Petition and Summons Procedure

Discussion paper for the Rules Rewrite Committee of the Scottish Civil Justice Council

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Discussion Paper on Petition and Summons Procedure

Structure of Paper

1. Research Specification

I have been asked by the Rules Rewrite Committee (the "Committee") of the Scottish Civil Justice Council (the "SCJC"), to provide historical and principled academic analysis in relation to questions arising from the proposal to merge petition and summons procedure.

The Committee has advised that the purpose of the research is:

- to assist the Committee with its consideration of whether to merge petitions and summons procedure;
- to assist the Committee with its understanding of the issues that would be raised should it decide to merge petition and summons procedure.

It was added by the Committee that it is not the purpose of the research to make substantive suggestions or recommendations to the Committee about whether petition and summons procedure should be merged or how that might be achieved in practice.

The Committee has advised that the objectives of the research are to provide it with:

- an understanding of the history of the distinction between petition and summons procedure;
- an understanding of the legal and principled basis for that distinction;
- an analysis of any difficulties caused by that distinction in present practice;
- an analysis of any difficulties likely to be presented by the proposal to remove that distinction;
- a comparative analysis, as appropriate, of the approach taken to any similar matters in England and Wales, Commonwealth jurisdictions such as Canada and Australia, and other comparable places.

It was added by the Committee that the focus of the research is expected to be the law and history of the Court of Session, as that is the forum where the procedural differences between the procedures are most marked. It was also added that, to the extent that it is necessary, appropriate or interesting, the focus of the research may also extend to the law and history of the sheriff courts, to investigate

whether a consistent approach between the courts can be achieved.

2. Historical, legal and principled basis for the distinction

2.1 Overview

The petition[1] and the summons[2] are the two principal forms of originating process in the Court of Session. The distinction between them is found, with variations in terminology, over a relatively long period in Scots civil procedure. It is useful to introduce the discussion with an overview of some of the orthodox positions taken in the literature on the basic distinction. Beginning with the institutional writers, Stair described the distinction as follows:

> A solemn action is that which proceeds expressly in the King's name, and hath no execution till parties be heard, or be contumacious. And so a summary action is that which wants these solemnities.[3]

Bankton stated that:

> A general division of actions, most frequent with us, is, that they are either Ordinary or Extraordinary. The first are these which proceed in the common course, by citation of the parties, whether on a privileged or other summons. Extraordinary, are such as are brought into court in a different manner, and not in the ordinary course of proceeding, *viz.* by way of Complaint or Suspension.[4]

Erskine wrote that "[s]undry actions proceed upon a warrant of the Court of Session, without any summons issuing from the signet, and therefore denominated *summary actions*". Examples were given of bills of complaint exhibited against members of the College of Justice or court practitioners, factors on sequestrated estates, inferior judges in contempt of authority, officers of the law for oppression, and litigants in any action brought before the court who were guilty of a wrong pending suit.[5]

1 Petition procedure is sometimes called "summary procedure". The petition should not be confused with a petitory action – see the *Laws of Scotland: Stair Memorial Encyclopaedia* (Civil Procedure Reissue), paras. 36 and 38.
2 Summons procedure is sometimes called an "action", "ordinary action" or "solemn procedure".
3 Viscount Stair, *The Institutions of the Law of Scotland* (5th edn, 1832, John Shank More (ed)), IV.3.24.
4 Andrew McDouall (Lord Bankton), *An Institute of the Law of Scotland* (1752, rep 1994, Stair Society), IV.24.19.
5 John Erskine, *An Institute of the Law of Scotland* (5th edn, 1824), IV.1.9.

Among the classic statements in the broader literature and case law, the Clyde Report of 1927 made the following distinction between the petition and the summons:

> The object of the summons is to enforce a pursuer's legal right against a defender who resists it, or to protect a legal right which the defender is infringing; the object of a petition, on the other hand, is to obtain from the administrative jurisdiction of the court power to do something or to require something to be done, which it is just and proper should be done, but which the petitioner has no legal right to do or to require apart from judicial authority. The contentious character of the proceedings which follow a summons necessitates a higher degree of formality than is appropriate to an *ex parte* application such as a petition, even though opposed; hence the distinction between the "solemn" procedure in an action and the "summary" procedure in a petition.[6]

It was suggested in the *Stair Memorial Encyclopaedia* that this gave an unduly narrow description of the object of petitions, and that Lord Keith and the *Dunedin Encylopaedia* were nearer the mark.[7] Lord Keith made the following distinction:

> The summons and the petition have different historical origins and the purpose of the summons is different from the purpose of the petition. A summons was a writ issued in the King's name, directed to messengers-at-arms, charging a defender to appear within a certain period, if he wished to resist decree passing against him, and the procedure in the event of his non-appearance was settled by a very long course of practice and regulation. A petition is an *ex parte* application addressed to the Lords of Council and Session and seeks their aid for some purpose or other, *e.g.*, by supplying some deficiency of power in the petitioner, in protecting pupils and minors, by exercising some statutory jurisdiction, or the *nobile officium*, in a variety of matters. We are entirely masters of the procedure in a petition, subject to any regulations thereanent made by Act of Sederunt.[8]

The *Dunedin Encyclopaedia* stated that:

> Historically the petition, or, as it was sometimes called supplication, was regarded in early times as purely an equitable proceeding, suitable whenever the ordinary forms of action were inapplicable or circumstances required a simple and summary form of procedure... Some traces of its origin survive

6 *Report of the Royal Commission on the Court of Session* (Cmd 2801) (1927) ("Clyde Report"), pp.50-51.
7 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 26. See also para. 31.
8 *Tomkins v Cohen*, 1951 SC 22 at 23, per Lord Keith. The procedure initiated by petition was described in the same case as "entirely different" to the procedure initiated by summons – *ibid.*, per Lord President Cooper.

> in the rule that procedure by petition is incompetent whenever any other form of action can be used. The purely equitable jurisdiction of the Court known as the *Nobile Officium* has always been, and still is, invoked by petition.[9]

The difference between the petition and the summons (or "action") was set out as follows in *Balfour's Handbook of Court of Session Practice*:

> Procedure by petition differs from procedure by action in respect that –
>
> 1. It is in general *ex parte* or non-contentious;
> 2. The initial writ is not a summons in name of the Sovereign, but a petition addressed to the Court;
> 3. An order of the Court must be asked and obtained before it can be served;
> 4. While the action generally asks the Court to vindicate and enforce some right already existing in the pursuer, the petition, as a rule, asks the Court to confer some privilege or authority on the petitioner; and
> 5. The procedure is summary.[10]

Likewise, it was described in Maclaren's *Court of Session Practice* as follows:

> While procedure by summons is based on the idea that there is some person, whether an individual, body corporate or unincorporate, or the lieges, against whom the pursuer desires to establish a right or seek a remedy, a petition is an *ex parte* application craving the authority of the Court for the petitioner, or seeking the Court to ordain another person, to do an act or acts which otherwise the petitioner would be unable to do, or cause to be done.
>
> A petition does not run in name of the Sovereign; it is simply addressed to the Court.
>
> While a summons usually passes the Signet and may thereupon be served upon the defender, a petition cannot be served until the authority of the Court has been obtained.
>
> A summons may be signed by a law agent, whereas a petition must be signed by counsel.
>
> In a summons the procedure is solemn, while the procedure in a petition is summary.[11]

9 Viscount Dunedin et al (eds), *Encyclopaedia of the Laws of Scotland* (W. Green, Edinburgh, 1926-1935) ("*Dunedin Encyclopaedia*"), Vol. XI, at 308.

10 Robert Berry (ed), *Balfour's Handbook of Court of Session Practice* (5th edn) (W. Green, Edinburgh, 1922), p.200.

These statements generally highlight a number of common distinctions made between the petition and the summons. Among the more common features attributed to the petition is that it is usually made *ex parte*, and typically initiates non-contentious or non-adversarial proceedings. It is addressed to the court, rather than to a contradictor,[12] and the commencement of process arises at the point of lodging the petition in court. The comparatively greater flexibility available under the petition is often emphasised.[13] In addition, the petition is often regarded as invoking a comparatively greater sense of discretionary or equitable jurisdiction, particularly as the petitioner approaches the court not on the basis of right, but to seek a remedy to which he has no right, and which he instead seeks from the court on a discretionary or equitable basis.

By contrast, the summons is typically said to have a contradictor, initiating contentious or adversarial proceedings. The summons is addressed to the defender, rather than to the court,[14] and the commencement of process arises by service of the summons on the defender. The court is regarded as commanding comparatively less flexibility under the summons than under the petition. This may imply a relatively lesser sense of the invocation of discretionary or equitable jurisdiction, particularly as the pursuer typically approaches the court to enforce or vindicate a legal right. The tone of proceedings initiated by summons is a more ordinary and regularised one.

These and other characteristics which are often attributed to the petition and the summons may be contrasted as follows:

Summons	Petition
Usually with contradictor	Usually *ex parte*
Usually contentious or adversarial	Usually non-contentious or non-adversarial
Signeted in the name of the Sovereign	Addressed to the court (neither Signeted nor made out in the name of the Sovereign)[15]
Warrant for service on the respondent must be obtained from the Signet office	Warrant for service on the respondent (if any) must be obtained from the court[16]

11 James A. Maclaren, *Court of Session Practice* (W. Green, Edinburgh, 1916), p.825.
12 Form 14.4 (form of petition).
13 Contrast, for example, the Rules of the Court of Session (Act of Sederunt (Rules of the Court of Session 1994) 1994 (Scottish SI 1994/1443) ("RCS"), Sch. 2), Chs. 13 (Summonses, Notice, Warrants and Calling) and 14 (Petitions).
14 Form 13.2-A (form of summons).
15 This difference is not applicable in the sheriff court, where both an ordinary cause action and a summary application are commenced by way of initial writ – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 25.
16 *Ibid.*, which describes this as now a technical distinction.

Commenced by service of the summons (or, in the sheriff court, the initial writ) on the defender	Commenced by lodging of the petition (or, in the sheriff court, the initial writ[17]) in court
Procedure relating to decrees in absence is applicable	Procedure relating to decrees in absence is not applicable
Procedure involves the application of rules of law as distinct from the discretionary exercise of statutory or common law powers	Procedure involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law
Procedure is in the relevant sense ordinary	Procedure is in the relevant sense extraordinary
Court has comparatively less discretion over procedure	Court has comparatively greater discretion over procedure
Pleas-in-law must be inserted	Pleas-in-law are generally not required to be inserted (other than in petitions for judicial review)
Always originates in the Outer House, never in the Inner House (when originating in the Court of Session)	Some petitions must originate in the Outer House and others must originate in the Inner House (when originating in the Court of Session)[18]
Procedure is solemn	Procedure is summary
Process initiated to enforce or vindicate a legal right	Process initiated to seek a remedy to which the petitioner has no legal right
Comparatively lesser appeal to the court's equitable discretion	Comparatively greater appeal to the court's equitable discretion

This is not an exhaustive characterisation of the two forms of originating process, but juxtaposes their arguably more salient or distinctive features. To some extent, this may appear to be a principled basis on which to make the distinction between the two contrasting forms of proceeding. The summons initiates the ordinary form of action whereby a pursuer seeks to enforce or vindicate a legal right, whereas the petition initiates a more abbreviated and flexible form of proceeding whereby a more extraordinary, discretionary or equitable process or remedy may be used or delivered by the court not of right, but of privilege.

The situations in which the petition may or must be used are numerous and varied, and provision as to the appropriate form of originating process is found in a variety of sources, both statutory and non-statutory.[19] The *Stair Memorial Encyclopaedia* sets out a number of situations in which the petition is regarded as the appropriate form by which process should be initiated.[20] Whilst these

17 In relation to summary applications.
18 See pp. 11-12 below.
19 See pp. 10-14 below.
20 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 28.

will not be restated in full, they can be summarised as follows:

- Procedure involves the discretionary grant of authority or permission (supplying some deficiency of power in the petitioner)
- Procedure involves the discretionary appointment of a person to an office
- Procedure involves the discretionary grant of a remedy which only the court can grant and to which the pursuer is not entitled as of right
- Claim involves exercise of the Court of Session's *parens patriae* jurisdiction[21]
- Claim involves exercise of the Court of Session's *nobile officium*[22]
- Claim by its nature is set apart for the Inner House
- Procedure involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law

Classic examples of the petition being the appropriate form of originating process include an application for the appointment of a judicial factor, a trustee applying for authority for an act relating to the management of trust funds or for directions, an application to the *parens patriae* jurisdiction, an application to the *nobile officium*, an application for suspension, suspension and interdict or suspension and liberation, or for certain applications for the inspection, photographing, preservation, custody and detention of documents and property.[23]

It has been suggested that there is not just a single policy reason for distinguishing the petition from the summons, but rather policy reasons which "var[y] with each different class of petition".[24] This may at least partly explain the several and varied classes of petition, and the piecemeal provision for petitions in the legislation and Rules of Court.[25] However, it also raises another important feature of the petition which is that it is not a uniform category of originating process, singularly and

21 The *parens patriae* jurisdiction is the protective jurisdiction of the Court of Session over vulnerable persons or those unable to act for themselves, such as children and the terminally ill. It is related to, but apparently distinguishable from, the *nobile officium* – see Stephen Thomson, *The Nobile Officium: The Extraordinary Equitable Jurisdiction of the Supreme Courts of Scotland* (Avizandum, Edinburgh, 2015), pp.118-120.

22 The *nobile officium* is the Court of Session's extraordinary equitable jurisdiction to award a remedy where a legal norm is deficient, unavailable or absent, or to alleviate the rigour of the strict law where its application would be unduly excessive, oppressive or burdensome. Whereas the Court of Session's *nobile officium* extends to matters of civil jurisdiction, the High Court of Justiciary has a *nobile officium* over matters of criminal jurisdiction. See generally Thomson, *The Nobile Officium*.

23 Administration of Justice (Scotland) Act 1972, s. 1(1); RCS, Ch. 64.

24 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 24.

25 The current Rules of Court, with their separate chapters for different categories of petition, seem to reflect a "codification" of former practices specific to those categories, which were nevertheless transacted under general rules – see *ibid.*, para. 228.

categorically distinct from the summons. Rather, there are a number of different categories of petition, and their features display a degree of diversity. In this regard, "[d]ifferent types of petitions have different purposes", and these "seem to have resisted compendious, affirmative definition".[26] For example, as described below,[27] the petition for judicial review is in several respects quite different from other types of petition.

Furthermore, in terms of policy justifications for the petition, speed and cheapness are cited.[28] This *prima facie* appears to be a sensible approach to civil procedure: if an intending petitioner requires a remedy with a greater sense of urgency or supplication of the court's privilege than is usual, why subject him to the same length and expense of proceedings as a pursuer in an ordinary action? If there is typically no contradictor, why not abbreviate proceedings in the interests of expediency and efficiency? If the outcome of the process depends essentially on the court's discretion (as the remedy is not demanded of right), why not allow the court to abbreviate and modify procedure as it sees fit to effect and transact the process? These considerations seem to enhance the accessibility of judicial proceedings and, broadly speaking, "access to justice". However, speed and cheapness are by no means the only policy justification for the petition, and some urgent applications can even be made by way of summons.[29]

2.2 Determination of whether to commence process by petition or summons

A number of statutes make direct provision on the form of originating process to be used. For example, it is provided that petition is to be used for an application by trustees or beneficiaries for the variation of trust purposes,[30] by a company member for an order against the conduct of company affairs which are unfairly prejudicial to company members,[31] by a solicitor whose name has been struck off the roll in pursuance of an order of the court to have the court order his name to be restored to the roll,[32] and by the Lord Advocate for a scheme to be made for the future government and management of an endowment.[33]

26 *Ibid.*, para. 26.
27 See pp. 15-16, 27-29 and 35, and fn. 79 below.
28 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30.
29 See p.38 below.
30 Trusts (Scotland) Act 1961, s. 1.
31 Companies Act 2006, s. 994(1).
32 Solicitors (Scotland) Act 1980, ss. 55(3) and (4).
33 Education (Scotland) Act 1980, s108A.

The Rules of Court often specify whether process in a given case must be initiated by petition or summons. It is provided, for example, that an application for revocation of a patent,[34] appointment of a judicial factor,[35] discharge of a judicial factor,[36] and certain applications under the Financial Services Act 1986,[37] Uncertificated Securities Regulations 1995,[38] Gender Recognition Act 2004,[39] and in relation to qualified conveyancers and executry practitioners,[40] shall each be made by petition. Meanwhile, it is provided that certain applications for financial provision after overseas divorce or annulment, and overseas dissolution or annulment of civil partnership, shall be made by summons.[41] An application under section 7(2) of the Family Law (Scotland) Act 1985 (variation or termination of agreement on aliment) "shall be made by summons or in defences in a family action, as the case may be".[42]

Chapter 14 of the Rules of Court makes provision for the distribution of petition business between the Inner and Outer Houses of the court. The current distribution of business is as follows:

Outer House[43]

- Application for the appointment of a judicial factor, a factor *loco absentis*, a factor pending litigation or a curator *bonis*
- Application for the appointment of a judicial factor on the estate of a partnership or joint adventure
- Application to the *nobile officium* of the court which relates to the administration of a trust, the office of trustee or a public trust
- Petition and complaint for breach of interdict
- Application to the supervisory jurisdiction of the court
- Application for suspension, suspension and interdict, and suspension and liberation
- Application to recall an arrestment or inhibition other than in a cause depending before the court

34 RCS, r. 55.6(1).
35 *Ibid.*, r. 61.2(1). This appointment, when achieved on a non-statutory basis, may be sought in exercise of the *nobile officium* – see Thomson, *The Nobile Officium*, pp.70-74.
36 RCS, r. 61.33(1). This does not apply to situations in which application for discharge is to be made to the Accountant of Court – *ibid.*, rr. 61.31 and 61.33(1).
37 *Ibid.*, r. 75.2.
38 *Ibid.*, r. 75.6.
39 *Ibid.*, rr. 91.2(1) and 91.3(1).
40 *Ibid.*, r. 80.2(1).
41 *Ibid.*, rr. 49.53(1) and 49.53B(1).
42 *Ibid.*, r. 49.57.
43 *Ibid.*, rr. 14.2(a)-(i).

- Petition or other application under the Rules of the Court of Session or any other enactment or rule of law
- Application to the court in exercise of its *parens patriae* jurisdiction

Inner House[44]

- Petition and complaint other than for breach of interdict
- Application under any enactment relating to solicitors or notaries public
- Application which is, by virtue of the Rules of the Court of Session or any other enactment, to be by petition and is incidental to a cause depending before the Inner House
- Application to the *nobile officium* of the court other than an application mentioned in RCS, Rule 14.2(c) (applications relating to the administration of a trust, the office of trustee or a public trust)
- Petition by trustees for directions under Part II of Chapter 63
- Application under section 1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (assistance in obtaining evidence for civil proceedings in another jurisdiction)
- Application under section 1 of the Trusts (Scotland) Act 1961 (variation or revocation of trusts)
- Application under section 17(6), 18(7), 20(7), 20(11)(b), 21(5), 21(7) or 21(10) of, or under paragraph 20 of Schedule 1 to, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (orders in relation to conveyancing or executry practitioners)
- Application required to be made to the Inner House under any enactment

Where a provision does not specify whether a petition must be made to the Inner or Outer House, effectively the default position is now that the petition should be presented to the Outer House.[45]

In some circumstances, the form of originating process to be used is determined by whether a cause is already depending before the court. For example, certain applications under the Copyright Act 1988, Trade Marks Act 1994 or Olympics Association Right (Infringement Proceedings) Regulations 1995 shall be made:

(a) in a cause depending before the court, by motion; or

44 *Ibid.*, rr. 14.3(a)-(i).
45 See *ibid.*, Ch. 14 in general, and rr. 14.2(h) and 14.3(i) in particular.

(b) where there is no depending cause, by petition...[46]

In another example, applications to set aside transactions under section 3 of the Age of Legal Capacity (Scotland) Act 1991 may be made:

(a) by an action in the Court of Session or the sheriff court, or
(b) by an incidental application in other proceedings in such court...[47]

It has been suggested that it is unclear whether in some circumstances the petition must be used.[48] Whilst in some cases the choice of procedure may have a bearing on the substantive law to be applied, in other cases it might have no material effect on the substantive law.[49] In the former case, selection of the wrong procedure should in principle increase the risk of the court finding the selected procedure to be incompetent.

It has been stated that in "most" cases, the intending litigant has no choice as to whether to initiate process by way of petition or summons, as statute or the Rules of Court "usually" specify which form of process must be used.[50] However, in some cases the choice is apparently for the litigant to make. For example, Rule of Court 73.2 provides the following in relation to applications for rectification of defectively expressed documents under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985:

(1) Subject to paragraph (2), an application to which this Chapter applies shall be made by petition.

(2) An application to which this Chapter applies may be made-

(a) in an action to which Chapter 47 (commercial actions) applies, by summons or by a conclusion ancillary to other conclusions in the summons or in a counterclaim; or

46 *Ibid.*, r. 55.17.
47 Age of Legal Capacity (Scotland) Act 1991, s. 3(5).
48 See *Parliament House Book*, Rules of Court annotations, para. 14.2.10.
49 See *Paterson, Petitioner (No 2)*, 2002 SC 160 at para. 53, per Lord Carloway.
50 Robert Howie QC and Bryan Heaney, *'Petitions in the Outer House'* in *Court of Session Practice* (Bloomsbury Professional, accessed via Practical Law, 20th November 2016), para. 2.

(b) in any other action, by a conclusion in a summons or in a counterclaim.[51]

There also appears to be a choice under Rule of Court 53.1 on whether to include in a summons conclusions for suspension, interdict and liberation in qualifying circumstances.[52] To the extent that the initiator of the process has a choice in whether to use the petition or the summons, this may suggest a category of cases in which the distinction between the two forms of process is based not necessarily on legal doctrine or policy as such, but on the option of the initiator. Perhaps, if cases exist where either process can be used, there is less distance between the forms of process in terms of principle – or at least not as much conceptual distance between them in all cases.

Nevertheless, where proceedings are initiated by petition – even where the court is not persuaded that this was the proper form of process, but where no objection has been taken and the court is not prepared to deem them incompetent – the effect of this is not to "transform a case involving an ordinary remedy based upon legal right into a purely discretionary one".[53] That in itself is potentially significant, and again suggests the possibility of less conceptual distance between the two forms of process – at least in some cases – than the orthodox coverage might have recognised.

2.3 Testing the distinction between the petition and summons

The preceding sections set out the generally accepted features of, and distinctions between, the petition and the summons as forms of originating process. The existing literature has tended not to test those putative features and distinctions, however. Rather than merely serve to repeat or reiterate the orthodox view of the forms of process, the opportunity is taken in this paper to ask to what extent these features and distinctions are comprehensively applicable. Indeed, the general lack of commentary on the forms of process – and in particular scholarly analysis – might lead statements to import the logic and premises of historically expressed views without subjecting them to a sufficient level of scrutiny.

The doctrinal, policy and practical justifications for the petition depend on the alleged distinctions between the petition and the summons being accurate. A comprehensive, empirical study of

51 RCS, r. 73.2. See further pp. 25-26 below.

52 RCS, r. 53.1.

53 *Paterson, Petitioner (No 2)*, 2002 SC 160 at para. 53, per Lord Carloway. Consider also, though of a different nature, *Wilson v Inverness Retail and Business Park Ltd*, 2003 SLT 301, in which it was doubted whether the court could dismiss an otherwise competent and relevant action on the view that it was "inappropriate" in light of some alternative means of proceeding – at para. 27, per Lord Eassie.

processes initiated by petition and summons is beyond the scope of this paper, but it is instructive to ask to what extent these distinctions hold true in practice, and to subject them to tests for analytical rigour. Are, for example, petitions typically *ex parte*, without a contradictor? Are they generally non-contentious or non-adversarial in nature? Do they indeed invoke a comparatively greater sense of the extraordinary, the discretionary or the equitable? This section will raise questions of this nature under two headings: (a) that the petition is usually an *ex parte* form of originating non-contentious or non-adversarial process, and (b) that the petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law.

The purpose of this section is not to "disprove" or completely reject the existing accounts of the distinction between the petition and the summons. Its purpose is more nuanced – to the extent that the features and distinctions do not hold comprehensively true, the two forms of process might not be so categorically divided as a matter of principle as the views traditionally expressed would have it – in which case, there may be space created for the recommendation for the distinction's abolition. In this way, the current section looks to introduce balance to the analysis of the distinction.

a. Petition is usually an ex parte form of originating non-contentious or non-adversarial process

The petition is typically described as a form of originating process initiated *ex parte*. By contrast, the summons is regarded as typically having a contradictor – in other words, a party cited as a respondent who resists or objects to the action. In many cases this may be correct, and it has been said that, with the notable exceptions of petitions for the custody of children, judicial review, and suspension and interdict, it is apparently not common for a petition to be opposed.[54] In fact, there have even been cases in which a petition has been refused as incompetent on the basis that it involved a question of disputed right.[55] There have also been cases in which a petition was sisted to allow disputed matters to be settled by way of an action.[56]

However, a significant number of petitions do not proceed as *ex parte* applications, but as

54 William W. McBryde and Norman J. Dowie, *Petition Procedure in the Court of Session* (2nd edn) (W. Green, Edinburgh, 1988), p.3.
55 *Mackenzie v Macfarlane*, 1934 SN 16; *Simeone, Petitioners*, 1950 SLT 399; *Heggie v Davidson*, 1973 SLT (Notes) 47.
56 *Davidson's Trustees v Arnott*, 1951 SC 42; *Church of Scotland Trust v O'Donoghue*, 1951 SC 85.

contentious or adversarial proceedings. The salient example is the petition for judicial review,[57] which in the majority of cases will have a party cited as respondent who seeks to resist or object to the petition. Indeed, the very essence of judicial review is to confine a body to its jurisdiction,[58] and this can take many forms such as seeking reduction of an *ultra vires* decision, an order of specific implement to compel a body to decide or to give reasons for its decision, or an order of interdict to restrain a body from acting *ultra vires*. It is commonplace in such petitions for the body whose decision, act or omission is challenged to be cited as contradictor, and they will typically resist or object to the petition. The most recently available statistics published by the Scottish Government (covering the year 2014-2015) disclose that 399 petitions for judicial review were initiated, and 287 disposed, in the Court of Session.[59] 1,213 cases were initiated, and 1,062 disposed, through the Petitions Department.[60] Proceeding on the assumption that all or almost all petitions for judicial review are contested,[61] this means that – on the basis of petitions for judicial review alone, and not taking into account other types of petition – approximately 27-33% of petitions did not proceed on an *ex parte* basis, but instead had a contradictor and proceeded on a contested basis. These are very rough figures, but they already suggest that a significant volume of petitions are not made *ex parte*, and are used to transact contentious or adversarial proceedings.

Petitions other than those for judicial review do sometimes proceed contentiously or adversarially. For example, though most petitions to the *nobile officium* are *ex parte* and neither demand nor require a contradictor, some petitions are met with resistance in the form of a party who lodges objections. Even the *nobile officium*, therefore – despite putatively being the greatest appeal to the court's "equitable" jurisdiction – can be, and has been, invoked through contentious or adversarial proceedings initiated by petition.

A further example is found in relation to the enforcement of foreign judgments under section 9 of the Administration of Justice Act 1920 or section 2 of the Foreign Judgments (Reciprocal

57 Changes to the Rules of Court, particularly those relating to petitions for judicial review, have "tended to blur the distinction [between the petition and the summons] over recent years" – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 87.

58 See Stephen Thomson, *'The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session'* [2016] Public Law 670.

59 *Civil Justice Statistics in Scotland 2014-2015* (Published by the Scottish Government, 18th March 2016), p.76 (Table 23). This is the highest number of petitions for judicial review initiated over the period of coverage in the report, namely from 2008-2009 to 2014-2015. It represents approximately a 30% increase on the immediately preceding year.

60 *Ibid.*, p.55 (Table 2). The table also shows that 139 cases were initiated, and 138 disposed, in the Inner House. This is described as first instance business only, excluding appeals and reclaiming motions, but it is unclear whether it includes any petition business.

61 Figures do not appear to be available for this.

Enforcement) Act 1933. The application for registration of such a judgment shall be made by petition,[62] presumably *ex parte*. However, on registration of the judgment, the petitioner must serve notice on the judgment debtor in the prescribed form,[63] and the judgment debtor may then apply by note to set aside the registration.[64] These proceedings can conceivably be regarded as contentious following the judgment debtor's application by note, and it can be seen that the judgment debtor's prescribed mechanism for objecting to the registration is by note (presumably within the existing petition procedure) – with no requirement to initiate process by summons. Related to this, a decree for payment made by a court in another part of the United Kingdom may be challenged by applying either to sist proceedings for enforcement,[65] or to reduce the registration of the judgment.[66] This must be done by petition.[67]

A solicitor whose name has been struck off the roll in pursuance of an order made by the court may apply to the court for an order directing his name to be restored to the roll,[68] and a solicitor whose rights of audience have been revoked in pursuance of an order made by the court may apply to the court for an order restoring those rights.[69] These applications shall be made by petition, and intimation of the petition shall be made to the Scottish Solicitors' Discipline Tribunal, which shall be entitled to appear and be heard in respect of the application.[70] These can potentially be contentious proceedings.

Separately, a petition made "in a summary way" for determining whether rolling stock and plant is liable to be attached by diligence can presumably be opposed,[71] and though generally a quite distinct class of petition, the election petition will typically have at least one respondent.[72]

The availability of interim interdict and other interim orders demonstrates that contentious proceedings can arise in procedure initiated by petition, and that non-contentious proceedings can arise in procedure initiated by summons. This further tests the putative correlation between the petition and the summons, and their respective characteristics of being non-contentious and

62 RCS, r. 62.5(1).
63 *Ibid.*, r. 62.9.
64 *Ibid.*, r. 62.10(1).
65 Civil Jurisdiction and Judgments Act 1982, Sch. 6, para. 9.
66 *Ibid.*, para. 10.
67 RCS, r. 62.37(3).
68 Solicitors (Scotland) Act 1980, s. 55(3).
69 *Ibid.*, s. 55(3A).
70 *Ibid.*, s. 55(4).
71 Railway Companies (Scotland) Act 1867, s. 5.
72 See *Laws of Scotland: Stair Memorial Encyclopaedia* (Elections and Referendums Reissue), para. 354.

contentious. Section 47(1) of the Court of Session Act 1988 provides for interim interdict to be sought in any cause containing a conclusion or crave for interdict or liberation, with additional provision for orders for interim possession of any property to which a cause relates,[73] including in relation to orders (and interim orders) *ad factum praestandum*.[74] These interim orders are made by motion, though the defender may lodge a caveat in which case the issue is contentious, even though the motion may have been made in the context of a petition.[75] This would therefore be a contentious proceeding arising within the context of a petition. Conversely, if the process was initiated by summons and the defender had not lodged a caveat (or the motion had not been intimated to the party affected[76]), the motion would be made (and order granted) *ex parte*. This would therefore be a non-contentious proceeding arising within an otherwise "contentious" cause initiated by summons.

Finally, though perhaps unusual (or even exceptional) due to the pressing nature of the case, the summons has successfully been used to obtain declarator even where the issue to be decided was uncontentious – in the sense that the parties to the case were not in dispute about the legal consequences of a particular action. The Inner House (in a court of five judges) considered that such a course would be inappropriate in future cases, however, in which the court's *parens patriae* jurisdiction fell to be exercised.[77]

The conclusion which may be drawn from this discussion is that, whilst it might generally be true that the petition is an *ex parte* form of originating non-contentious or non-adversarial process, it is not universally true. Just how many petitions do and do not fall into this category cannot be ascertained without large-scale empirical research. However, the fact that several classes of petition can initiate contentious or adversarial proceedings – including the major category of petitions for judicial review, in which the contentious or adversarial nature of proceedings is the norm – raises questions about just how extensively the claimed attributes of petitions can be and ought to be asserted. In addition, as procedure initiated by summons can, albeit infrequently or even rarely, be non-contentious or non-adversarial, there is further uncertainty in the accuracy and extent of the putative correlation between the forms of originating process and the *ex parte*, contentious,

73 Court of Session Act 1988, s. 47(2).
74 *Ibid*., s. 47(2A).
75 Including (but not limited to) a petition for judicial review – RCS, r. 58.13(2)(b).
76 See the *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 117.
77 *Law Hospital NHS Trust v Lord Advocate*, 1996 SC 301. Application to the *parens patriae* jurisdiction is now made by petition to the Outer House – RCS, r. 14.2(i).

adversarial or otherwise character commonly attributed to them.

b. Petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law

It has been claimed that petition procedure involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law, the converse applying for summons procedure. This is closely associated with the idea that whilst in a summons the pursuer seeks to enforce or vindicate a legal right, the petitioner supplicates the court to exercise its privilege to grant a remedy to which he has no legal right. The court's discretion is, the principle goes, key to the success of a petition.[78]

The respective forms and terminology reflect this distinction. Form 13.2-A is provided for use in procedure initiated by summons. This is addressed from the pursuer to the defender, in which "the pursuer craves the Lords of our Council and Session to pronounce a decree against you [the defender] in terms of the conclusions appended to this summons". Meanwhile, Form 14.4 is provided for use in procedure initiated by petition. It is instead addressed from the petitioner "unto the Right Honourable the Lords of Council and Session" – to the court itself. Likewise, whereas the summons contains the pursuer's "crave", the petition contains the petitioner's "prayer".[79] The idea of the latter is that it comprises a more elevated expression of humility on the part of the petitioner, who seeks from the court a remedy to which he has no right. The petition even introduces the substance of the application with the words "humbly sheweth", and in former times – around the 18th century in particular – there were cases in which the petitioner was designed as the "supplicant".

The traditional characterisation of each form of originating process under the present heading might again hold true in many cases. As for the previous section, the precise accuracy or extent of this characterisation cannot be measured without a large-scale empirical study. However, the distinction is again one which can be tested, both on the more general level of principle, and in relation to remedies. The paper will challenge this distinction in the interests of testing the veracity of the orthodox view, and ensuring balance in the analysis and range of perspectives available to the

78 Consider *Bank of Scotland v Brunswick Developments (1987) Ltd (No 2)*, 1997 SC 226 at 231, per Lord President Rodger.

79 However, petitions for judicial review have no prayer.

Committee.

Beginning with the more general point of principle, Lord Macfadyen and Sean Smith stated with reference to the Clyde Report's distinction between the purpose of the petition and the summons that:

> While this remains a useful distinction, it should not be thought that it is always necessarily inappropriate to proceed by way of petition where it is sought to enforce or protect a party's rights. For example, it has been held competent to proceed by way of petition in order to recover possession of heritable property, though the orders sought might in substance have the same effect as an action of removing.[80]

The authors cite, in this regard, a case in which "petition procedure had been chosen in order to avoid perceived objections to the competency of raising a simple action of removing in the Court of Session".[81] Other categories of petition in which the object of the petition is to "protect a legal right which the defender is infringing" (putatively the object of the summons) are the petition for suspension, petition for interdict, and petition for suspension and interdict.[82] The general principle that the petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law can therefore already be seen as not one of universal application.

Likewise, the general principle that the summons involves the application of rules of law as distinct from the discretionary exercise of statutory or common law powers is also not one of universal application. In particular, the summons can be used to obtain so-called "equitable remedies"[83] which are allegedly awarded on a more or less discretionary basis. This also extends to the award of interim remedies, such as interim interdict. The basis for the court's decision on whether to grant an interim order is the balance of convenience test,[84] which is a matter for the discretion of the

80 Lord Macfadyen and Sean Smith, *'Procedure in an Ordinary Action'* in *Court of Session Practice* (Bloomsbury Professional, accessed via Practical Law, 20th November 2016), para. 2.
81 *Oliver & Son Ltd, Petitioners*, 1999 SC 656.
82 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 26.
83 See pp. 22-25 below.
84 Indeed, this test applies not only to an order for interim interdict, but also, for example, interim suspension – see *Muqit v General Medical Council*, 2000 SLT 943.

court.[85]

Sometimes the court has discretion under summons procedure which seems more redolent of that under petition procedure, such as the provision that, in an application to set aside a transaction under the Age of Legal Capacity (Scotland) Act 1991, the court "may make... such further order, if any, as seems appropriate to the court in order to give effect to the rights of the parties".[86] Conversely, even when exercising the *nobile officium* – putatively the court's "purely equitable" jurisdiction[87] – the award of remedies is not entirely discretionary (or perhaps better put, not arbitrary), with precedent continuing to play a perhaps surprising role.[88]

In relation to remedies, it can also be seen that there are questions about the extent to which it is accurate or appropriate to regard the petition as a form of process categorically concerned with the discretionary exercise of statutory or common law powers.[89] Though there is potentially scope for argument that discretion can take on more or less equitable forms, the petition has often been taken to invoke a greater sense of acting according to equitable considerations than as a matter of strict legal right.

The equitable nature of jurisdiction, judicial power and remedies is complex and under-explored in both the law and literature. The "equitable" descriptor has also been used with great elasticity and lack of precision in many different scenarios over a prolonged period of time, such that it is not always clear that the term is being used with consistency or to convey the same meaning, categorisation or conceptual analysis. It is also important to note that there is no exact correlation between the "equitable" remedy and the process or jurisdiction by which it is accessed – for example, an "equitable" remedy (such as interdict[90]) can be accessed through a non-equitable form of process (in principle, the summons[91]); whilst a non-equitable remedy (such as damages[92]) can be

85 *Toynar Ltd v Whitbread & Co plc*, 1988 SLT 433, p.435. See also *Scottish Power Generation Ltd v British Energy Generation (UK) Ltd*, 2002 SC 517.

86 Age of Legal Capacity (Scotland) Act 1991, s. 3(5). It is provided in s. 3(5) that the application may be made by action in the Court of Session or the sheriff court, or by incidental application in other proceedings in such court. The "action" referred to is presumably one initiated by summons; though the application could also be made incidentally under petition procedure.

87 *Dunedin Encyclopaedia*, Vol. XI, para. 697.

88 See Thomson, *The Nobile Officium*, pp.241-252.

89 It is perhaps also worth noting that the *nobile officium* has sometimes been regarded as an exercise of, but at other times distinguished from, common law powers – see *ibid.*, pp.26-28.

90 See pp. 22-23 below.

91 For a recent example of interdict obtained by summons, see *Van Lynden v Gilchrist* [2016] CSIH 72.

accessed through a supposedly "equitable" form of process (such as the petition for judicial review[93]). It can also be observed that the court (and in some circumstances the sheriff court) retains much in the way of discretion in the many and varied applications of tests of fairness, reasonableness, justice, equitableness and so on. These may bear a wide range of applications of, or relationships to, the "equitable" or discretionary forms of process, jurisdiction, judicial power, legal doctrine and remedies. The tests are too numerous and varied to enumerate, but include statutory and non-statutory tests such as:

- Where a party has suffered damage including personal injury or death in circumstances where that is the result partly of his own fault and partly the fault of another (contributory negligence), the court's power to reduce damages recoverable by an injured party to such extent as the court thinks just and equitable having regard to his share in the responsibility for the damage;[94]
- The requirement in seeking the remedy of recompense that it be equitable for the pursuer to be reimbursed by the defender on the basis of *quantum lucratus* in respect of the loss incurred by the pursuer;[95]
- An order of the court winding up a building society if the court is of the opinion that it is just and equitable that the building society should be wound up;[96]
- The application of *Wednesbury* unreasonableness as a ground of judicial review;[97] and
- The sheriff's power to postpone the granting of authority to a trustee to sell the family home for such period (not exceeding three years) as the sheriff considers reasonable in the circumstances, or to grant the application for authority to sell subject to such conditions as the sheriff may prescribe.[98]

The imprecise use of the term "equitable" may be responsible for what is potentially an over-extension of its application. This is particularly discernible in relation to remedies, where many of the common law remedies have been, at one time or another, described as "equitable". Repetition,[99]

92 Though rules of law may provide for the award or calculation of damages on an equitable basis.
93 RCS, r. 58.13(g).
94 Law Reform (Contributory Negligence) Act 1945, s. 1.
95 See *Varney (Scotland) Ltd v Lanark Town Council*, 1974 SC 245, p.260.
96 Building Societies Act 1986, s. 89(1)(h).
97 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, accepted as a ground of review in Scots law.
98 Bankruptcy (Scotland) Act 2016, s. 113(2).
99 *Compagnie Commerciale Andre SA v Artibell Shipping Co Ltd*, 2001 SC 653; and see *Courtney's Executors v Campbell* [2016] CSOH 136, paras. 52-53.

restitution[100] and recompense[101] have each been described as equitable remedies, as have rescission[102] and retention.[103]

Sometimes the supposedly equitable nature of a remedy depends on the context in which it is used: reduction, for example, appears to have been regarded as "equitable" in nature when used as a mode of review, but perhaps not, or not to the same extent, when used as a rescissory action.[104] It has nevertheless been described as an "equitable remedy" in recent case law.[105]

Interdict has been subject to varying views on the extent to which it is an equitable remedy. It has been described as "well known" that interdict is an "equitable remedy",[106] and that:

> It is essential to keep in view the very peculiar nature of a process of interdict, which differs materially from every other civil suit... An interdict is thus of the nature of an extraordinary remedy, not to be given except for urgent reasons, and even then not as a matter of right, but only in the exercise of a sound judicial discretion.[107]

However, a more restrained view has also been taken of the equitable nature of interdict:

> Discretion does not normally come into the question when the Court comes to adjudicate as to the final rights of the parties upon an ascertained state of facts. Apart from some understandable exceptions... the general rule is that when operations have been found to be illegal by a final judgment of the Court, the petitioner has a definite right to interdict, unaffected by questions such as balance of convenience or loss...[108]

Perhaps lying between these two positions is the following view:

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100 *McGraddie v McGraddie* [2012] CSIH 23, para. 55.

101 *Varney (Scotland) Ltd v Lanark Town Council*, 1974 SC 245; *McGraddie v McGraddie* [2012] CSIH 23, para. 55; and see *Courtney's Executors v Campbell* [2016] CSOH 136.

102 *AW Gamage Ltd v Charlesworth's Trustee*, 1910 SC 257.

103 *Stobbs & Sons v Hislop*, 1948 SC 216, p.223; *McNeill v Aberdeen City Council (No 2)* [2013] CSIH 102, para. 30; *Laws of Scotland: Stair Memorial Encyclopaedia* (Remedies Reissue), para. 96. See also *Inveresk plc v Tullis Russell Papermakers Limited* [2010] UKSC 19 at paras. 81-84, per Lord Rodger of Earlsferry.

104 *Spence v Davie*, 1993 SLT 217; *Stair Memorial Encyclopaedia* (Remedies Reissue), para. 25. See also, however, the *ibid.*, para. 62.

105 *Cooney v Dumfries and Galloway Council* (unreported, 29th March 2011) at para. 4, per Lord Prosser (cited in *Watt v Lothian Health Board* [2015] CSOH 117 at para. 33); *McLeod v Prestige Credit Ltd* [2016] CSOH 69 at para. 17, per Lord Tyre.

106 *Murdoch v Murdoch*, 1973 SLT (Notes) 13 at 13, per Lord President Emslie.

107 *School Board of the Parish of Kelso v Hunter* (1874) 2 R 228 at 231-232, per Lord Deas.

108 *Ferguson v Tennant*, 1978 SC (HL) 19 at 47, per Lord Justice-Clerk Wheatley.

> It is true... that interdict is an equitable remedy but the court's discretion to refuse interdict on that score is strictly limited...[109]

Equitable discretion has also been cited with reference to specific implement, where it was said that the court:

> possesses an overall equitable jurisdiction which enables it in certain circumstances to refuse to grant the remedy (although normally available) in exceptional circumstances, where there exist compelling reasons rendering it inconvenient or unjust to do so.[110]

This has also been judicially established,[111] and though specific implement has perhaps not ordinarily been considered a discretionary remedy, it has been said that, in certain contractual and perhaps other situations (which would usually involve issues of right transacted by summons procedure), the court retains discretion to withhold the remedy in exceptional circumstances such as impossibility or impracticability.[112]

Though this already accounts for a number of common law remedies, exceptionally, it has even been stated that the court has an underlying discretion to withhold a remedy even where it is strictly due as a matter of legal right:

> It appears to me that a superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights. There are, so far as I know, only three decided cases, in which the Court of Session, there being no facts sufficient to raise a plea in bar of the action, have nevertheless denied to the pursuer the remedy to which, in strict law, he was entitled. These authorities seem to establish, if that were necessary, the proposition that the Court has the power of

109 *Webster v Lord Advocate*, 1985 SC 173 at 180, per Lord Stott, citing Hector Burn-Murdoch, *Interdict in the Law of Scotland* (William Hodge, Edinburgh and Glasgow, 1933), pp.102-103. The view expressed in the *Stair Memorial Encyclopaedia* is that "[w]hile interdict has been described as an equitable remedy, this does not mean that it is not, at the stage of final judgment, granted as of right" – *Stair Memorial Encyclopaedia* (Remedies Reissue), para. 17.

110 *Ibid.*, para. 9.

111 *Beardmore & Co v Barry*, 1928 SC 101.

112 *Paterson, Petitioner (No 2)*, 2002 SC 160 at para. 56, per Lord Carloway. See also *Stair Memorial Encyclopaedia* (Remedies Reissue), para. 9.

> declining, upon equitable grounds, to enforce an admittedly legal right; but they also shew that the power has been very rarely exercised.[113]

This, even if it accounts only for exceptional circumstances, puts significant strain on the idea of "legal rights", as a right is presumably inviolable and something which is indeed enforced or vindicated as a matter of strict legal entitlement. However, a number of the common law remedies are not universally for the enforcement of "legal rights", and the suggestion is that the court retains an underlying discretion to withhold remedies (including those due in enforcement or vindication of legal rights) as a matter of equitable jurisdiction. This introduces a somewhat restrictive interpretation of the idea of a "right to a remedy" or the "enforcement or vindication of legal rights", and it suggests that the remedies cannot be categorically forced into the classification "equitable" or "non-equitable".

Nevertheless, the classification of remedies as "equitable" or otherwise is relevant for the perceived competency of remedies which can be sought in a given case. This is seen, for example, in *Varney (Scotland) Ltd v Lanark Town Council*. Lord Justice-Clerk Wheatley stated that:

> Recompense is an equitable doctrine. That being so, it becomes a sort of court of last resort, recourse to which can be had only when no other legal remedy is or has been available. If a legal remedy is available at the time when the action which gives rise to the claim for recompense has to be taken, then normally that legal remedy should be pursued to the exclusion of a claim for recompense.[114]

Similarly, Lord Kissen stated that "in principle, [he] cannot see how an equitable remedy can be invoked when another remedy given by statute or, indeed, by common law was available and was not used".[115] Lord Fraser added that in the same case "the common law did afford relief, but the pursuers did not avail themselves of it, and in the circumstances of this case that is, in my opinion, enough to prevent their relying on the equitable remedy".[116]

Furthermore, if equitable discretion features (according to the various instances of case law and the broader literature) in relation to so many common law remedies, obtainable by way of petition or

113 *Grahame v Magistrates of Kirkcaldy* (1882) 9 R (HL) 91 at 91-92, per Lord Watson. See also Thomson, *The Nobile Officium*, pp.170-171.
114 *Varney (Scotland) Ltd v Lanark Town Council*, 1974 SC 245 at 252-253, per Lord Justice-Clerk Wheatley.
115 *Ibid.* at 257, per Lord Kissen.
116 *Ibid.* at 260, per Lord Fraser.

summons, uncertainty is raised on what it means for the petition to be said to involve the discretionary exercise of statutory or common law powers as distinct from the application of rules of law – and the converse for the summons.

Another casting of this distinction is that whereas the summons is used for the enforcement or vindication of legal rights, the petition is used to seek a remedy to which the petitioner has no legal right. It is for this reason that it has generally been thought incompetent to seek declarator by way of petition, for declarator implies (or even requires) the existence of some legal right in order to be granted. An action of declarator has been said to be:

> one by which a right which has been questioned, or a fact or facts on which such right depends are declared... Unless, however, there is an actual or threatened violation of a right, the Court will not pronounce judgment on declaratory conclusions... Even where there is a right, the Court will not declare it if it is not disputed... But where a right future and even contingent is disputed, and there is a proper contradictor, a declarator will be sustained... [I]t may now almost be said that any question of law which a suitor has an interest to obtain an answer to, and as to which he can get a proper contradictor, may be made the subject of a declarator.[117]

The case of *Renyana-Stahl Anstalt v MacGregor* has been cited as authority for this proposition,[118] however there are two important qualifications to be made in relation to this case. First, the court's reasoning turns primarily upon a construction of Rule of Court 73.2 (and the Rules of Court are always subject to change[119]).[120] Second, whilst the court's discussion spills out into a more general consideration of the distinction between the petition and the summons,[121] the case proceeds on a reading of Rule 73.2 which is open to challenge. The court (correctly) reasons on the basis that Rule 73.2(1) provides that an application for rectification "shall" be made by petition. However, it then goes on to reason that, despite noting that Rule 73.2(2) "permits" such applications to be brought by way of summons or counterclaim in certain circumstances, the procedural avenues specified in Rule 73.2(2) "should" be used in those circumstances.[122] In fact, Rule 73.2(2) specifies that the application "may" (not "must" or "shall") be brought by way of summons or counterclaim

117 Æ.J.G. Mackay, *Manual of Practice in the Court of Session* (W. Green, Edinburgh, 1893), pp.374-375.
118 Howie and Heaney, *'Petitions in the Outer House'*, para. 5.
119 As the court acknowledged in relation to suspension of diligence, which formerly required a separate application by petition, but can now be sought by conclusion for suspension in a summons of reduction (per r. 53.1) – *Renyana-Stahl Anstalt v MacGregor*, 2001 SLT 1247, para. 52.
120 *Ibid.*, para. 51.
121 *Ibid.*, para. 52.
122 *Ibid.*, 2001 SLT 1247, para. 51.

in those circumstances. This stands in contrast with Rule 73.2(1) which specifies that (subject to Rule 73.2(2)) the application "shall" be made by petition. The provision in Rule 73.2(1) is therefore mandatory, whilst that in Rule 73.2(2) is permissive. The court in *Renyana-Stahl* has, however, in interpreted Rule 73.2(2) to be mandatory rather than permissive. That interpretation is open to challenge,[123] though it is possible that "may" in Rule 73.2(2) refers to the "choice" between Rules 73.2(2)(a) and (b), rather than being permissive (as opposed to mandatory).[124]

Nevertheless, Lord Tyre held in two more recent cases that it was incompetent to seek the remedy of declarator by way of petition.[125] This was grounded in the fact that whereas petition procedure was not about the enforcement of rights as such, declarator was precisely an endeavour to have an existing right declared or enforced.[126] Lord Tyre stated that the appropriate mechanism for changing such a long-established practice as that reflected in the petition/summons distinction would be the work of the Committee "rather than judicial innovation".[127]

It is the case, however, that declarator can be competently sought in certain classes of petition. The Rules of Court specifically provide for the court's power to award declarator in a petition for judicial review.[128] Declarator can be used in this context for a number of purposes, such as declarator that a decision-maker has acted *ultra vires* of its statutory powers, declarator that a purported act or decision has no legal effect, or declarator on the status of a person, object or instrument in clarification of the applicability or non-applicability of statutory provisions.

It is, on this note, questionable whether a major class of petition – those to the supervisory jurisdiction for judicial review – should properly be considered "equitable" in nature. Whilst it is true that remedies can be withheld even if other relevant legal tests for awarding them have been satisfied – and that the remedies are in that sense awarded equitably[129] – many, presumably most, petitions for judicial review are concluded on the application of rules of law, as opposed to the discretionary exercise of statutory or common law powers. Where a body acts in excess of

123 Though it is also the interpretation of the *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 31.

124 This Rule of Court could perhaps be better drafted to remove the ambiguity, such as by substituting "must" for "may" if this is intended to refer to the "choice" between Rules 73.2(2)(a) and (b), and therefore to be mandatory only where either Rules 73.2(2)(a) or (b) apply.

125 *Chaudhry v Advocate General for Scotland* [2013] CSOH 36; *Hooley Ltd v Ganges Jute Pte Ltd* [2016] CSOH 141. Though it is competent to seek declarator in a petition for judicial review – RCS, r. 58.13(3)(b).

126 See *Hooley Ltd v Ganges Jute Pte Ltd* [2016] CSOH 141 at paras. 9-10, per Lord Tyre.

127 *Ibid.* at para. 11, per Lord Tyre.

128 RCS, r. 58.13(3)(b).

129 See Thomson, *The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session*, pp.674-676, and the authorities cited therein at fn. 56-58.

jurisdiction, there must be few cases in which the court would not proceed on the basis that legal rules have been violated or are likely to be violated, and award whatever remedy is needed to cure the unlawful decision, act or omission. In such cases it is questionable whether the court acts on the basis of, or is principally motivated by, considerations of equitable discretion. That is the case even though the supervisory jurisdiction is invoked by petition, against the backdrop of equitable conceptions of judicial review.[130]

All of this serves to question to what extent the distinction between the petition and the summons, as forms of process involving the discretionary exercise of statutory or common law powers versus the application of rules of law, is accurate both as a matter of principle and practice. It may be true in some, perhaps many, cases – again, the exact extent would require empirical research. However, there are questions to be asked, and doubts to be expressed, about some of the fundamental assumptions and forms of analysis used to express these distinctions, and concerns about concepts and descriptors used with insufficient precision or consistency. This creates room for doubts and uncertainty about the alleged gulf of principle between the petition and the summons. It is difficult to pinpoint exactly to what extent each form of process aligns with the respective ideas of jurisdiction being exercised on a discretionary basis, and jurisdiction being exercised in the strict application of legal rules (and whether these are always standalone categories). If, however, this distance of principle is not as great as initially anticipated, the principled justification for dividing the two forms of process is susceptible to erosion. It is important to note that the analysis presented in this section of the paper is not to diminish, nor to argue for the diminishment or collapsing of, principled distinctions between the petition and the summons. Rather, it seeks to serve as a counterweight to the prevailing narrative in the law and literature that the two forms of process are separated by fundamental issues of principle, and to ask questions of the accuracy and universal applicability of that narrative. The conclusion of this section is that questions and doubts may be legitimately expressed, but that it is difficult to assess just to what extent the principled basis of the distinction is eroded.

3. Difficulties caused by the distinction in present practice

One of the general difficulties caused by the distinction in practice is that an applicant can choose a particular form of originating process only to find that it is incompetent. This outcome can be

130 See *ibid.*, pp.674-676.

encountered for a number of reasons, such as the remedy or remedies sought, the contentious or non-contentious nature of the application, inadvertent non-compliance with a Rule of Court, statutory provision or common law rule, or the attempted order of utilising remedies or avenues of redress.

First, some remedies have historically been said to be available under just one of the forms of process. For example, suspension has been thought to be the exclusive preserve of the petition, though it was not completely unheard of for it to have been granted by way of summons.[131] There was once a view that an action for interdict (with no other remedy sought) by summons was incompetent, though Lord Cameron corrected this view on consideration of the authorities and literature to say that, though rare, it was competent.[132] It has nevertheless been noted that the preferable process for obtaining interdict is by petition due to its "summary nature".[133] It has also been stated that, with the exception of petitions for judicial review and two other exceptions:

> the main traditional judicial remedies for the affirmation, protection or enforcement of rights – declarator; reduction; payment; decree *ad factum praestandum* (specific implement); and removing or ejection – can in principle only be competently granted if concluded for in an action commenced by summons.[134]

In addition, the Rules of Court provide that applications for suspension, suspension and interdict, and suspension and liberation "shall be made by petition".[135] The view has also been expressed that it is in principle incompetent to seek damages for reparation or breach of contract in a petition, or the enforcement of a contract by specific implement.[136]

Second, the contentious or non-contentious nature of the application can lead to its being held competent or incompetent. As noted above,[137] there have been cases in which a petition has been refused as incompetent on the basis that it involved a question of disputed right.[138] There have also

131 See *Gilmont Transport Services Ltd v Renfrew District Council*, 1982 SLT 290.
132 *Exchange Telegraph Co Ltd v White*, 1961 SLT 104. A conclusion for interdict may be included in a summons where real or personal diligence is sought – RCS, r. 53.1.
133 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 237.
134 *Ibid.*, para. 31.
135 RCS, r. 60.2(1). An exception is where a pursuer may include a conclusion for suspension in a summons where it is sought to suspend diligence – *ibid.*, r. 53.1.
136 Howie and Heaney, *'Petitions in the Outer House'*, para. 5.
137 See p. 15 above.
138 *Mackenzie v Macfarlane*, 1934 SN 16; *Simeone, Petitioners*, 1950 SLT 399; *Heggie v Davidson*, 1973 SLT (Notes) 47.

been cases in which a petition was sisted to allow disputed matters to be settled by way of an action.[139] The contested nature of a petition can therefore lead to its being held incompetent.

Third, it was noted earlier that the provisions on the form of originating process to be used are found in a number of different sources. Sometimes provision is made in the Rules of Court, other times in an array of statutory provisions, and sometimes it is unclear which form of process should be used.[140] It can also be seen that there are a number of common law rules on the forms of originating process and the circumstances in which one or the other is appropriate for use. As a result, there is a wide range of sources to be consulted by intending applicants in order to ensure that all statutory and non-statutory rules are complied with.

Finally, there are, as noted, rules on the order in which attempt should be made to utilise remedies or avenues of redress. The putatively greater appeal to the court's discretion under petition procedure could also support the principle that the petition should not be utilised when other statutory rights of appeal or other common law remedies are available and have not been attempted.[141] A further difficulty is that it has sometimes appeared necessary on a strict reading of the rules to raise two causes instead of one due to the petition/summons distinction and its attendant rules. This can give rise to expense and duplication, though for those reasons the court has exercised discretion to allow the relevant remedies to be pursued in a single form of process.[142] Though abolition of the distinction between the petition and the summons would address that issue, so might express provision for the court's discretion to permit the remedies to be sought in a single form of process as it thinks fit, or a relaxation of the confinement of particular remedies to one or other form of process.

Though there are rules and principles applicable to the circumstances in which particular remedies or processes should be attempted, the relevant issues of principle and practice are not always clear, nor consistently applied and articulated by the court. In addition, complications are encountered when multiple remedies are sought, such as a combination of "equitable" and non-equitable remedies. The ways in which multiple remedies or avenues of redress combine or do not combine are potentially a source of needless additional work for intending litigants and counsel. There are uncertainties about when the summons should be used to initiate contentious proceedings, or when

139 *Davidson's Trustees v Arnott*, 1951 SC 42; *Church of Scotland Trust v O'Donoghue*, 1951 SC 85.
140 See fn. 48 above.
141 Consider also pp. 24-25 above.
142 *Gilmont Transport Services Ltd v Renfrew District Council*, 1982 SLT 290.

these can be dealt with by way of a petition which is resisted or to which objections are lodged. There is underlying judicial discretion in relation to many of these issues, and whilst the existence of that discretion can act as an important safety valve to ensure the rationality of procedure and the ability to deal with unusual or exceptional circumstances, it gives rise to further uncertainties about the appropriate form of process in a given case and the relevant expectations of the court. Indeed, even where the "wrong" form of process is selected, there may be the opportunity to convert proceedings from one form of process to another,[143] but this opportunity will not always be available and, to the extent that the court has discretion on whether to permit the form of process to be converted, there arises the concomitant scope for uncertainty. The court also appears to have discretion to allow the "wrong" form of process to be used where no objection has been taken.[144]

These issues give rise to significant concerns about whether procedure is sufficiently accessible, navigable and understandable to the extent possible for ordinary litigants, and consequential concerns about access to justice. There can be little justification for any more procedural complexity than is necessary, and in the interests of the accessibility and transparency of judicial procedure, where steps can be taken to simplify and make more accessible – without sacrificing any of the utility, operability or rationality of procedure – they should be taken.

There are two ways in which the problems set out in this section can be approached and considered. One view is that the distinction between the petition and the summons is an additional procedural complexity which must be navigated, and which presents ample opportunity for getting it wrong. Not only can getting it wrong frustrate the achievement of justice, be costly for litigants and needlessly consume court resources, the additional necessary endeavours by intending litigants to avoid getting it wrong potentially increase the time and cost of legal advice and litigation. Abolition of the distinction could therefore potentially simplify this aspect of the court's procedure and improve the prospects of utilising process in a correct and timely manner, furthering the possibility of achieving justice, and saving time and resources for both litigants and the court.

However, there is another view. Even if the issues raised in this section are regarded as problematic, abolition of the distinction between the petition and the summons will not necessarily solve those problems. Difficulties may persist about when one remedy or another is regarded as

143 See, for example, RCS, r. 60.5.
144 See *Paterson, Petitioner (No 2)*, 2002 SC 160, para. 53.

appropriate – for example, whether declarator is an appropriate remedy where the applicant seeks an order to which he has no right; or whether non-equitable or "contentious" remedies or those which presuppose the existence of legal rights can be appropriately used in *ex parte* applications; or whether an "equitable" remedy can be pursued when other statutory or common law remedies have not been utilised or attempted. It may still be necessary to sist non-contentious proceedings to allow disputed matters to be settled. There would likely be, unless broader reforms were enacted, significant remaining complexities about the availability and appropriateness of various remedies or avenues of redress, with provisions continuing to be scattered throughout an array of statutory and non-statutory sources. Even with the abolition of the distinction between the petition and the summons, there might remain differences in the availability of remedies depending on which branch of procedure is accessed by way of the generic writ.[145] The order in which remedies or avenues of redress should be attempted will likely persist as a difficulty to be encountered in relevant cases.

Abolition of the distinction between the petition and the summons could therefore be a partial solution to some of these complexities, but it seems unlikely that, without the enactment of broader reforms, many of these difficulties would disappear or be fully alleviated. The extent of the perceived advantages of abolishing the distinction would have to be determined, and weighed against potential challenges and drawbacks encountered by its abolition.[146] It would also have to be determined whether abolition of the distinction goes far enough to alleviate some of these issues encountered in civil procedure, and if not, whether abolition of the distinction is an appropriate or sufficient response to those issues. For example, there might be alternative options to be explored such as allowing more or all of the common law remedies to be competently sought under either form of originating process, whilst retaining the distinction between the petition and the summons and the procedural differences they putatively embody. There might need to be serious consideration given to what it means to describe some remedies as "equitable", and others as non-equitable; to consolidate provisions on the availability and applicability of remedies or forms of process in the Rules of Court (rather than requiring intending litigants to trawl through the Rules of Court, statutes and case law just to attempt to ascertain how to competently initiate process). There may well be advantages to be gained from abolishing the distinction between the petition and the summons, but this must be weighed against alternatives and potential costs.

4. Difficulties likely to be presented by the removal of the distinction

145 See pp. 22-27 above.
146 See pp. 32-39 below.

4.1 Risk of replacing one two-tier process with another

The view was expressed by the Gill Report that the essential procedural elements of summons and petition procedure are the same:

> there is a writ containing an application to the Court to make an order; the writ must set out the names of other parties who have an interest in the application, the facts on which the application is based and the legal justification for the order desired; the Court gives its authority for the writ to be served on the other parties; the other parties have a specified time in which to respond to the writ; and in the absence of any response it is open to the originating party to ask the Court to make the order requested. This should be the standard initial procedure for all actions.[147]

Even if this is true, it should not conceal the fact that the newly introduced writ would be used to access more than one alternative form of procedure. The extent to which there would be procedural uniformity, or consolidation of process, would appear to be limited.

This can be seen in relation to the sheriff court, where ordinary cause actions and summary applications are each commenced by initial writ (though note some special forms of statutory application[148]).[149] This was not always the case – in the late 19th century, process could be initiated in the sheriff court by either summons or summary application. In 1876, these forms of process were unified in a single writ called a petition,[150] thereafter replaced by the initial writ.[151]

There is potentially an argument for proposing that, if these different categories of application can be commenced by a single type of initial writ in the sheriff court, the same can be achieved in the Court of Session. In other words, the petition and the summons can be replaced by a single type of writ which can be used to access different branches of procedure. Furthermore, some have expressed a desire for procedural uniformity between the Court of Session and the sheriff court, and the replacement of the petition/summons distinction in the Court of Session with a single type of

147 *Report of the Scottish Civil Courts Review* ("Gill Report") (September 2009), Ch. 5, para. 69.
148 See *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 772, fn. 1.
149 Ordinary Cause Rules (Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (Scottish SI 1993/1956) ("OCR"), Sch. 1), r. 3.1; Summary Application Rules (Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999) (Scottish SI 1999/929) ("SAR"), r. 2.4.
150 Sheriff Courts (Scotland) Act 1876, s. 6 (repealed).
151 Sheriff Courts (Scotland) Act 1907, Sch. 1, r. 1 (as originally enacted), and r. 2 (as originally enacted and subsequently amended by the Sheriff Courts (Scotland) Act 1913, Sch. 2).

initial writ could achieve a degree of uniformity between the courts.

However, there are some important qualifications to make on the apparently more unified nature of sheriff court procedure. First, the recently introduced Simple Procedure Rules[152] appear to be initiated by filing a "claim form" rather than an initial writ.[153] If this interpretation is correct, the initial writ cannot be regarded as the single form of originating process in the sheriff court. It remains to be seen what provision is made in the forthcoming Simple Procedure (Special Claims) Rules.

Second, even the initial writ presents what is potentially a veneer of uniformity, as it is used to access different underlying branches of procedure.[154] It has been said that, though there is a single type of initial writ for ordinary cause actions[155] and summary applications, the "procedures themselves are quite distinct".[156] This raises the question of why it is important to proceed by way of a single form of originating process when more than one branch of procedure is capable of being accessed. It might legitimately be asked what purpose a unified form of writ serves if it can alternatively access distinct procedures; and separately, whether the challenges which must be faced, and adaptations which must be made, under such a new procedure are justified by the perceived benefits such a change would bring.

The risk in the Court of Session is that the status quo of two main forms of originating process (petition and summons) is replaced by a single form of generic writ which is nevertheless capable of being used to access different avenues of procedure. In particular, the single form of writ may be used to access – whether on the application of a party or on the court's own motion – a full (akin to a solemn) or abbreviated (akin to a summary) process. Whilst there might be good reason for this, it continues a distinction between a more solemn and more summary process. The sheriff court itself retains a distinction between a full (ordinary cause action) and abbreviated (summary application) process. Even with the introduction of a single, generic form of writ in the Court of

152 Act of Sederunt (Simple Procedure) (Scottish SI 2016/200), effective 28th November 2016.

153 Simple Procedure Rules ("SPR"), rr. 3.2 and 3.3.

154 Though, it should be noted that the Gill Report's recommendation was for a "standard *initial* procedure" to be used for all causes – *Gill Report*, Ch. 5, para. 69 (emphasis added).

155 In addition, two forms of procedure exist within the ordinary cause action, namely standard procedure (OCR Ch. 9) and additional procedure (OCR Ch. 10). The sheriff is empowered under OCR r. 9.12(4) to, at the options hearing, and having heard the parties, of his own motion or on the motion of any party, and on being satisfied that the difficulty or complexity of the cause makes it unsuitable for transaction under Chapter 9 procedure, order that the cause proceed under Chapter 10 procedure. This is essentially a matter for the sheriff's discretion – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 426.

156 *Ibid.*, para. 26.

Session, there would seem to be, at a minimum, the replacement of one two-tier process with another. A concern of this nature was expressed elsewhere, where it was said that the:

> range of reasons given in the sources for using the flexible procedure of petition or summary application in lieu of the relative rigidity of ordinary action procedure rather suggests that if the distinction did not exist, it would have to be invented.[157]

However, the counter-argument can also be presented: if the litigant can access alternative branches of procedure in the sheriff court by way of a single form of initial writ, why should he be required to choose (and correctly choose) one of two forms of originating process in the Court of Session? If it is possible in the sheriff court, why is it not also possible in the Court of Session? In addition, even if a single form of process can be used to access different branches of procedure, is it not nevertheless a simplification of procedure to remove the requirement to choose between different forms of process?

It should be considered whether abolition of the distinction will necessarily result in the replacement of one two-tier process with another, or if this can be avoided. Alternatively, if a new two-tier process is introduced, perhaps along the lines found in the sheriff court,[158] then it will have to be considered how to reduce or minimise the disadvantages of the current process. If the distinction between the petition and the summons is replaced by a single form of writ which can be used to access a more solemn or more summary procedure, and some of the existing difficulties can be removed or alleviated, then it may be a reform worth pursuing.

There are, alternatively or in addition, other potential reforms which could achieve increased uniformity within the Rules of the Court of Session, and between the Court of Session and the sheriff court. For example, an area in which sheriff court procedure is more uniform than Court of Session procedure is in relation to pleas-in-law. In the Court of Session, a summons is required to

157 *Ibid.* Lord Cullen, in his *Review of the Business of the Outer House of the Court of Session* ("Cullen Report") (1995), para. 9.9, considered the argument that "petitions as a separate type of proceeding should be abolished and... one document should replace both the summons and the petition". He rejected this proposal including on the basis that the distinction between the petition and the summons was "sensible and well founded". Niall Whitty, author of the relevant section of the *Stair Memorial Encyclopaedia*, "support[ed] Lord Cullen's conclusion unreservedly" – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 26.

158 Which is technically "multi-tier" as several branches of procedure can be initiated by way of initial writ.

include pleas-in-law.[159] There is no requirement to include pleas-in-law in a petition,[160] though they must be included in a petition for judicial review,[161] and in practice are included where it is expected that answers will be lodged by a respondent.[162] Where answers are lodged to a petition, these must (contrary to former practice[163]) include pleas-in-law.[164] By contrast, in the sheriff court, initial writs in both ordinary cause actions and summary applications are required to contain pleas-in-law[165] – though there is an exception to this in relation to personal injury actions.[166] A possible reform could be to require pleas-in-law to be included in all (or no) forms of originating process initiated in the Court of Session, to introduce uniformity.

Finally, it should be remembered that abolition of the distinction between the petition and the summons would not eradicate the divide between forms of originating process in the Court of Session, for there is also the special case, which is neither a petition nor a summons.[167] This could either remain as an alternative form of process, or itself be abolished. If retained, the special case procedure could potentially also be initiated by way of the newly introduced generic writ.

4.2 Ensuring the continued possibility of *ex parte* applications

It must be ensured that applications can still be made *ex parte* under the new unified form of process, for example in applications to the *nobile officium*, by trustees for directions,[168] for the inspection, photographing, preservation, custody and detention of documents and property (on an *ex parte* basis),[169] for the disclosure of information as to the identity of persons (on an *ex parte* basis),[170] and other proceedings in which an *ex parte* application is appropriate.

4.3 Retaining flexibility/brevity in appropriate cases

159 RCS, r. 13.2(3)(b) and Form 13.2A.
160 See *ibid.*, rr. 14.4(1) and (2).
161 *Ibid.*, r. 58.3(3) and Form 58.3.
162 *Green's Annotated Rules of the Court of Session*, note 14.4.7.
163 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 227.
164 RCS, r. 18.3(2)(b).
165 OCR, r. 3.1 and Forms G1 and G1A.
166 OCR, r. 3.1(1)(c) (inserted by Act of Sederunt (Ordinary Cause Rules Amendment) (Personal Injuries Actions) 2009/285 (Scottish SI), r. 2(2)); and Form PI1, which contains a statement of claim rather than pleas-in-law.
167 Court of Session Act 1988, s. 27; and see RCS, Ch. 78. This is different from the summary trial, which is initiated by petition – Court of Session Act 1988, s. 26(1); RCS, Ch. 77.
168 On the applicability and application of the *nobile officium* in relation to trusts, see Thomson, *The Nobile Officium*, pp.31-67.
169 Administration of Justice (Scotland) Act 1972, s. 1(1); RCS, Ch. 64.
170 Administration of Justice (Scotland) Act 1972, s. 1(1A); RCS, Ch. 64.

One of the issues likely to be presented by the abolition of the distinction is how to effect and craft in the Rules of Court (or, where appropriate, statute) the retainment of putatively greater levels of discretion by the court in cases which would currently be transacted by way of petition. For example, in petitions to the *nobile officium* there seems to be an inherent need for maximum procedural flexibility. It must be considered how this is to be retained – whether in the Rules of Court or otherwise – when the distinction is abolished. Possibilities include enacting a Rule of Court which states that an application to the *nobile officium* permits the court to, for example, "dispense with such procedural requirements [in the Rules of Court] as it thinks fit", or empowering the court to "do all things which the Court could have done by exercise of the *nobile officium* prior to the enactment of [the new Rules of Court]".[171]

However, it may not be difficult to retain flexibility and/or brevity in relation to particular categories of application under the new procedure. For example, there might continue to be provision for the specific procedure relating to mutual recognition of protection measures in civil matters, which are at present made by petition.[172] Indeed, the relative flexibility pertaining to petition procedure does not necessarily require that there must be a distinction between petition and summons procedure. Nor, using the previous example, does an application to the *nobile officium* necessarily require as a matter of principle to be made by petition for the jurisdiction to be capable of being used in its current form. Whilst it may be true that there is doctrinal and symbolic significance in the fact that the *nobile officium* is accessed by way of petition,[173] it is not the petition – which is merely a form of originating process – which confers the jurisdiction and powers of the *nobile officium* upon the court.[174] Moreover, it has already been demonstrated that a number of petitions do not initiate *ex parte*, non-contentious or non-adversarial process, nor do they always

171 The intending litigant would likely still have to consult the case law, however, for guidance on the scope, extent and applicability of the various branches of procedure accessed by a generic form of writ.

172 RCS, r. 106.9(1). The application may be made by note where a process exists in relation to an incoming protection measure – *ibid.*, r. 106.9(2).

173 The author of this paper wrote elsewhere that "[i]t is doctrinally significant that the *nobile officium* is accessed by way of petition... The heightened equitable nature of the *nobile officium* is... captured in its invocation by petition rather than by way of summons. Although the *nobile officium* is not the only object at which a petition may be presented, it clearly involves addressing the court for assistance rather than initiating an action against a contradictor, with the court adjudicating over an adversarial dispute of right" – Thomson, *The Nobile Officium*, pp.24-25.

174 It can also be considered what role the Rules of Court play in distributing *nobile officium* business between the Inner and Outer Houses. It is arguable that in this regard the Rules of Court merely distribute that business between the Inner and Outer Houses, and reflect a statutory restriction on the competency of raising this particular form of proceeding in the wrong forum. This does not mean that the Rules of Court are the source of the *nobile officium* and the powers that the court thereby enjoys – if statute provides a legal basis for the exercise of the *nobile officium*, it perhaps does so only indirectly.

involve the discretionary exercise of statutory or common law powers as distinct from the application of rules of law.

As has been pointed out, sheriff court procedure retains the option of raising an ordinary cause action or a summary application, even though each is commenced by initial writ. In addition, a claim form is used to commence an application under simple procedure. Not only are these procedures governed by their own banks of rules,[175] there can also be more than one form of procedure within a single category of process. This applies to the distinction between standard procedure[176] and additional procedure[177] in the Ordinary Cause Rules, with the sheriff having discretion to order that the cause proceed under additional instead of standard procedure.[178] There are clearly options available in terms of reforming the Rules of the Court of Session to build sufficient capacity for flexibility and brevity in appropriate cases into the rules. This could be achieved by replacing the petition and the summons with a single form of generic writ, though another possibility is investing the court with greater capacity to ensure flexibility and brevity, where appropriate, under summons procedure.

4.4. Retaining the relative speed and cheapness of abbreviated/expedited process

The speed and cheapness of petition procedure, relative to summons procedure, has been cited as a policy reason justifying the existence of the petition.[179] However, some urgent applications may[180] or must[181] be initiated by summons, meaning that relative speed, cheapness or urgency cannot be the sole criterion on which, as a matter of principle, petitions and summonses are cleaved. Moreover, whilst the *Stair Memorial Encyclopaedia* cites relative speed and cheapness as a policy

175 OCR, SAR and SPR, respectively.
176 OCR, Ch. 9.
177 *Ibid.*, Ch. 10. This is "more flexible" than Chapter 9 procedure – *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 423; see also paras. 426-429.
178 See [fn. X] above.
179 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30. See also, for example, *Peel's Trustees v Drummond*, 1936 SC 786; and *Gordon's Trustees, Petitioners*, 1990 SC 194.
180 See the Court of Session Act 1988, s. 47.
181 *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30; James J. Darling, *The Practice of the Court of Session* (Vol. 2) (William Wait, Edinburgh, 1833), p.596.

justification for the introduction in 1985, on the recommendation of the Dunpark Working Party report, of the rule that applications for judicial review should be made by petition,[182] the use of petition to access the supervisory jurisdiction of the court is also at least partly explained by a longstanding and lingering association between judicial review and broader notions of equitable jurisdiction.[183]

Nevertheless, the flexibility afforded by the Rules of Court to petition procedure facilitates its being a potentially speedier and cheaper procedure than that pursued by way of summons. It is provided that, where answers are lodged to a petition, the petitioner shall "apply by motion for such further procedure as he seeks, and the court shall make such order for further procedure as it thinks fit".[184] Where the petition is unopposed, "the court shall, on the motion of the petitioner, after such further procedure and inquiry into the grounds of the petition, if any, as it thinks fit, dispose of the petition".[185] In that regard, the court "may make such order to dispose of a petition as it thinks fit, whether or not such order was sought in the petition".[186] The flexibility of this procedure allows the court to dispense with procedural formalities,[187] and the position is encapsulated in Lord Keith's statement that the judges are "entirely masters of the procedure in a petition, subject to any regulations thereanent made by Act of Sederunt".[188] There are also other examples of relative speed and cheapness being made possible by virtue of flexibility of procedure, such as when proceedings are to an extent "administrative", the court is "not bound to adhere to strict rules of evidence".[189]

It would be desirable to retain, under the new procedure, the possibility of relative speed and cheapness in applications where appropriate.[190] These might include, for example, applications for judicial review, trustees' applications for directions, or applications to the *nobile officium*. It has elsewhere been stated that judicial remit is more commonly used in petition procedure, and is intended to save time and expense compared with a contested proof on the factual issue.[191] Sufficient provision may therefore be made under the new procedure to ensure that time and

182 See *Stair Memorial Encyclopaedia* (Civil Procedure Reissue), para. 30.
183 See Thomson, *The Doctrinal Core of the Supervisory Jurisdiction of the Court of Session*, pp.674-676.
184 RCS, r. 14.8.
185 *Ibid.*, r. 14.9(1).
186 *Ibid.*, r. 14.10(1).
187 As, for example, in *Low, Petitioner*, 1920 SC 351; and *Watson, Petitioners*, 1920 1 SLT 243.
188 *Tomkins v Cohen*, 1951 SC 22 at 23, per Lord Keith.
189 *Colville, Petitioner*, 1962 SC 185 at 192. See also *Gordon's Trustees, Petitioners*, 1990 SC 194.
190 It is worth noting the current provision that the court has the power to sanction relief from compliance with the Rules of Court in individual cases (RCS, r. 2.1), and that the Lord President has flexibility over the applicability of procedure (RCS, r. 2.2). However, these are probably not envisaged as being used with frequency.
191 Lord Macfadyen and Smith, *'Procedure in an Ordinary Action'*, para. 10.

expense can continue to be saved in appropriate situations, such as by judicial remit. The opportunity to make balanced time and cost savings can greatly enhance the accessibility of judicial procedure, and access to justice more broadly. This manifests both in time and cost savings for intending litigants, but also in a potential reduction in the consumption of court resources. It is worth adding that, if the possibility exists for urgent applications to be made by summons in limited circumstances, it might be asked why that cannot be achieved by way of summons or any other form of writ where speed and/or cheapness is desirable, including the newly introduced form of generic writ. This could potentially be achieved by allowing the generic writ to be capable of accessing a more summary procedure in appropriate cases.

5. Other jurisdictions

A brief overview will be given of comparative forms of originating process in other Common law jurisdictions, namely England and Wales; the Australian states of New South Wales and Victoria; New Zealand; and the Canadian provinces of Ontario, British Columbia and Alberta.

5.1 England and Wales

Civil procedure in England and Wales is primarily regulated by the Civil Procedure Rules 1998.[192] There are two principal methods of commencing proceedings under the CPR: (i) by issuing a claim form under Part 7 of the CPR, or (ii) by issuing a claim form under the alternative procedure provided for in Part 8 of the CPR.

Part 7 is the standard method for commencing proceedings.[193] Part 8 is used where a claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact,[194] such as trustees seeking directions on the management of trust property, or where a declaration is sought on the interpretation of a trust deed. Part 8 is also used where a CPR rule or Practice Direction permits or requires the use of that procedure in specified proceedings.[195]

192 SI 1998/3132 (as amended) ("CPR"). These were made following an inquiry led by Lord Woolf – see *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) – and the enactment of the Civil Procedure Act 1997. The CPR ultimately replaced the Rules of the Supreme Court 1965 (SI 1965/1776) and the County Court Rules 1981 (SI 1981/1687).

193 *Halsbury's Laws of England* (Civil Procedure, Vol. 11, 2015), para. 138.

194 CPR, r. 8.1(2)(a).

195 *Ibid.*, rr. 8.1(2)(b) and 8.6.

For example, Part 8 procedure may be used in a claim by or against a child or protected party as defined in Rule 21.1(2) which has been settled before the commencement of proceedings and the sole purpose of the claim is to obtain the approval of the court to the settlement, or a claim for provisional damages which has been settled before the commencement of proceedings and the sole purpose of the claim is to obtain a consent judgment.[196] Part 8 procedure *must* be used in, for example, a claim under section 1 of the Inheritance (Provision for Family and Dependants) Act 1975,[197] certain claims against a solicitor (unless made in existing proceedings[198]),[199] or an application for a writ of habeas corpus.[200]

There are various procedural differences for proceedings commenced under Part 8. Provision is made in Part 8 for the matters which must be stated in the claim form. The defendant is not required to file a defence, and therefore Part 16 on statements of case, Part 15 on defence and reply, any time limit in the CPR which prevents the parties from taking a step before a defence is filed, and the requirement under Rule 7.8 to serve on the defendant a form for defending the claim, do not apply.[201] In addition, the claimant may not obtain judgment by request on an admission and therefore Rules 14.4-14.7 on admissions, and the requirement under Rule 7.8 to serve on the defendant a form for admitting the claim, do not apply.[202] A claim under Part 8 is also treated as allocated to the multi-track and therefore Part 26 on case management (preliminary stage) does not apply.[203] Where the claimant uses Part 8 procedure he may not obtain default judgment under Part 12,[204] and the court's permission is required for a party to make a Part 20 claim (counterclaims and certain additional claims).[205] A modified procedure applies to appeals from Part 8 procedure.[206]

Some of the procedural rules under Part 7 also apply to proceedings commenced under Part 8.[207] The court may at any stage order the claim to continue as if the claimant had not used Part 8 procedure and, if it does so, the court may give any directions it considers appropriate.[208]

196 Practice Direction 8A (Alternative Procedure for Claims), para. 3.1.
197 CPR, r. 57.16(1).
198 *Ibid.*, r. 67.2(2)(b). In which case an application notice is made in accordance with CPR Part 23.
199 CPR, r. 67.2(2)(a).
200 *Ibid.*, r. 87.2(1)(a).
201 *Ibid.*, r. 8.9(a).
202 *Ibid.*, r. 8.9(b).
203 *Ibid.*, r. 8.9(c).
204 *Ibid.*, r. 8.1(5).
205 *Ibid.*, r. 8.7.
206 *Halsbury's Laws of England* (Civil Procedure, Vol. 11, 2015), para. 151.
207 Practice Direction 8A (Alternative Procedure for Claims), para. 4.1(1).
208 CPR, r. 8.1(3).

The same form of originating process – the claim form – is used to commence proceedings under each of Parts 7 and 8. However, the CPR generally do not apply to specific categories of proceedings where particular statutory forms of application are provided. These include insolvency proceedings, non-contentious or common form probate proceedings, proceedings in the High Court when acting as a Prize Court, proceedings before the Court of Protection, family proceedings, adoption proceedings and election petitions in the High Court.[209] Particular statutory forms of application, or separate provision for application, are specified for these types of proceeding.[210] Whilst it is therefore the case that there is a single form of originating process under the CPR (the claim form), this does not account for other forms in proceedings initiated under provisions other than the CPR.

5.2 Australia

a. New South Wales

In New South Wales, there are two main forms of originating process, namely the statement of claim and the summons.[211] The statement of claim must be used in proceedings, *inter alia*, for relief in relation to a debt, tort or trust, or for damages for breach of duty including for the death of any person, personal injury to any person, and damage to property.[212] The summons must be used in certain specified proceedings, including where there is no defendant, on an appeal or application for leave to appeal (other than proceedings assigned to the Court of Appeal), on a stated case, and on any application (other than one for damages) made under any Act (other than the Civil Procedure Act 2005).[213] The summons *may* be used (except where the application is made in proceedings that have been commenced in the court[214]) to initiate the following kinds of proceeding:

(a) proceedings on an application for a writ of habeas corpus ad subjiciendum,

(b) proceedings on an application for an order for the custody of a minor,

209 *Ibid.*, 2.1(2).

210 See, for example, the Insolvency Rules 1986 (SI 1986/1925); Non-Contentious Probate Rules 1987 (SI 1987/2024); Prize Court Rules 1939 (SR & O 1939/1466); Court of Protection Rules (SI 2007/1744); Family Procedure Rules 2010 (SI 2010/2955); and Election Petition Rules 1960 (SI 1960/543). See also *Halsbury's Laws of England* (Civil Procedure, Vol. 11, 2015), para. 160.

211 Uniform Civil Procedure Rules 2005 (New South Wales) ("UCPR"), r. 6.2.

212 *Ibid.*, r. 6.3.

213 *Ibid.*, rr. 6.4(1) and 6.4(3).

214 In which case the application should be made by motion – *ibid.*, r. 18.1.

(c) proceedings on an application for an order for the appointment of a tutor of a person under legal incapacity,

(d) proceedings on an application for a declaration of right,

(e) proceedings in an application for an injunction,

(f) proceedings on an application for the appointment of a receiver,

(g) proceedings on an application for an order for the detention, custody or preservation of property,

(h) proceedings on a claim for relief for trespass to land.[215]

In addition, it is provided that:

Proceedings:

(a) in which the sole or principal question at issue is, or is likely to be, one of:

(i) the construction of an Act or a Commonwealth Act, or

(ii) the construction of an instrument made under an Act or a Commonwealth Act, or

(iii) the construction of a deed, will, contract or other document, or

(iv) some other question of law, or

(b) in which there is unlikely to be a substantial dispute of fact,

are amongst those which are appropriate to be commenced by summons unless the plaintiff considers the proceedings more appropriate to be commenced by statement of claim.[216]

Whereas the statement of claim is mostly used in proceedings involving a dispute of fact, the

215 *Ibid.*, r. 6.4(2).
216 *Ibid.*, r. 6.4(4).

summons is mostly used where a question of law is at issue. As the summons is not designed to transact proceedings involving a dispute of fact, it takes a more summary form. It has been said that proceedings commenced by summons usually proceed on affidavit evidence, but that the evidentiary rules are the same whether one proceeds by summons (using affidavits) or statement of claim (using oral evidence).[217] There does, however, seem to be changing practice with regard to proceedings initiated by summons. Previously, for example, specific performance was not generally awarded other than under a statement of claim, but it is now commonly sought in summonses.[218]

There is some flexibility if the wrong form of process is used.[219] The UCPR also provide for the court to make summary judgment,[220] and though this is potentially available under either form of originating process, in practice it is limited to process initiated by statement of claim.[221]

b. Victoria

In Victoria, proceedings are mainly commenced by writ or originating motion.[222] There is a general requirement to initiate proceedings by writ,[223] but originating motion must be used where there is no defendant in the proceedings, where by or under any Act an application is authorised to be made to the court, or where required by the Supreme Court (General Civil Procedure) Rules.[224] For example, originating motion shall be used to commence proceedings for judicial review,[225] and applications under the Evidence (Miscellaneous Provisions) Act 1958 for the examination of a witness in Victoria in relation to a matter pending before a court or tribunal in a place out of Victoria shall be made by originating motion not joining any person as a defendant.[226] Applications

217 The Hon. Mr Justice P.W. Young, *'Equity'* (2007) (Bar Practice Course materials, The New South Wales Bar Association, accessed on 10th December 2016 at http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Young%20J.pdf), pp.13-14.
218 *Ibid.*, p.31.
219 Uniform Civil Procedure Rules 2005 (New South Wales), rr. 6.5 and 6.6.
220 *Ibid.*, r. 13.1.
221 The Hon. Mr Justice P.W. Young, *'Equity'* (2007) (Bar Practice Course materials, The New South Wales Bar Association. Accessed on 10th December 2016 at http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Young%20J.pdf), p.23.
222 Supreme Court (General Civil Procedure) Rules 2015 (SR No 103/2015) (Victoria), r. 4.01. Interlocutory applications are made by summons – *ibid.*, r. 4.02.
223 *Ibid.*, r. 4.04(1).
224 *Ibid.*, r. 4.05(1).
225 *Ibid.*, r. 56.01(2).
226 *Ibid.*, r. 81.01(2)(a).

for punishment for contempt of court shall be made by summons or originating motion.[227]

In addition, proceedings *may* be initiated by originating motion where it is unlikely that there will be any substantial dispute of fact and, for that reason, it is appropriate that there be no pleadings or discovery.[228] There is also provision for a special procedure to apply in proceedings initiated by originating motion, including for an order to be made in an urgent case, to save time and expense for the parties, or where the defendant consents.[229] Generally, whereas evidence is to be given orally in proceedings commenced by writ, in proceedings initiated by originating motion, evidence is to be given by affidavit, though it can be given orally by agreement of the parties and unless the court otherwise orders.[230] There is some flexibility offered where the wrong form of process is used.[231]

5.3 New Zealand

The principal form of originating process in the High Court of New Zealand is the statement of claim,[232] but this does not apply in relation to a number of specified proceedings.[233] These are:

- An unopposed application relating to estate administration (including probate),[234] in which case other forms of application are specified;[235]
- Certain statutory appeals,[236] in which case a notice of appeal is filed;[237]
- Certain proceedings commenced by originating application;[238]
- An application to the High Court to put a company into liquidation,[239] where separate

227 *Ibid.*, r. 75.06(1).
228 *Ibid.*, r. 4.06.
229 *Ibid.*, r. 45.05(3).
230 *Ibid.*, rr. 40.02 and 45.02. Evidence is generally to be given by affidavit in any interlocutory or other application in any proceeding – *ibid.*, r. 40.02(a). Provision is nevertheless made for the court to order that evidence be given orally on the hearing of an interlocutory or other application in any proceeding or at the trial of a proceeding commenced by originating motion, or by affidavit at the trial of a proceeding commenced by writ – *ibid.*, r. 40.03.
231 *Ibid.*, rr. 2.02 and 4.07.
232 High Court Rules 2016 (LI 2016/225) (New Zealand) ("HCR"), r. 5.25(1).
233 *Ibid.*, r. 5.25(2).
234 *Ibid.*, r. 5.25(2)(a).
235 *Ibid.*, Part 27.
236 *Ibid.*, r. 5.25(2)(b).
237 *Ibid.*, Part 20.
238 *Ibid.*, r. 5.25(2)(c); and Parts 18, 19 and 26.
239 *Ibid.*, r. 5.25(2)(d).

provision is made for filing a statement of claim;[240] or

- A proceeding, commenced in accordance with the Trans-Tasman Proceedings Regulations and Rules 2013, to register under subpart 5 of Part 2 of the Trans-Tasman Proceedings Act 2010 a registrable Australian judgment,[241] where certain forms and provisions on interlocutory applications are provided.[242]

Of most relevance to this paper is the third itemised point, where proceedings are commenced by originating application. Certain statutory applications "must" be made by originating application.[243] In addition, liquidators, receivers and certain types of judicial manager and statutory manager "may" seek the directions of the court by originating application.[244] Further, the court "may, in the interests of justice, permit any proceeding not mentioned in rules 19.2 to 19.4 to be commenced by originating application",[245] and that permission may be sought without notice.[246] This includes the possibility of applying for permission to raise certain applications that are otherwise to be commenced by statement of claim, to instead be commenced by originating application.[247] Notable in this category of applications are "proceedings in which the relief claimed is wholly within the equitable jurisdiction of the court", such as:

(i) the determination of a claim of an entitlement as beneficiary under a will or trust or on the intestacy of a deceased person, or as a creditor of a deceased person, whether the claim is made by the person claiming to be entitled or by that person's assignee or successor:

(ii) the ascertainment of a class of creditors, beneficiaries under a will, or persons entitled on the intestacy of a deceased person, or of beneficiaries under a trust:

(iii) the giving of particular accounts by executors, administrators, or trustees:

(iv) the payment into court of money held by executors, administrators, or trustees:

(v) the giving of directions to persons in their capacity as executors, administrators, trustees, or

240 *Ibid.*, Part 31.
241 *Ibid.*, r. 5.25(2)(e).
242 Trans-Tasman Proceedings Regulations and Rules 2013.
243 HCR, r. 19.2.
244 *Ibid.*, r. 19.4.
245 *Ibid.*, r. 19.5(1).
246 *Ibid.*, r. 19.5(2).
247 *Ibid.*, r. 18.4.

beneficiaries to do or abstain from doing a particular act:

(vi) the approval of a sale, purchase, compromise, or other transaction by executors, administrators, or trustees:

(vii) the carrying-on of a business authorised to be carried on by any deed or instrument creating a trust or by the court:

(viii) the interpretation of a deed or instrument creating a trust:

(ix) the determination of a question that arises in the administration of an estate or trust or whose determination is necessary or desirable to protect the executors, administrators, or trustees.[248]

This category also includes certain statutory applications (notably (but not limited to) company, family and trusts legislation),[249] certain issues relating to contracts for the sale of land,[250] certain issues relating to mortgages and charges over land,[251] and "any other proceeding to which the court directs that this Part is to apply".[252]

A proceeding is commenced by originating application when the application is filed in the proper registry of the court,[253] or when the court gives permission for the above applications to be made by originating application.[254] Proceedings commenced by originating application can be *ex parte*,[255] and may have evidence taken orally on oath if the court, on application before or at the hearing, so directs.[256] The scope of process initiated by originating application has been amply set out in the case law:

> [T]he type of proceeding suited to the originating application procedure is a straightforward application, not requiring detailed pleadings or interlocutory orders for its fair resolution. Such a type of proceeding tends to be an application under a specific statutory provision, where the issue that arises can be clearly defined, and the issues confined. The procedure is not well suited to the

248 *Ibid.*, r. 18.1(a).
249 *Ibid.*, r. 18.1(b).
250 *Ibid.*, r. 18.1(c).
251 *Ibid.*, r. 18.1(d).
252 *Ibid.*, r. 18.1(e).
253 *Ibid.*, r. 19.7(1).
254 *Ibid.*, rr. 19.5(1) and 19.7(1).
255 *Ibid.*, r. 19.9(2).
256 *Ibid.*, r. 19.13.

> determination of substantive rights involving the application of common law doctrines as distinct from statutory tests. It is not well suited to cases involving multiple parties, and cases where there is the possibility of crossclaims or counterclaims...
>
> It is no longer right to say that [originating application procedure] cannot be utilised where there is an opposing party. Nevertheless, while the procedure is not limited to applications where there is no opposing party, it is nevertheless, in relation to contested proceedings not listed in r 19.2, an exceptional procedure. It is limited to cases where it is not necessary in the interests of justice for there to be the usual particularised pleadings, or interlocutory steps such as discovery, for the proper determination of the issues. While the types of proceedings where the originating application procedure can be used as of right under r 19.2 have been expanded, and can include the determination of substantive personal and property rights, this expansion does not create a carte blanche to commence any urgent matter by way of originating application. If a party wishes to obtain an urgent hearing and a truncated procedure in such a circumstance, it should file a standard proceeding in the usual way and seek priority, or allocation to the Fast Track, or some other step within the ambit of the standard procedure that will reduce time limits. A party should not treat the originating application procedure as a short cut for urgent cases.[257]

In another case, when deciding whether to grant leave to proceed by originating application under Rule 19.5, the High Court of New Zealand stated that the party opposing the application "played up the need for full pleadings, full discovery, and the opportunity to cross-examine witnesses" and that they "had in mind a procedure which would not ensure a hearing for at least another six months, long after [a particular] tribunal hearing will have been completed". The court was of the view, however, that "[t]hose general submissions did not impress".[258]

5.4 Canada

a. Ontario

The Rules of Civil Procedure in Ontario provide for a statement of claim, notice of action, notice of application, application for a certificate of appointment of an estate trustee, counterclaim against a person who is not already a party to the main action, and third or subsequent party claim.[259] The general position is that proceedings shall be commenced by action,[260] the originating process for

257 *Hong Kong and Shanghai Banking Corporation Ltd v Erceg* (2010) 20 PRNZ 652 at paras. 25-26, per Asher J.
258 *Wellington City Council v Registrar of Companies* [2015] NZHC 572 at para. 27, per Associate Judge Bell.
259 Rules of Civil Procedure (RRO 1990, Reg 194, as amended to O Reg 281/16) (Ontario) ("RCP"), r. 1.03(1).
260 *Ibid.*, r. 14.02.

which is a statement of claim.[261] Where there is insufficient time to prepare a statement of claim, an action may be commenced by issuing a notice of action,[262] with a statement of claim filed within thirty days after the notice of action is issued.[263] It should be noted that there is a separate procedure called "simplified procedure" for which the originating process is a statement of claim or notice of action.[264]

An application is commenced by issuing a notice of application or, where appropriate, an application for a certificate of appointment of an estate trustee.[265] This may be made under an authorising statute[266] or under the RCP.[267] The RCP provide for the commencement of process by application in the following scenarios:

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

261 *Ibid.*, r. 14.03(1).
262 *Ibid.*, r. 14.03(2).
263 *Ibid.*, r. 14.03(3).
264 *Ibid.*, r. 76.4 – see generally r. 76.
265 *Ibid.*, r. 14.05(1).
266 *Ibid.*, r. 14.05(2).
267 *Ibid.*, r. 14.05(3).

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.[268]

The situations in which the RCP provide for commencement of process by notice of application bear some similarity to scenarios in which it might be appropriate to initiate process in the Court of Session by petition.[269] Nevertheless, for each type of originating process, the process is "issued by the registrar's act of dating, signing and sealing it with the seal of the court and assigning to it a court file number".[270]

b. British Columbia

In another Canadian province, British Columbia, the general form of originating process is a notice of civil claim.[271] However, certain processes must be initiated by filing a petition or requisition, as appropriate:

(a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;

(b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;

(c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document;

(d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;

(e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;

(f) the relief sought is for payment of funds into or out of court;

(g) the relief sought relates to land and is for

(i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,

(ii) a declaration that settles the priority between interests or charges,

268 *Ibid.*

269 Potentially also including item (g.1), which could be analogous to a petition for judicial review on the basis of violation of the Human Rights Act 1998.

270 RCP, r. 14.07(1).

271 Supreme Court Civil Rules (BC Reg 168/2009, as amended to BC Reg 3/2016) (British Columbia), r. 2-1(1).

(iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or

(iv) an order of partition or sale;

(h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.[272]

Some of these situations, in which the originating process must be by petition or requisition, again bear similarity to situations in which it might be appropriate or necessary to initiate process in the Court of Session by petition.

c. Alberta

In the Canadian province of Alberta, a court action is generally required to be initiated by statement of claim. However, there are certain situations in which the action may be initiated by originating application:[273]

(a) there is no substantial factual dispute,

(b) there is no person to serve as defendant,

(c) a decision, act or omission of a person or body is to be the subject of judicial review,

(d) an enactment authorizes or requires an application, an originating application, an originating notice, a notice of motion or a petition to be used,

(e) an enactment provides for a remedy, certificate, direction, opinion or order to be obtained from the Court without providing the procedure to obtain it, or

(f) an enactment provides for an appeal to the Court, or authorizes or permits a reference to the Court, or provides for a matter to be put before the Court, without providing the procedure to be used.[274]

Once again there is some similarity with circumstances in which it might be appropriate or necessary to initiate process in the Court of Session by petition. Process initiated by originating application is not generally subject to the rules on the management of litigation or disclosure of information unless the parties otherwise agree or the court otherwise orders.[275] The court also has

272 *Ibid.*, r. 2-1(2).
273 The originating application was previously known in Alberta as an "originating notice".
274 Alberta Rules of Court (AR 124/2010, as amended to AR 85/2016), r. 3.2(2). See also *ibid.*, rr. 3.15 and 3.16, on originating applications for judicial review.
275 *Ibid.*, r. 3.10(1).

the power to relax certain other rules where process is by originating application.[276] It is explained that:

> Typically, an action started by originating application will not require the same kind of management, either by the parties or the Court, nor require the same kind of disclosure of records or questioning, as actions started by statement of claim. However, if management, document disclosure and questioning are required, the parties may agree or the Court may order them.[277]

6. Conclusion

This paper has sought to promote the purpose and objectives of the Committee's research brief. It has also sought to challenge some of the orthodox conceptions about the distinction between the petition and the summons. This has been done both to test the veracity of that distinction and, noting that the existing literature has tended to affirm rather than challenge the distinction, improve the analysis and range of perspectives available to the Committee. The position of this paper is not that the distinction is disproved or rejected, but that a critical analysis shows that there are significant questions to be asked of the distinction and the differences in policy and doctrine that each form of originating process is alleged to represent. These do not automatically lead to either conclusion – that the distinction between the petition and the summons should be retained or abolished. It is hoped that the paper offers an additional, original perspective which can improve the clarity and critical nature of the analysis available to the Committee in deciding whether and how to proceed with the proposed reform.

This includes challenges to the generally held belief that the petition is usually an *ex parte* form of originating non-contentious or non-adversarial process, and that the petition involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law. It also includes the signalling of caution in regarding sheriff court procedure as more unified than Court of Session procedure, referring in particular to the variety of distinct procedures which can be accessed by way of initial writ, and cognisant of the new Simple Procedure Rules. On the other hand, it has been suggested that the existence of the petition and the summons might represent a needless complication of Court of Session procedure. The distinction between the petition and the summons does raise doctrinal and practical difficulties, including difficulties of

276 *Ibid.*, r. 3.10(2).
277 *Ibid.*, r. 3.10 (information note).

consistency, accessibility and comprehensibility.

With the abolition of the distinction would come both opportunities and risks. The replacement of the petition and the summons with a single, generic form of originating process would remove a potentially unnecessary procedural complication. That would present opportunities for time and cost savings in judicial proceedings, and therefore for the improvement of access to justice. However, the abolition of the distinction risks the replacement one two-tier process with another. It should also be ensured that the new procedure offers the continued possibility of initiating *ex parte* applications, that it retains flexibility and brevity in appropriate cases, and that it retains the relative speed and cheapness of abbreviated or expedited process.

It would appear that abolition of the distinction between the petition and the summons would offer, at best, a partial solution to the complexities of the procedural issues discussed in this paper. Abolition would not necessarily eradicate difficulties about the competency of individual remedies in given circumstances, the equitable or non-equitable nature of remedies, the ability or otherwise to transact contentious proceedings by way of an *ex parte* application, and the order in which remedies or avenues of redress should be attempted. A significant outstanding difficulty, which is potentially a great impediment to access to justice, is that the legal rules and principles on these issues are scattered throughout a wide array of statutory and non-statutory sources. Even when located, those rules and principles are not always articulated with clarity, certainty or consistency.

Finally, the opportunity was taken in the paper to consider comparative forms of originating process in other jurisdictions. It is notable that, in each of the seven jurisdictions under review, there is not a single form of generic writ which applies comprehensively to all civil proceedings. The most unified in terms of generic originating process appears to be England and Wales, where the claim form is used to initiate proceedings under the CPR, regardless of whether Part 7 or Part 8 procedure is used. However, as noted, the CPR do not apply to a number of specific categories of proceedings where particular forms of application are provided.

In the other jurisdictions under review, there appear to be two or more forms of originating process. There also appears to be a regular form of process and a form of process which initiates a typically more abbreviated or flexible type of proceeding. Each jurisdiction would require further research to

explore in depth the context, background and reasons for those distinctions, but it is certainly interesting that none of those jurisdictions have proceeded down the route of a single form of generic writ in civil procedure. That does not necessarily lead to the conclusion that Scotland should not pursue that objective, but it does raise the question of why the other jurisdictions under review have not done so. The reason could be as banal as conservatism or a lack of imagination on the part of those with responsibility for regulating civil procedure, or it is thought too technically difficult to achieve in practice. However, the reason could alternatively be that a single form of originating process is thought not to serve the needs of litigants or the utility of civil procedure.