

Article

"Scottish Portias: Women in the Courts in Mediaeval Scottish Towns"

Elizabeth Ewan

Journal of the Canadian Historical Association / Revue de la Société historique du Canada, vol. 3, n° 1, 1992, p. 27-43.

Pour citer cet article, utiliser l'information suivante :

URI: <http://id.erudit.org/iderudit/031043ar>

DOI: 10.7202/031043ar

Note : les règles d'écriture des références bibliographiques peuvent varier selon les différents domaines du savoir.

Ce document est protégé par la loi sur le droit d'auteur. L'utilisation des services d'Érudit (y compris la reproduction) est assujettie à sa politique d'utilisation que vous pouvez consulter à l'URI <https://apropos.erudit.org/fr/usagers/politique-dutilisation/>

Érudit est un consortium interuniversitaire sans but lucratif composé de l'Université de Montréal, l'Université Laval et l'Université du Québec à Montréal. Il a pour mission la promotion et la valorisation de la recherche. Érudit offre des services d'édition numérique de documents scientifiques depuis 1998.

Pour communiquer avec les responsables d'Érudit : info@erudit.org

Scottish Portias: Women in the Courts in Mediaeval Scottish Towns

ELIZABETH EWAN

Résumé

By studying the fifteenth and early sixteenth-century records of several Scottish towns, this paper examines the roles of women in the town courts of mediaeval Scotland. It argues that, although women faced certain legal disadvantages, they were able to make use of the courts to advance their own interests. An examination of the actions of these women shows that the legal restrictions were often flouted in practice, with women arguing their own cases and even occasionally acting as procurators for others. This case study points out the necessity of examining the practical application of the law as well as legal codes and treatises before reaching conclusions about women's status. By showing the active part which women took in the legal life of the town, it also suggests that Scottish urban history needs to take into account women's experiences in reconstructing the life of mediaeval towns.

* * * *

Cet article utilise les archives judiciaires de plusieurs villes écossaises du XVe siècle et du début du XVIe siècle pour tenter de cerner le rôle des femmes dans les cours de l'Écosse médiévales. Malgré les barrières légales qu'elles y rencontraient, les femmes furent capables d'utiliser ces cours à leur avantage. Souvent, faisant fi des restrictions légales, des cours autorisèrent des femmes à défendre leur propre cas et, à l'occasion, à agir comme procureur pour d'autres. Cette étude de cas signale combien il est important d'aller voir la façon dont lois, codes et traités furent appliqués dans les faits avant de risquer des généralisations sur le statut des femmes. En soulignant le rôle actif qu'elles jouèrent dans la vie judiciaire de la ville, elle invite les historiens de l'Écosse urbaine à considérer davantage les expériences des femmes dans leurs travaux de reconstruction de la vie au moyen âge.

In *The Book of the City of Ladies*, written in the early fifteenth century, Christine de Pisan asks "why women do not plead law cases in the courts of justice, are unfamiliar with legal disputes, and do not hand down judgments." The answer she gives is that "because of the integrity to which women are inclined, it would not be at all appropriate for them to go and appear so brazenly in the court like men, for there are enough men who do so." But she is careful to add that "if anyone maintained that women do not possess enough understanding to learn the laws, the opposite is obvious from the proof

The author thanks the Social Sciences and Humanities Research Council of Canada for financial assistance with the research for this article, and Edward J. Cowan for his helpful comments.

afforded by experience."¹ Christine then offers examples of highly learned women from the past to prove that women's intelligence is no weaker than men's, although she does not provide instances of women pleading law.

Across the North Sea, however, in the towns of Scotland in the fifteenth and early sixteenth centuries, women were appearing in court, pleading cases both on their own behalf and that of others, and showing in their arguments that they were indeed quite familiar with the law. Although women did not control the courts or hand down judgments, they showed themselves very capable of using the law to protect and advance their interests.

The poet William Dunbar acknowledged their prowess in his poem "Of the Ladyis Solistaris at Court." "Thre dayis thair/ They will do mair/ Ane mater for till end/ Than thair gud men/ Will do in ten."² Although Dunbar's purpose in this poem was satirical, and the methods of pleading he hinted at of an intimate nature not usually seen in open court, he recognised that women were capable of entering the primarily male world of the courts and of being effective advocates for their cause. This recognition was based on the reality of what he saw around him in the town courts of fifteenth-century Scotland.

Dunbar's awareness of women's role has not been shared by most Scottish historians. Until very recently, women's contribution to Scottish history has received very little attention.³ This is especially true for the mediaeval period, where, apart from a small section in a general survey of Scottish women and some short biographies of Scottish "heroines," there has been almost nothing published.⁴ Some urban historians have suggested in passing that women played an active role in the life of the towns; A. A. M. Duncan and Michael Lynch, in their discussions of the mediaeval urban economy, pointed out that women were prominent in the brewing industry, while a study of Aberdeen in the fifteenth century indicated that much of the property of the town was in the hands of heiresses.⁵ But there has as yet been no study focussing specifically on mediaeval townswomen. This paper will address one aspect of the lives of these women, their experience of the legal world of the town courts.

1. Christine de Pisan, *The Book of the City of Ladies*, trans. Earl J. Richards (London, 1982), 31-2.
2. William Dunbar, "Of the Ladyis Solistaris at Court" in James Kinsley (ed), *The Poems of William Dunbar*, (Oxford, 1979), 11.4-8.
3. For a recent survey of writing on Scottish women's history see Joy Hendry, "Snug in the Asylum: Women's History in Scotland" in Ian Donnachie and Christopher Whatley, eds. *The Manufacture of Scottish History* (Edinburgh, 1992), 125-42.
4. Rosalind Marshall, *Virgins and Viragos. A History of Women in Scotland from 1080-1980* (London, 1983); M. R. Keary, *Great Scotswomen* (London, 1933).
5. A. A. M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1975), 499; Michael Lynch, "The Social and Economic Structure of the Larger Towns, 1450-1600" in M. Lynch et al, eds. *The Scottish Medieval Town* (Edinburgh, 1988), 277-8; Harold Booton, "Burgesses and Landed Men in North-East Scotland in the Later Middle Ages: a Study in Social Interaction" (Aberdeen: PhD thesis, 1988). The women in Booton's study, however, appear mainly as passive transmitters of property, rather than individuals participating actively in the urban land market.

The legal arena is an interesting area in which to examine women's participation in the "public world" outside the home although, as we shall see, the dichotomy between private and public spheres is not really appropriate here as women's "public" actions often addressed concerns arising from their "private" sphere.⁶ At first sight the legal world seems an area in which they suffered severe disadvantages. The law codes and customs of most mediaeval countries restricted women's rights to appear in courts of law and to defend their actions. Wives were to be represented by their husbands, while unmarried women and widows were expected, if not legally required, to be represented by a male relative or paid advocate. In some countries, women could not act as witnesses except in special circumstances when there might be no males present.⁷ Married women's participation in court business was further limited by restrictions on their ability to make contracts or to sue without their husband's participation.

Many earlier legal historians were more interested in the law itself than in the way it worked in practice. Recent studies have looked instead at the way in which the laws were applied and have warned against assuming that the letter of the law was always followed in practice. David Herlihy, for example, pointed out that town legislation tells more of legal constraints than actual behaviour.⁸ Such work implies that women may have found legal action less restricted than the lawcodes imply, although the study of mediaeval women as plaintiffs, who they were in social and economic status, what sort of actions they might bring, their rate of success and other such issues is only just beginning.⁹ However, an examination of cases brought before the town courts of late mediaeval Scotland suggests not only that women were able to use the law for their own advantage but that the opportunity was also available for them, if they wished, to make use of it without male assistance.

It should be stressed at the outset that such opportunity was limited in nature. Women were barred from the actual administration and making of the law by their ineligibility for the political offices of the town.¹⁰ Although in many towns women could be made burgesses in their own right,¹¹ they could not serve as the aldermen or bailies

6. The appropriateness of the theoretical framework of "private sphere/ public sphere" for understanding women's history is coming under increasing attack as research shows that the two worlds cannot be easily separated. See the discussion in Susan M. Reverby and Dorothy O. Helly, "Introduction: Converging on History" in D. Helly and S. Reverby, eds. *Gendered Domains: Rethinking Public and Private in Women's History* (Ithaca, 1992), 1-24.
7. Shulamith Shahar, *The Fourth Estate* (London, 1983), 14-15.
8. David Herlihy, "Women and the Sources of Medieval History" in Joel Rosenthal, ed. *Medieval Women and the Sources of Medieval History* (Athens, Ga., 1990), 138.
9. Janet Senderowitz Loengard, "'Legal History and the Medieval Englishwoman' Revisited. Some New Directions" in *Medieval Women and the Sources of Medieval History*, 219. Judith Bennett's *Women in The Medieval English Countryside: Gender and Household in Brigstock Before the Plague* (New York, 1987) makes an extensive examination of actions pursued by women in the manorial court.
10. Bennett stresses women's lack of access to political power in the community of the English village, despite their independent actions in court in "Public Power and Authority in the Medieval English Countryside" in Mary Erler and Maryanne Kowaleski, eds. *Women and Power in the Middle Ages* (Athens, Ga., 1988).
11. For example, women were made burgesses in Dunfermline and Peebles. See Erskine Beveridge, ed. *The Burgh Records of Dunfermline 1488-1584 [Dunfermline Recs.]* (Edinburgh,

who supervised the procedure of the court, nor could they act as the sergeants who carried out the commands of the court officers. There are no records of a case in which a woman was part of an assise, the group of arbiters often appointed to resolve disputes. Nor, with one exception,¹² do women appear as sureties guaranteeing the behaviour of others.

In this respect, Scottish courts were more restrictive than those of some other countries. In Cologne, for example, women were allowed to serve as assessors of pledges for the court, and in Wales a jury of women might be empanelled to determine if a woman was guilty of a sexual offence. Similarly, in Normandy women were used to determine the truth of claims of beating or rape.¹³ But their dependence on men, even while serving the court, is emphasized by the practice of identifying them in most cases in terms of their relationship with a male relative, as "daughter of," "wife of," or "widow of."

In common with the lawcodes of many mediaeval countries, the Scottish laws also reflected the attitude expressed in *The Book of the City of Ladies* that court activity was unseemly for women. Chapter 31 of the *Laws of the Burghs*, a compilation of laws which formed the basis of urban law codes in Scotland, says that each married man may answer for his wife and stand in judgment for her and do all things that the court orders if she be challenged of anything,¹⁴ and examples of this practice occasionally appear in the records. In Aberdeen in 1459 Wil Alaneson, the husband of Anny Baxter, obligated himself to fulfill the condition whereby his wife should be freed of a debt which she owed to Gilbert Kintore for one barrel of salmon.¹⁵ The responsibility of the husband for his wife's actions was based on the legal concept that husband and wife were one body, with the husband as head, an idea which was also reflected in laws concerning matrimonial property which gave the husband power over all his wife's property during the marriage.¹⁶ This, in theory, affected women's ability to contract and pursue debts, one of the major areas of activity of the courts.

However, the law does not say that men *must* represent their wives, but only that they *may* represent them. Does this perhaps suggest a somewhat more flexible attitude to the participation of women in court than in some other contemporary societies? In one English town, for example, "married women who sued on their own in the Exeter

1917), 70,87,89; R. Renwick, ed. *Extracts from the Records of the Burgh of Peebles*. [Peebles Recs.] (Scottish Burgh Records Society [SBRS], 1910), 113, 133, 197.

12. In Stirling in 1529 Cristian Henderson stood as pledge for her mother, a huckster, that she would not break the town statutes again. See R. Renwick, ed. *Extracts from the Records of the Royal Burgh of Stirling* [Stirling Recs.] (Glasgow, 1887), 34.

13. Erika Uitz, *Women in the Medieval Town*. (London, 1988), 98; R. R. Davies, "The Status of Women and the Practice of Marriage in Late Medieval Wales" in D. Jenkins and M. Owen, eds. *The Welsh Law of Women* (Cardiff, 1980), 111; Shahar, *Fourth Estate*, 15.

14. *Leges Burgorum*, ch.31 in Cosmo Innes, ed. *Ancient Laws and Customs of the Burghs of Scotland 1124-1424* (SBRS, 1868).

15. Aberdeen City Archives [ACA], Aberdeen Council Register [ACR], iv, f.377.

16. A. D. M. Forte, "Some Aspects of the Law of Marriage in Scotland: 1500-1700" in Elizabeth M. Craik, ed. *Marriage and Property* (Aberdeen, 1984), 109-10; also Rab Houston, "Women in the Economy and Society of Scotland, 1500-1800" in R. Houston and I. D. Whyte, eds. *Scottish Society 1500-1800* (Cambridge, 1989), 129.

courts were accused of failing to appear with their husbands.¹⁷ Although much of Scottish law as set down in the law codes and legal treatises was borrowed from English law, this objection was not raised in any Scottish town courts, suggesting that the English rules may have been altered in practice.¹⁸ The *Burgh Laws* were used as the basis for the laws of the towns but they too could be modified, in this case by individual communities.¹⁹ Furthermore, many of the restrictions which a married woman faced could be moderated by marriage contract provisions, even to the extent of giving her full administrative power over her own property. This gave her a position similar to that of the *femme sole* in England and France.²⁰ Moreover, in Scotland until well after the Middle Ages, a woman kept her own name on marriage, a practice which suggests that the merging of a wife's identity in her husband's was possibly not so complete as in some other countries. Thus, although Scottish laws limited women's actions to pleading and defending cases, they definitely made their mark despite the provisions which should have restricted their participation.

Calling upon women to serve as witnesses was another matter, however, in Scotland and elsewhere. Several countries were uneasy about accepting the testimony of female witnesses except in matters where no man was present such as childbirth or where a physical examination was necessary to determine pregnancy or virginity. Welsh law prohibited women from acting as witnesses for men, while Irish law banned them from being witnesses altogether.²¹ In England, female witnesses were not forbidden, but there was a general feeling that a man's testimony was of more value.²² These restrictions reflected deep-seated doubts about women's truthfulness, well illustrated in a commentary on the Toulouse Custom of the late thirteenth century which stated that "women

17. Maryanne Kowaleski, "Women's Work in a Market Town: Exeter in the Late Fourteenth Century" in Barbara Hanawalt, ed. *Women and Work in Preindustrial Europe* (Bloomington, 1986), 146. Bennett has noted that the women of Brigstock enjoyed a good degree of legal independence during adolescence but that this came to an end with marriage, Bennett, *Countryside*, 104-8.
18. See for example Lord Cooper, ed. *Regiam Majestatem* (Stair Society, 1947), much of which is based on the English treatise of Glanville, and the parts of the burgh laws which are borrowed directly from Henry II's customs of Newcastle, and Hector MacQueen and William J. Windram, "Laws and Courts in the Burghs" in *The Scottish Medieval Town*, 209.
19. See discussion of the laws in MacQueen and Windram, "Laws and Courts in the Burghs" and Iain Flett and Judith Cripps, "The Documentary Sources" in *Scottish Medieval Town*, 20.
20. G. Campbell H. Paton, "Husband and Wife. Property Rights and Relationships" in *Introduction to Scottish Legal History*, Stair Society, vol. 20 (1958), 98, 101, 104. A *femme sole* was a married woman who was given the legal rights of a single woman so that she could carry on a business independently of her husband.
21. R. A. Houlbrooke, "Women's social life and common action in England from the fifteenth century to the eve of the Civil War," *Continuity and Change*, 1 (1986): 174; Christopher McAll, "The Normal Paradigms of a Woman's Life in the Welsh and Irish Laws" in *The Welsh Law of Women*, 19.
22. In York in the fifteenth century, "one party in a matrimonial case sought a male witness to her marriage because her existing witnesses were only female." P. J. P. Goldberg, "Marriage, Migration, Servanthood and Life-cycle in Yorkshire Towns of the Later Middle Ages: Some York Cause Paper Evidence," *Continuity and Change* 1 (1986): 146

always give varying and changeable testimony."²³ As a result of such attitudes, in most of France a woman's testimony had to be supported by another witness to be acceptable.²⁴

Such attitudes were not found everywhere in Europe — German cities seem to have been relatively amenable to female witnesses²⁵ — but the Scottish *Burgh Laws* reflected the more negative position of England. Female witnesses are specifically mentioned only in chapter 41 in a section dealing with a man's right to a burgage obtained through his wife after his wife died. If he had a living son or daughter with her he could enjoy the property for life (even if the child died immediately after birth) so long as he could prove that the child had been born alive by the testimony of two loyal men or women neighbours who heard it cry.²⁶ Since women were most likely to have been present at the birth it was perhaps to be expected that their testimony should be specifically mentioned, but it appears that male witnesses were nevertheless preferable as the requirement that the child be heard to cry could be seen as enabling the men outside the room to act as witnesses in the case.²⁷ In other cases requiring witnesses they are usually referred to as "neighbours," and since "neighbours" usually means burgesses the implication is that they were normally expected to be male.²⁸

The attitude to women's capacity for independent action in general was summed up in chapter 118 which says a husband should chastise a wife who had been convicted by the courts of misdemeanours as though she were a young child.²⁹ The legal dominance of the husband over his wife was continued in the legal systems of most European countries well beyond the Middle Ages.³⁰ But this was the formal law; how close was the reality?

Social historians are constantly discovering how much the actual life and practices of a society differed from the picture portrayed in the laws of that society. That seems to be the case in Scotland. Far from being passive figures relying on male protection in the courts, Scottish women appear often enough as active litigants on their own behalf, and although they prosecuted fewer cases than men they were by no means invisible.³¹

23. J. H. Mundy, *Men and Women at Toulouse in the Age of the Cathars* (Toronto, 1990), 23.

24. Shahar, *Fourth Estate*, 14.

25. Uitz, *Women in Medieval Town*, 116.

26. *Leges Burgorum*, ch.41. This custom was known as "the law of courtesy" in England. For a case in 1489 involving "courtesy of Scotland," see Henry M. Paton and Gordon Donaldson, eds. *Protocol Book of James Young 1485-1515 [PB Young]* (Scottish Record Society, 1941), no. 188.

27. My thanks to David Sellar for discussion of this point.

28. *Leges Burgorum*, ch.74, 77.

29. *Leges Burgorum*, ch.118.

30. In eighteenth-century England, for example, Blackstone argued that the legal existence of the woman was suspended during marriage. Jane Rendall, *Women in an Industrializing Society: England 1750-1880*. (Oxford, 1990), 34.

31. Similar actions by women were to be found in places as diverse as Reconquest Castile, fourteenth-century Shetland and the German towns of the later Middle Ages. See Heath Dillard, *Daughters of the Reconquest. Women in Castilian Town Society, 1100-1300* (Cambridge, 1984), 91, although she suggests at the end of her book that the situation became less

About one-fifth to one-quarter of the transactions in the protocol books of the Scottish notaries recording legal contracts and court decisions involve women; and women constantly appear in the records of the proceedings of the burgh court — not just to be punished for offences but also to prosecute cases and to defend themselves and their rights.

It was not just the urban courts which saw women acting on their own behalf. In a study of the church court of the Official of Lothian, Simon Ollivant found women taking independent legal action, although “on the rare occasions when a married woman appeared without her husband the fact was carefully recorded.”³² Women also appeared personally before the Lords of Council on judicial business.³³ However, it is the town records which best show women acting on their own initiative and they are therefore the basis of this study. Several protocol books and court records survive for the late fifteenth and early sixteenth centuries. The evidence which follows has been gathered from the protocol books of James Young, John Foular and James Darow,³⁴ and the burgh court records of Dunfermline, Peebles, Lanark, Edinburgh, Stirling, Dundee, and Aberdeen.³⁵

advantageous for women from the fourteenth century onwards as the reconquest became more firmly established; Barbara Crawford, “Marriage and the Status of Women in Norse Society” in Craik, *Marriage*, 84-6. Martha Howell, *Women, Production and Patriarchy in Late Mediaeval Cities* (Chicago, 1986), suggests that restrictions against women’s legal independence were being eroded in German cities in the later Middle Ages, unlike Italian cities where they remained in force, 15-16. In the sixteenth century the restrictions gradually returned as women lost economic independence, although Merry Wiesner points out that despite the legal restrictions women often appeared in court, *Working Women in Renaissance Germany* (New Brunswick, 1986), 30-1.

32. Simon Ollivant, *The Court of the Official in Pre-Reformation Scotland*. Stair Society, vol. 34 (1982), 75.
33. For example, G. Neilson and H. Paton, eds. *Acts of the Lords of Council in Civil Causes*, ii, 1496-1501 (Edinburgh, 1918), 19, 42, 87; James Clyde, ed. *Acta Dominorum Concilii 1501-1503*. Stair Society, vol. 8 (1943), nos 64, 108, 153, 163.
34. *PB Young*; M. Wood, ed. *Protocol Book of John Foular 1503-1513 [PB Foular]* (Scottish Record Society, 1942); *Protocol Book of James Darow 1469-1484 [PB Darow]*. I am grateful to Alan Borthwick for allowing me to consult the typescript of the forthcoming calendar of Darow.
35. *Dunfermline Recs.*; R. Renwick, ed. *Extracts from the Records of the Royal Burgh of Lanark 1150-1722 [Lanark Recs.]* (Glasgow, 1893); *Peebles Recs.*; *Stirling Recs.*; Sir James Marwick, ed. *Extracts from the Records of the Burgh of Edinburgh AD 1403-1528 [Edin. Recs.]* (SBRs, 1869); John Stuart, ed. *Extracts from the Council Register of the Burgh of Aberdeen 1398-1570 [Abdn. Counc.]* (Spalding Club, 1844); Edinburgh, Scottish Record Office [SRO], B30/9/1, Haddington Court Book 1423-1514; SRO.B58/8/1, Peebles Court Book; Dundee Archives [DA], “The Book of the Church” 1454-1524; DA, Burgh Protocol Book 1, 1518-1534; ACA, ACR, vols i-vi. St. Andrews Library, B54/7/1, The Newburgh Court Book, 1459-1479, and SRO. B51/10/1, The Montrose Court Book, 1455-1467 were also consulted but had little material about women. The reasons for variations between the burghs will be considered in a later paper.

The tradition of women appearing in court was known from at least the time of David I (1124-53). According to his twelfth-century biographer, Ailred of Rievaulx, it was David's custom to sit at the entrance of the royal hall and hear the cases of the poor men and old women of the district who came to him singly and do his utmost to help them.³⁶ By the time more regular court records appear, however, it was not just old women, presumably mostly widows, who came before the courts, but young women, spinsters, and wives as well. Moreover, their ability to represent themselves effectively is very clear. Under the laws, we would expect to find women appearing only rarely in court, and then mainly to appoint procurators to represent them. Indeed, since the law stated that a husband could act for his wife it would not seem necessary for her to specifically give such authority to her husband. But it appears that these powers were not as automatic as the laws would otherwise suggest. There was a simple ceremony carried out before the court for appointing a procurator, a process which was often recorded by the court scribe or a notary. In Dunfermline in 1496, for example, Agnes Murray compeared and made two men her procurators for all matters and actions pertaining to her and especially to pursue and defend a burgh land, having full power to lose and win as if she herself were present.³⁷ In a number of cases, a wife specifically constitutes her husband as her procurator.³⁸

Women could also appoint other procurators to act on their behalf. The appointment of procurators was a common practice for both male and female litigants throughout Europe. In Castile, for example, widows could act for themselves, but they could also ask for the help of "knowledgeable citizens."³⁹ The use of a procurator seems to have been dictated more by practical concerns than legal stipulations. Some women began cases themselves but later appointed procurators to see them through.⁴⁰ Or, as in Germany, they might appoint procurators but then ignore them in the actual proceedings and even dismiss them.⁴¹ Possibly some women chose procurators just in case, for whatever reason, they were unable to pursue the case themselves. (The length of time required to bring many cases to a decision could be a considerable burden on litigants, who often found it easier to appoint someone else to make the necessary appearances.) In several cases, a procurator was appointed to pursue a case on behalf of two or more women — presumably on the grounds that it would be easier to arrange the appearance of one litigant than all of them.⁴² In other cases, the litigant might live outside the town where the case was being heard or be away on other business but still need to ensure that her case was pursued.⁴³

36. A. A. M. Duncan, "The Central Courts Before 1532" in *Introduction to Scottish Legal History*, 321.

37. *Dunfermline Recs.*, 64; Ollivant, *Court of the Official*, 57-9.

38. *Dunfermline Recs.*, 70, 117; ACA, ACR vi, f.465.

39. Dillard, *Reconquest*, 119.

40. *Dunfermline Recs.*, 42, 43 (1493).

41. Howell, *Women, Production*, 16 n. 24; PB Darow, no. 20 (1471).

42. In 1471, Andrew Maurice, burgess of Stirling, acted as procurator for four sisters, PB Darow, nos 49, 50. See also two cases in Dunfermline, *Dunfermline Recs.*, 71.

43. ACA, ACR iv, f.583, vi, ff 162, 230.

Sometimes a procurator might be appointed because of his legal expertise. In creating an early form of legal aid, a royal statute in 1424 ordered that judges provide a wise advocate for any poor creatures unable to follow their case themselves “for default of cunning.”⁴⁴ In some cases where procurators were apparently unrelated to their clients, the outcome was decided on the basis of arguments turning on legal technicalities which would probably be unfamiliar to most ordinary inhabitants of the burgh, men or women. For example, possession of one land in Canongate (beside Edinburgh) was disputed because the sasine or possession had been given by a bailie of a burgh of barony rather than a bailie of a royal burgh.⁴⁵ But not all women were ignorant of the law, and many of those prosecuting their own cases often made good use of their knowledge. Scotland was unusual in mediaeval Europe in that women themselves could act as procurators, sometimes in association with others, especially their husbands,⁴⁶ but also alone. Unlike England, where a distinct legal profession had begun to emerge as early as the thirteenth century, the lay legal profession in Scotland was just beginning to develop in the fifteenth century⁴⁷ and there were no hard and fast rules about who could be legal representatives. However, the role became increasingly dominated by professionals in the sixteenth and seventeenth centuries, closing off this opportunity for women who were barred from formal education in the law. Studies of women’s legal position in the post-Reformation period suggest that they enjoyed less legal independence than in the later Middle Ages.⁴⁸

There is some hint already in the fifteenth century that the ability of women to act as procurators was not readily accepted everywhere. In one case, a woman procurator who appeared for another woman had her credentials carefully examined by the court. In Aberdeen in 1466 Mage, Philip’s daughter, who came from Edinburgh, appeared with power of procuratory for Anny Baroune, daughter of late Robert Baroune, burgess of Aberdeen, “which power was seen by alderman and council to be lawfully ordained.”⁴⁹ It is possible, though, that the council was more concerned about Mage because she was from Edinburgh than because she was a woman. Certainly, other women acted as procurators, apparently without question, although the range of people who

44. T. Thomson and C. Innes, eds. *Acts of the Parliaments of Scotland* [APS] (Edinburgh, 1814-75), ii, 8, c.24.
45. *PB James Young*, no. 220 (1489). In fourteenth-century Montpellier, women and men usually appointed procurators “to draft their contracts before the notary and to carry out their business.” Kathryn L. Reyerson, “Women in Business in Mediaeval Montpellier” in *Women and Work in Preindustrial Europe*, 122. Presumably the procurator’s expertise would help to ensure the legal validity of the contract.
46. DA, “Book of the Church,” f.35v (1521); ACA, ACR, vi, f.131 (1471); *PB Young*, no. 144 (1488). It appears that such a practice was not accepted in other countries, Judith Bennett, “Public Power and Authority,” 35; Shahar, *Fourth Estate*, 13-14.
47. David H. Sellar, “The Common Law of Scotland and the Common Law of England” in R. R. Davies, ed. *The British Isles 1100-1500. Comparisons, Contrasts and Connections* (Edinburgh, 1988), 88, 93. In 1455 Parliament decreed an official form of dress for professional “forespeakers,” APS, ii, 43 c.12.
48. Houston, “Women 1500-1800,” 132; David Walker, “Evidence” in *Introduction to Scottish Legal History*, 306.
49. ACA, ACR, iv, f.583.

used their services was smaller than those who employed male procurators. Women acted mainly for family members, usually their husbands or children, or occasionally for other women.⁵⁰ The fact that they acted as procurators supports the assumption that when the record stated that a woman argued her case, it meant exactly that.

Women procurators were as capable of defending their client's interest as were men. On 25 May 1491, Elizabeth Prestoune, acting as procurator for her husband, John Williamsone, burgess of Edinburgh, passed to the house of Alexander Creichtone, burgess of Edinburgh, and produced a document which said

I Elizabeth, spouse and procuratrix for John Williamsone, warn you Alexander Creichtone, here at your dwelling house since I cannot apprehend you personally to flit [move] and remove your goods of our lands of Carnehill which is my spouse's heritage and my conjunct infetment that I have warned you at your house in presence of your wife and also caused my chaplain to warn you that my husband and I will occupy the lands with our own goods and if you do not remove your goods by Wednesday next I tax you to pay each day 1/2 merk mail, and protest herefore and that your absence not prejudice me or my husband, since I have done my diligence to obtain your presence and have remained here at your house and gate all day from 7 hours until now near 10 hours.⁵¹

It is noticeable that Creichtone's wife was accepted as a sufficient witness of these events.

Women were accepted as valid witnesses in court cases, although their testimony was not sought very frequently. In the early modern period, prejudice against women as witnesses seems to have increased so that their testimony was only accepted in cases of infanticide or witchcraft or when it was absolutely necessary.⁵² Mediaeval courts were more willing to accept their evidence especially when their presence would be expected: at the deathbed of a dying father, for example, or to attest to the ages of their children.⁵³ But women's testimony was accepted on other occasions as well. One woman testified to the oral contract made between two merchants over the payment for a barrel of salmon, others to the delivery of certain goods.⁵⁴ The contract for salmon was attested to by other witnesses as well so that the woman's evidence was not essential to the case, but it was used to strengthen it. Moreover, the social status of the woman did not apparently affect her reliability as a witness in the court's eyes — female witnesses ranged from the wives of prominent merchants to servant women. In Dundee in 1521 the witnesses to a case were the plaintiff's servant and her sister-in-law.⁵⁵

50. In Dundee in 1521 Janet Spalding appointed her sister Jane as one of her procurators, DA, "Book of the Church," f.35. In 1523 an aunt was a procurator for her niece, *Ibid*, f.138r. In Aberdeen a mother acted for her daughter, ACA, ACR, vi, f.57 (1470). In Dunfermline in 1504 a woman and her father-in-law acted for her husband, *Dunfermline Recs.*, 141.

51. *PB Young*, no. 454.

52. Houston, "Women 1500-1800," 132; David Walker, "Evidence" in *Introduction to Scottish Legal History*, 306.

53. *Stirling Recs.*, 29-30 (1527); DA, Protocol Book 1, f.5 (1518).

54. ACA, ACR, vi, f.7 (1467); DA, "Book of the Church," f.123r (1523).

55. DA, "Book of the Church," f.28r.

In mediaeval courts, the usual role of witnesses was not so much to give evidence of a claim as to act as character witnesses for the parties involved in a debate. Both plaintiff and defendant were given the opportunity to "lead witnesses" or compurgators who would swear to the reliability of their claims. In England the law officially required male compurgators, although several English town courts did accept female compurgators.⁵⁶ Unfortunately, the Scottish records say almost nothing about compurgators, only reporting that the parties in the case led witnesses. Probably women were used, but it is not possible to prove this.

Still, the main occasion for women's appearance in court was to pursue a claim or to defend their actions against an accusation by the council or another townspeople. Women's defence of their actions will be dealt with elsewhere — the focus of the rest of this study will be on women's actions as plaintiffs, bringing their complaints before the court and pursuing them through both legal and extra-legal channels. Most women were content to seek legal remedies for their claims, but in some cases, they were prepared to take matters into their own hands, although in a way which preserved a quasi-legal status.

Women appeared before the courts for a variety of reasons, most of which were similar to men's interests. Women are found prosecuting artisans for poor workmanship, seeking satisfaction of debts, accusing other townspeople of "strublang" which could range from withholding goods to name-calling to physical battery, and seeking the court's legal recognition of their status as executors for their husbands or guardians of their children. Property rights were among their chief concerns, however, and questions of property rights were one of the major items of business of the burgh courts. Cases were brought by both men and women and involved questions of inheritance, of encroachments by neighbours, and of the validity of land sales and grants. Many women used the court to gain legal recognition for their rights of inheritance. They would obtain a *briefe of inquest* from the crown which ordered the burgh court to establish the nearest heir of the deceased. Having established the heir the court would then order the bailie to give *sasine* of the lands and goods of the deceased to her.⁵⁷ In this way, women were able to use the burgh court as a guarantee of their rights to their lands. Women were aware of the correct legal forms and were prepared to use them. They may have had advisers in the background, but in most cases the actions they undertook in such instances were recorded as their own.

A glimpse of domestic tensions can be caught in a number of these cases, illustrating the way in which women showed great initiative in defending their own rights or those of their families. In 1474 Elizabeth Lithgow, widow of a Stirling burgess, appeared to support the claim of her son to his brother's inheritance against her granddaughters, who she alleged were illegitimate and therefore ought to be excluded from the inheritance. When a letter was produced testifying that they were legitimate, she "objected to the contrary and alleged that legitimization of offspring could not be allowed by law in a court held by secular judges but only by judges spiritual."⁵⁸ Unfortunately, it is not

56. Shahar, *Fourth Estate*, 15.

57. *Dunfermline Recs.*, 52-3; DA, "Book of the Church," f.80v; ACA, ACR vi, f.83.

58. PB Darow, no. 292.

recorded if this argument on legal technicalities was effective enough to win her case. Many other property disputes involved women contesting actions by other family members,⁵⁹ implying that family pressure did not always deter women from pursuing their rights.

As well as bringing a case to court, a woman could take other actions to pursue her property rights which avoided the expense and delay associated with obtaining a royal brief. The petitioner could ask a ward of court to decide the question of heirship — a number of women used this process.⁶⁰ In all recorded cases, the court found in the petitioner's favour. Women might also go to the disputed property and ritually break *sasine* which had been given to someone else by taking a dish from the house and breaking it or casting it away.⁶¹ In this way, she publicly announced her claim. This action was not done by someone on her behalf, but by the woman herself. In the interests of legality and possibly self-preservation, she ensured that there were several witnesses to the act.

Another way to prosecute a case over property was by presenting earth and stone of the disputed land before the court. This avenue was employed by several women who went to the land in question and took earth and stone in the presence of witnesses, often the town magistrates.⁶² This process was also used to claim unpaid rents by the owner of a land. In Dundee in 1520 Paul Kyd's wife and her sisters were accompanied by the bailies to poind a property for rent due. It was the women themselves who did the poinding despite the fact that the case had been brought before the court on their behalf by Paul Kyd.⁶³

Some women took the law into their own hands and were prosecuted for doing such things unlawfully, without first obtaining official sanction. In Dunfermline in 1502 Marion Symson was fined 6d for the wrongful poinding of a horse "at her own hand."⁶⁴ Some women went overboard — in 1497 Esabel Gerves in Dunfermline was fined for wrongfully taking away from a disputed land thatch, timber, stone and rafters. The court ordered her not to be so hasty in the future.⁶⁵

Women appeared before the court to prosecute other cases as well. Many disputes concerned faulty workmanship by artisans, especially weavers, entrusted with their goods. Several women appeared before the courts in various burghs charging weavers with spoiling cloth and asking for their goods and money back.⁶⁶ In Aberdeen in 1457

59. ACA, ACR v, f.319 (1457), f.640 (1468); *Peebles Recs.*, 129-30 (1458); *Stirling Recs.*, 16 (1522).

60. *Dunfermline Recs.*, 87, 108, 129.

61. PB Darow, no. 89 (1472). This was a recognised way of breaking *sasine*, John Durkan, "The Early Scottish Notary" in I. B. Cowan and Duncan Shaw, eds. *The Renaissance and Reformation in Scotland* (Edinburgh, 1983), 32.

62. PB Darow, no. 147 (1472); *PB Young*, nos 373, 379 (1490); *Dunfermline Recs.*, 111.

63. DA, "Book of the Church," ff 8v,9r.

64. *Dunfermline Recs.*, 126.

65. *Dunfermline Recs.*, 73.

66. *Dunfermline Recs.*, 106.

Janet Quhit received compensation of 44s from two men when the court decided that they had spoiled some grey cloth which she had given them.⁶⁷ Other crafts could also be at fault. In Dundee in 1522 John Anth was ordered to restore to Mege Quhit 24 pounds of iron that she had given him to work for her.⁶⁸ Women did not hesitate to use the burgh court to seek justice in everyday transactions.

Many of the disputes were the result of business transactions with either goods or money being withheld by one party from the other. It has been argued for England that it was worthwhile raising such cases as the cost of pursuing them was small and even if the plaintiff lost the fine was usually minimal.⁶⁹ Such conditions suited women who generally had less access to capital than men. These cases give an insight into the extent to which women were involved in the economic life of the burgh, as they appeared prosecuting debtors both on their own and on their husband's behalf. As in other countries such as Germany, wives were often responsible for sales of the product, so debts were owed to them rather than their husbands.⁷⁰ In 1521 the Dundee court found a man owing 22s 2d for two bolls of bere to two women, at least one of whom was married. In 1491 Effe Malcom complained that she had paid 21s 9d to David Fausid's wife for malt but it had not been delivered.⁷¹

One of the interesting aspects of these cases is that they show women actively making contracts. The contracts involved not only single women and widows, but also married women who officially did not have the legal power to enter into such contracts. In 1497, Jonet Moscrop, wife of a burghess of Jedburgh, was called to appear to receive repayment of a debt owed to her by an Edinburgh man.⁷² Women, like men, occasionally used the court to register debts owed to them by others in order to ensure payment. In Dunfermline in 1500 Thomas Rodger pledged he would pay Katherine Yalloar 13s silver or two bolls of malt by Whitsunday.⁷³

Where the outcome is known it did not seem to harm women who prosecuted their her own cases even against defendants whose status in the community was higher than their own. In Peebles in 1462 Margaret of Fylope claimed she had legal possession of a cauldron which her father had given to her and then taken away, claiming that it was part of the inheritance of his nephew — the court found in her favour.⁷⁴ There is little evidence of the bias found in some other countries against women who took the initiative to prosecute a case.⁷⁵

67. ACR, ACA, iv, f.319.

68. DA, "Book of the Church," f.117v. For another example see *Lanark Recs.*, 23.

69. Barbara Hanawalt, *The Ties that Bound. Peasant Families in Medieval England* (Oxford, 1986), 122.

70. Merry Wiesner Wood, "Paltry Peddlers or Essential Merchants? Women in the Distributive Trades in Early Modern Nuremberg," *Sixteenth-Century Journal*, xii (1981): 4; DA, "Book of the Church," f.109r.

71. DA, "Book of the Church," f.41r; *Dunfermline Recs.*, 29.

72. *PB Young*, no. 951.

73. *Dunfermline Recs.*, 105.

74. *Peebles Recs.*, 143-4.

75. In Exeter there appears to have been a bias against women who initiated suits. See Kowaleski, "Women's Work," 150-1.

Women used the court to publicise and safeguard their rights and transactions, showing an awareness of the increasing importance of having written proof of their rights. Burgh court books were used to register deeds, contracts and agreements from at least the fourteenth century.⁷⁶ In disputes over property, for example, women were often quick to produce documents in support of their case.⁷⁷ In Peebles in 1458 Janet Mowat defended herself successfully in a case by claiming that her rights were entered in the common book of the town.⁷⁸ Women often asked that a notarial instrument be made recording the decision on a case in order to safeguard their rights in the future. In 1423 in Haddington, Eufamia, daughter and heir of the late Adam Brewster, burgess of Haddington, not only acquired a royal breve in order to make her claim to a tenement, but also asked for a notarial instrument to record the fact that the court had found in her favour.⁷⁹ This suggests that despite being legally barred from full participation in the process of law-making, women showed a wide knowledge of the law as it affected their rights, a knowledge which has been noted among women in other countries as well.⁸⁰

As well as appearing before the court on their own and other's behalf, women carried out other actions which were part of the legal life of the burgh. It was not uncommon for husbands to name their wives as executors of their wills, a practice Scottish husbands shared with those in other countries.⁸¹ This made practical sense. As one husband said, "The gudis that I have and the dettis that ar awand me the said margaret my spous kennis."⁸² Sometimes the wife was made a co-executor;⁸³ in other cases she was appointed sole executor.⁸⁴ Sometimes the process showed the genuine affection of the husband for his wife. The Stirling notary John Darow noted one case in which the actions seemed to speak louder than words. In 1472, Darow recorded that "Andrew Symson (moved by most tender affection towards Elizabeth Levingstoun, his spouse, as appeared to the notary)" lovingly bestowed his lands and goods on her.⁸⁵

Acting as executor might well involve widows in court proceedings over debts and disputed inheritances. Often the wife was made executor of the goods and property of her husband and given the responsibility of looking after them while the children were

76. Elizabeth Ewan, *Townlife in Fourteenth-century Scotland* (Edinburgh, 1990), 53-4.

77. *PB Young*, nos 125 (1488), 315, 373 (1490).

78. *Peebles Recs.*, 129-30.

79. SRO, B30/9/1, f.1. For another example, see PB Darow, no. 30 (1471).

80. Barbara Hanawalt notes the legal knowledge of English women and men in *Crime and Conflict in English Communities 1300-1348* (Cambridge, Mass., 1979), 45. Similar capacities are found among German townswomen, Uitz, *Women in Medieval Town*, 119.

81. Ollivant, *Court of the Official*, 70; Ann Kettle, "'My Wife Shall Have It': Marriage and Property in the Wills and Testaments of Later Mediaeval England" in Craik, *Marriage*, 100-1.

82. *PB Young*, no. 1242 (1502).

83. *PB Young*, no. 482 (1491); PB Darow, no. 79 (1471); *Edin. Recs.*, i, 230 (1527); DA, "Book of the Church," f.158r (1486).

84. *Peebles Recs.*, 149-50 (1463); *PB Young*, no. 39 (1486).

85. PB Darow, no. 88.

minors.⁸⁶ Probably, as in England,⁸⁷ this meant that she was legally liable for them. Sometimes this would involve her in disputes with others who wanted to claim the rights of wardship over children, especially if they were of a wealthy family.⁸⁸ In Aberdeen in 1465 there was a dispute between the dean of Aberdeen and Marion Gleny over the curatorship of Marion's son, Wat Young. The court decreed that if Marion could prove that she had been chosen curate by her son before he chose the dean, she should be recognised as the lawful curate.⁸⁹ As in other countries, widows defending the rights of their children or dealing with matters pertaining to their late husband's business were among the most frequent female plaintiffs in the courts.⁹⁰

Women were made executors by other women,⁹¹ or they might act as agents for men going out of the country. In 1500 John Finlawesone of Edinburgh made his mother Margaret Werty his factor for his lands of Leith until he returned from overseas.⁹² In other cases, a husband might make over all his goods to his wife with full power to dispose of them "at her own free will" to give her power over his business affairs during his absence.⁹³ Such responsibility was not always welcome. In Stirling in 1477 Jonet Guld renounced the office of executor to Thomas Guld her father which she said he had imposed on her.⁹⁴ But usually the duty was accepted.

Although on the surface the burgh legal system appeared disadvantageous to women, in fact women proved perfectly capable of using it in their own best interests and did not hesitate to do so. Moreover, the burgesses who constituted the courts were aware that the women appearing before them had the power to look after their own affairs. This is well illustrated by a trend in property transactions which began in the mid-fifteenth century. If a husband wished to alienate a land to which his wife had some claim either because it came to him as part of the marriage or because they had joint possession of it, he usually began the charter by stating that he granted the land with the consent of his wife. This was to ensure that the wife would not claim back the land after his death as she was legally entitled to do if he had disposed of it without her permission.⁹⁵ That this was a real threat is shown by some of the cases where the widow appears and claims back the land, asserting that she had not consented to the grant, that it had been done against her will, but that she had not protested because of fear of her

86. *Peebles Recs.*, 117-8 (1457), 127-8 (1458); DA, "Book of the Church," ff 54v (1521), 110v; *PB Young*, no. 793 (1495).

87. Bennett, "Public Power," 23.

88. Central Region Archives, B66/15/1 (Stirling Council Minutes 1519-30) f. 12v (1520).

89. ACA, ACR iv, 539. Ollivant suggests, *Court of the Official*, 74, based on the evidence of cases before the Official of Lothian, that women may not have been eligible for such curatorship, but the town court records disprove this.

90. Reyerson, "Montpellier," 119. DA, "Book of the Church," ff 55r, 63r (1521); *PB Young*, no. 373 (1490).

91. *Edin. Recs.*, i, 230 (1527).

92. *PB Young*, no. 1036. See also *Ibid*, no. 1243; *Aberdeen Counc.*, 400.

93. *PB Young*, no. 579 (1493).

94. *PB Darow*, no. 470.

95. Paton, "Husband and Wife," 111-12. See for example, *PB Darow*, no. 118 (1472).

husband — or, as Jonet, widow of Richard Waldy, put it in Edinburgh in 1490 “for crabin and displesans of my said spouse I durst nocht in the tyme breke the said pretendit stat and sasine.”⁹⁶

In the mid-fifteenth century an attempt was made to solve this problem, although a cynical view would suggest that this was because of sympathy with the grant recipients rather than the wives. Probably borrowing from English precedent,⁹⁷ the burgh courts began to require the husband to leave the court after he had announced his intention to make a grant, at which point the court officials would ask the wife whether she truly agreed to the grant of her own free will and not because of fear or compulsion. If the resignation really was her wish, she was to swear that this was the case on the gospels and to swear not to revoke the grant. The earliest example of this procedure comes from Edinburgh in 1438.⁹⁸ The practice was upheld by a decision in Parliament in 1481 which upheld the validity of the wife’s oath after her husband’s death.⁹⁹

On the surface this seems to have offered women a chance to have a say in the alienation of their property, although one cannot help but wonder in the case of a woman who did not want to agree to the grant whether fear of God for making a false oath or fear of her husband would be stronger. But not all grants of a wife’s property were followed by the wife’s oath. In Stirling, Edinburgh, and Dunfermline, for example, there were several years in a row where they were commonplace, then they died out for a while, then reappeared.¹⁰⁰ Perhaps the reappearance was due to some women taking advantage of the lack of an oath to revoke grants. In Dunfermline in 1494 the oaths were reinstated soon after one woman used the fact that she had not sworn such an oath as justification to revoke the grant.¹⁰¹ That it became practice to require such oaths, however, reflected a recognition on the part of the burgh authorities that townswomen, although they might not exercise formal political power, did have a power of their own, that they were prepared to exercise it publicly, and that they, just as much as the men of the town, were an active and important part of the burgh community.

When assessing women’s roles in the legal world of mediaeval Scottish towns it is important to look beyond the formal codes to the actual functioning of the law. Although the former placed definite restrictions on the actions of women, especially wives,

96. *PB Young*, no. 379. See also *Ibid*, no. 373 (1490).

97. In English law it early became practice for a wife to renounce her dower after being privately examined by the magistrates. The renunciation was then recorded by a deed in the borough court, Ann Kettle, “My Wife Shall have It,” 90-1. By the mid-fourteenth century, it was common to examine a wife for her consent to a grant by her husband, R. M. Smith, “Women’s Property Right Under Customary Law: Some Developments in the Thirteenth and Fourteenth Centuries,” *Transactions of the Royal Historical Society*, 5s, 36 (1986): 183-4.

98. *Registrum Cartarum Ecclesie Sancti Egidii de Edinburgh* (Bannatyne Club, 1859), 72. Other early examples can be found in Haddington, SRO, B30/9/1, f.6 (1442), *Peebles Recs.*, 120 (1457), and St. Andrews University Library, B54/7/1 (Newburgh Court Book 1459-1479), f.19v (1466).

99. *APS*, ii, 140 c. 14.

100. See PB Darow, *PB Young, Dunfermline Recs.*

101. *Dunfermline Recs.*, 48.

women found ways around them, and in doing so proved themselves a force to be reckoned with in the courts. Indeed, the late-fifteenth century attempts to forestall wives' claims on their property after their husband's death suggest that the town authorities were fully aware of the fact that women would not hesitate to come before the courts to claim what they believed was rightfully theirs. Only studies of town courts in other countries will reveal whether such determination was typical of mediaeval women in general — or a characteristic peculiar to the temperament of their Scottish sisters.