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‘For eschewing of trouble and exorbitant expense’: Arbitration in the Early Modern British Isles

*Margo Todd**

The history of binding arbitration in British customary law is very long, and in scope, very broad. In Scotland and in England, in settings both urban and rural, commercial and ecclesiastical, and across a broad range of social estates, from craftsmen to lords, alewives to merchant princes, it had by the sixteenth and seventeenth centuries become the default mechanism to avoid costly litigation, and to resolve disputes likely otherwise to end in bloodshed.¹ It was often a device to avoid the courts, since litigation was always expensive and time-consuming; however, in a great number of cases it occurred in cooperation with legal processes. Frequent referral by the courts, and the regularity with which judges and other court officials themselves served as arbitrators, demonstrates that arbitration was by no means consistently extra-judicial, and that the strangely lingering myth of judicial hostility towards it is in dire need of quashing.² It could operate independently, but it also found a place in all of the overlapping legal systems that competed for jurisdiction in the British Isles. While its referral from equity and common law courts, especially those at the highest levels, has received scholarly attention, the evidence of recent research demonstrates its regular use also at quite local levels and its very frequent referral by ecclesiastical, merchant, borough, and guild courts. In nearly all such cases, both of the elements in this essay’s title – “trouble” and “expense” – played a role. Arbitration was ubiquitous because it had distinctive advantages over litigation in efficiently achieving its larger goal – making peace at a time when

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1. This dating requires a caveat: more documents have survived from the early modern period than from earlier centuries, and it is likely that the rate at which arbitration was sought in the Middle Ages may have been just as high. See Edward Powell, *Arbitration and the Law in England in the Late Middle Ages*, 33 *TRANSACTIONS OF THE ROYAL HIST. SOC.* 49, 55 (1983); Edward Powell, *Settlement of Disputes by Arbitration in Fifteenth-Century England*, 2 *L. & HIST. REV.* 21, 43 (1984); Michael Clanchy, *Law and Love in the Middle Ages*, in *DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST 47-67* (John Bossy ed., 1983) (on settlement by arbitration – *pactum per amorem* – in Norman and Angevin England); DEREK ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES: ENGLAND 1154 TO 1558* (2013), DEREK ROEBUCK, *THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I* (2015).

2. R.L. STOREY, *THE END OF THE HOUSE OF LANCASTER* (London, 1966) (regarding arbitration as a temporary stopgap for justice seekers in the troubled fifteenth century, when the common law courts were so corrupt under weak monarchies as to be inoperative); J.G. BELLAMY, *CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES* (1972) (echoing this view). See JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 51-52, 57-59, 84-99, 105, 113-15, 128-42, 126 (1918) (reprinted in 2012).

the general violence level was very high in England, and when feud still persisted in Scotland.³

Its first advantage was simply that it was community-based. Early modern arbitrators were generally local men: when dealing with disputes, they had the advantage of knowing the quarrelers and their families, and the local history of how particular kinds of disputes had been handled in the past. Their store of personal knowledge made them the preferred resort, for instance, of burgh courts and ecclesiastical tribunals at the parochial level. In English archidiaconal and consistory courts and in Scots referrals from protestant kirk sessions (the lowest level of church courts there), slander and defamation cases were particularly numerous in the sixteenth and seventeenth centuries; local arbitrators were equipped to set a particular slander within the context of family quarrels over time, even over generations, by numerous individuals within families at odds.⁴ They were able, accordingly, to seek the origins of longstanding quarrels, and to deal with complicated facets of a dispute that may not have been alleged in a suit, making them much more likely to be able not only to resolve the particular slander at issue, but even to settle the larger quarrel.⁵ In property disputes, like cattle theft or the moving of boundary markers, the theft itself could be a matter for the courts, but the long background that might explain it would likely not appear in a suit, but could be known to local arbitrators. Their goal was to avoid future trouble between their neighbors, and they were better placed than outside judges to do so if they could consider and address the source of the quarrel. By the same token, commercial disputes in early modern London “were generally decided by reference to merchants as arbitrators,” sensibly so since these men were aware of the larger circumstances and relationships of trade which generated the disagreements.⁶

The ultimate goal of arbitration was not punishment or reparation, but peace-making and the fostering of harmony. The Lords of Council in the 1530s promoted it “for amity to be had amongst them [the disputants] in times coming;”⁷ their declared desire was “the weal of both parties, kindness and friendship to be had among

3. KEITH BROWN, *BLOODFEUD IN SCOTLAND 1573-1625: VIOLENCE, JUSTICE AND POLITICS IN EARLY MODERN SCOTLAND* (1986); Jenny Wormald, *Bloodfeud, Kindred, and Government in Early Modern Scotland*, 87 *PAST & PRESENT* 1, 54-97 (1980).

See PAUL GRIFFITHS, *LOST LONDONS: CHANGE, CRIME, AND CONTROL IN THE CAPITAL CITY, 1550-1660* (2008) (discussing violence levels in early modern England); J.S. Cockburn, *The Nature and Incidence of Crime in England 1559-1625: A Preliminary Survey*, *CRIME IN ENGLAND, 1550-1800*, at 49-71 (Cockburn ed., 1977) (same); IAN ARCHER, *THE PURSUIT OF STABILITY: SOCIAL RELATIONS IN ELIZABETHAN LONDON* (1991) (same); STEVEN RAPPAPORT, *WORLDS WITHIN WORLDS: STRUCTURES OF LIFE IN SIXTEENTH-CENTURY LONDON* (1989) (same); BELLAMY, *supra* note 2 *passim* (same); KEITH WRIGHTSON, *ENGLISH SOCIETY, 1580-1680*, at 66, 184, 222 (1982) (same); A.J. Fletcher & J. Stevenson, *Introduction*, in *ORDER AND DISORDER IN EARLY MODERN ENGLAND* 1 *passim* (A.J. Fletcher & J. Stevenson eds., 1985) (same).

4. See LAURA GOWING, *DOMESTIC DANGERS: WOMEN, WORDS AND SEX IN EARLY MODERN LONDON* (1996) (discussing the apparently rising numbers of such cases in sixteenth-century English ecclesiastical as well as common law courts); J.A. Sharpe, ‘*Such Disagreement betwix Neighbours*’: *Litigation and Human Relations in Early Modern England*, in *DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST* 167, 171 (John Bossy ed., 2003) (same).

5. See e.g., 1618 Falkirk settlement, National Records of Scotland [NRS], ms CH2/400/1, 28-31 (arbitration of extended family quarrels). See Powell, *Settlement*, *supra* note 1, at 36-37, 55-56 (making the point about arbitrators knowing disputants for the later Middle Ages).

6. William Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 *U. OF CHI. L. REV.* 445, 451 (1958).

7. NRS ms CS 5/43, folio 173 (The Lords of Council also sat as the Court of Session, the highest civil court in Scotland, constituted in 1532 as the College of Justice.).

them the parties, their kin, and friends.”⁸ They judged “not by law, but by common sense and bonds of affection.”⁹ In the opinion of the Earl of Sussex, writing in 1568, arbitration was the best way to settle civil disputes because the normal “proceeding of law breeds in these parts a grounded hatred between the parties.”¹⁰ The noble goal of arbitration was instead to “pass to concord,” in order “that kindness should be cherished more, and discord driven out.”¹¹ That was best accomplished not by declaring a winner and penalizing a loser, as in a litigated case, but by arriving at a compromise acceptable to all concerned, one in which both parties could come away with their heads held high, witnesses recognizing that there was right on both sides.¹²

A second advantage of arbitration – one that naturally gets quite a lot of attention – is that it was cheaper and quicker than litigation. The title of this essay quotes a 1534 Scots plaintiff who sought arbitration for a property case already before the Court of Session (a pricey enterprise), “for eschewing of trouble and exorbitant expenses”: *Borthwick v Hoppringle* was ultimately decided by King James V, who had been appointed arbitrator by the pope in response to a request by Hoppringle’s landlord, the archbishop of St Andrews.¹³ Even with the cost of traveling to the itinerant king’s court, the plaintiff saved money. An anonymous English treatise on arbitration echoed the sentiment in the next century: “arbitrement is much esteemed and greatly favored by our common law; the end thereof being privately to compose differences between parties by the judgement of honest men, and to prevent the great trouble and frequent expense of law-suits.”¹⁴ In an early seventeenth-century Staffordshire case, a plaintiff reportedly paid his attorney £22 a year to pursue litigation, “to the impoverishing of many poor people” who presumably might otherwise have benefitted from his alms.¹⁵ (A laborer at the time was fortunate to earn £14 annually.)¹⁶ Arbitration was generally free or nearly so, even in London: merchant arbitrators seem not to have accepted payment until the later eighteenth

8. NRS ms CS 6/1, folio 59v.

9. Clanchy, *supra* note 1, at 52.

10. National Archives, Kew [NA] ms SP 15/14, fol. 72 (1568-Oct. 1569); Sharpe, *supra* note 4, at 175-76 (providing similar sentiments).

11. Craig Muldrew, *The Culture of Reconciliation: Community and the Settlement of Economic Disputes in Early Modern England*, 39 *THE HIST. J.* 915, 942 (1996); Carole 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* 99-117 (J. Kermode Stroud ed., 1991).

12. JOHN GUY, *THE CARDINAL’S COURT: THE IMPACT OF THOMAS WOLSEY IN START CHAMBER* 97 (1977); Martin Ingram, *Communities and Courts: Law and disorder in Early Seventeenth-Century Wiltshire*, in *CRIME IN ENGLAND, 1550-1800*, at 126-27 (Cockburn ed., 1977); Powell, *Settlement*, *supra* note 1, at 39.

13. NRS ms CS 6/4, folio 16v (Feb. 23 1534). See JAMES BALFOUR, 2 *PRACTICKS* 411-17, 511-18 (P. McNeill ed., Stair Society 1963) (1754) (written 1574-83) (discussing arbitration and mediation procedures in Scots law). Wormald, *supra* note 3, at 132 (finding that both arbitration and mediation had been in regular practice in Scotland since the thirteenth century, when informal *amicabiles compositores* began making regular appearances in judicial processes).

14. *ARBITRIUM REDIVIVUM: OR THE LAW OF ARBITRATION* A3 (1694); John Dawson, *The Privy Council and Private Law in the Tudor and Stuart Periods: I*, 48 *MICH. L. REV.* 393, 424 (1950) (pointing out that the majority of cases before the Elizabethan and Jacobean Privy Councils were referred to arbitration, in part to save litigants’ costs, and that the letters that appointed arbitrators to “hear and end” a dispute often ended with the phrase, “so that we will be no more troubled”).

15. *COLLECTIONS FOR A HISTORY OF STAFFORDSHIRE: QUARTER SESSION ROLLS V* 1603-06, at 212 (S. Burne ed., 1940).

16. *Id.*

century.¹⁷ The decision of arbitrators could involve payment by an offending party to the other, of course, and there was sometimes a notary's or scribe's fee entailed, but arbitrators themselves were generally unpaid.¹⁸ Only at the very highest level was legal counsel involved in disputes referred by equity courts. In *Bishop of Ely v. Lord Hatton* (1677), Chancery referred the matter (a property dispute over valuable buildings in Hatton Garden) to arbitration by the Lord Chancellor, Lord Treasurer, three bishops, Viscount Fauconbridge, Chief Justice North, and others "to hear the matter debated by counsel learned on both sides."¹⁹ This latter provision brought significant legal costs into the equation, but the process did bring quick and equitable settlement. Finally, a "multiplication of costs" could be saved by all concerned by using mediation or arbitration to circumvent corrupt court officials, as work on the Quarter Sessions records of seventeenth-century Wiltshire demonstrates.²⁰

As for speed, a 1622 treatise on merchant law commended arbitration as the best way to resolve disputes with "all brevity" and so "to avoid interruption of traffick [business]."²¹ It was good advice: the seventeenth-century London merchant John Paige opined that it was "better to lose somewhat of your right than contest or go to law."²² Disputing freightage costs in a slave trading voyage, he preferred to avoid litigation against the ships' owner since he was "like to be plunged into a vexatious suit which will hinder me from [my] business."²³ Arbitration was quick, perhaps especially so because local fellow-merchants did the arbitrating: they were quite aware that in the commercial world, time is money.²⁴ North of the border, Scots arbitrators generally delivered their resolutions on the same day the dispute was brought to them, with the longest efforts lasting no more than a few weeks. In February of 1571, for example, the Perth merchants John Bacilly and James Powton "referred them to decision of William Fleming and John Peblis," two other merchants, "anent eight bolls, eight pecks barley claimed by Powton, and has accepted the same to be decided betwixt this [day] and Fastronseven [the day before Lent] . . . and the parties sworn to abide thereat" – that is, they took an oath, called the

17. JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 70 n.256 (2004) (citing JOHN PALMER, SUPPLEMENT TO THE ATTORNEY AND AGENT'S TABLE OF COSTS 73 (1833). BELLAMY, *supra* note 2, at 83 n.83 (stating that for Tudor England more generally that there were no court costs or lawyers' fees for arbitration, and that it was generally local, eliminating the costs of travel to a legal center). In most Scottish arbitrations legal counsel is likewise absent. *Id.*

18. OLDHAM, *supra* note 17, at 70 n.256 (citing JOHN PALMER, SUPPLEMENT TO THE ATTORNEY AND AGENT'S TABLE OF COSTS 73 (1833)); BELLAMY, *supra* note 2, at fn. 83.

19. LORD NOTTINGHAM'S CHANCERY CASES II 487-89 (E.C. Yale ed., 1961).

20. Ingram, *supra* note 12, at 110-34; T.E. Hartley, *Under-sheriffs and Bailiffs in some English Shrievalties, c. 1580 to c. 1625* BULLETIN OF THE INST. OF HIST. RES. 47, 164-65 (1974).

21. CONSUETUDO MALYNES, VEL LEX MERCATORIA (1622).

22. CRAIG MULDREW, THE ECONOMY OF OBLIGATION: THE CULTURE OF CREDIT AND SOCIAL RELATIONS IN EARLY MODERN ENGLAND 200-01 (1998). See also Muldrew, *The Culture of Reconciliation*, *supra* note 11, at 925-27. Robert Tittler, *The Emergence of Urban Policy*, 1536-58; in THE MID-TUDOR POLITY C. 1540-1560, at 74-93 (R. Tittler & Jennifer Loach eds., 1980) (noting that after 1550, towns began to acquire new charters of incorporation, giving them the right to hold courts of record for suits of civil pleas, suggesting that before this date arbitration was the principal means to settle credit and debt cases because courts not of record could only have heard suits of less than 40s value. Arbitration nonetheless remained popular in the later sixteenth and seventeenth centuries in English towns); *id.*, Appendix: borough incorporations, 1540-58, at 93.

23. MULDREW, ECONOMY OF OBLIGATION, *supra* note 22, at 200-01.

24. *Id.*

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compromissio, to adhere to the settlement or award (the *arbitrium*).²⁵ Arbitrators clearly recognized that the dispute before them could be part of a growing problem best nipped in the bud – in this case, within a week.

A third advantage of arbitration was its regularized and broadly uniform procedures, both in England and in Scotland, across a great variety of venues and at levels from very local to the center. All were aimed at quick resolution, fair judgment, public reconciliation of public quarrels, and binding devices including bonds and ritual performances. Post-Reformation ecclesiastical courts at the most local levels received disputes from plaintiffs or their neighbors, or from parish priests and churchwardens in England, and referred many, sometimes the majority of them, either to particular designated arbitrators (in general, with two or three men selected by each party and an *ourisman*, umpire or tie-breaker chosen by the court): thus a 1580s dispute concerning the rental incomes of the Perth hospital was referred to arbitration by four named men on each side, “the minister being overman,” with a notation that the laird of Moncreif, alleged to be debtor to the hospital, “promises to stand at their deliverance.”²⁶

In some towns, disputes went directly to semi-permanent arbitration panels.²⁷ In the Edinburgh suburb of the Canongate, for instance, boards of between four and six arbitrators sat at least weekly (sometimes thrice a week) from the 1560s for “reconciling all those that they knew were at variance” before Sunday services, receiving particularly large numbers just before communion Sundays.²⁸ No court referral was required; participation was voluntary, and the boards seem to have been extremely popular.²⁹ They were comprised of persons of good repute from the

25. Perth & Kinross Council Archives [PKCA] ms B59/12/6 (n.f.) (Feb. 15, 1571) (although with the holiday just a few days off). This is one of a plethora of examples: the generalization is based on a reading of the hundreds of extant kirk session minute books from 1560 through the 1640s, and presbytery and General Assembly records from the same period (most in NRS mss CH2); bailies court minute books from Perth for the 1550s-1660 (PKCA mss B59), guild minute books from the same burgh (e.g. National Library of Scotland [NLS] ms 19239); and Justiciary Court Records (in the NRS JC series) and royal and other correspondence from the period related to the author’s ongoing study of the royal burgh of Perth from the 1540s through the Cromwellian occupation. See MARGO TODD, *THE CULTURE OF PROTESTANTISM IN EARLY MODERN SCOTLAND* (2002) (discussing ecclesiastical records more broadly); *Consistoire, guilde and conseil: les archives des consistoires Écossais et l’urbanisation de la culture paroissiale*, 153 BULLETIN DE LA SOCIÉTÉ DE L’HISTOIRE DU PROTESTANTISME FRANÇAIS 3, at 635-48 (Droz, 2007) (for guild minutes). See Powell, *Arbitration*, *supra* note 1, at 54 (discussing the medieval use of the *compromissio*, the oath to uphold the award by arbitrators, usually with a significant financial penalty for renegeing).

26. THE PERTH KIRK SESSION BOOKS 1577-1590, at 401 (Margo Todd ed., 2012).

27. Christopher Haigh, *The Clergy and Parish Discipline in England, 1570-1640*, *THE IMPACT OF THE EUROPEAN REFORMATION: PRINCES, CLERGY AND PEOPLE 1570-1640*, at 125-142 (Bridget Heal & Ole Grell eds., 2008) (finding that of course, an unknown but presumably very large number were doubtless mediated by parish priests or ministers). See also MARK BYFORD, *THE PRICE OF PROTESTANTISM: ASSESSING THE IMPACT OF RELIGIOUS CHANGE IN ELIZABETHAN ESSEX: THE CASES OF HEYDON AND COLCHESTER, 1558-1594*, at 322 (1988) (discussing efforts at systematic parochial arbitration of disputes in English puritan parishes); W.J. SHEILS, *THE PURITANS IN THE DIOCESE OF PETERBOROUGH, 1558-1610*, at 120-21 (1979) (same). The kirk session itself could also sit as an arbitration panel; for example, the session’s 1585 ruling that “so many as were at variance” should bring their quarrel to “the decision of the minister and elders, [and] that in case their party adversary would not appoint with them, that they should be admitted to the communion and the party obstinate should be repelled therefrom and excommunicated.” PERTH KIRK SESSION, *supra* note 26, at 324.

28. THE BUIK OF THE KIRK OF THE CANAGAIT, 1564-1567, at 16-17, 24, 29-32, 257 (A.B. Calderwood ed., 1961). See NRS ms CH2/523/1, folios 9, 10, 12v (for a similar board in Burntisland parish); NLS ms Wod. Oct. IX, folio 5v (same); NLS ms Wod folio XLII, f. 13v (same).

29. BUIK OF THE KIRK OF THE CANAGAIT, *supra* note 28, *passim*.

town, of varying size but usually an odd number, including the *ourisman* appointed by the kirk session.³⁰ They addressed both civil and criminal disputes, although sanctions for the latter were sent on to secular magistrates.³¹ In addition to the standing board, the session also created *ad hoc* mediation panels of “brethren appointed by the kirk as judge arbitral to reconcile brethren.”³² Their guidelines were not to punish, but to draw quarrelers “with lenience to agree with the [other] party, to the end they may live in peace in all time coming.”³³ Married couples in conflict were referred by ministers or sessions to such “honest men being chosen to compose the matter betwixt them.”³⁴ At the highest level of Scots ecclesiastical courts, the 1581 General Assembly sent out commissions to “intervene for reconciling” feuding parties in the west of Scotland, and ordered presbyteries (the mid-level church courts) to enforce the regular offering of arbitration in all parishes.³⁵ At the 1583 presbytery visitation of Holyroodhouse parish, the minister was found negligent in assembling panels; he admitted his fault, but only in situations where he was apparently miffed at not himself having been “chosen to be judge arbitral.”³⁶ Clearly service as an arbitrator brought with it some status in the community.

In towns, bailies or borough courts regularly appointed arbitrators to deal with the courts’ overloads, especially disputes related to wider community division. Cases of failed credit arrangements, slander and defamation, and public quarreling predominated.³⁷ Scots bailies often appointed an “assize” in such cases – a group of neighbors whose resolution of the argument would be recorded but not pronounced by the court, and whose settlement would be final.³⁸ Select members of the council itself could serve as arbitrators, as in the 1582 case of *Cramby v. Cramby*, in which six members became “judges arbitrators and amicable compositors commonly chosen between Thomas Cramby maltman burgess and John Cramby his son” concerning a disputed debt “and in special touching seventeen merks yearly annuals and that for the mail [rent] of the house presently occupied by

30. NRS mss CH2/400/1 at 58; NRS mss CH2/636/34, folios 38, 51v; NRS mss CH2/523/1, f.4; NRS mss CH2/521/7 at 33; NRS mss CH2/299/2 at 3-5, 20-22, 24-25, 38; NRS mss CH2/424/1, f. 2v. See also New Register House, Edinburgh, ms OPR 310/1, folios 50v, 51v, 57v; BUIK OF THE KIRK OF THE CANAGAIT, *supra* note 28, at 16, 25, 29, 31.

31. PERTH KIRK SESSION, *supra* note 26, at 69 n.2.

32. BUIK OF THE KIRK OF THE CANAGAIT, *supra* note 28, at 31, 32. See NRS ms CH2/400/1 at 58 (presenting an *ad hoc* panel in Falkirk which dealt with a slander case and assigning a £10 bond to ensure the parties would abide by the arbitration); NRS ms CH2/636/34, folios 38, 51v (presenting another in Kirkcaldy).

33. NRS ms CH2/523/1, folios 9, 10.

34. PERTH KIRK SESSION, *supra* note 26, at 375, 380 (stating that three elders appointed in the latter case to reconcile spouses, “having respect to the good love and amity [that] should be betwixt [a] man and his wife”).

35. BOOKE OF THE UNIVERSALL KIRK OF SCOTLAND VOL. 2 at 539 & VOL. 3 at 992 (A. Peterkin ed., 1839).

36. NLS ms Wod. Folio XLII, f. 13-13v. It is worth noting that arbitration referrals from church courts seem to have been a post-Reformation phenomenon in Scotland. SIMON OLLIVANT, THE COURT OF THE OFFICIAL IN PRE-REFORMATION SCOTLAND 146 (1982) (discussing how for the 1540s, only one of the 221 cases initiated in the Lothian Official’s Court is recorded as being submitted to arbiters).

37. See, e.g., Perth Bailies Court records, PKCA mss B59/12 series.

38. See PKCA ms B59/12/11, f.2 (Mar. 21, 1648) (numbered from the back of this rough-copy bailies court minute book) (providing an example of what the Scots called an “assiza,” in this case to settle a testamentary dispute without resort to the distant Commissary Court of St Andrews). The arbitrators in this case included merchants, glovers, shoemakers, tailors, and two bailies. PKCA ms B59/12/6 [n.f.] (providing a very large numbers of such assizes from the 1570s).

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John.”³⁹ If a quarrel had already erupted in violence, particularly if it were between townsmen and local landowners, arbitration by local notables was the preferred option, with criminal processes avoided. In 1593, arbitrators including the earl of Gowrie, the laird of Tullybardine, an Edinburgh minister, and the commendator of Kinross made a £2000 award to the laird of Clackmannan, to be paid by the burgh of Perth

for the invading of me [attacking the laird with swords] by the bailies, council and community of the said burgh . . . within my house of Gaskonhall, demolishing of my said house, spuilzeing [destruction] and taking of goods and gear forth of the same, taking and transporting of my person to the tolbooth of Perth [the town gaol].⁴⁰

The heavy fine was worth it to the town, since the arbitrators also reprimanded and bound Clackmannan in future to pay his legal tolls to the town – the initial cause of the quarrel so violently addressed by the irate townspeople.⁴¹

In England, resort to arbitration was clearly as typical of provincial towns as of London. The rate at which English borough courts sent disputes to arbitrators is unknown in most instances, but in early seventeenth-century King’s Lynn, only 16 percent of disagreements brought to the borough court proceeded beyond complaint to the court clerk: such a complaint functioned in effect as a threat to get the defendant to agree to arbitration and so avoid costly litigation.⁴² Arbitrators could be found internally, but as in Scotland, local gentlemen or nobles could be called in to settle particularly divisive conflict within the corporation; in 1619, for instance, the town of Chester sought an end to a long dispute between two urban factions, one allied with the mayor and the other with the town recorder.⁴³ The town’s assembly referred the cause to arbitration by the earl of Derby, lord lieutenant of the county; Sir Peter Warburton, a judge of Common Pleas; and Sir Thomas Savage, deputy lieutenant and Justice of the Peace of Cheshire, all of whom had previously been elected aldermen of the city, indicating their close patronage ties to the corporation

39. PKCA ms B59/12/9, folio 42v (Sept. 24, 1582). See also PKCA ms B/59/12/6, n.f. dated Dec. 5, 1570 and dated Apr. 23, 1571. Members of the council arbitrating, in the latter case, a complaint brought against a widow for “downcasting” her neighbor’s wall, violating an earlier arbitration award; and 21 December 1570, appointment of an “assisa” to “decide and to cognose upon the controversies.” They pronounced their award on the same day they received the case. In 1624 the council ordered two men to submit their quarrel to four men;” two councillors and two craftsmasters were selected, the town provost “to be ourisman in case they agree not.” PKCA ms B59/16/2, f. 19v. Of course, townsmen also regularly chose their own arbitrators apart from the council, as in a dispute between rival Perth grammar school masters. PKCA B59/16/1, f. 337v; cf f. 347v.

40. PKCA ms B59/12/2, f. 82.

41. *Id.* PKCA ms B59/12/2 (providing a fair copy of the decreet arbitral). Robert Bruce of Clackmannan had been a thorn in the side of the burgh for many years, his heavily-armed men regularly bringing goods through the town and successfully avoiding tolls with threats of violent reprisal against the burgh officers and port keepers. A single noble arbitrator, David Lord Scone, was agreed upon by disputants over a 1612 building project near Perth. PKCA ms B59/16/1, f. 195.

42. MULDREW, ECONOMY OF OBLIGATION, *supra* note 22, at 202-03.

43. Catherine Patterson, *Conflict Resolution and Patronage in Provincial Towns, 1590-1640*, 37 J. OF BRITISH STUDIES 1, 1-25 (1998); *id.* at 3 (citing the Chester Assembly Books and noting throughout the article similar settlements in Worcester, Lincoln, Lyme Regis, Chichester, Ipswich, and other towns).

and its citizens and their vested interest in the peace of the community.⁴⁴ The award made, urban concord was restored.⁴⁵

Records of crafts guilds provide an abundance of evidence for a guild tradition of formal and quite binding arbitration of disputes among their own members. The tailors of Perth in 1544, for instance, addressed “injurious words” between two of their members in the bailies’ presence with a reminder to the town council that the craft should “have the correction of that matter.” The glovers, following suit, fined members who reported insults and injuries to the bailies court before seeking arbitration by the craft deacon.⁴⁶ The wrights in 1555 had a standing arbitration board of eight elected men with the deacon as tie-breaker, and the hammermen [metalsmiths] assigned either a deacon or a group of masters “to sit, consider, and discuss in all actions and debates between brother and brother of the craft, or between a master and his apprentice or servant” – an instance of arbitrators settling disputes between persons of unequal status.⁴⁷ Private arbitration between two guilds could receive endorsement by the town council, which would tend to underpin the authority of the award.⁴⁸

In commercial disputes across the island, if a case were brought to trial in an equity court, it was “generally decided by reference to merchant juries or arbitration,” in part because the principles of law merchant exceeded the scope of common law; likewise, once joint-stock companies had been established, company tribunals regularly referred disputes to arbitrators, especially for intra-company divisions.⁴⁹ Of course, individual businesspeople at odds could and did seek out their own arbitrators apart from town, guild, merchant, common law or equity courts. Generally their social peers, these men were charged to “review the circumstances so far as they could establish them,” and they had the option of calling witnesses and receiving depositions as well as hearing the testimonies of the disputants; their overriding concern was to seek an agreement that would satisfy both parties and the needs of the commercial society on which all their prosperity depended.⁵⁰ Finally, disputes at the highest level were, as we have seen, arbitrated extra-judicially by monarchs, bishops, or, in Scotland, Highland chieftains and magnate kin.⁵¹ James VI’s direct arbitration of disputes among western clan leaders contributed to a drastic reduction of blood feud by the early seventeenth century.⁵²

44. *Id.* at 3.

45. *Id.* at 4.

46. Perth Museum and Art Gallery [PMAG] ms 4, THE TAILORS INCORPORATION BOOK, f. 7, and ms 2/2, it. 35; PKCA ms 67/1/1, THE GLOVERS INCORPORATION BOOK, fols. 6, at 154 (1595). *See also* GILD COURT BOOK OF DUNFERMLINE 1433-1579 (E. Torrie ed., 1986) (providing numerous instances of another Scottish town court referring cases to arbitrators).

47. PMAG ms Wrights, p. 2; NLS ms 19239, THE PERTH HAMMERMEN BOOK, fols. 8 38v, 55v, 60v, *passim* (forbidding private vengeance). GESTA ABBATUM MONASTERII SANCTI ALBANI 163-70 (Riley, II ed., 2012) (providing early English examples of arbitration to reconcile employer and waged or master and apprentice); CALENDAR OF CLOSE ROLLS 1461-68 at 230-34 (1892-1954).

48. *See e.g.*, PKCA ms B59/12/9, f. 87v (May 27, 1569) (stating “arbitrators and amicable compositors” of a dispute between the wrights and masons guilds, having made their award, both guilds then asked the bailies “according to auld ancient use and wont” to “counterpone their authority thereto,” which the bailies “found reasonable”).

49. Jones, *supra* note 6, at 453. The incorporation of law merchant into the common law tradition was not achieved until the later eighteenth century. *Id.*

50. Ingram, *supra* note 12, at 127.

51. Jones, *supra* note 6, at 455 (discussing how after 1640 private voluntary arbitration was used more widely than in previous period, with accelerated use after the 1698 Arbitration Act).

52. BROWN, *supra* note 3, at 215-19, 234-35.

After an award was made, reconciliation in the early modern period was very often celebrated by a dramatic public ritual, large numbers of witnesses in effect serving to enforce future peace, if only by peer pressure.⁵³ Publicity *per se* tended to ensure that the settlement would be kept, since violating an agreement witnessed by the whole neighborhood would bring charges of duplicity and undermine reputation. If arbitrators determined that one party was at fault in a dispute, that person could be made formally to process through a town, often to the place where he had offended or to the home of the party he had harmed, there to kneel and apologize, clasp hands or kiss the plaintiff, and drink his health.⁵⁴ Mutual offense could result in a reverse trip and another exchange of kisses.⁵⁵ Public oaths never to offend the other in future were sealed by the signing of a bond or surety to insure future good behavior.⁵⁶ Oaths sworn on the Scriptures entailed the threat of spiritual sanctions for those who violated them; these may not be particularly relevant to modern dispute resolutions, but it is worth bearing in mind that early modern oathbreakers suffered in reputation (and therefore business) and risked the salvation of their souls, so oaths mattered as much as signed bonds, which imposed fines for those who broke them.⁵⁷ In the 1620s, two women in the Scots town of Yester, for example, swore that if they should in future quarrel in public, the one who instigated the dispute would pay 40s to the poor (*ad pios usus*); and in Dundonald, John Hunter and Robert Dickie “voluntarily and of their own proper consents acted themselves to live in peace and quietness together hereafter under the pain of £5” from whomever broke the peace first.⁵⁸ Arbitration was clearly binding.

Finally, particularly divisive cases could have their resolutions celebrated by feasting. The Perth hammermen ordered quarrelers who had been reconciled to drink together, and they threw such lavish feasts at these ceremonies that by 1592 the guild resolved that “what expenses be made . . . upon agreement and pacification” should henceforth be borne by the men who had quarreled, lest the craft treasury be emptied.⁵⁹ (Impressive amounts of drink were consumed at such events: after the successful arbitration of a quarrel between two Perth baxters in 1599, one Thomas Richie was after two days of indulgence “so drunken . . . that he cannot

53. MAX GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* 183-207 (1965) (discussing the anthropological theory behind this principle). See e.g., NRS mss CH2/521/2, folio 5, 28v, 106 (providing examples of the centrality of publicity and witnesses); NRS mss CH2/521/7 at 224-26 (same).

54. See e.g., NLS ms 19239, fols. 41v-42v, at 61 (showing that such ceremonies abound in the records).

55. *Consistoire*, *supra* note 25, at 635-48 (providing several examples); see also NRS mss CH2/523/1, folio 16v, 17v, 19v, 33 (providing several examples); NRS mss CH2/521/8/2, f. 169v (same); NRS mss CH2/716/1, f. 20 (same).

56. Wormald, *supra* note 3, at 54-97; Jenny Wormald, *The Bloodfeud in Early Modern Scotland, in DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST* 101-44 (John Bossy ed., 2003); *Id.* at 123 (discussing bonds). See NRS mss CH2/266/1, f. 2 (providing additional examples); NRS mss CH2/191/1, f. 52 (same); NRS mss CH2/448/2 at 256-57 & 280 (same); NRS mss CH2/377/1, f. 57v (same).

57. See NRS mss CH2/521/1, f. 6v (providing additional examples); NRS mss CH2/1142/1, f. 18v (same); NRS mss CH2/400/1 at 31, 83, 129, 147 (same); NRS mss CH2/4/1, f. 18v (same).

58. NRS mss CH2/377/1, f. 57v (cf. folio 52v). Compare THE SESSION BOOK OF DUNDONALD 1602-1721 at 23 (Henry Paton ed., 1936) *with id.* at 326, 412 (“Acting” oneself could be the signing of a bond by the literate or the swearing of an oath, generally in the presence of a scribe or notary, by the illiterate.).

59. Or if he were the one who decided to throw a reconciliation feast, then paid by the deacon personally; however, upon this ruling the deacon for the first time was given a stipend of £4 to help defray the expenses of his office. NLS ms 19239, f. 56; see also *id.* at folios 67, 67v (ordering that those reconciled drink together).

walk or convey himself upon the streets.”)⁶⁰ James VI feasted newly reconciled magnates in Holyrood before making them process the Royal Mile holding hands with their enemies.⁶¹ And in the Chester case cited above, the arbitrators “made Mr Mayor and Mr Recorder friends, and Sir Thomas Savage bestowed a fat buck on either of them upon condition that the one should sup the other at their own houses, with the aldermen and other friends on both sides,” which they did, together with the earl of Derby and other local gentry, showing “the whole community that discord had ended and that friendship and unity had returned.”⁶²

With these advantages, what may seem surprising is that so many disputes moved on to arbitration only after being initiated in the courts. There are multiple factors at work in moving them out of the judicial system, perhaps the most important being the pressure of business in the courts themselves – a strong motivation to get rid of cases whenever possible. Another, in the case of ecclesiastical courts, is that canon law itself had systematically encouraged shifting disputes away from church courts to arbitration, from at least the thirteenth century on, in regard for the greater religious purpose of peace-keeping.⁶³ But why did many plaintiffs start with the more expensive and lengthy litigation process, or pursue both simultaneously?⁶⁴

One obvious explanation is that the threat of litigation served as a powerful prod to get a foe to agree to arbitration, given the threat litigation posed to one’s purse and time. Another motive is the hope that one might get multiple decisions from multiple venues, including arbitration, and be able to choose the most advantageous. Finally, whatever the drawbacks of the courts, they did have the clout to enforce an arbitration award, with mechanisms more immediate and concrete than the dread of divine retribution for breaking an oath.

Since judges in all kinds of courts were by all accounts happy to refer cases to arbitrators, what happened in the early modern period to lead later students of dispute resolution to the quite false presumption that arbitration was always extra-judicial, and that the courts were enemies of the process? The culprit seems to be a misunderstanding of Robert Vynior’s case, an action brought to the Court of Common Pleas in 1609 against William Wilde for his failure to pay a bond of £20 ordered by arbitrators to resolve a dispute over “divers kinds of parish business.”⁶⁵ Wilde said that he had withdrawn from the case before the arbitrators had rendered judgment, but the court ruled for Vynior.⁶⁶ Chief Justice Coke, however, conceded that Wilde had the right to revoke his submission to arbitration since (as his characteristically convoluted prose puts it) “a man cannot by his act make such authority, power or warrant not, which by the law and of his nature is.”⁶⁷ Many modern jurists seem to consider this case as the legal origin of non-binding arbitration; they apparently see common law courts as jealous of the alternative path to resolution.⁶⁸

60. See also NRS ms CH2/521/3 at 101; NRS ms CH2/523/1, f. 22 (providing a situation similar to the 1605 instance).

61. NLS ms Wod. Oct. VII, f. 18.

62. Patterson, *supra* note 43, at 4.

63. Powell, *Arbitration*, *supra* note 1, at 53-55.

64. They had been doing so since the later Middle Ages. *Id.* at 52.

65. SIR EDWARD COKE. REPORTS OF SIR EDWARD COKE, KNT.: IN THIRTEEN PARTS, PART IV – 81B. 299-306, 300 (1826).

66. *Id.* at 303-04.

67. *Id.*

68. See e.g., COHEN, *supra* note 2, at 95, 105, 125-126, 128-142.

Coke, however, needs to be read with more attention to his own historical context. In reality, seventeenth-century plaintiffs shopped for verdicts by submitting suits to multiple jurisdictions (arbitrators and/or courts) and then revoking submissions when proceedings started to go against them.⁶⁹ A nice illustration is the 1617 case *Middleton v. Lort et al.*, a dispute involving church property, brought in Chancery as well as an ecclesiastical court, with the defendants ultimately complaining that their opponent “in order to vex the defendants with multiplicity of suits” had “taken proceedings in . . . five other courts.”⁷⁰ In the same year, the Spanish ambassador took a case against Richard Bingley, commander of the HMS *Dreadnought* (concerning seizure of Spanish goods after a pirate attack) from the Admiralty Court to Common Pleas, and then to arbitration, with the award of the arbitrators enforced by an order from the Common Pleas judges for the ambassador to submit a bill of discovery in Chancery – all, in the words of Francis Bacon, “in aid of the arbitration.”⁷¹ In all likelihood, Coke was simply reflecting general practice, rather than pronouncing a foundational legal principle. *De facto*, once a case reached arbitration, the award was understood by its contemporary fans as binding. It is worth noting that when Francis Bacon as Lord Chancellor sought information about social structures and customs in foreign lands, he instructed his agents to report “what good establishments [they had] to prevent the necessities and discontentments of the people, to cut off suits at law and quarrels.”⁷² He was typical of his time in recognizing mechanisms for settling quarrels outside the courts as signifiers of particularly enlightened societies.

It is the case that arbitration awards were on rare occasions contested, sometimes successfully; however, a close look at such instances reveals exceptions that prove the rule: In *Moor v. Hinton* (1678), Lord Nottingham in Chancery upheld a challenge to the award of Mr Saunders of the Middle Temple “because of the manifest partiality and injustice of it, . . . for a court of conscience will never confirm or decree an award against conscience.”⁷³ The clear message is that disputants should choose their arbitrators wisely – not that arbitration awards are not binding.

The conclusion drawn above concerning Vynior’s case gains support and further explanation from a glance at the Arbitration Act of 1698 (the “Locke Act,” after its author) by which Parliament confirmed the binding nature of arbitration by calling a violation of an arbitrated agreement contempt of court, not just a violation of contract:

It hath been found by experience that references [to arbitration] made by rule of court have contributed much to the ease of the subject in the determining of controversies because the parties become thereby obliged to

69. Edward Stringham & Todd Zywicki, *Rivalry and Superior Dispatch: An Analysis of Competing Courts in Medieval and Early Modern England*, 147 PUBLIC CHOICE 497, 497-524 (2011).

70. REPORTS OF CASES DECIDED BY FRANCIS BACON IN THE HIGH COURT OF CHANCERY 59-61 (John Ritchie ed., 1932).

71. *Id.* at 44-45.

72. JAMES SPEDDING, THE LETTERS AND THE LIFE OF FRANCIS BACON, Vol. II at 17 (1861).

73. *Lord Nottingham’s Chancery Cases*, *supra* note 19, at 619. See also *id.* at 699 (citing the 1678 case *Thomson v. Wood* in which an arbitration decree was overruled by Nottingham in Chancery “as obtained by corruption” and the arbitrator’s denial of corruption “overruled as frivolous because it tended to prevent all examination or proof of the corruption denied.”).

submit to the award of the arbitrators under penalty of imprisonment for their contempt in case they refuse.

The parties were henceforth required to include “their agreement . . . [and] the bond or promise whereby they have obliged themselves” into the court record by filing an affidavit; if they then disobeyed, they were subject to “all the penalties of contemning a Rule of Court,” and their only recourse would be to demonstrate convincingly that the arbitrator had misbehaved or was corrupt.⁷⁴ The act made awards into rules of court, and enforced them as such.

Other evidence for this read of Vynior’s case is simply the rising use of arbitration over the course of the seventeenth and eighteenth centuries. Daniel Defoe’s famous recommendation in *The Compleat English Tradesman* reflects this reality: “The honest peaceable tradesman will, as far as in him lies, prevent a decision at law” and rather bring differences to “a friendly accommodation by expostulation, by application, by arbitration.”⁷⁵ From the second half of the seventeenth century there are increasing references to arbitration in form books and tradesmen’s manuals, and an impressive upsurge in the numbers of legal textbooks on arbitration was a marker of the period.⁷⁶ By the latter half of the eighteenth century, no less a jurist than Chief Justice Mansfield would be found a notable friend of arbitration, not only in decision (like so many of his predecessors at all levels of the judiciary), but also in principle. In the still quite violent society of the eighteenth century, he would have been foolish not to be.

74. 9 & 10 Will. 3, c. 15 (Eng.). Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century*, 36 HIST. J. 137, 146 & 155 (Mar. 1993).

75. DANIEL DEFOE, *THE COMPLEAT ENGLISH TRADESMAN*, VOL. 2 119 (1727).

76. Jones, *supra*, note 6, at 456-57.