CHAPTER NINE

THE ROLE OF THE SESSION IN DISPUTE RESOLUTION

Introduction

Recent scholarship has tended to supplement a traditional concern with the development of law courts with an attempt to place the pursuit of legal action within the wider context of dispute resolution. This often involves emphasising other, less formal methods of achieving a conclusion to a dispute, and elaborating upon themes of compromise, settlement, the role of the feud, and the use of procedures such as mediation and arbitration as alternatives to litigation.1 This reflects a recognition that the maintenance of order and social stability in many medieval and early modern polities did not rest exclusively upon legal sanctions associated with the formal administration of justice, important though legal rules and courts of justice were. Justice could be achieved in other ways too, and the resolution of disputes through legal process had not yet achieved its subsequent degree of pre-eminence.

This approach has been evident in the context of Scottish history. However, it has a special relevance to the sixteenth century in Scotland. As we have seen in earlier chapters, this period witnessed extraordinary change in the system of law courts which was inherited from the

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mature medieval legal order of the fifteenth century. These changes in the administration of justice in the sixteenth century were themselves an important aspect of the wider development of the machinery of governance typically associated with the development of the early modern state. Assessing the implications of those changes for dispute resolution raises again the question posed in the previous chapter, namely what effect did the enhancement of “public” justice have upon existing practices of “private” dispute resolution? Furthermore, how does any effect of this sort provide a measure of deeper social or ideological change?

The previous chapter examined the history and nature of arbitration in order to provide a basis for analysing the role of the Session in dispute resolution generally, placing formal litigation alongside arbitration as a commonly used alternative method. There is a temptation to overlook this wider context, and the place of alternative methods of dispute resolution within it, since medieval Scotland was a land of common law, and the fundamental condition for the evolution of a common law in Scotland, as in England, had been the development of the jurisdiction of royal courts. Courts and legal forms of redress therefore form a natural focus of study, assisted by their tendency towards reliable record-keeping. Nevertheless, careful attention to methods of dispute resolution in the wider sense has been evident in relation to recent work on sixteenth-century Scotland, where particular insights have been gained from the fact that bloodfeud and the evidence for it is considered to have survived late by European standards.2 Famously in 1599 James VI had criticised the Scottish nobility in his Basilikon Doron for their readiness to “tak up a plaine feid” and to “bang it out bravely, hee and all his kinne”.3 The extent of this royal concern was evident towards the end of the sixteenth century, and in 1598 the well-known “Act anent removeing and extinguisching of deidlie feids” was passed.4 Notably, the main feature of the legislation was an attempt to force feuding parties to submit their disputes for resolution, but through private arbitration, rather than involving the full state legal apparatus in

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