edinburgh PhD thesis 1986, p. 262-90. A. M. Godfrey, *Arbitration and Dispute Resolution in Sixteenth-Century Scotland*, Tijdschrift voor Rechtsgeschiedenis: Legal History Review, 70 (2002), p. 109-35; *Alternative dispute resolution within law courts in 16th century Scotland*, in: *Mit Freundschaft oder mit Recht? Inner- und außergerichtliche Alternativen zur kontroversen Streitentscheidung im 15.-19. Jahrhundert*, ed. A. Cordes, Cologne 2015, p. 149-58.

⁹⁶ Coutts, *College of Justice in 1600 (supra, n. 21)*, p. 215-17. Nearly a quarter of litigants were from Edinburgh itself and the remainder mainly from the east-central and north-east Lowlands.

⁹⁷ *Selkirk protocol books, 1511-1547 (supra, n. 45)*, p. xvii.

⁹⁸ J. A. Sharpe, 'Such disagreement betwyx neighbours': *litigation and human relations in early modern England*, in: *Disputes and settlements: law and human relations in the west*, Cambridge 1983, p. 167-87. C. Rawcliffe, 'That kindness should be cherished more, and discord driven out': *the settlement of commercial disputes by arbitration in later medieval England*, in: *Enterprise and individuals in fifteenth-century England*, ed. J. I. Kermode, Stroud, 1991, p. 99-117. J. Biancalana, *The legal framework of arbitration in fifteenth-century England*, American Journal of Legal History, 47, 4 (2005), p. 347-82.

⁹⁹ Kagan, *Lawsuits (supra, n. 16)*, p. 4-20, brings out the tensions in early modern Castile, between criticising litigiousness and willingness actively to use the law, which seem to have been pervasive in all contemporary European societies. C. Muldrew, *The culture of reconciliation: community and the settlement of economic disputes in early modern England*, Historical Journal, 39, 4 (1996), p. 915-42.

¹⁰⁰ *Early records of the Burgh of Aberdeen: 1317, 1398-1407*, ed. W. C. Dickinson, Edinburgh 1957, p. cxxix-cxxx. Sanderson, *Mary Stewart's people (supra, n. 25)*, p. 24.

¹⁰¹ J. Wormald, 'Princes' and the regions in the Scottish reformation', in: *Church, politics and society: Scotland, 1408-1929*, Edinburgh 1983, p. 73, 79. J. W. Cairns, *Academic feud, bloodfeud, and William Welwood: legal education in St Andrews, 1560-1611 part 2*,

Edinburgh Law Review, 2 (1998), p. 281-5. J. Goodare, *The government of Scotland, 1560-1625*, Oxford 2004, p. 146-7. For the Kirk's remarkable breadth of involvement with matters civil and criminal see for example *Selections from the records of the kirk session, Presbytery, and Synod of Aberdeen*, ed. J. Stuart, Aberdeen 1846.

¹⁰² *The acts and proceedings of the general assemblies of the Church of Scotland 1560 to 1618*, ed. D. Shaw, Edinburgh 2004, p. 396-7. *Register of the minister, elders and deacons of the Christian congregation of St. Andrews comprising the proceedings of the Kirk Session and of the Court of the Superintendent of Fife Fothrik and Strathearn, 1559-1600*, ed. J. H. Fleming, Edinburgh 1889, p. 175, 251. In contrast, the Kirk Session retained two Masters of Arts as their procurators before all other courts. *Ibid.*, p. 303. M. F. Graham, *The uses of reform: "Godly discipline" and popular behavior in Scotland and beyond, 1560-1610*, Leiden 1996. The General Assembly had its own advocates to act on its behalf in matters affecting the whole Kirk. D. Shaw, *The General Assemblies of the Church of Scotland, 1560-1600: their origins and development*, Edinburgh 1964, p. 150-4.

¹⁰³ J. B. Post, *The admissibility of defence counsel in English criminal procedure*, Journal of Legal History, 5, 3 (1984), p. 23-32. J. M. Beattie, *Scales of justice: defense counsel and the English criminal trial in the eighteenth and nineteenth centuries*, Law & History Review, 9, 2 (1991), p. 221-67. D. Lemmings, *Criminal trial procedure in eighteenth-century England: the impact of lawyers*, Journal of Legal History, 26, 1 (2005), p. 73-82.

¹⁰⁴ In eighteenth-century Ireland counsel was rare in felonies and seldom involved in civil cases before the assizes. N. Garnham, *The courts, crime and the criminal law in Ireland, 1692-1760*, Blackrock 1996, p. 101, 114.

¹⁰⁵ M. McCrae, *Enquiry into the 'deficiency' of medical men in the mid-nineteenth century Highlands*, Scottish Archives, 11 (2005), p. 61-67. Finlay, *Legal practice (supra, n. 2)*, p. 17, notes: 'In some parts of Scotland, even well into the eighteenth century, lawyers existed in quite modest numbers.'

¹⁰⁶ A. E. Whetstone, *Scottish county government in the eighteenth and nineteenth centuries*, Edinburgh 1981, p. 11.

¹⁰⁷ Simpson, *Advocates (supra, n. 20)*, p. 164-77.

¹⁰⁸ Finlay, *Lawyers and the early modern state (supra, n. 16)*, p. 393, 403, 406. J. Finlay, *Advocates unlimited: the numerus clausus and the College of Justice in Scotland*, Historical Research, 82 (2009), p. 206-28. The limit is very close to the 47 advocates who appeared before the Lords of Council and Session in more than 2200 separate processes during the year 1600. Coutts, *College of Justice in 1600 (supra, n. 21)*, p. 5-6. English judges could also limit the number of barristers.

¹⁰⁹ Phillipson, *Social structure (supra, n. 28)*, p. 147. Simpson, *Advocates (supra, n. 20)*, p. 177. D. M. Walker, *Principles of Scottish private law*, 2 vols, Oxford 1970, vol. 1, p. 376. Kagan, *Lawsuits (supra, n. 16)*, p. 65-7, 241-6, notes the late emergence of professional associations in Castile, compared with France or Italy (or England); the chronology is nevertheless similar to Scotland. The Italian city of Milan is said to have had 1500 working notaries at the end of the thirteenth century, in a population of about 60000, Padua 600 for 20000, and Bologna 2000 among 50000 people. J. P. Byrne, *Notaries*, in: Medieval Italy: an encyclopedia, ed. C. Kleinhenz, London 2004, p. 782-3. This means one for every 40 inhabitants in Milan, 1:33 for Padua, and 1:25 in Bologna (none of these figures counts

advocates and proctors) whereas Edinburgh 400 years later (as we saw earlier, the most ‘lawyered’ place in Scotland) had a ratio of only 1:100 for *all* legal practitioners combined.

¹¹⁰ J. A. Sharpe, *The people and the law*, in: Popular Culture in Seventeenth-century England, ed. B. Reay, London 1985, p. 244–70.

¹¹¹ R. A. Houston, *Peasant petitions: social relations and economic life on landed estates, 1600-1850*, Basingstoke 2014.

¹¹² Petitions for justice or right were distinguished from those for grace in a report of 1604. *The ancient state, authoritie, and proceedings of the Court of Requests by Sir Julius Caesar*, ed. L. M. Hill, Cambridge 1975, p. 241-8.

¹¹³ Whitehaven Archive and Local Studies Centre D/LEC/265/27, 38, 48, 495.

¹¹⁴ Whitehaven Archive and Local Studies Centre D/LEC/265/333.

¹¹⁵ J. Bailey, *Voices in court: lawyers' or litigants'*?, *Historical Research*, 74 (2001), p. 392-408. T. Johnson, *The Preconstruction of Witness Testimony: Law and Social Discourse in England before the Reformation*, *Law & History Review*, 32, 1 (2014), p. 127-47. This might even extend to litigants and their proctors presenting definitive sentences to the judges. R. H. Helmholz, *The Oxford history of the laws of England: volume I, the canon law and ecclesiastical jurisdiction from 597 to the 1640s*, Oxford 2004, p. 344.

¹¹⁶ M. Brown and S. P. Donlan, *The laws in Ireland, 1689-1850: a brief introduction*, in: *The laws and other legalities of Ireland, 1689-1850*, eds M. Brown and S. P. Donlan, Farnham 2011, 16-24. N. Garnham, ‘The limits of English influence on the Irish criminal law and the boundaries of discretion in the eighteenth-century Irish criminal justice system’, in *Ibid.*, p. 97-115.

¹¹⁷ Alexis de Tocqueville, *Journeys to England and Ireland*, ed. J. P. Mayer, New Haven 1958, p. 119, 133. Catholics comprised about 80% of the population.

¹¹⁸ H. S. Pawlisch, *Sir John Davies and the conquest of Ireland: a study in legal imperialism*, Cambridge 1985. B. Lockey, *Conquest and English Legal Identity in Renaissance Ireland*, *Journal of the History of Ideas*, 65, 4 (2004), p. 543-58. N. Howlin, *Juries in Ireland: laypersons and law in the long nineteenth century*, Dublin 2017, p. 215.

¹¹⁹ D. A. Orr, ‘From a View to a Discovery: Edmund Spenser, Sir John Davies, and the Defects of Law in the Realm of Ireland’, *Canadian Journal of History* 38, 3 (2003), 395-408.

¹²⁰ Gillespie, ‘Manor court’, 81-2. E. C. Lapoint, ‘Irish immunity to witch-hunting, 1534-1711’, *Eire-Ireland* 27, 2 (1992), 76-92. Many legal tasks may have been performed in rural areas by educated men such as school teachers, acting as ‘hedge lawyers’. Pools of jurors were small outside towns and attendance poor. Howlin, *Juries in Ireland (supra*, n. 118), p. 105-10.

¹²¹ N. Garnham, *The criminal law 1692-1760: England and Ireland compared*, in: Kingdoms united? Great Britain and Ireland since 1500: integration and diversity, ed. S. Connolly, Dublin 1994, p. 224.

¹²² National Records of Scotland GD112/11/1/4/13 and 68 (1786).

¹²³ National Records of Scotland GD112/11/1/2/20, 71 and 89 (1779).

¹²⁴ R. M. Smith, ‘Modernization’ and the Corporate Medieval Village Community in England: Some Sceptical Reflections, in: *Explorations in Historical Geography: Interpretative Essays*,

eds A. R. H. Baker and D. Gregory, Cambridge 1984, p. 171. Goodare, *The government of Scotland* (*supra*, n. 101), p. 192-219. N. Landau, *The Justices of the Peace, 1679-1760*, London 1984, appendix A, shows that the number of JPs rose from about 2200 to 7300 during her period. Those nominated to the commission of the peace in Scotland also grew rapidly in the course of the eighteenth century to over 5000 by 1820, but the number of justices who qualified and acted increased much less and there were no more than 2000 active magistrates even at that date. While the nomination was an honour, the job was much less onerous than in England and many Scottish JPs served only occasionally. Whetstone, *Scottish county Government*, (*supra*, n. 106), p. 36-42. J. Findlay, *All manner of people: the history of the justices of the peace in Scotland*, Edinburgh 2000, p. 36. Other than in the burghs, participation in the formal institutions of Scottish local government was largely confined to a few thousand freeholders. Murdoch, 'The people above' (*supra*, n. 20), p. 22-7. The same was true of Irish JPs. N. Garnham, *Local elite creation in early Hanoverian Ireland: the case of the county grand jury*, Historical Journal, 42, 3 (1999), p. 625.

¹²⁵ Prest, *Lawyers* (*supra*, n. 1), p. 84. Brooks, Helmholz and Stein, *Notaries Public in England* (*supra*, n. 63), p. 5-8.

¹²⁶ W. D. H. Sellar, *Birlaw courts and birleymen*, in: Adventures of the law, eds P. Brand, K. Costello and W. N. Osborough, Dublin 2005, p. 70-87. As in Ireland, these local courts may have been little more than instruments of seigneurial control. Barnard, *Local courts* (*supra*, n. 6), p. 36-7. Formal representation by licensed lawyers was unusual before local courts in Ireland, though amateur agents may have been more common. McMahon, *Manor courts* (*supra*, n. 65), p. 150-2. R. Gillespie, *A manor court in seventeenth century Ireland*, Irish Economic & Social History, 25 (1998), p. 84.

¹²⁷ Garnham, *Courts* (*supra*, n. 104), p. 73-6, 273-5. Garnham, *Local elite creation* (*supra*, n. 124), p. 630-7, 640-2. Howlin, *Juries in Ireland* (*supra*, n. 118), p. 5-7, 99-100.

¹²⁸ M. J. Sechler and J. Greenberg, 'There is scarce a pamphlet that doth not triumph in Bracton': the role of *De legibus et consuetudinibus Angliae* in Stuart political thought, History of Political Thought, 33, 1 (2012), p. 25-54.

¹²⁹ J. G. A. Pocock, *The origins of study of the past: a comparative approach*, Comparative Studies in Society & History, 4, 2 (1962), p. 237-8. H. MacQueen, J. W. Cairns and T. D. Fergus, *Legal humanism in Renaissance Scotland*, Journal of Legal History, 9 (1990), p. 40-69. A. R. C. Simpson, *Counsel and the crown: history, law and politics in the thought of David Chalmers of Ormond*, Journal of Legal History, 36, 1 (2015), p. 3-42.

¹³⁰ P. Geng, *Before the Right to Remain Silent: The Examinations of Anne Askew and Elizabeth Young*, Sixteenth Century Journal, 43, 3 (2012), p. 667-79.

¹³¹ P. R. Hyams, *What Did Edwardian Villagers Understand by 'Law'*?, in: Medieval Society and the Manor Court, eds Z. Razi and R. M. Smith, Oxford 1996, p. 70.