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SCOTTISH ROYAL GOVERNMENT IN THE THIRTEENTH CENTURY FROM AN ENGLISH PERSPECTIVE

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All historians would agree that English identity in the thirteenth century was shaped by both the burdens and the benefits of royal government. It was in reaction to the burdens that the rebels of 1215, in Magna Carta's security clause, called into being 'the community of the land' to enforce the Charter's terms.[1] Yet the realm, or much of it, was also united by the 'common law', 'a royal benefit granted to the people by the goodness of the king', as *Glanvill* put it, which meant that throughout England, a vast amount of civil litigation was decided by juries before royal justices, according to standard forms initiated by the king's writs.[2] In Scotland, too, kingship and national identity were intimately related. Indeed, if, as seems the case, the diverse peoples within the boundaries of modern Scotland came to think of themselves as Scottish during the course of the thirteenth century, that was largely because of their common allegiance to the king of Scots.[3] The process, however, worked very differently north of the border. In Scotland, historians are agreed, the burdens of royal government were far lighter than they were in England. As a result, it was far easier for national identity to grow 'with' rather than 'against' the king. The first part of this essay will deploy new evidence to show just how extreme this contrast between England and Scotland was. Indeed, we may wonder whether the perception that, when it came to the demands of the crown, it was far better to be Scottish than to be English, was one of the forces driving the development of a separate Scottish identity in the thirteenth century. When, however, it comes to the benefits of royal government in the shape of the common law, the contrast between England and Scotland, according to the usual view, is far less marked. Indeed, the belief that, in the thirteenth century, a common law on the English model developed in Scotland has become almost axiomatic amongst historians. The second part of this essay mounts a direct attack on this view. It argues that the Scottish common law in the thirteenth century was an animal of very limited activity and significance. This finding, if correct, is important for our general understanding of government

[1] Holt, *Magna Carta*, 470–1 (cap. 61). I am most grateful to Alice Taylor for commenting on drafts of this essay and allowing me to see relevant sections of her forthcoming book *The Shape of the State in the Kingdom of the Scots* (Oxford University Press).

[2] *Glanvill*, 28 (referring here specifically to the grand assize).

[3] Broun, 'Becoming Scottish'.

and society in Scotland in the thirteenth century. It is also arguably related to the development of national identity. In England, the common law benefited the general run of freemen. It hardly did the same for the nobility, who saw their private jurisdictions weakened in various ways. The nobility of Scotland were determined not to suffer the same fate. Here was another reason for thinking it was better to be Scottish than to be English.

I

Kings of England and Scotland certainly raised their revenues in comparable ways. The basic unit of royal administration in the localities was the sheriffdom, and the sheriff was the chief revenue collecting officer.[4] Here, however, the similarity stopped. Whereas the great bulk of England was embraced by the sheriffdoms, much of Scotland was outside their jurisdiction altogether. True, in thirteenth-century England, Cornwall, Chester, and some liberties in the far north, including, of course, Durham and the king of Scotland's Tynedale, were held by their lords with large measures of independence.[5] Indeed, the further one advanced north from the Trent, the more prominent highly privileged liberties became. Yet the sheriffs of Northumberland and Cumberland were still powerful officials, and, like Philip of Oldcoates, under John, and William Heron, under Henry III, could be deeply unpopular.[6] Their authority stretched to the Scottish border, and they raised substantial revenues for the crown, not least when the king's judges came to hear judicial and forest pleas at Carlisle and Newcastle as they regularly did. The result was the discontent in the north with the rule of King John and the part played by 'the Northerners' in forcing Magna Carta upon him. The kings of England might have been southern based, but the claws of their local agents could scrape up revenue throughout the realm. Kings of Scotland, by contrast, had no power, through the routine operations of their government to raise revenue kingdom wide. There were no sheriffdoms at all in the central highlands and in the great sweep of northern

[4] For the Scottish sheriffs being expected to compel payment by distraint, see *ER* [all references are to volume I], 4, 20, 22, 32. In both England and Scotland, there were, however, many people and institutions who answered for farms and rents separately from the sheriffs. The revenues from the burghs do not feature in the later abridgements (discussed below) which are all that survive from the Scottish accounts from the 1260s and the period between 1288 and 1290. By contrast, the surviving rolls from 1326 to 1359 are largely taken up with such revenues: *ER*, 1–626.

[5] Stringer, 'States, liberties and communities', 6–7, 14. This chapter provides a fascinating discussion of the many angles from which liberties can be viewed. The major liberties in Cumberland were Allerdale and Copeland, and in Northumbria Redesdale and Tynedale. Holford and Stringer, *Border Liberties and Loyalties*, gives detailed discussion of Durham (by Holford) and Tynedale and Redesdale (by Stringer). For Durham, see also Fraser, *A History of Antony Bek*, chapter v.

[6] Holt, *The Northerners*. There are many references to Oldcoates both in *The Northerners* and in Carpenter, *The Minority of Henry III*. For Heron, see Matthew Paris's *Chronica Majora*, ed. Luard, v, 663; vi, 344. St Albans had a cell at Tynemouth and thus spoke from local knowledge.

and western Scotland between Dingwall on the Cromarty firth and Dumbarton on the Clyde.[7] In the areas outwith the sheriffdoms, Scotland was dominated by great provincial earldoms and lordships, which probably yielded little or no regular income to the crown. According to the calculation of Alexander Grant, these earldoms and lordships embraced two-thirds of the kingdom's surface area and covered 425 (46%) of its 925 parishes.[8]

In Scotland, therefore, there was a fundamental contrast between the Scotland of the sheriffdoms, royal Scotland, and the rest. In England, the contrast was far less marked. In large measure, the England of the sheriffdoms, royal England, was England. There was also, or so it seems, an equally striking contrast in the financial burdens imposed within the English and Scottish sheriffdoms, especially in the area of private debts. By these I mean debts which had arisen not from farms, rents, and customary dues, but from fines (essentially offers of money to the king for concessions and favours), reliefs (payments to enter an inheritance), and amercements (monetary penalties imposed for falling into the king's mercy as the result of some offence.) The distinction is important because the exaction of private debts was far more contentious politically than was the levying of farms and customary dues. The latter were raised, in large measure, from the king's own properties, with which he could do as he liked. Thus the 1215 Magna Carta exempted the king's demesne manors from restrictions placed on revenue raised above the county farms, while the 1217 Charter excepted the king's own villeins from the protection against arbitrary amercements.[9] The idea was already emerging that the king should 'live off his own', which meant live off his own lands, rather than the debts owed him by individuals and general taxation. This was, however, wishful thinking. In England, as we shall see, the exaction of private debts remained central to the processes of royal finance. It is far less clear that this was so in Scotland.

At the centre of debt collection in England was the exchequer, a central office, based at Westminster and open for most of the year, charged with exacting, receiving, auditing, and distributing the money owed the crown. Private debts themselves

[7] For a list of the sheriffdoms probably from the thirteenth century, see 'The Scottish king's household', ed. Bateson, 24–5, and for maps see *Atlas of Scottish History*, ed. McNeill and MacQueen, 192–4. Although the accounts of the 1260s show some money coming in from Ross, Sutherland, and Caithness, it was not large. The accounts of the bailiff of Dingwall were postponed indefinitely because of uncertainty over the farms, which probably means they hardly existed: *ER*, 19.

[8] Grant, 'Franchises north of the border', 160–4. This calculation is one for the late fourteenth and early fifteenth centuries, but, as Grant says, most of the earldoms and provincial lordships dated back much earlier so the calculations apply broadly to the thirteenth century as well. For maps of the earldoms and provincial lordships, see *ibid*., 170 (for the fifteenth century) and *Atlas of Scottish History*, ed. McNeill and MacQueen, 183–6.

[9] Holt, *Magna Carta*, 456–7, cap. 25. The restriction placed here on the raising of revenue above the ancient farms of the counties reflected the fact that by this time much of the county farm came not from land but from penalties imposed in local courts, notably at the view of frankpledge.

could arise in two main ways.[10] First, individuals and institutions were constantly coming to the king and making fines for a wide variety of concessions and favours. It was with the king too that reliefs were agreed, usually in accordance with the terms of Magna Carta. Occasionally money of this kind was paid immediately, cash down, to the king, paid, that is, into his chamber, or, from the reign of Henry III, his wardrobe.[11] In that case, the exchequer was not involved. But for the most part, this did not happen. Instead, it was up to the exchequer to collect the money. To that end, copies of the fine rolls, on which the chancery, itinerating with the king, recorded all the offers of money, were sent to the exchequer in instalments throughout the year, thus keeping it informed of what it had to raise. These copies were called the orginalia rolls. The second main way in which private debts arose was through the amercements imposed by the king's judges, especially those travelling to hear judicial pleas and the pleas of the forest. Here again it was up to the exchequer to collect the sums involved, and it thus received 'estreat rolls' from the justices, recording the amercements which they had imposed. Once the exchequer had possession of the originalia rolls and estreat rolls, it transferred the debts they recorded, together with old debts carried over from previous years, to lists called 'summonses'. These were then sent to the sheriffs to inform them of the money they were to raise. The sheriffs (apart from what they expended locally or sent to the wardrobe) paid this money into the exchequer, although some individuals, especially those of importance, might make their own payments.[12]

All this does not mean the light of the exchequer shone alone in the financial administration of the country. Alongside it was the light of the financial office, the wardrobe, which travelled with the king. It was this which received and spent, on whatever the king wished, a large proportion of the revenue of the kingdom. The wardrobe worked very closely with the chancery, using its rolls to record, and its clerks to write, the letters dealing with its business, letters which were authenticated with the great seal.[13] The wardrobe, however, remained very dependent on the exchequer. True, it might, as we have said, get funds from fines paid cash down, which

[10] What follows is my own sketch, informed by the secondary literature, and based on the evidence of the fine rolls, originalia rolls, eyre rolls, estreat rolls, receipt rolls, memoranda rolls, and pipe rolls. For the exchequer in the thirteenth century, see Barratt, 'Finance on a shoe string', and for the chancery, Carpenter, 'The English royal chancery'. A discussion of the fine rolls and originalia rolls (by David Carpenter and Paul Dryburgh) may be found on the website of the Henry III fine rolls project: www.finerollshenry3.org.uk/content/commentary/reign_intro.html.

[11] For chamber and wardrobe, see volume one of that classic work, T. F. Tout's *Chapters in the Administrative History of Medieval England*. Just why the wardrobe took over from the chamber as the office with the king charged with receiving and spending revenue is unclear. In what follows I have stuck to the term wardrobe.

[12] I discuss this more fully later.

[13] In the reign of Edward I, the wardrobe increasingly employed the privy seal for its own letters, and these were not recorded on the chancery rolls. The wardrobe also came to employ its own clerks, rather than those of the chancery, to write the rolls on which it recorded its receipts and issues, and other internal accounts. For the latter, see Carpenter, 'The household rolls of King Henry III'.

never entered the exchequer orbit. It could also alight on money due at the exchequer and order it to be paid direct to itself. Yet it was via cash collected by, and sent from, the exchequer that it received a large part of its funds. While, moreover, the wardrobe recorded its receipts and expenditure, it did not, in any major way, hear accounts. Thus when it diverted money to itself, it always informed the exchequer, and the exchequer gave debtors due allowance for such payments into the wardrobe when it audited their debts. As a result, such payments feature on the pipe rolls, the exchequer's record of its annual audit of the money owed the crown.

Some of this procedure was echoed in Scotland. It is clear, from the accounts of the 1260s, that the sheriff collected private debts both from fines and reliefs and also from the amercements and other issues arising from the work of the justiciars.[14] Equally, in Scotland, the chamberlain, chancellor, and clerks of the chapel were the rough equivalent of the wardrobe and chancery in England. (The term 'chancery' itself does not appear in any outright Scottish source in the thirteenth century.)[15] Yet here the parallel ceased, because in Scotland, the chamberlain, chancellor, and chapel stood alone at the centre of the financial administration of the country.[16] There was no Scottish exchequer; no office, that is, staffed by its own officials, separate from the itinerant court and fixed in one place, which extracted, received, and spent the king's money; audited the accounts of the sheriffs and other debtors; and recorded its business on its own rolls, as well as issuing its own letters in the king's name, and authenticating them with its own seal. Instead, in Scotland, all the revenue (unless spent locally) was received from the sheriffs and other debtors by the chamberlain;[17] the accounts of the sheriffs and other officials were heard by

[14] For private debts, see the Appendix at the end of this chapter.

[15] Murray, 'The Scottish chancery'; at 135 he says indeed that the royal chancery was habitually called the 'king's chapel' until the late sixteenth century and that 'chancellary' is not found until the fifteenth century. However, the table of contents to the Ayr Register from the early fourteenth century sets out 'capitula Capelle Regis Scocie' of letters and brieves 'per regem de Cancellaria mittendis'. For the appearance of the term 'chancery' in the late thirteenth century in English or English-influenced sources, see below, n. 145. In Amt and Church, *Dialogus de Scaccario,* at n. 64, Stephen Church considers the slow emergence of a 'chancery', so called, in twelfth-century England.

[16] The kings of Scotland themselves had a wardrobe. Indeed, as Alice Taylor points out to me, 'a cedule touching the wardrobe of the king of Scotland' and 'two ancient rolls of the wardrobe of the queen' were listed in the inventory of 1291, while the inventory of 1292 included 'two rolls touching the wardrobe of the king' which had been transferred from one official to another back in 1282: *APS*, i, 112, 115. It is far from impossible that sometimes money was paid directly into the wardrobe, rather than the chamber. It may be, however, that the Scottish wardrobe was essentially a place where cloth, clothes, and artefacts were stored, rather than a place for the receipt and expenditure of money. In that sense it had points in common with the great wardrobe in England, for which see Tout, *Chapters in the Administrative History*, iv, chapter xiv.

[17] Hence when the earl of Mar, as chamberlain, accounted in 1264 for receipts totalling some £5,313, these were probably a large part of the issues of the kingdom: *ER*, 10, and 2–4, 8, 15, 25, for the sheriffs paying money to the chamberlain.

the chamberlain, chancellor, and other officials, at various places through the year, probably during the normal course of the king's itineration;[18] and these accounts were recorded on the 'rolls of the chapel',[19] which was as though the English chancery was drawing up the exchequer's pipe rolls!

This single centre of financial administration meant that the process of debt collection was much simpler in Scotland than it was in England. When a fine or relief was agreed with the king, the chamberlain or chancellor communicated the sum to be collected direct to the sheriff.[20] They did not have to go through any exchequer. Likewise, the justiciars would have sent direct to the sheriffs the list of the revenues (the *lucra* as it is called in the accounts) which they were to collect.[21] The sheriffs, as we have said, apart from local expenditure, paid all their money into the chamber. They could do no other, for there was nowhere else for the money to go. In England, reformers sometimes took the view that all the revenues should go to the exchequer, with the wardrobe being funded simply from its receipts.[22] In Scotland, such a programme would have had no meaning.

These much simpler procedures for the collection of debts obviously reflected the fact that the Scottish kingdom's revenues were much smaller than those of England. Even allowing for differences in scale, the evidence also suggests that there were far fewer private debts to deal with. Within England, the number of private debts had greatly increased over the course of the twelfth and thirteenth centuries, as is revealed by the pipe roll, the annual audit of money owed the crown. The roll of 1129-30 has the names of around 1,500 debtors. That of 1229–30 has around 5700.[23] In Northumberland, there were five private debts in the pipe roll of 1130 and over 150 in that of 1258–9.[24] Now, whether paid in by the sheriff or by individual

[18] *ER*, 1, 9, 10, 18, 22, 24, 30, 34, which show accounts being heard at Scone, Arbroath, Edinburgh, Newbattle, and Linlithgow; see Duncan, *Making of the Kingdom*, 606–7.

[19] *ER*, 19. For discussion, see Taylor, *The Shape of the State*, chapter 6, 'Central administration'.

[20] For both chamberlain and chancellor moving the seal, see Duncan's model in *RRS*, v, 262. I am not sure, however, whether the separation he seems to envisage between the itinerant king and officials with the seal would be true of the thirteenth century.

[21] In England, especially when money was needed quickly, judges were occasionally ordered to send their estreat rolls direct to the sheriff so that collection could begin at once, but the exchequer was always informed as well and the debts were entered on the pipe rolls.

[22] Treharne and Sanders, *Documents of the Baronial Movement*, 106–7, cap. 14; Barratt, 'Finance on a shoestring', 74–5.

[23] *Magnum Rotulum Scaccarii*, ed. Hunter; *The Great Roll of the Pipe*, ed. Robinson. I owe these figures to a King's College London MA dissertation by Joshua Curk which compared the pipe rolls of 1130 and 1230. The figures are, of course, only a rough guide to the rise in private debts and are subject (as Curk showed) to all kinds of explanations and qualifications.

[24] *Magnum Rotulum Scaccarii,* ed. Hunter, 35–6; TNA/PRO E 372/ 103, r.14. Richard Cassidy, who is editing the 1258–9 roll for the Pipe Roll Society, has kindly given me a transcription of its Northumberland section, for images of which see http://aalt.law.uh.edu/AALT4/H3/E372no103/aE372no103fronts/IMG_1716.htm and http://aalt.law.uh.edu/

debtors, with one qualification mentioned below, all private debts had their own entry on the pipe roll. The rolls would thus record the initial size of the debt, the amount (if any) paid in, and the amount still owed. Thus a typical entry from the Northumberland section of the pipe roll of 1258–9 runs as follows:

> Adam Baret, coroner, accounts for 100s for several transgressions. [He has paid] into the treasury, 40s.[25] And he owes 60s.[26]

The sheriff, in other words, although he might collect private debts, was not put down as owing them. His obligations were confined to the county farm and any other farms for which he was responsible. The only private debts which did not have their own entries were the ones arising from the judicial and forest eyres which were so numerous and often of such small amounts that the sheriff accounted for them as lump sums, with the individual payments being recorded only in subsidiary documents at the exchequer.

If we turn then to Scotland, and look at the accounts from the 1260s, the contrast is quite extraordinary. In the whole of the accounts of the Scottish sheriffdoms, on the most generous count, only thirty-five private debts are mentioned.[27] For none of these debts, moreover, is there any sign of an audit process. The amount received by the sheriff is noted without any reference to the initial size of the debt, and what was still outstanding. So, to take one example, the sheriff of Roxburgh is said to have received, in one account, 66s 'from the fine of Geoffrey Liddell' and, in another, 10 marks 'through the fine of Geoffrey Liddal for that year', but nothing is said, on either occasion, about the size of the debt.[28] Now, of course, we need to consider whether this startling contrast is due just to the state of Scottish evidence. Whereas the English pipe rolls survive in full and continuous sequence, one for each year, from 1155, the Scottish accounts mentioned above are confined to abridgements, made in the seventeenth century by the earl of Haddington, from the accounts (now lost) covering the years between 1263 and 1266, and between 1288 and 1290.[29] The former, in their 1904 edition, run to thirty-four printed pages and the latter

AALT4/H3/E372no103/bE372no103dorses/IMG_1806.htm. Again the comparison is subject to all kinds of qualifications. I have left out the four pardons of danegeld in the 1130 roll, and clearly the number of debtors would have been much larger had the names of those who paid been noted. Equally I have left out from 1258–9 the large numbers of debts and pardons arising from the Welsh scutage of 1257.

25 Treasury here means the lower exchequer or exchequer of receipt. The upper exchequer dealt with the actual exaction of debts through the summonses and the hearing of the accounts.

26 http://aalt.law.uh.edu/AALT4/H3/E372no103/bE372no103dorses/IMG_1806.htm.

27 See Appendix, where two debts are in no. 24 and four in no. 29. I have excluded the lump sums paid in by the sheriffs from the profits of the justiciars' ayres. These are the equivalent of the lump sums from the eyres for which the sheriffs accounted in England.

28 *ER*, 21, 28–9; Appendix no. 18.

29 Haddington was 'one of the most learned Scottish lawyers of the seventeenth century': *ER*, xxxvi. New light is thrown on the nature of these abridgements by Alice Taylor in chapter 2.ii of *The Shape of the State*.

to sixteen.[30] The English pipe roll for 1242 takes up 350 pages. Having said that, while the Scottish accounts are abridgements, the fullest of them, that for Forfar, which runs to over three printed pages, is no different from the others in the virtual absence of private debts.[31] Even the single account with the most private debts, that for Ayr, has only four of them.[32] One cannot help thinking that, had private debts featured within the accounts in any striking number, then Haddington would have given a greater indication of the fact, just as he does indicate his omission of 'charges of silver, victual, and "caynis"' belonging to the king in every shire, and the expenditure on royal castles.[33] The same is true, perhaps even more so, when it comes to the audit process. Here Haddington did include material related to rates of payment. Thus, after recording the sheriff of Fife's receipt of 40 marks from John of Denmuir's debt to the king, the abridgement continues 'he ought to pay forty marks annually and this is his first payment of the debt etc.'.[34] The 'etc.' here and elsewhere is tantalising, but it is difficult to believe that Haddington, given his interest in the rates of repayment, had no interest at all in the sizes of debts, and was never moved to include them. The strong probability is that the accounts gave no such information.

Of course, the accounts, even if not misleading in their abridged state, cannot be the whole story. Since they are largely concerned with money actually collected by the sheriffs, they have little about debts which were left unpaid, unlike the English pipe rolls, which recorded all debts, whatever the state of payment. Likewise, the Scottish accounts are not concerned with debts which bypassed the sheriffs and were paid by individual debtors direct into the chamber. It is impossible to know the precise scale of what is missing here. Perhaps some of the rolls inventoried by Edward I's officials in Edinburgh castle in 1291, including those 'of fines made by the people of Scotland' and of 'debts owed the king', would have thrown light on the question.[35] It may be that the £1,808 from the 'common receipts with fines and reliefs' accounted for by the chamberlain in 1264 included money which bypassed the sheriffs, but it is equally likely that it overlapped with what is found in the sheriff's accounts, where, after all, farms are quite separate from fines and reliefs.[36] Clearly, where a debt became the exclusive concern of the chamber in Scotland, or the wardrobe in England, then it would not involve the sheriffs, although the English

[30] *ER*, 1–35–51. The fullest analysis is by Duncan, *Making of the Kingdom*, 596–600, 606–8. The rolls which survive from 1329 to 1359 are confined to returns from the burghs and have no accounts from the sheriffs: *ER*, 52–626.

[31] *ER*, 6–9; see Duncan, *Making of the Kingdom*, 597–8.

[32] Appendix, nos 4–7.

[33] *ER*, 23–4.

[34] *ER*, 31.

[35] The muniments included fifty-two rolls, schedules, and memoranda 'namely certain rolls of fines made by the people of Scotland with the kings of the same kingdom, both in cows and money and certain *de lucris* of the justiciars and other perquisites'. There were also forty-six rolls 'great and small of which certain are of debts owed the king': *APS*, i, 8, 46.

[36] *ER*, 10. Duncan thought the 'common receipts' would have included reliefs and that the chamberlain negotiated sums to be paid into the chamber: *Making of the Kingdom*, 599.

parallel would suggests this did not happen very often. When it came to choosing between paying one's debt to the sheriff and paying it direct to the chamber (if there was a choice), one had to balance the advantage of avoiding shrieval peculation against the disadvantage of the journey. It would not be surprising, as was probably the case in England, if the debts most often paid in directly were those owed by great men who were frequently at court.[37] By contrast, distance and absence may have been a factor in the sheriff of Inverness receiving the debts of the bishop of Ross and the earls of Ross, Sutherland, and Caithness.[38] Yet it is equally clear that the sheriffs of Scotland *did* collect money from men of substance within the heartland of the kingdom. The 'home counties' sheriff of Fife received considerable sums from the knight John of Denmuir.[39] So did the sheriff of Roxburgh from the knight Robert of Cockburn,[40] from Richard Lovel, probably lord of Hawick,[41] and from Nicholas Corbet, lord of Fogo and grandson of the earl of Dunbar.[42] The sheriff of Ayr had money from Earl Patrick of Dunbar[43] and the knights Roland of Carrick and Simon Lockhart.[44] That the chancellor or chamberlain sent the sheriffs regular lists of the debts to be collected, if necessary by distraint, is implied by the occasions when sheriffs asked not to be burdened in their accounts with answering for particular debts, one of their reasons being that the debtors had nothing in their bailiwick by which they might be compelled to pay.[45] Clearly the sheriff, in these cases, has been told to collect the debts in question. If this was the normal procedure, then the number of debts which bypassed shrieval collection is unlikely to have been large, or large enough to alter the conclusion that private debts in Scotland were nowhere near on England's scale.

As for the audit of private debts, there must surely have been some central procedure for this. Indeed, that is implied by those occasions where sheriffs protested that they should not be 'burdened in their accounts' with particular debts.[46] Evidently,

[37] For barons in England paying in their debts directly, see Amt and Church, *Dialogus de Scaccario*, 172-7; and more generally, *Receipt Rolls*, ed. Barratt, xix-xxvi.

[38] Appendix, nos 9–13.

[39] Appendix, no. 2; PoMS, no. 2116 (http://db.poms.ac.uk/record/person/2116/; accessed 21 September 2012).

[40] Appendix, no. 21 but see no. 23; PoMS, no. 5963 (http://db.poms.ac.uk/record/person/5963/; accessed 21 September 2012).

[41] Appendix, no. 22. Richard was presumably a descendant of the Richard Lovel, lord of Hawick, who floruit in 1173; see PoMS, no. 13892 (http://db.poms.ac.uk/record/person/13892/; accessed 21 September 2012).

[42] Appendix, no. 20; PoMS, no. 2092 (http://db.poms.ac.uk/record/person/2092/; accessed 21 September 2012).

[43] Appendix, no. 7.

[44] Appendix, nos 4, 6; PoMS, no. 2338 (http://db.poms.ac.uk/record/person/2338/; accessed 21 September 2012); PoMS, no. 10863 (http://db.poms.ac.uk/record/person/10863/; accessed 21 September 2012).

[45] Appendix, nos 1, 17. The lands of the knight Alexander of Dunoon were in the king's hands through failure to pay: Appendix, no. 27, and PoMS, no. 9489 (http://db.poms.ac.uk/record/person/9489/; accessed 21 September 2012).

[46] Appendix, nos 1, 13, 17.

the auditors had a list of debts for which they expected the sheriff to account. What they probably did was work through the list sent to the sheriff by the chancellor or chamberlain, a parallel to the procedure in England where the exchequer worked through the list it had itself sent to the sheriff. What the Scottish auditors did not do, as we have seen, was to record the state of play of such debts in the shrieval accounts. Conceivably, there was some roll, now lost, which set out private debts with all the punctilio of an English pipe roll. On the other hand, if we are right about the small number of such debts, then the record might have been more informal. A parallel here may be presented by Henry III's treatment of his fines of gold between 1255 and 1257. These were collected in the wardrobe and bypassed the exchequer altogether.[47] The principal record was simply on the fine rolls, which recorded the nature of the fine and when the payment was due. Following payment, a note was made along the lines of 'afterwards he paid that gold into the wardrobe and is quit'. This system was only possible because the fines were usually comparatively small in value and were cleared in one or at most two payments. A similar system, simply ticking off the payments against the initial record of the fine, would have been possible in Scotland, not because the fines were necessarily small, but because there were few of them.

II

What has been said so far suggests that the pressure of royal government within the sheriffdoms was comparatively mild, at least in the area of private debts. But there remains one major question. How can that mildness be squared with the work of the justiciars? Again, it may be helpful to start with the English parallel. In England, royal justice was a 'benefit' to the people. Thus Magna Carta in 1215 laid down that two judges were to tour the counties four times a year to hear the common law legal procedures introduced by Henry II.[48] Clearly the aim was to make these procedures more available than they had been before when judges had sometimes been dispatched to hear them intermittently, if at all. It is vital to remember, however, that this popularity of royal justice related entirely to the civil pleas about disputes over property. It did not relate at all to the crown pleas which included criminal justice, the trial and punishment of serious crime. Far from welcoming the crown pleas as integral to the king's most basic task of maintaining the peace, local communities deeply resented the way they seemed essentially related to raising money. Had Magna Carta laid down that the justices in eyre, who toured the kingdom periodically to hear the pleas of the crown (as well as all civil pleas), should come four times a year there would have been horror. Instead the judges envisaged were to hear civil pleas only.

[47] See Carpenter, *The Reign of Henry III*, chapter 6: 'The gold treasure', and Cassidy, 'The reforming council'.

[48] Holt, *Magna Carta*, 456–7 (cap. 18).

Under the crown pleas procedures, juries from the hundreds and major vills came before the justices in eyre and gave evidence about all serious crime since the last visitation and usurpations of royal rights. In the process, they rendered themselves and the local communities they represented liable to a whole series of amercements imposed by the judges for such things as false evidence, concealment of crime, and failure to arrest criminals. With the chattels of those outlawed or hanged, this was why criminal justice was so profitable. It has been estimated that in the 1240s the proceeds of a nationwide all pleas eyre would have been some £24,000, the rough equivalent of the crown's ordinary annual revenue. The great bulk of the proceeds came from the pleas of the crown.[49] The money-making preoccupations of the judges are graphically revealed in a letter to the chancellor from William of York, one of the justices on eyre in Cumberland in 1227:

> My Lord,
> On Saturday after the exaltation of the Holy Cross [18 September 1227] I left Carlisle, having finished all the king's business. We were there nine days and obtained forty marks a day for the king, the total of the eyre being 360 marks or more.[50]

The panels of jurors bothered and burdened by the eyre were often headed by gentry lords, and then embraced a cross-section of free society running down to the peasantry.[51] This was an important constituency on whom the working of local government depended. It was one increasingly making its voice felt at the national political level. Not surprisingly, during the great reform of the realm in 1258–9, the impositions of the justices in eyre were targeted for reform in the 'Petition of the Barons' and then were restricted in the Provisions of Westminster.[52]

How then does all this relate to the situation in Scotland? Was the hearing of crown pleas there regarded with similar loathing? A case could certainly be made for the view that it was. The accounts of the 1260s show both the justiciars of Scotia and Lothian on eyre and raising substantial money for the crown. The sheriffs accounted for this money in lump sums, known as the '*lucra*', or 'profits' of the justiciar, just as the English sheriffs accounted in lump sums for the profits of the eyre.[53] No records survive of the constituents of the *lucra*, but it clearly included the proceeds of crown pleas. Thus, thanks to the sheriffs being relieved of responsibility

[49] *Crown Pleas of the Wiltshire Eyre*, ed. Meekings, 112–13; Stacey, *Politics, Policy and Finance*, 213–14. Meekings's introduction to *Crown Pleas of the Wiltshire Eyre* remains the classic explanation of how the crown pleas worked.

[50] Meekings, 'Six letters', in Meekings, *Studies in 13th Century Justice*, 497, with the Latin text in Shirley, *Royal Letters,* ii, 222–3.

[51] For studies of thirteenth-century hundred jurors, see Asaji, *The Angevin Empire*, part 3, and *The 1263 Surrey Eyre*, ed. Stewart, introduction, chapter X.

[52] *Documents of the Baronial Movement,* ed. Treharne and Sanders, 82–4, caps 13, 14, 21; 142–3, 146–9, caps 5, 21–3. See Brand, *Kings, Barons and Justices*, 77–82, 87–94, 119–20, 128–33.

[53] *ER*, 18, 27. Some individual debts arising from the English eyres, especially when of significant size, were accounted for individually outside the lump sums. Barrow, 'The justiciar', chapter 3 of Barrow, *The Kingdom of the Scots*, is the classic work on the subject of the justiciar. For the *lucra justciarii*, see 95–6.

for their collection, there are three references to the chattels of executed criminals being part of the *lucra*, very much as in England.[54] There is also mention of a very large penalty (of £32) imposed on four men for failing to produce an indictment before the justiciar of Scotia. This may reflect in Scotia a process similar to that set up in Lothian by legislation of 1245 under which crime was to be investigated before the justiciar through the oaths of three or four men of each 'toun'. Clearly the jurors could be penalised financially in much the same way as the English juries of presentment on which the Scottish 'dittay' was probably modelled.[55] If all this seems bad enough, there is one additional consideration which would seem to make the crown pleas far more burdensome in Scotland than in England, that is the extraordinary fact, or fact as stated in much of the historiography, that the Scottish justiciars went on their tours not once in every several years (as in England), but *twice a year*![56] In England, as we have said, such a prospect would have been regarded with absolute horror, since it would have given the judges many more opportunities to impose penalties on the local juries and communities, sometimes for offences of a technical nature (such as mistakes in giving evidence) which bore no relationship to actual crimes.

Unfortunately, it is difficult to make direct comparisons between the monies raised by the eyres north and south of the border. For the 1256 eyres in Northumberland and Cumberland, the sheriffs accounted for lump sums totalling some £1,018, which was almost the same as the value of the *lucra* (£1,027) in the 1260s accounts for all the Scottish sheriffdoms put together.[57] The contrast may not be entirely fair, however, since the eyres in England were intermittent. The 1256 eyre in Northumberland and Cumberland was the first for ten years. Since the bulk of the money came in fairly soon after an eyre, there would have been periods between 1246 and 1256 when the sheriffs accounted for little or no eyre revenue at all, although they may have had money raised by judges with lesser powers. In Scotland, on the other hand, if the ayres were more frequent, then the cash would have come in more evenly. Equally difficult is any comparison between the revenues of individual sheriffdoms, given that Scotland's were generally smaller than those in the north of England. The accounts of the 1260s, nonetheless, do sometimes show substantial amounts of *lucra* raised from individual sheriffdoms, notably £144 from Berwick, £129 from Edinburgh, and (the biggest sum of all) £187 from Lanark. That makes a total of £460 which comfortably tops the £385 lump sum raised by the 1256 eyre in Cumberland.[58] It is smaller than the £632 due from Northumberland, but

[54] *ER*, 4, 17.

[55] *ER*, 34; Barrow, 'The justiciar', in *The Kingdom of the Scots*, 111–13; Duncan, *Making of the Kingdom*, 546–7.

[56] Barrow, 'The justiciar', in *The Kingdom of the Scots*, 96; Duncan, *Making of the Kingdom*, 595–6; MacQueen, 'Scots law under Alexander III', 78; *Atlas of Scottish History*, ed. McNeill and MacQueen, 195; Grant, 'Franchises north of the border', 156.

[57] This is including the *lucra* for the ayres of Fleming, Berkeley, and Comyn discussed below: *ER,* 9–10, 18, 27.

[58] *ER*, 27; http://aalt.law.uh.edu/AALT4/H3/E372no101/aE372no101fronts/IMG_1401.htm. I am adding here to the lump sum an amercement of 100 marks imposed on all the county for trespasses.

what if the Scottish ayres were coming round much more regularly than those in England? [59]

There are, however, grounds for taking a rather less alarming view of the activities of the Scottish justiciars. In important respects, their jurisdiction did not measure up to that of the English justices in eyre. This was because the lords of Scotland had a far greater share in the trial and punishment of crime than did their counterparts in England; hence, at the end of the twelfth century, the contrast between English and Scottish peacemaking oaths, as elucidated by Alice Taylor in her forthcoming book.[60] In England in 1195 all men were to take an oath to keep the king's peace and hand lawbreakers over to the sheriff. In Scotland, the oath of 1197, sworn at Perth, was only taken by the bishops, earls, barons, and thanes. It bound them essentially to bring criminals to justice in their own courts, and said nothing about the king's peace or the sheriff. The justiciars' eyres may have done something to alter the balance of power between king and lords, but they hardly transformed it.

The first point, a cardinal one, concerns the geographical range of their activities. The English justices covered nearly all the country – indeed we have seen them at work in Cumberland. That was certainly not the case with the Scottish justiciars. The accounts in the 1260s show the justiciar of Scotia simply progressing from Inverness down to Fife. The accounts of the justiciar of Lothian have him moving between Edinburgh, Berwick, and Roxburgh in the east across to Dumfries, Ayr, and Dumbarton in the west.[61] Just, therefore, as a significant part of Scotland was outwith the sheriffdoms, so it was also with the justiciars' ayres. They did not penetrate at all into the great provincial earldoms and lordships which embraced, as we have seen, a large part of Scotland. While the sheriff of Inverness accounted for some '*lucra justiciarii*' north of the Cromarty firth, the amounts involved were small – £4 10s from Ross and 18s from Caithness.[62] The profits of the justiciar in

[59] http://aalt.law.uh.edu/AALT4/H3/E372no101/aE372no101fronts/IMG_1405.htm. Again I am adding in an amercement of 100 marks imposed on all the county. These figures for both Northumberland and Cumberland catch the great bulk of the money due from the eyre but not all of it. They exclude debts which had their own entries in the pipe roll and also further lump sum payments entering the pipe roll in later years. The Northumberland figures also exclude the king of Scotland's Tynedale.

[60] Taylor, *The Shape of the State*, forthcoming, chapter 4.ii, 'Theft, homicide, feud and peace'. For the text of the English oath, see *Chronica Magistri Rogeri de Hovedene*, ed. Stubbs, iii, 299–300. The differences between the English 1195 oath and the Scottish oath of 1197 are also drawn out in Taylor, '*Leges Scocie* and the lawcodes', 212–13; text of oath at 271–3. Howden (*Chronica Magistri Rogeri de Houedene*, ed. Stubbs, iv, 33) describes the 1197 oath but in a way that suggests he was overly influenced by the English setup.

[61] *ER*, 4, 17; *Atlas of Scottish History*, ed. McNeill and MacQueen, 195.

[62] *ER*, 13. These sums were after deductions of 10s and 2s for the tithes of the bishops of Ross and Caithness.

Galloway were similarly exiguous amounting to £9 9s 7d.[63] This was very similar to the sum (£9 20d), drawn from both sides of the River Urr, accounted for in 1288.[64]

It is possible, of course, that while the justiciars did not enter the provincial earldoms and lordships, they drew the pleas of the crown from them for hearing in the nearest adjoining sheriffdom. They would then have included the proceeds in their general accounts for the sheriffdom's *lucra*. How effectively this could have happened with lordships far away from the ayre circuits may be doubted, but it was obviously a possibility for those near at hand. One may remember that when William the Lion, around 1172, confirmed Annandale to Robert de Brus, he reserved the pleas of the crown, or, as he put it, cases belonging to his regality, cases, that is, of treasure trove, murder, premeditated assault, rape, arson, and robbery. These were to be heard before the king's judges in the *comitatus*, here meaning sheriffdom, of Roxburgh.[65] We will also see that just over a hundred years later, in 1285, in the earldom of Carrick, it was jurisdiction over homicide and theft which was in the hands of the earl. This might seem to have left murder and the other pleas mentioned in the Annandale charter to be heard when the justiciar visited Ayr, on Carrick's northern frontier.[66]

The situation in Carrick, however, also leads us in a rather different direction. It indicates that a large share of criminal jurisdiction was enjoyed by provincial lords, a share which must have limited the amount of business claimed by the justiciar's ayres. The earl in Carrick, as we have said, had jurisdiction over both theft and homicide. This is quite clear from a concession he made in 1285 to the monks of Melrose, which referred to the abbey's men 'condemned for homicide and theft in our court'. Their chattels and lands had then been seized for the earl's use.[67] It would seem that the same situation obtained in Annandale since neither theft nor homicide were reserved for the king in its *ca* 1172 charter. Probably, in all the provincial lordships and earldoms, theft and homicide and their profits were in the hands of the lord, while murder, at least in theory, was for the king. What though was the distinction between 'murder' and 'homicide'?[68] The starting point here must be *Glanvill*, which averred that there were two types of homicide, one 'murder' being secret killing for which no hue and cry could be raised, while the other, 'in ordinary speech called simple homicide', was (by implication) killing which was either well known or admitted by the perpetrator.[69] This distinction was certainly appreciated in Scotland, for in the text of the oath sworn at Perth in 1197, there is a reference to 'killers in secret' (*interfectores in murthedric*). A later version

[63] *ER*, 16–17. This sum was after the deduction of the eighth of the bishop of Glasgow amounting to 27s 1d. The *lucra* here appears in the account of the sheriff of Dumfries. There is no account in the excerpts of the justiciar himself.

[64] *ER*, 37. The *lucra* here appears in the account of the justiciar of Galloway.

[65] *RRS*, ii, no. 80.

[66] *Melr. Lib*., i, no. 316. For another possible example of the reach of the sheriff of Inverness into the neighbouring lordships, see MacQueen, 'Scots law under Alexander III', 88–9.

[67] *Melr. Lib*., i, no. 316. I discuss this episode in detail in the 'Paradox' Feature of the Month for February 2010: http://paradox.poms.ac.uk/feature/february10.html.

[68] For what follows, I am indebted to Sellar, 'Forethocht felony', 43–59.

[69] *Glanvill,* 174–5.

of the oath, moreover, makes the Glanvillian distinction explicit, referring both to *murdratores* and *interfectores hominum*.[70] The passage in *Glanvill* was also copied without alteration into the treatise *Regiam Majestatem*, which dates to sometime in the early fourteenth century.[71] It would seem, therefore, that the great lords of Scotland had jurisdiction over homicide in the sense of open or admitted killing, which must have meant that, in practice, the trial and punishment of violent death were in their hands, since most killing was open and hot-blooded, as any analysis of a thirteenth-century English eyre roll would show.

So much for the reach of the justiciars. What about the burdens they imposed within the actual beat of their ayres?[72] Here too, their activities were limited by baronial liberties. We have seen that the earls and provincial lords had jurisdiction over homicide and theft. The same was true, to a significant degree, of the barons within shrieval Scotland. In legislation of 1244 for Lothian, Alexander II laid down that 'all those convicted of theft or homicide before the justiciars shall be handed over to the barons or their baillies to do justice upon them in their free baronies'.[73] The precise relationship between conviction in the justiciar's court and the 'justice' in the barony is not clarified. It is difficult to know whether the king was attempting to limit baronial jurisdiction, and, if so, what were the effects. On the face of it, the justiciars do seem to be claiming a greater oversight over theft and homicide than they would have possessed in Carrick. In Lothian thieves and killers can be '*convicti*' before the justiciar. In Carrick they are '*dampnati*' in the court of the earl. Yet, under the legislation of 1244, the chattels of the thieves and killers convicted before the justiciar were still to go to the lord.[74] Their bodies too, as we have seen, were to be handed over to the lord for 'justice'. That this meant they were to be hanged on the lord's gallows seems clear, for an early fourteenth-century legal treatise stated that 'all barons who have gallows and pit for theft' 'shall also have a gallows for homicide'. Since the liberty, referred to here (that of 'infangthief') was integral to baronial status, in practice this meant all barons, full stop.[75] Now the lords who enjoyed this privilege were not small in number for the Scottish sheriffdoms were covered, as Alexander Grant has shown, by small baronies, many no more

[70] Taylor, 'Leges *Scocie* and the lawcodes', 272, notes 761–2 and Taylor, *The Shape of the State*.

[71] *Regiam Maj*., ed. Cooper, I.4; *APS*, i, 598 cap. 1. Later, in the fourteenth century, it is clear that the distinction had altered and become one between premeditated and unpremeditated killing, the latter for example in the course of some affray. I do not think that, for the thirteenth century, one can confidently translate 'homicidium' as 'manslaughter', as is often done. For 'homicidium' in King Robert's legislation of 1318 see *RRS*, v, 407, caps iii and iv where it may cover both 'murder' and 'homicide' in the senses mentioned above.

[72] *ER*, 34.

[73] *APS*, i, 403 (cap. xiv).

[74] *Ibid.*

[75] Grant, 'Franchises north of the border', 158–9. Grant is here citing *APS*, i, 319 c. 13, from (he says) the second oldest manuscript of Scots law, the Ayr MS of ca 1330. He also cites a passage from *Quoniam Attachiamenta*, c. 16 (*APS*, i, 650 c. 14): 'the lord ... who has court competent to deal with homicide'.

than the size of a parish, so much so that 'Scotland's baronies ... can be regarded as administrative and judicial subdivisions of the sheriffdoms.'[76] Of course, this still left the king with the pleas of the crown, yet, even within the heart of the kingdom, he was sometimes prepared to abandon them. Thus Alexander II granted the land of Nigg to Arbroath Abbey on its dedication '*cum placitis et loquelis ad coronam nostram spectantibus*'.[77] Before the end of the thirteenth century, there were Scottish lordships (notably Sprouston and Garioch) which were held 'in regality', so that the lord had jurisdiction over pleas of the crown and indeed could conduct his own ayres.[78] In practice, we may think this was the situation which also obtained in the provincial earldoms and lordships, whether or not sanctioned by the crown.[79]

In all this, there are parallels with England where roughly half the hundreds, the basic subdivision of the county, were in private hands, which meant the sheriff, to a greater or lesser degree, was excluded from them, and the lords' bailiffs executed the king's commands. Many lords of private hundreds, moreover, had the liberty of 'infangthief' which, as in Scotland, meant they had a right to a private gallows and the chattels of those hung on them. The liberty was also possessed by some lords of individual manors within hundreds. Here, however, the parallel ceases, for the liberty of infangthief in England extended only to the right to hang and have the chattels of thieves taken red-handed on the lord's property.[80] It certainly did not include, as it did in Scotland, the right to hang and have the chattels of those convicted of homicide. Both the great provincial lords and the lords of baronies within the sheriffdoms were thus far more generally privileged than the earls and barons of England, where all killing, secret or open, premeditated or unpremeditated, was a plea of the crown.[81] There was equally a contrast when it came to theft. True, lords in England had the right to hang thieves taken red-handed under their infangthief jurisdiction. But this was very far from a liberty enjoyed by all lords in the kind of blanket way that seems to have been the case in Scotland where the king can hardly have punished or profited from theft at all outside his own demesnes. In England, thieves were routinely tried by the king's judges, and executed on the king's gallows with their chattels going to the king.[82] True, some lords in England claimed the right to the chattels of their men convicted of all manner of crimes before the king's

[76] Grant, 'Franchises north of the border', 159, 166, 190.

[77] *Arb. Lib*., i, no. 101, a reference I owe to Alice Taylor. Taylor sees in the oath of 1197 other evidence of lords having jurisdiction over pleas of the crown through its explicit inclusion of *interfectores in murthedric* and *raptores*.

[78] Grant, 'Franchises north of the border', 167, 172.

[79] This would thus seem to have been the case in Lennox and Strathearn: see Neville, *Native Lordship in Medieval Scotland*, 114–15.

[80] Cam, *The Hundred and the Hundred Rolls*, 137, 176–8. In the 1270s, of the 628 hundreds, 358 were private and 270 royal. For an instructive infangthief case, see *Annales Monastici*, ed. Luard, i, 511–16.

[81] *Glanvill*, 3, 174–5.

[82] So, for example, Pugh, *Wiltshire Gaol Delivery*, nos 189–92. The number of convictions, however, was never high.

justices, but this was a liberty enjoyed mostly by highly privileged ecclesiastical institutions, not by the general run of barons.[83]

There is one final but highly important point about the Scottish justiciars. Is it really true that they itinerated twice a year? This has been stated more or less as fact, yet the evidence for it is flimsy. It derives almost entirely from the statement to that effect in a treatise on the Scottish king's household drawn up in the late thirteenth century: 'And there shall be in Scotland three justices, that is to say, a justice of Lothian, a justice of the sea of Scotland, and a justice of Galloway and they shall have their sessions of the justice ayre twice a year, once at the season of the grass, and once at the season of winter sowing.'[84] This certainly shows there was a view that the justiciars should itinerate twice a year, and such visitations were indeed considered the 'old rule' in the fifteenth century, although equally one honoured in the breach.[85] But how far did this really happen in the thirteenth century? The precise date of the treatise on the household is unknown, but it is clear from much of the content that it is a series of recommendations for the future, rather than a statement of practice in the past. The fact that, as with the sections on the justiciars, much of the document is couched in the future tense, makes that point. Some of the statements appear quite contrary to past practice, and indeed seem to be influenced by English ideas of constitutional reform. Thus the injunction that the king should appoint his chancellor, chamberlain, and other chief ministers with the counsel and consent of his baronage gathered together in a common assembly, reflected a demand made again and again in the parliaments of Henry III, and realised, if briefly, by the reforms of 1258.[86] The further stipulation that the sheriffs be elected 'by the good people of the county' was another English demand, and one conceded by Edward I in the *Articuli super Cartas* of 1300.[87] The view that Scottish justiciars should itinerate twice a year may likewise have had an English provenance. Magna Carta in 1215, as we have seen, laid down that assize judges should visit no less

[83] See Meekings, *Crown Pleas of the Wiltshire Eyre*, 111–12; Carpenter, *The Reign of Henry III*, 85–8.

[84] 'The Scottish king's household', ed. Bateson, 31–43 at 36–7, 42–3 (cap. xv).

[85] *Ibid*., 19. Legislation in 1485 had to lay down twice-yearly visitations, although only till 'the realm should be brought to good rule'.

[86] *Ibid.*, 31–2, 38, 42 (caps ii, iii, xvi). Duncan, *Making of the Kingdom*, 595 acknowledged that the treatise gave a place to the magnates in choosing the king's ministers 'as they had never enjoyed' but otherwise thought 'much' of what was written was 'in accordance with thirteenth-century practice'. However, his subsequent discussion noted other instances where the treatise seemed at variance with practice: 596, 600–1, 605–6, 609–10. Barrow, who deemed the treatise 'well-informed and authoritative' thought there were some grounds for ascribing it to 1292 and for supposing it was prepared for John Balliol: Barrow, 'The justiciar', in *The Kingdom of the Scots*, 93 and n. 32. For further discussion of the document see David Carpenter's feature of the month for October 2011 on the Breaking of Britain website: www.breakingofbritain.ac.uk/blogs/feature-of-the-month/october-2011-the-scottish-kings-household/.

[87] 'The Scottish king's household', ed. Bateson, 42, cap. xvi; Morris, *The Medieval English Sheriff*, 184. In the event, the counties were wary of exercising this privilege for fear they would be held liable for the sheriff's failures.

than four times a year, while the Statute of Westminster in 1285 put the number of their visitations at three and gave them precise dates.[88]

The accounts of the 1260s certainly show the justiciars at work in the sheriffdoms. Indeed, the accounts of the justiciar of Scotia place the sheriffdoms in a north-to-south order as though reflecting the course of his perambulation. There is, however, nothing here which proves those perambulations took place twice a year.[89] Indeed, there is strong evidence pointing in the contrary direction, and suggesting that the visitations were actually intermittent. The key fact, never apparently recognised, is that the proceeds of the eyre were very uneven. They also bear little relationship to the revenues of the sheriffdoms, as revealed by a valuation contained in the same collection of documents which has the tract on the king's household. Some sheriffdoms, moreover, seem not to have been visited at all. Table 4.1 illustrates the point. It is drawn from the accounts of the justiciar of Scotia, Alexander Comyn, earl of Buchan, and the justiciar of Lothian, Hugh de Berkeley. Comyn's account covered an unspecified period, which is unlikely to have been less than a year. (He took office in 1258.) Berkeley's account is dated 1265 and it covered the period since he had taken office, which was sometime in 1262.[90]

Now, the variations in these figures are surely startling and cannot be explained by the differences in wealth between the sheriffdoms. In Scotia, sums of between £90 and £129 were raised from Forfar, Inverness-Cromarty-Dingwall, and Aberdeen at a percentage between *lucra* and value of between 15% and 18%. None of the other ten sheriffdoms which appeared in the accounts (three do not feature at all) managed more than £25, although in all cases, save Elgin, this left their *lucra*/value percentage in single figures. Indeed, the average percentage for these ten sheriffdoms is five. In Lothian, as we have seen, sums of between £129 and £187 were raised from Edinburgh, Berwick, and Lanark at a percentage between *lucra* and value of between 37% and 42%. From the six other sheriffdoms in the accounts (and this time four do not appear at all), the most raised was £40, while the average was £15.6. Only with Dumbarton did the sum represent a high percentage (42%) of the *lucra*. In the five other sheriffoms the average percentage was 3.5.

There may, of course, be all kinds of explanations for these figures, but they are hard to square with the justiciars having gone through all the sheriffdoms twice a year to hear pleas in the same way in each. If they had, one would surely have expected a much more regular pattern of returns. Conversely, the figures are perfectly compatible with Comyn, as justiciar of Scotia, having concentrated on the sheriffdoms of Inverness, Aberdeen, Forfar, and perhaps Elgin. Likewise, Berkeley, as justiciar of Lothian (despite his account covering at least two years) had

[88] Of course, these stipulations in England only related to assize justices, and the Scottish justiciars had a wider competence, including crown pleas. The author may not have realised this and the consequences when making his recommendations.

[89] Barrow ('The justiciar', in *The Kingdom of the Scots*, 96) suggested that 'Surviving record gives some slight support to this seasonable pattern [of one session in 'the season of grass' and one in winter] for it reveals two groups of transactions involving justiciars, one having dates running from about the end of April to early August, the other running from about Michaelmas to January.' The emphasis here might be on 'slight'.

[90] Barrow, 'The justiciar', in *The Kingdom of the Scots*, 138, 116.

Table 4.1. Lucra of the justiciars as found in the 1260s accounts[a]

Sheriffdoms visted by justiciar of *Scotia*	***lucra justiciarii***	**value of sheriffdom**	**% of *lucre* to value**
Inverness, Cromarty, Dingwall	£95	£629	15
Invernairn	£3	£109	3
Forres	nothing	£70	0
Elgin	£15	£141	11
Banff	£12	£414	3
Aberdeen	£129	£708	18
Kincardine	£25	£305	8
Forfar	£90	£575	16
Perth	£23	£1086	2
Fife	£11	£167	7
Unmentioned			
Auchterarder		£51	
Kinross		£143	
Clackmannan		£185	
Sheriffdoms visited by justiciar of Lothian	***lucra justiciarii***	**value of sheriffdom**	**% of *lucre* to value**
Berwick	£144	£390	37
Roxburgh	£40	£593	7
Edinburgh	£129	£303	43
Lanark	£187	£494	38
Peebles	£10	£127	8
Ayr	£7	£291	2
Dumfries	nothing	£124	0
Dumbarton	£33	£78	42
Stirling	£4	£533	.75
Unmentioned			
Linlithgow		£195	
Haddington		£125	
Wigtown		£158	
Selkirk		£91	

[a] Compiled from *ER*, 18, 27. In both cases here, Haddington gives no indication of omissions. For the sheriffdoms, see 'The Scottish king's household', ed. Bateson, 24–5. No date of this valuation is given, but its description of the sheriffdoms, which it divides into those of 'Scocia' or 'ultra mare Scocie', and those 'citra mare Scocie' is compatible with a thirteenth-century date.

concentrated simply on Berwick, Edinburgh, Lanark, and Dumbarton. The accounts of Stephen Fleming, who was justiciar of Lothian between *ca* 1260 and 1262, are even more striking. They suggest he had only visited four sheriffdoms and held no major sessions in any of them. Having left office, his *lucra* since his last account (perhaps that when he ceased to be joint justiciar in 1259) covered only Ayr (£21), Lanark (£5), Peebles (£1), and Roxburgh (£45).[91] His percentage of *lucra* to value ranged between 1% and 8% with an average of 2%. Linking these accounts with those of Fleming's successor, Berkeley, it would seem that only in Roxburgh, where Fleming raised £45 against Berkeley's £40, had the two men been equally active, and even there this was at low *lucra*/value percentage level of 7/8. The large sum which Berkeley raised in Lanark (£187) as against Fleming's £5, may suggest that, by the time Berkeley came, the sheriffdom had seen no real ayre there for some time.

The idea that Scottish justiciars went through the sheriffdoms to hear pleas in any kind of regular and consistent fashion seems, therefore, to be a myth. Rather, the evidence suggests that, within the periods covered by their accounts, they heard pleas, on any substantial scale, in only a handful of the sheriffdoms. Sometimes, as in the case of Fleming, they hardly heard them, on any scale, at all. The king's maintenance of the peace and dispensation of justice through the ayres was thus far more intermittent and patchy than has previously been imagined. There was also another factor which lessened the ayre's burden, and was related to their intermittent nature. The money that they raised came in very gradually, quite unlike that raised by the eyre in England. In the sheriffdoms in which they had concentrated, the accounts of the justiciars certainly show them 'receiving' substantial sums of money as *lucra*. 'Received' here, however, is simply a term of account. It does not mean the justiciars actually collected the money themselves. Instead, this was left to the sheriffs. Thus, at the end of Comyn's account, it was stated that the sheriffs would answer for his *lucra* in their own accounts. Likewise, Fleming's account ended with the statement that his 'receipts ought to be received from the sheriff'.[92] Now, the justiciars did not expect the sheriffs to raise all the *lucra* at once. Instead, they gave them terms for doing so. Thus, in the accounts of the sheriff of Forfar, a memorandum stated that he should not be compelled to pay the *lucra* of the justiciar, amounting to £28 2s 6d 'before the terms stated by the justiciar'.[93] The terms given to the sheriffs hardly seem severe. Indeed, the amounts the sheriffs answered for bore no relationship at all to the large sums sometimes found in the accounts of the justiciars. The largest amount by far was the £28 2s 6d due from the sheriff of Forfar, and here payment was delayed, as we have seen. This contrasts with £90 worth of *lucra* found in Comyn's Forfar account. The amount of *lucra* the sheriff received in Aberdeen was £5 14s, against Comyn's £129.[94] Of course, in any individual case a low sum could be explained by a much higher one in some earlier account, but if the sheriffs did collect large sums, for example immediately after

[91] *ER*, 9–10; Barrow, 'The justiciar', in *The Kingdom of the Scots*, 124, 128–9, 138.

[92] *ER*, 18, 8. Berkeley's account just said he owed the money, which again suggests he had not collected it: *ER*, 27.

[93] *ER*, 9.

[94] *ER*, 11–12. For *lucra* in the sheriffs accounts, see *ER*, 4, 9–11, 13, 15, 17–18, 31–4.

an ayre visitation, then one would surely expect some trace of that in the accounts, even allowing for them being abridgements. Now, all this makes a striking contrast with England where sheriffs were expected to collect at once the great bulk of the revenue raised by the eyre. The sheriff of Cumberland thus paid immediately £372 from the proceeds of the 1256 eyre.[95] Whether the intervals between full-scale Scottish ayres were ever as long as in England, is impossible to know. What does seem clear is that during those intervals, the *lucra* was paid in gradually, whereas in England the king wanted the money in at once. The English eyres were correspondingly far more oppressive.

In comparing the financial demands of English and Scottish royal government, there is one final contrast, which, in some ways is more important than anything else.[96] This is the complete absence in Scotland of general taxation levied on the movable property of everyone in the realm, or at least everyone above a very minimum property qualification. The king of Scotland did have the right to levy aid on his kingdom as one of the 'common burdens' but this was a levy on land, like the old English geld,[97] and probably like the English geld in the twelfth century, was nowhere near as lucrative as taxation on movable property would have been. Whereas the geld in England raised several thousand pounds, John's tax of 1207 on movables raised £60,000.[98] There appears to be little evidence as to how often, how effectively, and with what geographic reach the common aid was levied in the thirteenth century. If it was raised regularly, it caused no apparent resentment. If it required consent from the great men of the realm, that did not give power to a Scottish parliament, in the same way as it did to the English.[99]

The usual view that the hand of Scottish royal government was lighter than that of its English counterpart would seem, therefore, amply justified. Fundamentally, outside the *lucra* of the justiciars, the king was able 'to live off his own', that is, to live from his farms, rents, and customary dues. Much of the *lucra* too probably came from the king's own peasants and properties. The king drew little revenue from the great provincial lordships and earldoms. He also played a limited role

[95] http://aalt.law.uh.edu/AALT4/H3/E372no101/aE372no101fronts/IMG_1405.htm. I am including here money from the 100 mark amercement imposed on the county. In Northumberland, William Heron either paid into the treasury or expended locally £178. This was a poor performance by usual standards: http://aalt.law.uh.edu/AALT4/H3/E372no101/aE372no101fronts/IMG_1401.htm.

[96] Another important contrast not discussed here is the lack of money raised in Scotland from anything like the forest eyres in England.

[97] Taylor, 'Common burdens in the *Regnum Scottorum*', 185–7, 192–3, 195–6.

[98] Mitchell, *Studies in Taxation*, 84–92 and 159–69, 199–207, and 214–21 for the taxes on movables of 1225, 1232, and 1237. For land taxes see *ibid*., 129–36 and Green, 'The last century of danegeld'.

[99] I deduce this from the discussion in Taylor, 'Common burdens in the *Regnum Scottorum*', 185–7, 192–3, 195–6, 202–4, 213–14, 220–2. For consultation see 195–6. It has been suggested (see *ibid*., 196) that the £6,666 which William the Lion promised Richard I to free his kingdom from English overlordship came from an aid, but we do not know whether it contributed the whole sum. The classic work on the English parliament is now Maddicott, *The Origins of the English Parliament*.

there in the maintenance of law and order. Within the sheriffdoms, even allowing for the difficulties of the evidence, individuals probably owed money to the crown on a much smaller scale than in England. The jurisdiction of the ayre was curtailed by liberties which gave baronial lords a significantly greater share in punishing and profiting from crime than their English fellows. The ayre visitations were also intermittent, and the revenue they raised was allowed to come in gradually. Scottish kings seem to have made little effort to alter the situation. They neither harried their kingdom for money, like John and Edward I, nor challenged the liberties of their great men. As Alexander Grant has observed, Scotland had no equivalent to Edward's *quo warranto* inquiries.[100] This picture fits with Alice Taylor's recent study of the common burdens, of which the most important was probably army service. In contrast to previous opinion, she argues that the sheriff only levied these from crown lands. Elsewhere they were collected by lords. 'This points to a society', she comments, 'where royal authority, although geographically extensive, did not permeate far past the *potentes* of the realm whose exercise of their own power must have become more intensive as a result of the key part they played in levying the common burdens of the realm.'[101] The relationship between king and realm was thus very different either side of the border. The Scottish kings faced no Magna Carta, no Provisions of Oxford, no *Articuli super Cartas*, and no parliamentary opposition.[102] The Scottish nobility, through their English land holdings, were of course very aware of the contrast. It would have given them good reason to celebrate their separate Scottish identity.

III

If Scotland then escaped burdens like those imposed by English royal government, did it also enjoy equivalent benefits, the benefits of the common law? During the course of the thirteenth century in England there was a huge increase in the litigation in royal courts according to that law's forms. In the 1220s, it has been calculated, some 2,500 cases might be before the bench at Westminster in any one year. Just over a hundred years later the number was probably approaching 8,700.[103] What made that law genuinely 'common' was that its procedures were the same throughout the country, the writs which initiated them being as available in Northumberland and Cumberland as they were in the south. Of course, given the usual location of king and chancery, getting the writs required far more effort for northerners, yet many were prepared to make the effort.[104] One barometer of this is provided by a feet of fine league table, the feet being the government's share of the tripartite final

[100] Grant, 'Franchises north of the border', 15–16.

[101] Taylor, 'Common burdens in the *regnum Scottorum*', 223.

[102] The situation in Scotland was replicated in Tynedale, where the Scottish king's 'relatively easy going lordship' helped create 'communities of rulers and ruled': Stringer in Holford and Stringer, *Border Liberties and Loyalties*, 275, 287.

[103] Carpenter, 'The English royal chancery', 55; Palmer, *The Whilton Dispute*, 5–8.

[104] For the difficulties of getting writs, see Hershey, 'Justice and bureaucracy'.

concord which concluded so much common law litigation. Taking the feet between 1199 and 1307, now preserved in the National Archives, we find that Yorkshire with a score of 3,498, comes second in the table only to Norfolk's 3,527.[105] It is true that the three northernmost counties, Northumberland, Westmorland, and Cumberland come bottom of the table, but this was as much due to their exiguous population as to questions of distance. As it is, if we take their combined score of 701, then it exceeds that for Huntingdonshire (440), for Shropshire (661), and Staffordshire (623).[106]

If litigants had to travel to get the writs, they did not have to do so for the hearing of their cases since they could await the visitations of the justices in eyre; indeed, many writs were purchased in anticipation of such visitations. The great nation-wide eyres of the thirteenth century were another way in which the common law became genuinely common. Thus the justices visited the far north ten times in the thirteenth century – in 1202, 1208, 1219, 1227, 1235, 1241, 1246, 1256, 1278–80 and 1292–3.[107] The 1293 Northumberland eyre has 765 separate items of civil business (leaving aside essoins and appointments of attorneys) recorded in the recent edition published by the Surtees Society.[108] Between the great all pleas eyres, which heard both civil and criminal cases, there were also numerous visitations for specifically civil business ranging from the commission of judges to hear individual assizes to ones for the hearing of all civil pleas. This did not mean those in the far north were shy of coming to Westminster to litigate before the court of common pleas. Indeed, in the Michaelmas term of 1285 around sixty Northumberland cases were before the bench.[109] In terms of its geographical reach then, the common law was no home counties, royal heartland law; it was genuinely common to the whole kingdom. It was also common in another way, namely in the social range of those who sought its help. The Northumberland cases before the bench in the Michaelmas term of 1285 ranged from those concerning the great baron Gilbert de Umfraville, lord of Redesdale, to Matilda, the widow of William the Clerk, who sought dower in a third of messuage in Wooler from David the Chapman of Wooler.[110] Much of

[105] I have made these and the following calculations about feets of fines by adding up the numbers (mercifully given in blocks) in TNA's CP 25 (1) catalogue.

[106] The total of feet for the northern counties excludes the king of Scotland's Tynedale since its feet went not to Westminster but to Edinburgh. Litigants in Tynedale also got their writs from the king of Scotland's chancery, which must often have been closer than that of the king of England. The forms of action in Tynedale were the same as in England, and thus the liberty very much benefited from the English common law. See *APS*, i, 114; and Stringer in Holford and Stringer, *Border Liberties and Loyalties*, 243 n. 39, 236, 281–5.

[107] Crook, *Records of the General Eyre*, 64, 69, 73, 75–6, 80, 82, 100, 107–8, 121–2, 137–8, 146–7, 171–3.

[108] *The Northumberland Eyre Roll*, ed. Fraser, nos 1–413, 798–1150. The civil pleas business generated nearly a thousand fines and amercements (nos 1150–1217).

[109] TNA, CP 40/ 60, images of which can be seen on the Anglo-American legal tradition website: http://aalt.law.uh.edu/E1/CP40no60.

[110] http://aalt.law.uh.edu/E1/CP40no60/CP40no60afr/IMG¬¬_0678 and IMG_0704. For the Umfraville's liberty court of Redesdale being claimed see http://aalt.law.uh.edu/E1/CP40no60/CP40no60dorses/IMG_1074.

the litigation recorded on the rolls was indeed for very small amounts of property. On the 1240 Suffolk eyre, 60% of the properties in dispute were under ten acres in size, and many of the litigants were free peasants and freemen below the level of the gentry.[111]

How far then was the geographical range and social depth of the English common law replicated in Scotland? Here no one doubts that, in the thirteenth century, equivalents emerged of the two most popular of the English common law actions. In 1230 Alexander II issued legislation which set up a Scottish assize of novel dissasine. This was clearly modelled on the English assize, which provided a remedy, through the verdict of jury given before royal justices, for someone disseised unjustly and without judgement of his free tenement.[112] Then in 1253 in Scotland, there is a reference to a case begun by royal letters of 'mortancestry'. Clearly there was now an assize modelled on the second most popular of English actions, mort d'ancestor, which provided a remedy for someone denied succession to property claimed in hereditary right.[113]

The question, then, is not the existence of these procedures but the extent of their use. Here there have been two sharply divergent views. The first, often associated with Lord Cooper, is that the common law procedures had very limited currency in the thirteenth century (at least until the last decades) and that most civil disputes were settled by agreement, arbitration, and litigation in ecclesiastical courts.[114] The second view was put eloquently by F. W. Maitland, who (as quoted by Hector MacQueen) affirmed that 'we may doubt whether a man who crossed the river [Tweed] felt that he had passed from the land of one law to the land of another ... It seems clear enough from abundant evidence that, at the outbreak of the war of Independence, the law of Scotland ... was closely akin to English law.'[115] If the current trend amongst historians is to adopt Maitland's dictum, the way had actually been prepared by Lord Cooper himself.[116] Aware of the legislation in 1318 which reformed the common law procedures, and also of early Scottish Registers of Brieves, he had started to modify his views in the very course of setting them out.[117] His later statement that 'the practitioners in the one country would have been just as much at sea in the courts of the other as their successors of the present day

[111] *The Civil Pleas of the Suffolk Eyre*, ed. Gallagher, lxix–lxxii.

[112] For the text see below, n. 142.

[113] *Dunf. Reg.*, nos 82–3. Both assizes are fully discussed in MacQueen, *Common Law and Feudal Society*, chapters 5 and 6.

[114] The views associated with Lord Cooper are set out and criticised in Barrow, 'The justiciar', in *The Kingdom of the Scots*, 85–9; in Sellar, 'The common law of Scotland', 82–6; and in MacQueen, 'Scots law under Alexander III', 76–9. For Lord Cooper himself, see his introductions to *Select Cases*, xxi–lxviii, and *Reg. Brieves*, 1–32.

[115] MacQueen, 'Scots law under Alexander III', 79.

[116] As MacQueen observes, 'Scots law under Alexander III', 79. Thus Sellar ('The common law of Scotland', 86–7) affirms that 'In the thirteenth century Scots and English common law could be spoken of as a single entity ... Thirteenth-century Scotland, then, was a land of the Common law.' He then goes on, however, to explain significant differences between the two.

[117] *Select Cases*, xli–xlv, lxv–lxvi.

would now be', while apparently a direct contradiction of Maitland, was prompted not by the absence of common law actions in Scotland but by their forms, in various technical ways, being different from those south of the border.[118]

Of course, holders of the Maitland–MacQueen view, if we may call it that, are well aware that the Scottish system was different from that in England, and not just in the technical ways. The number of forms of actions revealed in the Scottish Registers of Brieves was far smaller than those found in English Registers of Writs. There was also no equivalent in Scotland to England's corpus of professional judges and emerging legal profession.[119] Nonetheless, Scotland had still made large strides in the English direction. MacQueen writes as follows:

> By the mid-thirteenth century, most of Scotland had been divided up into sheriffdoms, which were in turn grouped into three justiciary districts – Scotia, Lothian and Galloway – through which the justiciars passed regularly on circuit, or ayre ... Taken altogether, therefore, the rise of royal justice in Scotland in the twelfth and thirteenth centuries shows many parallels with the same phenomenon in England: an increasing number of royal courts, the use of royal writs to start litigation there, and the employment of juries as a rational method of determining where truth lay ... In this early period royal power itself was limited, but well before the end of the thirteenth century the king's jurisdiction was being exercised much more regularly and systematically, principally through a system of local courts linked to central administration by means of the brieve system and the visitations of the justice and chamberlain ayres.[120]

Anyone trying to explore a debate of this kind is, of course, faced by one appalling problem, namely the total absence of Scottish plea rolls from the thirteenth century. Here the contrast could not be sharper with England where the rolls of the central courts alone, between 1199 and 1250, fill twenty printed volumes containing (with indexes) over 11,000 pages.[121] Given this situation, there is really no possibility of resolving the debate one way or the other. It may be that the maximum Maitland–MacQueen view is the right one. In what follows, however, I will consider it quizzically and show there is a great deal of evidence arguing for a much more minimal opinion of the common law's scope and importance in the thirteenth century. My focus will be on the situation outside the burghs, although there too, according to evidence from Aberdeen in the early fourteenth century, while the common law option was known, it was hardly in frequent or exclusive use.[122]

The first point to make concerns the limited geographic range of the common law, a possibility of which Maitland himself was aware. MacQueen, as we have seen, quotes him as saying that 'the law of Scotland ... was closely akin to English law', but in the passage omitted Maitland had qualified the statement, so that what

[118] *Reg. Brieves*, 24.

[119] MacQueen, 'Scots law under Alexander III', 80. See Brand, *The Origins of the English Legal Profession*.

[120] MacQueen, *Common Law and Feudal Society*, 49, 50; and see 247. The ayres of the chamberlain are supposed to have done for the burghs what the ayres of the justiciar did elsewhere but the evidence for them is not extensive.

[121] *Curia Regis Rolls* (*CRR*).

[122] See below, n. 138.

he actually wrote was 'the law of Scotland, *or of southern Scotland*, was closely akin to English law'. By 'southern Scotland', moreover, Maitland meant Scotland between Forth and Tweed. 'Of what went on beyond the Forth it is not for us to hazard a word.'[123] The English common law, as we have seen, covered the whole country. The Scottish equivalent certainly ran north of the Forth (in that sense Maitland was overcautious), but it was still confined to the Scotland of the ayres and the sheriffdoms. This is clear from the fact that the forms of the novel dissasine and mortancestry brieves in the early fourteenth-century Ayr Register, the best guide to contemporary practice, are quite specifically for land within the sheriffdoms.[124] Likewise, the ten civil cases from the thirteenth century, commenced by pleadable brieves (brieves which initiated litigation), which Lord Cooper collected from cartularies and other miscellaneous sources, are also confined to the sheriffdoms.[125] Unfortunately no pleadable brieves themselves survive from the thirteenth century as originals or copies, but some guidance about their geographical scope may be afforded by seven surviving returnable brieves (brieves which commissioned inquiries into disputes over rights or property, and ordered the inquiry to be returned to the king). With one exception all of these concern land within the sheriffdoms. The exception is a brieve dealing with land in the earldom of Carrick which was then in the king's hands.[126]

Equally significant is the way the Scottish brieve of right failed to provide a way into the earldoms and other lordships. Whereas its equivalent in England was addressed to the lord, telling him to do justice to the plaintiff, in Scotland it was addressed to the sheriff and concerned land held in chief from the king.[127] MacQueen argues, on the basis of several cases, that in the thirteenth century there was also a form addressed to the lord, but, if so, it made no lasting impact for there is no sign of it in the Ayr Register.[128] MacQueen also suggests that another form of brieve may have developed, which allowed plaintiffs to begin actions for land held from subordinate lords in the king's courts, without any initial action in lords' courts at all. This, therefore, 'short-circuited' the procedure whereby 'claims begun in the lord's court found their way into the king's'.[129] Although MacQueen does not register the fact, such a procedure would seem to mark a very radical advance at the expense of lordly jurisdiction. That alone gives reason for wondering how far it really took place, and indeed the evidence that it did is hardly strong. It rests on a passage in *Regiam Majestatem* which sets out the count of the plaintiff in a plea

[123] MacQueen, 'Scots law under Alexander III', 79; Pollock and Maitland, *The History of English Law* (1968), i, 222–3 (my italics).

[124] *Reg. Brieves*, 40–1, caps xx, xxi.

[125] *Select Cases*, nos 28, 52–4, 56–7, 59–61, 70. There is some overlap with the proceedings initiated in the writs mentioned in the note next above. Cases missed by Cooper equally relate to sheriffdoms; see Barrow, 'The justiciar', in *The Kingdom of the Scots*, 115–16; MacQueen, *Common Law and Feudal Society*, 138–9.

[126] H 1/8/ nos 27 (Carrick), 32, 36, 38, 66, 73, 74; see also H1/8/ nos 28, 69, and 81. These brieves survive either as originals or as copies.

[127] *Glanvill*, 137; *Reg. Brieves*, 39, cap. xviii.

[128] MacQueen, *Common Law and Feudal Society*, 194–6.

[129] *Ibid*., 193, 196.

of right, and has him referring to the land 'which I claim to hold hereditarily from the lord king or another lord'.[130] This may be more a count imagined by the author of *Regiam*, than a reflection of an action which actually gained purchase. Again the key evidence here is that provided by Registers which are innocent of any such procedure. Indeed, the form of the writ of right found in the Ayr Register remains the same in the later formularies, although other changes (to the brieve of protection for example) show these were no mere slavish copies.[131]

In terms of its geographical range, then, the Scottish common law was not common at all. One may equally wonder whether it was common in its use even within the compass of the ayres and sheriffdoms. Both Cooper and MacQueen were impressed by the legislation of 1318 which expanded the scope of novel dissasine and mortancestry. In the case of the former, the original dissaisor could now be named in the brieve alongside the actual possessor of the land. In the case of the latter, claims could be based on the title of grandparents.[132] The fact of this legislation does not, however, prove that the assizes were intensively used in the thirteenth century. Product of particular circumstances around 1318, the measures are an uncertain guide to earlier practice.[133] Paul Brand, moreover, has shown that detailed changes to the law could sometimes arise from issues raised by single cases.[134] In mounting his argument, MacQueen gives great weight to a rule which, he suggests, actually 'compelled' resort to the new procedures. This was a rule to the effect that 'no one in possession could be put out of land except by legal action begun by pleadable brieve'.[135] The fact is, however, that the rule is not clearly stated until the 1318 legislation, and that it needed there to be 'ordinatum et assensum' hardly suggests it was already a cast-iron feature of Scottish law.[136] Before that date, it may have applied to lands and tenements within burghs because it is stated in the *Leges Burgorum* which date in their earliest MS form to around 1270. In the *Leges*, however, the rule is stated with a qualification, a point I owe to Alice Taylor: 'Anyone challenged for land or tenement in a burgh is not held to answer his adversary without a letter of

[130] *Regiam Maj*., ed. Cooper, I, 10.2; *APS*, i, 601–2. For further discussion see Taylor, 'The assizes of David I', 222–3.

[131] *Reg. Brieves*, 39, cap. xviii; 61, cap. 91; *Quoniam Attachiamenta*, ed. Fergus, 288. I owe this last point to Alice Taylor.

[132] *RRS*, v, no. 139, caps xiii, xxiii; MacQueen, *Common Law and Feudal Society*, 146–53, 177–8; *Select Cases*, xli–xliv.

[133] The legislation was the product of the peculiar conditions of the time. MacQueen has argued that many land disputes may have followed the division of 1314 (*Common Law and Feudal Society*, 106–7, 146–53). Robert may also have been legislating to display the legitimacy of his kingship. Light on the circumstances of the legislation and allied legal developments is shed in Taylor, 'The assizes of David I', 231–5.

[134] Brand, *Kings, Barons and Justices,* 196–203; *The Earliest English Law Reports IV*, ed. Brand, xlii–xlv, liv–lxviii.

[135] MacQueen, *Common Law and Feudal Society,* 109, 247.

[136] *RRS*, v, 413, cap. xxv. MacQueen acknowledges that the legislation may reflect some uncertainty about the rule's application outside the burghs: *Common Law and Feudal Society*, 106–8.

the lord king, unless he wishes voluntarily to do so, *nisi sponte voluerit*.'[137] That the king advertised the possibility of litigating without his brieve, hardly suggests he was very confident in spreading its use, let alone seeking to compel it.[138] Meanwhile, outside the burghs, there is virtually no evidence for the rule. All that Alexander Macdonald of Islay told Edward I in 1296 was that 'many people say that according to the laws of England and Scotland no one ought to lose his heritage unless he has been impleaded by brieve and named in the brieve by his own name', a remarkably tentative statement if the rule had long been compulsory.[139]

There is one other reason for doubting whether the rule was directly associated with the assize of novel dissasine for their terms are rather different. The 1318 rule applied quite specifically to land held 'in fee':

> *nullus eiciatur extra liberum tenementum suum de quo clamat se vestitum et saysitum ut de feodo sine brevi regis placitabili.*
>
> none shall be ejected from his free tenement of which he claims himself vested and seized as of fee without a pleadable writ of the king.

The presence of '*ut de feodo*' here, which seems to have excited little comment, probably means, as in the English and Scottish writs of mort d'ancestor, land held with some degree of hereditary right.[141] Now this does not match up at all with the assize of novel dissasine as introduced. The earliest text, as unravelled by Alice Taylor, refers simply to dissasine unjustly and without judgement without specifying the subject of the dissasine at all.[142] Equally, it does not match up with the developed brieve of novel dissasine found in the Ayr Register which refers to a tenement

[137] *APS*, i, 341.

[138] The rule is appealed to by a defendant in a case in the Aberdeen Burgh court in 1317. The plaintiff, self-evidently, had not felt compelled to begin his case by a brieve of right, nor did the defendant insist he would only answer to one. The case was settled, without a brieve, and in the defendant's favour, by 'a good and sufficient assize of faithful men of the burgh, with a great oath of sworn men': *Early Records of the Burgh of Aberdeen*, ed. Dickinson, 1–17 at 10–15. Of the two other substantial cases, in the roll, one was carried through again without a pleadable brieve, while the other was commenced by a brieve of right issued while the king was in Aberdeen: *ibid.*, 1–8; MacQueen, *Common Law and Feudal Society*, 189. The roll covers seven courts held between August and October, so, in this three-month period, only one case was proceeding according to the common law. More generally, see MacQueen and Windram, 'Law and courts in the burghs'.

[139] Sellar, 'The common law of Scotland', 87; MacQueen, *Common Law and Feudal Society*, 105.

[140] *RRS*, v, 413, cap. xxv.

[141] *Glanvill*, 150; *Reg. Brieves*, 40, cap. xx. Paul Brand, Dauvit Broun, and Alice Taylor have all helped me on this point. The Scottish rule differs from that in *Glanvill*, 137, 148 which simply concerns '*aliquod liberum tenementum vel servicium*'.

[142] The usually cited version of the legislation, that in *APS*, i, 400, cap. 7 (see MacQueen, *Common Law and Feudal Society*, 137) refers to disseisin 'of any tenement of which he [the plaintiff] was previously vest and seised' but Taylor argues this has no textual authority and is an amalgamation of two very different versions of the legislation. See Taylor, 'The assizes of David I', 217–20.

of which the plaintiff had been '*vestitus et saisitus*' not just '*ut de feodo*' but also '*de dote vel firma ad terminum qui [non]dum preteriit*'.[143] None of this suggests that the rule and the assize of novel dissasine were very closely associated.

MacQueen also ascribes importance to the brieves which initiated the common law actions being '*de cursu*', 'of course'. This means they were of standard form and obtainable at small cost. 'The existence of brieves *de cursu* before the end of the thirteenth century is powerful evidence of the regularisation of, and steady demand for, royal justice in this period.'[144] It is worth saying, however, that the only specific statement that Scottish brieves were 'of course' comes in the late thirteenth-century tract on the Scottish king's household which, as we have said, provides a highly questionable picture of actual conditions in Scotland. Indeed this very section, as Duncan recognised, contains some very doubtful assertions about the use of the Scottish privy seal.[145] Accepting, nonetheless, that the chancellor in the thirteenth century was issuing brieves 'of course', it does not follow that these

[143] *Reg. Brieves*, 40–1, cap. xxi.

[144] MacQueen, *Common Law and Feudal Society*, 50.

[145] 'The Scottish king's household', ed. Bateson, 31–2, 37–8, cap. II; Duncan, *Making of the Kingdom*, 605. The treatise states that no writs were to be issued by the chancery save those 'of course' 'without the special command of the king's privy seal'. This gives to the privy seal a place and importance there is no evidence it possessed. It seems to reflect more conditions in England than Scotland where the growing separation between chancery and king was leading increasingly to chancery letters being authorised by the privy seal. The treatise also states that the chancellor should stay either with the king or, at the king's command, 'in a suitable place for the convenience of the people'. The idea of the chancellor being in a fixed place may possibly be connected with the Treaty of Birgham's stipulation that until the queen entered her kingdom the current seal was to be 'in a place specially deputed' to do for the Church and the community of the realm 'what ought to be done according to the laws and customs of the kingdom' (Stevenson, *Documents*, 169). On the other hand, it also reflects very strongly English conditions where the volume of the writs 'the people' demanded to initiate the common law legal proceedings was a major reason for the English chancery 'going out of court'. As early as 1280, when Edward I left Winchester to hunt in the New Forest, he sent the chancellor back to Westminster 'so that', as the Waverley annalist put it, 'all seeking writs and prosecuting their rights might find a remedy ready in a certain place': *Annales Monastici,* ed. Luard, ii, 393; see Carpenter, 'The English royal chancery', 55–8. Two other pieces of evidence bearing on Scottish writs *de cursu* are cited from the 1290s. In the Treaty of Birgham (Stevenson, *Documents*, 169) it was said that 'no letter containing common right ('jus') or special grace, shall go out from the chancery save according to the accustomed and due course of the chapel of the king and kingdom of Scotland'. The 'due course' (*le cours acostume/ debitum cursum*) might seem to refer here not to a standard form of the documents (for a writ of grace by its nature did not have a standard form) but to the standard processes by which the documents were produced, which would mean that a writ of grace would need proper authorisation. The second statement (a vague one) comes from June 1291, in the arrangements about the custody of the seal made at Norham, where it was said that the chancellor was to give 'the complement of justice' to everyone but letters of grace were to be reserved for the king of England (Stones and Simpson, *Edward*, 96–7).

were exclusively, or even mainly, the ones which initiated common law litigation. Other brieves may have been as much, or more, in demand, for example those of protection.[146]

There is in fact some evidence suggesting a low level for the purchase of the common law brieves. Whatever the defects of the evidence, it remains significant that the accounts of the 1260s contain not a single reference to monies received from the purchase of brieves, this after over thirty years of supposedly compulsory resort to novel dissasine. True, if the English model was followed, then the small sums due for the brieves *de cursu* would have gone straight to the chancellor and not featured in the accounts. But one might have expected to find in Scotland, as in England, the purchase of brieves which expedited the common law actions beyond what was possible via simple brieves 'of course'. Costing a half mark or more, these bulk large on the English pipe rolls. Sixteen were purchased in the Northumberland section of the 1258–9 pipe roll alone. In the Scottish accounts there is no sign of them. There is also some evidence from a later period. This comes in the accounts for the fees charged by the chancellor for sealing documents during just over a year in 1328–9. The total raised was £56 1s 3d. Now there is no way of knowing how this sum broke down between the various types of charters, letters patent, and letters close issued by the chapel. A. A. M. Duncan, however, hazarded that within the total package there might have been some 255 letters close. He did not take speculation further and consider how many of these were common law brieves *de cursu*, but it can only have been a proportion of them.[147] If these figures are any guide, then the contrast with England is gigantic for there, in the 1320s, the equivalent accounts for sealing fees suggest the chancery was issuing as many as 29,000 writs *de cursu* a year![148] The Scottish common law by that test (even allowing it all 255 brieves) was smaller than the common law in England by a factor of at least 113. Even if we divide the 113 by 6 to take account of Scotland's smaller population, the factor is still 19.

Another pointer to the contrast between England and Scotland is the complete absence north of the border of the tripartite final concord. In England, litigation initiated by the equivalent of the pleadable brieves was frequently terminated by such final concords of which 'the foot' was kept by the government. This practice began as early as 1195, and, for the period from 1199 to 1307, over 40,000 of these feet survive, one of the most striking testimonies to the popularity of the common law.[149] Sometimes litigation itself was fictional, being initiated with the compromise already in mind, the aim being simply to have the concord formally recorded in the government archive. This practice was certainly known at the Scottish court because, amongst the muniments in the treasury of Edinburgh, inventoried by Edward I in 1291 were 'the feets of fines levied in the eyre of the justices in Tynedale', the feet that is levied in the king of Scots' Northumbrian liberty.[150] The muniments also

[146] Harding, 'The medieval brieves of protection'. For the development of brieves in general, see Broun, 'The adoption of brieves'.

[147] *RRS*, v, 213–14.

[148] Carpenter, 'The English royal chancery', 55–6.

[149] See above, n. 106.

[150] *APS*, i, 114.

contained a great roll of 62 'pieces' which contained amongst other things 'divers concords and conventions had between magnates and other men of the kingdom'. Of Scottish feets of fines, there is no reference.[151] This can only be because there was no demand in Scotland for what south of the border was one of the most characteristic and popular features of the common law.

There is also the question of the forms of the pleadable brieves themselves, which (as Cooper appreciated) are broader in the issues they address and vaguer in the procedures they lay down than their English counterparts. Thus one brieve in the Ayr Register, in the multiplicity of questions put to the jury, 'might be said to be nearly co-extensive with the entire range of [the English] real and possessory actions'.[152] The brieve of novel dissasine was itself broader than in England since it covered land held for 'a term not yet extinguished' as the English remedy did not.[153] Alice Taylor, moreover, has argued that, in its original 1230 form, the assize could also act as a remedy for the recovery of chattels. This explains why it does not specify the actual object of the disseisin, which could, therefore, be chattels as much as land.[154] In England, by contrast, there was a separate action (of replevin) for the recovery of chattels. The English procedure was also far more precise and 'fit for purpose' when it came to chattels taken in the course of the actual seizure of land, something which must often have aggravated the dispute. Whereas the Scottish brieve of dissasine did not mention this issue at all, the English one instructed the sheriff to restore the chattels to the land, this before the case was heard. If they were seized again before the hearing, then there was a separate action available for their restoration.[155]

The Scottish procedures also placed far more burdens on the justiciar than did those south of the border on the justices in eyre. The English writ was addressed to the sheriff who had to take the security for the prosecution, assemble the jury, get it to view the land, and then produce the jury and the litigants before the justices when they arrived. It was the sheriff too who was to execute the verdict, this time as commanded by another writ issued by the justices themselves.[156] By contrast, in the Scottish procedure, as found in the brieves in the Ayr Register, the sheriff is not mentioned, and the brieve is addressed to the justiciar who was himself to take security for the prosecution, but was then given no specific instructions at all about assembling the jury or producing the litigants.[157] The whole procedure seems far vaguer and open to discretion than it was in England. Cooper himself believed the

[151] *Ibid.*

[152] *Reg. Brieves*, 16, 41–2, cap. xxiii.

[153] *Ibid*., 15, 40–1, cap. xxi. See Sutherland, *The Assize of Novel Disseisin*, 12–13. I would like to thank Paul Brand for help on this point.

[154] Taylor, 'Aspects of law, kingship and government', 258–62.

[155] *Glanvill*, 167–8, 170, 142–3. For pleas concerning the taking of chattels in the Scottish legislation of 1318, see *RRS*, v, 411 cap. xvi. In the version of the 1230 assize which may date to around 1320, the chattels were to be restored to the successful plaintiff during the court session (see Taylor, 'The assizes of David I', 218–20) but nothing was said about the fate of the chattels while the case was ongoing.

[156] *Glanvill,* 150, 152–3, 167–8.

[157] *Reg. Brieves*, 40–1, caps xx, xxi. In the 1230 legislation, it was either the justiciar or the sheriff who was to carry out the recognition.

differences between the English and Scottish forms were due to Scottish practitioners consciously fashioning their common law on a 'simpler plan' and making 'a general effort towards greater simplicity, flexibility and directness'.[158] Perhaps so, but the real explanation may simply be that there was no need to fashion any elaborate system given the paucity of the demand for common law justice.

We have left to last the most significant piece of evidence arguing against the widespread use of the common law. It is evidence which might seem to have devastating consequences for hypotheses of that kind. This takes us to the penalties which anyone seeking the writs had potentially to face. According to the assize of 1230, in the text unravelled by Alice Taylor, a convicted disseisor was to be at the mercy of the king to the tune of £10. In addition,

> If it is understood that the complainer said an untruth, he shall give the forfeiture over the matter.
>
> *Si cognitum fuerit quod falsum dixerit conquerens inde dabit forisfactum.*

Now the complainant here was, of course, the plaintiff seeking the writ. The text of the assize does not specify the nature of the forfeiture but almost certainly, like the penalty faced by the disseisor, it was £10. 'Upon pain of the king's full forfeiture of £10' appears twenty-one times in the PoMS material.[159] That this was the expected penalty for a false claim in a novel dissasine case is confirmed by what Alice Taylor has shown is a later recension of the 1230 assize (probably written soon after 1318), a recension which here was designed to fill out its wording rather than alter the substance of the original text.

> If, however, it be acknowledged that the complainer made an unlawful suit, the complainer shall be at the mercy of the lord king, that is, for £10.
>
> *sinautem recognitum fuerit quod conquerens iniustam querimoniam fecerit ipse conquerens sit in misericordia domini Regis scilicet x libris.*

Anyone seeking to bring a novel dissasine action, therefore, faced a very heavy penalty in the event of failure. One may assume that the same was true for those litigating via brieves of mortancestry and brieves of right. In thirteenth-century Scotland a knight's fee could be thought to yield £20 a year.[161] In England this was the level of income which rendered one liable to take up knighthood, although

[158] *Reg. Brieves*, 24–5.

[159] I owe this information to John Reuben Davies. To call it up go to the basic search function on the PoMS database under 'sources' and type 'full forfeiture' and '£10' into the search box. Then click 'Go' for the results. Alice Taylor points out to me that all these examples concern penalties threatened for offences against the forest. It may be that the penalty was specified in these cases because forests were under very active threat.

[160] The true text of the 1230 assize and the later version referred to here are both set out in Taylor, 'The assizes of David I', 218–19 As observed above, Taylor shows that the usually quoted version of the 1230 assize in *APS*, i, 400 (cap. 7) is a conflation with no textual authority. In the above quotations, I have used Taylor's translations.

[161] Simpson, *Handlist,* nos 212, 216; *CDS*, ii, nos 1737, 1617. Under David, a fee was valued at 20 marks a year: *Chrs David I*, no. 194.

in 1256 the threshold was set as low as £15.[162] Even someone of knightly status, therefore, bringing an action in Scotland, might have to contemplate the loss of a substantial part of his annual income if he failed to make his case. He would have needed to be very confident of his case or very sure of the king's favour to proceed. People of less wealth and status would surely not have proceeded at all. Indeed, they may well have been prevented from doing so, through lacking the land which the king, as we will see, could require as security for the payment of any future amercement. The contrast with the situation in England was almost total. There too unsuccessful litigants were amerced for false claims but the amounts involved were generally trivial by Scottish standards. Of the twenty-eight such amercements from the 1286 Buckingamshire eyre, the two largest were of £1, eight were of half a mark (6s 8d), and the rest of 20d or 40d.[163] In Scotland the amercement for a false claim was a major deterrent to bringing a common law action. In England, for anyone other than the poor, it was no deterrent at all.[164]

Now it might seem that, in this discussion, a great deal has been hung on two pieces of legislation. Did it really work like that in practice? There is evidence that it did. In a letter of 1261, the justiciar of Lothian, Hugh of Berkeley, instructed the constable of Berwick that

> from the land of John Scot of Reston, which he has placed in pledge before us against the lord king, for two pairs of brieves of the lord king of dissasine, you are to raise by sale without delay £10 for the work of the chapel of the castle of Berwick. What if anything will remain beyond £20, you are to cause to be delivered to the said John. And this you are in no way to omit, unless the foresaid John satisfies you immediately for the foresaid £10.[165]

The most likely interpretation of what has happened here is as follows.[166] John Scot has secured brieves to begin two actions of dissasine, against whom we do

[162] Powicke, *Military Obligation*, 73–4; *Close Roll*s 1254–6, 293.

[163] *The Buckinghamshire Eyre*, ed. Boatwright, nos 878, 881, 883–93, 895–904.

[164] The actual cost of the brieves may not have been a deterrent, at least according to later evidence. In a post-1363 legal text the charge for a brieve close was given as 6d to the chancellor and 4d to the clerk: Duncan, 'The "laws of Malcolm MacKenneth"', 250.

[165] *Cold. Corr.*, no. I; PoMS, H3/83/19 (http://db.poms.ac.uk/record/source/4383/; accessed 9 November 2012). The Latin in the printed text runs as follows: *Hugo de Beklay* [sic], *justiciarius Laodoniae, dilecto sibi et fideli Willielmo de Baddeby, Constabulario de Berwyk, salutem. Mandamus vobis et praecipimus quatenus de terra Johannis Scoti de Ristona, quam traxit in plegiagium coram vobis versus dominum regem, pro duabus paribus literarum domini regis de disseisina, decem libras ad operacionem capellae castri de Berwyk per venditionem sine dilatione capiatis de dicta terra. Si quid autem residuum fuerit ultra viginti libras, dicto Johanni deliberari faciatis, et hoc nullo modo omittatis, nisi dictus Johnannes vobis in dictis decem libris incontinenti satisfecerit. In cujus rei testimonium has literas meas vobis patentes* [sic]. *Datae apud Berewyk die dominica in quinquagesima, anno gratiae millesimo, ducentesimo, sexagesimo, primo.*

[166] I am indebted to Dauvit Broun, John R. Davies, and Alice Taylor for help with the interpretation of the case although the ultimate responsibility for what is said here is my own. For the case see also, Barrow, 'The justiciar', in *The Kingdom of the Scots*, 116 and MacQueen, *Common Law and Feudal Society*, 139.

not know.[167] Through the justiciar, to whom the brieve would have been addressed, he has placed his land in pledge as security for paying the two £10 amercements, to which he will be liable if he should lose the cases and be convicted of false claims. This is the evidence that security had to be given in advance before a case was commenced. In the event, John did lose, and thus owed the king £20, of which £10 was now due. Unless he paid the sum immediately, the constable of Berwick was to raise it by sale from his land, the money being devoted to the works on the chapel of Berwick castle. The rest of the letter is more obscure but perhaps implies that another £10 from the proceeds of the sale, and due for the second amercement, were to be kept by the constable, while anything left beyond that could be returned to John.[168]

The case has a sequel. A later letter, from the prior and convent of Coldingham, shows that all John's land in Great Reston (which he held hereditarily) had been lost for offences against the king of Scotland – '*amisit iudicialiter pro forisfacturis erga dominum regem Scocie*'.[169] The *forisfactura* here would fit perfectly with the *forsfactura* incurred under the legislation of 1230 for false claims, the plural indicating John's conviction in both his assizes. The *iudicaliter* would refer to the judicial process by which the land had been taken into the king's hands on the non-payment of the amercements. John had evidently then failed to recover it, for the prior and convent went on to explain how they had received the land from the king, and were now selling it back to Patrick Scot, John's brother and heir. If it came right in the end for Patrick, the litigation for John Scot had been disastrous, despite the fact that he was evidently a man of some means. His experience can hardly have encouraged resort to the new procedures of the common law.

All this may provide some insight into the political and social circumstances in which the common law actions came to Scotland. We have said that, in England, the new procedures were popular but that was not true for all sections of society. Lords can hardly have given them a hearty welcome. Their 'disciplinary jurisdiction' might be undermined if they had to face actions of disseisin every time they seized land to enforce loyalty and services.[170] They might also find litigation being moved from their own courts into the courts of the king. The king's judges did protect lords in one way, that is, by preventing the unfree using the procedures. Indeed, they defined for the first time the distinction between the free and unfree

[167] MacQueen (*ibid.*, 162, n. 14) suggests that there were pairs of brieves because one was the brieve of dissasine and the other the summons to the defendant to answer in court. He says (139) that the justiciar rather than the king had issued both sets of brieves but the letter does not seem to be explicit on that. For John, see PoMS, no. 5372 (http://db.poms.ac.uk/record/person/5372/; accessed 9 November 2012).

[168] The constable was told '*decem libras ... per venditionem ... capiatis de dicta terra*', which perhaps suggests he was to raise money from selling the chattels on the land rather than the land itself.

[169] *North Durham*, App., no. 579; and PoMS, H2/67/8 (http://db.poms.ac.uk/record/source/2340/; accessed 9 November 2012).

[170] See Milsom, *The Legal Framework of English Feudalism*, chapter 1.

in order to do just that. Only those who were free could bring the common law actions.[171] More, however, lords did not get. The power of the king and the sections of society which resorted to the common law was too great. In Magna Carta, lords restricted the use of the writ *precipe*, which had deprived them of the jurisidiction of their courts, but there was no way they could restrict or abolish the new actions. Indeed, Magna Carta, far from limiting or abolishing the new actions, sought to send two judges round the country four times a year to hear them. In Scotland, we may think, lords had similar misgivings. The 1230 assize was very much pointed in their direction: 'if any one complains to the lord king or his justiciar that his lord or any other person dissaised him unlawfully and without judgement ...'.[172] This challenged lords in two ways. Firstly, and specifically, they might be the actual target of the litigation. Secondly, where the disseisor was 'any other person' they might face the transfer of the case from their own courts to the court of the king. Scottish lords, however, had greater power to do something about these threats than their English counterparts. The new procedures were introduced, but with a heavy penalty for false claims and with the necessity to put security up front for its payment.[173] The exclusion of the lower ranks, therefore, was achieved through limiting the assizes to those of a certain wealth rather than, as in England, to those of a certain legal status. But the wealth required was such as to set the bar far higher than south of the border. In practice, litigation was confined to the comparatively wealthy or well connected. Whereas in England a large class of freemen, some of peasant or not much more than peasant status, used the assizes, in Scotland these people were effectively excluded from them. Even those of gentry status must have hesitated, unless very sure of their ground, before resorting to the new actions.

There was one other way in which the Scottish nobility, we may argue, sought to limit and also, up to a point, exploit the development of the common law. This takes us back to the remarkable contrast between the English writ and Scottish brieve of right. In England, as we have seen, the writ of right was addressed to the lord and told him to do justice to the plaintiff. The equivalent Scottish brieve was addressed to the sheriff and concerned land held in chief from the king. It thus provided no means of litigating against one's lord. But there was more to it than that. If the brieve could not be used against lords, it could be used *by* them. Indeed, that was the point. To understand the background here, it is useful to recall an important hypothesis of J. C. Holt, set out in a new chapter on justice and jurisdiction in the second edition of his *Magna Carta*.[174] Here Holt argued that before Magna Carta tenants-in-chief were excluded from the benefits of common law litigation when litigating over land held in chief from the king. Thanks to the form of the writ of right, there was

[171] For contrasting but compatible views of the introduction of the common law of villeinage, see Hyams, *Kings, Lords and Peasants in Medieval England*, chapter 13 and Hilton, 'Freedom and villeinage'.

[172] I am using Alice Taylor's translation from her 'The assizes of David I', 218–19.

[173] One wonders if the 1244 legislation referred to above was also the result of compromise between the king and his lords.

[174] Holt, *Magna Carta*, chapter 5, 'Justice and jurisdiction'.

simply no writ through which such litigation could be initiated. Instead, lords were dependent from start to finish on the grace and favour of the king, and might well have to pay large sums of money to gain it. All this, Holt suggested, changed with Magna Carta after which a new writ 'of course', 'precipe in capite', emerged, which at last made it possible to initiate litigation over land held in chief in a cheap and automatic way. It was precisely this which the nobility obtained in Scotland. There the brieve of right, as we have seen, was designed for litigation over land held in chief from the king. Indeed, the brieve (as MacQueen recognised) may actually have been modelled on '*precipe in capite*', the great baronial prize (as Holt saw it) resulting from Magna Carta.[175] If there ever had been parallel brieves in Scotland, as MacQueen has argued, enabling tenants to litigate against their lords, then the lords had managed to kill them off, or at least ensure they were so little used that they never found their way into the Registers. Whether *precipe in capite* in England really did make litigation between great men over land held in chief routine and problem-free to the extent Holt believed, is open to doubt. In cases involving great men justice always moved to political rhythms.[176] The same was doubtless true in Scotland. Nonetheless, the nobility of Scotland had scored a victory. They had shaped the writ of right very much in their own interests.

It would certainly be foolish to insist that common law litigation was absolutely closed in Scotland to the kind of ordinary folk who exploited it in England. The king could make exceptions and waive his rules. Indeed, where litigation was horizontal, rather than vertical, between parties who were insignificant, and where no lords were claiming jurisdiction, then, one might think, the king would be under no pressure to obstruct the litigation by threatening the penalties for failure. If, however, the king needed to waive the rules, then the brieves were again more brieves of grace than brieves of course. To secure them penalty free would have needed negotiation and, quite probably, the payment of extra money. This would have been a deterrent to any kind of general use, even assuming the procedures were widely known at lower levels of society, which may not at all have been the case. It is true that several widows feature in the early litigation. Indeed, Emma of Smeaton, who obtained the first known brieves of mortancestry, was self-confessedly 'poor'.[177] This poverty, however, was evidently relative since she was able to achieve a settlement which brought her 20 marks a year for life. In an early case of dissasine, the widow, Mariota of Chirnside, sought with her son a ploughgate at Renton, which (at over a

[175] MacQueen, *Common Law and Feudal Society*, 193.

[176] This was the theme of my critique of Holt's chapter found in Carpenter, 'Justice and jurisdiction under King John and King Henry III', chapter 2 of *The Reign of Henry III*. I also suggested that the writ *precipe in capite* might have been in existence before Magna Carta. Sir James's response, in a letter to me, was to say the paper was 'almost totally misconceived, as your brighter students will be able to tell you in a moment'. However, I saw no reason to change what I had written in the light of his comments.

[177] *Dunf. Reg.*, nos 82–3, 194–5; see PoMS, H1/8/20 (http://db.poms.ac.uk/record/source/979/); PoMS, H4/37/3 (http://db.poms.ac.uk/record/source/4277); PoMS, H3/538/3 (http://db.poms.ac.uk/record/source/5830/); PoMS, H3/538/4 (http://db.poms.ac.uk/record/source/5831/); all accessed 9 November 2012.

hundred acres) was a significant portion of land.[178] Another widow, Mariota, daughter of Samuel, resigned her claims to land in Stobo in return for an annual pension of 10 marks from the bishop of Glasgow.[179] These were all women of some substance. It is also noticeable that many of those who obtained the returnable brieves (and thus one may think the pleadable ones also) were either people of high status – bishop, abbot, earl, knight, tenant-in-chief – or those in some way connected with the king – like the daughters of the doorkeeper of Montrose castle, Robert the crossbowman of the king's garden of Elgin.[180]

If resort to the common law remedies was limited in Scotland, how were disputes over property settled? At least some answer can be given to that question. Cooper pointed to the number of cases, especially those involving church property, which were heard by ecclesiastical courts, and perhaps these were used to resolve a wider range of issues. Cases may also have been settled by a variety of traditional procedures in shrieval and baronial courts.[181] While, moreover, there is limited evidence for the common law legal procedures in action, there is plenty for the operation of the returnable writ and the inquiry it ordered. In the use of the writ, and in the appearance of a jury before a royal official, this procedure resembled the common law actions, but it was also quite different because instead of the juries' verdict being followed by the sentence of the judge, and that sentence's implementation, the verdict was simply sent back to the king. Often we do not know what action he took as a result of it. A variant of this procedure was for a dispute over land to give rise to a perambulation which would likewise be returned to the king. Indeed, amongst the muniments inventoried by Edward I were ninety-three 'small rolls, schedules and memoranda concerning diverse inquiries, perambulations and extents of lands'. Many of the cases which came back to the king in this way may have ended in compromises. Thus in the muniments there was a great roll, in ninety-two pieces, which contained amongst other things 'pleas in which nearly all judgements are respited or amicably terminated and also diverse concords and conventions on

[178] Barrow, 'The justiciar', in *The Kingdom of the Scots*, 115–16; MacQueen, *Common Law and Feudal Society*, 138–9. For Mariota of Chirnside, see PoMS, no. 11664 (http://db.poms.ac.uk/record/person/11664/) and PoMS, H3/142/1 (http://db.poms.ac.uk/record/source/4752/), both accessed 9 November 2012. For the ploughgate: Duncan, *Making of the Kingdom*, 312.

[179] For Mariota, daughter of Samuel, see PoMS, no. 4166 (http://db.poms.ac.uk/record/person/4166/) and PoMS, H2/7/77 (http://db.poms.ac.uk/record/source/1709/) and PoMS, H3/527/1 (http://db.poms.ac.uk/record/source/5949/), all accessed 9 November 2012.

[180] PoMS, H1/8/27 (http://db.poms.ac.uk/record/source/938/); PoMS, H1/8/32 (http://db.poms.ac.uk/record/source/944/); PoMS, H1/8/36 (http://db.poms.ac.uk/record/source/950/); PoMS, H1/8/38 (http://db.poms.ac.uk/record/source/954/); PoMS, H1/8/66 (http://db.poms.ac.uk/record/source/978/); PoMS, H1/8/73 (http://db.poms.ac.uk/record/source/989/); PoMS, H1/8/74 (http://db.poms.ac.uk/record/source/933/); see also PoMS, H1/8/28 (http://db.poms.ac.uk/record/source/959/); PoMS, H1/8/69 (http://db.poms.ac.uk/record/source/987/); PoMS, H1/8/82 (http://db.poms.ac.uk/record/source/972/); all accessed 11 November 2012; and *Select Cases*, nos 28, 52–4, 56–7, 59–61, 70.

[181] *Select Cases*, xxv–xxvii; MacQueen, 'Scots law under Alexander III', 80–2 agreeing with Cooper on the importance of church courts and also commenting on the continued importance of the Celtic element in Scots law and legal procedure.

controversies between magnates and other men of the same kingdom'.[182] In their 'controversies with other men of the kingdom', we may well think that magnates were happy with these procedures. They could bring influence to bear more easily on the outcome in settlements at the court of the king, than if they had to do battle with all the rules and regulations of the common law.

IV

The first part of this chapter supported and extended the view that Scottish royal government was far less exigent financially than its counterpart in England. It had no regular and routine revenues in the great provincial lordships and earldoms, which made up a good part of Scotland. Within royal Scotland, the Scotland of the sheriffdoms, the very small number of private debts revealed by the accounts of the 1260s likewise suggests (for all the difficulties of the evidence) a major contrast with England, where such debts filled the pipe rolls to overflowing. A related contrast lies in the activities of the Scottish justiciars which had far less scope than those of the justices in eyre in England. The justiciars did not enter the provincial lordships and earldoms. Within their normal beat of the sheriffdoms, their visitations, far from being twice a year, were intermittent. The revenues they raised came in much more slowly than those of the English eyres. They had a limited jurisdiction over crime. The numerous barons within the sheriffdoms, and the great lords outside them, retained, in various degrees, jurisdiction over the punishment of homicide and theft, together with a right to the resulting profits, all this on a scale unknown in England. The higher one was in Scottish society, the more likely one was to be aware of these profound differences with England. They gave the Scottish nobility every reason to embrace a sense of Scottish identity and history, thus marking Scotland off from England.

In the final part of the chapter, we argued that resort to the common law in Scotland was on a much smaller scale than is usually supposed. It was nowhere near comparable to the situation in England. Whatever may have happened in the burghs, outside them the bulk of litigation according to its forms probably involved no more than a small elite. This was because the Scottish nobility were very clear that they did not want a common law as in England where cases might be removed from their courts, and they might be subject to litigation in the courts of the king brought by their social inferiors. On the 1221 Warwickshire eyre, the earl of Warwick was convicted of disseising one of his tenants and heavily amerced.[183] That was not going to happen in Scotland. So when the assize of novel dissasine was introduced, it was linked to a penalty for unsuccessful prosecution which effectively barred all but the comparatively wealthy from using the action, unless that is they enjoyed some favour with the king. When it came to the brieve of right, the nobility ensured it could be used by them, but not against them, the exact reverse of the situation, on Holt's hypothesis, which obtained in England before 1215. All this provided further incentive to mark Scotland off from England, by stressing its separate identity.

[182] *APS*, i, 114.
[183] *Rolls of the Justices in Eyre*, ed. Stenton, no. 390.

The middling and lesser folk of Scotland, by contrast, might have benefited from the spread of the common law as their counterparts did in England. But precisely because of their social position, inherently more localised, they were unlikely to know what they were missing. The nobility, with their connections with England, saw only too well the disadvantages of the common law. The middling and lesser folk, lacking those connections, were unaware of its benefits. In effect, the greater the benefits, the less likely one was to know about them. The chances of the middling and lesser folk supporting union with England in order to get the blessings of the common law were not very great! At the very bottom of society, of course, the situation was different again. In England, the peasantry were the greatest losers from the common law (at least in theory) since a rigid dividing line was drawn by the king's lawyers between the unfree and the free in order to exclude the former from it.[184] In Scotland, the absence of any widespread operation of the common law had at least one overwhelming benefit. It saved the Scottish peasantry from the same package of legal rules about unfreedom which their counterparts struggled so long to overthrow in England.[185] Had they known that, which they probably didn't, the Scottish peasantry would doubtless have fought all the harder to preserve their country's independence.

The loss of Scottish plea rolls, and the absence of any great survey like the English hundred rolls, means that much of what is said in this chapter will remain hypothesis. Where work can be done, however, is in determining the extent and social depth of the contacts between England and Scotland in the years before the Wars of Independence. Were these limited, as suggested above, to the nobility or did they also embrace the middling, lesser, and lowest folk of Scotland? 'The Breaking of Britain: cross-border society and Scottish independence 1216-1314', the new AHRC project based at the University of Glasgow, will take us a long way towards finding out.[186]

[184] There is, of course, a big debate about the disadvantages and (in certain economic conditions) the advantages of being unfree. This was initiated by Hatcher, 'English serfdom and villeinage'.

[185] For the status of the peasantry in Scotland, see chapter 3 by Alice Taylor, above.

[186] Since the completion of this chapter, an illuminating study of the sheriff of Northumberland, William Heron, has appeared: R. Cassidy, 'William Heron, "hammer of the poor, persecutor of the religious", sheriff of Northumberland, 1246–58', *Northern History*.

APPENDIX

Private debts in the Scottish financial accounts of the 1260s[187]

1. (p. 4) Memorandum that the sheriff of Fife (David of Lochore) is not to be burdened in his account with the 12 marks which Duncan, nephew of the earl of Fife, incurred ('*incidit*') before Alexander Comyn, earl of Buchan, justiciar of Scotia, as is more fully contained in the account of the justiciar, nor ought he to be compelled to the payment of the said money, because the same Duncan nor [...] are living or have anything in the sheriffdom of Fife by which they might be compelled to pay. But the sheriff of Perth, in which sheriffdom they live, should compel them to pay the 12 marks.

2. (p. 31) The sheriff of Fife (David of Lochore), in a second account, 40 marks from John of Denmuir for the debt which John owes the king, which he should pay at 40 marks a year, until it is fully paid. This is the first payment etc.

3. (p. 5) Memorandum that the sheriff of Ayr (the earl of Menteith) has the son of Gilaverian, who was farmer of Cumbraes,[188] as hostage for Gilaverian's fine with the king for 80 cows, until the cows are paid.

4. (p. 28) The sheriff of Ayr (William Comyn of Kilbride) 18 marks from the relief of Roland of Carrick.

5. (p. 28) The sheriff of Ayr (William Comyn of Kilbride) 5 marks from the relief of the wife of Robert de Montgomery.

6. (p. 28) The sheriff of Ayr (William Comyn of Kilbride) £40 16s 8d from the fine of Simon Lockhart which he made for the indictment (*dictamentum*) of the men of the Steward in Kyle, save the eighth of the bishop of Glasgow (115s 8d).

7. (p. 28) The sheriff of Ayr (William Comyn of Kilbride) £17 10s from the fine made by Earl Patrick for the sons of Mac Galgys, save the eighth of the bishop of Glasgow (50s).

8. (p. 9) Memorandum that the sheriff of Forfar (E. [sic] de Muhaut[189]) seeks to be allowed (locari) £14 from the fine of the burgesses of Forfar for which he says he was burdened in his account rendered at Arbroath in the year 1261, because the debt was respited by letter of the earl of Mar, which he has.

[187] Private debts are defined as debts owed by individuals, institutions, and communities other than those owed for farms, rents, customary payments, and offices held under the crown. The order here follows that in the accounts (*ER*, 1–34) save that, where a sheriffdom appears more than once, all the subsequent references follow the first entry. The word I render 'from' is either 'de' or 'per'. It is quite clear these represent receipts.

[188] Great Cumbrae and Little Cumbrae Islands off the north Ayrshire coast.

[189] The 'E' is evidently a transcription error for 'R'; this figure is Robert Mowat.

9. (p. 13) The sheriff of Inverness (Laurence Grant) 10 marks from the fine of the bishop of Ross 'for that year'. (For receipt of a further 10 marks 'for that year', in a second account of the same sheriff, see p. 19.)[190]

10. (p. 13) The sheriff of Inverness (Laurence Grant) £20 for part of the fine of the earl of Sutherland 'for that year'. (For receipt of a further £20 in a second account of the same sheriff, see p. 19.)

11. (p. 13) The sheriff of Inverness (Laurence Grant) 50 marks from part of the fine of the earl of Caithness 'for that year'. (For receipt of a further 50 marks in a second account of the same sheriff, see p. 19.)

12. (p. 19) Under the expenses of the sheriff of Inverness (Laurence Grant), 'concerning 200 cows of the fine of the men of Caithness, 58s with all expenses (*sumptibus*)'. (This is in the sheriff's second account.)

13. (p. 19) The sheriff of Inverness (Laurence Grant), under expenses, is allowed 100s for 20 cows of the fine of the earl of Ross given to Kermac MacMaghan by the earl of Buchan and Alan Durward, having power of the king by his letters patent at the time of the advent of the king of Norway.

Memorandum (p. 20) that the sheriff of Inverness (Laurence Grant) ought not to be compelled [to pay] £45 for 180 cows for the fine of the earl of Ross for which the king has given respite to the earl, until the king specially issues an order about compelling payment.

14. (p. 20) The sheriff of Inverness (Laurence Grant), under expenses, has 4 marks deducted from the fine of the wife once of John Bisset as the tenth of the bishop of Moray.

15. (p. 16) The sheriff of Dumfries (A[ymer] of Maxwell) £15 from the debt of John of 'Gemilston'[191] for his fine.

16. (p. 20) The sheriff of Invernairn (Alexander of Moray) owes 26 marks which he pledged to pay for the executors of Freskin of Moray.

17. (p. 20) Memorandum that the sheriff of Invernairn (Alexander of Moray) says he ought not to be burdened with £20, with which he is burdened above in his account, through Gervase Matthew, because Hugh of Abernethy and Reginald le Chen were pledges of the foresaid £20. Nor do they have anything within his bailiwick by which they might be compelled to pay.

[190] In this second account he is styled Laurence le Graunt.
[191] See Black, *The Surnames of Scotland,* 295.

18. (p. 21) The sheriff of Roxburgh (Hugh of Abernethy) 66s 8d from the fine of Geoffrey Liddell. (In a second account of the same sheriff [p. 28], he has received 10 marks 'for that year' from the same debt.)

19. (p. 21) The sheriff of Roxburgh (Hugh of Abernethy) 6 marks for that term for the relief and marriage of the son of Thomas Finemund. (In a second account [p. 29], of the shame sheriff, he has received 10 marks from the same debt. This is linked to no. 21 below.)

20. (p. 21) The sheriff of Roxburgh (Hugh of Abernethy) 25 marks for the fine of Nicholas Corbet 'for the same term etc.'. (In a second account [p. 29], the same sheriff has received from the same debt 'for that year, 50 marks etc.'.)

21. (p. 29) In the second account of Hugh of Abernethy as sheriff of Roxburgh, 30 marks which Robert of Cockburn, knight, has fined for the relief and marriage of the son of Thomas Finmond. (See no. 19 above.)[192]

22. (p. 28) In the second account of Hugh of Abernethy as sheriff of Roxburgh, 100 marks for the relief of Richard Lovel.

23. (p. 22) Under the account of the sheriff of Roxburgh, Thomas Kauer, memorandum that Robert of Cockburn, knight, owes 15 marks for the marriage of his daughter, which ought not to be placed in this account as he has no goods in the bailiwick of Roxburgh by which he might be compelled [to pay].

24. (p. 26) The sheriff of Linlithgow (R. de Mowbray) is allowed 72s for two amercements remitted to the Master of Torphichen and John Blonde by letters of the king.

25. (p. 27) The sheriff of Perth (John of Cameron) 20 marks from the relief of Walter son of Adam of Alyth.[193]

26. (p. 27) The sheriff of Perth (John of Cameron) 100s from the fine of William Uviet.[194]

27. (p. 30) The sheriff of Dumbarton (William earl of Mar) has received 22 marks 8s 10d from the land of 'Neuyd' of Alexander of Dunoon which will be in the hands of the king until he pays 600 cows.

28. (p. 30) The sheriff of Lanark (Alexander Uviet) £6 6s 8d from the land of Covington which is in the hands of the king for a fine of 100 marks.

[192] The whole entry in the second account (p. 29), thus reads: *'Item per relevium et maritagium filii Thome Finmond x marcas, et de xxx marcas quas Robertus de Kokeburn, miles, finiuit pro ea.'*

[193] This seems to be a receipt although placed apparently under expenses.

[194] This seems to be a receipt although placed apparently under expenses.

29. (p. 32) The sheriff of Haddington (William Sinclair) is allowed 64s 10d for four amercements remitted to Aymer of Maxwell by a letter of the king, save the tithe of the abbot of Holyrood.

30. (p. 33) The sheriff of Traquair (Simon Fraser) from the relief of Robert Mappar 35s beyond the eighth of the bishop of Glasgow which is 5s.

31. (p. 34) The sheriff of Aberdeen (Andrew of Garioch) is allowed £32 by order of the king because of the poverty of four men for a pledge, which they suffered for a certain indictment to be produced before the justiciar which they did not produce at the stated days.[195]

[195] I am most grateful to Matthew Hammond for identifying the people and places in this Appendix.