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**THE PREVENTION AND RESOLUTION OF DISPUTES OVER
PROPERTY RIGHTS IN TWELFTH AND EARLY THIRTEENTH
CENTURY SCOTLAND**

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**Thesis submitted for the degree of Doctor of Philosophy, University of
Glasgow, Faculty of Arts, Department of History**

November, 2006

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ABSTRACT

The accepted view of dispute resolution during the twelfth and early thirteenth century is to either dismiss the possibility altogether due to a scarcity of documents or to look backward from the later thirteenth century and beyond, measuring the records of the twelfth century and early thirteenth against the more prolific and more detailed records of later periods. This has led to the widely accepted conclusion that either the means of resolving disputes in the earlier period were less sophisticated, less developed versions of later legal systems, or that the earlier period was in a legal dark age where the light of reason and systematic approaches to law had not yet developed.

The evidence discussed here shows, however, that there were systematic approaches to both preventing disputes and resolving those that did occur. The documents are not in the format that came to be accepted in later periods, nor are they worded as later legal documents would be. But that there were legal decisions being made according to norms, customs and rules that were consistently applied is clear.

Using complexity theory as a means of analysis allows us to see the patterns and the systematic approaches, not in a system wide context, but at the level of decision making, where these rules, norms and customs were applied to the facts by one or more decision makers in order to achieve a just result. This approach affirms the underlying concept of justice that drives any legal system, whether a more modern, well documented legal structure or one where the records are not so abundant.

ACKNOWLEDGEMENTS

This thesis could not have been completed but for the support and funding from the Stair Society and The University of Glasgow Faculty of Arts scholarships. I am indeed very grateful to both for the scholarships and their patience in waiting for the result.

In addition, I should like to thank the many people who were instrumental in the completion of this thesis. My supervisor Dauvit Broun was endlessly patient and encouraging. I am deeply grateful that he was willing to let me approach this topic from an unorthodox perspective, and was always there to redirect when I got caught up in circles of my own making. I am grateful to David Bates, my second supervisor who was the first to encourage me to attempt this study and who has been kind enough to read what I have sent him even after he left Glasgow. I also wish to thank the many members of staff and students of the Department of History and the Law Faculty who offered encouragement and comments and were always willing to listen.

My family and friends have been supportive throughout this process. In particular, I could not have completed it without my sister Sheila, who had faith that I would finish even when I thought I couldn't, and Richard J. Daley, for allowing me space in his office to work on the thesis, reading parts of it and offering constructive criticism and for moral support and encouragement.

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ABBREVIATIONS

<i>Aberdeen Registrum</i>	<i>Registrum Episcopatus Aberdonensis</i> (Spalding and Maitland Clubs, 1845).
APS	<i>Acts of the Parliaments of Scotland</i> , vol. I, (1124-1303).
<i>Arbroath Liber</i>	<i>Liber de S. Thome de Aberbrothoc</i> (Bannatyne Club, 2 vols., 1848-56).
Barrow, <i>Charters of David I</i>	<i>The Charters of King David I: The Written Acts of David I King of Scots, 1124-53 and of his son, Henry Earl of Northumberland, 1139-52</i> , (The Boydell Press, Woodbridge, 1999).
Barrow, <i>Kingdom of the Scots</i>	<i>The Kingdom of the Scots: Government, Church and Society for the eleventh to the fourteenth century</i> , (St. Martin's Press: New York, 1973).
Barrow, <i>RRS, I</i>	<i>Regesta Regum Scottorum, I, The Acts of Malcolm IV, King of Scots, 1153-1165</i> (University Press: Edinburgh, 1960).
Barrow, <i>RRS, II</i>	<i>Regesta Regum Scottorum, II, The Acts of William I, King of Scots, 1165-1214</i> (University Press: Edinburgh, 1971).
BL	British Library
BM	British Museum.
Bossy, <i>Disputes</i>	<i>Disputes and Settlement: Law and Human Relations in the West</i> , (Cambridge University Press: Cambridge, 1983).
Bracton	Bracton, Henry de, <i>De Legibus et Consuetudinibus Angliae</i> ,

- English & Latin, Vol. II, Samuel E. Thorne (trans. and ed.)
- Cal. Docs. Scot.* *Calendar of Documents Relating to Scotland*, J. Bain, (ed.), (Edinburgh, 1881-1996).
- Cambuskenneth Registrum* *Registrum Monasterii S. Marie de Cambuskenneth*, W. Fraser, (ed.), (Grampian Club, 1872).
- Chibnall, *Orderic Vitalis* Chibnall, Marjorie (ed. & trans.), *The Ecclesiastical History of Orderic Vitalis*, Vol. IV, Books VII and VIII (Oxford, 1973).
- Chronicle of Holyrood* *Chronicle of Holyrood: A Scottish Chronicle known as the Chronicle of Holyrood*, M.O. Anderson, (ed.) (Scottish History Society, 1938).
- Chronicle of Lanercost* *Chronicle of Lanercost: Chronicon de Lanercost, 1201-1346*, J. Stevenson, (ed.) (Bannatyne Club, 1839).
- Chronicle of Melrose* *Chronicle of Melrose: The Chronicle of Melrose, A.D. 735-1270*, facsimile edition, A.O. and M.O. Anderson, (eds.) (London, 1936).
- Coldstream Chartulary* *Chartulary of the Cistercian Priory of Coldstream*, C. Rogers, (ed.), (Grampian Club, 1879).
- Cooper, *Select Cases* Lord Cooper, *Select Scottish Cases of the Thirteenth Century*, (William Hodge & Co. Ltd.: Edinburgh, 1944).
- Cooper, *Selected Papers* Lord Cooper, *Selected Papers 1922-1954*, (Oliver & Boyd: Edinburgh, 1957).

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|--------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Davies and Fouracre | Wendy Davies and Paul Fouracre, (eds.), <i>The Settlement of Disputes in Early Medieval Europe</i> (Cambridge University Press: Cambridge, 1986). |
| DCM, Misc. Chrts, Durham | Dean and Chapter Muniments, <i>Miscellaneous Charters, Durham.</i> |
| Donaldson, <i>Conveyancing</i> | Gordon Donaldson, 'Early Scottish Conveyancing; Supplementary to Formulary of Old Scots Legal Documents', P. Gouldsbrough, (ed.) (The Stair Society: Edinburgh, 1985). |
| Dowden, <i>Medieval Church</i> | Dowden, John, <i>The Medieval Church in Scotland : its constitution, organisation and law</i> , (MacLehose: Glasgow, 1910). |
| Duncan, <i>Kingdom</i> | Duncan, A.A.M., <i>Scotland: The Making of the Kingdom</i> (Edinburgh, 1975). |
| <i>Dunfermline Registrum</i> | <i>Dunfermline Registrum: Registrum de Dunfermelyn</i> (Bannatyne Club, 1842). |
| <i>Dunfermline</i> | <i>Registrum de Dunfermelyn</i> (Bannatyne Club, 1842). |
| <i>Dryburgh Liber</i> | <i>Liber Sancte Marie de Dryburgh</i> (Bannatyne Club, 1842). |
| Easson, <i>Coupar Angus</i> | Easson, D.E. (ed. and trans.), <i>Charters of the Abbey of Coupar Angus, Vol. I, Charters I to CXVIII, 1166-1376</i> (Edinburgh, 1947). |
| <i>EHR</i> | <i>English Historical Review.</i> |
| <i>ESC</i> | Lawrie, A. (ed.), <i>Early Scottish Charters, Prior to A.D. 1153</i> (Glasgow, 1905). |

- Ferguson, *Papal Representatives* Ferguson, Paul C. *Medieval Papal Representatives in Scotland: Legates, Nuncios, and Judges-Delegate, 1125-1286* (Stair Society: Edinburgh, 1997).
- Glanvill* Glanville, Ranulf de, *Tractatus de legibus et consuetudinibus regni Anglie*. (English & Latin): *The treatise on the laws and customs of the realm of England commonly called Glanvill* / edited with introduction, notes, and translation by G.D.G. Hall, (Holmes Beach, 1983).
- Glasgow Registrum* *Registrum Episcopatus Glasguensis*, Cosmo Innes, (ed.) (Bannatyne Club, 1843).
- Gratian Gratian, *The Treatise on Laws (Decretum DD 1-20) with the Ordinary Gloss*, Augustine Thompson, O.P. and James Gordley., (trans.), Introduction by Kenneth Pennington (Catholic University of America Press: Washington, D.C., 1993).
- Holyrood Liber* *Liber Cartarum Sancte Crucis* (Bannatyne Club, 1840).
- Inchaffray Liber* *Liber Insule Missarum* (Bannatyne Club, 1847).
- Inchcolm Charters* *Charters of the Abbey of Inchcolm*, D.E. Easson and A. MacDonald, (eds.) (Edinburgh, 1938).
- Jus Feudale* Clyde, James Avon, 'Introduction', *The Jus Feudale*, vol. 1. (William Hodge & Co., Ltd.: Edinburgh and London, 1934).
- Kelso Liber* *Liber Sancte Marie de Calchou* (Bannatyne Club, 2 vols., 1846).

- Kiel and Elliott, *Chaos Theory* L. Douglas Kiel and Euel Elliott, *Chaos Theory in the Social Sciences: Foundations and Applications*, L. Douglas Kiel and Euel Elliott, (eds.) (The University of Michigan Press: Ann Arbor, 1997).
- Lindores* Dowden, Rev. John, (ed.) *The Chartulary of the Abbey of Lindores 1195-1479*, SHS, vol 42, (Edinburgh: Printed at the University Press by T. and A. Constable for the Scottish History Society, 1903).
- MacQueen, *Common Law* MacQueen, Hector, L., *Common Law and Feudal Society in Medieval Scotland* (Edinburgh: University Press, 1993).
- Maitland, *Collected Papers* Maitland, F.W. *The Collected Papers of Frederick William Maitland, Volume I*, (Cambridge: Cambridge University Press, 1911).
- Medieval Latin Word List* Latham, R.E., *Revised Medieval Latin Word-List, from British and Irish Sources, with Supplement* (London, 1999).
- Memory* Clanchy, M.T., *From Memory to Written Record: England 1066-1307*, (2d Edition)(Blackwell: Oxford, 1993).
- Moray* *Registrum Episcopatus Moraviensis* (Bannatyne Club, 1837).
- Newbattle Registrum* *Registrum S. Marie de Newbotle* (Bannatyne Club, Edinburgh, 1849).
- Paisley* *Registrum Monasterii de Passelet* (Maitland Club, 1832).

- Pollock & Maitland
 Pollock, Sir Frederick and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, (Cambridge, 1968), (2d ed), and Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed. (Union, NJ, 1996), I.
- Raine, *North Durham*
 Raine, James, *The History and Antiquities of North Durham: Appendix* (London, 1852).
- Regiam Majestatem*
 Lord Cooper, of Culross, (ed.) *Regiam Majestatem and Quoniam Attachiamenta*, (Stair Society: Edinburgh, 1947).
- Scone Liber*
Liber Ecclesie de Scon (Bannatyne Club, 1843).
- St. Andrews Liber*
Liber Cartarum Prioratus Sancti Andree in Scotia (Bannatyne Club, 1841).
- Stair, *Institutions*
 Stair, James Dalrymple, Viscount, *The Institutions of the Law of Scotland, Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations, in IV Books*, David M. Walker, (ed.) (Glasgow and Edinburgh, 1981).

CHAPTER I

COMPLEXITY AS A MEANS OF ANALYSIS

Scots law has been perceived as following the model set forth in Justinian's Institutes.¹ Thus, the traditional divisions, between the law of persons, things and actions, have permeated the approach to the law's past as well as the approach to the present and any future changes. But this approach, necessarily systematic, is essentially external. That is, it views the law from the outside, observing where such and such an action or law more properly fits by what it affects, or its subject matter. This approach is greatly facilitated by written records, and in particular, by the existence of the systematic approach to reporting cases, reinforced by generations of lawyers and historians who have learnt to conceptualise the law within this framework. Law properly understood, however, works first at the individual level, between people who seek a perceived just outcome. The process that occurs at the individual level, and specifically in the decision-making, gives a more fundamental structure to the legal process. Understanding what happens at this microcosmic, internal level provides a way into those areas where the

¹ Eric Deschecmacker, 'Mapping the Common Law: on a Recent English Attempt and Its Links with Scottish Jurisprudence', 115 *Juridical Review* 2003, 295-311.

records fail to give the details modern lawyers expect, or fail to give them in the traditional format.

Complexity theory² provides a model with which to understand this structure and place it in context. The elements of the model are those that make up the decision making process itself in any legal setting: the law, facts and the decision-maker. The factors to be examined within this model are the words used in the documents, the shifts or changes in the roles of those who made the decisions regarding disputes, and the types of documents used to record them. Specifically, what words are used to describe a law, custom, norm or rule? Who is making decisions, the king or one of his officials? Or are the decisions made by one or more 'wise men' of the community? And perhaps most importantly, since it impacted perceptions of all three factors, what type of documents were used to record transactions either in an attempt to prevent disputes or to memorialize the outcome?

There were changes in each of these factors. All of them are important in examining the records concerning matters that occurred in the period before

² It should be understood that there is no attempt to force an understanding of physics into a legal model. The theory provides a way of translating the decision-making process into a geometric model which can be shown to repeat without exact replication, providing continuity and the perception of linearity. This has been tested for example, in an examination of legal decision-making in the United Nations Security Council and in the International Criminal Tribunals. E. O'Sullivan, *Non-Linear Decision Making in International Law*, unpublished LLM dissertation, University of Glasgow, 2001 and 'Law and Chaos: Legal Argument as a Non-Linear Process', in *Law and History: Current Legal Issues*, 2003, Vol. 6, eds. Andrew Lewis and Michael Lobban, (Oxford, 2004), 433-451. That research focused on decision making within a modern legal system.

the thirteenth century, before 'organised justice was dispensed in this land.'³ The documentary evidence from the twelfth century is not in a format that readily complies with the case report format imposed on the thirteenth century material by Lord Cooper.⁴ But examining the evidence shows that there was a pattern, however incompletely captured and reflected in the records. The evidence supports the conclusion that decision-making with regard to property rights in the twelfth century, just as in modern legal systems, was primarily concerned with an underlying concept of justice which acts, then as now, as a sort of strange attractor or focal point of the decision making process. An analysis of the Scottish material within this framework demonstrates that the process as well as methods for preventing and resolving disputes evident in the charters, place Scotland in the mainstream of the European legal tradition during this period. 'Historians have tended to underemphasise the element of decision-making and negotiation that lies behind charters.'⁵ Behind every charter, there were decisions taken, negotiations and agreements which may not be clearly set out in the charters produced as a result of these interactions. Understanding the process of decision-making which lies behind twelfth and thirteenth century charters may allow for a greater appreciation of the forces acting upon the individuals involved, and the significance of the charters to those individuals.⁶

³ Lord Cooper of Culross, *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944), xxiii [Cooper, *Select Cases*].

⁴ *Ibid.*

⁵ Paul Hyams, 'Charters and the Early Common Law', *Journal of Legal History*, Vol. 12, No. 3 (1991), 173-89, 174.

⁶ *Ibid.*

Conceptually, reasoning follows the format, 'if *a*, then *b*'. This is the template applied not only to reasoning in general, but legal reasoning in particular.⁷ This linear construct is insufficient, however, in trying to understand the process of legal reasoning as it occurs because it is one dimensional and static. It is also inadequate for the same reasons, as a means of explaining the unpredictable elements found in any dynamical system (one which changes over time) and for any attempt at predicting the course of the decision making process for any length of time. Because this construct is inadequate but widely used and taught, it leads to misconceptions. These misconceptions have influenced how the charter evidence of the prevention and resolution of disputes has been interpreted.

The perception of linearity, whether in legal decision-making or in other areas, has impacted how information about decisions is organised and processed. This in turn influences the language used when such decisions are discussed, which reinforces the construct. That is, decisions follow one another in a straight line, and show continual progression. This may be seen in a modern context in the references to precedent, to a case 'and its progeny', or to a line of cases. Historically, the emphasis on the gradual, seemingly inexorable increase in standardization, especially with reference to charter format and language, demonstrates the same misprision.

⁷ Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford, 1995), 19-52.

But linearity is not the only construct of progression. There are at least two other models that have been reflected in the literature, especially in the twentieth century. The other models discussed here are the periodic or oscillating model, and in the late twentieth century, the chaotic model, formally known as complexity theory. The oscillating model is similar to the 'boom-bust' approach to history, where progress is made, but by a series of fluctuations between two states of being. Chaotic or complex systems operate in a non-linear fashion, leaving one with a situation that is perhaps predictable in the short term, but not for any appreciable length of time. Such systems are very sensitive to initial conditions, so that a small change or difference at the beginning of two similar situations can have an exponentially disproportionate impact on outcome. This is sometimes referred to as the 'butterfly effect'. In this essay, the terms chaos and complexity will be used interchangeably.⁸

Each of these models, the linear, periodic and complex, are constrained by an attractor. This can be conceived as a point to which the system continually reverts. The attractor draws the decisions in each of these systems to it and results in the overall structure of the map itself. For a linear model, the attractor would be a fixed point. For the oscillating model, the attractor would

⁸ Much has been written about complexity theory. For more detailed and scientific explanations, the following may be consulted: J. Gleick, *Chaos: Making a New Science* (New York, 1987); D. Ruelle, *Chance and Chaos* (Princeton, 1991); N. K. Hayles, *Chaos and Order* (Chicago, 1991); D. Byrne, *Complexity Theory and the Social Sciences: An Introduction* (London, 1998); *Chaos Theory in the Social Sciences: Foundations and Applications*, eds. L. Douglas Kiel and Euel Elliott, (Ann Arbor, 1996).

be a closed loop, also fixed.⁹ It would be set between the two consistent points¹⁰ and 'correct' for the perceived deviation in any decision making process. For the third, complex model the attractor is not fixed. It in fact shifts in response to the decisions previously made, and is therefore an integral part of the process. This 'strange attractor', if graphed, would appear as a variety of unique shapes, characterized by a recognisably repeating form, which does not retrace the previous path. Thus, while the first two systems would create a graph of a line or a graph that moved between two fixed parameters, the complex system would appear as a graph that goes up and down (and around) in no fixed or predictable pattern.¹¹

For each of these models, the attractor is the element which guides the overall structure or pattern. If the linear model and the oscillating model are inadequate, one is left with the complexity model. The attractor which determines the overall structure of a complex system must be one equally applicable at any time period, and fundamental to the perceived integrity of the system. For legal decision-making, this 'strange attractor' is a concept of justice. As Bassiouni notes,

[a] concept of justice and a justice system have characterized every society throughout the thirty-five or so recorded civilizations over the

⁹ Gleick, *Chaos: Making a New Science*, 134-138.

¹⁰ Kiel and Elliot, *Chaos Theory in the Social Sciences: Foundations and Applications* (Ann Arbor, 1996), 7.

¹¹ Ruelle, *Chance and Chaos*, chapter 10, especially 60-65.

past 40,000 years. This enduring presence evidences that justice is both a human and a social value.¹²

The concept of justice changes continually, but is nevertheless recognisable, and it is that which the system continually is drawn towards and repeats without (necessarily) exact replication. It is also the concept that readjusts the system when it has gone too far in any direction. In effect, the system is 'drawn' toward the concept of justice, with each decision that is made.¹³

Notwithstanding the chaotic, or complex nature of these decisions, there is a pattern, determined in part by this underlying concept of justice. Justice acts as a unifying force, the 'strange attractor' which is not rigidly fixed.

Decision-making does follow a pattern, regardless of context. It does have the same elements involved and the same underlying concept. It is this evolving concept of justice which accounts for the flexibility and unpredictability of decisions. It is also what makes a necessity to lawyers (re-interpretation of prior decisions), a perversion to historians (who object to the re-working of history to fit the present).¹⁴

¹² M. Cherif Bassiouni, "Combating Impunity For International Crimes", 71 *U. Colo. L. Rev.* 409 (2000), 420.

¹³ This differentiation between stable (linear), stable periodic (oscillating) and chaotic (non-linear, non-periodic) is not the only way of describing these systems, nor the most complex. Ruelle adds a further level of the 'superimposition of two or more oscillations (or modes), then chaos.' Ruelle, *Chance and Chaos*, 83-84.

¹⁴ *The Collected Papers of F. W. Maitland*, ed. H. A. L. Fisher (ed.), 3 vols. (Cambridge, 1911), 1, 491.

This strange attractor, labelled here a concept of justice, may be compared to Dworkin's¹⁵ concept of integrity, or MacCormick's¹⁶ theory of coherence. It is that which continually draws the individual decision, made within the system, back to within the recognizable overall structure, back to within recognizable boundaries. Even though complex systems are essentially unpredictable, there is an overall pattern, an overall recognisable structure. The strange attractor is that which in an organic, dynamic way, maintains this structure. This strange attractor, the concept of justice in this analysis, evolves over time but is understood by decision-makers at every level of the process.

Chaotic or complex regimes 'function within defined parameters'. This means that there is stability in the chaotic system, even though it appears disorderly.¹⁷ The system generates repeating forms that do not retrace previous forms. These forms are said to be 'self-similar'. That means that at whatever scale one examines them, they appear to look the same. Another name for these self-similar forms is fractal.¹⁸

In law and in any decision-making process, whatever the venue, an example of one of these self-similar forms, or fractal, might be the description of the

¹⁵Ronald Dworkin, *Law's Empire* (Oxford, 1998), 11.

¹⁶Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford, 1995), McCormick, 107.

¹⁷L. Douglas Kiel and Euel Elliott, *Chaos Theory in the Social Sciences: Foundations and Applications* (Ann Arbor, 1996), 7.

¹⁸D. Byrne, *Complexity Theory and the Social Sciences: An Introduction* (London, 1998), 172.

process of decision-making itself. At whatever level, and whatever scale of magnitude, the process, from the decision an attorney or party makes in formulating a legal argument to the decision a judge makes in any given case, to the decision a group makes in a legislative or quasi-legislative body, the parameters are the same. The factors that impact on the decision are the established facts determined to be relevant, the law, and the decision-maker, whoever that may be. Visually, this legal 'fractal' might be conceived as a triangle, repeated endlessly at every level of the legal decision-making process. The sides to this triangle are 'facts', 'law (or rule)', and 'decision-maker(s)'. Looking at the process from further away, the facts that have been presented to the decision-maker have been themselves decided by a previous decision-maker. The rules or laws to be applied by the ultimate decision-maker have often been determined by the one presenting the question in the first place. Thus, for each 'side' of the triangle, there would be another triangle informing the ultimate facts, rules or law, and decision-maker.

Although self-similar, no two decisions are ever *exactly* the same. Likewise, at any level of the legal process one chooses to examine, this same fractal appears. Whether it is a royal court or sheriff court, or a legislative body of any size, the paradigm applies. If one understands this 'fractal' quality of legal decision making, one begins to understand that chaotic behaviour 'is globally stable, but locally unstable.'¹⁹ Thus, a rule of law or norm may be

¹⁹ Kiel and Elliott. *Chaos Theory in the Social Sciences*, 7.

generally (globally) applicable, but specifically (locally) it may not apply to the instant case. Further, even if it were to be found to apply to the specific case, it may not be applied as those who formulated the rule or have adopted the norm anticipated.

This process is easier to discern when looking at modern cases. The facts, the law and the issues involved are usually laid out in judicial opinions in a well recognised (and linear) format. For the most part, one cannot say this about twelfth-century charters. Part of the problem is the charter material itself. It does not follow a rigid format as most modern judicial decisions do.

Although many of the charters are formulaic, and can be categorised by type and often labelled as to the underlying action, they are not structured as modern documents, legal or otherwise. The format changes over time, however, and becomes more linear in presentation, supporting the concept of linear progression.

This leads to another term: 'dynamical'.²⁰ Dynamical systems are those which evolve through time. Because the system or process is dynamic, meaning it changes over time, there is an inherent instability within the process itself. In a dynamical system, the change is not linear, nor is it static.

²⁰ This is not quite the same as dynamic. 'Dynamic' may be either a noun or an adjective, and is used to describe how something changes over time. 'Dynamical' is an adjective used to describe a system together with rules for how this system changes or evolves over time. See David J. Wright, 'Introduction to Dynamical Systems', <http://www.math.okstate.edu/mathdept/dynamics/lecnotes/node2.html>. Although there are other definitions, this is one of the clearest.

Individuals however operate conceptually as if they are in a purely deterministic or static system. They assume that if they do the same thing today as they did yesterday, they will get the same result. And most of the time, in many situations, they do get *essentially* the same result. But it is never the exact same result.

These expectations of achieving a particular result impact not only how one would proceed in a particular matter, but how one perceives what has gone before. Thus there may be a level of tension between the perceptions of past events and how one should proceed in the face of these perceptions. And this is as true for the twelfth and early thirteenth century as it is for the modern legal world. This is apparent in the citing of precedent in the modern world, and in the reference to prior acts and donations during the twelfth and thirteenth centuries. This would include references to prior charters as seen in some of David I's charters,²¹ or the objections voiced by the earl of Dunbar in his dispute with Melrose Abbey when the judge or decision-maker fails to meet his expectations regarding procedural rules.²² This tension is compounded by the unpredictability inherent in dealing with factors beyond one's control.

Another example of this might be the papal court in the twelfth century. R.A. Fletcher, in his discussions of the relations between various Spanish bishops

²¹ G.W.S. Barrow, *The Charters of David I* (Woodbridge, 1999), nos. 9, 10, 11.

²² T. Thomson, *Liber Sancte Marie de Melros (Melrose Liber)* (Edinburgh, 1837), no. 101.

and the papal court, demonstrated that while bribes were often required to achieve one's aims,²³ they were no guarantee. Factors such as the untimely death of someone thought to be favourable to one's cause²⁴ or the interventions of a local or regional ruler²⁵ could interfere with the best-laid plans.

The lack of predictability in relations with the papal see is demonstrated in two very different circumstances dating from the twelfth century. The first concerns the many and convoluted steps taken by Bishop Diego Gelmírez to obtain the rank of metropolitan for the see of Santiago de Compostela. The road to promotion was a long one, starting in 1095 when the current bishop of Compostela obtained the papal privilege *Et decretorum synodaliū at Clermont*,²⁶ and it was confirmed in 1101.

Diego Gelmírez made several visits to Rome, and sent emissaries when he could not go himself.²⁷ He used allies both in Spain and abroad to further his cause, and was not hesitant to use the pecuniary route when deemed expedient. As mentioned above, untimely deaths and unforeseen events could impact the outcome, with little or no control possible. Gelmírez's object, to get metropolitan status for Compostela, was successful, but took several

²³ R.A. Fletcher, *Saint James's Catapult* (Oxford, 1984), 199, 201, 205. Indications of bribes could range from being 'urged to be suitably grateful' to 'prudently' bestowing a prebend on someone in a position of power, or even outright request for 'presents'.

²⁴ Fletcher, *Saint James's Catapult*, 197-198.

²⁵ *Ibid*, 199.

²⁶ *Ibid*, 195.

²⁷ *Ibid*, 196-199.

years, and was by no means a straight road. What is known about the politics, the favours, bribes and untimely events comes from two primary sources: the *Historia Compostellana*, which is essentially a *gesta* of the life and deeds of Diego Gelmírez, and the papal records that survive.²⁸

The second case is perhaps the most extreme example that illustrates this principle of unpredictability. The inconsistency of papal decisions and unpredictability of events clearly has an effect on the outcome in the dispute over the bishopric of Zamora between the three archbishoprics, Santiago de Compostela, Toledo and Braga. All had claims to Zamora as a suffragan. Santiago de Compostela's claim was based on the fact that Zamora was part of the bishopric of Salamanca up to 1120. In 1121, when Zamora was formally established as a diocese, it was given rights over lands which had been in the diocese of Astorga, a suffragan of Braga.²⁹ The matter is complicated further by Zamora's bishop, Bernardo. He had been a part of the entourage of the archbishop of Toledo. Toledo thus had this basis for claiming Zamora as well as its claim to metropolitan status over all bishops in Spain who did not have a metropolitan.³⁰

The dispute between the three archbishoprics lasted from the 1120's throughout the rest of the twelfth century. In the course of the next 60 years

²⁸ Ibid, chapter VIII, 192-222.

²⁹ Fletcher, *The Episcopate in the Kingdom of León in the Twelfth Century* (Oxford, 1978), 195.

³⁰ Ibid, 196.

or so, various representatives of the three bishoprics sought and obtained a number of rulings, some of which were contradictory. The first ruling was obtained by Alo, bishop of Asturga. Zamora had been given lands which previously had belonged to Asturga, and Asturga wanted them back. Alo petitioned Cardinal Deusdedit in 1123, at the council of Valladolid. Cardinal Deusdedit ruled that Bishop Bernardo of Zamora would remain in position and continue to administer the lands he currently had until either his death or transfer to another see. Deusdedit also ruled that after Bernardo died, the bishopric of Zamora would be abolished. After Bishop Bernardo's death or transfer to another see the territories would revert to Asturga.³¹

Although this decision was reversed in part by Calixtus II, sometime before his death on 13 December 1124, it did not stop Braga from claiming Zamora as one of its own suffragans. Then Lucius II (12/03/1144-15/2/1145) declared that Zamora was the suffragan of Toledo. Bishop Bernardo of Zamora remained in office until his death in 1149. At that time, the archbishop of Toledo consecrated Esteban as bishop of Zamora, in violation of the portion of Deusdedit's ruling that Zamora would be abolished after Bernardo's death, which had not been reversed or rescinded. As a result of this, Braga appealed to the Pope.³² The archbishop of Braga then made his obedience to Toledo as primate in May 1150. In January 1151, Bishop Esteban appears to have been at the papal curia and in June of the same year, Pope Eugenius III rebuked the

³¹ Fletcher, *Episcopate*, 196.

³² *Ibid.*, 197.

archbishop of Toledo for consecrating the bishop of Zamora. Toledo was summoned to Rome for an investigation. Whether or not he actually went to Rome is uncertain and Archbishop Raimundo died in August 1152.³³ His successor Juan went to Rome for consecration. While the archbishop elect of Toledo was in Rome, the archbishop of Braga was also there and Pope Eugenius III heard their arguments over Zamora. He reversed the decision of Lucius II and ruled that Zamora was a suffragan of Braga.³⁴

There were problems, however. Bishop Esteban refused to profess obedience to Braga, in part because the archbishop of Braga was suspended from office and Braga's suffragans were absolved from the duty to submit to the archbishop for several years.³⁵ In addition, Santiago de Compostela continued to claim Zamora as one of its suffragans. Pope Alexander III had determined that Compostela could command (call, assemble, convene), and that Zamora ought to respond to Compostela. This was a reversal of his confirmation of Zamora as a suffragan of Braga of 1163. This decision probably happened some time after 1172-1173.³⁶ Apparently, Compostela claimed that Braga had never exercised possession over Zamora (Bishop Esteban's continued refusal to submit) and so should give up any claim to Zamora.

³³ Ibid, 197, 198.

³⁴ Ibid, 198.

³⁵ Ibid, 198, 199.

³⁶ Ibid, 199.

Alexander III commissioned three bishops to hear the dispute between Compostela and Braga, probably in 1180/1181. These three were suffragans of the three archbishops who had any claim to Zamora. They were: Porto (Braga), Avila (Compostela) and Tarazona (Toledo). Alexander III died in August 1181, and the commission was renewed by Lucius III.³⁷ One of the delegates, the bishop of Avila also died and he was replaced by the bishop of Salamanca, another suffragan of Compostela. The delegates met at Coria and rendered a decision, but the bishop of Porto could not attend. The remaining delegates acted without him. In addition, the archbishop of Braga did not appear. The others proceeded with the case without Braga and without the delegate which was suffragan of Braga. Compostela presented her claim unopposed and the delegates ruled that Zamora was a suffragan of Compostela.³⁸

Braga's complaints about how this was conducted might lead one to think that the decision had been predetermined, or fixed. She claimed that the original hearing was to be held at Alcanices but was changed to Coria which was more inaccessible to Braga. Braga also implied that Porto was excluded from the decision-making deliberately.³⁹ Braga's complaints about how the proceedings were conducted may or may not have influenced Urban III's decision regarding the confirmation of the delegates' decision sought by Compostela. Urban III ordered John of Breescia and John of Bergamo to

³⁷ Ibid, 200.

³⁸ Ibid.

³⁹ Ibid, 201.

investigate only the decision of the delegates, and to confirm or refute the '*sententia*' of the judges delegates. Braga refused to be limited by the Pope's mandate to the two, and reopened the entire issue. Compostela, already in the position of having won the issue before the delegates, simply pushed forward on its request for confirmation. A report was made to the Pope by John of Brescia, who had affirmed the sentence in favour of Compostela but nothing was done until Innocent III addressed the matter.⁴⁰

In 1199, Innocent III reviewed the entire proceedings. His ruling neither confirmed Zamora to Compostela as had been recommended by John of Brescia, nor did he deny the rights of Compostela.⁴¹ He also ruled that John of Brescia's ruling should not prejudice Braga. Shortly after the ruling, Innocent III appointed three more delegates to hear the whole suit, should Braga wish to pursue it.⁴² Apparently, Braga never did.

These examples demonstrate that papal decisions, made by the most highly trained legal minds of the time, and in the most record intensive forum, were not always consistent, and the reasons for particular decisions were not predictable or even logical. The success of petitions to the papal court for the same or similar concessions depended upon many factors, not least of which were the favour of the pope and important people at his court, and the policies

⁴⁰ Ibid, 201.

⁴¹ Ibid, 202.

⁴² Ibid, 202.

of the then current pope. These same accounts show that there is a lack of consistency in the results obtained for what appear to be similar goals.⁴³

This lack of exactitude normally may not seem to matter, but sometimes, it makes all the difference. If it is understood that the system is inherently unstable, even when things look the same, then one may have a greater appreciation of the fact that all situations are different, and what happened once will not happen in exactly the same way again. While this may at first not seem to apply to historical situations and historical documents, it does. The events and the records themselves may not change, but the information about them and about the individuals making decisions in medieval Scotland may very well change. And the perceptions and interpretations of legal historians continually change. If there is an understanding of the stochastic element in the decision-making process, one can no longer accept the conclusion that the decisions taken in a particular case, whether in Spain or in Scotland, were directly the result of a grand design of Christian unity throughout the west or even of 'Normanisation' in Scotland. Nor can one rest comfortably on the assumption that the perceived linearity and progress towards centralisation was inevitable.

David Ruelle points out, in *Chance and Chaos*, 'Chaos...is quite a pervasive feature of natural phenomena.'⁴⁴ This theory has been applied to several

⁴³ Fletcher, *Episcopate* (Oxford, 1978), especially chapter 2, 31-86 and chapter 5, 181-220; and *Saint James's Catapult* (Oxford, 1984), chapter VIII, 192-222.

fields, but as Ruelle notes, when it is being applied to social sciences, economics, history or other 'soft sciences', the analysis 'will necessarily be somewhat fuzzy and qualitative.'⁴⁵ This is in part due to the subjectivity involved in assigning numerical values to non-numerical phenomena, such as behaviour, or words. Chaos theory, applied to non-physical systems, 'appears to provide a means for understanding and examining many of the uncertainties, non-linearities and unpredictable aspects of social systems behaviour.'⁴⁶ 'That chaos may be a part of elementary politics is evidenced by highly exploratory work in the fields of electrical behavior, [*sic*] game theory, axiomatic choice theory, and conflict analysis.'⁴⁷ As any system which includes interactions between humans can be classified as a 'social system', applying this theory to decision making in the prevention and resolution of disputes in twelfth and thirteenth century Scotland may allow legal historians to see the events which have occurred and the decisions which have been made from a new perspective.

There are several ways in which chaos theory or complexity is described.

When analysed within a particular system, such as a legal system, any inconsistencies seem to reduce to a problem of semantics rather than inherent conflicts within the theory itself. One explanation states that systems may be predictable in the short term, but not in the long term. Another approach

⁴⁴ David Ruelle, *Chance and Chaos* (Princeton, 1991), 80.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, quoting from S. Krasner, (ed), *The Ubiquity of Chaos* (Washington DC, 1990).

⁴⁷ T. A. Brown, "Non-linear Politics", in *Chaos Theory in the Social Sciences: Foundations and Applications*, eds. Kiel and Douglas, (Ann Arbor, 1997), 119.

states that while predictions of where the system will go are very difficult, there is an overall pattern, which is discernable. Another explanation is that 'chaos theory describes the manner in which even very simple systems can behave in unpredictable ways in response to two kinds of factors: extreme sensitivity to initial conditions—for example, when a person misses a bus that runs every ten minutes and for that reason misses a train that runs every hour; and recursion—the feeding back of previous outcomes into the determination of the next set of results'.⁴⁸ This recursion is what some authors have labelled 'functional folding', or self referencing. These are not Luhmann's⁴⁹ or Teubner's⁵⁰ self referential systems, however. Their approach is more cybernetic; a basic assumption of their work is that law and the legal system are not dynamic, nor are they organic or focused upon the individual decision-maker. The application of chaos theory to decision-making and legal reasoning here presupposes both of these.

It has been noted before in the legal literature that the courts are extremely complex systems. Chaos theory attempts to explain that complex, dynamic systems are examples of order masquerading as disorder, that is, they are unpredictable, but not unstructured.⁵¹ Reynolds, in his article 'Chaos and the

⁴⁸ G. H. Reynolds, 'Chaos and the Court', 91 *Colum. L. Rev.* 110, 111.

⁴⁹ N. Luhmann, 'Law as a Social System', *Northwestern University Law Review*, Vol. 83, Nos. 1&2, 136-150 (1989).

⁵⁰ G. Teubner, 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review*, Vol. 17, No. 2 (1983), 239-285.

⁵¹ Glenn Harlan Reynolds, 'Chaos and the Court', 91 *Colum. L. Rev.* 110, 112.

Court', discusses the applicability of chaos theory to law, more particularly to a discussion of the patterns in legal decision-making within the court system.

Others have written about this theory and its application to international relations, politics, and economics, as well as to courts systems, and to the legal process itself. This thesis seeks to take the application one step further. Chaos or complexity theory may elucidate the mechanisms of legal reasoning which may lead to greater understanding of the process of legal decision-making. This reasoning process may be analysed in the same way, whether the time period being examined is the twelfth century or the twenty-first century. Dworkin has noted that, '[i]f we understand the nature of our legal argument better, we know better what kind of people we are'.⁵² Likewise, 'the structure of judicial argument is typically more explicit, and judicial reasoning has an influence over other forms of legal discourse that is not fully reciprocal'.⁵³ Because the purpose behind the prevention and resolution of disputes is essentially the same regardless of time, complexity theory is useful as a tool to understand the dynamics of the process whether it occurs in the present or in medieval Scotland. Because the underlying motivating factor, the strange attractor, is the same, there is a coherence in the process that is not constrained by the fact that the events are historical rather than current. Decision-making does follow a pattern, regardless of context. It does involve

⁵² Ronald Dworkin, *Law's Empire*, Oxford (1998), 11.

⁵³ *Ibid*, 15.

the same elements and the same underlying concept which lends coherence to the procedures.

In the context of dispute prevention and resolution, if one accepts the gradual development theory, whereby Scotland has marched along the same path (albeit slightly behind) as England and by 1250 has a centralised and recognisable legal system, one should expect to see this linear development reflected in the charters. If the oscillating model is to be accepted, which some might detect in Cooper's phrase of 'false starts' in the sense that there are a series of starts and then apparent stops, one should expect to see a well defined arc of progress within set parameters. This would again lead without much deviation to the legal system as it existed *circa* 1250. While it is possible to posit these scenarios, and even reconstruct the evidence in such a way to support these models, there are difficulties. There are charters that do not fit the pattern, events that do not support either a smooth and continual advance or a cyclical evolution. Complexity theory is one way to accommodate the elements that do not 'fit'.

With some sorts of data it is possible to assign numerical values to particular types of items and then to place these items in a graph, depicting a variety of relationships between the items and demonstrating all three types of behaviour. There are problems with this approach, however, as there are with any approach to a large body of information. By necessity, there is a selection

process. Although a database has been generated for the charters studied, the definitions of terms and types of charters are not easily quantifiable. At best, a database is a blunt tool circumscribed by the initial terms used to define particular aspects of the charters. Any graphs generated from this method of organising the material would be two-dimensional and lend an imagined uniformity and normality to the evidence which may lead to false impressions. Thus, organising the charters into graphs would in fact generate representations of the non-linear complex nature of the evidence, which may be as misleading as the other models.

It is in the nature of the process that the selection of material and the markers used to categorise the charters is subjective to some extent. There is also a great deal of overlap between charter types. An example is that the same charter might use the term 'chirograph' within the text, but also be a 'quit-claim', a record of a donation and confirmation, and a record of a dispute settled after the intervention of a third party.⁵⁴ To label this single charter as one type of document or another may be acceptable within the strict limits of diplomatic, but in terms of its context as part of a quasi-legal process it is problematic and ultimately misleading. To include it in all or several different categories violates the integrity of the database and is equally misleading.

⁵⁴ But see Ágnes Juhász-Ormsby, 'Changing Legal Terminology in Dated Private Documents in England in the Twelfth and Thirteenth Centuries: A Case Study-Quitclaims', in *Resourcing Sources, The Use of Computers in Developing Prosopographical Methodology*, ed. K.S.B. Keats-Rohan (Oxford, 2002), 195-207. The author has been able to distinguish quitclaims from final *Concordia* in the English material from 1170-1319. The Scottish charter material often combines quitclaims with other types of documents, confirmations with original donations, and grants with settlements.

The charter evidence as a group is not readily amenable to structured mapping. In addition to the problems of labelling a particular charter of one type or the other, there are the compounding problems of the limitations on source material resulting from any number of causes, not least of which are the archival practices of the time period and the accidents of survival. Both the initial selection of which charters to preserve and secondary selection of continued preservation of these charters has already been done. These initial selections were in most cases conducted with an agenda in mind, although that agenda may not be clear at a later date. A further selection has been conducted here. Not every charter can be discussed. It is not even possible to discuss every dispute, especially if one takes the view that there is at least a potential dispute behind every charter. The analysis here proceeds in a roughly thematic and chronological fashion through the twelfth century. The focus is on a few noteworthy cases, either a single record or a group of related records, as exemplars. Although this narrows the scope and has an admittedly subjective element, it allows for more in-depth discussion of these charters and what may be learnt from them about the decision-making process and approaches to disputes in medieval Scotland.

Another aspect where complexity may be discerned is reflected in the 'charter development' into more standardised forms. A good example of this is in the

charters of both David I⁵⁵ and Mael Coluim (Malcolm) IV⁵⁶ concerning briefes of neyfty. At first glance, one may see a trend towards standard language with the use of *precipio*, *iniuste* and reference to a penalty in the phrases *super meam defensionem*, *super meam forisfactum*. Upon closer inspection, however, the charters demonstrate conformity to an idea rather than to strict formulaic phrases. There is an address in some of the charters to ‘*omnibus probis hominibus tocius terre sue*’⁵⁷ which is from both David’s and Malcolm’s reigns, datable to 1141x1150 for David I and 1153x1162 for Malcolm IV, but the phrase might also appear as ‘*omnibus fidelibus suis tocius Scocie et Laudonie*’⁵⁸ as seen in an early charter of David I datable to c. 1128. In one of Malcolm’s later charters, the phrase is after the specific address to the various officials: ‘*Justiciis suis, Vicecomitibus, Prepositis, Ministris, Cunctisque Aliis probes hominibus totius terre sue.*’⁵⁹ Although there is an address, and it seems to conform to a particular format, it does not become more standardised over time. More striking still is the variation in the text of these charters. While the message remains constant, that is, they all are commands to return fugitive neyfs or serfs and prohibitions against keeping those that belong to another, the wording does not become more regularised. These texts represent more of a variation on a theme rather than

⁵⁵ Barrow (ed), *Charters of David I*, nos. 20, 142.

⁵⁶ G.W.S. Barrow (ed), *The Acts of Malcolm IV King of Scots 1153-1165*, (RRS, I) (Edinburgh, 1960), nos. 167, 188, 192.

⁵⁷ Barrow (ed), *David I*, no. 142, RRS, I, nos. 167, 188.

⁵⁸ Barrow (ed), *David I*, no. 20.

⁵⁹ Barrow, RRS, I, no. 192.

standardised phrases. This sort of conformity to an idea rather than strictly to a format is evident in many royal charters of different types.

What follows is a discussion of the charter evidence, within the framework of complexity applied to decision-making in the prevention and resolution of disputes. Analysis of these decisions demonstrates that decision-making was in fact a complex and multi-faceted process, dependent upon several factors which changed depending on the circumstances and people involved. The Scottish evidence places Scotland within the European legal tradition, and demonstrates that the changes taking place throughout Europe during the twelfth and early thirteenth centuries were also affecting Scotland.

CHAPTER II

DEFINING DISPUTES

Scholars from several disciplines have analysed disputes and the disputing process. Over the last century, perceptions and discussions of this topic have undergone several shifts and incorporated a variety of methodologies and influences from different disciplines. Broadly speaking, the approaches to the topic of disputes and the subsequent analysis may be divided into two groups.

First, there are those who have examined disputes and the disputing process within a broad context, such as the society or culture. These generally take a more 'institutional' approach. Another way of characterizing this is as a more 'external' examination of the disputing process. Disputes are characterized as part of the framework of a system of administering justice within a set of rules or laws, which have been accepted by those involved and the group as a whole, whether an entire society, region or kingdom. This perspective makes basic assumptions concerning confrontations about injury or harm suffered by one and inflicted by another. There is a shared concept of wrong, and a shared acceptance of ways to redress the wrong. This external approach places the dispute rather than the law at the centre of the discussion within a given context.

The second group is composed of those who have examined the actual workings of the process itself. This approach focuses more on individual behaviour, on the application of the rule, norm or law to the particular facts in a particular instance, by a particular decision maker. This may be viewed as a more 'internal' perspective. Such an approach is more flexible, more adaptable and may focus on the 'soft' aspects of a society: the beliefs, values

and attitudes of the individuals and groups within that society. Thus, there is room for variations in perceptions of what is just depending on an individual's status or circumstances. While this may at first be considered the more legalistic approach, the emphasis is less on the rule of law than on the process itself. The external approach is actually more focused on the structure of the institutions, society, and the rule of law, all of which are external to the individual. Neither approach is mutually exclusive. Examining disputes and the disputing process using both approaches in fact yields a more complete picture of what is actually happening both internally, within the dispute itself, and externally, placing the dispute in the larger context of law and justice and society as a whole.

What follows is a brief overview of the literature on disputes, focusing on changes in perceptions of what constitutes a dispute, and on how disputes have been examined, and how this affects the analysis of decision making with regard to disputes in twelfth century Scotland.

The literature on disputes shows that over time, perceptions and attitudes change, and often the changes feed upon themselves in an evolutionary way. Thus, one change or shift begets another which could not have arisen in the same way without the earlier event. Part and parcel of this process is the way each group and each generation perceives and defines both the past and its own identity. Both perceptions of the past and notions of identity evolve dynamically. Historians and lawyers continue to re-examine the past, sometimes discovering new material, but more often re-interpreting what others have culled and talked through many times. This is especially true for legal decisions; their value lies in their ability to be re-interpreted and made

relevant to present needs. The process of legal decision making is also one which has evolved, more in the way it has been presented than in the way it was done. Re-examining the written evidence of these decisions over time allows for conclusions concerning the underlying process, the mutability of perceptions with regard to it, and the factors which impact on both the underlying process and the evolution in perceptions of those involved. Changes occurred in the way disputes were prevented and resolved in twelfth century Scotland and in the way they were perceived, recorded and utilised.

Disputes are an inevitable part of life in any society. They occur as part of the interactions between individuals and may appear in any aspect of the life of a community. 'Tensions and conflicts are facts of civilization, and when exacerbated create harm and suffering which may be deeply felt. It is the business of the political authority to decide what is permitted and forbidden, to categorize the multiplicity of illegal acts; but it is for the individual or collective victim to demand justice, satisfaction and punishment.'¹ Because they are such an integral part of the communal landscape, studying disputes, and specifically the prevention and resolution of disputes, allows a deeper understanding of the values of a community, and the nature of and approach to concepts of justice and law, and expressions of power. Although this study focuses primarily on Scotland during this era, the 12th and early 13th centuries were a period of change not just in Scotland but all over Europe. In a sense,

¹ N. Castan, 'The Arbitration of Disputes under the "Ancien Régime"', in J. Bossy, *Disputes and Settlements: Law and Human Relations in the West*, ed. J. Bossy (Cambridge, 1983), 219.

Scotland was a microcosm of what was taking place throughout Western Europe.

The shifts in concepts of law, justice and the impact they had on the prevention and resolution of disputes may be discerned in the monastic cartularies and royal charters of this period where the extant records of disputes may be found. When analysing them, however, one must be vigilant about the various influences that were brought to bear on the processes reflected in the texts. These influences include the perspective of those making the records, the people involved in the underlying action and not least in importance, why the record was made and to whom it was directed. Lastly, one of the most important aspects of all written evidence of disputes, or of steps taken to prevent disputes, is their value in portraying concepts of power and how it was exercised.

In the prevention and resolution of legal disputes, the decision-making process follows the same triangular fractal discussed above where the decision maker applies the law to the relevant facts, regardless of when or even who is making the decision (at least in the Western world).² But because the charter evidence is not constructed as modern judicial decisions, where the

² Although women could make decisions and were part of disputes in a fair number of charters, the vast majority of decision makers were men. Thus for simplicity and to avoid unnecessary verbiage, the masculine will be used in all general references. A detailed analysis of women in power including women's roles as holders of property with all that that entailed (including the issuing of charters and the use of seals) may be found in Susan M. Johns, *Noblewomen, Aristocracy and Power in the Twelfth-century Anglo-Norman Realm* (Manchester, 2003).

reasoning is laid out in the *ratio decidendi*, the reasoning process taking place in medieval disputes must be discerned from a composite of information and within an inter-disciplinary context, especially in the early part of the period studied. An analysis of the charter evidence shows an uneven evolution towards conformity in the way decisions are expressed, and in the elements included in the texts, but this process is not linear, nor is it predictable. This shift may be seen to be part of the larger one in western intellectual thought, involving the changes not only in teaching methods, but in the emphasis towards Dialectics and on rational persuasion occurring in the twelfth century.³ Part and parcel of this shift is the increasing emphasis on the written word, and objectification and expansion of rules beyond the local, to

³ Lynn H. Nelson, (trans.). Herman of Tournai, *The Restoration of the Monastery of Saint Martin of Tournai*, appendix 2, 138-139. Although placing the shift in description of the dispute resolution process within the context of this intellectual shift is valid, the topic is beyond the scope of this thesis and must be explored at a later date. For more general discussions of law and reason within the intellectual framework of the medieval era, see G. R. Evans, *Law and Theology in the Middle Ages*, (London, 2002), and *Philosophy and Theology in the Middle Ages*, (London, 1993); Edward Grant, *God and Reason in the Middle Ages*, (Cambridge, 2001), as well as older works on the subject, including those by Charles Homer Haskins, and Brian Tierney. While there will be some discussion of the Rational/Irrational debate, it will be limited. There simply is not enough evidence in the Scottish charters studied here to support a lack of rationality in decision-making or problem solving. For further reading on this debate, see R.C. Van Caenegem, 'Reflexions on Rational and Irrational Modes of Proof in Medieval Europe', *Tijdschrift voor Rechtsgeschiedenis*, vol. 58, 1990, 263-280; 'The Developed Procedure of the Second Middle Ages, XII-XV Century', in *Encyclopaedia of Comparative Law, XVI (Civil Procedure)*, Tübingen: Mohr, London: N. Joff (1984), 11-53; Paul Hyams, 'Trial by Ordeal: The Key to Proof in the Early Common Law', in M.S. Arnold, et al. (eds.), *On the Laws and Customs of England: Essays in Honor of S.E. Thorne*, (Chapel Hill, N.C., 1981), 90-126; S. Reynolds, *Kingdoms and Communities in Western Europe, 900-1300* (Oxford, 1997); M. Clanchy, 'Medieval mentalities and primitive legal practice', in *Law, laity and solidarities. Essays in honour of Susan Reynolds*, eds. Pauline Stafford, Janet L. Nelson, Jane Martindale (Manchester, 2001), 83-94. These are just a few of the writings on this subject. There are few, if any, that directly address the question with regard to the Scottish material. This may be due to the fact that there are so few references to 'non-rational' modes of proof such as the trial by ordeal. This is not to say that there were no references, just that there are so few in the twelfth century material for Scotland that it would be difficult to draw useful comparisons between what may be termed rational modes of proof and irrational modes of proof.

encompass an entire region or kingdom. This refocusing from emphasis on oral to written means of communication profoundly affected the way in which disputes were conceptualised and framed in the texts. This change in the way the evidence of disputes was recorded and preserved in turn affected the way historians and lawyers have approached them.

This problem is compounded by the differing perspectives and approaches of lawyers and historians to the evidence. As Milsom has pointed out, when discussing the approach of lawyers to medieval law-suits,

[T]o us a law-suit should first ascertain the facts and then apply the law. Relevant facts are therefore stated; and although we cannot know whether any particular party is telling the truth, we can be fairly sure that it would be lawful to act as he did if the facts were as he says. This last of course is always so; and to the extent that facts are stated at all in the earliest records the legal and social order is faithfully reflected.⁴

Both historians and lawyers however have been influenced by other disciplines in the analysis of disputes, and in the perceptions of customary law in the middle ages. The more recent view has been that customary law, by which these disputes were regulated, was more flexible and adaptable than

⁴ S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976), 2. This approach is not limited to lawyers; see A.A.M. Duncan, *Scotland: The Making of the Kingdom*. I must acknowledge the influence on my own perspective of both legal and historical training.

previously thought. It was also more rational in its approach to the prevention and resolution of disputes. 'Despite the occasional use of ordeals and the belief in supernatural sanctions which they imply, it seems to give considerable scope for argument to evaluate degrees of wrong and to fit general principles to particular cases.'⁵ But as Reynolds points out, '[F]ormalism is, on the face of it, more likely to characterize professional law than unprofessional customary law. Without written records, forms of words are unlikely to be fixed, and without some form of publication, definitions and decisions cannot become authoritative.'⁶ Reynolds goes on to say that 'unwritten, customary law therefore cannot be rigid' and assumes, understandably but too readily, that written records inhibit or even prevent mutation, and indeed, result in a more rigid formalism.⁷ Analysing disputes in a society not recognised by either lawyers or historians for a perceived 'formalistic' approach to decision making may prove instructive in what, if any, elements exist of Milsom's description of the application of laws to the facts of a given case. It may also demonstrate how flexible the approaches may have been before the advent of the more structured and external legal system of the mid- thirteenth century.

'Dispute settlement is a subject of crucial importance to both sociologists and historians of other societies. Of particular interest... is the fact that the study

⁵ Susan Reynolds, *Kingdoms and Communities in Western Europe, 900-1300* (Oxford, 1997), 14.

⁶ *Ibid.*

⁷ *Ibid.*

of the settlement procedures which lay behind the records highlights the relationship between the charter's form (and the history of its form) and its social, political and cultural context. And without this understanding, legal history becomes another specialist taskmaster, written as it usually is, if not by lawyers, then with a legalist slant...'⁸ While the disputing process can and should be studied by lawyers and legal historians, an interdisciplinary approach may yield deeper understanding of the non-legal aspects involved in the disputing process. 'When there is a formal dispute over property the recorded process of establishing ownership becomes far more complex and may reveal to us a vivid and detailed impression of contemporary activity.'⁹

Yet if one compares the approaches to disputes by the various disciplines, one needs to exercise caution. Each discipline has its own mentality, both in research and in writing about the subject. 'History as usually written... is quite different from history as usually lived: the historian records the exceptional because it is interesting-because it is exceptional... Anthropologists and historians use history differently because anthropologists are generally more concerned with uncovering, describing, and analysing the normal processes of social life and of change, rather than the exceptional processes. And legal history differs from both in its attempts

⁸ W. Davies and Paul Fouracre, *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), 2.

⁹ *Ibid.*, 23.

to reconstruct the laws and legal systems of a particular period and their uses in society.¹⁰

In order to understand the factors impacting on the interpretation of the charter evidence a brief overview of the approaches to dispute prevention and resolution in law, legal anthropology and history may prove instructive. While the body of literature is vast and cannot be covered in detail here, there are some notable highlights. Numerous authors have dealt with the subject.¹¹ The variety and combinations of some of these approaches bring new perspectives to prior events and new lessons from old material. These approaches over the last century or so have ranged from that arising out of the legal anthropology field up through the 1960s, to the more variant approach of Frederic Cheyette¹² in the 1970s and the studies of Stephen White in Northern and Western France in the 1970s and early 1980s.¹³ Patrick Geary has also written on this subject for France.¹⁴ There have been studies of England during the Anglo-Saxon period, most notably by Patrick Wormald,¹⁵ and R.C.

¹⁰ J. Starr, 'The "Invention" of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women', in *History and Power in the Study of Law*, eds. J. Starr and J.F. Collier, 345-68, 345-6.

¹¹ A good selection of articles may be found in J. Bossy, *Disputes and Settlement: Law and Human Relations in the West* (Cambridge, 1983), and W. Davies and P. Fouracre, *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986).

¹² See for example, F. Cheyette, 'Suum cuique tribuere', *French Historical Studies*, Vol. 6, No. 3 (Spring, 1970), 287-299.

¹³ S. White, 'Pactum...Legum Vincit et Amor Judicium', 'The Settlement of Disputes by Compromise in Eleventh-Century Western France', *American Journal of Legal History*, Vol. XXII, 282-30 (1978).

¹⁴ P. Geary, 'Vivre en Conflit Dans Une France Sans État : Typologie Des Mécanismes de Règlement des Conflits (1050-1200)', *Annales ESC, septembre-octobre 1986, no. 5*, pp. 1107-1133.

¹⁵ P. Wormald has written extensively on this and related topics. See his *Legal Culture in the Early Medieval West: Law as Text, Image and Experience* (London and Rio Grande 1999),

Van Caenegem, Susan Reynolds, Paul Brand, Paul Hyams, David Bates and John Hudson among others, for the Anglo- Norman era.¹⁶

For Scotland, there has also been a substantial body of literature, especially regarding the origins and development of the laws of Scotland. A logical starting point is the Stair Society's publications. Volume 1, *An Introductory Survey of the Sources and Literature of Scots Law*,¹⁷ discusses the various records and literature considered as sources of law. Slightly more than twenty years later, another volume of the Stair Society focused directly on the legal history of Scotland.¹⁸ Other writings include Lord Cooper's *Select Scottish Cases of the Thirteenth Century*,¹⁹ a legal history by David Walker,²⁰ and various writings by G.W.S. Barrow, A.A.M. Duncan, and articles by David Sellar, Hector MacQueen, and Alan Watson, to name but a few who have contributed to the field. While many of these writings are general overviews, some specific works have been done which have influenced how lawyers and historians approach Scottish legal history.²¹ One of the most influential in this field, especially for the topic here, has been Hector MacQueen's, *Common*

especially chapter 11; also, there are several disputes/lawsuits discussed in his *The Making of English Law: King Alfred to the Twelfth Century* (Oxford, 1999).

¹⁶ J. Hudson, *The Formation of The English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London and New York, 1994). There are several articles as well, including Hudson, 'Anglo-Norman land law and the origins of property', in G. Garnett and J. Hudson, (eds.) *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt* (Cambridge, 1994), 212.

¹⁷ *An Introductory Survey of the Sources and Literature of Scots Law*, Stair Society, Vol. 1 (Edinburgh, 1936).

¹⁸ *An Introduction to Scottish Legal History*, Stair Society, Vol. 20 (Edinburgh, 1958).

¹⁹ Cooper, *Select Cases*.

²⁰ D. Walker, *A Legal History of Scotland* (Edinburgh, 1988).

²¹ Especially of note are the works by T.B. Smith, *British Justice: The Scottish Contribution* (London, 1961); and *The Doctrines of Judicial Precedent in Scots Law* (Edinburgh, 1952).

Law and Feudal Society in Medieval Scotland, focused primarily after the mid 13th century.²²

Many of these writers have dealt with the development of the law, and especially the common law,²³ legal institutions or the interface between law and society.²⁴ While they often used case studies in their works, they do not focus on the decision-making process itself as a part of dispute management. Examining the decision-making process within this context places the aspects of both continuity and change, necessary in any dynamic system, in sharp relief. Limiting the focus to the period of *circa* 1115 to 1250 in Scotland demonstrates the universality of both the decision making process and the necessity of the twin concepts of justice and law.

Simon Roberts has given a brief historical perspective on the anthropological studies done on disputes in various cultures over the last century or so. He noted a change in the approach; where initially the studies done had a 'straightforward, functionalist character' relying explicitly on legal theory²⁵

²² H. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993).

²³ P. Brand, *The Making of the Common Law* (London, 1992); R.C. Van Caenegem, *The Birth of the English Common Law* (Cambridge, 1988); D. Bates, 'The earliest Norman writs', *English Historical Review* (1985) 266-284, and 'The Origins of the Justiciarship', *Proceedings of the Battle Conference* (1981), 1-12; P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century, Vol. 1*, (Oxford, 1999), are just a few of the many who have dealt with this subject.

²⁴ S. Reynolds, *Kingdoms and Communities* (Oxford, 1997) (2d ed.); *Ideas and Solidarities of the Medieval Laity* (Aldershot, 1995); *Fiefs and Vassals: the Medieval evidence reinterpreted* (Oxford, 1994); 'Fiefs and Vassals in Scotland: A View From Outside', *SHR*, (2003), 176-93.

²⁵ S. Roberts, 'The Study of Dispute: Anthropological Perspectives', in *Disputes and Settlement: Law and Human Relations in the West*, ed. J. Bossy, (Cambridge, 1983), 1-24, 3.

which he described as 'rule-centred'²⁶, it soon gave way to research with a transactional flavour. This new influence was already evident in the 1920s. He also noted that these later studies owe very little to legal theory. They focused on small, isolated communities, with the researcher often visiting in the field, and staying for extended periods in order to observe first hand.

The basic arguments concerning dispute resolution have been set out since the 1960s within the field of legal anthropology. An overview of this literature may be found in Francis G. Snyder's 'Anthropology, Dispute Processes and Law: A Critical Introduction'.²⁷ He noted that '[T]he main contributions of anthropologists have been to outline different forms of dispute processing, provide ethnographic data (usually from other countries) and propose limited generalisations. Though it is impossible to delimit these contributions precisely, one important strand clearly concerns the influences of social organisation on dispute processing, including informal alternatives to courts.'²⁸

Snyder discussed the basic assumptions proposed by Laura Nader in 1965. These are, that: '1) there is a limited scope of disputes for any particular society...; 2) a limited number of formal procedures are used in human

²⁶ Ibid, 4.

²⁷ F. Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction', *British Journal of Law & Society*, Vol. 8, Number 2, (1981). This article, as well as a number of others on the subject, has been re-published in *Law and Anthropology* eds. Peter Sack and Jonathan Aleck, (Aldershot, 1992).

²⁸ Ibid, 74.

societies in the prevention of and /or settlement of disputes...; 3) there will be a choice in the number and modes of settlement...'.²⁹ While the terms 'formal procedures' and even 'dispute' may generate disagreement as to exact meaning, here these terms will be confined to the generally accepted ones that a formal procedure would involve more than the disputants themselves, that is, some sort of public forum or involvement (formal), some recognisable rules by which the individuals operated within the context of a dispute spectrum (procedure), and an actual or potential dispute over property rights.

This 'processing' or differentiating the modes of dispute has given way since the 1960s to a comparative approach. Roberts noted that legal anthropologists have moved on to consider the relationships between these groups and the state, or larger groups into which they have become incorporated. These have given rise to comparisons, which seemed to be where the research was at the time of Roberts' publication. He did give some definitions though which may be useful for purposes of this analysis.

One of the key concerns is the definition of disputes. There are several approaches available. A modern, legalistic way of defining disputes is as 'a specific disagreement relating to a question of rights or interests in which the

²⁹ L. Nader, 'The Anthropological Study of Law' (1965) 67 (6) (2), in *American Anthropologist*, ed. L. Nader, (Special Publication on 'The Ethnography of Law'), 3-32, at 13.

parties proceed by way of claims, counter-claims, denials and so on.³⁰ One which seems to include a more interdisciplinary approach has been put forth by Roberts:

‘One possible approach is to identify as ‘disputes’ only those confrontations which follow from an actor’s perception that some harm he has suffered or anticipates flows from another’s departure from accepted criteria of association. The existence of any human group must imply *some* understanding among the members as to how the activities of everyday life should be arranged, and as to what forms of conduct are to be acceptable or unacceptable in a given context. How far these understandings are translated in explicit, articulate normative terms has been shown to vary considerably from one culture to another; but some shared idea of recognized interest, some conception of ‘wrong’, constitutes a necessary basis of association. From that position, we could treat as disputes those occasions where one feels he has suffered an injury, sees another as to blame and confronts him with responsibility.’³¹

This definition necessarily assumes that there has been a departure from accepted behaviour. If there has been no such departure, then there should not

³⁰ J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford, 1999), 1.

³¹ S. Roberts, ‘The Study of Dispute: Anthropological Perspectives’, in *Disputes and Settlement: Law and Human Relations in the West* ed. J. Bossy, (Cambridge, 1983), 1-24, 7.

be a basis for holding another responsible for the injury. This, in turn, assumes *à priori* an adversarial element in all relations in a society. Thus, there would always be at least the potential of a dispute, a dispute 'in embryo' so to speak in any interaction. In addition, while the more legalistic definition appears more objective, viewing disputes according to external criteria and observable actions (procedural steps) taken by the actors, Roberts' definition incorporates a more subjective, individualistic element, from the perspectives of the participants themselves.

According to Roberts, Henry Sumner Maine in his *Ancient Law* saw adjudication as the basic means of dispute settlement from the outset of social life. In all levels of society, disputes were resolved by a third party decision-maker. For Maine, it was a matter of judging, regardless of whether it was in the form of arbitration or adjudication.³² Roberts also noted that the judging was done at different levels of civilization by different kinds of people, with different criteria underpinning their judgements. Underlying this approach, as well as underlying the approaches of Durkheim and M. Weber, is an assumption of a 'necessary link between social order and some form of central control.'³³ Roberts pointed out that '[o]nce we are freed from the *necessity* of the King and the Judge, though in the West still expecting to find

³² Roberts, 'The Study of Dispute,' 10. Roberts does not give a footnote reference for Maine.

³³ *Ibid*, and see footnote 14 on p. 10.

them somewhere in the picture, it becomes possible to examine the range of dispute institutions in a far less restricted way.³⁴

This opened the door to approaching disputes from the view of the parties, or from a perspective more universal than either the parties or the judge. If one considers the whole notion of disputes as a means of balancing rights, then the idea of justice as a pre-eminent motive becomes more acceptable. Likewise, if one is examining the whole range of dispute institutions, analysing the methods used to prevent disputes in the first place demonstrates the continuum of mechanisms available at almost every stage from negotiation through final conclusion.

While the actual role of disputes in the interactions of individuals within society has been shifted over time, the earlier (1960s-1970s) literature placed disputes at the centre of any discussion, rather than placing law at the centre. As Snyder noted, an analysis of the dispute process 'denotes clearly that the outcome of disputes is not necessarily a firm resolution of the issues ostensibly at stake. Disputing displaces law as the subject of study.'³⁵ He then built on Gulliver's 1969 definition of a dispute as the public assertion, usually through some standard procedures, of an initially dyadic

³⁴ *Ibid.*, 11.

³⁵ F. Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction', *British Journal of Law & Society*, Vol. 8, Number 2, Winter 1981, in *Law and Anthropology* ed. P. Sack, (Aldershot, 1992), 69.

disagreement, noting that it has been widely accepted.³⁶ Once it becomes a public concern, the attitudes, expectations and roles taken on by the community become a focus of attention as well.

'Forms of dispute processing have been the subject of a great deal of research',³⁷ leading to an equally large amount of literature. Much of the theoretical work by anthropologists has been stimulated by sociological theories. These have ranged from the concept that political and judicial modes form two ideal, polar types of processes, to a distinction between law and warfare as two basic forms of conflict resolution.³⁸ 'Any typology that distinguishes simply between judicial and political forms of processing is now widely deemed inadequate, as most scholars recognise that both norms and power are pervasive elements in all dispute processes everywhere.'³⁹ This bipolarisation, either/or nature of situations may be seen in the sources as well as in the literature. One example is the discussions of judgement and settlement as if they were mutually exclusive,⁴⁰ when in fact, all too often

³⁶ Ibid. 'Dyadic' meaning between two individuals or entities.

³⁷ Ibid 72.

³⁸ Ibid. This paragraph is a paraphrase. For a current discussion of the relationship between law and politics, see, Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford, 2000).

³⁹ Ibid.

⁴⁰ M. Clanchy, 'Law and Love in the Middle Ages', in J. Bossy, *Disputes and Settlements* (Cambridge, 1983), 47. At 49, Clanchy also quotes *Glanvill*, 'it is generally true that agreement prevails over law' as support for the proposition. While that quote referred to contracting parties, not opponents in a court, the principle holds equally true for disputants. *Glanvill* discusses agreements (concord, chirographs) made in the king's court in Book VIII. G.D.G. Hall, *The treatise on the laws and customs of the realm of England commonly called Glanvill, (Glanvill)* (London, 1965), 94-103.

both extremes are to be found.⁴¹ Thus, one may visualise the disputing process as a spectrum or a continuum rather than an either/or situation.

During the 1970s the focus shifted to Western societies, and specifically to alternative dispute processing. Much has been done in this field with regard to modern dispute resolution, chiefly with the court annexed and non-court alternatives to dispute processing. This focus has been evident since the late 1970s among legal academics, and has borne fruit in the number of alternative dispute mechanisms which have become available to litigants and potential litigants. These programmes have been in operation for a number of years in the United States and in Europe.

Since the early 1980s much work has been done in these fields with regard to dispute management in both so called 'primitive' cultures and latterly, in modern cultures. The effects of these studies include the reorganisation of some modern court systems in Europe and the United States, with alternative dispute resolution becoming a focus of attention, and more emphasis placed on non-confrontational means of resolving disputes.⁴² With the greater

⁴¹ For discussions on 'law and love' and lovedays, see M. Clanchy, 'Law and Love in the Middle Ages', in *Disputes and Settlements*, ed. J. Bossy, (Cambridge, 1983), 47-67 and J. Bennett, 'The Mediaeval Loveday', *Speculum*, Vol. 33, No. 3 (1958) 351-370. In many of the Scottish disputes, this in fact seems to be the outcome. There are hearings, sometimes before both ecclesiastical and secular judges, and then a chirograph which indicates there was an amicable agreement between the parties.

⁴² There are courses being taught in law schools on Arbitration, Negotiation, Alternative Dispute Management, as well as government funding for 'Court-Annexed Dispute Resolution'. There has been for a number of years the various Arbitration associations, and the International community has long used non-litigious means of settling disputes, which

interest in modern alternative dispute mechanisms the question of how earlier European societies went about preventing and resolving disputes has become more pertinent.⁴³

Although studies have been done, as mentioned above concerning medieval society in general and for particular geographical areas, comparatively little has been done on this topic for Scotland prior to 1250. Exceptions to this include Lord Cooper's *Select Scottish Cases of the Thirteenth Century*⁴⁴ which includes several cases before 1250, and discussions of the early laws and customs in E.W. Robertson's *Scotland under her Early Kings*,⁴⁵ A.C. Lawrie, *Early Scottish Charters Prior to A.D. 1153*,⁴⁶ and references to early legal matters in *Habakkuk Bisset's Rolment of Courtis*.⁴⁷ And the most recent extensive discussion of disputes is, again, Hector MacQueen's *Common Law and Feudal Society in Medieval Scotland*. In this comprehensive work, MacQueen discussed others who have approached the whole feudal question especially with regard to law. In discussing Milsom, he points out that Milsom's feudal world 'is an essentially legalistic one' where 'society seems

have been set forth in a number of international treaties, including the Charter of the United Nations.

⁴³ This focus in the legal profession has in turn, influenced the literature on this subject. See Stephen D. White, 'Feuding and peacemaking in the Touraine around the year 1000', *Traditio*, 42 (1986), 195-263; Patrick J. Geary, 'Living with conflicts in stateless France: a typology of conflict management mechanisms, 1050-1200', in *Living with the dead in the middle ages* (Ithaca, N.Y., 1994), 125-160.

⁴⁴ Cooper, *Select Cases*.

⁴⁵ E. W. Robertson, *Scotland Under her Early Kings: a History of the Kingdom to the Close of the Thirteenth Century* (Edinburgh, 1862).

⁴⁶ A.C. Lawrie, *Early Scottish Charters Prior to A.D. 1153* (Glasgow, 1905).

⁴⁷ *Habakkuk Bisset's Rolment of Courtis*, ed. P.J. Hamilton-Grierson, Vols. I-III (Edinburgh and London, 1920).

almost solely dependent upon fairly precisely-defined tenurial relationships to define the exercise of power and authority.⁴⁸ To be fair, Milsom himself acknowledged that his approach was that of a lawyer.⁴⁹ As Milsom's conclusions are based on an investigation of legal sources generated in the time period 'immediately after that in which he says that they were most powerful' they 'tended to emphasise the court as taker of decisions on disputed matters.'⁵⁰ But MacQueen, quoting Paul Hyams, pointed out that one must be careful of what a source says about a prior age.⁵¹ MacQueen's work assumed, as have other legal histories, a more centrist and 'rules' approach, focusing on the various *briefes* in use in Scotland, procedural requirements, and methods of obtaining relief.

One can divide the approaches to analysing disputes into two camps: institutional analysis, which has a more 'external' approach, and observation of behaviour, which is focused more on the 'internal' aspects of the process.⁵² The institutional approach seems to be favoured more by Western jurists, 'since it is suited to state societies and written forms of law, past or present, Western or non-Western.'⁵³ But Rouland points out that in oral societies, the institutional approach is insufficient, and the use of the observation of behaviour may actually be more valuable. Such an approach focuses on legal

⁴⁸ H. MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), 11.

⁴⁹ S.F.C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976), 1.

⁵⁰ H. MacQueen, *Common Law*, 11.

⁵¹ *Ibid.*

⁵² N. Rouland, *Legal Anthropology*, trans, Philippe G. Planel, (London, 1994), 141.

⁵³ *Ibid.*

behaviour and the values and beliefs of the individuals and groups involved.⁵⁴ Rouland points out that 'the perception of just and unjust will vary according to the status of groups and individuals in the social hierarchy; hierarchies, values and authority must thus be clearly identified, without neglecting minority interests.'⁵⁵ 'The description of behaviour will permit a clearer interpretation of institutions.'⁵⁶ When taken together, descriptions of behaviour and analysis of institutions complement each other in the formation of a three dimensional reconstruction of the disputing process. The written texts themselves incorporate these two facets of a complex and ever-changing process.

There have been, likewise, two models used to define societies in the field of legal anthropology. The harmony model, where the society and means of preventing or resolving disputes were primarily concerned with maintaining harmony and cohesion in a community, and the adversarial model, where disputes were more often resolved contentiously, and with less regard for harmony. It has been observed that the 'harmony model was being replaced by the adversary model as the new nation-states developed.'⁵⁷ This shift could easily be argued as occurring in the 12th and early 13th century, where one finds an increase in centralisation and more and more evidence of individuals taking an adversarial approach rather than one designed to

⁵⁴ Ibid, 142.

⁵⁵ Ibid, 142.

⁵⁶ Ibid, 142.

⁵⁷ L. Nader, 'The Crown, the Colonists, and the Course of Zapotec Village Law', in *History and Power in the Study of Law*, eds. J. Starr and J.F. Collier, (Ithaca, 1994), 320-344, 321.

maintain relationships. But such a stark delineation may result in obscuring rather than illuminating what was actually happening.

If one regards the process of dispute prevention and resolution as a spectrum, then harmonisation and adversity are two aspects of the process, and both approaches may be evident at the same time. Thus, in addition to the long adversarial process evident in some of the cases noted herein, there were attempts to work towards accord. The charter evidence discussed both settlements arrived at after litigation,⁵⁸ and settlements arrived at through active co-operation of the parties.⁵⁹

Alternative mechanisms of resolving disputes have always been a part of the inter-power, inter-regnal and international legal arsenal. The mechanisms of 'good offices', conciliation, negotiation, mediation, arbitration and only then formal litigation procedures, have demonstrated that the preventing, processing and resolution of disputes is a continuum⁶⁰ as well used by the

⁵⁸ *Melrose Liber*, no. 111, the charter concerning the settlement between Richard de Moreville and Melrose Abbey over the forest called Threepwood between the Gala and Leader Waters. See also, G.W.S. Barrow, *The Acts of William I*, no. 236 and comments. This is but one of the settlements arrived at after what appears to have been a long running dispute.

⁵⁹ This is arguably what was happening between the Bishop of St. Andrews and Arbroath in a series of quit claims concerning several churches, all of which had been mentioned in a chirograph, which was then referenced in each of the quit claims. See *Arbroath Liber*, nos. 153-171.

⁶⁰ See generally, J. Merrills, *Dispute Settlement in International Law* (Cambridge, 1996) and J. Collier and V. Lowe, *The Settlement of Disputes in International Law* (Oxford, 1999) for an introduction into each of the areas of dispute resolution in the international arena. These same areas may be perceived in the dispute process in the medieval context, although rarely are they so clearly distinguished in the charters. One reason for relying on International law sources is the pan-European legal tradition of which Scotland was a part. Another is the 'international' reach of the papal curia and its influence. For distinctions between judging and arbitration, and rules governing them, see Lord Cooper, (trans and ed), *Regiam*

ecclesiastical and royal powers called upon in particular disputes in the twelfth century as in the modern world. These mechanisms were valued as part of the arsenal of approaches to dispute prevention and resolution not only by secular and religious leaders, but by lay individuals as well. All factions made use of these mechanisms for particular disputes.

In the modern world, this array of options is incorporated not only into the United Nations Charter, but also in the Hague Conventions on public international law and more importantly, private international law, where it may arguably be more useful. A dispute may be avoided with good planning, as is the usual approach in the drafting of a contract, and mechanisms for handling any disputes that do arise may be provided within the terms of the contract itself. Just as in modern contracts, examples of the planning and attempts to prevent disputes may be seen in the language used in donation charters.⁶¹ From the phrases, '*in elemosinam*' to the provisions for curses and then warrandice and maintenance, it is clear that the parties involved in the transactions reflected in the charters were thinking ahead from the time of the donation to when potential attacks or claims on the property donated might interfere with the original donors' intentions.

Majestatem and Quoniam Attachamenta (Edinburgh, 1947), specifically, *Regiam Majestatem, Book II*, chapters 1-10.

⁶¹ Donation charters were not, however, contracts in the modern sense, and should not be confused with them. See John H. Baker, *An Introduction to English Legal History* (London, 2002), chapter on Contracts and Conveyancing.

When examining the dispute process in medieval society, however, there are limitations and elements which must be acknowledged. To begin with, there is the assumption that there was a strict hierarchy of class and social position which would have permeated all aspects of life. But in anthropological studies done in the last (twentieth) century, of the attempts to 'delegalise' the processing of disputes (the influence of which may be seen in Roberts' approach), there were some interesting and thought provoking results. Francis G. Snyder, in a discussion concerning various movements in legal anthropology, quotes Abel in a review of delegalising movements, who 'showed that delegalisation assumed rough equality between social actors, a high degree of normative consensus and the existence of adequate informal controls. He (Abel) concluded that in capitalist societies, where these assumptions did not hold, delegalisation tended to be detrimental to the already underprivileged and powerless.'⁶² This supports the idea that a more 'law' centred and externally enforced dispute resolution process may equalise or even out any disparity between the relative power of the parties. One could argue that there was a 'delegalised' approach evident in the charters in the early part of the twelfth century, and as centralisation increased, so too did the more 'legalised' approach. But the evidence of disputes and how they were resolved from this time period argues against any idea of a lack of enforcement mechanisms.

⁶²F. Snyder, 'Anthropology, Dispute Processes and Law: A Critical Introduction', in *Law and Anthropology*, eds. Peter Sack and Jonathan Aleck, (Aldershot, 1992), 75, quoting from Abel, "Delegalization: A Critical Review of its Ideology, Manifestations, and Social Consequences", in *Alternative Rechtsformen und Alternativen zum Recht*, eds. Blankenberg, Klaus and Rottleuthner, (1979).

For example, in the case of Kirkness and Robert, ancestor of the family of Lochore,⁶³ one sees that in a pre-capitalistic society, where there is little if any centralised enforcement yet (*circa* 1128), there are mechanisms of enforcement which may be characterised as horizontal and communal rather than hierarchical and external.⁶⁴ For all the equalising effect of the communal approach, social organisation and hierarchy were important in the handling of disputes in medieval Scotland not only with regard to the parties themselves, but with regard to the status and position of the witnesses and judges.

Conceptions of what was just, however, might vary. The *Digest* 'defines justice as the constant and enduring will to give each what is proper to him.'

⁶⁵ This approach also incorporates the sense that justice may be applied differently depending on the circumstances and the station in life of the parties to the dispute. While this particular case seems to have been decided not only by lay judges, but also by those deemed to be knowledgeable about justice, it seems safe to presume that the application of justice in this case was accepted by the participants and by the community as a whole.

In contrast to this, where there is primarily or even exclusively external, centralised enforcement there is less requirement for a shared concept of justice, or how it should be administered. There is then a complete

⁶³ G.W.S. Barrow, 'The origins of the family of Lochore', *SHR* 77 (1998) 252-4.

⁶⁴ This case is discussed in more detail in the chapter on *noticiae*. p. 109-113.

⁶⁵ G. Evans, *Law and Theology in the Middle Ages* (London, 2002), 8.

subjugation to external means, which can be and often are forcefully imposed. One could see this solely as a mechanism of centralisation of the state, of accretion of power by a ruler, but that would only be half the equation. The other half is the acknowledgment and acceptance of that shift to a centralised power. For members of a society to give up local and individual autonomy, there has to be a reason. There is no charter evidence that there ever was, in Scotland, a complete autonomy for the individuals and local communities, since even the earliest charters show the king has authority over grants of property rights and some, if not all, disputes.⁶⁶ This is reflected in the fact that '[t]he huge majority of [charters] are in the king's name and may reflect royal aspirations to some extent.'⁶⁷ There is, however, evident in the charters of the twelfth century, a gradual shift to more centralisation and external, centrally administered and enforced decisions regarding disputes. This may be seen as early as the charters of David I where he uses the phrase, '*super meum forisfactum*'⁶⁸, '*super meam plenariam forisfacturam*'⁶⁹, or '*super meam defensionem*.'⁷⁰

This shift seems to have had at least two results. The first and most influential was the increase in perceived importance of the written word.

⁶⁶ No conclusions are drawn here for conditions prior to the written evidence.

⁶⁷ D. Broun, 'The Adoption of Brieves in Scotland', in *Charters and Charter Scholarship in Britain and Ireland*, ed. Marie-Therese Flanagan and Judith A. Green (London, 2005), 164-83, 165.

⁶⁸ Barrow, *The Charters of David I*, no. 172.

⁶⁹ *Ibid.*, no. 38.

⁷⁰ *Ibid.*, no. 188. These were not new sanctions. Rather, what was new was the focus on the king's authority to punish transgressions in the written documents themselves.

There was no mention of charters or writings of any kind in the Kirkness dispute. There appears to have been written evidence regarding the lands of the Céli Dé which arguably could have been used, but there is no reference to charters being used in the dispute with Robert of Burgundy.⁷¹ Very early in David I's reign the charter evidence reveals that documentation was important in proving property interests and rights.⁷² The second was the apparent grafting of one way of accomplishing the resolution of rights disputes onto another, pre-existing one. This is perhaps most evident in the combining of different forms of evidence to achieve the same end.

Legal pluralism has been defined as a 'situation in which two or more legal systems coexist in the same social field.'⁷³ There is very little evidence of what kind of legal system existed before the early twelfth century in Scotland. But that there was a coexistence of distinct laws and customs in the twelfth century that differed, sometimes markedly, can scarcely be doubted. Considering the separate rules for the Galwegians, the Burgh laws, and the importation of Anglo-Norman rules and approaches to administration of government starting at least as early as David I, one could argue that there was legal pluralism in Scotland in the twelfth century.

⁷¹ It should be noted that the Kirkness case not only took place after the Horndean dispute, but that it was in a different geographic location. Thus there may be local customs dictating the forms of evidence used. This is also an example of the unpredictability and nonlinear development.

⁷² See the Horndean case, discussed *infra*.

⁷³ S. Merry, 'Legal Pluralism', in *Law and Anthropology*, eds. Peter Sack and Jonathan Aleck, (Aldershot, 1992), 131-158, reprinted from an article which appeared in *Law and Society Review*, Volume 22, No. 5, 869-96 (1988).

In approaching the problem as one of legal pluralism, some assumptions must be accepted. One of these is the definition of a legal system; it must necessarily be flexible enough to encompass the customary law and norms followed by the various groups co-existing in Scotland, even though these various systems may not have measured up to the same definition of a legal system envisioned today. 'All local communities tended to develop their own laws and customs, which, even without charters, would with time acquire a certain validity which the community could try to maintain against its ruler.'⁷⁴

'Early medieval law was customary law, *unprofessional* customary law. It had general underlying principles but they were taken for granted rather than stated: they were general norms rather than what we would call legal rules.'⁷⁵

One way of viewing the litigation process between ecclesiastical and lay entities is as an evolution of power, and 'civil conflict'. These disputes, of which there are documents from the twelfth century, are almost always won by the church. There was of course, the tension between secular jurisdiction and ecclesiastical. This was a power struggle, which arguably was played out in the processing of disputes. Bias of the parties, especially the victor, must be acknowledged, but also the fact that the records are almost exclusively ecclesiastical in one sense may be interpreted as evidence of the relative

⁷⁴ S. Reynolds, 'English Towns of the eleventh-century in a European Context' in S. Reynolds, *Ideas and Solidarities of the Medieval Laity* (Aldershot, 1995), VII, 7.

⁷⁵ S. Reynolds, 'The History of the Idea of Incorporation or legal personality: a case of Fallacious teleology', in *Ideas and Solidarities of the Medieval Laity*, ed. S. Reynolds, (Aldershot, 1995), VI, 3.

positions of the parties. The victor not only wins the dispute, (presumably the *res* of the dispute as well changes hands or is more secure), but also the future perceptions of these disputes are controlled by the victor, since it is the victor who has written the history. 'This raises suspicions that the records bestowing property or privilege which are generically known to English-speaking historians as charters have been doctored or fabricated to the advantage of those who preserved them.'⁷⁶ Of course, not all charters are straightforward records of disputes. Therefore, even if there had been an actual dispute behind the charter, the record could very well be an edited or skewed version of the events. Thus, the writing of a record is a means of cementing the power garnered in the process of resolving the dispute. It is also a means of capitalising on the present gain for future needs of justification or rationalisation.⁷⁷

It has been suggested that 'access to justice was a key concept if one took seriously the litigant's perspective....in evaluating or ascribing a meaning to this notion, one had necessarily to take account of people's feelings and perceptions.'⁷⁸ This is not a new idea, and ample evidence can be found in the charters of individuals exercising their perceived rights to access the king,

⁷⁶ W. Davies and Paul Fouracre, (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), 1

⁷⁷ W. Brown, 'Charters as Weapons. On the role played by early medieval dispute records in the disputes they record' *Journal of Medieval History*, 28 (2002) 227-248. This article argues that charters concerning disputes were used by the monks for several purposes, including enhancing the images of the churchmen and the institution involved, undermining or even destroying the image (record) of their opponents, and promoting a particular agenda within the local and regional territories.

⁷⁸ Ibid, quoting from Nader, "Forums for Justice: A Cross-Cultural Perspective", 31 *Journal of Social Issues* (1975) 151-170 at 163

the font of justice, in resolving disputes. One of these, concerning the woman Leofgifu, was a brieve from King David I addressed to all responsible men in his land that her fugitive serfs were to be restored to her wherever they may be found.⁷⁹ While this may seem minor compared to larger disputes between a magnate and a monastic house, it was not a minor matter to the woman herself, and demonstrates that individuals (including women) exercised their rights to access the king in pursuit of justice.

The following discussion focuses on the disputes primarily during the reigns of David I, Malcolm IV and William I of Scotland. The approach taken will be to analyse the records of disputes, and where possible, further analyse the decision making process itself. This includes the way such records were used both in the prevention of disputes and in the use of records to prove or dismiss a claim. The whole notion of jurisdiction as not only a property right, but as a decisive factor in the resolution of a dispute becomes more prominent by the end of the twelfth century. Much of the methodology used to dissect the framework of facts, law/rule and decision maker is based on complexity theory, but the application is limited by the inability to quantify words or ideas. Even with these constraints, viewing the decision-making process within this context allows for a greater understanding of the immediacy and mutability of the process.

⁷⁹ Barrow, *The Charters of David I*, no. 142, p. 121.

The bifurcated analysis of these records demonstrates that there were two important shifts during that period. The first is the way such information was recorded, and the second was the way in which the first changes affected the decision making process and perceptions of those for and by whom such records were made. Lastly, each generation perceives the past in light of the present. These perceptions then feed into that generation's myths regarding identity, however defined.

CHAPTER III

JUDGES

The generally accepted wisdom regarding the institutions of justice in the twelfth and thirteenth centuries may be best summed up by a quote from Lord Cooper: ‘until the later years of the 13th century important civil controversies, when not settled by agreement or arbitration, were usually left to the decision of the skilled and ubiquitous ecclesiastical lawyers, who in Scotland found ample scope for their activities owing to the absence of a fully organized judicial system and a legal profession to work it’.¹ This conclusion has been challenged by others, including Hector MacQueen, who has discussed the development of the institutions of justice in his *Common Law and Feudal Society*, and in various articles.² His conclusions show that there were systematic approaches to administering justice in the courts of lay lords, but that they were subject to ‘royal correction and

¹ Lord Cooper of Culross (Cooper), *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944), xxvi.

² MacQueen, *Common Law and Feudal Society*, especially chapter 2; see also ‘Scots Law’ and ‘Expectations of the Law in 12th and 13th Century Scotland’, *Tijdschrift voor Rechtsgeschiedenis*, 70 (2002), 279-290. Barrow has also challenged this assumption, see his *The Kingdom of the Scots, Government, Church and Society from the eleventh to the fourteenth century*, (2d ed) (Edinburgh, 2003), 68-111. See also, *The Scottish Legal Tradition*, eds. Michael C. Meston, W.D.H. Sellar, The Rt. Hon. Lord Cooper, (Edinburgh, 1991), 29-64.

control'.³ These corrections would have been made by royal officials, either sheriffs or justiciars, or by the king himself. MacQueen focused his study on the thirteenth century rather than the twelfth. As he noted, '[F]rom the thirteenth century on, the evidence for the courts...becomes much more extensive.'⁴ Although it is most probably correct that the evidence becomes more extensive because there are more cases and more activity in the thirteenth century, as MacQueen noted, '[M]ost of what then becomes visible was probably also present in the twelfth century.'⁵ This view of the twelfth century extends to the administration of justice, to the judges and others who performed a decision-making role. Their roles become clearer with time and greater detail in the records, but a close examination of the records for what they do say as well as what they omit allows for a picture to emerge, not perfectly clear, but better defined than most historians have accepted thus far.

The rough outlines of what would become the structures of legal administration can be seen in David I's reign, but become more defined under Malcolm IV and especially under William I. If the approach to the topic is from an institutional basis, an examination of

³ MacQueen, *Common Law*, 66.

⁴ *Ibid.*, 37. This is in keeping with Susan Reynolds comment about legal historians focusing on the thirteenth century at least in part because of the more plentiful sources. See S. Reynolds, 'The Emergence of Professional Law in the Long Twelfth century', 21 *Law & Hist. Rev.* 348 (Summer, 2003).

⁵ *Ibid.*, 37.

the records for evidence of sheriff courts,⁶ justiciar courts,⁷ courts baron and procedural briefes,⁸ would lead one to conclude that there is a steady rise in the bureaucracy of the Scottish kingdom, and an increasing structure to the administration of law and justice. Most historians have indeed taken this linear, progressive approach.⁹ One could even conclude that the legal transplanting and borrowing acknowledged in the *Regiam Majestatem* was intentional and part of an overall plan.¹⁰

⁶ Eg., *The Sheriffs of Scotland*, eds. Norman H. Reid and G.W.S Barrow (St. Andrews, 2002) xlii-xlvii; William Croft Dickinson, *Sheriff Court Book of Fife* (Edinburgh, 1928), 'Introduction', xi-cv; Isabel A. Milne, 'The Sheriff Court: Before the Sixteenth Century', in *An Introduction to Scottish Legal History* (Edinburgh, 1958), 350-355; Barrow, *The Kingdom of the Scots* (Edinburgh, 2003), 1-68; *Habakkuk Bisset's Rolment of Courtis* ed. Philip J. Hamilton-Grierson, (Edinburgh, 1926), Vol. III, 29-36. Because I have found no evidence for courts or legal decision making by mairs, although they did perform administrative duties, I do not discuss them here.

⁷ Barrow, *Kingdom of the Scot*, (Edinburgh, 2003), 68-111; see literature cited in previous footnote. For all courts and procedures, see *APS*, I, 317-325 (David I), 363-365 (Malcolm IV), 371-392, (William I).

⁸ These are thoroughly discussed in Hector L. MacQueen, 'Pleadable Briefes, Pleading and the Development of Scots Law' 4 *Law and History Review* (1986) 403-22, and *Common Law and Feudal Society in Medieval Scotland*. See also Hector Mc Kechnie, *Judicial Process upon Briefes, 1219-1532* (David Murray Lecture) (Glasgow, 1956).

⁹ See for example, W.C. Dickinson, *The Sheriff Court Book of Fife* (Edinburgh, 1928), 'Introduction'; Walker, *The Scottish Legal System* (Edinburgh, 1992); I. Willock, *The Origins and Development of the Jury in Scotland* (Edinburgh, 1966); *Habakkuk Bisset's Rolment of Courtis*, Vol. III, ed. Philip J. Hamilton-Grierson (Edinburgh and London, 1926), 'Introduction'; as well as the first three chapters in Barrow, *Kingdom of the Scots*.

¹⁰ Cooper, 'Introduction', *Regiam Majestatem* (Edinburgh, 1947), 9. He stated that 'We borrowed at an early date several of the most notable and suggestive remedies- the writ of right, mortancestor, and novel disseisin for example- and though each of these received in course of time individual Scottish characteristics, there need be no doubt whose was the master patent for these fruitful and ingenious inventions. We even picked up many useful ideas on such technical matters as citation, essonzie, procedure in absence, advocacy, the assise of error, and registration for execution.' See also Alan Harding, *Medieval Law and the Foundation of the State* (Oxford, 2002), 199, concludes that the 'compilation of the *Regiam Majestatem* may possibly have stemmed' from a reaction to English legal imperialism early in the fourteenth century.

While there is no intention here to negate or disagree with the validity of this linear development perspective *per se*, an examination of some of the charters during the reigns of David I, Malcolm IV and William I allows for further conclusions about not only the structure of these administrative units, but of procedures followed, and then current perceptions about the administration of justice and the roles of the various officials. The process was at once more complex and much simpler than current historiography would suggest. There is more complexity in the decision-making and procedural norms discernable in the documents individually, and more simplicity as well, because of the *ad hoc* nature of supplying or fashioning solutions to immediate problems. There was a direct shift in the position of the king with regard to dispute resolution, from a mediator or arbitrator to a central figure making decisions about evidence (in a graphic sense, a shift from a more horizontal structure to more vertical), procedure and final outcomes; a similar shift is not seen for justiciars and sheriffs for the simple reason that these offices were imported during the twelfth century, and they, derivatively as the king's agents, were more central figures from the beginning. Their position in the shift to verticality, as it were, did not really change. As to the *judex*, it has been argued that their roles became more peripheral with greater centralisation but they were vital and integral parts of the disputing process well beyond the

end of the twelfth century. They did, however, move to a lower position in this more vertical orientation of the disputing process.

Any discussion of the secular institutions of justice has been focused on the *office* involved, whether of the sheriff or the justiciar, and to a limited extent, the *judex*.¹¹ This may be due in part, perhaps, because the first two were imported and more easily delineated than the latter. The fact that for some of the early cases involving a *judex*, the record is actually more explicit than the concurrent records involving the activities of a sheriff or justiciar may be a reflection of contemporary perceptions and record-making practices rather than a lack of activity on the part of these latter officers. In other words, the relative absence of detailed records of judicial process or decision-making by these imported offices early on may indicate that they and their activities were taken for granted more than the *judices*, at least by those making the records. These scribes, mostly clerics, would have been recent transplants and thus arguably more familiar with the workings of a sheriff or justice as seen elsewhere.¹² In addition, the very structure of the records reflecting disputes changed, becoming less a narrative, descriptive history and more a record of acts and procedures that were

¹¹ Barrow, *Kingdom of the Scots*, chapter 3, 'The *Judex*'.

¹² John Bannerman, 'MacDuff of Fife', in *Medieval Scotland: Crown, Lordship and Community: Essays presented to G.W.S. Barrow*, eds. A. Grant and K.J. Stringer (Edinburgh, 1993), 23.

increasingly perceived to be within a more formalistic, legal structure.¹³

Both Barrow and MacQueen have noted problems with Cooper's summary dismissal of any judicial system before the end of the thirteenth century.¹⁴ This approach has coloured the perceptions of most twentieth century historians when examining the record evidence for signs of a judicial system.¹⁵ Part of the problem lies in attempting to approach the problem from an external perspective. Barrow and others have started with a discussion of Scottish government, and the mechanisms of enforcement.¹⁶ While both of these factors are important in their own right and impact on any understanding of the administration of justice, an understanding of how disputes were prevented and resolved should also include an examination of the individuals (and perceptions about them) who actually made judgements, and to the extent possible, the decision-making process itself. Including this approach may help to circumvent the limitations

¹³ This is discussed in more detail in the chapters on *Noticiae* and Charters, *infra*.

¹⁴ Barrow, *Kingdom of the Scots*, 2nd ed. (2003), especially chapters 1-3; MacQueen, 'Scots Law under Alexander III', in Norman H. Reid, (ed), *Scotland in the Reign of Alexander III* (Edinburgh, 1990), 74-102.

¹⁵ This approach, while most succinctly stated by Cooper, pervades earlier writings as well. The summaries of the administration of justice by Dickinson, Hamilton-Grierson, and others emphasise the offices and structure of government rather than the cases, decisions and decision-makers. While this is understandable given the structure of the records themselves, it leads to the perception that the structure of decision making may have been fundamentally different from that of later judgements. It should be noted that Cooper, in *Selected Scottish Case of the 13th Century* (Edinburgh, 1944), does attempt to approach the material on a case study basis, which in effect, places the material in a format similar to modern case decisions.

¹⁶ Barrow, *Acts of Malcolm IV*, 35.

imposed by the records themselves, although it presents its own problems of analysis.

THE KING

Although there are a few records from the reigns of kings of Scots from 1094 to 1124, they provide only hints for the details of the means and mechanisms of preventing and resolving disputes. One may, however, discern in the reigns of these earlier kings the outlines of the framework of justice and the role of the king as the font of justice.¹⁷

The record evidence from Scotland demonstrates that the position of the king shifted in judicial matters from that of mediator or arbitrator, to a more active, central role as decision-maker. As Pennington has noted, the king or prince was 'not at the center of a trial before the thirteenth century. Rather, the community gathered around him in court, dictating the course of a trial and determining its outcome'.¹⁸

¹⁷ Issues of constitutionality, detailed discussion of government and the nature of kingship are beyond the scope of this thesis. Scotland was well within the common European experience during the twelfth century, and its kings were operating in essentially the same cultural milieu as other monarchs during that period. See A.A.M. Duncan, *The Kingship of the Scots, 842-1292, Succession and Independence* (Edinburgh, 2002); James C. Holt, *Magna Carta* (Cambridge, 1992), especially Chapter 4, 'Custom and Law', 75-122; R.C. Van Caenegem, *Legal History: A European Perspective* (London, 1991), 71; and generally, O.F. Robinson, T.D. Fergus, W.M. Gordon, *European Legal History, Sources and Institutions* (London, 1994).

¹⁸ Kenneth Pennington, 'Due Process, Community, and the Prince in the Evolution of the *Ordo iudicarius*', <http://www.maxwell.syr.edu/inaxpages/classes/his381/procedure.htm>, 1-24, at 1; also published in *Revista Internazionale di diritto commune* 9 (1998), 9-47.

The extant early Scottish charters from Duncan II (1), Edgar (8) and Alexander I (10) showed similar uses for charters as found elsewhere in Europe, but there are not enough of them to draw firm conclusions regarding the details of the administration of justice.¹⁹ There are hints, however, that even then, the king's role was shifting. Alexander I's charter telling the prior not to do anything with regard to the settlement of a dispute concerning Swinton is one of the earliest pieces of evidence that the king had an active role in the resolution of disputes.²⁰ It seems that, at the least, Alexander intended to be present when any decision regarding Swinton was made and may have intended to preside over the proceedings himself.²¹

The evidence for the role of the king with regard to the settlement of disputes becomes more explicit during the reign of David I. This cannot be attributed solely to the increase in records, but to some degree of course, it is the result of the establishment of administrative procedures during his reign. David I had been involved in the resolution of disputes well before becoming king of the Scots,²² and

¹⁹ A. C. Lawrie, *Early Scottish Charters Prior to A.D. 1153* (Glasgow, 1905), 1-44.

²⁰ *Ibid.*, 22. This case is discussed in more detail *infra*. The charters of King Edgar also show adherence to the pattern of use regarding certain phrases in grant charters.

²¹ This may also have been a contested issue of jurisdiction between the lord of Lothian, David brother of the king, and King Alexander himself. See Duncan, *The Kingship of the Scots*, 62.

²² J. A. Green, 'David I and Henry I', *Scottish Historical Review*, 75 (1996) 1-19, at 11, where she pointed out that David had been a royal justiciar in England under Henry I.

had fairly extensive experience while at the court of Henry I.²³ After his marriage to Maud de Senlis, he was involved in the settlement of disputes by virtue of holding the Honour of Huntingdon. He acted as mediator,²⁴ presiding judge,²⁵ and even as the one before whom an appeal was brought in a matter previously decided.²⁶ All of these roles were repeated after he became king. The breadth of roles, which David filled both before and after his inauguration, shows that the shift to more central authority was gradual, fluctuating and inconsistent. While David I may indeed have had a plan to import administrative practices, it would have been based on his own experiences as Earl of Huntingdon, and his experience at the court of Henry I. There are no records where his intentions are stated, thus it is possible that this importation was simply a practical *ad hoc* means to achieve just results rather than an overt intention to impose a structural framework over the existing practices.

When David I first became king, he appeared to have been willing to allow the established means of doing justice to continue, and only gradually to integrate the offices of sheriff and justiciar with the local

²³ *Habakkuk Bisset's Rolment of Couris*, Vol. III ed. Philip Hamilton-Grierson (Edinburgh, 1926), 7; E.W. Robertson, *Scotland Under Her Early Kings* (Edinburgh, 1862), I, 235; A.C. Lawrie, *Early Scottish Charters Prior to A.D. 1153* (Glasgow, 1905), 262, 265.

²⁴ See Peverel case, *infra*.

²⁵ See criminal case –can't remember the name, in addition to cases such as the inquest of Glasgow.

²⁶ See the Horndean case, *infra*. While a formal appellate process cannot be concluded from the evidence, aggrieved parties could, and did seek redress from Earl David.

thanes and *judices*.²⁷ This may be concluded from the apparent refusal to render summary justice himself upon the request of the Céli Dé in the Kirkness dispute. Instead, David convened a hearing to be conducted in the traditional manner. There was no wholesale imposition or attempt to eradicate existing customs and laws, as seems to have been feared much later in Scottish history, during the reign of Edward I of England.²⁸ David made use of existing practices and officers, supplementing where needed. His importation of administrative procedures seems to have been largely limited to the land south of the Forth, along with his grants to newly arrived land seekers.²⁹ This would mirror the extent of immigrant implantation during his reign, supporting the idea that this was a gradual integration rather than an imposition of foreign ways.

This pragmatic approach to the administration of justice did not appear materially to change the rules or norms under which David I operated as an individual. Grants made in the king's name seem to have been bound by the same rules as other grants, and the language in charters reflected duties that accompanied all such grants. There is a notable

²⁷ Michael C. Meston, W.D.H. Sellar, Rt. Hon. Lord Cooper, *The Scottish Legal Tradition* (Edinburgh, 1991), 34, 35. Sellar notes that the Celtic law was 'gradually integrated until at length virtually unrecognisable' as was the *breithheamh* or *judex*. He further notes that the 'Anglo- Norman law ... was adopted or received by the kings of Scots themselves rather than imposed from without by conquest.'

²⁸ MacQueen, 'Scots Law', 84.

²⁹ A.A.M. Duncan, *Kingship of the Scots, 842-1292, Succession and Independence* (Edinburgh, 2002), 79.

one datable to 1145x1153, where David grants lands to Walter of Ryedale in Roxburghshire.³⁰ The charter explicitly states a remedy to be provided by the king, in the case of failure of the king's warrandice: *et si ego aut heredes mei Waltero vel heredibus suis predictas terras propter iustam alicuius calumpniam warrantizare non poterimus, ego et heredes mei ei et heredibus suis excambiam ad valenciam ad suum rationabile grahamt dabimus.*³¹ The rules or norms of inheritance and grants appear to have applied no matter who the parties were. The language supports the conclusion that, with regard to measures found within the grant charters to secure the transfer of rights, even the king was bound by rules that protected the grantee from future claims. The only requirement seems to have been that the donor be a free man.³²

The role of the king apparent in David I's charters with regard to disputes continued to be more clearly defined under Malcolm IV and William I, with more examples of royal acts of justice, and increasing detail concerning the king's actions as a judicial decision-maker.

Although 'there are very few references to Malcolm IV exercising his

³⁰ Barrow, *Charters of David I*, no. 177.

³¹ Ibid. Barrow compared the warrandice language in this matter to the warrandice language given by T. Madox, *Formulare Anglicanum: Et si contigerit quod non ei possim warrantizare illam, dabo ei excambium alibi ad suum grantum, et ad vallitudinem illius predictae terre* (in the time of Robert II earl of Leicester, d. 1168). Barrow also noted that this record survives as a judicial transumpt in the justiciar's court held in 1506.

³² *Glanvill*, VI, 18: 'Every free man who has land can give a certain part of his land...'

judicial functions'³³ there are numerous references to his agents acting in their judicial capacities.³⁴ There are numerous charters reflecting disputes or complaints brought by monks directly to the king, and relief was granted.³⁵ Horndean³⁶ is unique in that it is clear the king is making decisions regarding procedure, but there is at least one case where Malcolm IV required proof of a quitclaim from the prior heirs of the fee in question before a subsequent grant was to be confirmed.³⁷ Although there are no details beyond Malcolm IV's charter, judicial action is implied, and the king's role as the one requiring certain kinds of proof is explicit. There is no way to determine for this case whether the proof required was a charter or simply witnesses. There are other charters where it is clear that there was a hierarchy of officials before whom complaints could be brought, and procedures to be followed in the case of failure to procure justice.³⁸

The picture of Malcolm IV generally has been an oscillation between a weak, ineffective king who did not keep the peace, and a vainglorious,

³³ Barrow, *RRS*, i, 49.

³⁴ *Ibid*, 35-52. Nos. 144, 145 (steward and men of the Honour of Huntingdon ordered to maintain justly the monks of St. Andrew's Priory), 153 (order to steward to enquire into a will), 198, 199 (perambulation)

³⁵ *Ibid*, nos. 126, 151, 154 (confirmed a prior grant and gave the monks the right to deal with the land as if it were their own in case of failure to pay the *render*, in essence forfeiture on failure of payment), 167, 170 (blanket order to repay debts owed to brethren of Hospital of St. Andrews), 173 (confirms chirograph), 177, 179, 181, 211 (order to Elstow convent to give possession of certain property to Nostell Priory or the king's sheriff will do so), 220, 233, 242, 245 (grant of all teinds of all pleas), 247 (one of the few references to trial by battle or ordeal). These are some of the charters of Malcolm IV that reflect judicial actions by the king or his officers.

³⁶ The case is discussed *infra*.

³⁷ *RRS*, i, no. 206.

³⁸ *Ibid*, no. 253.

ambitious military leader.³⁹ Although Barrow himself notes that there are few charters that show him rendering judicial decisions, Malcolm IV is described by his contemporaries as 'having a concern for equitable justice, he dealt fair judgement between man and man, and bringing the inflexible penalty of the law to bear upon thieves, robbers and traitors...'⁴⁰ When comparing the charters of David I and his grandson Malcolm, and indeed, with the charters of William I, it would be easy to conclude that both David I and William I were more active, more proactive in the prevention and resolution of disputes than Malcolm IV seems to have been, a perception fed by the greater number and more explicit detail of David I's charters dealing with overt disputes and the sheer number of William I's charters. The evidence, however, when read for what it does not say as well as what it does, points to a king following in his grandfather's footsteps, building on the administrative and judicial practices already in place, and delegating judicial authority to officials whose duties seem to have been well understood, even if they are not explicit in the charters.

Under William I the role of the king is portrayed in more detail in the records. While William I continued to perform the same types of functions regarding the administration of justice as his brother and grandfather, he also was more active in asserting royal jurisdiction, and

³⁹ Barrow, *RRS*, i, 25.

⁴⁰ *Ibid*, 26.

was called upon, as were David and Malcolm before him, to mediate disputes as well as resolve them directly.⁴¹ With regard to disputes or potential disputes, a similar situation held: where the king was one of the parties, the same rules appear to have been applied as with other contesting parties. Perambulations were conducted before witnesses.⁴² The king walked the disputed lands along with his men, or delegated the marching of boundaries to his responsible men. Generally, there is more written evidence that William I was involved personally in the resolution of disputes than his brother. This does not mean that Malcolm IV did not act in the same capacity, just that the charters are more explicit under William I as to his presence.⁴³

The procedural hierarchy reflected in the charters of all three kings becomes more explicit. The move to a more central role that the documents show had begun early in the twelfth century continued. But

⁴¹ Cases involving David I as mediator, discussed *infra*; for Malcolm IV, there are inferences, especially in the Calendar of Act of Malcolm IV, nos. 312, and 313. William I's role as mediator and arbitrator shows that the process was not a continuum, and would not fit a linear model.

⁴² Barrow, *RRS*, II, no. 130. This is a grant to Dunfermline Abbey and the chapel of Stirling certain land in exchange for the land that King William I took as part of the King's Park. The perambulation was conducted by Richard de Moreville, constable, Robert Avencel, Justiciar, Ralph the sheriff, and Peter of Stirling.

⁴³ Barrow, *RRS*, II, nos. 35 (Balchrystie); 84 (Hardingstone) and comments. Barrow notes that this charter may reflect a dispute between William de Vieuxpont and Delapr . There are other charters where it is clear that the dispute was resolved in the presence of the king, including nos. 105, (Edrom); 165 (which supports the conclusion that William was not literate), 236 (de Moreville), 249 (East Kilbride), 252 (Moorfoot), 364 (Alan son of Walter vs. Melrose Abbey), 430 (Muckcroft), 483 (Dunbar vs. Melrose), 491 (Leuchars), 496 (Bangour). A number of William's charters also reflect disputes that were probably settled in his presence, or at least finalised, but the texts do not always announce that these matters were resolved before the king himself.

the hierarchy of administration was set in place during David's reign, and does become more explicit in the charter evidence from Malcolm IV and William I. There are charters setting out the procedural steps and duties of the officials from King Malcolm IV and William I which may be based on earlier charters of David I.⁴⁴ Behind these charters are individuals whose complaints were being addressed by the king in a variety of ways. Most involve property rights of course, but there are also issues concerning jurisdiction, procedure, and evidence.⁴⁵ The most telling charters setting out the procedural steps to be followed are those involving the enforcement of collection of tciinds in various parishes throughout the kingdom. The fact that these charters reference prior acts from earlier rulers, and repeat the same hierarchy indicates that these procedures were well known and accepted. It does not appear, however, that they were always followed by the officials involved.

The parishioners of various churches seem to have had a problem paying their teinds during the reigns of both Malcolm IV and William I. One of Malcolm IV's charters, datable to 1153x1165, concerned

⁴⁴ There is no single extant prototype charter of David I on this, but there are references to the practice set out in the charter to those of King David I. In fact, William I's writs refer to the 'assise of King David' as authority for his own commands to his officers to enforce tiends. See Barrow, *RRS*, ii, no. 132; see also Duncan's comments on this, in *Kingship of the Scots*, 114.

⁴⁵ These topics are covered in greater detail, *infra*.

teinds payable to Glasgow.⁴⁶ There is a detailed ordering of officials, and list of what can be paid in teinds. It is addressed to '*Justiciariis, baronibus, vicecomitibus, ministries, Francis et Anglicis, Scottis, Walensibus, Gauelensibus, et omnibus ecclesie Sancti Kentigerni de Glasgu et eiusdem episcopi parrochianis*' which implies that there may have been at least one justiciar living within the bishopric of Glasgow during Malcolm's reign, although, as in other charters of Malcolm IV, there are no names given for the justiciar. Malcolm IV ordered that the sheriff take the forfeiture from anyone withholding teinds, and should the sheriff fail or 'connive' at the withholding, then the king's justice is to take a forfeiture from the sheriff, 'lest a complaint should reach the king through default of justice'.⁴⁷ Since this was the second order to his sheriffs and mairs within the diocese of Glasgow regarding the revenues due the church, it would seem that Glasgow was having a more severe problem than other places, although they were not alone.⁴⁸

A similar problem occurred during William I's reign in a different region. In a charter addressed to all his responsible and faithful men of Moray, King William I commands them all to pay teinds to their churches, parsons and officers of those churches, all ecclesiastical dues

⁴⁶ Barrow, *RRS*, *i*, no. 258. This is also one of the very few charters to use the word '*lex*' rather than '*ius*'.

⁴⁷ *Ibid.*

⁴⁸ Barrow, *RRS*, *i*, 242 (Glasgow); 233 (St. Andrews Priory).

and all teinds.⁴⁹ If anyone withholds his teind, then he is to be compelled to pay it by the sheriff in whose jurisdiction he lives, along with the same forfeiture taken in the diocese of St. Andrews.

There is a subsequent charter that seems to be on the same topic. The people of Moray appear to have been recalcitrant in paying their teinds, and perhaps the officials were at least slack in enforcing the first charter. The second charter⁵⁰ is even more detailed. It commands all the responsible men of Moray to pay their teinds, listing all the kinds of teinds due, including any annual increase. If anyone withholds his teinds, he will be compelled to pay it and a forfeiture, 'according to the assize of King David I' and as was the custom in his day and still is in the diocese of St. Andrews. Then the charter lays out the levels of recourse and enforcement from the lowest to the highest. If the neyf refuses, the thane in whose jurisdiction he lives or his lord shall compel him and take the forfeiture. If the thane himself or the lord will not compel the neyf or withholds his own teind, then the sheriff shall compel the detainer to pay both the teinds and the forfeiture to the king. And if the sheriff is negligent in executing this command or withholding his own teind, the king's justiciar shall compel the detainer to pay the teind and pay a forfeiture of 8 cows to the king.

⁴⁹ Barrow, *RRS*, ii, no. 132; *Moray Registrum*, no. 1. Barrow dates this charter to 23 January x April 1172, fairly early in William's reign.

⁵⁰ *RRS*, ii, no. 281, datable to 1185x1189, probably 1187x1189.

The ordering of the payment of teinds found in William's charters addressed to the men of Moray is similar to the order in a charter of David I, in favour of the church of the Holy Trinity of Urquhart.⁵¹ This charter is dated towards the end of David's reign, 1145x1153, perhaps as late as 1152x1153. Although David I had exercised at least nominal control over Moray since 1130,⁵² there are few charters surviving from his reign directed to any church entities in that region. Lawrie noted that '[I]n the second great charter to the Abbey of Dunfermline, King David granted the half of his tithe of Ergaithel and of Kentir.' He further noted that this was 'the only mention of a grant of the tithe of the can of Moray'.⁵³ Although there were bishops of Moray, of course, there do not seem to be any other extant charters from David's reign specifically addressed to them. This charter granting *inter alia*, a tenth of the king's *cain* of Argyll and of the king's pleas and all revenues from that province, may be the basis for William's later order to pay up, although the language in William's charter seems to refer to the customs of St. Andrews. While there are numerous charters from David's reign concerning Dunfermline, there do not seem to be specific charters relating to Moray in the *St. Andrews Liber*, and no specific charters concerning St. Andrews delineating the

⁵¹ Barrow, *Charters of David I*, no. 185; *FSC*, no. 255; *Dunfermline Register*, no. 33; *Moray Register*, 254. Although they are different types of teinds, the hierarchy of payments and who would be responsible for enforcement is notable.

⁵² Barrow, *RRS*, i, 43. Barrow states that it came 'directly under royal control on the death of its last morraer, Angus, in 1130.'

⁵³ Lawrie, *ESC*, 442.

hierarchy of offices and remedies as found in these charters. This charter concerning Urquhart is found in both the *Moray Register* and the *Dunfermline Register*.⁵⁴

There are three possible options as the basis for William I's charter. Either there was such a charter more specifically related to the matter discussed in King William's charter and it is now lost, the charter to the Holy Trinity in Moray is the basis, or William I is essentially saying that these customs have been in force since King David's time in one diocese, and they should be followed in Moray as well.⁵⁵ It is not clear whether the 'assize of King David' applied to Moray specifically, to St. Andrews, or generally to the whole realm. Since there are numerous charters from King David that address the enforcement of teinds, it is difficult to assign just one of them, absent the naming of Moray, as the definitive precursor to William's charter. But the idea is there that this was not new, either substantively or procedurally. These practices had been in force since David I's reign, and William I expected them to continue during his reign. In fact, there are several later charters issued by William I relating to the payment of tiends, indicating that while there were enforcement procedures in place, and the expectation of compliance, they were not always pursued to the satisfaction of the complainants.

⁵⁴ *Moray Registrum*, no. 254; *Dunfermline Registrum*, no. 33.

⁵⁵ This is not the only time William commanded the payment of teinds as they had been rendered in the past. See *RRS*, ii, no. 189, referring to Glasgow.

The hierarchy set out is not just for enforcement of payment of teinds, but details the steps the church *needed* to take before reaching the king in pursuit of these payments. The first step is the neyf who owes. If there is default of payment recourse goes up the chain to the thane, or lord, then the sheriff, then the justiciar. This sets out very clearly and methodically the levels of officials and their jurisdiction. The sheriff presumably would want to ensure that the thane or lord had at least attempted to enforce the payment, or had been asked to pay his teinds before being petitioned to do something about it. There is not just a methodical, procedural approach to remedies for this complaint, but there is the citation of authority. Not only does William's charter refer to the assize of David I, but to the customs, past and present, of the diocese of St. Andrews. The charter makes distinction between custom and what may well be a written order from King David.

While it may be stretching the argument a bit to call this a reference to 'precedent', it is an example of the 'self-referencing' and reversion discussed above. By referring to earlier and current customs and the assize of David I, William is bolstering the authority and justification for his command. Technically, as king, he does not need to do this. In earlier charters, specifically David's, there are few references to earlier commands, or to earlier royal orders. There are few, if any references

to the laws of Malcolm III, or to Alexander I or to Edgar, when issuing orders or enforcing them. David does refer to grants and charters of these earlier kings, but not to their government, their assises or procedures followed during their reign.

Another factor which may be gleaned from these charters is the implied realization of dereliction of duty on the part of officials at the least, and overt corruption at worst. The provisions for enforcing the collection of teinds and forfeitures from the officials who may have been lax in performing the duties of their office indicate royal awareness of such problems.

Under William I the role of the king is portrayed in more detail in the records. As indicated, this does not mean that William I actually acted any differently than his predecessors; it does mean that the records are becoming more detailed, and the use of writing as a means of bolstering the authority and presence of the king is more widespread.

JUDEX

The term *judex* is found in Scotland, England and indeed, throughout Europe in various forms during the Middle Ages.⁵⁶ The office of *judex* seems to have been common in England as well as Scotland.⁵⁷ English documents reflect several officials whose duties are discrete from one another. The records from Scotland however show that the *judex* seems to have been a composite of the roles set out in similar charters of disputes in England. The *judex* in Scotland declared the law, but also swore the witnesses. This does not seem to have been the case in England. Several other historians have discussed the nature of the *judex*. Barrow has concluded that not only was the *judex* a 'tenacious survival of an ancient judicial caste,'⁵⁸ but that they were attached to a geographic region, and were important in the administration of law and justice.⁵⁹ The *judex* might be called upon to perform a number of duties that were discrete, separate roles in England. A *judex* seems to have served as actual judge, expert witness, repository of knowledge about local customs, laws and norms, juror, and what may be termed

⁵⁶ This section does not directly address the origins of the jury, although the jury and the office of *judex* are certainly related. See, Ian Willock, *The Origins of the Jury*, Stair Society. See also, Mike MacNair, 'Vicinage and the Antecedents of the Jury', in *Law and History Review*, Volume 17, Issue 3, 1-36, <http://www.historycooperative.org>.

⁵⁷ David Bates, *Regesta Regum Anglo-Normannorum, The Acta of William the Conqueror, (1066-1087)* (New York, 1998). There are numerous references to the *judex*.

⁵⁸ Barrow, *Kingdom of the Scots* (2003), 57.

⁵⁹ *Ibid*, 58. Barrow's is the most comprehensive study of the office of *judex* thus far, although the older literature should not be ignored.

bailiff, court official or macer in the modern sense.⁶⁰ The duties of bailiff/court official/macer would include swearing witnesses and jurors, keeping order in the proceedings, and essentially guarding the conduct of the proceedings.⁶¹ A more negative reading of this

⁶⁰ W.C. Dickinson, *The Sheriff Court Book of Fife, 1515-1522*, (Edinburgh, 1928), lxvi-lxvii. Dickenson attributed the decay of this office to 'the development of feudalism, the growth of national law and, with it, written court record' at lxvii.

⁶¹ The Scottish Courts Website, duties of court official/macer.

<http://www.scotcourts.gov.uk/index1.asp?path=%2Fsheriff%2Fhistory.htm>.

Compare the role of the *judex* or *judices* to the Carolingian *scabini*, which Susan Reynolds terms 'collective assessors or judgement-finders.' S. Reynolds, *Kingdoms and Communities*, (1997), 23, and the role of the Sacrabar, detailed by D.M. Stenton, *English Justice Between the Norman Conquest and the Great Charter, 1066-1215*, (London, 1965), 55-56, as a court official or public prosecutor. The definition given in R.E. Latham (preparer), *Revised Medieval Latin Word-List from British and Irish Sources*, (London, 1999), 415, is 'public prosecutor in local court (Norse *sakar-ábert*); -barrum, (?) action instituted by the same.' J.M. Kaye, 'The Sacrabar', *EHR* 83, 1968, 744, argues that contrary to D.M. Stenton's views in *English Justice*, the sacrabar was not a public prosecutor. Rather the meaning of the root word from Old Scandinavian, of 'bearer of a suit' seems to be the one intended. The references in the English charters point to this as a right; the reference in Thomas Mackay Cooper, *Regiam Majestatem and Quoniam Attachimentia*, (Edinburgh, 1947), 311,312 which is also contained in T. David Fergus, (ed), *Quoniam Attatchiamenta*, (Edinburgh, 1996) Ch. 1, 117, refers to "Attachments in cases of 'wrang and unlaw and other actions which are pursued by sickerborg'", that is, civil wrongs such as delicts. Cooper's determination that the word sickerborg means 'sure caution' seems to have been founded on Sir John Skene's definition of 'sacreborgh' as equivalent to '*securus plegius*'. Fergus refers back to Skene *De Verborum Significatione*, *Habakkuk Bisset*, *The Sheriff Court Book of Fife* and Cooper in support of this same interpretation. This interpretation may also find support in what Balfour has written on the subject; see P. G. B. MacNeill, (ed), *The Practicks of Sir James Balfour of Pittendreich, Vols. I, II*, (Edinburgh, 1962), 210, 214, 505. It seems however, that this may actually be a variant of sacrabar, especially since the variants include the spelling 'sacreborgh'. See *Habakkuk Bisset's Rolment of Courtis*, Vol. III, ed. Philip J. Hamilton-Grierson (Edinburgh and London, 1926), 54. See also Woodbine, *Bracton De Legibus et Consuetudinibus Angliae*, Vol. II, trans. and ed. Samuel E. Thorne, (Cambridge, Mass. 1968), 425. If indeed the root of both may be interpreted as the 'bearer of suit', there may be a relationship between the sacrabar or sickerborgh and the jurors or suitors. If so, it would be another instance of legal borrowing from pre-Norman, Anglo-Saxon England. Another aspect must not be ignored, although proving it is difficult. The terms *sac et soc* are jurisdictional, and include the right to hear pleas of one's tenants. See also D.M. Hadley, *The Northern Danelaw*, (London, 2000), 168, where she notes that '*sac*' meant cause or dispute in the legal sense. There seems to be not only a procedural aspect to the term sacrabar but a jurisdictional one as well. See Lawrie, *Early Scottish Charters*, (Glasgow, 1905), 48, 306. Pollock and Maitland, in *The History of the Common Law before the time of Edward I*, Vol. I (Cambridge, 1968), 579, states that *team* 'ought to mean the right to hold a court into which outsiders may be vouched as warrantors, or, to use a more technical term, the right to enforce a 'foreign voucher.' They go on to state that 'The word *sac* (or, as

combination of roles would be that given by Cooper when he concluded that, '[I]t is hardly possible during the period under review to disentangle the functions of a member of an assise as a judge of fact from his functions as himself a witness to fact, the latter functions long predominating.'⁶²

John Bannerman has a slightly different approach to the references to the *judex*. He stated that the *judex* might have been a term used for 'justiciar'.⁶³ He based this on the fact that the record of the Kirkness dispute had been translated into Latin from Gaelic. If the phrase referring to Earl Constantine, who was called '*magnus judex in Scotia*' had been translated from Gaelic, it might have first been '*brithem mór i nAlbain*'. This would have been the Gaelic equivalent of 'justiciar in Scotia', which Constantine, as Earl of Fife, may have been.

MacQueen's interpretation of this case is in keeping with this version.

MacQueen states, '[T]he dispute was resolved in the court of Fife and

we had better spell it, *sake*), the Anglo-Saxon *sácu*, the modern German *Sache*, means thing, cause, matter...in legal language it means a cause, a matter, an action...a grant then of *sake* should be a grant-by a very general term- of jurisdiction.' Perhaps there was, in Skene's Scotland, a conflation of the meanings of *team* and *sake*.

⁶² Cooper, 'From David I to Bruce, 1124-1329', in *An Introduction to Scottish Legal History*, (Edinburgh, 1958), 11.

⁶³ John Bannerman, 'MacDuff of Fife', in *Medieval Scotland: Crown, Lordship and Community*, eds. Alexander Grant and Keith J. Stringer (Edinburgh, 1998), 23. He refers to Barrow on this point, in support of this interpretation; Barrow, *The Acts of Malcolm IV*, 50, has stated '[W]e cannot trace any organic link between the office of Justice on the one hand, an obviously Anglo-Norman innovation, and the office of *judex (brithem)* on the other, an ancient institution of Celtic Scotia and Cumbria.' See also, R. Andrew MacDonald, *The Kingdom of the Isles, Scotland's Western Seaboard, c. 1100-c. 1336* (East Lothian, 1998), 59-60, where MacDonald discusses the translation of Gaelic titles into Latin equivalents.

Fothrif, presided over by the earl of Fife, "great judge in Scotia", and two *judices*, who ordered the restoration of the *célidé*.' He then goes on to state that 'this was clearly the earl's court in action, (and) the office of earl had a predominantly public character at this period, and the proceedings were commanded by the king'.⁶⁴

The precise nature of the role and duties of the *judex* is uncertain. One position that has been accepted is that the Scottish office was inherited from the Irish, which would mean that these men were in a sense, professional lawmen.⁶⁵ The Scottish charter evidence, however, shows that the men called *judices* served a number of functions. This would be in keeping with much of the rest of continental Europe in the early Middle Ages, where 'the legal expert ... was often no more than a man who happened to be knowledgeable in the law. His expertise was a source of social and political influence but not of his daily livelihood nor was it acquired by a formal education.'⁶⁶ Although Lawrie states these men are 'practically witnesses in the modern sense',⁶⁷ and it is tempting to limit their role to witnesses and fact finders, they are more than either of those roles. In one case, they had been described as

⁶⁴ H. MacQueen, *Common Law and Feudal Society*, 43. This interpretation would indicate that David I's administrative importations had penetrated northward early in his reign.

⁶⁵ Meston, *et al*, *The Scottish Legal Tradition*, 34.

⁶⁶ *Lawyers and Laymen*, eds. T.M. Charles-Edwards, Morfydd E. Owen and D.B. Walters (Cardiff, 1986), 5. Ireland and Wales are the notable exceptions to this, but a detailed discussion of Irish and Welsh law or their judicial castes is outwith the scope of this thesis.

⁶⁷ Lawrie, *ESC*, 304.

senior and wise men in all Cumbria, called specifically to help with the inquest.⁶⁸ This would support Bellomo's view, that these "judges" 'were simply "those who judge"; people who, in real life and at a specific moment and a particular time in their lives or their daily activities, found themselves in a position of having to adjudicate.' He states that these men were not 'professionally engaged in that activity' and the role could have been filled by an individual or a group of men called upon to act as judges.⁶⁹ While this has some similarity to the duties that may be discerned from the Scottish charters, the Scottish *judex* does not appear to have been such a happenstance role.

These men were considered to be repositories of knowledge about the properties themselves, and rights in the properties. In the Inquest of Glasgow, at least two of these men were called *judices*.⁷⁰ From later documents, it appears that the *judex* had specific duties with regard to hearings where what might be termed 'legal' decisions were made.⁷¹ They often appeared in charters concerning proceedings where there is

⁶⁸ Barrow, *Charters of David I*, no.15.

⁶⁹ M.Bellomo, *The Common Legal Past of Europe, 1000-1800*, 45.

⁷⁰ Lawrie, *ESC*, 304. Lawrie points out that Dr. Prescott holds the view that the four men whose names appear before the term *judices*, while Lawrie would attribute that term to only the last two, Leysing and Oggo. Although the arguments of both have merit, since there is one individual, Halden son of Eadulf, named after the term *judices*, Lawrie's position seems more likely. The usual seems to have been one or two, although there is the possibility of more, noted by Barrow concerning the Letter of Brice, the *judex*, in Barrow's article, '*judex*', and in the Kirkness dispute.

⁷¹ See e.g., *Dunfermline Register*, no. 15, where King David ordered his *judices* to attend the abbey courts '*ut placita et justicie juste tractentur*'.

also a sheriff and/or justiciars, and appear to have had set duties.⁷²

Barrow notes that in the letter from Brice, *judex* of the king, dated 11 November 1221, one of these duties was to swear the jurors on a *scrinarium*, or relic.⁷³ There were occasions where they were called upon to testify about their collective memories concerning property rights,⁷⁴ or convened together by the king to determine property rights, including the rights of a king.⁷⁵ They have duties that go beyond mere 'judging'.

Whether these men could be deemed 'professional lawmen' at the beginning of the twelfth century and throughout the period may never be fully understood; the charter records show however, that it would be wrong to say, as Bellomo has, that these '*judices*' had little acquaintance with the customs of the place in which they lived, or that they did not 'interpret' a norm or law.⁷⁶ The Scottish evidence demonstrates that at least some of these *judices* were seen to be expert

⁷² See, e.g., *RRS*, ii, nos. 452, 399, (grant to Coupar Angus with perambulation by *inter alia* Earl Duncan, MacBeth, *judex* of Gowrie, and others, and witnessed by Duncan the justiciar). See also, Dickinson, *Sheriff Court Book of Fife*, lxvi-lxviii, the section on the dempster. Dickinson notes that the '*judex* performed many of the functions of the sheriff prior to the institution of that office.'

⁷³ Barrow, '*Judex*', 19, 26.

⁷⁴ Innes, *Glasgow Register*, no. 1

⁷⁵ A gathering of *judices* was in fact, held during William's reign, ca. 1187 at Lanark, to 'adjudge the king's right to collect his *cain* in Galloway.' See APS, I, 378, c. XXIII; Duncan, *Scotland, The Making of the Kingdom*, 186.

⁷⁶ Bellomo, *The Common Legal Past of Europe*, 45.

in the laws and customs of the region, in addition to being elders of the community.⁷⁷

Barrow noted that in Scotia proper, the *judex* continued to appear until at least the end of the thirteenth century.⁷⁸ The use of the term *judex* did not last so long in the south, disappearing from the charter evidence by the mid-thirteenth century.⁷⁹ It is interesting to note that

⁷⁷ *St. Andrews Liber*, 114-117. The Kirkness dispute is a prime example not only because there is reference to three judges, but that the 'great judex', Constantine, Earl of Fife defers to Dubgall because he is thought to be more experienced and knowledgeable in the law.

⁷⁸ The *judex* was preserved in the office of dempster, which survived into the modern era. One of the clearest examples of the transition of terms, may be seen in the charters concerning Fergus, called *judex* in the original charter datable to 1295, to a reference to '*Fergusius dictus Demster*' in 1310, and finally a reference to the same Fergus in 1431, as *Fergusius Dempstare*. See C. Innes, *The Book of the Thanes of Cawdor, A series of papers selected from the Charter Room at Cawdor, 1236-1742* (Edinburgh, 1859); Dickinson, *Sheriff Court Book of Fife*, lxxvii, note, 1. See also Barrow, *Kingdom of the Scots*, 61-65, especially his notes on the connections of Kerald, *judex* with Careston, Angus, and the Dempsters of Careston.

⁷⁹ Barrow, '*judex*', 23-24; *Atlas of Scottish History to 1707*, eds. P. G.B. McNeill and Hector L. MacQueen (Edinburgh, 1996), 189. The maps show that *judices* were found in the charters in Strathnith, Galloway, Carrick and Cumbria. The only reference to a *judex* in Cumbria is during David's reign, and Barrow notes that references to them in the other regions had disappeared by the mid-thirteenth century. The *judices* that are named in the Inquest of Glasgow, Lessig and Oggu, are also witnesses in the Holyrood foundation charter, (1141x1147), *Charters of David I*, no. 147, but the term *judex* is not used for either. This may be due to the composite nature of the charter, which Barrow, (notes to 147) and Lawrie (pp. 257, 386), or it may be that they were not acting in any official capacity; Barrow states that no. 147 is based on an original foundation charter which no doubt did have these two listed as witnesses. The maps also show that by 1193x1195, there was at least one reference to sheriffs in Carrick and in Galloway, and McNeill and MacQueen noted that 'it is possible that there was a sheriff of Dumfries by this period.' But the *judex* was preserved in the office of dempster, which survived into the modern era. One of the clearest examples of the transition of terms, may be seen in the charters concerning Fergus, called *judex* in the original charter datable to 1295, to a reference to '*Fergusius dictus Demster*' in 1310, and finally a reference to the same Fergus in 1431, as *Fergusius Dempstare*. See C. Innes, *The Book of the Thanes of Cawdor: A series of papers selected from the Charter Room at Cawdor, 1236-1742* (Edinburgh, 1859); Dickinson, *Sheriff Court Book of Fife*, lxxvii, note, 1. Although the connections between the shift in terminology from *judex* to dempster in Scots legal history have a parallel in Roman law in the *judex* and *recuperatores* or assessors, *scabini*, and then the dempsters or doomsmen, tracing the chronology and nature of these linguistic

while there is some overlap, chiefly in the area just north of the Forth, the map showing the distribution of the judicial officer known in the charters as '*judex*' reflects an absence of such an office or official in the centre of the area below the Firth of Forth, which is where many of the sheriffdoms are found before 1165.⁸⁰ During William I's reign, sheriffdoms spread north of Forfar, along the east coast, and to the south and west, into Lennox and Galloway. By the end of the twelfth century, there were sheriffdoms in several areas where *judices* had been found.⁸¹ The offices of sheriff and *judex* seem to have co-existed for some time in certain areas and often both sheriffs and *judices* appeared as witnesses in the same charters.⁸² This would fit with the initially administrative roles of the sheriffs and judicial roles of the *judices* slowly fusing into a single role. This supports the notion that the procedures being followed were evolving, and the process of integration was not forced. While the perception of the role of these judicial men must remain unclear, what is evident is that they were, for several centuries after the advent of the Anglo-Normans, an integral

influence is beyond the scope of this thesis. See O.F. Robinson, T.D. Fergus and W.M. Gordon, *European Legal History* (London, 1994), 33; *The Institutes of Gaius*, trans. W.M. Gordon and O.F. Robinson (London, 1988), 545.

⁸⁰ Barrow, *The Acts of Malcolm IV, King of Scots 1153-1165* (Edinburgh, 1960), 40. Barrow notes that there were already sheriffs of Stirling during the reign of David I.

⁸¹ McNeill, *et al.*, *Atlas*, 189, 192, 193. There is some overlap, as there is no direct correlation between the appearance of the sheriff and the disappearance of the *judex*. And it is noteworthy that the early sheriffdoms established before William's reign are in areas where there is little evidence of *judices*, such as Lothian, where there was a Gospatric, sheriff son of Uhtred, probably by 1120-23x1124. See Barrow, *Charters of David I*, no. 14.

⁸² *Arbroath Liber*, nos. 35, 126, 149.

part of the resolution of disputes, and in some cases, they were the decision makers rather than simply advisors.

JUSTICIAR

Barrow has previously noted that 'when we examine the office of Justice (*justicia*) between 1153 and 1165, we see, first that it was accorded a high importance, and secondly that we can discover very little else about it.'⁸³ Later in his career, he has noted that the evidence in the records before the end of the thirteenth century as well as beyond that date did not entirely support the Cooper analysis. He concluded that a study of the office of justiciar 'ought at least put us on our guard against hasty condemnation of the native secular legal machinery. It is not self-evident that the institutions at the disposal of the Scottish state for administering justice during the period from David I to John Balliol were inadequate for the purposes for which they were designed.'⁸⁴

There do not seem to be any clearly notated examples of cases brought before the justiciar during this period.⁸⁵ While there are records which include the names of men who were justiciars as witnesses, none of

⁸³ Barrow, *RRS*, i, 49.

⁸⁴ Barrow, *Kingdom* (2003) 109.

⁸⁵ Except for the Kirkness case, if one accepts that the Earl of Fife was in fact a justiciar.

these records allows for certainty in concluding that such matters were heard by and decided before a particular justiciar acting in his official capacity. There are references to such hearings during David's reign, and inferences that may be drawn from royal charters throughout this period.⁸⁶ As Barrow alludes, however, it would be dangerous to conclude that there were no such cases, or no such courts. The numerous references to *justiciis* in the royal charters, and commands to them regarding legal proceedings, indicate that there were such officials acting in a judicial capacity most probably in David I's reign, and certainly in Malcolm IV's and William I's reigns. The earliest non-criminal case, however, where it is clear that the matter was decided in the court of the justiciar is in 1235 regarding a dispute between Maldoven, Earl of Lennox and Gilbert, son of Samuel. It was decided before Walter son of Alan, justiciar of Scotia, and others.⁸⁷ The justiciar, Walter son of Alan, William abbot of Paisley and the Earl of Lennox all appended their seals to the agreement.

It is to Barrow and Professor Nicholas Vincent that Scottish historians owe an additional debt. They have now documented an unpublished *briefe* of Malcolm IV, which sheds some light on the role of the

⁸⁶ See Barrow, *Charters of David I*, no. 176, where the king states that Baldwin the Lorimer should not have to answer any lawsuit except before the king or his justiciar.

⁸⁷ *Registrum Monasterii de Passelet, cartas privilegia conventiones aliaque munimenta complectens* (Edinburgh, 1832), 170-171.

justiciar in the mid-twelfth century.⁸⁸ The text of this brieve is significant for a number of reasons, two of which concern the topic at hand. First, it refers to a justicia of Lothian, and another of Teviotdale, which offices do not appear elsewhere in the extant records from Malcolm IV's reign. From the wording of this document, it appears that either there was no justiciar north of the Forth, or if one existed, he was unable to act as required by the brieve. Second, it gives clear information about the duties of the sheriff and the justiciar. From the charter, the sheriff's duties included apprehending those holding stolen property and bringing the offender before the justiciar of Lothian or Teviotdale so that full justice may be done to them in his (the justiciar's) presence.⁸⁹ This is one of the earliest and clearest expressions of the duties of the justiciar regarding the hearing of pleas (in this case, criminal) and the rendering of justice. It does not actually describe the process to be carried out when in front of the justiciar, however.

SHERIFF

The extent to which a judicial (as opposed to an administrative,) function for the sheriff in Scotland can be substantiated in the twelfth

⁸⁸ G.W.S. Barrow, 'An Unpublished Brieve of Malcolm IV', *SHR* LXXXIV (2005), 85-87.

⁸⁹ Bodleian Library, MS Top. Yorks e. 12, fo. 76^{r-v} (a manuscript of John Burton, editor of *Monasticon Eboracense* (1758)); Barrow transcript of charter.

century charters is debatable. The records do indicate that there were sheriffs operating as judges in England at this time as noted above, and Earl David's charter to the monks of La Charité listed Hugh the sheriff as the first witness. It is clear that one of the early roles of the sheriff was as an administrator for the king. The sheriff's duties would have included ensuring the collection and distribution of revenue⁹⁰ and enforcing the decisions regarding disputes.⁹¹ Because he addresses '*omnibus vicecomitibus suis cunctibus baronibus Francis et Anglicis*', in a recording of a grant to his *miles* Ernulf, it seems reasonable to presume that the role of sheriff in Northumberland was, at the very least, similar to the role of sheriff in the rest of David I's kingdom.⁹² It has been noted that '[I]t cannot be doubted that Scottish Northumbria and the southern areas of Scotland-Teviotdale, Tweeddale, Lothian and probably also Clydesdale and the south-western areas outside Galloway- shared an administrative history closely related to more southerly parts of the island.'⁹³

Although 'it is clear that by the mid twelfth century the system of local administration, depending on the sheriff as the king's primary intermediary official for judicial, administrative and fiscal affairs, was

⁹⁰ Barrow, *The Charters of David I*, no. 49.

⁹¹ *Ibid*, no. 75. While it is not entirely clear that the dispute was decided by David I, he is clearly instructing his sheriffs to see that the sequestration is carried out.

⁹² Barrow, *The Charters of David I*, no. 53. The date of this charter is 1140 x1141.

⁹³ *The Sheriffs of Scotland, An Interim List to c. 1306*, eds. N.H. Reid and G.W.S. Barrow, (St. Andrews, 2002), xiii.

well advanced,⁹⁴ the precise nature of their judicial functions is more difficult to describe. Barrow and Reid have noted, however, that the sheriffs 'regular presence in, for example, perambulations of marches to resolve tenurial disputes, demonstrates that they were expected to wield at least civil power.'⁹⁵ They had fiscal responsibilities as borne out by the records in the Exchequer Rolls,⁹⁶ and duties to enforce the king's brieves and ensure the receipt of grants.⁹⁷ While these may not be viewed as judicial activities, strictly speaking, they were part of the enforcement procedures called into play after a variety of royal decisions including grants and gifts or writs of protection. These would include orders to refrain from collecting revenues,⁹⁸ and orders to sequester lands until the king's arrival.⁹⁹

This is supported again by King David's charters, in the addresses to '*Comitibus, Baronibus, Iusticiis, Vicecomitibus, Ministris...*'¹⁰⁰

Although one could argue that this address was to the sheriffs as the king's local administrators, David has also addressed it to the Justices, indicating that he wanted all those in positions of power, before whom

⁹⁴ Ibid, xiv.

⁹⁵ Ibid, xv.

⁹⁶ *The Exchequer Rolls of Scotland, Vol. I, A.D. 1264-1359*, eds. John Stuart and George Burnett, prefaces, and pp. 1-34. Although these records begin in 1264 and are therefore beyond the scope of this thesis, they illustrate the types of activities of the sheriffs especially with regard to the collection and dispersal of revenues.

⁹⁷ Barrow, *The Charters of David I*, nos. 45, 49, 51, 67 are just some of the types of royal brieves directed to sheriffs.

⁹⁸ Ibid, no. 45.

⁹⁹ Ibid, no. 75.

¹⁰⁰ Barrow, *The Charters of David I*, no. 97.

any dispute could be heard and by whom any decision could be enforced, to be on notice of the proceedings in the subsequent text. By at least 1135, the king was issuing brieves addressed to '*baronibus, vicecomitibus, ministris et omnibus probis hominibus*' specifically forbidding the taking of poinds on church lands.¹⁰¹ This implies that sheriffs would have been one of the officials who would be called upon to enforce a judicial decision. A questionably more enlightening charter is the one issued by Henry, earl of Northumberland to William Cumin the chancellor and Osbert the sheriff of Durham, forbidding them to implead the monks or their men except before the earl himself or his justice.¹⁰² It seems to imply that William Cumin and/or Osbert the sheriff had so impleaded someone; it also implies that Earl Henry was putting a stop to this practice. From this charter alone there is no way to draw a firm conclusion. Were the sheriffs actually hearing the pleas and was Earl Henry objecting to this practice? Or were the sheriffs performing their duties, but there were irregularities causing Henry to halt the practice until the matter could be dealt with by himself or his justice? While none of these charters are explicit in detailing what might be termed the judicial duties of the sheriff, it does appear that the sheriff's duties encompassed at least a quasi-judicial component as early as David's reign. In England during Henry I's reign, it is clear that there were shire courts, and sheriffs did hold

¹⁰¹ Barrow, *The Charters of David I*, no. 100.

¹⁰² *Ibid*, no.103. This charter is dated 1141.

judicial hearings.¹⁰³ Although there is no direct proof, it seems more likely than not, that there were sheriff courts during David's reign, conducting the same sorts of procedures.

Stenton relates a case also from Henry I where, by the King's command, the sheriff was to *hear the plea* made by the monks of St. Stephen of Caen regarding the 'encroachment made by [the King's] men of Bridport on the manor of Burton Bradstock. In this matter, there were sixteen jurors.¹⁰⁴ In both of these cases, which are exceptional in their detail, the sheriff's judicial role is more clearly defined. He was instructed to hear a plea, and he is described as having the role of a judge. It seems that even if it was not routinely part of his duties, he did occasionally take on judicial duties in England during the first part of the twelfth century.

There is another case which could just as easily be covered under another heading, but is important here because it was brought before and heard by the sheriff at Huntingdon while David I held that Honour. The case brought by the Abbey of Thorney against Robert of Yaxley is instructive not only procedurally, but substantively, with regard to the requirements of assent and consent.¹⁰⁵ This series of charters makes

¹⁰³ D.M. Stenton, *English Justice Between the Norman Conquest and the Great Charter, 1066-1215* (London, 1965), 140-147.

¹⁰⁴ *Ibid.*, 21.

¹⁰⁵ *Ibid.*, Appendix. This topic is covered in more detail, *infra*.

clear that the original transaction had not been approved by the chapter, so Robert did not have clear title. He also did not have the confirmation of the king. These were considered fatal defects. The case was heard before Fulk, the sheriff at Huntingdon, where there was a full shire court. Fulk the sheriff not only held the court and presided over the matter, he also apparently gave advice to Robert of Yaxley when it appeared that Abbot Robert had proved his case. The sheriff is seen to be not only acting as an administrative officer, but as a judge before whom pleas are made and witnesses called to testify. While there are clear parallels between the charter evidence in England and the far less numerous charter evidence in Scotland, and it is tempting to draw a straight line between the two, this is not entirely possible. There are discrepancies, most notably in the role of the *judex*, and possibly, but not conclusively, the role of the sheriff.

The various roles of those who decided the fate of disputants in the twelfth century were in flux. From being a communal effort, where many in the community had a voice, dispute resolution was well on the way to becoming, by the end of that century, one which was regulated and controlled by a few. The role of the king shifted to a more central, authoritative position, where issues of jurisdiction, procedure and evidence were decided by him, as well as the outcome of the matter. This shift had a cascading effect on those who derived their authority

directly from the king, specifically the justiciar and sheriff. Their positions became more clearly delineated in the documentary evidence, but as imported offices, we do not witness the same shift directly, only derivatively. They begin with a more central role as officials of the king, and evidence concerning them becomes more frequent and detailed over time.

Not only were the processes of dispute prevention and resolution and certain roles of decision-makers evolving during the twelfth century, but the records reflecting these disputes and the measures taken to prevent them were also changing. Indeed, a key factor driving the changes in procedure was the impact of changing attitudes towards, and used of the written word. With that in mind an examination of the types of documentation used to record disputes, actual and potential is in order.

CHAPTER IV

NOTICIAE

While the majority of records concerning the prevention and resolution of disputes were charters, usually writ-charters, there are several texts in the form of a *noticia*.¹ Lawrie describes *noticiae* as documents that record the process of how certain properties came into the recorder's possession; the documents discussed here deal specifically with either frank disputes or some sort of judicial proceeding involving property rights. There are only a handful of these types of records. Several are datable to the 1120s, although these types of documents do not have an end date and some may be found throughout the twelfth century.² Some indeed, do not fit nicely into the definition of a notice or notification so much as they are informative narratives relating information

¹ Lawrie, *ESC*, 220, defined *noticiae* as 'writings made after an event or grant, recording how lands had been acquired.' Many of the documents that reflect the resolution of a dispute, and certainly the prevention of a dispute are writ-charters which themselves could be called *noticiae*. The address is general, the action is described in the past tense, and there may or may not be any command or prohibition addressed to the recipient. A detailed discussion of the different and more precise definitions of these types of documents may be found in Richard Sharpe, 'The use of writs in the eleventh century', *Anglo-Saxon England* 32 (2003) 247-91. The author defines the writ-charter as 'addressed by the king to the officers and suitors of the shire court,' at 3. The function, according to this author, was as a grant or confirmation of rights in property. That meant that the form of the writ charter was often as a notification, although there were clauses of prohibition and injunction included in the writ. The chief distinctions between a notice type document as discussed here and a writ-charter, of whatever form or purpose, are the authentication by seal of the writ-charter, where the notice was not so authenticated, and the use of the writ-charter in the proving of a claim. *Noticiae* do not seem to have been used in this fashion.

² Barrow, *RRS*, i, Introduction', 75-76, in his discussion of notifications; *RRS*, ii 'Introduction', 78, and as an example, no. 287, relating that the loan from the Cistercians should not act as precedent.

about a dispute or process. And some of them would be virtually incomprehensible if not read in conjunction with other records, including grants and confirmations.

Most historians do not analyse *noticiae* as separate types of documents; they are usually included in notifications of all types,³ certificates or letters.⁴ In a broad sense, the records discussed here are narrative stories, but unlike chronicles or histories, these are single documents, usually included in monastic or diocesan cartularies. Because they memorialise certain events with regard to a dispute or judicial hearing concerning property rights, they should be viewed as ‘legal’ records. As a particular type of legal writing or legal discourse, they have become the focus of scholarly research.

Narratives, narrative testimony and the impact of language and literacy on law are some of the subjects that have been examined by scholars in a variety of fields, especially in the last fifty years.⁵ While no one method or approach is

³ Barrow, *RRS*, ii, 78. Strictly speaking, *noticiae* are notifications. But they can include letters, such as Simon the Cantor’s letter regarding Moorfoot, *infra*.

⁴ M.T. Clanchy, *From Memory to Written Record* (Oxford, 1993), generally, chapter 3, especially 89-92. Clanchy, at 88, defines certificates as ‘public statements by individuals...issued in the form of recognizances, testimonials, notifications, wills, sealed memoranda and similar records.’ He indicates at 90, that ‘letters’ in their earliest forms were not correspondence but rather ‘writs’ or brieves.

⁵ These fields have included law, linguistics, sociology and Anthropology, literature and language and linguistics. See B.S. Jackson, *Law, Fact and Narrative Coherence* (Merseyside, 1988); Jackson, ‘Towards an Interdisciplinary Model of Legal Communication’, 97-110; David Nelken, ‘Rules and Stories: A Comment on Jackson’ 111-118, both in *Legal Semiotics and the Sociology of Law*, ed. B.S. Jackson (Ofati, 1994); Peter Brooks, *Law’s Stories, Narrative and Rhetoric in the Law* (New Haven, 1996); John Gibbons, *Forensic Linguistics, An Introduction to Language in the Justice System* (Oxford, 2003); Jack Goody, *The Logic of Writing and the Organization of Society* (Cambridge, 1986); Brenda Danet and Bryan Bogoch, ‘From Oral Law to Literate Law: Orality, Literacy and Formulaicity in Anglo-Saxon

adopted here, examining these records in light of the recent interdisciplinary scholarship may increase understanding of the shift in mentality evident in the twelfth and thirteenth century. This shift is evident in the greater importance given to records in the disputing process.⁶ Even more fundamentally than the changes evident in the use of records however, is the evolution in the perceptions of the authors about the disputing process and their expectations of justice and law.

This change in mentality encompasses the shift from orality to literacy noted by Clanchy, Ong, Goody and others;⁷ it also highlights cultural constructs⁸ and cultural self-reflection.⁹ Essentially, these records were simply *memoranda*, created to preserve information for the future with regard to

Wills', in *Legal Semiotics and the Sociology of Law*, ed. B.S. Jackson (Oñati, 1994), 227-292. David Mellinkoff, *The Language of the Law* (Boston, 1963) is useful as a background to the diverse linguistic influences on Anglo-American law, but does not deal specifically with narrative, or the linguistic dissection of legal discourse.

⁶ Clanchy, *Memory to Written Record*, generally and chapters 1, 5, introduction to Part II, 7 and 8.

⁷ Walter Ong, *Orality and Literacy: The Technologizing of the Word* (London, 1982); and Ong, 'Oral Residue in Tudor Prose Style', *PMLA*, LXXX (1965), 145-154, 146, where he notes that 'Generally speaking, literature becomes itself slowly, and the closer in time a literature is to an antecedent oral culture, the less literary or "lettered" and the more oral-aural it will be'; Jack Goody, author of several manuscripts on the impact of literacy, including *Logic of Writing*, cited above, and *The Power of the Written Tradition* (London, 2000), and Clanchy, cited above. Others are cited above, n. 5. See also, Henrietta Leyser, 'Texts and languages, old and new', in *The Twelfth and Thirteenth Centuries*, ed. Barbara Harvey (Oxford, 2001), 167-199, at 169, who notes that the shift from memory to record was European in scope, but the lack of documentation had a more regional effect for the conquerors. It was both a curse and a boon to the Normans- they could not find written evidence of the activities and properties of their predecessors, but they also could 'rewrite' unwritten histories.

⁸ K. Heidecker, 'Introduction', in *Charters and the Use of the Written Word in Medieval Society* (Turnhout, 2000), 11.

⁹ Robert Weisberg, 'Proclaiming Trials as Narratives: Premises and Pretenses', in *Law's Stories, Narratives and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirtz (New Haven, 1996), 61-83, 63, where he notes that 'Certain ethical, political, and legal values manifest themselves or operate only in the medium of narratives by which a culture or nation defines itself.'

particular property claims.¹⁰ Aspects of the records which shed light on these various elements include language, particularly the address, verb tenses used and 'voice' of the account, the person or authority in whose name it was drafted, and finally, who actually created the document and why.

Although negative criteria may not be considered the best way to define or discuss a class of document, it can be a useful way of distinguishing *noticiae* from other types of records. Thus, these documents do not have any authentication, are not usually sealed, and have few formulaic phrases. The format is inconsistent, with some being cast in the form of a history or an account, some in the form of a letter, and some truly fit the very limited definition of strict notification of actions taken. One of the most important characteristics of *noticiae*, however, is that they do not seem to have been drafted with an eye to their future *use*, so much as records or accounts of transactions or events.¹¹

There are certain formulaic phrases that are found in *noticiae*. These may include, (but are not limited to) words such as *sciatis* or *notum sit*. Formulaic language has been described both as 'oral residue' and as indication of the

¹⁰ Clanchy, *Memory*, 146.

¹¹ In contrast to charters, which, as legal documents were drafted in anticipation of using them in the proof of rights in property. See also, Herwig Weigl, 'What to Write in Court: Literacy and Lawsuits in Late Medieval Austria', in *Charters and the Use of the Written Word*, ed. Karl Heidecker, 63-80, 66, where the author notes that court books, '*Stadtbücher*, were kept by town-councils...to keep all this in memory after the participants had died, in order to avoid renewed trouble. The entries into the book were therefore considered to have the same validity as sealed charters.' Future use was not limited to charters where disputes were concerned.

move towards 'communicative practices specific to writing'.¹² Narrative analysts have argued that 'every historical rendering of events is an aesthetic project, as well as an empirical one, and that every aesthetic strategy has ethical premises and effects.'¹³ They are in a very real sense, stories of past events that were placed in a record the existence of which may not yet have been perceived to be *legally* necessary.¹⁴ It would be misleading, however, to assume the accounts were unbiased records. '...Narrative discourse is never innocent, but always presentational, a way of working on story events that is also a way of working on the listener or reader.'¹⁵ All of the *noticiae* were written for a particular purpose, whether stated or not. Each of the extant records discussed below is preserved in the cartularies of one of the interested parties.

Records memorialising the cases discussed below may only have survived as one-sided *noticiae*, but they are important nonetheless. These narrative

¹² Danet and Bogoch, 'From Oral Law to Literate Law: Orality, Literacy and Formulaicity in Anglo-Saxon Wills', 227-292, 230. A fundamental assumption in the authors' work is that medieval texts are transitional not only because of their dating, but because they were produced 'in an era where primary orality was being eroded and in which beliefs and practices associated with literate culture were in the process of formation.' Thus, they seek to examine 'how written legal acts emerged from oral ones in the Middle Ages.' See also, Ong, 'Oral Residue in Tudor Prose Style', in *Publications of the Modern Language Association of America* LXXX (1965) 145-154, 146, where he defines oral residue as '...habits of thought and expression tracing back to pre-literate situations or practice, or deriving from the dominance of the oral as a medium in a given culture, or indicating a reluctance or inability to dissociate the written medium from the spoken.'

¹³ Robert Weisberg, 'Proclaiming Trials as Narratives: Premises and Pretenses', in *Law's Stories, Narratives and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirtz (New Haven, 1996), 61-83, 63.

¹⁴ There are instances where *noticiae* were used in the presentation of a claim concerning property rights, such as those set out in the Gospel Book of Deer; see Barrow, *Charters of David I*, no. 136.

¹⁵ Peter Brooks, 'The Law as Narrative and Rhetoric' in, *Law's Stories, Narratives and Rhetoric in the Law*, eds. Peter Brooks and Paul Gewirtz (New Haven, 1996), 14-22, 17.

accounts provide a window on the author's perspective of what is important in the resolution of disputes. Their value is in detailing the perceptions of what they thought the source of law was and how those perceptions changed during the course of the twelfth century.

The case studies that follow range from before Earl David became king to the 1180s, and include disputes between religious and laity as well as those where both parties are religious. While there are some common elements, such as the lack of authentication, there is no over-arching pattern to which all seem to conform. As with other case studies here, there is no inevitable progression towards a more refined state, no clearly marked path to a more perfect record type. There is, however, a clear change in approach towards the disputing process and the recording of information about them over time. It is an uneven, inconsistent evolution, and the accounts set out in these *noticiae* are examples of an earlier stage compared to the more precise, 'future use' focused writ charters.

Peverel

One of these disputes, datable to the ten-year period before David's inauguration as king, concerned land in which both William Peverel and

Thorney Abbey claimed interests.¹⁶ William Peverel of Dover was connected to David through the Honour of Huntingdon, which David inherited on his marriage to Maud de Senlis.¹⁷ As one of David's men, William Peverel would have been able to look to the Earl in resolving any disputes. Although this particular dispute occurred in England, it demonstrated, first that David I had partaken in the resolution of disputes well before becoming king of the Scots,¹⁸ and second, that the mechanisms for resolving disputes were similar whether in England or in Scotland, and indeed as will be shown later, in northern France. Finally, the *noticia*, authored most probably by a monk of Thorney Abbey, sets out what that monk thought was important about the procedures used to settle the dispute and the details worth mentioning.

In this case, David as Earl of Huntingdon, met with William Peverel and Robert, abbot of Thorney at Keyston, in the presence of many barons,¹⁹ regarding a dispute between the two. Earl David persuaded William to abandon his claim to the parish church of Boynhurst against Thorney Abbey, for the good of William's soul and for his ancestors. Although the dispute was resolved, there are few details about the exact facts or indeed the procedures followed. What is notable, however, is how inclusive both the procedure and the record of it seem to be. Earl David met with the disputants before a large

¹⁶ Barrow, *The Charters of David I*, no. 5; Thorney Abbey cartulary, MS. Add.3021, f. 417', Cambridge University Library.

¹⁷ Barrow, *The Charters of David I*, 20.

¹⁸ J. A. Green, 'David I and Henry I', *SHR*, LXXV, 1 (1996) 1-19, 11, where she pointed out that David had been a royal justiciar in England under Henry I.

¹⁹ Barrow translates this as 'Earl David, in the presence of a concourse of barons assembled at Keyston'.

number of barons, and it was in the presence of these men that the dispute was brought to an end.²⁰ David was instrumental in resolving the dispute, but appears to have been perceived as more of a mediator rather than a decision-making judge.²¹ While the term 'judge' can be misleading, it is clear that David's role was closer to the modern concept of the role of a mediator than the role of a *judex*, or even of a president, which can be determined from the cases involving the *judices*.²² Also, Earl David's persuasion of William Peverel is key in labelling this a mediation rather than an adjudication. David was not deciding who was right or wrong, but facilitating an agreement that satisfied both parties. William Peverel gave up his claim for the benefit of the prayers of the monks, and for his soul; the Abbot and the Abbey got the rights to the church and undertook the obligation to pray for William and his *familia*. Neither left empty-handed.²³

The language of the document is also important. The record of this dispute is of the process, rather than a judgement. It is informative, declarative rather than commanding.²⁴ From the universal address to the close listing the witnesses on behalf of the parties, it is in the voice of an anonymous third

²⁰ This fits well with the general description set forth by Susan Reynolds.

²¹ See White, 'Inheritances' at 65, where the definition of a mediator and of mediation has been described as 'involving third parties who did not act as judges, but could instead serve as effective go-betweens because of their pre-existing relationships with the disputants.' For the definition in a modern context, see J. Collier and V. Lowe, *The Settlement of Disputes in International Law, Institutions and Procedures* (Oxford, 1999), 27-29.

²² The cases involving *judices* are discussed below in more detail.

²³ Frederic L. Cheyette, 'Suam Cuique Tribuere', *French Historical Studies*, VI (1970), 287-99, at 291.

²⁴ Barrow, *Charter of King David I*, 54. The document begins 'Notum sit', and was probably fairly contemporaneous with the internal action.

person. It is a narrative relating how the controversy between the abbot and William Peverel came to be resolved. Procedurally, the details are slim, but show elements of ritual in David kissing the hand of the Abbot. Witnesses were present on behalf of each of the parties. Whether these witnesses actually testified or merely witnessed the proceedings is not clear, but their partisanship was important enough to be noted. Also, although it was 'in respect of the parish church of Bolnhurst', the precise nature of the dispute remains obscure.

The record did not reflect everything that was going on between those involved. It is only a record of what the *author* perceived to be important. Thus, there is the reference to the kissing of the Abbot's hand by Earl David, but no details about why William Peverel was willing to enter into a settlement that seems from the record, to be all to the advantage of the Abbey. He probably got something of value in return and there is some evidence to suggest that David did give William Peverel land in Bedfordshire in approximately 1124.²⁵ Because it appears that the Abbey generated this record as an account of how certain properties came into its possession, it would not necessarily have tried to make an objective or even complete account. While the inherent bias means that much is omitted, it is also useful to determine what the author thought was notable.

²⁵Barrow, *The Charters of David I*, no. 5, no.264 (lost act). Although Barrow dates the settlement between Peverel to 1114x1124, and the lost act to c. 1124, one cannot help but think the two may be related.

The other factor which must be taken into account is that this is a record of a concluded matter. There is no way to determine how much of the record was based on anecdotal information, other records, or personal knowledge of the scribe. The focus for its use would have been on the prevention of future disputes, hence the address, rather than fully explaining the current one, although the detail of the transfer would have been useful in any future disagreement to show that there had been an actual transfer. There are few other such references to physical transfers in the charters recording land transfers in the remainder of the twelfth and early thirteenth centuries.

Inquest of Glasgow

Earl David as *princeps* of Cumbria held an Inquest concerning the see of Glasgow some time before he became king. The inquest was made²⁶ and was carried out in order to 'define the possessions of the see of Glasgow.'²⁷ But although he held the inquest, and probably presided over it, Earl David was again not the decision maker regarding the merits of the inquest.²⁸ The

²⁶ *ESC*, 301. Lawrie states that David 'probably issued a brieve; the names of those to whom it was addressed have not been recorded.'

²⁷ N.F. Shead, 'Benefactions to the Medieval Cathedral and See of Glasgow' *The Innes Review*, Vol. XXI, 1 (Glasgow, 1970), 3-16, 3. It might well be that the extent of the possessions of Glasgow was the same for the prince of Cumbria, and therefore, David had a direct interest in determining what belonged to the see of Glasgow.

²⁸ C. Innes (ed), *Registrum Episcopatus Glasguensis (Glasgow Register)*, I (Edinburgh, 1843), xviii-xix. In the preface to the printed register, Cosmo Innes points out that this is a memoir, or *notitia*, lending support to the analogy to a sort of record of proceedings. He notes that the investigation is 'directed by David, while Prince of Cumbria'. 'The narrative, at its commencement, does not claim the same authority with the subsequent verdict of the five *juratores, -seniore homines et sapientiores totius Cumbriae.*' This inquest is also discussed in

language used in the record is clear.²⁹ These senior and wise men from Cumbria were the decision-makers.

According to Lawrie³⁰ and Innes,³¹ these men were jurors, although precisely what that meant is not certain. It is not clear from this record who swore them in, nor if as in other *judex* cases, they swore on relics. But they were the ones who made the decisions regarding the properties under investigation in this matter. Lawrie had also assigned the role of witness to these men, but the records for this case and others involving the *judex* show their roles were more complex.³² Barrow points out that there were only five jurors, most of whom would not be in the best position to know about the extent of the lands belonging to Glasgow, although several of the witnesses would have been in a position to have such knowledge. Barrow concludes that, '[T]heir role must have consisted in supervising the findings of more numerous local jurors.'³³ These local men were repositories of knowledge about the properties themselves, and the rights in the properties. More importantly, perhaps, those involved seem to have conducted the proceedings along well-established and accepted lines, which were not fully described in the account. While it is difficult to determine the exact facts to which these 'witnesses' testified or judged, it is clear that they gave information about their collective memories

The Victoria History of the County of Cumberland, Vol. II ed. James Wilson (London, 1905), 3.

²⁹ Barrow, *The Charters of David I*, no. 15.

³⁰ *ESC*, 304.

³¹ Innes, *Glasgow Register*, xix.

³² *ESC*, 304. See also the discussion of the role of the *judex*, *infra*.

³³ Barrow, *The Charters of David I*, no. 15, and comment.

of which parcels of land belonged to Glasgow.³⁴ As with the other *noticiae*, it records the perceptions of the author about the inquest and what was important, not necessarily everything that historians or lawyers would consider vital to a record of such a case.

As with the previous case, this record is of past actions in both narrative and confirmatory terms. It runs in David's name, but is in the third person as well.³⁵ It does not lead with an address; the beginning of the record is a narrative account, and the end contains, in non-standard language, a concession by Earl David's wife, Matilda. The list of witnesses to Matilda's portion is more detailed than the list of five sworn 'jurors'.

There is again the blend of orality, memory and the recording of a proceeding. While this is a judicial proceeding, the document does not read like a judgment, nor even a standard confirmation. But neither the previous record nor this document were authenticated by Earl David. They are differences between the two, though. The record of the inquest is more formal than the account in Peverel in appearance and language without rising to the formality implicit in a sealed writ-charter. It is a combination of two types of records: the narrative, based on a recollection of what happened and who was involved, and the latter part, which could almost be read on its own as a confirmation by Matilda, although there is no indication that the end portion, starting with

³⁴ Innes, *Glasgow Register*, No. 1, 3-5 at 4, 5.

³⁵ The opening is 'Earl David...to his friends' and then later, it switches to first person, with the account in terms of what he has done.

Huius rei testes sunt ut audientes et videntes was ever in a separate document.³⁶ In addition, Peverel seems to have been drafted shortly after the events it records. The Inquest document may have been drafted any time up to the mid-twelfth century because of its placement adjacent to a document of that date.³⁷

There are some questions about this proceeding and about the record that remain unanswered. Lawrie had dismissed the record as 'interesting' but concluded that too much had been made of this document. He noted, 'there was no grant made nor act done by the Earl which witnesses could attest.'³⁸ And Barrow noted puzzling details, such as the 'absence of persons from the northern part of the diocese' and that of the five jurors, 'two at least and possibly three, seem to have been men of Tynedale and north-east Cumberland.'³⁹ There is an explanation for these anomalies, although it is and may remain complete speculation.

If the approach to the document starts from what the author perceived to be important, some things become less puzzling. First, although it is an inquest and there is no mention of adverse parties, Glasgow was maintaining the

³⁶ See Barrow, *Charters of David I*, no. 15, comments. Since the entire document is preserved in the *Glasgow Register*, with no separate originals, it is difficult to know precisely what the original appearance was.

³⁷ *ESC*, 299, where he notes that the document is found immediately preceding a charter datable to 1152, and in a volume which appears to have been compiled in the mid-13th century, well after the events.

³⁸ *ESC*, 299.

³⁹ Barrow, *Charters of David I*, no. 15, comments, p. 61.

position that it had right to certain lands. But as prince of Cumbria, David may have had claims to some of the same lands. Thus, even if this was a ‘friendly’ dispute, it was a situation where the two parties, the see of Glasgow and the principality of Cumbria had opposing interests. As Barrow noted, David I was embarking on a programme of infestment in southern Scotland and would not have wanted to encroach on church lands.⁴⁰ Any grant David made of lands to Glasgow, or a confirmation of grants previously made would have been important enough to be noted in this record.

There is also the concession by Matilda, who was not only the wife of Earl David, but also the descendant of Walthcof, Earl of Northumberland. As his heir, she may have had rights in certain lands in the area in question.⁴¹

Barrow’s explanation, that Matilda may have been given a dower that included certain lands in Cumbria to which Glasgow had a claim does not take into account that there is no record of a grant by David, to which she would have been conceding.⁴² Concessions had legal effect and would not have been given gratuitously. Her concession might have been a necessity if lands in which she had an interest were being confirmed to Glasgow. This is more likely to have been in the north-eastern portion of Cumbria rather than the areas nearer to Glasgow proper, precisely where the majority of the jurors

⁴⁰ Barrow, *Charters of David I*, no. 15, comments.

⁴¹ Ibid.

⁴² Barrow, *Charters of David I*, no. 15, comments.

seem to have originated.⁴³ All this remains speculation, however. There is no firm evidence to prove any of these suppositions, but they do provide an interesting scenario for the puzzling aspects of this *noticia*.

Kirkness

'The most often quoted lawsuit of twelfth-century Scotland, the dispute between the monks of Loch Leven and Robert, the ancestor of the family of Lohore over the marches of Kirkness near Loch Leven, c.1128, was determined at King David's command'⁴⁴ by three *judices*. The record of this dispute, again in the form of a *noticia*, is not a charter, nor is it supported by other, fairly common elements of an 'official' record such as being issued in the name of the king or royal official, or authenticated by a seal. It is a record drafted by one of the disputants, the clerics of Loch Leven who could not be described as objective. But precisely because it is not an objective account it describes in explicit terms what was expected from the procedures used to resolve the dispute, and the perceptions of the author about the process and the outcome.

In this dispute, David again was not the 'judge' and was not the decision maker regarding the merits of the dispute. He sent his sergeants and called

⁴³ Ibid. See also, McNeill and MacQueen, *Atlas of Scottish History to 1707* (Edinburgh, 1996), 79.

⁴⁴ Barrow, *RRS, i*, (Edinburgh, 1960), 50; For the Robert involved here, sometimes referred to as 'the Burgundian', see G.W.S. Barrow, 'The origins of the family of Lohore', *SHR* 77 (1998) 252-4.

together the men of the area, including the *judices*. These men were the ones who were expected to make any decisions regarding the merits of the case; of the three named, two of the *judices* deferred to Dufgal son of Mocche 'because of his seniority and skill in the law'.⁴⁵ They were the ones who knew the customs and laws of the area and were respected by the local community.

There is less adherence to a hierarchy as well. Constantine, Earl of Fife is termed *magnus judex*, yet he defers to an older, more experienced *judex*, as discussed by MacQueen.⁴⁶ The overall impression is of a more horizontal structure to the proceedings. Both the king and the earl were very much a part of the proceedings, and MacQueen notes that David 'commanded' them, but neither one of them seem to have been in control as would a modern judge.

Certain elements are clear in the record.⁴⁷ The information is presented more in a (rather colourful) narrative form rather than a formal description of a process or judgement. While certain facts are explicit, such as Robert having encroached on the land of the religious and an outraged response, there is no detailed report of the facts or what exactly was proven. As in the other narrative accounts, there are no overt references to rules or to prior records or acts concerning the donation of the lands to the Céli Dé. It is essentially a summary of events with no indication of when in relation to the hearing the

⁴⁵ Ibid, 50-51.

⁴⁶ MacQueen, *Common Law and Feudal Society*, 43. See previous discussion at p. 82.

⁴⁷ T. Thomson, *Liber Cartarum Prioratus Sancti Andree in Scotia* (Edinburgh, 1841), 114-118.

record was made. While modern legal writers may find fault with this record for its lack of transparency and detail, it is in accord with the other similar types of records of the time and place, and indeed, with the notion of law itself. Every case has a story, and every story has a narrative. It is the normal way for people to relate information and especially with regard to the expression of legal information; '...narratives are essential to the notion of the law in a customary society.'⁴⁸

The less than formal narrative and colourful details show that this was not the type of record routinely kept. As with other narrative accounts, it is more a story or history than 'evidence' of rights in property. There is no implicit intent to use it at a later date to prove such rights, as seen with writ charters. There is no authentication, and no apparent attempt to present this as anything other than perhaps an eyewitness account by one of the interested members of the religious community. Some care was taken however in the noting of details about who was present, testified and who passed judgement.⁴⁹ This provides not only valuable information about the people involved and the procedures, but about the awareness of the importance of these factors

⁴⁸ Mary Jane Schenck, 'The Role of Narration in Philippe de Beaumanoir's *Coutumes de Beauvaisis*', in *Essays on the Poetic and Legal Writings of Philippe de Remy and His Son Philippe de Beaumanoir of Thirteenth-Century France*, eds. Sarah-Grace Heller and Michelle Reichert (Lampeter, 2001), 205-220, 207. With regard to modern cases, a recitation of the facts is simply a bare bones narrative. Schenck at 208-209, quoting Plunknett, also pointed out that early on, lawyers were known as *narrators*. See also, Clanchy, *Memory*, 274; the description of what the narrator did was essentially acting as advocate, and the pleading he did on behalf of the litigant was called a 'tale' or *conte*.

⁴⁹ While it is clear that the king ordered the proceeding, it is not clear whether he was actually present. He sent *nuncios* and summoned all to meet in one place, but he is not named as present; the Earl of Fife is.

included in the telling of the tale. The satisfaction evident in the concluding remark that their adversary had been publicly conquered also points to a record drafted more for internal consumption rather than explicitly something specially to be used as proof at a later date.

As with the other documents, the most useful information provided by this account is about the perceptions and expectations of the author. Speaking for the Céli Dei, the author concentrated on the details he perceived to be important. His comment about why the monks went to King David in the first place, 'for justice and a just judgement' says more about their expectations than any of the other *noticiae*, before Simon the Cantor's letter.⁵⁰ They sought justice from the king; and while the procedures described were public, there is a lack of concentration on the precise nature of the process, or on whether the procedures conformed to a customary practice. This was not a record to be used in later proceedings, nor was it to be used to prove ownership. There was no information about the actual settlement included, as if such details would be already known to the audience. In contrast, the following dispute over Eccles produced a *Concordia* that gives the impression of a record made late and with less attention to detail than the other *noticiae*, but also of one drafted specifically to recount in summary form the details of a transaction deemed to be significant.

⁵⁰ *Newbattle Register*, no. 3. It is a document datable to 1184, discussed in greater detail, *infra*.

Eccles

There are some disputes for which classification of document type is not easy. These records appear in the monastic cartularies, clearly reflect a dispute, or the resolution of one, but to call them *noticiae* may be inadequate, or may not be entirely in accord with the words of the record itself. Yet these types of records are not in the form of traditional charters, may not have an address, but still record a dispute and its resolution. One such case, occurring late in David I's reign, is that of the contested matter between Robert, Bishop of St. Andrews and Geoffrey, Abbot of Dunfermline.⁵¹ The dispute concerned the church of Eccles and the chapel of Stirling, the teinds of which had been given to Dunfermline by King Alexander I. No charter of donation remains for Alexander's gift, if there had ever been one.

The matter was resolved in the presence of David I, Earl Henry and their barons at Edinburgh. There are several witnesses listed within the document. The record, which states it is a *concordia*, does not reflect the positions of both of the parties so much as Dunfermline's record of the *memories* of the barons about the terms of the agreement. All the barons are said to have been in agreement as to their recollection of the terms of the *Concordia*. It is a narrative, but like both Peverel and Glasgow, it is in the third person. The tone is more objective than Kirkness, but since there is no way to determine

⁵¹ *Dunfermline Register*, no. 4.

precisely when either of these records was made, it is difficult to draw any conclusions about the evolution of the documents.⁵² The Eccles record cannot have been drafted too long after the events it recorded because of the dating of the witnesses and the death of Earl Henry.⁵³ The record is not entirely clear but the 'decision' in this case does not seem to have been made by David I, contrary to Cooper's conclusion.⁵⁴ David appears to have acted again, more as an arbitrator rather than a decision maker, in keeping with the *noticiae* accounts of other disputes resolved in his presence. As with other such documents, there is no authentication and apparently no confirmation charter by the king or Earl Henry. Since Dunfermline is one of the most complete cartularies for royal acts, if a royal charter had been issued, it is strange that no copy of it was preserved in the Dunfermline register.⁵⁵ The record seems to have been based upon the recollections of several barons, but there is no evidence that either the king or his son validated it.

Newbattle-Masterton

There are some matters that have been preserved in a combination of both *noticiae* and charters. The evidence concerning the lands of Masterton and

⁵² The dispute itself in Kirkness is datable to *ca.* 1128; Eccles is probably 1147x1151.

⁵³ The ecclesiastical witnesses place the charter between 1147x1151. There are discrepancies: Osbert, prior of Holyrood did not assume office until 1151, and H. prior of Coldingham held office from 1147x1150. There is no reason to doubt that these individuals were there, but it is probable that the events occurred while H was still prior of Coldingham, and the record generated after Osbert became prior of Holyrood.

⁵⁴ Cooper, *Selected Scottish Cases*, xlvii.

⁵⁵ Dauvit Broun, 'The Adoption of Brieves in Scotland', in *Charters and Charter Scholarship in Britain and Ireland*, eds. Marie-Therese Flanagan and Judith A. Green (London, 2005), 164-83.

Moorfoot is one such case. The factors discussed above may also be seen in these records where an explicit dispute was never discussed but when examining the entire series of records, both charters and *noticiae*, involving related plots of land, rights and individuals, it becomes clear that, in all likelihood, there had been a dispute and there were certain procedures followed in order to resolve it. This series of records spanned three reigns during the twelfth century, and may indeed reflect controversy over the lands in question for the same length of time. The charters of donation and confirmation describe the land itself and the perambulations that occurred during King David's reign and King William's. There are confirmations from three twelfth-century kings, David I and his two grandsons. For our purposes here though, the most important document in this series is the *noticia* or letter of Simon the Cantor preserved in the *Newbattle Register*.⁵⁶ It describes a perambulation in the presence of the king as an *ordo judicarius*. Barrow has dated this to Malcolm IV's reign,⁵⁷ but because of the witnesses and the details in the charters of William I, this *noticia* must be dated to 1184.

King David I donated certain lands in Newbattle and Moorfoot to Newbattle Abbey;⁵⁸ and granted Masterton (in Newbattle) to a layman, Robert the ironsmith, referenced in the donations to Newbattle, but for which no separate

⁵⁶ *Newbattle Register*, no. 3.

⁵⁷ Barrow, *RRS*, i, 49.

⁵⁸ Barrow, *Charters of David I*, no. 96 (1 Nov. 1140), (Newbattle); no. 97 (1140x1141), (Moorfoot).

charters exist.⁵⁹ Robert the ironsmith also made donations to Newbattle. Both this donation and the donation of the lands of 'Ruchalech' and 'Blankeland' are reflected in the same charter, for which no separate donation or confirmation charters exist.⁶⁰ There are two charters from David I regarding Moorfoot, one of which describes the lands being given,⁶¹ while the second charter reflected the grant of lands of Newbattle and of Moorfoot and included language that David I and some of his responsible men had traversed the boundaries of these lands and of 'Ruchalech' and 'Blankelande', and the land he had given to Robert the ironsmith as well.⁶² Even with these two charters, there appears to have been a dispute over the boundaries as there was another perambulation over forty years later at the order of King William I.

There are also two charters which Barrow has dated somewhat later, which must be taken into account; the date spread could indicate that they were closer in time to the charters discussed above, and may be directly tied to them. The first is a grant to Newbattle of 'Ruchale', a place which Barrow

⁵⁹ Ibid. The exact phrase is: '*exceptis duabus Carrucatis terre quas Roberto Ferrario pro servitio suo dedi*'.

⁶⁰ Ibid, no. 98 (1140x1152). Barrow dates this charter to 1140x1152, presumably because Earl Henry is a witness. Because there was still land from Robert the ironsmith to be transferred to Ralph Freebern, it does not appear that the ironsmith gave the entirety of the two carrucates to Newbattle.

⁶¹ Ibid, no. 97.

⁶² Ibid, no. 98. The passage could be interpreted to mean that David and his men traversed only Moorfoot, and he is granting and conceding the other lands mentioned, but this makes less sense than David traversing all the lands and granting the pannage and timber. It is clear that Robert had granted some of his land to Newbattle, and David could be simply confirming the gift, but that is not clear from the language. According to Barrow, *Charters of David I*, no.96, the location of the land and meaning of the name known as 'Ruchalech' is now 'lost'. Barrow also notes that in the contemporary table of contents, this charter is listed as '*confirmacio ejusdem*'.

describes as lost.⁶³ The second of these charters is the one following, showing a grant to Holyrood Abbey of certain parts of Dalkeith in exchange for 'Ruchalc', which the king gave to Newbattle.⁶⁴ The only subsequent reference to these parcels of land is in a confirmation of William I, of the property and privileges of Newbattle, where the only property with a name similar to these two (and both were granted to Newbattle), is 'Ruchalc'. There is only one such name.⁶⁵ It may be that 'Ruchaiech' and 'Ruchale' or Rhuchale' are the same parcel of land.

There were subsequent activities regarding these lands. Malcolm IV's charter granting land to Robert Freebern is datable to the last few years of his reign. This charter indicated that the land originally granted to Robert the ironsmith was being regranted by King Malcolm IV to Robert Freebern, along with the lands of Rosyth and Dunduff.⁶⁶ This grant was subsequently confirmed by William I, with a reference to the terms of Malcolm IV's charter.⁶⁷ One may presume that Robert the ironsmith had probably died without heirs before 1162, although it is possible but less likely that Robert the ironsmith and Robert Freebern were related. Since the terms of Malcolm's charter indicated that the king was *granting* the land to Robert Freebern, and there was no

⁶³ Ibid, no. 124.

⁶⁴ Ibid, no. 125. It seems that these two lost parcels may have actually been the same piece of land. If so, the charter order and dating would be as follows: no. 96, 97, 124, 125, and finally, no. 98.

⁶⁵ Barrow, *RRS*, *ii*, no. 61.

⁶⁶ Barrow, *RRS*, *i*, no. 256.

⁶⁷ Barrow, *RRS*, *ii*, no. 9. The confirmation of Malcolm's grant to Robert Freebern by William I is datable to 1166x1171.

language of a confirmation of a transfer, it does not seem likely that there was any sort of transaction regarding the land between Robert the Ironsmith and Robert Freebern.

The next two charters at first may seem problematic, but on closer inspection the dating of the documents and the actuality of a dispute become apparent.

One is the memorandum from Simon the Chanter of the church of Glasgow, which Barrow has called the 'best recorded activity of sheriffs and justices in twelfth century record.'⁶⁸ The other was a charter of William I himself, detailing a perambulation that he ordered of the boundaries of Moorfoot.

When read in conjunction with the other charters previously discussed, these records demonstrate what appears to be a long running contest concerning the boundaries of these lands between Newbattle and a succession of lay landholders.

Simon's *noticia* indicated that there was a perambulation in the presence of John, bishop of Glasgow and Sheriff Alexander.⁶⁹ Bishop John was listed as a

⁶⁸ *Ibid.*, 49.

⁶⁹ The reference to John, bishop of Glasgow may have been a mistake. John was bishop until 1147, well before the gift to Robert Freebern by Malcolm IV. If it had been a mistake for Jocelyn, the dates would be 1174x1199, which is more likely with a reference to Sheriff Alexander and during William's reign. See *Fasti Ecclesiae Scoticae Medii Aevi Ad Annum 1638*, eds. D.E.R. Watt and A.L. Murray (Edinburgh, 2003), 188. The reference to Sheriff Alexander may be to Alexander Saint Martin, who was sheriff of Edinburgh in the 1180's; the only certain reference seems to be 1184, (this case). See N.H. Reid and G.W.S. Barrow, *The Sheriffs of Scotland, An Interim List to c. 1306* (St. Andrews, 2002), 13. There are no records of any other sheriff with the name Alexander for this period. If in fact, the reference to Bishop John were to be taken as correct, then the sheriff of that area, variously designated as Edinburgh, Haddington, Linlithgow or Lothian, would have been Thor, who can be dated to 1140x1150, but appears only once, as do the other sheriffs of the area, Robert, 1153x1162;

witness to the donation of King David of the land of Newbattle, with the exception of two carrucates of land to Robert the ironsmith.⁷⁰ Simon related that the lands held by Newbattle were confirmed to that establishment except for the two carrucates that had been given to Robert Freebern by Malcolm IV. He also indicated that he had been present during the transaction where the King had ordered a perambulation, along with the said Bishop John and Sheriff Alexander. Although this presents problems since Bishop John was long since dead, it could easily be a transcript error, mistaking John for Jocelin.

The royal charter from William I is tracked a little more easily. It was dated within the text to 1184, and made it clear that William had ordered the marches of Moorfoot between the monks of Newbattle and David Uviet to be perambulated and sworn to by responsible men, in short, a sworn jury.⁷¹ Those conducting the perambulation included Alexander sheriff of Haddington, Simon son of Malbet, sheriff of Traquair and other honourable men. This charter specifically referred to the charter of King David, and the descriptions of the boundaries perambulated in William's charter track almost word for word the description of the perambulation in David's charter.⁷² Yet William's charter did not mention the grant to Robert Freebern, nor the land

Geoffrey Melville, 1162; Uhtred, 1162, 1159x1163; Hervey, 1170x11Nov. While there are other sheriffs in other places and at other times named Alexander, none coincide with the place and time besides Alexander Saint Martin.

⁷⁰ *Newbattle Reg*, no. 2.

⁷¹ *Newbattle Reg*, no. 20; *RRS*, ii, no. 252.

⁷² Barrow, *Charters of David I*, no. 97.

granted to Robert the ironsmith; it did, however, refer to David Uviet.⁷³ This is the first indication that David Uviet has an interest in this land. This is in contrast to Simon's *noticia*, which, considering the witnesses and the periods of office for both witnesses and Simon, must refer to the same perambulation as William I's charter. Yet Simon's *noticia* contained a reservation of the two carrucates of land granted to Robert Freebern by Malcolm, but did not mention David Uviet.

Interpretations of these charters could take several routes. The route that makes most sense is that the monks were concerned about the boundaries of their lands from the very beginning, and King David perambulated the lands of Newbattle and Moorfoot to ensure the boundaries of both the grant to Newbattle and to Robert the ironsmith. Newbattle continued to be concerned, quite possibly because of disputes between Newbattle and both Roberts, right through William's reign. In 1184, William put an end to disputes concerning the boundaries of Moorfoot with the perambulation he ordered. There remains the problem of Robert Freebern and David Uviet. Considering Simon's letter in conjunction with William's charter, it seems plausible that both David Uviet and Robert Freebern were holding lands bordering Newbattle and Moorfoot,

⁷³ It is not clear when David Uviet would have been granted the land. See, Barrow, *Charters of David I*, 21: although Barrow discusses the Uviet 'the white' who was lord of Duddingston, it is not clear that this David Uviet is related, since it appears that David Uviet had been granted his land, and there is no record of the land of the lord of Duddingston being granted to him. David's no. 177 listed David Uviet as a witness to King David I sometime between 1145x1153, probably 1150x1153, and he appears in Malcolm IV's reign as a witness; see Barrow, *RRS*, i, nos. 120, 197, 265. The sworn body of men ordered to perambulate the boundaries has similarities to the jury of recognition as well.

or perhaps parcels within the boundaries of the land held by Newbattle, and disputes had arisen between the monks and these lay landholders about the boundaries on more than one occasion. Simon's *noticia* could be interpreted as a note of reassurance, or simply a report to H(ugh) the dean and Helias the cleric regarding the outcome of the proceedings concerning the boundaries of Newbattle's lands.

Discussion

A key factor to understanding the importance of *noticiae* is their subjective nature. What was written about a dispute tells us what the author thought was important. These records also document how perceptions changed throughout the twelfth century. In turn, these narrative accounts detail expectations of law and justice through the language used to describe the various proceedings.

Each of these cases demonstrates the central role of the 'story' of a dispute. Each presents in greater or lesser detail, a narrative of the basics of the 'who, what when and sometimes, why' of a particular controversy. This manner of relating the facts of a dispute is as important a part of the legal process now as it was in the 12th and 13th centuries.⁷⁴ The records can be analysed for details that those who wrote it and their audience perceived as important, especially with regard to facts, the law, rule or norm applicable to the matter, and who

⁷⁴ Peter Brooks, 'The Law as Narrative and Rhetoric', *Law's Stories*, eds. Brooks and Gewirtz (New Haven, 1996), 14-22, 20.

the decision-makers were.⁷⁵ The same story can be analysed at a later date and re-interpreted to determine its relevance to that time and place. This is, in a basic sense, why reading history, literature and legal cases remains important.⁷⁶ Each generation re-interprets the past in light of its present.

In cases where the narrative form is the only record that survives to indicate that there was a judicial process or a dispute, a lack of other records is in a sense, an advantage. There is nothing to compare it to, to 'fill in the gaps' so to speak. There is only the narrative to indicate what was deemed important enough to be included in the tale, or indeed, what the desired effect of telling the tale was to have been.⁷⁷ Where there are other records, such as chronicle entries or charters, the one even less official than the narrative, the other not only more official but specifically drafted with a legal purpose in mind, the immediate perceptions of those involved may become obscured.

Language is key in narrative accounts in determining the perceptions of those involved of the events themselves, and the law or rules applicable. Choice of

⁷⁵ These factors have all been discussed in the chapter on Complexity, *infra*. It must be remembered that these facts were not 'all the facts' even in *noticiae*. There was a decision-making process going on with the scribe, who decided what to include based upon his determination of what was 'relevant'.

⁷⁶ Martha Minow, 'Stories in Law', in *Law's Stories, Narratives and Rhetoric in the Law* (New Haven, 1996), 24-36, 25: 'At the most basic level, then, I suggest that storytelling offers real continuities with common-law reasoning; it dwells on particulars while eliciting a point that itself may be moulded or recast in light of the story's particulars reviewed in a different time.' This is another example of the 'perversion of the past' necessary to lawyers, but rejected by historians.

⁷⁷ Paul Hyams, *Rancor and Reconciliation in Medieval England* (Ithaca, 2003), ix. '...the way the story is told—by whom, starting and ending at which points—all these matters determine the kind of thrust and impact the tale will have.'

words, tone and ‘voice’ of the record communicate more than the basic information of what happened. But where there is choice, that is, a lack of formulaic terminology and flexibility in word usage, there may be problems with distortion. The narratives may be (and often are in these cases) incomplete, inaccurate and biased.⁷⁸ Yet those very qualities that may offend a more structured legal approach with pretensions to objectivity are useful in gauging the subjective component implicit in narrative accounts. It is from the narrative discourse that the outrage of the Céli Dé over how they have been treated by Robert, the ancestor of the family of Lochore, becomes clear. It is also within the narrative structure of the record that what they sought, justice according to the procedures with which they were familiar, is expressed. While storytelling may lack the logic and formal analysis necessary in the application of legal rules, it is from the story of a dispute that the question of justice can be best understood.⁷⁹

The tale in the narrative is descriptive, not primarily prescriptive, as writ-charters and brieves are. There are few, if any, commands *per se*, in these

⁷⁸ Daniel A. Farber & Suzanna Sherry, ‘Legal Storytelling and Constitutional Law: The Medium and the Message’, in *Law’s Stories*, eds. Brooks & Gewirtz (New Haven, 1996), 37-53, 37-38. The modern debate is precisely that narrative can distort legal debate. There is tension between the two forms: the modern formalistic structure of legal discourse is incompatible with the storytelling format. Yet both are necessary in the presentation of a lawsuit and in the writing of legal opinions.

⁷⁹ Hyams, *Rancor and Reconciliation*, ‘Introduction’, ix. Hyams notes that people cannot say what justice is, but they are very well able to relate stories of injustices done to them. See also Farber & Sherry, ‘Legal Storytelling’, 39-42, in their discussion of the impact of critical legal studies and the indeterminacy thesis. Essentially, the argument is that formal legal reasoning does not in fact ‘provide concrete, real answers to particular legal or social problems...’. The judicial decision is based on social and political judgement incorporating numerous factors. This again goes back to the concept of ‘justice’ as the basis of judicial reasoning and judicial action. See chapter on ‘Complexity’.

accounts. In Peverel, there is a recounting of how the dispute came to be resolved, and what role Earl David played in bringing about a resolution. There is no ‘*mando, precipio*’ or even ‘*volo*’ in the document. In the Inquest of Glasgow, while there is no command language, there is an indication of Earl David’s power to do so in the phrase *rogatu et imperio supradicti principis*. Even so, the judgement made by the *juratores* did not result in an order from the earl, at least none that the scribe thought important enough to record.⁸⁰ But certain facts were considered relevant and important enough to note, such as who called for the inquest and why, the names of who determined the extent of Glasgow’s properties, and that Matilda had conceded something of value, but full details of that concession were not included.⁸¹

The lack of command language in these early narratives supports the more horizontal structure of the process generally. This horizontal structure changes towards the end of the twelfth century and is evident in the language used in royal charters to describe the role of the king. While not strictly a narrative account, these phrases are a narrative element in the more formal charters issued in the king’s name. They are a piece of the ‘story’ that actually illuminates the changing role of the king and the perceptions of the importance of noting these changes.⁸² While there is a certain amount of discretion on the

⁸⁰ Barrow, *Charters of David I*, no. 15.

⁸¹ These would probably all make their way into a modern legal report as well.

⁸² See Barrow, *RRS*, II, nos. 105, 236, 249, 252, 253 (spurious, but using the first person similar to other charters). The most common phrase is that the dispute was settled ‘in my presence’ and ‘in my court’. Some, such as in the de Moreville case, indicate that peace was made by the king (*sciatis me fecisse pacem*).

part of the scribe in the wording of a charter, since the description of the role of the king is consistently more detailed in the later charters, this change had to reflect at least acquiescence on the part of the king.

In Kirkness, the same discretion is evident in what was included in the narrative, and what was not. There is a vivid description of Robert, the ancestor of the family of Lochore's behaviour, self-serving comments about the monks wanting peace and a just judgement as their reason for petitioning the king, and details about procedure and who actually made the judgement. There is no indication in the record itself that a perambulation actually took place,⁸³ although that is in the rubric.⁸⁴ To the *viros Religiosos*, it was more important that the record clearly show that Robert had violently injured them and that he was justly punished (conquered) before a multitude for trying to take their property. The description of public humiliation and vindication of the injured party's position was a well understood part of the process of seeking and obtaining justice. As a sort of balance to the public humiliation, the transgressor might well have expected an equally public pardon.⁸⁵ While this is not explicit in the text of the Kirkness account, there is language to suggest that something of the sort took place.⁸⁶ But considering the subjective nature of the account, it cannot be assumed that the events occurred as

⁸³ *St. Andrews Liber*, 117-118. There is a reference in the record to an oath of some of the *Céli Dé* took regarding the boundaries of Kirkness, but it does not say the boundaries were perambulated.

⁸⁴ *St. Andrews Liber*, 117-118.

⁸⁵ Hyams, *Rancor and Reconciliation*, 200-201.

⁸⁶ *St. Andrews Liber*, 117-118. The specific terms in the text include, *fulit compromissum*,

recorded. Whether the actual events played out as described by the Céli Dé, however, is not as important as the perceptions of the author and his intended audience. The record describes the author's own interpretation of the events and the significance of the outcome to the parties.

Both Eccles and Newbattle present narrative accounts that differ yet again in their portrayal of what was important. Eccles is a record that, to all appearances was made to act as a substitute for a charter that would have contained the terms of the agreement. Although there are both ecclesiastical and lay witnesses listed, it is unclear if they were present when the matter came before the king, or if they were witnesses to the drafting of this record.

Simon the Cantor's letter does not give a lot of detail about the procedure, which is actually described more fully in the royal charter. But there is a description: he calls what he witnessed an *ordo judicarius*.⁸⁷ In a way, this short phrase says more about the perceptions and the expectations of Simon than the more detailed passages from the other texts. It shows at least a limited understanding and expectation of Romano-canonical law and judicial process that is distinct from the pursuit of justice evident in the other narratives. The language itself is critical. While the religious men sought a 'just judgement' from King David in the Kirkness dispute, Simon saw the boundaries of Newbattle's lands determined by a judicial process, for which

⁸⁷ *Newbattle Register*, no. 3.

he had a formal and technical, procedural name. Although 'there is evidence that pre-Gratian canon law materials were known in Scotland, and there cannot be much doubt that the *Decretum* was also in circulation there,'⁸⁸ this is the first reference to the Romano-canonical procedure in a non-papal charter. The term does appear a few years earlier in a papal bull from Alexander III to the Bishops of Glasgow and Whithorn regarding Holmcultram, so the term and what it represented were known to the ecclesiastics in Scotland at least by 1181.⁸⁹

Kenneth Pennington has argued that the transition from the Romano-canonical procedure of the *ordo iudiciarius* to the secular courts is not well understood since so many of the secular court proceedings were oral, leaving no records.⁹⁰ If the use of this phrase by Simon the Cantor is accepted as an accurate reflection of the technical meaning of the term with regard to ecclesiastical legal procedure, and the description set out in the royal charter is accurate (which should be a fairly safe presumption), the combination of these records shows a rare glimpse of a case where the two overlapped. Since the procedures outlined in the royal charter do not differ greatly, if at all from the

⁸⁸ MacQueen, 'Canon Law, Custom and Legislation', 229.

⁸⁹ R. Somerville, *Scotia Pontificia*, no. 98. The exact phrase in Alexander III's letter is '*iudiciario ordine*'. There is no way to tell if the phrase that Simon used truly described a Romano-canonical procedure that was any different from the procedure described in William I's charter concerning the perambulation conducted in 1184 over these lands. See Barrow, *RRS*, ii, no. 252. William's charter clearly states in the first person that the procedure was at his command and in his presence. Since the king also is confirming the perambulation that occurred during his grandfather's reign, it seems logical that the procedure William followed was similar to the earlier one. The descriptions of what was done are similar.

⁹⁰ Kenneth Pennington, 'Due Process, Community and the Prince in the Evolution of the *Ordo iudiciarius*', http://classes.maxwell.syr.edu/his381/procedure.htm#N_14_.

earlier procedures in David I's charters, it is arguable that the secular procedures followed in David's reign as early as the 1140s and continued under William I, were adopted as acceptable Romano-canonical procedure (or at least not markedly different from it). It is also possible, that the *ordo judiciarium* described by Simon was actually known in Scotland from the time of David's reign.⁹¹ Either way, they are evidence of the legal transplantation discussed by Watson.⁹² Watson points out that complete adoption is not necessary, and the rules adopted will in any case be modified over time within the new context.⁹³

Other elements found in Simon's record are important as well. The use of the phrase *ordine judicario* places this record in an altogether different category from other records within this group or within the twelfth century as a whole. Although Barrow described this as a 'somewhat obscure letter', and it certainly is that, it is the first time that a formal, technical name was applied to a legal proceeding.⁹⁴ The significance of this phrase in terms of legal development or the existence of a legal system is critical. Coupled with the

⁹¹ Evidence supporting the conclusion that perambulations were regularised under King David I is found in *Arbroath Register*, nos. 228,229. These two charters refer to a perambulation according 'to the assise of King David' between Arbroath and the Barony of Kynblathmund and Achinglas in 1219, and the subsequent Recognition of the perambulation in 1227 in the full court of the king. Examination of the procedures described in the charters concerning the Masterton-Moorfoot lands show that the initial marking of the boundaries was described in no. 97. Subsequently, no. 98 was issued which refers to the lands being traversed, and the terms of the charter are more formalistic rather than descriptive. This suggests that the assise concerning the procedure for perambulations may have taken place during the 1140s, specifically the early part of it, between the time when David I gave the lands to Newbattle, and then perambulated the bounds in a more formal manner.

⁹² Alan Watson, *Legal Transplants: an Approach to Comparative Law*, 2d ed. (Athens, Ga., 1993), 21.

⁹³ *Ibid.*, 7.

⁹⁴ Barrow, *The Acts of Malcolm IV*, 49.

description of the proceedings conducted by William I set out in the royal charter, it shows the existence of rules recognised by both individuals and the officials conducting the proceedings.⁹⁵ The phrase as it is used also demonstrates a 'self awareness' within the text of a distinction between procedures and process. If the distinction between legal rules and their application is a marker of a legal system's autonomy,⁹⁶ using the terminology that characterises a particular series of actions as a specific judicial *process* demonstrates an abstraction and conceptualisation of process from practice and procedure.

This issue of abstraction and conceptualisation is especially important for any discussion of a full fledged legal system if in fact, there were regularised procedures compatible with Roman law during David I's reign. Adoption of procedures does not necessarily mean an internalisation of the abstract notions that went with it. Nor does following a procedure from another legal system imply complete adoption of all the 'baggage' that went with it. There is no firm evidence of such abstraction or conceptualisation that can be firmly dated

⁹⁵ H.L.A. Hart, *The Concept of Law*, (Oxford, 1993), at 113 states that there are 'two minimum conditions necessary and sufficient for the existence of a legal system.' First, there must be rules of behaviour, valid according to that system's 'ultimate criteria of validity' which must be generally obeyed, and second, the rules of recognition and rules of change and adjudication must be 'effectively accepted as common public standards of official behaviour by its officials.'

⁹⁶ Andrew Lewis, 'The Autonomy of Roman Law', in *The Moral World of the Law*, ed. Peter Coss, (Cambridge, 2000), 39-40. Lewis was discussing the comment by Cicero which demonstrated the distinction between argument and legal doctrine. Lewis argues, that 'this distinction, which lies at the heart of the autonomy of a legal system's rules, was already developed in the middle of the last century BC when many of the classical rules were as yet unformulated. It is the capacity to separate the discussion of legal rules from their possible application in actual circumstances that characterises autonomy.' This will be discussed in more detail, *infra*.

to David I's reign. But such evidence is present by the 1180's with Simon's letter. One letter is not conclusive proof that the Romano-canonical rules of procedure had been adopted *en masse*, but when placed in context with the other elements such as the change from *justicia mea* to *justiciarius meus* discussed above,⁹⁷ it is further evidence of the maturation and growing complexity of the legal system in the twelfth century.

The Moorfoot charters are another example of the process. When examined separately, the impression is of formulaic phrases used in donation and confirmation charters with little sense of outside factors impacting on the language used and actions described. But when the charters are pooled and dissected as a group, a different picture emerges. The story behind this series and many other similar series throughout all the chartularies is a continuum of interactions on many layers, not least of which is what can only be described as the ongoing legal relationships between the neighbours regarding the properties over which they claimed interests. This series starts out as a standard grant and confirmation, and culminates in the determination of the boundaries of the lands granted by a recognised, formal judicial proceeding.

All of these cases use the narrative to relay information about the underlying events. The subjective tone of these records communicates the perceptions and expectations of the authors and their audience about justice, law and the

⁹⁷ See chapter on Judges, specifically, the section on the Justiciar, *infra*.

resolution of disputes. Each of the cases discussed provides more evidence of the maturing legal system and increasingly formalised procedures used to settle disputes regarding property.

CHAPTER V

CHARTERS

Although *noticiae* seem to have functioned more as records of concluded disputes or events, charters were the primary text format used both in the prevention and the resolution of disputes. Charters have been defined as ‘...written declarations meant to serve as evidence of actions of a legal kind, recorded in specific forms, which are, however, changing according to the various persons, times, places and topics concerned.’¹ This necessarily assumes that these records will be authenticated, preserved and produced in the case of a dispute. These assumptions do not apply to other, less formal records such as discussed earlier. *Noticiae* were not sealed, and as seen in the previous chapter, could be a private letter or memorandum. Sealed writ-charters, however, were different. Originally, ‘the sealed charter had hitherto been in essence a letter informing the recipient of a transaction already passed. It was in fact an undated *post factum* record of a verbal transaction, carefully recording the names of the

¹ *Charters and the Use of the Written Word in Medieval Society*, ed. K. Heidecker (Turnhout, 2000), 2.

witnesses who had seen the transaction and heard the covenanting words.’²

The taint of ‘unreliability is most obvious in the witnesses listed on charters. The presence of witnesses cannot be presumed simply because their names appear on the charter’,³ but their inclusion in the list of witnesses does say something about the perceived status of the witnesses and their desirability as such.

Charters ‘are not only written texts but also material things. Their texts are written down, preserved, copied... and used in many ways by many different people.’⁴ As Susan Reynolds has noted, ‘the most obvious innovation in twelfth-century landholding was that grants of land were more and more often recorded in charters.’⁵ Most charters of this period reflected human acts and human intentions regarding property rights of some sort. ‘..[T]he motive force behind the production, transmission and preservation of all kinds of charters was the conservation of property, and it is the establishment or description of the property ownership in the

² V.H. Galbraith, ‘The Literacy of the Medieval English Kings’, in *Kings and Chroniclers* (London, 1982), I, 102. Hudson discusses the distinction between writ-charters, used to record grants, and writs, used to convey orders. There were several ‘mixed-style documents’ found in his study of the charters of the Earls of Chester. John Hudson, ‘Diplomatic and Legal Aspects of the Charters’, in *The Earldom of Chester and its Charters*, ed. A.T. Thacker (Chester, 1991), 153-177, 154. There are several such mixed documents among the early charters of David I.

³ David Bates, ‘The Prosopographical Study of Anglo-Norman Royal Charters’, in *Family Ties and the Roots of Politics: The Prosopography of Britain and France from the Tenth to the Twelfth Century* ed. K.S.B. Keats-Rohan (Woodbridge, 1997), 92.

⁴ K. Heidecker, ‘Introduction’, in *Charters and the Use of the Written Word*, (Turnhout, 2000), 4.

⁵ Susan Reynolds, ‘Fiefs and Vassals in Scotland: A View From Outside’, *SHR*, LXXXII, (2003), 176-93, 182.

charter which illuminates the underlying human activity.⁶ As the existence of a charter took on greater significance in the course of the twelfth century, the perception of its value with regard to proof of ownership changed. Charters were used in the settlement of disputes,⁷ but the lack of a charter was no bar to claiming possession, nor was it deemed *necessary* to prove rights, early in the twelfth century.⁸ By the thirteenth century, however, the production of a charter was adequate proof, and the lack of a charter could be a problem in protecting one's property rights.⁹ As the use of charters became more prevalent, a lord could demand that his tenant produce his charters to show what he held and under what terms he held from the lord.¹⁰ Not only were charters used more and more regularly, they began to be perceived as necessary to prove one's rights. This perception could and did lead to falsification of charters, sometimes well after the supposed grant occurred.

⁶ Paul Fouracre, "Placita" and the settlement of disputes in later Merovingian Francia', in *The Settlement of Disputes in Early Medieval Europe*, eds. W. Davies and Paul Fouracre, 23.

⁷ Barrow, *Charters of David I*, nos. 9, 10, 11.

⁸ Ibid, no. 11, where either the charter or testimony of witnesses was deemed acceptable. This is discussed in more detail, *infra*.

⁹ Bracton, *De Legibus et Consuetudinibus Angliae*, trans. Samuel E. Thorne, Vol. II (Cambridge, Mass., 1968), 62: 'If a charter is made the gift will be more secure, for a gift may be proved more easily and more effectively by a writing and instruments than by witnesses or suit.' See also Hyams, 'Warranty and good lordship in twelfth century England', *Law and History Review* 5 (1987), 437-503.

¹⁰ MacQueen, *Common Law and Feudal Society*, 120-121. This was called 'showing the holding', a means for the lord to determine the terms on which his tenants held of him, and 'ensure the preservation of their written titles. It was an administrative and disciplinary procedure which 'was probably, perhaps even certainly, older than the brieve rule'. As MacQueen points out, initially charters were probably not absolutely necessary, as long as the terms of the grant and sasine were remembered in the lord's court.

Not only were charters evidence of rights in property, they were also tangible representations of power and identity. These were expressed in different ways, the most consistent of which were when and by whom the record was created, the type of charter, and the specific words used in it. A subsequently created charter demonstrated the increasing perceived importance of records, especially with regard to a disputed property. Equally important were the type of charter used to resolve a particular dispute, and the precise wording of the charter text. The following cases demonstrate the importance of these factors in the prevention and resolution of disputes. As with all case studies, there is some overlap; some cases could easily be discussed under different headings. But the specific points being made seem best illustrated by the particular charters for each topic.

Avenel

Confirmations played a vital role in the transfer of property rights. While there is little firm evidence that a confirmation charter was legally necessary at the beginning of the twelfth century, it was common practice to have at least one confirmation, preferably royal. The Avenel charters are noteworthy because there are numerous confirmations as well as a chirograph. The purpose of so many charters seems to have been to erase any doubt of the validity and royal approval of the transfer, and negate any

possibility of future claims by Robert Avenel's family. The series of charters record the history of the grants concerning the land of Eskdale. Where charters have not been preserved, information about earlier transfers was preserved in the later confirmation charters.

King David had granted the land of Eskdale to Robert Avenel, for his service, sometime before 1153. No grant charter from David I to Robert Avenel remains for this transfer. Robert Avenel then gave this land to Melrose during the reign of King Malcolm IV. There is no extant charter reflecting this gift, but it is recorded in the confirmation charter of William I early in his reign.¹¹ Although it appears from the witness list that there were other family members, including sons, they are not noted in the body of the text.¹² His son and heir, Gervaise, is named in the body of the first donation charter, as granting and assenting to his father's gift. Although there is no original of this grant, there is a charter of Bishop Herbert during the reign of Malcolm IV which supports a donation of the tithes of the land which the monks held of Robert.¹³ Robert's renewal of the gift, reflected in William I's confirmation may be seen as a means of reinforcing the effectiveness of the charter itself, and indicates in no uncertain terms that the royal confirmation was deemed to be for

¹¹ NLS, Adv. 34.4.11, fo. xxxv^v-xxxvi^r - xxxvi^v; *Melrose Liber*, no. 39.

¹² 'Glai, nephew of Robert Avenel, Robert the clerk, son of the same Robert'. In the confirmation charter of Robert's son and heir, the witnesses are 'Gervaise, nephew of Robert Avenel, Glai, nephew of the same, Robert son of Robert Avenel'.

¹³ The charter from Bishop Herbert of Glasgow described the gift of tithes given by Robert Avenel from Eskdale. NLS, Adv. MS 34.4.11, fo. xliii^r; *Melrose Liber*, no. 5.

enforcement, irrespective of whether the king was involved in or had given up any rights to the subject property. The chirograph between Robert, his son Gervaise and Melrose included reference to the four merks which apparently served as rent or render in addition to the terms of the agreement regarding the other grants.¹⁴ The internal text and the witnesses allow it to be dated to on or shortly before 8 March 1185, the day Robert Avenel died.¹⁵ The third charter in this series is the confirmation from Gervaise of his father's gift.¹⁶

There is a second confirmation from William I, which Barrow dates roughly twenty years later.¹⁷ The earlier one has already been discussed; Barrow comments regarding the second, that '[t]he probability seems to be that the Avenels' charters and King William's confirmation of them were issued in 1185, the former shortly before Robert's death, the latter shortly afterwards.'¹⁸ The timing could explain why the monks were so meticulous about the language in the charters and the confirmations. Deathbed gifts were suspect, and were one of the few donations that could successfully be challenged.¹⁹ The overt references concerning why Robert

¹⁴ NLS, Adv. MS 34.4.11, fo. xxxviii^r; *Melrose Liber*, no. 40.

¹⁵ *Chronica de Mailros*, ed. J. Stevenson (Edinburgh, 1835), 93.

¹⁶ NLS, Adv. MS 34.4.11, fo. xxxvi^r; *Melrose Liber*, no. 41.

¹⁷ Barrow, *RRS*, ii, no. 104, dated to 1165x1171; no. 264, dated to 1180x1193.

¹⁸ *RRS*, ii, no. 264, comments.

¹⁹ *The Treatise of the Laws and Customs of the Realm of England commonly called Glarvill*, trans and ed. G.D.G Hall (Oxford, 1993), 70.

wanted the royal confirmations and the stated purpose of making the charter 'more firm and stable' support this.²⁰

There is a second series of charters concerning this land during the reign of Alexander II. In this second series, there is an almost verbatim duplicate of Gervaise's confirmation. The only significant difference is that the new confirmation from Gervaise contained a reference to his own son, Gervaise.²¹ There is yet another confirmation of this gift, from Roger Avenel, grandson of Robert and son of Gervaise, which reiterates the language of the confirmation charters from Gervaise, and records the history of these transactions.²² Immediately following this confirmation by Roger Avenel of the gifts of his father Gervaise and grandfather Robert, is an agreement regarding Eskdale.²³ This is a charter of Alexander II dated within the text to 1235, regarding an amicable agreement between Roger Avenel and the Abbot and monks of Melrose, over the contentious matters between them. King Alexander's charter refers to Roger's charter; either they are contemporaneous or Roger's charter predates Alexander II's, but, of course, after 1214. It also includes Roger's brother as one of the witnesses.

²⁰ *Melrose Liber* no. 39.

²¹ *Melrose Liber*, no. 196. This charter is not included in the MS in the BL.

²² *Melrose Liber*, no. 197.

²³ NLS, Adv. MS 34.4.11, fo.xxxviii^v (or fo. xlii^v, depending on how the folio markings are read); *Melrose Liber* no. 198. It should be noted that the later Eskdale charters are in the same place as the earlier one from William I's reign. The printed version has them separated by reign. Roger's charter is datable to the reign of Alexander II and before 1235.

Returning to Robert Avenel, it is interesting that his charter uses the rare word *incartavi* in that section when referring to his gift to the monks during the reign of Malcolm IV. This term is also used in the confirming charter of Gervaise. This word, which may be translated as ‘to grant by or embody in a charter’²⁴ would only be used in the context of a grant, and then only where there was a charter reflecting the grant. It may, indeed, have been used where the charter itself is part of the granting process, as a symbol of what has been granted.

Robert Avenel had been a justiciar under William I.²⁵ Presumably, he would have been as aware of any procedural customs or rules in use to enforce grants or prevent later claims as the monks. This is not to imply any specialised ‘legal’ knowledge on his part, but it supports the conclusion that he and his son were perhaps more sophisticated than many of their peers regarding the ensuring of their donations. There are multiple confirmations of grants, recitation of procedural history and generally more attention to detail than is normally found in confirmations. The chirograph, with its quitclaim regarding the four merks which the monks had been rendering for Eskdale, is a record of past acts and provided for future acts as well. The provisions for payments regarding his wife Sybil and his son Gervaise are carried over into Gervaise’s confirmation. The

²⁴ R.E. Latham, *Revised Medieval Latin Word-List, from British and Irish Sources, with Supplement* (London, 1999), 240.

²⁵ Barrow, *RRS, i*, (Edinburgh, 1960), 50.

major difference between the two is that the king's brother, David, is named as Earl David in the chirograph but not in Gervaise's charter. If he had been present when the transaction reflected in Gervaise's charter was conducted, most likely, but not certainly, he would have been included. By the same reasoning, the chirograph was not drafted at the same time as William I's second confirmation charter, since Jocelin, Bishop of Glasgow is not listed, nor are some of the other ecclesiastics we find in the prior charters. Surely persons so illustrious would have been included if they had been present?²⁶ The fact that the monks were so thorough in obtaining so many confirmations raises the question of whether they had doubts about the security of their claim on Eskdale. While there were several purposes for obtaining a confirmation charter, the two most important and which seem to have been operating here, were validation and authentication of the grant or gift, and enforcement of the terms.

If one accepts that each charter reflects a decision-making process, whether a donation, confirmation or resolution of an actual dispute, referencing prior charters or companion charters serves several functions. There is a contextualisation of the particular charter in relation to other charters and the actions depicted therein. There is a bolstering of credibility, and thus, authenticity of both the charter referred to and the

²⁶ G.W.S. Barrow, 'Witnesses and the Attestation of Formal Documents in Scotland, Twelfth-Thirteenth Centuries', *Legal History*, 16 (1995), 1-20. Although this presumption cannot be relied upon completely, it is a factor that must be weighed when attempting to date the charters, determine the chronology of events, or evaluate the importance of certain witnesses.

one referencing other charters. There is also the validation of the underlying transactions related in the texts of these charters above and beyond the authentication or the enforcement aspects. This self referencing or recursion which is fundamental to the reproduction of the decision making paradigm also serves to demonstrate how the evolutionary process of decision-making may at one and the same time *appear* to be and reinforce the perception of linearity, while actually being non-linear. If the confirmation charters were simply re-iterations of the original grant charters, there would be no additional language, and no question about the original terms. There would be no new grants. This is not the case since there are charters which give more detail than the originals and the confirmations often have additional grants. In those charters that include the text of other charters, such as those charters incorporating papal charters with judicial mandates, or instructions in procedure or law, the effect may be even more marked. The decision making process is laid out (so to speak,) in a sequential form. Yet the charter is more than a confirmation of the incorporated document; it is also a history, commentary and justification of actions ultimately taken in a particular case.²⁷

By reference to the king's confirmation, requested by Robert in order to make his gift stronger and more stable, he is referring to and relying on the

²⁷ *Melrose Liber*, nos. 101 and 133 are both examples from William I's reign.

authority of the king to enforce the agreement even against himself and his heirs. These references to charters within charters also demonstrate the recursion or self-referencing and functional folding aspects of complexity theory.²⁸ In effect, they incorporate the power and authority deemed to exist in a royal charter by reference to it, as well as obtaining a separate confirmation.

The authority and thus credibility of the charter was often tied to not just the person in whose name the document has been issued, but to whether the charter had the symbols of authority, the seal and a formulaic approach within the text, the analysis of which is used by modern historians to determine authenticity and dating.²⁹ One by-product of this need for formulaic uniformity and authenticity, as well as continuity of the transactions of the prior charters, may be seen in the periodic issuance of general confirmation charters. These confirmation charters normally included references to all the previous donations. Since these earlier charters did not always survive, the language cannot be checked in every instance for formulaic phrases, but of those that did survive, the language usually tracks the original donations, unless there were additional grants from the king who issued the confirming charter.³⁰

²⁸ G. Harlan Reynolds, 'Chaos and the Court', 91 *Colum. L. Rev.* 110, 111.

²⁹ Barrow, *RRS, II* (Edinburgh, 1971), 75-94.

³⁰ There are several general confirmations to be found in the various cartularies. One series that includes references to grants memorialized in prior charters, fresh grants, and references to grants for which no documentation exist is that of Dunfermline. See *Dunfermline Registrum*, no. 1, (David I), no. 35 (Malcolm IV), and no. 50. It has been

Confirmation charters show elements of the 'transition from pre-literacy to textuality' discussed by David Postles in his article 'Country *Clerici* and the Composition of English Twelfth-and Thirteenth-Century Charters'.³¹ Relying on Michael Clanchy, Postles discusses the process whereby the written record, while becoming more pervasive, still relies on memory. The recitation of prior gifts, inclusion of prior beneficiaries, and sometimes a reiteration of texts of prior charters, as was seen in the Avenel charters, shows reliance on the recollections of those involved, but no longer does there seem to be complete trust in the accuracy of memories, collective or not. Thus orality and literacy, memory and record, are intertwined, and to some extent, dependent upon each other for their existence. Robert Avenel was relying on memory when he incorporated the terms of the earlier grant into the later charter. King William may well have relied on memory when confirming the Annandale grant to Robert de Brus. His charter may have simply contained the terms of the agreement between Robert de Brus and David I, which all had understood before but had not felt the need to include in the text.³² During the intervening years

suggested in the literature that confirmations had to be renewed by subsequent lords because a confirmation was only good as long as the person confirming was alive. This does not make sense when discussing gifts in alms, or where they were given in perpetuity; see Richard Sharpe, 'The Use of Writs in the Eleventh Century, A hypothesis based on the archive of Bury St. Edmunds', *Anglo-Saxon England* 32 (2003), 247-91.

³¹ David Postles, 'Country *Clerici* and the Composition of English Twelfth- and Thirteenth Century Charters', in *Charters and the Use of the Written Word in Medieval Society*, ed. Karl Heidecker (Turnhout, 2000), 27-42.

³² Barrow, *RRS*, ii, no. 80. I am indebted to Dr. Broun for pointing out that this also could represent the settlement of a dispute over jurisdiction; hence the detailed listing of those *regalia* or pleas of the crown which the king reserved to himself. The king also reserved

they gradually became more dependent on the written record rather than memory, and make use of the documents as proof of what their memories told them, when they referred to other charters, or incorporate the terms of another charter as reflecting the terms of the instant charter. This may be seen most clearly in the phrases '*notiantur et continentur in cartis Domini Roberti Avenel*' in William's second confirmation charter, and the phrase '*sicut carta Roberti Avenil eis testatur et confirmat*'. This internal referencing of prior charters is fairly commonplace by the mid-twelfth century, although there are references to prior charters found much earlier.³³

'The growth of reliance on writing has been a continuing process without a precise beginning or end.'³⁴ In the Avenel charters we see a discrete example of these changes, and the increasing importance attached to having a written confirmation in addition to original charters. The increasing numbers and more precise and formulaic language seen in confirmation charters demonstrate that by the reign of William I there is a clear, conscious and transparent (in the sense it is explicitly stated in the charter) reliance on the crown for enforcement of legal rights in property, and in the charter as evidence of such.

the right to name a man of the fief as prosecutor and that all such causes would be brought before the king's justiciar.

³³ See for example, confirmation charter of David I, while still titled 'Earl', to Prior Algar and the monks of Durham regarding the donation of Swinton made by his brother King Edgar; Barrow, *Charters of King David I* (Woodbridge, 1999), 56.

³⁴ M. T. Clanchy, *From Memory to Written Record: England 1066-1307*, (Oxford, 1993), 42.

David I and Earl Henry - Assent and Consent

As was seen in the Avenel charters, Robert and Gervaise obtained the assent and consent of their heirs and so stated in their charters. This phrase or some variation appears frequently in donation charters, but is not present in all of them. Whether obtaining assent and consent of either the lord or one's heirs was necessary to effect a transfer of property has been addressed in the literature. Tabuteau, in her study of property transfers in eleventh century Norman law, has detailed the two most important questions concerning consent: whether it was legally necessary, and if not, why was it so often obtained, sometimes at great trouble?³⁵ There is no absolute concurrence among historians: some have concluded that this custom may have been a good idea, but was not legally necessary,³⁶ while others have concluded that there seems to have been sound practical reasons for getting the assent and consent of one's relatives. Professor Duncan has commented on Tabuteau's work, stating that she has 'greatly

³⁵ Emily Zack Tabuteau, *Transfers of Property in Eleventh-Century Norman Law* (Chapel Hill, 1988), chapter 8 generally, and 170.

³⁶ Paul Hyams, 'Charters and the Early Common Law', *The Journal of Legal History*, 12, (1991), 173-89; Stephen D. White, *Custom, Kinship and Gifts to Saints, The laudatio parentum in Western France, 1050-1150* (London, 1988). See also J.G.H. Hudson, 'Diplomatic and Legal Aspects of the Charters', in *The Earldom of Chester and Its Charters*, ed. A.T. Thacker (Chester, 1991), 153-178. He mentions the debate on participation, and points out that 'references to gifts made with a lord's permission are extremely rare in English charters.' He notes that 'participation of a donor's heirs might be desirable, [but]...[was] in no sense strictly legal,' and points out that very few of the grants by Chester include the heir's consent, 170-171.

elucidated the significance of signatures and of the consent of relatives.³⁷ Such consent 'was often expressed in Norman charters...most frequently that of sons, wife or brothers, suggesting that a relative's right to inherit made his or her consent desirable.'³⁷

The contrary position is that obtaining consent in the charters alienating property, especially in Northern France, was a norm which amounted to a rule. While, '[n]o legislation prescribed that change, yet the increasing appearance of such consent in the charters demonstrates the evolution of a new norm, which became a rule and developed into the standard *retrait lignager* of thirteenth-century customary law.'³⁸ This did not hold for England, except perhaps in the boroughs.³⁹ The general trend in Anglo-Norman law after the conquest was towards free alienation of land, but this was a slow process.⁴⁰ While an ultimate answer to whether the custom of obtaining the assent and consent of heirs was in fact a rule may not be satisfactorily answered here, the charter evidence for Scotland tends

³⁷ A.A.M. Duncan, 'Yes, The Earliest Scottish Charters,' *SHR*, LXXVIII, (1999) 1-38, 13.

³⁸ Gavin I. Langmuir, 'Community and Legal Change in Capetian France', *French Historical Studies*, 6, (1970), 275-286, at 278.

³⁹ The right of the expectant heir to redeem the family land that had been alienated by his ancestor seems to have applied in English boroughs; see Pollock and Maitland, *History of English Law*, Vol.ii, 330. They also confirm that in England, 'There is no *retrait lignager*; the landowner can sell or give without the consent of his heir,' and under tenure, Pollock and Maitland note that 'if the English law knows no *retrait féodal*, it knows no *retrait lignager*'.

⁴⁰ S.E. Thorne, 'English Feudalism and Estates in Land', *Cambridge Law Journal* (1959), 193-209, 202-203. Thorne, at 195, argues that the giving and receiving of homage was at the crux of the need for consent, not heritability.

towards the conclusion that it may well have been more important than previously thought, at least in some cases.

Tabuteau has detailed several instances in eleventh-century Normandy where consent seemed to have been important. One of the approaches she takes in discussing the necessity of consent is to examine instances where consent was refused. This was apparently effective only in cases where a donor was attempting to transfer property held by a tenant. One of the cases she discusses involved a donor who gave two-thirds of the tithes of certain lands, except for those held by tenants who refused to consent to the tithes being transferred. This and other charters examined lead Tabuteau to the conclusion that tenants, but only tenants 'could block an alienation completely.'⁴¹ This was not true of lords or even of relatives. While a lord's consent may have delayed a transfer, it did not prevent it. Likewise, a relative refusing to consent does not seem to have prevented a transfer. She cites two cases where a donor's son refused consent, the transfer occurred anyway, and the son later consented.⁴² Even so, consent of relatives appears over and over again. One of the most compelling points she makes is that '...the clear impression left by the charters is that

⁴¹ E. Z. Tabuteau, *Transfers of Property* (Chapel Hill, 1988), 171. Tabuteau refers to several other cases which also seem to support this position.

⁴² *Ibid*, 172.

recipient churches were much more worried about the consent of relatives and tenorial superiors than about the consent of tenorial subordinates.⁴³

There are very few extant cases where consent, or the lack thereof, was used as grounds for complaint. Tabuteau discusses one that involved the absence of consent on the part of a chapter. The monks of Saint-Pierre de Préaux invited Roger de Beaumont to their chapter and he enquired about their affairs. They complained to him that the previous Abbot, Ansfrid, had alienated land donated in a charter confirmed by both Roger de Beaumont and his father without the license or consent of the monks. Upon hearing this Roger 'ordered that everything which had been dispersed without the license or consent of their convent should return to the monks' demesne just as it was written in the charter.'⁴⁴ Although Tabuteau uses this as an example of the charter being taken as proof of the extent of the monastery's holdings, it also shows (perhaps more strongly than her examples in the chapter on Consent) that in eleventh-century Normandy, a lack of consent of an interested party, in this case the convent, was grounds to force return of alienated property. Granted, the property in question had been given by Roger de Beaumont and he was ensuring that it stayed where he had intended, but the lack of consent was still grounds for nullifying the subsequent transfer. Consent itself seems to

⁴³ Ibid. 171-173. But Tabuteau has doubts. She points out that the charters taken as a whole demonstrate that 'the consent of relatives and lords [was reported] much more often than that of tenants,' 173.

⁴⁴ E. Z. Tabuteau, *Transfers of Property* (Chapel Hill, 1988), 214.

have been a form of acknowledgement, which would bind the heirs and others to uphold the terms of the transfers. This is supported by Bracton, where he states: '[A]nd that one may give land in free, pure and perpetual alms, more freely than he himself holds it of his feoffors and chief lords, and that his heirs are bound to warrant *if they have acknowledged his charter* or it has been proved...' ⁴⁵ (emphasis added). Although it is true that Bracton comes somewhat later, the requirements with regard to charters and confirmation of which he writes are borne out in Scotland by the evidence in David I's reign and beyond.

This seems to be something separate and apart from any feudal practices, but more to do with obtaining quiet title, and preventing possible heirs from making later claims. Susan Reynolds has commented that,

The earliest references I have found to the need to get consent to alienation of property seem in other countries to have nothing to do with anything that could be called feudal tenure. They concern the objection that members of a donor's family might make to his or her gifts to a church of property that they expect to inherit. From the ninth century churches in the Frankish kingdom began to record consents of wives and heirs in their charters so as to secure their titles against later claims. Then when

⁴⁵ Bracton, *De Legibus et Consuetudinibus Angliae*, (*On the Laws and Customs of England*) (Cambridge, Mass., 1968), at 93-94.

churches in France no longer had effective protection from kings they began to get consents or confirmations from local lords who might offer it instead. By the twelfth century custom had hardened and lords were beginning to require those over whom they claimed authority, including people with alods or free inheritances, to get permission to alienate.⁴⁶

According to Reynolds, then, there was a shift in who was asked to give consent. It began as an agreement involving the heirs, to safeguard against later claims by the family, and gradually shifted to essentially obtaining permission from one's lord, again for protection against later claims.

Milsom also discussed the evolution of the lord's consent to a transfer, from a custom to a rule in his *Legal Framework*. He postulates that the change was not in the customs, but in the tenant's view of what he had and what he could do with it. 'Before royal control, and in particular before *mort d'ancestor* allowed an heir to feel that he entered in his own right rather than under a grant to himself from the lord, no tenant could think that he had something which he could by himself give for ever to an

⁴⁶ Susan Reynolds, 'Fiefs and Vassals in Scotland: A View from Outside', *SHR*, LXXXII, (2003), 187.

institution which would last for ever: of course the lord must join in....The gift was unthinkable without [the lord's confirmation].⁴⁷ According to Milson, the change was that the tenant had a title which he could transfer on his own, and there may have been marginal loss to the lord. '[A]nd so we find lords beginning to propound the custom as a rule: *sine assensu et voluntate intrusit se in feudum...contra consuetudinem regni*.'⁴⁸ He goes on to state, '[G]rantees and their successors allege compliance, but nothing visibly turns on it: we do not see the heirs of grantors getting the land back on the ground that the rules were broken.'⁴⁹ These alternate views bring us to the fundamental question: if it was not a norm or custom amounting to a rule, why was it so prevalent?

In examining the Scottish material, it becomes apparent that there is a mixture of consent and assent by heirs, and confirmations by both superiors and heirs, as seen in the Avenel charters. There are also cases where failure to obtain the assent or consent of heirs, by whatever means, was associated with a claim by the heirs regarding the subject property.⁵⁰ Pollock & Maitland have asserted that nowhere does *Glanvill* indicate that the consent and assent of the lord was required in all transfers, but he writes at some length concerning 'the restraints on alienation that are set

⁴⁷S.F.C. Milson, *The Legal Framework of English Feudalism* (Cambridge, 1976), 120.

⁴⁸Ibid, 121.

⁴⁹Ibid, 123.

⁵⁰See discussion of the de Frivill case, below.

by the rights of expectant heirs.⁵¹ It was prevalent in the French cartularies, not only for alienation of property in pure alms, but in transfers by sale or exchange.⁵² *Glanvill* discusses several scenarios where the consent of heirs is necessary. These include situations where a free man has given land heritably, in recompense for service but without seisin,⁵³ and where a gift has been made on a death-bed or last will transfer.⁵⁴ Whether the donor had inherited the land or acquired it by other means was vital in determining whether consent or assent was needed. If a free man had only inherited land, then he could give a certain part to anyone,⁵⁵ but if he had only acquired land, he could give a part of the acquired land but not all of it, 'because he must not disinherit his son.'⁵⁶ *Glanvill* is very clear on the distinction between the different types of land: 'If he [the donor] has both inherited and acquired land, then it is beyond question that he can give in perpetuity any part or all of his acquired land to whom he pleases; he can also, notwithstanding this, give a reasonable part of his

⁵¹ Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed. (Union, NJ, 1996), I, 332.

⁵² There are numerous examples throughout the cartularies of monastic houses in France, as well as in the French royal charters. See M. Jean Dufour, *Recueil des Actes De Louis VI, Roi de France (1108-1137)* (Paris, 1992); J.-J. Vernier, *Chartes de L'Abbaye de Jumièges (v. 825 à 1204)* (Rouen, 1916), Tome I, II; M. Lucien Merlet, *Cartulaire de L'Abbaye De La Sainte-Trinité de Tiron* (Chartres, 1883), Tome I, II.

⁵³ *Glanvill*, VI, 18- VII, 1, 69: 'Every free man...can give a certain part of his free tenement to whom he pleases in recompense for his service, or to a religious place as alms. If seisin follows... the land will remain for ever with the donee and his heirs, if it was given to them heritably; however, if no seisin follows such a gift, then after the donor's death nothing can be claimed in reliance on such a gift against the will of the heir...'

⁵⁴ *Ibid*, at 70, '...a gift of this kind made to another in a last will can hold good if made and confirmed with the heir's consent.'

⁵⁵ *Ibid*.

⁵⁶ *Ibid*, 71.

inherited land...'⁵⁷ These rules⁵⁸ must be taken into account when analyzing grant charters, particularly where there is inconsistency in wording. Nowhere is it more glaring than in the donation charters of David I.

There are several examples where the assent and consent of the heir or heirs is noted in the donation charters of David I and just as importantly, there are charters which do not have these words. While Geoffrey Barrow has presented arguments that explain the use of these words in these charters as proof of a dual or joint kingship between David I and Earl Henry,⁵⁹ his explanation does not seem to work legally, or beyond the royal charters. The phrase is used in non-royal charters as well,⁶⁰ and one must look outside the framework of government administration to determine why these words were used in specific charters, but not in all charters.

Barrow asserts that 'more than a fifth of the surviving acts of David I either imply or explicitly state that the royal government of Scotland between the mid-thirties and the early fifties of the twelfth century was a joint government of father and son.'⁶¹ His conclusion is based upon the

⁵⁷ Ibid, 71.

⁵⁸ This is the term used in *Glanvill*, 70.

⁵⁹ Barrow, *Charters of David I*, 5-8.

⁶⁰ There are numerous examples throughout the Scottish material as well as in other cartularies, such as the Avenel charters discussed above.

⁶¹ Ibid, 7.

number of charters that reflect Henry's assent or consent to alienation of lands, confirm gifts made by David, or where David I and Earl Henry are listed as witnesses to the other's acts. He relies heavily on the phrase, '*rex designatus*' which appears in a couple of charters produced by St. Andrews, and concerning properties granted to St. Andrews by David I.⁶² The first, in David's name, is a general confirmation of all that had been granted by Bishop Robert of St. Andrews to the cathedral priory,⁶³ and the

⁶² *St. Andrews Liber*, 189-91, 192-3. But see Dauvit Broun, *The Charters of Gaelic Scotland and Ireland in the Early and Central Middle Ages*, Quiggin Pamphlets on the Sources of Medieval Gaelic History (Department of Anglo-Saxon, Norse, and Celtic, University of Cambridge, Cambridge, 1995), 27: '[t]he coincidence is notable, but it need only be the Latin phrase, not the concept of "king designate" itself, which travelled from France to St. Andrews.'

⁶³ *St. Andrews Liber*, 189-91; Barrow, *Charters of David I*, no. 126. The language in this charter is striking. It refers to Henry as '*heres meus et rex designatus*' and the verb used to confirm is plural, but there is a separation between the joint confirmation of Bishop Robert's gifts and the gift by David I. There, the granting language is singular, and the confirmation plural. Technically, it is not a joint grant. While the phrase *rex designatus* may have been how Bishop Robert saw Henry, and he was David's heir, this confirmation charter is not an act of joint government. It is a confirmation. It could easily have been two or more separate charters: separate confirmations by David and Henry, a separate grant by David, and separate confirmation by Henry. In fact, the confirming language at the end of the charter is separate.⁶³ *St. Andrews Liber*, 189-01; Barrow, *Charters of David I*, no. 126. The language in this charter is striking. It refers to Henry as '*heres meus et rex designatus*' and the verb used to confirm is plural, but there is a separation between the joint confirmation of Bishop Robert's gifts and the gift by David I. There, the granting language is singular, and the confirmation plural. Technically, it is not a joint grant. While the phrase *rex designatus* may have been how Bishop Robert saw Henry, and he was David's heir, this confirmation charter is not an act of joint government. It is a confirmation. It could easily have been two or more separate charters: separate confirmations by David and Henry, a separate grant by David, and separate confirmation by Henry. In fact, the confirming language at the end of the charter is separate.⁶³ *St. Andrews Liber*, 189-91; Barrow, *Charters of David I*, no. 126. The language in this charter is striking. It refers to Henry as '*heres meus et rex designatus*' and the verb used

second is a confirmation of King David's charter. Barrow notes that Henry's confirmation is probably close in date to David's charter, and dated them to 1144, although he had noted that canons had been introduced at St. Andrews by 1140 or so.⁶⁴ Both charters confirm property from Bishop Robert to St. Andrews priory. The *St. Andrews* charters are the only ones that refer to Earl Henry as *rex designatus*.⁶⁵

There is one charter where David I and his son participated in a joint grant to Dunfermline Abbey.⁶⁶ This involved the land of Balchrystie and Newburn, both lying above the Forth. Of the charters referring to Henry as *rex designatus*, this is the only one which could be considered a joint grant. Yet it is issued in the name of King David alone, and cannot be considered an act of governance; it is a donation made for the benefit of their souls.⁶⁷

to confirm is plural, but there is a separation between the joint confirmation of Bishop Robert's gifts and the gift by David I. There, the granting language is singular, and the confirmation plural. Technically, it is not a joint grant. While the phrase *rex designatus* may have been how Bishop Robert saw Henry, and he was David's heir, this confirmation charter is not an act of joint government. It is a confirmation. It could easily have been two or more separate charters: separate confirmations by David and Henry, a separate grant by David, and separate confirmation by Henry. In fact, the confirming language at the end of the charter is separate.

⁶⁴ Barrow, *Charters of David I*, 94, comment; A.A.M. Duncan, 'The Foundation of St. Andrews Cathedral Priory, 1140', *SHR*, LXXXIV, (2005), 1-37, 2.

⁶⁵ Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1975).

⁶⁶ Barrow, *Charters of David I*, 171.

⁶⁷ *Ibid*, no. 177. A distinction must be made in the granting of perpetuities. Those made to religious houses for the benefit of the donor's soul are not related to the administration of government. Those made to an individual in exchange for military service or administrative service are, in fact, 'governmental' in nature. David did make several grants to his men, such as Walter of Ryedale, which were not joint acts with Henry even though they were in the south. This reinforces the notion that any joint action with regard to granting perpetuities was not considered an act of government.

Barrow noted in his argument for a joint government that the ‘joint action seems to have been confined, with almost no exceptions, to perpetuities, charters granting or confirming permanent property, privileges and rights.’⁶⁸ With regard to administrative and legal briefes, there are no duplications or ‘dual production of briefes.’⁶⁹ More significantly, and Barrow acknowledged the importance of this fact, ‘there are comparatively few examples of joint documentation for the country north of Forth.’⁷⁰ As for Dunfermline, Earl Henry did not take any part in their affairs except for the two diplomas given to the Abbey by David I. This is true as well for the charters concerning grants to the Isle of May. Henry is noticeably absent. Most telling of all is the confirmation to St. Andrews priory confirming David’s gift of property in Haddington. As Barrow noted, ‘it does look as if Earl Henry’s activity in royal government was largely confined to Scotland south of the Forth, to Cumbria, and of course to English Northumbria.’⁷¹ While Barrow’s explanation is certainly attractive, especially considering the experiments in government throughout northern Europe in the twelfth century,⁷² the use of the phrase *rex designatus* in the French royal charters,⁷³ and the English dual kingship with Henry II and young King Henry, it is not the only

⁶⁸ Barrow, *Charters of David I*, 7.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 7-8. In fact, they are mostly limited to the three where the phrase *rex designatus* appears.

⁷¹ *Ibid.*, 8.

⁷² Judith Everard, ‘The Assize of Count Geoffrey’ (1185): Law and Politics in Angevin Brittany’, in *Expectations of Law in the Middle Ages*, ed. Anthony Musson (Woodbridge, 2001), 54-55.

⁷³ M. Jean Dufour, *Recueil des Actes De Louis VI, Roi de France (1108-1137)* (Paris, 1992). There are numerous examples.

explanation which fits these facts. It may have simply boiled down to the fact that grants of property owned by the king were not seen as primarily royal acts but rather as governed by the same norms or rules as any other transfer of property.⁷⁴ A review of how these lands came into the possession of David I supports the conclusion that the king followed these rules concerning the assent and consent of the heir when transferring these properties, primarily land, especially to religious houses.⁷⁵

In 1094, King Duncan's charter asserted that he was king by right of inheritance.⁷⁶ In his charter, he also lists his brothers, among others as those for whose souls the donation is given. In addition, he states, '*Et quoniam volui quod istud donum stabile esset Sancto Cuthberto, feci quod fratres mei concesserunt.*'⁷⁷ Taken alone this would perhaps raise no eyebrows, but it becomes important when considering the royal charters of Duncan's half brothers, Edgar and David.

In 1097, Edgar made the same assertion regarding inheritance.⁷⁸ It is an assertion repeated in Edgar's other charters. In 1107, King Edgar died,

⁷⁴ *Glanvill*, 69-70.

⁷⁵ Most of the examples concern donations to religious houses, but the rule seems to have been applicable regardless of who or what the donee was.

⁷⁶ Lawrie, *ESC*, no. xii. Although one could argue that both Duncan II and Edgar had acquired the kingdom by 'conquest', since they had to fight for it and both required help from William II, they do not seem to have considered it a conquest, so much as a retaking of what was rightfully theirs.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, no. xv. See also Gordon Donaldson, 'Early Scottish Conveyancing; Supplementary to Formulary of Old Scots Legal Documents', ed, P. Gouldsbrough (Edinburgh, 1985).

leaving a will which divided his *dominium* between his two surviving brothers. Alexander was to be King. David, Alexander's presumptive heir to the Scottish throne, was to have Cumbria and some parts of Lothian, but not all, before 1124. Between 1107 and 1124, David ruled as *princeps* of Cumbria. If Cumbria and part of Lothian were considered the appanage of the heir to the Scottish throne,⁷⁹ it would in part, explain why Henry is so frequently a part of any charters concerning properties in these areas. But there must be more involved. More because the charters that include reference to the assent and consent of Henry with 'almost no exceptions' relate to perpetuities, property, privileges and rights; in short, property rights of whatever stripe. There are no acts of joint governance which concern royal briefs or commands. The only joint acts occurred outside what may be deemed to be official, governmental acts. All such acts of David I and Earl Henry, since they involve property rights, may just as easily have been performed by other, non-royal individuals. This is not to say that David I always acted in concert with Henry even in granting perpetuities in the south. There are examples of such grants made by David I alone

In addition, there is the issue of Moray. David I did not gain control of this land until 1130, when he obtained it by right of conquest, not direct

⁷⁹ R.L. Graeme Ritchie, *The Normans in Scotland* (Edinburgh, 1954), 125. But see A.A.M. Duncan's discussion, in *Kingship of the Scots*, 59-61.

inheritance.⁸⁰ This distinction is vital when placed in a context where the one who had acquired or conquered the lands wishes to dispose of some or all of them. *Glanvill* sets out the rules concerning the distinctions in treatment between inherited and conquered land very clearly: ‘...the general rule is that any person is allowed to give freely in his lifetime a reasonable part of his land to whom he pleases...’⁸¹ A man cannot disinherit his son, so must not give all his inherited land away. Nor, if he only has acquired land, may he give it all away at the expense of his son. But ‘if he has both inherited and acquired land, then it is beyond question that he can give in perpetuity any part or all of his acquired land to whom he pleases; he can also, notwithstanding this, give a reasonable part of his inherited land, as has been explained above.’⁸²

There are only a few charters dealing with land in Moray, two of which are donations to the church. By comparison with other charters, these would normally include some reference to assent or consent of the heir, as was David’s practice. This of course would be true except in one circumstance. If Henry’s assent and consent were not necessary as the heir, there would be no need for his consent to be reflected in the charter. As land held by conquest, when there were other lands inherited and held

⁸⁰ *The Ecclesiastical History of Orderic Vitalis*, trans. and ed. Marjorie Chibnall, Vol. IV, Books VII and VIII (Oxford, 1973), 277. With the defeat of Angus, earl of Moray, the territory of Moray ‘no longer had a lord and defender, and (David) conquered the whole of that extensive duchy. In this way David grew more powerful than his predecessors.’

⁸¹ *Glanvill*, 70.

⁸² *Ibid.*, 71.

in patrimony for the heir so that his rights were not at issue, Henry had no heritable claim to the lands of Moray.⁸³ David did not need his assent or consent and could dispose of these lands as he wished.

This is precisely what David did. In the two charters concerning the Holy Trinity at Urquhart, an offshoot of Dunfermline, David was implementing his policy of settling religious houses in Moray, and did this without any input from Henry. There is no assent or consent, no *pro anima* clauses and no confirmation by Henry. The dating put forth by Barrow for both of these charters is late in the reign. One of them at least could well be dated to the year Henry died, 1152. So it could be argued that there is no mention of Henry in this act because he was dead. While this is true, it does not explain why there was no confirmation by Malcolm IV, nor does it explain why there was no mention of successors.

⁸³ Compare the situation here with that faced by William the Conqueror, when allocating his lands between his sons. He gave the patrimony, Normandy to his eldest son, but England, obtained by conquest, he designated to William Rufus. See discussion of this in *Orderic Vitalis*, above. Primogeniture does not seem to have been firmly established during the first half of the twelfth century; succession did not become a problem in Scotland, however until the Great Cause, see A.A.M. Duncan, *Kingship of the Scots*, (Edinburgh, 2003), especially chapters 12 and 13 (on the Great Cause); but see 80-81, where Duncan notes that "In Scotland primogeniture in the male line became the rule for heritage in the time of David I, if not earlier...and the royal house itself was probably committed to lineal descent, as became apparent in 1153." This makes the reference in Duncan II's charter to obtaining the consent of his brothers, not his wife or his children, even more marked. Although one could argue that his children were not of age to give consent, one explanation is simply that his heirs to the kingdom and its lands were his brothers, not necessarily his children. This is in keeping with the experiments in government discussed earlier. I am indebted to Neil Strevett for the many conversations we have had concerning these issues.

In support of this interpretation is the fact that King David commanded Earl Duncan to take his grandson Malcolm throughout Scotia, the provinces north of the Forth and proclaim him the heir to the Scottish kingdom.⁸⁴ This is significant for two reasons. David was not bequeathed the kingdom on Alexander's death, and there may have been a question of succession of such a young king. But even more important is that this parade of the young heir was not conducted in the South. Perhaps it was deemed unnecessary since Malcolm IV was the heir of Henry, and the land would have been presumed to go to him by inheritance.⁸⁵

One must take into account the charters of Malcolm IV. Out of the approximately 160 charters of which we have extant texts, only three indicate that Malcolm's brother William gave his assent or consent. The first is a grant to the cathedral church of Glasgow and concerns the church of Old Roxburgh, the chapel of the king's castle at Roxburgh and land attached to it. It is datable to 1153x1156, and before William lost the earldom of Northumbria. The precise phrase is *Willelmo Comite fratre meo illud idem concedente*, but there is no mention of assent as such.⁸⁶

⁸⁴ Barrow, *RRS*, I, 6.

⁸⁵ Another explanation is that there were no other 'suitable' heirs. Although Duncan II's son, William had a place at David's court, there is no mention of him succeeding David I or any contest for the succession before Earl Henry's death. William fitz Duncan was dead by 1152, probably in 1151, so this would not have been an issue after Henry's untimely death.

⁸⁶ Ibid, no. 114. It would seem that it was enough to get his consent rather than the entire phrase.

The second charter of Malcolm IV that contains similar language is a confirmation and grant to Melrose Abbey. It is for easements through the king's forest of Selkirk and Traquair, several parcels of land and certain fishing rights. This charter is datable to 1162x1165.⁸⁷ The phrase used there is the full *annuente et concedente Willelmo fratre meo*.

The third and final charter with this language is datable to the last year of Malcolm's life. It concerns a grant to the cathedral church of Glasgow of the land now known as Glasgow Green. William is listed as the first witness: *Willelmo fratre Regis idem concedente*.⁸⁸ The last two charters both have extensive *pro anima* clauses and are in the later years of Malcolm's reign.

A common denominator for these three charters is that they are all grants of property below the Forth. Although Malcolm made several other grants during his reign, and some of them were in the same general area, there does not seem to be the same pattern with Malcolm as was seen with David. The reason for the phrases appearing in these particular charters is not entirely clear, especially since there were many other similar grants where no such language was used. Since they were all in the more southern part of the realm, it may well be a similar situation of William being the presumptive heir to the lands in question. With regard to

⁸⁷ Ibid, no. 235. Barrow notes that the dating is probably 1162x1165 because of the reference to Richard de Moreville who had succeeded his father in 1162.

⁸⁸ Ibid, no. 265.

Malcolm IV, factors which might have influenced the use (or lack) of these terms could well be the minority of the king and his brother and the lack of clear designation of William as his heir until later in his reign.

There is also the possibility that the area outside Scotia was deemed to be held of the English king (unlikely, since this was never explicitly acknowledged), but may have had customs more like those of England.⁸⁹

A number of royal charters dating back to Duncan II had consent language included for lands south of the Forth. If assent and consent had been required or at least strongly indicated in any donation because it was alienating land away from the patrimony, and these were the king's own lands and/or rights, then the assent and consent may have been procedurally important, *possibly* even necessary, to ensure the validity of the gift. A confirmation was also required to validate the gift. If one accepts that as late as David I's reign, there was still the idea that a kingdom was 'personal' that is, heritable and could be disposed of by the king, as the king in fact did when he donated lands to the church and gave

⁸⁹ A.A.M. Duncan, *Kingship of the Scots* (Edinburgh, 2002), 56. He has argued that the charter in Lawrie wherein Edgar holds of the English king is in fact genuine, although Barrow disputes this. The question of English lordship presumably would not have applied to Scotia, only, if at all, to the southern portions of the kingdom. Whether this was actually the way those areas outside Scotia were regarded is unclear, but there are some indications that the English king did have an interest in the disposition of portions of southern Scotland. Duncan, at 107, points out that in 1195, when William I was ill, he began to make plans for the throne to pass to his daughter Margaret. He initiated arrangements for a betrothal of Margaret to Otto of Brunswick, who was also nephew to Richard I of England. Under the proposed arrangement, 'Otto was to be given Lothian, Northumbria and Cumberland, but the English king was to have *in custodia* Lothian and its castles, the Scottish king Northumbria, Cumberland and their castles.'⁸⁹ This arrangement received strong support from Richard I, but was jettisoned because Queen Ermengarde became pregnant and William was hoping to have a son.

land to retainers in exchange for service, then it makes sense to get the assent and consent and then the confirmation of the heir.⁹⁰ Henry is in fact named as the heir.

There is no way to be certain that obtaining the assent and consent of the heir or successor was legally required in the twelfth century, but it was one way of ensuring the royal gift remained with the beneficiary. The practice in England in the early twelfth century seems to have been the same. With regard to the requirement of assent, in donation charters and with regard to the necessity of a confirmation from the king, the case brought by the Abbey of Thorney against Robert of Yaxley, *infra*, is instructive.⁹¹ Robert's failure to obtain the assent and consent of the chapter and the confirmation of the king was fatal to his case.

De Frivill - *pro anima* clauses

In addition to the assent and consent clause, donation charters usually included a clause stating that the gift was made for the souls of the donor,

⁹⁰This question was never addressed directly in the Scottish material until the Great Cause at the end of the thirteenth century. See E.L.G. Stones and Grant G. Simpson, *Edward I and the throne of Scotland, 1290-1296: an edition of the record sources for the Great Cause* (Oxford, 1977, 1978) (2 vols.).

⁹¹ D.M. Stenton, *English Justice Between the Norman Conquest and the Great Charter, 1066-1215* (London, 1965), Appendix IV, 140-147. Stenton took this case from the *Red Book of Thorney*, 3, fo. 417. It is datable to 1113x1127, within the period when David I would have had control of the Honour of Huntingdon. This case is discussed above with regard to the role of the sheriff acting as judge.

his or her family, lords, ancestors and successors.⁹² For the most part, this phrase, included in the term *laudatio parentum*, has been considered to indicate the motive behind the gift.⁹³ There is no evidence that this phrase was required when donating property in alms,⁹⁴ but on occasion, it may have been used as additional ammunition, consideration⁹⁵ or persuasion to support the security of a gift. Even though it may not have been required to effectuate a gift, there are some cases where the lack of such a phrase is associated with a failed gift, and where subsequent confirmation charters included amended *pro anima* clauses.⁹⁶

⁹² While this is normally referred to as the *laudatio parentum*, I have separated the assent and consent clause from the *pro anima* clause for the purposes of this discussion. It seems to me that they are not interchangeable; although they were often used together, they served different, but related purposes. The assent and consent clause may have been more important in securing a gift that alienated part of an heir's inheritance, while the *pro anima* clause gave a more intangible benefit to those included in its prayer. I have found no instances where someone who could not have made a claim to the property in question had been included in the *pro anima* clause.

⁹³ E. Z. Tabutcau, *Transfers of Property* (London, 1988), 15.

⁹⁴ See generally, White, *Custom and Gifts to Saints*; Hyams, 'Charters and the Early Common Law' where they both conclude that assent and consent were not required. They do not specifically separate the assent and consent from the *pro anima*, as I have here.

⁹⁵ The requirement of consideration for a contract to be valid would not have truly developed under English law until the thirteenth century, but there are earlier cases where the monks who received lands from a family member demonstrated that the heirs had received something in the exchange, thus defeating their claims to the property.

⁹⁶ One such series is that involving the de Colville charters. *Melrose Liber*, nos. 192, 193, 194, 195. The *pro anima* clause in this first charter was short and to the point: *pro anime mee et omnium antecessorum meorum*. The language in this second charter appeared to be essentially the same as the first, but with an addition in the *pro anima* clause. It included language concerning the king and his predecessors by name: '*pro salute anime mee & pro animabus david, malcolmi, Williame Regum Scocie & omnium antecessorum meorum....*'.

Richard de Frivill donated two pieces of land to Arbroath Abbey. The first was a full ploughgate of land in 'Balekelsan'⁹⁷ and the second was a half ploughgate of land in the territory of Mondynes, in Fordoun, Mearns, on the Bervie Water.⁹⁸ There was a confirmation by William I of the half ploughgate.⁹⁹ The two donation charters are datable to 1178x1180; Barrow dates William I's charter of confirmation to '1178x1188, perhaps 1178'.¹⁰⁰ There apparently were objections by the heirs of Richard de Frivill over these gifts of land to Arbroath. There are several possibilities for this, although all are based more or less on speculation rather than firm evidence. The objections may have been based on the claim that Richard de Frivill had no right to donate these lands in the first place, or that the way he did it was not proper, such as in a death-bed situation where none of the heirs was present or consented. It may have left his heirs destitute, which would mean the family/heirs would have the right to object. Or it may be that Richard de Frivill did not follow certain customs or rules when he donated these lands, rules that were to protect the donor, the heirs, the donees, and any other interested parties.

The first donation charter of Richard de Frivill concerns the land of Balekelsan.¹⁰¹ This charter is addressed to the universal holy mother

⁹⁷ NLS, MS. Adv.34.4.2, fo. 66. *Registrum Veteri; Arbroath Liber*, no. 90. The present name of this land is undetermined.

⁹⁸ NLS, MS. Adv. 34.4.2, fo. 66; *Arbroath Liber*, no. 91.

⁹⁹ *Ibid*, no. 91 (*bis*), p. 63; Barrow, *RRS*, *ii*, no. 225.

¹⁰⁰ Barrow, *RRS*, *ii*, no. 225.

¹⁰¹ NLS, MS. Adv. 34.4.2, fo. 66, *Registrum Veteri; Arbroath Liber*, no. 90.

church, and starts out (as many donation charters do) with the '*Sciatis me dedisse et concessisse et hac carta mea confirmasse....*' Richard de Frivill had given one full carrucate (ploughgate) in land, by its right boundaries, '*pro animabus Regis David et Regis M, et pro animabus antecessorum meorum et pro salute Regis Willhelmi et pro salute anime mee*'. The witness list is as follows: 'Turpin bishop of Brechin, Walter archdeacon St. Andrews, William son of the Earl of Angus, Angus of Dunlopyn, John of Hastings, William son of Freskin (fretheschyn), William Malvoisin (mauuesyn) clerk of the king, Walkin the brewer, David of Forfar, Malcolm of Kettins (ketenes); this charter is datable to 1178x1180, shortly after Arbroath was founded.

Although this looks in form and language like other donation charters, and seems to have all the pertinent parts, there are significant omissions. First, the *pro anima* is only for Richard's ancestors, himself and the kings of Scotland. There is no mention of his successors, his children, his heirs. Second, there are no witnesses who appear to be relatives of any kind. There is no inclusion of others in the benefits of the gift other than his ancestors and himself, except the reference to kings, especially to William I. There is no assent or consent by any family members. There does not appear to be a specific confirmation charter from the King for this donation either. While there were general confirmations from both King William I and his son Alexander II, there were several donation charters,

including the second donation charter of Richard de Frivill, where a specific confirmation from the king was obtained.

The second charter from Richard de Frivill concerns his gift of land in Mondynes, in Fordoun, Mearns, on the Bervie Water.¹⁰² The address is the same as in the previous charter. The donation is of '*illam terram in territorio de monethechen propinquam aque de Beruyn per dimidia carucata terre per rectas divisas*'. This piece of land had been ploughed¹⁰³ by Richard de Frivill and several others, including John Hastings, Walter Scot, and the Abbot of Arbroath. The text refers to '*sicut ego ipse et Johannes de Hasting et Walterus Scotus cum ipso abbate de Abirbrothie et pluribus aliis peraravimus*'. The land is given for the souls of King David, King Malcolm and '*pro animabus antecessorum meorum*', and for the health of King William and himself. The text of this charter includes the phrase, '*Testibus Rege Willelmo et hoc idem concedente*' and then is followed by a list of other witnesses, none of whom appear to be a relative or heir of de Frivill, although there are several high ranking individuals.¹⁰⁴ There is no *laudatio parentum*, no assent and consent, and no confirmation from anyone except the king.

¹⁰² NLS, MS. Adv. 34.4.2, fo. 66^v; *Arbroath Liber*, no. 91, 62.

¹⁰³ Literally, *peraravimus*, 'we ploughed through, furrowed'.

¹⁰⁴ The witnesses include the Bishop of Aberdeen, Earl David, the earl of Angus, Robert de Quincy and several of the king's close associates as well as a number of churchmen. The consent of de Frivill's lord, the king, concurs with Susan Reynolds conclusions set forth above, and the requirements for royal consent in the Thorney vs. Yaxley case, above, p.163.

The third charter in this series is the confirmation of William I for the donation by Richard de Frivill of the land in Mondynes.¹⁰⁵ In this charter William conceded and his charter confirmed that half ploughgate in land in the territory of Mondynes which Richard de Frivill gave to the monks. The land is to be held as freely and quietly fully and honourably as the charter of the same Richard stated and confirmed, saving the king's service. Many of the same witnesses that appeared in Richard's charter are also named in the king's confirmation.¹⁰⁶ The dating indicates that this may have been one of the earliest donations to the Abbey.

This is not the end of the story regarding this donation, however. There is another charter from William I.¹⁰⁷ This second charter granted to Arbroath one ploughgate of arable in Mondynes, on the Bervie Water. The land had been measured, at the king's order, by several of the king's men, some of whom were also witnesses to the other charters. The king stated his reasons for giving this land to Arbroath:

*Volo quidem ad omnium noticiam pervenire quod per hanc
carucatam terre quam eis dedi adquietavi ab eis unam carucatam*

¹⁰⁵ NLS, MS. Adv. 34.4.2, fo. 66^v, *Arbroath Liber*, no. 91 (*bis*), 63. This was the accepted format. See J.G. H. Hudson, 'Diplomatic and Legal Aspects of the Charters' in A.T. Thacker (ed), *The Earldom of Chester and Its Charters* (Chester, 1991), 162, where he notes that '...from c. 1130, most confirmations of vassals' gifts distinguish between the vassal giving and the lord confirming.'

¹⁰⁶ Barrow, *RRS ii*, no. 222.

¹⁰⁷ NLS, MS. Adv. 34.4.2, fos. 66^v-67^r; *Arbroath Liber*, no. 92.

*terre et dimidiam quas ex dono Ricardi Frivill' habuerunt et de quibus cartas suas eis dederat.*¹⁰⁸

The purpose of his actions was further elaborated:

Unde non liceat alicui heredum predicti Ricardi si qui eorum terram illam recuperaverint super predicta terra erga eos aliquam questionem movere.

Barrow renders this as, 'so that none of Richard's heirs may bring any lawsuit against the abbey in respect of the 1 ½ ploughgates if they should recover them'.¹⁰⁹ The witness list to this charter included several of the same individuals, but this time, their titles were included.¹¹⁰ While this may not be significant procedurally, it may indicate an attempt to give the charter more weight. Barrow dates this as 1183x1188, and notes that the compensation offered by the King to the Abbey may have been for warrandice.¹¹¹

¹⁰⁸ The verb *acquietare* means to pay; to free or discharge; to acquit. The passage translates roughly as: 'I will that notice reach all that by this carucate in land which I have given to them I have acquitted from them one carrucate and ½ which they had from the gift of Richard Frivill and by his charter he gave to them.'

¹⁰⁹ Literally, the phrase may be translated: 'So that none of the heirs of Richard, if any of them recover that land, may be permitted to move any question towards (against) them over the said land.'

¹¹⁰ Witnesses were Hugh, bishop of St. Andrews, John, bishop of Dunkeld, Robert, Abbot of Scone, Earl Duncan the Justiciar, Richard de Moreville the Constable, Walter Olifard, Philip de Valognes, Roger de Berkeley, Walter de Berkley the Chamberlain.

¹¹¹ Barrow, *RRS*, ii, no. 277.

There are some conclusions that may be drawn fairly clearly from the charters. First, that Richard de Frivill believed he had good title, and the king actively supported this (at least as to Mondynes) since he is listed as a witness in the donation charter, and he confirmed the gift with a separate charter. There is no indication in the charters themselves where Richard got this land, but Barrow notes that the de Frivills were one of the families settled north of the Forth by William I during his reign, as part of his policy of granting crown lands in exchange for military service, or as an extension of the policies of David I and Malcolm IV. He notes that, '[t]he individuals whom we know from authentic records to have been infeft in land in the Mearns in the time of William I include, ...Richard de Frivill...'¹¹² Barrow also connects this Richard de Frivill with the family of de Preville, attached to the house of Warenne.¹¹³ It is more than likely that Richard had been given this land by William I sometime before 1178 in return for military service. There does not seem to be a donation charter that has survived reflecting the grant from William I to Richard de Frivill or his relatives.

Second, there is no mention in either of the two donation charters of any family or heirs of Richard de Frivill. This could be because he was not married and had no legitimate offspring at the time of the donation, but it would not account for any siblings or parents. There is no mention of any,

¹¹² Ibid, at 17.

¹¹³ Ibid, no. 225, comment, p. 269, where he refers to EYC, viii and that one Ralph de Preville witnessed Warenne charters during the period 1159x1196.

nor are there any names in the charter that may be ascribed to Richard as either relatives or heirs. Thus, there is no indication that his heirs (for he apparently did have them) knew of his donations, or in any way consented to them or confirmed them. Although one could argue that his reference to ancestors may include his parents, they would not be his heirs. Since the lines of succession according to *Glanvill* normally descend,¹¹⁴ the term ‘ancestor’ refers usually to those who have died rather than anyone living.¹¹⁵ In addition, the term ‘successors’ would not cover parents, but might cover collateral heirs such as brothers, sisters and their collateral descendants, and more remotely, paternal and then maternal uncles, aunts and their descendants.¹¹⁶

The third fact which may be gleaned from the charters is that sometime after c.1180 and before 1183 at the earliest and 1188 at the latest, Richard de Frivill died. Thereafter, his heirs appear to have raised a claim regarding Richard’s donations. The king’s charter gives no details about who these heirs were, how the issue was raised, nor even the grounds upon which the claim was based. It could have been either directly with the king when the heirs attempted to claim the property of their deceased relative, or even raised by the monks of Arbroath, who may have noticed a

¹¹⁴ *Glanvill*, 73.

¹¹⁵ See, for example, the charter of Walter son of Alan the Steward in his donation of the church of Innerwick and of Ledgerwood and a ploughgate of land of Hassendean, etc. where he specifies ‘*antecessorum meorum defunctorum*’, and then goes on to include the living. Charter is datable to 1165x1173, *Registrum Monasterii de Passelet (Paisley Register)* (Edinburgh, 1832), 7.

¹¹⁶ *Glanvill*, 75.

‘defect’ in the language of the charters. It may be that the lack of *pro anima* language or anything with similar effect was an indication that there was something irregular about the transaction. It seems more likely, however, that the heirs may have been approached for a confirmation by the Abbey, and refused. Donations could be confirmed by the heirs after the death of the donor, and often were.

Since the record of this series of charters is found in the cartulary and no originals remain, there is no way to determine if the originals were drafted by a royal scribe or someone from Arbroath. Assuming, however, that the charters were drafted by a scribe from Arbroath, the question remains regarding the omission of any reference to successors. If Richard had not married by the time of the donations, and had no apparent heirs, the monks may not have considered the lack of reference to heirs or successors an issue. Alternatively, he may have died before the monks could obtain a confirmation charter from his heirs, who then refused to confirm *post mortem*. Although this would perhaps be unusual, as the heirs had a duty to protect the reasonable donations of those from whom they inherited,¹¹⁷ their objection would be understandable if Richard had failed to provide adequately for his heirs before his death. It could also be a problem if Richard did not have clear title, although as indicated, this is less likely. None of these possibilities can be excluded, however, since there is no

¹¹⁷ ‘The heirs of donors are bound to warrant to the donees and their heirs reasonable gifts and the things given thereby.’ *Glanvill*, 74.

clear reference to how the claim of the heirs was made. The explanation for this could be any of the above reasons, but the most appealing, (because it fits with what *Glanvill* indicates was a good reason to negate a gift) is that the gift was made on Richard's death-bed, and none of the heirs was present to acknowledge or assent to it, and they refused to do so later. Nor in fact, can it be ruled out that the omission by Richard of any reference to heirs or successors was deliberate.

The charter evidence above allows for a slightly different interpretation, at least for Scotland, of the premise in Stephen White's book that the *laudatio parentum* was not a 'legal' rule. White suggests that '[T]he *laudatio parentum* can therefore be regarded as a precautionary practice that flourished in a conflict-ridden society where knightly strength often overcame monastic justice and where the moral or customary rights of a donor's relatives sometimes overrode the legal title of his monastic donee.'¹¹⁸ He further notes that the available evidence does not provide a clear answer to the question of whether the *laudatio parentum* was required by law or merely procured out of prudence.¹¹⁹ White notes that '[T]here is little evidence, for example, that legal rules were routinely and systematically differentiated from other sorts of norms or that people clearly distinguished between what would now be considered legal, moral,

¹¹⁸ Stephen White, *Custom, Kinship, and Gifts to Saints: The Laudatio Parentum in Western France, 1050-1150* (Chapel Hill & London, 1988), 68.

¹¹⁹ *Ibid.*, 69.

religious, or customary duties and rights.¹²⁰ White concludes that “like the norms cited by poets, the rule or adage that gifts should be made with the *laudatio* articulated only a general standard of customary practice.”¹²¹ At least with regard to de Frivill, the lack of any mention of or acknowledgement from heirs, or later confirmations led to the failure of the gift.

Alienation of land to the detriment of one’s heirs has been discussed briefly above. It dates back to the Roman period, where the rule was that one could not alienate the inheritance of ones heirs to their detriment.¹²² There was a similar, though not so particular customary law that one could not alienate one’s property to leave heirs destitute, followed generally throughout northern Europe. This customary rule might have required notification and/or consent of the heirs for any alienation to actually be effective. Failure to notify, and to prove notification, could provide grounds for recovery of the property by the heirs. Bracton notes that a gift, to be effective, must have certain elements, which generally follow the Roman law but with some additions.¹²³ Although Bracton is later than these charters, the requirements he discusses probably were not. This is

¹²⁰ Ibid, 70

¹²¹ Ibid, 73

¹²² The prohibition can be traced to the *lex Falcidia* of 40 BC, where ‘legacies were not to be allowed to reduce what remained to the heir below a quarter of the value of the net inheritance. If less than a quarter remained, the legacies were reduced *pro rata*, see Barry Nicholas, *An Introduction to Roman Law* (London, 1962), 266; see also James Brundage, *Medieval Canon Law* (London, 1995), 87-89; W.M. Gordon, O.F. Robinson, *The Institutes of Gaius*, II (London, 1988), 224-228.

¹²³ *Bracton on the Laws and Customs of England*, Vol. II trans. Samuel E. Thorne, and ed. George E. Woodbine, Vol. II (Cambridge, Mass., 1968), 62.

reinforced by the fact that Bracton states, 'the gift will be more secure' if there is a charter, 'for a gift may be proved more easily and more effectively by a writing and instruments than by witnesses or suit.'¹²⁴

Although there is not enough evidence to say that what is happening in this group of charters is a concretisation of what had been a convention, norm or custom, into a legally enforceable rule, it does show that the language used in the *pro anima* clause may have carried more weight than previously thought.

There is another aspect which must be considered. Although the consent of one's superior lord seems to have been required, and may questionably be dated to the reign of William I,¹²⁵ there were limitations on this, and it does not (at this point) appear to have extended to one's heirs. According to Pollock and Maitland, the lord had a right to prevent alienations which would seriously impair his own interests.¹²⁶ Burgess points out that the first attempt to define this position is made by William I, in a statute providing:

¹²⁴ Ibid. Although Kenneth Pennington states that Bracton is not really a Roman lawyer, he was trained as both a Roman and canon lawyer. It would be hard to imagine that he could simply divorce himself from his training to any great extent. See Kenneth Pennington, 'Roman and Secular Law in the Middle Ages', at <http://faculty.cua.edu/pennington/Law508/histlaw.htm>. This article was also published in *Medieval Latin: an Introduction and Bibliographical Guide*, F.A.C. Mantello and A.G. Rigg (eds.), (Washington, D.C., 1996), 254-266.

¹²⁵ Robert Burgess, *Perpetuities in Scots Law* (Edinburgh, 1979), 58.

¹²⁶ Burgess, *Perpetuities*, 58; Pollock & Maitland, *History of English Law*, vol. I, 344.

1. *Nullus liber homo potest dare, vel vendere alicui plus de terra sua, quam de residuo terrae posit fieri domino feudi servitum ei debitum; et quod pertinent ad feudum;*
2. *Et si qui oppositum fecerit, si vocetur forisfactum ad curiam ea de causa, omittet id quod tenet, nisi Domini superioris ad hoc habuerit benevolentiam aut confirmationem.*¹²⁷

He notes that although there is a similar provision in the Magna Cartae of 1217 and 1225, in England they had little effect and were not observed by the time of Bracton. In Scotland however, according to Burgess, this provision 'was refined so as to prohibit alienating more than one half of the fief without the consent of the superior and continued in existence until the abolition of wardholding.'¹²⁸ This approach to alienation can be seen in the charters themselves, especially starting from William's reign, where there are often references to excepting the king's service in the donation charter itself. It does not appear to be a stretch to argue that this consent requirement by the superior was evident in the donation charters and confirmations at least as early as William I's reign, and perhaps earlier. But it does not answer the consent requirement for heirs and successors.

¹²⁷ Burgess, *Perpetuities*, 58, referencing 'Leg. Gul. c.31'. I cannot find this reference. It does not appear as chapter xxxi in *The Acts of Parliaments of Scotland*, Vol. I, 1124-1303, (1844); There are provisions discussing what a man may do with inherited property or that acquired by conquest, but these provisions are not the same as those quoted by Burgess. Burgess does acknowledge that 'the authenticity of this provision as being of William the Lion has been doubted, (cite omitted)' although it is cited in some of the late cases on recognition.

¹²⁸ *Ibid*, 59.

Stephen White concluded that the *laudatio parentum* found in so many donation charters was not a legal requirement to effectuate a gift to religious houses.¹²⁹ Although White's study concerned the north and west of France between 1050-1150, Hyams had concluded the same about England. 'To seek the assent of selected kin to one's dispositions was thus often prudent, sometimes an emotional necessity, but never, in England, a legal requirement.'¹³⁰ *Glanvill* appears to contradict the conclusions of Hyams and White, at least in part. As Reynolds pointed out, obtaining the consent of relatives was a preventative measure, and was indeed a prudent thing to have in any donation. But if, as has been shown in David I's charters, there is a consistent pattern of obtaining the consent of the heir as to certain lands but not to others, it seems reasonable to infer that David I was following the rule that the heir's consent was necessary, at least as to inherited land.

There is a difference, however, between obtaining the assent and consent of heirs, and making a donation for the benefit of someone's soul. The *pro anima* clause was at once more inclusive, and less particular. One could make a donation for the benefit of the souls of one's family, lord, or ruler, and all the ancestors and successors attached to them. But one would hardly make a donation for the soul of someone to whom no duty could

¹²⁹ White, *Custom, Kinship and Gifts to Saints* (London, 1988).

¹³⁰ Paul Hyams, 'Charters and the Early Common Law', *The Journal of Legal History*, 12, (1991), 173-89, 183.

possibly be owed. One might take advice from friends and relatives about a particular matter, but one would normally only obtain the assent and consent of the heirs.

The previous examples show how the charter, and in particular the wording of the specific charter, could be used to prevent disputes from arising as the result of a donation to a religious entity. The various parts of the *laudatio parentum* each had a role to play. Whether the phrase was indeed necessary to protect one's gift may have been dependent on the circumstances as well as the wording. While it does not look as if such a phrase was mandatory in all transactions, it may well have been so for those situations where someone had an interest in the property being alienated. Thus, for relatives in general, one's lord, spouse or king, the *pro anima* clause could be used as a dis-incentive to making a claim after the death of the donor. With regard to the necessity of the assent and consent clause, there is a more concrete example of its necessity, at least as far as the royal donations of David and Malcolm's reigns are concerned.

Wedale

One of the most striking examples of the changes in perception with regard to the importance of charters is the Wedale case. The details of the case are recorded in an entry in the Chronicle of Melrose and in a spurious

charter datable to the mid-thirteenth century which was supposed to have been issued by William I. The monks of Melrose do not seem to have thought it necessary to have a charter drawn up shortly after the dispute was settled, although it was one in which the king took an active part, yet approximately one hundred years later, they fabricated a charter including the king's seal.¹³¹

This controversy was between the Abbey of Melrose and the men of Wedale, datable to William I's reign. The case is recorded in both the *Chronicle of Melrose* and *RRS, ii, The Acts of William I* but there are differences between the two accounts, mostly concerning the descriptions of procedure. The charter was written substantially later than the *Chronicle* entry. This raises the question of why, when there is an account of what transpired in the *Chronicle*, would a later concoction have been deemed necessary? Although this charter was created much later than the events it reflects, the account recorded in it seems to follow the *Chronicle* in many respects. There does not seem to have been an intention to deceive the reader of the later charter as to the occurrence of these events, only as to the date and authenticity of the charter itself.

¹³¹ Barrow, *RRS, ii*, no. 253, and notes. The spurious charter appears to have had a seal attached, but it no longer remains.

Heidecker has pointed out that every charter may be considered a ‘forgery’ since it is a cultural construct.¹³² Later concoctions are also cultural constructs, but of a different context; the information such a charter provides may be more directly related to the time and context of its creation than to the culture it purports to reflect. Subsequently created charters provide information not only about the importance of a charter at the time it was created, but the differences in detail in the text of the charter compared to other, more contemporary written records of the events allow for inferences to be drawn about the relative value of such details.¹³³ This is clearly illustrated in the case of this dispute.¹³⁴ While the essence of the chronicle entry is repeated in the later charter, there are discrepancies, most evident in the details concerning procedure.¹³⁵ Why the monks fabricated the charter may never be clear, but by comparing the two types of documents, it is possible to discern what may have been significant to them at different times. Since there is a period of approximately 100 years between the drafting of these documents,¹³⁶ what was important to note about the procedures may well have changed. By the latter half of the thirteenth century, swearing on relics may not have

¹³² K. Heidecker, ‘Introduction’, in *Charters and the Use of the Written Word*, 11.

¹³³ Although charters were created subsequent to the transactions they detailed, there were several reasons for this, such as changes in the terms of the original grant, or a lost or damaged charter. There were in fact charters drafted which incorporated the terms of earlier agreements where no earlier agreement has survived. See the Avenel charters, above.

¹³⁴ *Chronicle of Melrose*, 93; Barrow, *RRS*, ii, no. 253, and notes. While there are other subsequent fabrications, most cannot be measured against a contemporary chronicle entry.

¹³⁵ See Procedure, *infra*.

¹³⁶ Barrow notes, in *RRS*, ii, at 288, in the comments to no. 253 that the writing is ‘almost certainly of the second half of the thirteenth century’.

been as critical as including the more 'legalistic' descriptions of perambulation, and reservation of rights by the king. Also by that time, having a royal charter authenticated by the king was deemed to be vital.

One of the critical factors to note when comparing the chronicle entry written shortly after the settlement before the king in 1184 and the later charter is the shift in importance of these records. The mere fact that the monks thought it necessary to fabricate a sealed charter a century later shows the perceived importance of having such a document. It was not just that the monks wanted a record reflecting their interests; they needed a royal charter authenticated by the king, in spite of any risks associated with such a fabrication.¹³⁷ The Chronicle entry is only a narrative about the proceedings, its focus the chain of events and the favourable outcome for the monks. The royal charter shifts the focus to the king himself, and his role. This gives the authenticated charter, however false it may be more weight as proof of rights in property.

There are two other possible explanations for the differences between the chronicle entry and the charter. There is of course, the argument that these are two different types of documents, and what would be perceived as acceptable in a chronicle entry, a more narrative text, would not always reflect what was deemed appropriate in a royal charter. The entry

¹³⁷ As noted *infra*, the penalties for forgery were quite severe.

concerning papal privileges would substantiate this conclusion, in addition to demonstrating bias. This is especially noteworthy since it would have been thirteenth century monks deciding what should have been included in the charter, while the chronicle entry is clearly more contemporary. While these were undoubtedly different types of documents, they were both generated by the same monastic house. Although Duncan pointed out that the lack of a charter may have been an indication of the lack of status of the men of Wedale,¹³⁸ these men did not gain in stature over the course of a century. The second is the possibility that there had been an authentic royal charter which had been damaged or lost. While this could explain the dating of the charter hand, it does not address the misdated witnesses.¹³⁹ There is no indication that this actually happened. Neither of these points adequately accounts for the differences between the two records. What did change during the period between the chronicle entry and the creation of the royal charter was the perception of the importance of a sealed, authenticated royal charter as proof of the property rights described in the document.

In short, charters became increasingly important as legal documents and they must be read as such. They were issued by a person in authority, to one or more individuals or groups, for a specific purpose. They most often

¹³⁸ Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1996), 420. 'The fact that the Wedale decision was not recorded in a charter, while the de Moreville one was, confirms that the men of Wedale were of little social consequence.'

¹³⁹ Barrow, *RRS, ii*, 288-289.

concerned rights in property of some sort. As legal documents, the wording used is crucial. The appearance of certain words or phrases, and just as importantly, when these words or phrases were absent, identifies the type of document, its purpose and in some cases, its effectiveness.

The use of charters in the transfer of property became more accepted and even necessary in the twelfth century. Although the existence of the charter was important, even more crucial was the wording in the charter. These phrases were not simply formulaic rote. Each played a role in securing the property transferred, and preventing future disputes.

The role of the charter in the resolution of disputes is equally informative. Charters were used to prove rights in land, and prevent someone else from asserting rights in the same land. As evidence, they became the proof of a property right, absence of which could negate any claim, as well as the primary tool for preventing and resolving disputes. As with the nature of charters and their wording, how they were used as evidence also evolved. The next chapter explores the use of charters in the resolution of disputes.

CHAPTER VI

EVIDENCE and PROCEDURE¹

There is a debate among scholars about whether the settlement of disputes in the early to mid twelfth century was informal, flexible, political and oriented towards a compromise where all parties had some satisfaction, or whether such disputes were decided by legal argument and according to legal norms.²

This divide in opinion followed the earlier conclusions that older modes of trial were inflexible, rigid, and strictly according to forms.³ Milsom's conclusions concerning this issue were that legal decisions could only be based upon a full understanding of the facts, and these were rarely, if ever

¹ The law of procedure is normally distinguished from the law of evidence, but will be discussed together here since the intellectual distinctions between the two are of more recent vintage than the twelfth century. Procedure is defined as 'the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product.' *Black's Law Dictionary*, (4th ed.), (St. Paul, 1968), 1367-1368. Evidence comprises any type of proof, 'legally presented...by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc.... As a part of procedure "evidence" signifies those rules of law whereby it is determined what testimony should be admitted and what should be rejected in each case, and what is the weight to be given to the testimony admitted.' *Ibid*, 656-657.

² John Hudson, 'Court Cases and Legal Arguments in England, c. 1066-1166', in *Transactions of the Royal Historical Society*, X, (Cambridge, 2000), 91-115. Paul Hyams, 'Norms and Legal Argument Before 1150', in *Law and History, Current Legal Issues 2003*, Vol. 6, eds. Andrew Lewis and Michael Lobban, Vol. 6, (Oxford, 2004), 41-61; Stephen D. White, ' "Pactum...Legem Vincit et Amor Judicium" The Settlement of Disputes by Compromise in Eleventh-Century Western France', *American Journal of Legal History*, 22, 281-308, (Philadelphia, 1978); Georges Duby, *The Chivalrous Society*, trans. C. Postan (Berkeley and Los Angeles, 1980), especially chapter 2, 'The evolution of judicial institutions', 15-58; Frederic Cheyette, "Suam Cuique Tribuere", *French Historical Studies*, VI, (1970), 287-299; S.F.C. Milsom, *Studies in the History of the Common Law* (London, 1985).

³ James B. Thayer, 'The Older Modes of Trial', *Harvard Law Review*, V, (1891), 45-70.

adduced. With regard to legal development, 'the limit at any time is the extent to which the legal process presents the facts for legal handling.'⁴ All seem agreed that there were procedures followed and that these were based on long established customs. Some have argued that the primary goal was amicable settlement, either by arbitration or compromise, although war was also an option.⁵ The ordeal in property disputes was also a possibility, although there is evidence that it was offered as a negotiating tool to achieve compromise rather than in earnest.⁶ The nub of the argument is expressed most clearly by Hyams and Hudson. Hudson takes the position that there were legal norms and legal argument and they were important during the century after the Conquest.⁷ Hyams asserts his 'inclination to minimize the prevalence of a clear distinction between legal norms...and other more general imperatives.'⁸ The real problem, unstated by Milsom, Hyams and Hudson, is that from a modern perspective, it is the records themselves that are lacking, not the normative value of the decisions made or the facts upon which these decisions were based.

⁴ S.F.C Milsom, 'Law and Fact in Legal Development', in *Studies in the History of the Common Law*, 171-189, 171.

⁵ Cheyette, "*Suum Cuique Tribuere*", 291.

⁶ Stephen D. White, 'Proposing the Ordeal and Avoiding it: Strategy and Power in Western French Litigation, 1050-1110', in *Cultures of Power, Lordship, Status, and Process in Twelfth-Century Europe*, ed. Thomas N. Bisson, (Philadelphia, 1995), 89-123. See also, Jane Martindale, 'Between law and politics: the judicial duel under the Angevin kings (mid-twelfth century to 1204)', in *Law, Litty and Solidarities: Essays in Honour of Susan Reynolds*, eds. Pauline Stafford, et al. (Manchester, 2001), 116-149.

⁷ Hudson, 'Court Cases and Legal Arguments, c. 1066-1166.

⁸ Hyams, 'Norms and Legal Argument Before 1150', i

Putting aside the relative dearth of charter and chronicle evidence in Scotland for this period, an examination of the records that do exist shows that the evidence could be read to support either side. There were customary procedures that did not rise to the level of the forms of action or the systematized approach of the later common law. But the records do show a rational and pragmatic handling of these disputes, which appears to have been informed by facts and legal norms that may be discerned from an analysis of the texts. A central point to keep in mind in reading these records is the evolution in how disputes were recorded, and how this changed not only the procedures themselves, but how they were perceived.

The evidence for customary procedures for the presentation and preservation of a claim with regard to property rights, or the settling of a dispute regarding such a claim in Scotland may be datable from the early twelfth century, mostly due to the lack of written records before then. The more formal writs of procedure modeled after those in England appear in Scotland from about 1230.⁹ But there were inquests¹⁰, hearings and perambulations throughout the twelfth century which were conducted according to certain procedures or customary norms in order to prevent and settle disputes. These are recorded

⁹ Ian Douglas Willock, *The Origins and Development of the Jury in Scotland*, (Edinburgh, 1996), 31. Chapter V discusses early civil procedure in Scotland, but focuses on the thirteenth century. For more in depth and detailed discussions see Hector MacQueen, *Common Law and Feudal Society in Medieval Scotland*, (Edinburgh, 1993).

¹⁰ F. Pollock and F.W. Maitland, *The History of English Law*, Vol. 1, (Union, NJ, 1996), 144, and fn 3. The authors note that from David I onward, Scottish kings used the inquest, and conclude that 'On the whole we take it that the jury has much the same history in Scotland and in England; it spreads outward from the king; it is an 'assize', an institution established by ordinance.' Since the records for most inquests are in the form of *noticiae*, they will not be covered here.

in the *noticia* and charters, and a few are also found in the chronicles. Many of the cases reflected in these documents involved *judices* and were communal affairs.¹¹ Accounts detailing customary practices appear much earlier both on the continent and in Anglo-Saxon England.¹² Records from throughout medieval Europe show that these procedural norms followed in the prevention and resolution of disputes were similar, and became more regularized as they were written down.¹³ This standardization of practice was

¹¹ The *judex* has been discussed elsewhere, and will not be covered in this chapter, nor the origins of the jury. There is some disagreement regarding how 'communal' these matters were. See Willock, *The Origins and Development of the Jury in Scotland*, (Edinburgh, 1966), 5. He makes it clear that the 'jury' in the modern sense can be traced to the thirteenth century. Compare the cases involving Kirkness, which was indeed a communal affair.

¹² Rosamund McKitterick, *The Carolingians and the Written Word*, (Cambridge, 1989), 23-75, where she points out that there was 'resort to written means in a wide variety of cases, [which] is reinforced by the surviving examples of Merovingian *placita*', at 25; Michael Clanchy, *From Memory to Written Word*, (Oxford, 1993), generally, and specifically 272-278; Ann Williams, *Kingship and Government in Pre-Conquest England, c.500-1066* (London, 1999), 88-89, chapter 9, where she notes that the king's officials used written orders in the administration of government, at p. 108, and procedures in the shire courts are described in the 'vernacular notifications of the late tenth and early eleventh centuries'; these notifications were used for a variety of purposes including lawsuits. Documents were used in lawsuits to record the events of the hearing and outcome; in addition, written declarations were also used during a hearing and seem to have been witness statements. Williams does not find clear evidence that the proceedings began with a written pleading, however; see p. 110-115, especially 113. Patrick Wormald, *Legal Culture in the Early Medieval West*, (London, 1999); Wendy Davies and Paul Fouracre (eds.), *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986).

¹³ A comparison of the records themselves shows such similarities, and that these similarities were customary in many parts of Europe. Many of the customals produced from the end of the twelfth century through the fourteenth show great similarity in procedures. See, for example, the procedure for summoning someone to court: 'Those who are going to deliver a summons can make their summons wherever they find the person, and if they do not find him by chance they should go and deliver the summons to his residence where he resides,' in Philippe de Beaumanoir, *The Coutumes de Beauvaisis of Philippe de Beaumanoir*, F.R.P. Akehurst, (trans.) (Philadelphia, 1992), Chapter 2, para. 69, 36; 'Again, in all the aforementioned pleas which are pleaded by wrang and unlaw with respect to moveable property, the summons should be made at the dwellings of those who are impleaded -[that is,] where they have their residences- and in no other place,' in *Quontam Attachiamenta*, T. David Fergus (Edinburgh, 1996), chapter 2, 120-121; 'And if any such offender fled and could not be found, the baron should have him summoned in the place where he was from (according to written law in the Code, *De foro competenti*, l. *Juris ordinem* and in the *Decretals De dolo et contumacia, capitulo Causam quae* where this matter is discussed), and in the church of the parish where he lived...' in *The Etablissements de Saint Louis, Thirteenth-Century Law Texts from Tours, Orléans, and Paris*, trans. F.R.P. Akehurst (Philadelphia, 1996), Book I,

greatly impacted not only by the use of written records to preserve an account of the proceedings, but also to affect the outcome of the disputed matters. Use of documents in the proving of a claim was not unheard of before David I, although evidence for this is outwith Scotland. Most often though, procedures for the presenting of evidence in proving a claim had been oral rather than written. The twelfth century saw marked changes in the way proofs were presented and how proceedings were recorded. Van Caenegem has focused attention on the changes in the rules of procedure and shift from 'customs' to more formal legal rules in his article on procedure.¹⁴ As he points out, there were essential characteristics common to all of Europe. Some of the customs or norms were incorporated with the more formal rules adopted from Roman and Canon law. These 'rules of procedure were no more left to develop unattended and unconsciously, but became the subject of systematic attention and study on the part of scholars and judges: custom turned into reasoned law.'¹⁵

The question remains however, whether the Scottish records indicate to what extent these customs and changes in practice were followed in Scotland. Do the charters reflect a decision making process of applying a norm, rule or law

28, p. 23. These rules seem to assume a written procedure for summoning, in keeping with the rule established by Henry II that 'no one is bound to answer for any freehold of his in his lord's court without a royal writ.' Nevertheless, oral summoning continued until much later. Clanchy, *From Memory to Written Record*, 273.

¹⁴R.C. Van Caenegem, 'The Developed Procedure of the Second Middle Ages, XII-XV, in *International Encyclopaedia of Comparative Law, XVI (Civil Procedure)*, ed. M. Cappelletti (Tübingen, 1984), 11-53.

¹⁵ *Ibid.*, 11. But see Hyams, 'Trial by Ordeal', where he notes that legal process is mostly oral, and thus, each new case considers custom in light of the current situation, which of course leads to modification.

to a set of facts by a decision maker? How were these norms applied, what type of evidence was allowed and how was it judged?¹⁶

There are only a few cases where procedures in the decision making process are discussed, and even fewer where elements of what was considered as evidence are noted. These few cases are important precisely because, aside from the survival factor, those making the decisions behind these documents thought the procedural and evidentiary aspects were important enough to be recorded. The cases discussed below show that while there were norms or customs regarding the presentation of evidence during this period, they were mutable, inconsistent, and the importance of specific procedures often varied depending upon who was recording and preserving them. Two of the cases are from the first half of the century, before and during the reign of David I. The latter two are from William I's reign. There are none from Malcolm's reign discussed in detail. As Barrow has noted, '[N]ot a single document relating to Scotland survives from his [Malcolm's] reign that can be called an official record of a lawsuit or of a trial terminated in the king's court.'¹⁷

Although there is evidence of sheriff's courts and administration, there is a dearth of evidence in the charters of Malcolm IV concerning actual disputes, and none that highlights the importance of charters in the resolution of disputes as well as the four cases discussed here.

¹⁶ Warren Brown, 'The Use of Norms in Disputes in Early Medieval Bavaria', *Viator*, 30 (Los Angeles, 1999), 15-40, 16: 'Norms' have been defined as 'rules that purport to govern behaviour-embody authority'. See also, Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology*, (London, 1979).

¹⁷ Barrow, *The Acts of Malcolm IV*, 49.

Charters were also used to ensure compliance with a negotiated settlement or agreement, however unwilling the parties were to come to an accord. The Wedale case especially, demonstrates how important a charter detailing an agreement had become by the thirteenth century. Forging a royal document was no light matter, even if it did represent the events more or less accurately.¹⁸ Finally, the charters discussed in these cases also demonstrate that the impact of writing and of written records may be viewed as a gradual process, not a consistently progressive one, but having a permanent effect on the way disputes were prevented and resolved.

THE CASES

The land known as Swinton¹⁹ had been the subject of disputes through several reigns. One of the earliest records concerning it issued from King Alexander I, who sent a brieve to the prior of Durham, telling him to do nothing about the land of Swinton (over which there had been a dispute) until the king arrived. The charter is the earliest extant brieve, and contained a personal message from Alexander to the prior, about 'many secret things' that Alexander wished to discuss with the prior.²⁰ This land had been granted to

¹⁸ Pollock & Maitland, *History of English Law*, Vol. ii, 504, 540.

¹⁹ Both Swinton and Horndean disputes show elements of jurisdictional sharing and possible friction between Alexander I and Earl David.

²⁰ A. C. Lawrie, *Early Scottish Charters Prior to A.D. 1153*, (Glasgow, 1905), 22.

Durham by King Edgar; the grant was confirmed by Earl David after Edgar's death and before he became king.²¹

There are three documents from David I concerning Swinton. While the first two (more properly writ-charter notifications) vary in wording to some extent, their reference to prior written records and to physical acts of donation and confirmation indicate that David relied heavily at times,²² but not uniformly, on charters as a basis for his decisions very early in his reign. In the records concerning Swinton, he referenced his brother Edgar's charter to the monks of Durham in his confirmation of the grant,²³ and to the same charter in a letter to 'John, bishop (of Glasgow) and the brothers Cospatric, Colban and Robert, and all his faithful drengs of Lothian and Teviotdale.'²⁴ The third document referring to this land looks like an original grant; there is no reference to written documents, nor to prior gifts, although it appears that some of the lands mentioned had been previously granted. Barrow commented that the

²¹ DCD. M.C. 762, G.W.S. Barrow, *The Charters of King David I*, (Woodbridge, 1999), no.9.

²² G.W.S. Barrow, *The Charters of David I*, nos 9, 10, 11. These charters are in fact pre-1124, and are the first in Barrow's edition to refer to prior charters. This appears to be related to the way these prior documents were used in the process rather than straightforward confirmations. The fact that other charters do not refer to earlier documents however, cannot be taken to mean that there were no prior charters for a particular grant. See no. 12, the confirmation by David of Thor the Long's gift, where a prior charter has survived, but was not mentioned in David's confirmation.

²³ *Ibid.* This is, of course, another example of the 'self-referencing' which serves to validate the current actions by incorporating past acts and past documents.

²⁴ *Ibid.*, no.10. This address implies that these were officials presiding over the shire court. See Richard Sharpe, 'The Use of Writs in the Eleventh Century, A hypothesis based on the archive of Bury St. Edmunds', *Anglo-Saxon England* 32 (2003), pp. 247-91, 247. There is a *Cospatricio vicecomite* listed as a witness in *The Charters of David I*, no. 14, datable to 1114x1124. Barrow notes that it is probably 1120x1121 or 1123x1124. While there is no firm proof that this is the same Cospatric, the time frame places those addressed in charter nos. 10,11 and the witness in 14 in the same area during the same time period. See also, Norman H. Reid and G.W.S. Barrow, *The Sheriffs of Scotland. An Interim List to c. 1306*, (St. Andrews, 2002), 37.

language and the witnesses leave the authenticity of the charter in some doubt, but he also noted that there were ‘authentic seals of David I ‘attached’ to the charter.²⁵ One factor is the difference in the dating of the charters. The first two are datable to after David I’s marriage to Maud de Senlis,²⁶ and appear to be in the nature of notifications of prior acts by David while he was still an Earl. The last is datable to shortly after he became king, and is in the form of a new royal grant.²⁷

During the same time period, another notice was issued in David’s name addressed to Bishop John of Glasgow, and to Colban and Cospatric.²⁸ In this document, Earl David reminded them that a judgement had been rendered before him (*iudicatum fuit ante me*)²⁹ concerning Horndean. This land had been the subject of a dispute between the monks of St. Cuthbert and David’s dregs of this same land. The charter stated that if the monks had either lawful witnesses, (*legales testes*) or the charter (*breve*) of his brother (Edgar), the land shall remain with the monks. David I could have been answering a procedural inquiry as to what evidence was required in order to prove a claim.

²⁵ Ibid, nos 31, 32, and comment. There were two versions of the same grant.

²⁶ Ibid., nos 10, 11. No. 10 is datable to ‘1114x1118, probably 1116x1118’; no. 11 is probably also 1116x1118. Barrow notes that the hand of these three charters is the same, a Durham scribe, who is probably the same as the one for nos 31,32, and earlier charters, although his identity is unknown. See Barrow, *The Charters of David I*, 25, and comments to nos 9, 10, 11, 31, 32.

²⁷ Ibid, nos 31, 32. If the effectiveness of a donation charter expired when the donor died, it may also have expired when the donor became king even though he would still have held the Honour of Huntingdon. It may also be an example of the monks being overly careful of their records.

²⁸ G.W.S. Barrow, (ed.), *The Charters of David I*, (Woodbridge, 1999), no. 11. In the introduction, Barrow indicates that the bishop is perhaps a justiciar and the other two local officers. His conclusion is that this breve commanded them to enforce the judgement of the court, at 10.

²⁹ Ibid. Barrow translates this phrase as ‘judgement has been made before him’.

More likely, the monks had presented some evidence, either witnesses or a written charter, and those sitting in the local sheriff's court, Bishop John, Colban and Cospatric, had refused to accept it as valid proof.

His response included information about his own review of the charters: '*Et ideo volo sciatis quod ego ipse vidi breve et donum fratris mei Eadgari Regis quod ad vos etiam misi, et quicquid illud breve eis testatur...*'³⁰ Not only had David I reviewed both the gift and the charter and found them acceptable proof, but he was ordering his officials to accept the charter or witnesses as well.³¹ This is one of the clearest and earliest statements of accepted 'rules of evidence'³² or procedure in any of the twelfth century Scottish charters.

Circa 1170, the monks of Melrose became involved in a long running dispute with Richard de Moreville, constable of the king, which continued for

³⁰ G.W.S. Barrow, *The Charters of David I*, no. 11. While this charter is not conclusive proof that David could actually read the charter, it lends credence to that assumption. Duncan seems to have also interpreted this charter as showing that David actually read the charter of his brother. See A.A.M. Duncan, *Kingship of the Scots*, 62. This language supports the idea that David presided over the proceedings, and even determined what evidence was acceptable, which would indicate a division between decisions regarding the facts and procedures to be followed.

³¹ Barrow, *The Charters of David I*, no. 11. It is unclear whether this means that David actually viewed the land itself, or if he simply read the charter and was acknowledging the gift set forth in that charter. There is no indication of where the charter was issued, which could have supported the inference that he did, in fact, view the land. Barrow interprets this language in a slightly different manner. He states that 'King Edgar's deed of giving and the *breve* or brief charter by which his deed was announced to all his lieges throughout his realm...was apparently one and the same thing.' See Barrow, 'The Scots Charter', in *Studies in Medieval History presented to R.H.C. Davis*, eds. Henry Mayr-Harting and R.I. Moore (London, 1985), 149-164, 153.

³² Referring to a 'rule of evidence' at this stage is anachronistic, since such rules appear later, in the thirteenth century; but it seems the best term for what is happening in this charter. Norms followed may have been more like rituals than objective rules. See generally, Hyams, 'Trial by Ordeal' and *Rancor and Reconciliation in Medieval England*.

approximately ten years.³³ It was finally decided in the presence of the King and his brother Earl David and '*coram aliis tam ecclesiasticis quam secularibus personis innumeris.*'³⁴ In this famous dispute, both parties claimed rights in the area of Threepwood, between the Gala and Leader waters. This case highlights the shift in land use during the twelfth century, from primarily a combination of forest and pasture used for hunting and grazing, to more tillage and plowed fields.³⁵ As more grants issued from the kings over the course of the century, this shift became the basis for disputes between the new or recent grantees, most often the religious houses, and the more established land users.³⁶ Although the earlier grant charters to the de Morevilles no longer survive, there are several documents concerning this dispute.

³³ This is not the first charter dealing with ascertaining the boundaries of the lands of Melrose. Among others, there is also a charter in the Dryburgh cartulary, no. 113, between Melrose Abbey and Dryburgh Abbey, concerning the metes of Kedslie and Colmslie, datable to c.1160. This date is listed in the 'Tabula' of the *Dryburgh Cartulary*, although Cooper dates the charter to c. 1170. Cooper, in his article on Melrose Abbey *versus* the Earl of Dunbar, asserts that this charter was confirmed 'by the Bishop of Glasgow, within whose diocese the property lay', but the only confirmations I have found are general confirmations by the Bishop of St. Andrews, *Dryburgh Cartulary*, nos. 235, 236, 237. There are also grants concerning the land of Kedslie and Colmslie from Walter son of Alan (no. 112), and Earl Patrick of Dunbar and his heir (nos. 114, 115). I do not find a confirmation of the agreement between Melrose and Dryburgh by either King Malcolm IV or William I, although there is a general confirmation of the property and privileges of Dryburgh Abbey by King William, datable to c. 1165x1171 which refers to '*landam totam que vocatur Caddisteyca*', but does not mention the agreement with Melrose, see Barrow, *RRS, ii, The Acts of William I*, no. 65.

³⁴ *Chronicle of Melrose*, 90.

³⁵ McNeill and MacQueen, *Atlas of Scottish History to 1707*, 455. The map sets out several locations mentioned in the charters reflecting a number of disputes Melrose had with its neighbours. Most, but certainly not all, of those with whom they had disputes seem to have been concentrated in the eastern part, along the Leader. There were several landholders whose properties bordered the Leader, including the de Morevilles to the north, the Stewarts and the Earls of Dunbar; see map on p. 412, and *Melrose Liber*, nos. 93-112.

³⁶ Lord Cooper of Culross, *Selected Papers*, (Edinburgh, 1957), 81.

There are three sources for information on this dispute: a charter from Richard de Moreville,³⁷ a chirograph,³⁸ and an entry in the *Chronicle of Melrose*. The chirograph is in the king's name, in the first person. It related that the king himself perambulated the area with his honourable men when the dispute was finally resolved in 1180. By the chirograph, Richard and his heirs quitclaimed any right they had to the wood and pasture between the Gala and Leader. In exchange for the quitclaim, the monks gave them 100 merks of silver. The charter of Richard de Moreville however, does not indicate any reference to a quitclaim, nor does it mention the 100 merks, although the chirograph does.³⁹ These charters are confirmed in the king's full court and in his presence. The Bishop of Glasgow and David, brother of the king are also present and set their seals to the chirograph as well.⁴⁰

There is an entry in the *Chronicle of Melrose* for the year 1180, which indicated that this controversy had been settled in the presence of King William and his brother, Earl David and many other persons. Compared to other entries, this one does not give many details about the procedures followed. The entry refers to '*comitis David fratris sui*' which means the entry itself may have been made after March 1185.⁴¹ There is also the phrase

³⁷ *Melrose Liber*, no. 110.

³⁸ *Melrose Liber*, no. 111; Barrow, *RRS, ii*, *The Acts of William I*, no. 236.

³⁹ *Melrose Liber*, no. 110 (Richard de Moreville's charter) and no. 111 (Chirograph).

⁴⁰ *Ibid*, no. 111. Also, Barrow, *RRS, ii*, *The Acts of William I*, no. 236. The importance of seals and the language concerning them in the text seems to have been for enforcement as well as authentication.

⁴¹ This is when David became Earl of Huntingdon, but since he already held the Earldom of Lennox, it is possible that he was called earl in 1180, although most often he is referred to as 'David, brother of the king.' See also, A.A.M. Duncan, 'Sources and uses of the Chronicle of

*'et Dei adiutorio respondebat monachis iustitia sua in hac parte, ita videlicet quod, chartarum suarum merito et privilegiorum Romane ecclesie auctoritate, ipsis adjudicata est possessio.'*⁴² This phrase is not reflected in King William's charter, or in Richard de Moreville's, nor are there any references to Rome in these lay charters.

The next dispute involving the monks of Melrose occurred c. 1184, between the Abbey and the men of Wedale (Stow), located on the northwestern edge of the area most fought over by the monks and the various other landholders.⁴³ It was again over boundaries, forestland and pasture rights. As with de Moreville, the dispute was decided in the presence of the king, his brother and several earls and barons. The *Chronicle of Melrose* indicated that the judgement was made at Crosslee by Richard de Moreville constable of the king and twelve faithful men, who swore over relics of the church with fear and trembling regarding the boundaries of the lands belonging to Melrose.⁴⁴ There is also a charter, included in *The Acts of William I*, which Barrow concluded is spurious since the witnesses do not fit the time frame.⁴⁵ The charter contains specific language regarding a perambulation while the chronicle entry does not have such language. Both, however, do state that the

Melrose, 1165-1297', in *Kings, clerics and chronicles in Scotland, 500-1297*, ed. Simon Taylor, (Dublin, 2000), 146-185, 147.

⁴² *Chronicle of Melrose*, 90. For comparison, see the entry for the controversy with the men of Wedale, discussed at 180-185.

⁴³ The Wedale charter was discussed in the previous chapter.

⁴⁴ *Ibid*, 93. This again shows procedural elements of the 'jury'. Compare the *judex* cases, *infra*.

⁴⁵ Barrow, *The Acts of William I*, no. 253, and notes.

judgement was made by Richard de Moreville and twelve faithful men, agreeing on some key elements of procedure. Even though the charter is not, and according to Barrow, cannot be authentic, he states that there is no reason to doubt that such an event took place on the date indicated, as it is described in the *Chronicle of Melrose*.⁴⁶ It is noteworthy that this entry in the *Chronicle of Melrose* also includes reference to '*iiiij. sive v. Romanorum pontificum privelegia, firmiter confirmata, et irrefragabiliter solidata*.'⁴⁷

There are other differences between the chronicle entry and the charters for both these cases. With regard to the de Moreville case, the chronicle entry is brief and to the point. The chronicle entry for Wedale is more detailed. For Wedale, the entry in the *Chronicle* included information about where the dispute was decided.⁴⁸ This information is not included in the charter. The entry in the *Chronicle of Melrose* included the same reference to papal confirmation noted above.⁴⁹ The spurious royal charter lacks any such reference. The charter also has much more detail about the terms of the judgement in question, including the mandatory language common in William's charters, as well as his reservation of hunting rights for himself and his heirs.⁵⁰

⁴⁶ *Ibid.*

⁴⁷ *Chronicle of Melrose*, 93.

⁴⁸ Barrow, *The Acts of William I*, 288-289. While I have found no proof that this is where they actually met, there is a hill at Crosslee Rig just to the north of Crosslee, where there would have been space to have a moot which had included so many people.

⁴⁹ *Ibid.* The comment implies that the one writing it was inferring backwards from his own present. Because it would have taken some time for a papal confirmation to be returned, the *Chronicle* entry must have been somewhat later than the events it records.

⁵⁰ *Chronicle of Melrose*, 93.

The four cases taken together show the evolution in the importance of charters, from administrative briefes and writ charters directing the proceedings both during and after a hearing, to documenting the outcome, and preservation of the charter as evidence of title, even if forged. Because of the difference chronologically as well as the distinctive features of the cases themselves, these four studies can be divided into two groups, and will be discussed as such.

THE DISPUTING PROCESS

Swinton and Horndean are similar in the way charters are used, both administratively and with regard to the charter as proof during a dispute hearing. Barrow has detailed the different types of briefes, but has not discussed the charter as evidence.⁵¹ Swinton incorporates distinctions made between the type of charter used for administration and the more formulaic grant charter. The first two records concerning Swinton from Earl David are of the mixed style variety. Within each of these documents there are references to prior acts of donation by Edgar, to his charters which bear witness to Edgar's gift, and enforcement provisions. The enforcement language is in the nature of an indirect prohibition in no. 9, and a direct prohibition in no. 10. The difference is most probably related to the ones to

⁵¹ Barrow, *The Charters of King David I*, Introduction, 9-11.

whom these two charters are addressed. The first, to Prior Algar, indicated David's willingness to enforce the grant and protect the prior and his monks of Durham concerning the gift. The second, addressed to John, bishop of Glasgow and three brothers who were prominent in the area is essentially an order to enforce the grant and protect the monks in their possession of the property.⁵² Both Hudson and Barrow have noted a wide variety in the address and language of charters; Barrow does not attribute to the royal scribes the intent to distinguish between the various formulae used in the charters, especially early on in the twelfth century. Yet these early documents were directed to specific individuals communicating essentially the same information, but using language sufficiently different that it is clear there was purpose in the choice of words.⁵³ The distinction in verb forms seems most marked in the use of *dare*, in grant charters and clauses, and *concedere* in confirmations.⁵⁴ Mortimer dates this to the later eleventh century in Anglo-Norman charters; the distinction is evident in the confirmation charters of

⁵² See J.G.H. Hudson, 'Diplomatic and Legal Aspects of the Charters', in *The Earldom of Chester and Its Charters, A Tribute to Geoffrey Barraclough*, ed. A.T. Thacker (Chester, 1991), 156. This was not uncommon. Hudson notes that a wide variety of addressees in English charters, ranging from those who were involved in a dispute or transaction to officials for the purpose of conveying orders, or as notification to men of the locality. See also, Richard Mortimer, 'Anglo-Norman Lay Charters, 1066-c.1100, A Diplomatic Approach', in *Anglo-Norman Studies XXV*, ed. John Gillingham, (Basingstoke, 2003), 153-175, 160. He notes that many eleventh century charters did not have an address clause: 'whole types of document omit any mention of their audience.' Mortimer, like Barrow, comments on the variety shown in the verb forms.

⁵³ *Ibid.*, and Barrow, 'The Scots Charter', 156-157. Barrow's point is well taken in that there is a multitude of verbal formulae used, but behind the variety was a particular purpose for each charter. Mortimer, like Barrow, comments on the variety shown in the verb forms.

⁵⁴ Mortimer, 'Anglo-Norman Law Charters', 164. He states that 'there seems during the later eleventh century to be a slide towards a distinction between grant and confirmation, expressed in the use of the verbs *dare* and *concedere*.'

David I shortly after his marriage to Maud de Senlis.⁵⁵ Although the two verbs are used together in some donation charters, this does not seem to be the case when David was confirming prior grants of his wife or grants that had been made before he became Earl of Huntingdon.

Distinctions were important in the Horndean case as well: a writ-order, even with language confirming a grant to one of the parties appears to have been insufficient to prove rights in property, though they do reflect those rights for the religious.⁵⁶ While the Swinton charters make reference to the *breve* of Edgar as support for the actions taken by the Earl, in Horndean these documents become not just ‘witnesses’ to the gift, but proof of it.⁵⁷ The monks had to provide either the grant charter itself or oral witnesses to show title.⁵⁸ A possible explanation for this is that the notifications were not in the form of a grant charter, and thus were not written proof of title. Notifications or *noticiae* do not seem to have been used to prove title in a disputed matter,

⁵⁵ Barrow, *Charters of David I*, confirmations using *concessisse* only, nos. 1, 2, 4, 7, 13; *dedisse* and *concessisse*, no. 6, 9, 12. The pattern continues after he becomes king.

⁵⁶ *Ibid.*, 154. These charters might be considered ‘mixed-style’ documents as discussed by Hudson.

⁵⁷ G.W.S. Barrow, ‘The Scots Charter’, in *Studies in Medieval History presented to R.H.C. Davis*, eds. Henry Mayr-Harting and R.I. Moore, (London, 1985), 149-164, 153. Barrow’s interpretation in no way detracts from the point being made here. Whether the charter is seen as the gift itself, or merely proof of it, the equation with oral witnesses remains significant for purposes of evidence in a hearing.

⁵⁸ Tabuteau, in *Transfers of Property*, also comments on the use of charters ‘as a reservoir of memory of alienation’ which could be used in disputes, ‘in addition to or instead of witnesses.’ She refers to several cases where charters were presented as proof and another where the absence of a charter was important, 213. This practice, of using both witnesses and charter evidence was in use during the period immediately after the conquest as well. See *English Lawsuits from William I to Richard I*, Vol. I, ed. Van Caenegem, 49; in a royal charter from the conqueror, it was noted that the abbot could prove that he was entitled to certain customs by witnesses and charters.

whereas grant charters were. There were mixed-use charters for quite some time after this, however. Richard Sharpe has a related explanation for apparently 'fresh' grants of the same property to the same party or parties. His hypothesis is that the writ-charter 'was not a privilege that bore perpetual witness to a transaction. It was in its nature a communication in writing to the shire court, and the privileges to which it referred were not grants of property but of prerogative rights alienated, on a temporary basis, by the king.'⁵⁹ This may explain why, even though the writ-notifications reflect grants of property rights, the monks sought writ-charters with more formulaic grant language and royal confirmation charters.

POST-DISPUTE

An analysis of Moreville and Wedale must focus more on the importance of the written word after a dispute was settled or resolved. The 'great controversy' between Richard de Moreville and the ever acquisitive abbey of Melrose is a good example of the ways in which charters were used to prove something during the decision making process, and also to enforce the

⁵⁹ Richard Sharpe, 'The Use of Writs in the Eleventh Century, A hypothesis based on the archive of Bury St. Edmunds', *Anglo-Saxon England* 32 (2003), 247-91, at 247. There are still questions however. The writ-charter notification is often the only record of a particular alienation or donation from the king. The records for most of the monastic houses in Scotland are not as complete as the archive at Bury St. Edmunds. Even so, one would expect that there would be more extant grant charters as records of a particular donation rather than just the notifications, unless of course, one accepts the idea that especially early in the twelfth century, having a grant charter or confirmation charter was still a relatively 'new' innovation that was not yet deemed necessary. I am not sure this is the case, and lean toward the idea that archival practice may be the real culprit in the lack of grant charters following a writ-charter notification.

results.⁶⁰ The Wedale controversy highlights the increasing importance of having a charter, even if forged, to prove rights. For both of these disputes, the Chronicle and the charters indicate an emphasis on the written word not seen in earlier disputes, although a comparable approach was taken by Melrose in the Avenel charters, used to prevent future discord.

The number and variety of charters concerning the de Moreville dispute and its resolution show that not only was it a great controversy, but that the monks had serious questions as to whether Richard de Moreville would abide by the settlement. These documents are more than just a plethora of settlement agreements. The chirograph runs in the king's name, and is counter sealed by the king, his brother Earl David and the Bishop of Glasgow, as well as the feuding parties. Both sides would have received a copy, and the language indicates prohibitions against both sides, and penalties and procedures to be followed should there be an infraction of the terms of the agreement. In addition to this extensive and detailed document, Richard de Moreville also gave the monks a quitclaim. The separate charter of de Moreville reads like a regular grant and confirmation, with the phrase, '*dedi et concessi*' operating as the primary verbs. But when put in context with the chirograph, it is clear this was more than a simple donation for the benefit of his soul. He received money in return, which fits well with Cheyette's view of settlement procedures. The procedures followed, including the participation of the king,

⁶⁰ *Melrose Liber*, no. 110 (Richard de Moreville's charter) and no. 111 (Chirograph).

the language in the chirograph pointing to enforcement and penalties for infractions, and the explicit nature of these terms, show that this was not really an amicable settlement, nor was it one where the parties went away happy, although neither were 'empty-handed'.

Charters had been and would become vital in the proof of rights in property because of their inherent nature as a record of prior transactions. In this, they differed not only from narrative accounts that were in the forms of *noticiae* but also from the chronicle accounts. Each type of record describes the proceedings differently. One of the most striking aspects of the descriptions in the chronicles is their similarity to the procedures described by Brice, the king's *judex* several decades later.⁶¹ Although there is no mention of a *judex*, many of the same procedures are followed as described by Brice. It is possible but less likely that Richard de Moreville, as constable, may have been performing the *judex* duties described by Brice somewhat later. Both the case described by Brice and the dispute between Melrose and Wedale involved a jury who swore on relics, and was led by someone in addition to the twelve *juratores*. The precise nature of the role assumed by de Moreville in this dispute remains unclear. As constable, his role should have been primarily military.⁶² There do not seem to be any explicit cases where the constable is described in the charters as performing duties normally ascribed to a sheriff or *judex*, although there are cases where Richard de Moreville is listed as taking

⁶¹ See discussion of the *judex* cases elsewhere.

⁶² Richard Oram, *The Lordship of Galloway* (Edinburgh, 2000), 155.

part in perambulations along with other men of William I's nearest associates.⁶³

There is also the possibility that there was no *judex*. This dispute was in Roxburghshire, an area to which the Norman institutions of sheriff and justice had come very early, and where there do not seem to be many references to a *judex*, as such, in the twelfth century. Hector MacQueen, in discussing the dispute between the men of Wedale and Melrose, points out that this is a jury composed of 'Richard de Moreville and twelve other faithful men.'⁶⁴

Although he noted that it is in William I's reign that 'we first see the jury in regular use, acting as witnesses to the truth of a disputed matter,'⁶⁵ because of the striking similarities between this account and the earlier *judex* cases, it would seem that the jury or something very similar, as a body of sworn witnesses, had been in use since at least David's reign.

PROCEDURES and EVIDENCE

The standard methods of proof in the secular courts may have been by ordeal, battle, and compurgation,⁶⁶ but there is little evidence of this in the Scottish

⁶³ See *The Acts of William I*, nos. 130, 215, where Richard de Moreville is required by William I to recite the boundaries perambulated during Malcolm IV's reign.

⁶⁴ MacQueen, *Common Law*, 48.

⁶⁵ *Ibid.*

⁶⁶ Charles Donahue, Jr, 'Proof by Witnesses in the Church Courts', in *On The Laws and Customs of England: Essays in Honor of S.E. Thorne*, eds. M.S. Arnold, et al. (Chapel Hill, 1981), 127-158, 128. These 'irrational' modes of trial and proof have been discussed elsewhere. See Jane Martindale, 'Between law and politics: the judicial duel under the Angevin kings (mid-twelfth century to 1204)', in Pauline Stafford, Janet L. Nelson and Jane

charters of the twelfth century. There is virtually no reference to these 'irrational' modes of proof in the extant charters of David I, where chronologically at least it is most likely to be found, except in some foundation charters and confirmation of property rights.⁶⁷ In these latter types of charters, the proprietary right to hold court where the ordeal may be used is mentioned, but no references to actual trials conducted by these means. The Scottish records from the first half of the twelfth century do not give as clear a picture of precisely how a dispute progressed in terms of evidence received and judged as do the later charters, and especially those after the mid thirteenth century. Procedures have been generally described in the literature.⁶⁸ A comparison of the records from Scotland with what is known from the English and French twelfth century charters, however, shows that all three had similar elements where evidence is concerned.

Martindale (eds.), *Law, Laity and Solidarities: Essays in Honour of Susan Reynolds*, (Manchester, 2001), 116-149; Paul Hyams, 'Norms and Legal Argument Before 1150', in *Law and History, Current Legal Issues 2003, Vol. 6*, eds. Andrew Lewis and Michael Lobban (Oxford, 2004), 41-61.

⁶⁷ It is true that the absence of references to these forms of proof does not mean they were not used. There just is no evidence of it in the charters concerning property disputes.

⁶⁸ F. Pollock and F. W. Maitland, *The History of English Law before the time of Edward I*, (Union, NJ, 1996), Vol. I, 138-144, where they discuss the differences between jurors, doomsmen and witnesses, and the various procedures of inquest, recognition, verdict and judgement, and Vol. II, Chapter IX, 'Procedure'; Paul Hyams, 'Trial by Ordeal: The Key to Proof in the Early Common Law', in *On The Laws and Customs of England: Essays in Honor of S.E. Thorne*, eds. M.S. Arnold, et al. (Chapel Hill, 1981), 90-126, where he notes that there was no remedial appeal available, final proof was left to the judgement of God, and finally, that in England at least, the ordeal seems to have been confined to criminal matters; property disputes were not normally settled this way but rather, with a judicial oath. See also, R.C. Van Caenegem, *The Birth of the English Common Law*, (Cambridge, 1973), 9.

While exact procedures were not detailed in the charters, the accounts do allow for some conclusions. The parties could combine types of proof such as grant charters and/or oral testimony of credible witnesses; either was considered competent. Enforcement of this principle was direct. After judgement had been entered, if the writ order was not followed by the local officers, the aggrieved party could go back to the king for redress, as seems to have been done in Horndean.⁶⁹ While this appears to have been similar to an appeals process, the evidence for this is slim;⁷⁰ the king certainly had the power to reverse the judgement of his subordinates, but there is not enough evidence to say this was a formal appellate process such as is found at a later date.⁷¹ Assuming however, that this was an 'appeal' from the results of the proceedings before this group of officials, Bishop John, Colban, and Cospatric, the grounds for it, failure to recognise a proffered proof, would be procedural or evidential, rather than factual.⁷² The writ notification in the

⁶⁹ This is, perhaps, an early example of the 'royal correction and control' discussed by MacQueen for the thirteenth century, in *Common Law and Feudal Society*, 66.

⁷⁰ Van Caenegem, 'The Developed Procedure of the Second Middle Ages, XII-XV Century', *Encyclopaedia of Comparative Law XVI (Civil Procedure)*, (Tübingen, 1984), 11-53, 30, where he states that 'The Common Law knew nothing of an appeal, i.e., a rehearing of a case...consequently there were no real appeal courts either. Appeal was linked with Roman Law, which was alien to the Common Law, and it presupposed a hierarchy of courts unknown in England...' As has been discussed earlier, there was a hierarchy of officials to whom a subject could go should the lower level official fail to do justice.

⁷¹ See, Van Caenegem, 'The Developed Procedure of the Second Middle Ages, XII-XV Century', *Encyclopaedia of Comparative Law XVI (Civil Procedure)*, (Tübingen, 1984), 11-53, where he discusses the practice of ordinary people obtaining redress from the king 'along extra-judicial lines, through peremptory, executive orders of restitution, reparation and protection...' at 24. While there are certainly writs from Scottish Kings that fit this description, these two cases do not, because of the references to judgement before David, among other elements of the charters. See examples of this in Barrow, *Charters of David I*, nos. 67, 75, 100, 115, 117, 128. All these charters seem to have been issued by David I to address a problem, and several require enforcement by the king's officials, yet there is no indication of a contested hearing or judgement.

⁷² Van Caenegem, 'The Developed Procedure of the Second Middle Ages, XII-XV Century', *Encyclopaedia of Comparative Law XVI (Civil Procedure)*, (Tübingen, 1984), 11-53, 18.

Horndean matter was in fact an order to grant equal weight to these types of evidence.

The later cases, de Moreville and Wedale, were decided before William I, during whose reign there is clear evidence of influence from Roman and Canon law.⁷³ Simon the Chantor's letter referred to the proceeding concerning Moorfoot as an *ordo judicarius*, but the description in William's charter for the Newbattle matter is of a perambulation much as is seen in other, earlier cases. The de Moreville and Wedale cases appear to have been more in line with the English (or Scottish) Common Law than with Roman law.⁷⁴ There is no indication that there was individual examination of witnesses, only that the judgement was made by faithful men. They were settled in a very pragmatic way, with a perambulation of the boundaries, sworn jurors, and finally, documentation to bind the agreement for the parties and posterity. Although it is clear that there were similar procedures followed

One of the main features of Canon Law was the procedure of appeal. This assumes a hierarchy of courts. While there was something of a hierarchy being established under David I, both Horndean and Swinton were before his inauguration. The evidence supports the conclusion that this may well have been a sheriff's court, but these two charters alone are insufficient to conclude that there was a firm and formal appellate procedure in place before David became king. After his inauguration, there is evidence of a hierarchy of courts: Barrow, *Acts of Malcolm IV*, no. 258, 242 (Glasgow); 233 (St. Andrews Priory; *Acts of William I*, nos. 132, 281, *Moray Registrum*, no. 1. These involved the payment of teinds to the Church and were in several different regions. While there may have been no formal hierarchy, the principles of justice allowed for a party who felt he had been wronged to seek redress from the king.

⁷³ See the letter from Simon the Chanter, *Newbattle Register* no. 3. The date for the perambulation in Simon the Chanter's letter was 1184.

⁷⁴ Charles Donahue, Jr., 'Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of Learned Law', in *On the Laws and Customs of England, Essays in Honor of Samuel E. Thorne*, eds. M.S. Arnold, *et al.*, 127-158, 128, fn.4. The 'first piece of academic writing directed to someone conducting a court' was by Bulgarus, datable to the period 1123x1141. Susan Reynolds notes that '[T]he first surviving *ordo* to require separate and private examination of witnesses seems to have been written c. 1182-85.' Reynolds, 'The Emergence of Professional Law in the Long Twelfth Century', 21 *Law & Hist. Rev.* 347 (2003), at 357.

in both of these cases, and in many others where a sworn body of twelve came to a judgement, there is insufficient evidence to say that William I was acting according to the Roman influences or simply following the procedures set down by his grandfather.⁷⁵

It has already been shown that oral witnesses were deemed on a par with charter evidence and either could be used to prove a claim of property rights. The preferred method seems to have been declarations by witnesses, rather than questioning them.⁷⁶ Although witnesses are mentioned fairly often in the charters of the twelfth century, it cannot be presumed that they were questioned individually. There is no solid indication in the Scottish charters of exactly how oral testimony was presented during this period. The Roman or Canon law manner was that the witness testimony and evidence would be taken '*in camera* and away from the public'⁷⁷ and then presented to the decision maker. In the tradition of the Common Law, witnesses were called to testify on the day and would have done so in public.⁷⁸ Although

⁷⁵ F.L. Cheyette, 'Custom, Case Law, and Medieval "Constitutionalism": A Re-Examination', in *Political Science Quarterly*, Vol. 78, Issue 3 (Sep., 1963), 362-290, 367. He seems to equate custom with procedural rules, and concludes that 'law' was imposed on the case after the fact, by rulers.

⁷⁶ *Ibid.* But see the 'Decret of the Synod of Perth, dated 1206, concerning the matter between William, Bishop of St. Andrews and Duncan of Arbuthnott, where the witnesses each gave a statement which was recorded in some detail in the decret, in *Spalding Miscellany V*, 209-213.

⁷⁷ *Ibid.*, 12, 17. Van Caenegem points out that in England, 'pleading remained oral and the all important use of the jury (also in civil cases) made the completely professionalized treatment of cases *in camera* impossible.'

⁷⁸ This is also what appears to have been done in the Kirkness dispute, the Inquest of Glasgow and the Peverel case, all of which were recorded in *noticiae*. See also, David Bates, 'The Land Pleas of William I's Reign: Penenden Heath Revisited', *Bulletin of the Institute of Historical Research*, 51 (1978), 1-19; R.C. Van Caenegem, (ed.), *English Lawsuits From William I to Richard I, Volume I*, (London, 1990), 'Having heard the conclusion of this plea,

questioning of witnesses may not have been the most accepted procedure, the testimony of witnesses 'was the means of proof *par excellence*.'⁷⁹ The oath would have been a vital part of any procedure, both for the jury, swearing on relics and for the witnesses.⁸⁰ This was seen in the *judex* cases discussed earlier; oath taking for witnesses seems to have been just as important although the descriptions of this were more detailed for the thirteenth century rather than the twelfth.⁸¹ While the cases indicate that witnesses were a vital part of these cases, not just in the testing clause but in the proceedings before judgement, there is no firm evidence of their oral contributions. There are no case reports from before 1200 of 'witness X said this' and witness Y replied thusly.' It seems fair to conclude that they were part of the perambulation, where indicated, and were relied upon for proof, but nothing more definitive may be concluded at this stage.⁸²

Other cautionary notes must be sounded regarding the records themselves. There are similar problems in these records as found with the record of the Kirkness dispute, namely, that it is an entry made by a member of one of the parties to the dispute, and thus is undoubtedly biased. The different

based on numerous witnesses and arguments...', 10, and in another account, '...in the presence of all he deraigned the freedom of his land by the testimony of old Englishmen who were versed in the laws of the land...' at 12.

⁷⁹ Van Caenegem, 'The Developed Procedure of the Second Middle Ages, XII-XV Century', *Encyclopaedia of Comparative Law XVI (Civil Procedure)*, (Tübingen, 1984), 11-53, 19.

⁸⁰ Paul Hyams, 'Trial by Ordeal', 92-93.

⁸¹ See the *judex* cases discussed earlier. Also, see Willock, *The Origins and Development of the Jury*, 32-33, where he discusses a couple of cases from the late thirteenth century.

⁸² See Hyams, 'Norms and Legal Argument Before 1150', 45. He comments on what he believes would have been normal 'pre-trial discussions of rights and wrongs' before perambulations and probably before and during court proceedings generally.

interpretations of the case may be seen in the contrast between the monastery's account in the chronicle, and comments by Barrow that 'it would not be rash to guess that the abbey was seeking to encroach upon or monopolise ancient shieling grazings.'⁸³ Duncan also has noted that while there is a chronicle entry concerning the Wedale dispute, there was no authentic charter, which may reflect on the perceived unimportance of the men of Wedale compared to Richard de Moreville, Alan son of Walter or the Earl of Dunbar, all of whom were involved in similar disputes.⁸⁴ There does not seem to be any reason, however, to doubt the description of the procedural aspects of the dispute.

Lord Cooper of Culross cited the Wedale case as well, noting that this was a case first brought before the king rather than before Papal judges delegate.⁸⁵ Cooper's interpretation is even more cynical than either Barrow or Duncan. His portrayal of the actions of the monks of Melrose during the latter part of the twelfth and early part of the thirteenth century is of greedy, systematic and planned exclusion of all others from the common pasture and forest area between the Gala and Leader.⁸⁶ Considering the tone of the references to Roman authority in the chronicle entry, it would seem that the monks felt entirely justified in pursuing their rights so vigorously.

⁸³ Barrow, *Kingdom*, 236. See also Duncan, *Scotland, The Making of the Kingdom*, 420, who described the monks as 'in ruthless pursuit of grazing rights and, no doubt, of the profits of the wool trade.'

⁸⁴ Duncan, *Scotland, The Making of the Kingdom*, 420. The other cases are discussed below.

⁸⁵ Cooper, *Select Scottish Cases of the Thirteenth Century*, (Edinburgh, 1944), xlviii. Duncan

⁸⁶ *Ibid.*, 81-83. One must also acknowledge the possibility of bias against the Roman Church on the part of Cooper.

In the charter contained in the *Melrose Liber* concerning the dispute with the men of Wedale,⁸⁷ it was the king who decided the dispute. Barrow points out in the note to the charter that the statement in the *Chronicle of Melrose* indicated that 'the dispute between Melrose and the men of Stow was settled ...by *Richard de Moreville* (emphasis added) and other twelve faithful men, in the presence of the king, his brother David and bishops, earls and barons.'⁸⁸ Although they are procedural rather than substantive, since the one presiding could either be the king or someone on his behalf, the language may have been changed when the charter was drafted well after the entry in the *Chronicle of Melrose*, to give the charter more authority. The procedures indicated would in fact, be similar to the procedures followed during the de Moreville dispute.⁸⁹

The initial question remains. Do these cases support the conclusion that facts were presented to the decision maker, and the decision was made according to legal norms or rules? The evidence may not be as explicit as that which came later, with all the facts neatly set out to please the modern legal eye, but they were there. Legal norms can be discerned as well. The simplest case and the one most easily read for a normative decision is the Horndean matter. The norm is very straightforward. Either witnesses or a charter were acceptable proof of rights in property.

⁸⁷ *Melrose Liber*, no. 112, *RRS*, II, no. 253.

⁸⁸ Barrow, *RRS*, II, 288-289.

⁸⁹ Reynolds, quote at beginning of *Judex* section.

This conclusion may not be acceptable to others. Hyams would argue against it, since the terms of modern law, such as proof, do not mean the same things in the twelfth century. Proof can be differentiated between ‘irrebuttable proof’ and what might be called ‘party proof’, that ‘evidence summoned by one party or another to support his case and counter that of his opponent.’⁹⁰ While his conclusions may be generally applicable, they are not universally so, especially in light of the charter material discussed here.⁹¹

Hudson’s position seems to argue in favour of recognizing the legal norms implicit in the facts and decisions behind the charter texts, although his conclusions were based upon records much more detailed than the Scottish material. But the approach is similar. In analyzing the arguments actually put forth in twelfth century trials, he comes closest to following the paradigm of decision making set out earlier, where the decision maker applies the norms, rules or ‘law’ to the facts. Again, referring to the charter on Horndean, where David I tells the Bishop and Colban and Cospatric to recognize either witnesses or the charter, which he had already seen, the following facts and procedural steps may be discerned. First, that the monks had come to David regarding this property, probably to get a confirmation, although that is not certain. David had examined the charter. The monks thereafter asserted their

⁹⁰ Hyams, ‘Norms and Legal Argument Before 1150’, 46. The term ‘party-proof’ is my own, but the definition is his.

⁹¹ Ibid, 47. Hyams asserts that ‘In the early common law, charters were seldom or never treated as conclusive proof of title’, but the evidence here, is directly contrary.

claim regarding this property before the three locally prominent men, based upon either witnesses or Edgar's charter, and these men had refused to recognize their rights. The monks returned to David, whereupon he issued the writ-charter in question stating that either form of proof was acceptable.⁹² Both facts and the applicable norm may be discerned from the charter, even though not explicitly stated.

Milsom states that

[T]o us a law-suit should first ascertain the facts and then apply the law. Relevant facts are therefore stated; and although we cannot know whether any particular party is telling the truth, we can be fairly sure that it would be lawful to act as he did if the facts were as he says. This last of course is always so; and to the extent that facts are stated at all in the earliest records the legal and social order is faithfully reflected. But the reflections are fragmentary because early law-suits did not work by ascertaining and examining the facts. The plaintiff alleged the basic ingredients of his case in a set form of words—for example that his ancestor was seised of the land in dispute and that he was heir; the defendant normally made a general denial; and the business of the court was to decide which side should swear to the justice of his cause and how the oath should be tested—for example by

⁹² It is tempting to go even further, and adopt Hyams' idea of 'clashing norms' in this case. If the monks asserted that only a charter would be adequate proof of their rights, and the laymen asserted only witnesses would be adequate, David's decision could be seen as a compromise, since he neatly affirmed both positions. 'Norms and Legal Argument', 53-54.

battle. The only facts stated are those required of the plaintiff, and most of what actually happened is lost in that general denial.⁹³

For the cases discussed here, even if the statement of facts by the complainant were simply an abbreviated 'I claim that Richard de Moreville damaged my forest rights as set forth in the chirograph, and I demand emendation for my injuries' the allegation would be there; the facts would have been put before the decision maker. The chirograph would have been reviewed and the measure of the damages would then be ascertained. The same analysis applies to the other cases. Milsom's complaint is not that there were not enough facts elicited during the case itself, but that readers several centuries later cannot read these facts in the charters. The writers did not include them in the record, but that does not negate their presence, or that they were judged according to customary norms.

The charters from Scotland in the twelfth century do not have the detail found in England or France, nor are they as numerous. The legal arguments Hudson was able to find and discuss in the English charters are not so apparent north of the border. The material likewise does not support an irrational approach to settling disputes. There are no cases of ordeal or trial by battle over property rights in this century. The most detailed accounts are found during the reign of William I, where it is clear that there were perambulations,

⁹³ S.F.C. Milsom, *The Legal Framework of English Feudalism*, (Cambridge, 1976), 2.

witnesses (but no definitive evidence that these witnesses were questioned singly or simply swore to a formulaic statement made by one of their number), and the use of charters for both proof and enforcement. There is however, enough in the charter texts to show that the decision making process was followed each time.

CHAPTER VII

JURISDICTION

Jurisdiction has been used as a marker of identity and sovereignty,¹ along with lesser forms of authority, autonomy and control, and arguments may be made that subsume identity and sovereignty into a power construct.² The most important aspect of jurisdiction however, is its fundamental meaning: it is the 'power to declare the law: *potestas iuris dicendi*.'³ One measure of jurisdiction is the geographical extent to which it may be seen to reach.⁴ This depends on enforceability, again relating back to power, but also to an acknowledgement of the claim of jurisdiction by those to whom such a claim would apply, and a willingness to abide by the limits demarked by the boundaries of the effectiveness of such jurisdiction. This active participation of those governed by such jurisdiction is intimately tied to identity.⁵

¹ Hector MacQueen, 'Regiam Majestatem, Scots Law, and National Identity' in *SHR*, Vol. LXXIV, 1 (1995) 1-25, 4.

² *Ibid*, 1. 'For in a very literal, even physical, sense law and jurisdiction do indeed define what Scotland is.'

³ G.R. Evans, *Law and Theology in the Middle Ages* (London: 2002), 43, quoting from Imerius. Evans also points out that jurisdiction means 'authority over' and distinguishes between the possession of jurisdiction and the exercise of it.

⁴ *Ibid*, 37.

⁵ MacQueen, *Regiam Majestatem*, 3-5. Although he does not deal precisely with this argument, MacQueen ties this notion of jurisdiction to Scots identity and sovereignty in his discussion of the purpose behind the composition of *Regiam*, and the effect on the same by Edward I's attempts to force appeals to be heard in England. In terms of recognition, the converse is equally true; in the end, the Scots refused to acknowledge, to 'recognise' the right of Edward I to exercise jurisdiction over Scotland or the Scots.

Normally, when discussing the issue of jurisdiction in the twelfth century, the focus would be on feudal jurisdiction or seigniorial, (including royal), jurisdiction, fealty and owing suit to one's lord's court.⁶ Although feudal or seigniorial jurisdiction is an integral part of this discussion, it is not the main focus here. The more encompassing struggle over jurisdiction, and one which had far reaching consequences, took place at one remove from the issues arising from lord and tenant in the twelfth century: between secular authority, specifically the king, and ecclesiastical authority. It is within this larger framework that certain disputes were conducted in the latter half of the twelfth and early thirteenth century. This struggle was not merely about power. It was about autonomy for both the Church and the secular authority within the territorial bounds of the kingdom.

Background

Although there had been tensions between Church and royal authority during the twelfth century and before, both of these entities needed the other in order to establish and solidify their own positions.⁷ The seeds of the conflict had

⁶ F. L. Ganshof, *Feudalism* (New York, 1961), 158, 'feudal jurisdiction, meaning by it cases arising out of the contract of vassalage and concerning its terms or affecting the fief itself. This jurisdiction normally belonged to the lord, who exercised it over his vassals and over the fiefs held from him.'

⁷ This was especially true in Scotland. Without royal support and protection, the monasteries could not have taken root so strongly in Scotland. Without the support of the Church, the Scottish kings of the twelfth century could not have extended and consolidated their power throughout Alba and what is now Scotland. By the mid-twelfth century, the Church, especially the monasteries, had become integral to the life of every day Scotland. See

been there from the beginning of Christianity.⁸ The separation of jurisdiction between the Church and State had been recognised early on by the Roman Pope, but neither side thought the other should have equal power. ‘Although each recognized the independence of the other, one almost inevitably tried to dominate.’⁹ Each not only thought it should be supreme within its own sphere, but the Church took the position that it had moral jurisdiction over the entire world. It could do little to enforce its claims to superiority. For several centuries, it appeared that the secular rulers were able to dominate the papacy, insisting on their right to invest church leaders with the secular trappings of their ecclesiastical offices.¹⁰ This began to change in the eleventh century under the reforming popes starting with Leo IX.¹¹ The assertion of superior jurisdiction was stated most emphatically by Pope Gregory VII (1073-1085), who declared that the pope could absolve subjects from obeying a sinful ruler and could even depose emperors.¹² The conflict between the two entities was impacted by the use of writing and the new emphasis on law and legalities in the twelfth century. ‘Popes and bishops, in their ceaseless battles to uphold their privileges against kings, nobles, and one another, valued documents and legal expertise.... [r]eligious houses assembled their charters, inventing and

Barrow, *The Kingdom of the Scots*, (2nd edn.) (Edinburgh, 2003), 169-170; Barrow, *Charters of David I*, 3.

⁸ ‘Render therefore unto Caesar the things which are Caesar’s...’ (Matt. 22.21).

⁹ Edward Grant, *God & Reason in the Middle Ages* (Cambridge, 2001), 22, referring to a quote from Pope Gelasius (492-496): ‘There are ...two by whom principally this world is ruled: the sacred authority of the pontiffs, and the royal power.’

¹⁰ Brian Tierney, *The Crisis of Church and State 1050-1300* (Toronto, 1999), Part II generally, and 33-44 regarding lay investiture and the arguments put forth by Humbert and Peter Damian.

¹¹ James A. Brundage, *Medieval Canon Law* (London, 1995), 34-41.

¹² *Ibid*, 23.

retouching them where necessary...kings had access to similar skills...[i]n order to uphold their authority in the face of what could appear an intolerable clerical assault, they defined what they saw as their own rights in written form...'.¹³

Although most historians do not emphasise this conflict in Scotland or in Scottish history, choosing to focus more on the Scottish Church's struggle for independence from the Archbishopric of York,¹⁴ Scotland was not immune to

¹³ Robin Frame, *The Political Development of the British Isle 1100-1400* (Oxford, 1995), 73, referring to the Constitutions of Clarendon. See also David Crouch, *The Reign of King Stephen, 1135-1154* (Harlow, 2000), Chapter 15, 295-319; Georges Duby, *The Age of the Cathedrals, Art and Society, 980-1420*, trans. Eleanor LeVieux and Barbara Thompson (Chicago, 1981), 137, 'And the pope attempted-and nearly managed- to include all of the sovereigns of Europe in an intricate web of feudal homage with himself at the summit.' See also Brian Tierney, *The Crisis of Church and State 1050-1300* (Toronto, 1988), chapter 4. Although there is ample evidence of papal action which supports this conclusion, Tierney points out a different slant taken by some historians; that the actions of the Pope (specifically, Innocent III) were 'inspired by the highest spiritual motives and that his theory of church and state was based on a cautious dualism, not on a theocratic doctrine attributing supreme temporal and spiritual power to the papacy', 128. But see Tierney, *Crisis of Church and State*, 50-51, the letter from the pope to Solomon, king of Hungary where the pope asserts that the kingdom of Hungary was 'surrendered to St. Peter by King Stephen as the full property of the Holy Roman Church under its complete jurisdiction and control.'

¹⁴ Lord Cooper of Culross, *Selected Papers, 1922-1954* (Edinburgh, 1957), 84, referring to the case of *Melrose v. Dunbar* as 'one of the very few echoes which we hear in Scotland of the bitter controversy which had been raging in England and elsewhere between Church and State.' 'Throughout most of the twelfth century the tensions were both within the Church and with the secular rulers, especially with regard to appointments; the Scottish Church strove to maintain its separate identity in the face of pressure both from the Church in England and from Rome, at least until the Papacy of Alexander III. Although a number of popes had ordered Scottish Bishops to submit to York, some of their actions actually counter-acted their words. Adrian IV, the English Pope, invited the bishops of Scotland to present any reasons they might have for failing to obey the Archbishop of York (see A.D. M. Barrel, 'The Background to *Cum Universi*: Scoto-papal Relations, 1159-1192' *Innes Review* 46 (1995), 116-38, 116-117 and fn7.), and Pope Alexander III, while at first supporting the independence of the Scottish Church from York by appointing the Bishop of Moray and then the Bishop of St. Andrews as papal legates in Scotland, subsequently returned to form by ordering the bishops of Scotland to show obedience to York in a papal bull of 21 September 1162. In 1164, in the midst of the Becket controversy, the pope consecrated the bishop elect of Glasgow, over the objections of York. In 1174 when Henry II tried to make the Scottish Church subordinate to the Church of England in the Treaty of Falaise, the Pope objected, claiming it was an infringement of the Church's liberties, in a bull of 1176. Throughout the 1180s there are several accounts of the tensions between King William I and the Church over

these forces nor should these forces be seen as entirely separate.¹⁵ There are exceptions. Both Barrow and Duncan have addressed jurisdictional issues between secular and ecclesiastical powers, but more generally than here and without examining the cases in detail.¹⁶ Hector MacQueen has also addressed

the appointments of Hugh and John the Scot to St. Andrews. In 1192, with the issuance of *Cum Universi*, Rome stated clearly that the Scottish Church was subject directly to the Pope with no intermediary. See *Registrum Episcopatus Glasguensis*, Vol. 1, no. 19; A.D. M. Barrel, 'The Background to *Cum Universi*: Scoto-papal Relations, 1159-1192' *Innes Review* 46 (1995), 116-38; Bruce Webster, *Medieval Scotland. The Making of an Identity* (Basingstoke, 1997), 50-70 covers this struggle for independence of the Scottish Church throughout the twelfth century, both within the Church in its refusal to submit to York, and the refusal of the kings of Scots to allow any such submission, but he does not cover the jurisdictional tension played out in the courts. A.A.M. Duncan, *The Kingship of the Scots* (Edinburgh, 2002), 114-116, discusses the problems with the papacy with regard to obtaining an archbishopric for Scotland, and rites of coronation, but does not focus on jurisdictional issues with regard to property claims; Duncan, *Scotland: The Making of The Kingdom* (Edinburgh, 1996), chapter 10, does discuss relations both over submission to York and conflicts with the king; Barrow, *Kingship and Unity, Scotland 1000-1306* (Edinburgh, 2003), 61-83, discusses the transformation of the Church in Scotland after the advent of Queen Margaret, and the conformation to the continental reforms, but barely mentions jurisdiction and does not discuss secular and ecclesiastical conflicts regarding it. But see John Dowden, *The Medieval Church in Scotland, Its Constitution, Organisation and Law* (Glasgow, 1910) briefly discusses 'The Conflict of Civil and Ecclesiastical Jurisdiction', but focuses primarily on the thirteenth century; he does discuss both the Leuchars and Dunbar cases, 208-212; the works of Hector MacQueen, especially more recently, also discuss the jurisdictional aspects of the relationship between the twelfth century Church and State in Scotland: See 'Expectations of the Law in 12th and 13th Century Scotland', *Tijdschrift Voor Rechtsgeschiedenis*, LXX (The Hague, 2002), 279-290.

¹⁵ The topic of jurisdiction generally becomes more popular with Scottish historians in the thirteenth century. See Hector MacQueen, above noted article, and 'Scots law under Alexander III', in *Scotland in the Reign of Alexander III*, N.H. Reid, (ed), 84-6; MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh, 1993), 85-9; and Hector MacQueen, 'Canon Law, Custom and Legislation: Law in the Reign of Alexander II, in *The Reign of Alexander II, 1214-1249*, ed. Richard D. Oram (Leiden, 2005), 221-251. This last contains a substantial amount from the *Tijdschrift* article. See also, Barrow, *The Kingdom of the Scots* (Edinburgh, 1973), 91-2; A.A.M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1975), 264, where he notes that 'The Scots had exploited the weakness of their opponent's position brilliantly, identifying him to the pope as Henry II, author of the Constitutions of Clarendon and of the murder of Becket...'

¹⁶ Barrow, *The Kingdom of the Scots* (Edinburgh, 2003), 72-73; *The Acts of William I* various comments to royal charters and Introduction; A.A.M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1996), chapters 10, 11.

these issues, especially lately, but not in the same way as discussed here, nor are some of the conclusions expressed here in accord with all of his.¹⁷

There were several cases in the twelfth century that, when read in context with the events, point to how jurisdictional matters actually played out between the two contesters. While relations do not seem to have been as contentious in Scotland between secular and ecclesiastical authority, there certainly was jurisdictional conflict.¹⁸ There was also a spirit of cooperation and accommodation, with the Church at times requesting and obtaining secular intervention and enforcement of its rights, and receiving confirmations and enforcement of judgements from the king. In spite of this more amicable state of affairs, the Scottish king did not allow the Church as much control as it wished in the twelfth century. There are a number of Scottish cases that encapsulate these competing forces, with two of them more remarkable than the rest; several of these began in the late twelfth century-early thirteenth, and often continued for several years right up to the end of the reign of William I. This series of cases, for it must be viewed as a series, demonstrate the evolution in how jurisdictional differences were perceived and how the issue

¹⁷ See previous works cited above, generally. Although MacQueen discusses the twelfth century in several of his writings, he focuses more on the thirteenth and considers the twelfth century evidence to be 'very patchy' at best. See 'Canon Law, Custom and Legislation', 225.

¹⁸ This can be seen as early as Alexander I's reign. Barrow, *The Kingdom of the Scots* (Edinburgh, 2003), 175-176; Lawrie, *ESC*, nos. XXXVII-XLV, and notes. These documents consist mostly of letters between Alexander I and Canterbury concerning Eadmer's refusal to follow the customs of Scotland, correspondence with the papacy, as well as letters from the Pope to Bishop John of Glasgow ordering him to obey his metropolitan, York.

of jurisdiction was used as a mechanism of power, authority and autonomy.¹⁹

While several historians have commented at various times on the cases discussed below, few have discussed them in light of the impact of acts such as the Constitutions of Clarendon or *Cum Universi* on the way jurisdiction was viewed, or how these and other events may have affected the process of dispute resolution evident in these cases.

Cases concerning lands subject to competing claims from clerics and from the laity were nothing new.²⁰ While the earlier part of the century did not demonstrate such acrimonious relations between the Scottish secular courts and the ecclesiastical, with cases often being brought before one or the other of these *fora*, this changed towards the latter part of William I's reign, especially after Innocent III became pope in 1198. Matters came to a head earlier and were more contentious further south. In England, by Henry II's reign, disputes that included jurisdictional issues had progressed to the point of having a specific assise to determine which forum should hear the dispute. The type of property at issue determined which forum should be used. If it were a lay holding, the dispute would be heard in the secular courts. If ecclesiastical, that is, land or property that had been given in free alms, then any dispute was to be decided in the church courts.

¹⁹ This was especially true for the Scottish king. See MacQueen, 'Scots Law and National Identity', 7; 'Law was closely associated with kingship as a mark of Scottish identity in the thirteenth century.'

²⁰ See Bates, 'The Land Pleas of William I's Reign: Penenden Heath Revisited' *Bulletin of the Institute of Historical Research*, 51 (1978), 1-19, and generally, *English Lawsuits from William I to Richard I*, Vol. I, William I to Stephen, (nos. 1-346) ed. R.C. Van Caenegem, (London, 1990). While the number of such cases is limited in Scotland, they do exist.

Questions involving competing claims between church and state about land were in all likelihood one of the earliest to be brought before a jury.²¹ The *assisa utrum* was ‘a “recognition” by twelve lawful men ...to decide whether (*utrum*) the land in question was alms or lay fee.’²² This jurisdictional issue was at the heart of much of the litigation between Church and State in the twelfth century. The rule that lay holdings should be brought before the king’s courts seems to have been the practice well before Henry II’s reign, both in England and in Scotland; many of the cases concerning disputes involving the church, either its property or as a party, were brought before the Scottish king during the twelfth century, perhaps in part at least, because most of the donations were from him.²³ Although not evident immediately, the

²¹ Pollock & Maitland, *History of English Law*, Vol. 1, 144.

²² *Ibid*, 145. See also, John Hudson, *The Formation of the English Common Law* (London, 1996), 129-130.

²³ *Melrose Liber*, ed. Thomas Thomson, (Edinburgh, 1832), ix-x; he asserts that as early as the reign of Malcolm IV, the Crown was ‘held to be the origin of all real property.’ Examining the earlier charters leads to the conclusion that this was the prevailing understanding as early as David I’s reign. This would have made the grantees, whether lay or ecclesiastical, holders of the king, and he would have exercised feudal authority over them, including holding court and administering justice. See Barrow, *The Charters of David I*, nos. 29, 30, 43, 97, 98, 164. These last three charters concern Moorfoot. Many of the grants made by David I and Earl Henry are of various churches, some with land as well; see nos. 45, 46, 52, 56, 72, 85, 86, 87, 91, 108, 133, 147, 150, 180, 200, 205, 215. None of the grants specified that the gift of patronage was also being donated, with the possible exception of no. 91. The language in that charter is ‘*sciatis me concessisse et confirmasse in perpetuum elemosinam donum ecclesie de Sprostun quod Johannes Glasguensis episcopus dedit ecclesie Sancte Marie de Kelcho, abbati et monachis, in elemosinam perpetuo possidendam.*’ Barrow translated this as ‘the gift made to it by John bishop of Glasgow of the church of Sprouston’. It seems to me that ‘*donum*’ may be referring to the gift of the living, or patronage of the church. See Barrow, *The Acts of William I*, nos. 211, 249, where Barrow translates ‘*donacione*’ as patronage. During Malcolm IV’s reign, the pattern continues: not only were there multiple donations to the Church of specific chapels and churches, but there is no clear language that the patronage of the church was being donated with it. There were also a number of apparent disputes between the church and laymen and between two church entities that appear to have been resolved either before King Malcolm IV or with his aid. See Barrow, *The Acts of Malcolm IV*, nos.

king's jurisdiction over these cases was affected by the issuance of the papal bull, *Cum Universi*. While some have noted that the king's authority was augmented by the bull in the specific privileges included for the king of Scotland, it could be argued that the effect with regard to disputes involving land claimed by the church was to pre-empt the king's jurisdiction.²⁴

One area where this power struggle appeared between these two entities was the right of advowson, which gave rise to two separate procedures, the assises *utrum* and *darrein presentment*. Although *utrum* was an earlier assise in England, it was no less important that the subsequent assise instituted to resolve one of the most common disputes between church and state. Under Henry II, the assise of *darrein presentment* was for the purpose of determining who should exercise the right of patronage. This was a possessory action, where the jury was asked to determine who had last presented an incumbent to the living. This was not the first step taken to address such questions. According to Pollock & Maitland, this possessory action was derivative of the writ of right of advowson. There had been litigation concerning the patronage of churches before this assise was

114,122,127,135,151,186,187,194,195,196,197,199,218 for gifts of churches; nos. 149,153,173,202,233,237,239,240.251,257, for what appear to be disputes between both lay and ecclesiastical parties. There were even more such cases under William I.

²⁴ Paul C. Ferguson, *Medieval Papal Representatives in Scotland: Legates, Nuncios, and Judges-Delegate, 1125-1286* (Edinburgh, 1997), 1-2. The papal bull set out three privileges for the Scottish king, one of which was that cases arising about the Church's possessions in Scotland were not to be referred outside the realm unless by appeal to Rome. See also *Habakkuk Bisset's Rolment of Courtis*, Vol. III, ed. Hamilton-Grierson, 25, where he notes that the church had jurisdiction in 'all matters respecting ecclesiastical persons and property, such as tithes and advowsons....' It is unclear that this was actually true during the twelfth century before the Bull was issued. In any case, such pre-emption was not always recognized by the king, either before or after the Bull.

developed, and there had been customary rules followed in the presentation of the claim and the process of resolution.²⁵ Because there was conflict over which forum should be deciding these issues, procedural rules were set out in the Constitutions of Clarendon in 1164. The first article of the constitution stated that '[I]f a controversy arise between laymen, or between laymen and clerks, or between clerks concerning patronage and presentation of churches, it shall be treated or concluded in the court of the lord king.'²⁶ Although it is not clear precisely when the *assise* itself was instituted, it was arguably after the Third Lateran Council of 1179, which provided that the bishop should name a parson to any church left vacant for three months or more.²⁷ If the living were to remain the gift of the laity rather than the church, possession of the right of advowson had to be determined quickly. The question of who had presented last was to be answered by the jury, and that person or his heir (or successor) were to have the right.

Although the issues were similar in both England and Scotland concerning first, the jurisdictional question and second, the right to present the living of a

²⁵ According to Pollock & Maitland, *History of English Law*, Vol. I, 148, 'A proprietary action for an advowson must be begun in the king's court by royal writ, "writ of right of advowson"; the claimant must offer battle; his adversary may choose between battle and the grand assise.' This preceded the institution of the *assisa de ultima presentatione*.

²⁶ Constitutions of Clarendon, c. 1 (1164), <http://www.fordham.edu/Halsall/sources/eclarendon.html>. Hall, *Glanvill*, (London, 1965), Chapter XIII, 19-22, 161-3; Pollock & Maitland, *History of English Law*, Vol. I, 148-149; F.W. Maitland, *The Forms of Action at Common Law: A Course of Lectures*, eds. A.H. Chaytor and W.J. Whittaker (Cambridge, 1948), ix, 42; W.L. Warren, *Henry II* (Berkeley, 1991), chapter 9, 317-361, for a general discussion of the legal reforms instituted by Henry II; John Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford, 1994), especially chapter 9.

²⁷ Third Lateran Council, clause 17, <http://www.piar.hu/councils/ecum111.html>. See also Pollock & Maitland, *History of English Law*, Vol. I, 148; Warren, *Henry II*, 341, and fn.1.

church, it cannot be concluded from the records concerning either the cases discussed here or the Scottish records in general that the procedures in Scotland were the same as in England. They certainly were not discussed using the same terminology. It appears in fact that there were no exact Scottish counterparts to the English assises of *utrum* or *darrein presentment*.²⁸ There are, however provisions in both *Regiam Majestatem* and *Glanvill* applicable here. The interesting aspect of these provisions is that they directly contradict each other.²⁹ Book I, c. 2, of the *Regiam Majestatem* entitled *De Causis ad Ecclesiam Spectantibus et de Jure Patronatus*, states that actions relating to advocacy and rights of patronage belong to the Church, while *Glanvill*'s provision is in accord with the Constitutions of Clarendon. But paragraphs 3 and 4 of the provisions in *Regiam* indicate that lay patrons must be careful to name a new parson within four months or they lose the right to the bishop. This rule only came into effect after the Third Lateran Council in 1179, and made the creation of the procedures to address the right to present necessary in England.³⁰ Both before and after that date, cases were brought before the Scottish king regarding patronage, without much attention

²⁸ Cooper, *Select Scottish Cases of the Thirteenth Century*, (Edinburgh, 1944), lxviii, noting in his examination of the Ayr and Bute Manuscripts, '[T]here is no trace of *Utrum* or of *Darrein Presentment*...'

²⁹ *The Treatise on the laws and customs of the realm of England commonly called Glanvill (Glanvill)* ed. G.D.G. Hall (Holmes Beach, 1983), 1, 3; regarding civil plea to be pleaded and determined only in the court of the lord king including 'pleas concerning advowsons of churches'. *Regiam Majestatem and Qouniam Attachamenta*, ed. Lord Cooper of Culross, (Edinburgh, 1947), 1, 2.

³⁰ The dating of *Regiam Majestatem* has already been set at shortly after 1318; A.A.M. Duncan, 'Regiam Majestatem: a re-consideration', *Juridical Review (JR)*, new series, vi (1961).

seemingly being paid to the jurisdictional issue.³¹ The clearest example of this is the case concerning East Kilbride, between the Bishop of Glasgow and Roger de Valognes. There the royal charter unequivocally states that the patronage of the church had been acknowledged and proved in the presence of the king and his full court. While it is true that several cases where both parties were ecclesiastical as well as cases where one party was lay were brought before judges-delegate, only a handful were specifically concerned with the right of patronage, most being more generally concerned with churches as a whole or, especially, its teinds and lands.³² This changed towards the end of the reign of William I, as is detailed in the following cases. Even with the changes in approach, right to the end of his reign, William I decided disputes over the right of patronage.³³

Although Duncan raised the issue of the assize *Utrum*, noting that while this was used in England to determine whether lands were lay or alms, he does not

³¹ Barrow, *The Acts of William I*, nos. 249(1182x1190; Glasgow v. Roger de Valognes re: East Kilbride), 477(18 Sept. 1203x1207; The King v. Brice, Bishop of Moray v. Gilchrist earl of Mar re: Aberchirder), 491 (20 May 1209x1211, prob. 1210; de Quincy v. St. Andrews Priory re: Leuchars), 562 (1202x1214; David de la Hay v. William Malvoisin, Bishop of St. Andrews re: land of Ecclesdovenauin and patronage of church of Errol). There are also grants of the right of patronage made by King William I. See charters nos. 211 (1178x1188), 344 and 345 (1189x1193), both grants to laymen, and 527 (1165x1195), a grant to Cambuskenneth of the patronage of the church of Glenisla.

³² Paul C. Ferguson, *Medieval Papal Representatives in Scotland: Legates, Nuncios, and Judges-Delegate, 1125-1286* (Edinburgh, 1997), 209-268. Patronage seems to become an issue dealt with by judges-delegate during with the papal reign of Innocent III, but not so much before. Although there were cases where other matters are in dispute between lay and ecclesiastical parties, they were not disproportionately decided before judges-delegate as opposed to the king's court.

³³ See cases and their dates, above. This is not to say that there were no cases brought before papal judges-delegate. There were. Contrary to the sense of the assertions, especially in the Dunbar case that the Church had exclusive jurisdiction over such cases, the evidence shows that they did not.

discuss this in any detail with relation to Scotland, simply stating Scotland did not have a similar act.³⁴ MacQueen has argued that lay litigants could point out that while England had the assise *utrum*, Scotland did not have a comparable procedure.³⁵ While there was of course, no procedure of *utrum* in Scotland, there was in fact, the process of 'recognition' as used in the East Kilbride case, which sounds remarkably similar to the procedure in the assise *utrum*.³⁶ The East Kilbride procedure was similar to that laid out in the Constitutions of Clarendon, and since it was after the reconciliation with Pope Lucius, there should have been no impediment to ecclesiastical jurisdiction if, indeed, such matters were 'customarily' heard in church courts.

While there may not have been formalised procedures called an assise '*utrum*' or *darrein presentment* in Scotland, there were methods for achieving the same result. The practice set out in East Kilbride had been used well before either the Leuchars or Dunbar cases, discussed below. The parallels between England and Scotland, both in tensions between secular and ecclesiastical power and as a basis for a writ or brieve are there, and it is within this climate of jurisdictional conflict and accommodation that these cases are best understood.

³⁴ Duncan, *Scotland: The Making of the Kingdom*, 288.

³⁵ MacQueen, 'Expectations of the Law', 284.

³⁶ Barrow, *RRS*, ii, 249.

The Cases

Several of these cases involved the Cistercian monastery of Melrose, concerning its boundaries and the rights and privileges regarding lands in the surrounding areas.³⁷ Beginning in 1170, Melrose Abbey began aggressively to assert its perceived rights regarding these lands, and came into conflict with neighbouring holders both lay and ecclesiastical. Some were settled more or less amicably, while others resulted in some kind of official action.³⁸ There does not appear to have been a deliberate program in the pursuit of its neighbours, even though it may appear to present such a pattern in retrospect.³⁹

*Dryburgh, Moreville and Wedale*⁴⁰

In 1170, Melrose Abbey and Dryburgh Abbey, located to the south, entered into an agreement settling their borders. The lands in question were in the diocese of Glasgow, and the agreement was confirmed by the Bishop of

³⁷ Some of the cases concerning Melrose's assertion of rights have already been discussed in the previous chapters, under different subjects and concentrating on different aspects than covered here.

³⁸ Cooper, *Selected Papers, 1922-1954* (Edinburgh, 1957), 81-87. Cooper discusses several of the cases here, all in relation to the dispute with the Earl of Dunbar. He does not explore the jurisdictional issues to any great extent, although he does mention them.

³⁹ *Ibid.* Cooper strongly argues that there was a deliberate campaign by Melrose. Some of this material was touched on in the earlier discussion of the de Moreville case, but not with regard to jurisdiction.

⁴⁰ Moreville and Wedale have already been discussed in detail and will not be separately treated here, but mention of these controversies helps to place this series of cases in perspective, both chronologically and thematically.

Glasgow, but not by the King.⁴¹ This agreement seems to have been amicable; there are no further records concerning any dispute between the two Abbeys over this land. The next two disputes chronologically were the *magna controversia* with Richard de Moreville, finally concluded in 1180, and the Wedale case, concluded in 1184.⁴² Both of these cases involved a dispute between the church and lay holders, although neither involved patronage of a church. Both were settled before the King, in his full court. There is no indication in the records that there was even a question raised about whether these matters should be brought before the king or before an ecclesiastical tribunal.⁴³ The next several cases follow the same pattern until Leuchars, and then Dunbar, where jurisdictional issues come to the fore with a vengeance. It should be noted that up to these last two cases, jurisdiction does not seem to have been an issue in spite of the many changes occurring both in the relationship of the Scottish Church to Rome, and in England.

East Kilbride

Sometime between 1182 and 1190, a case was brought before William I over the right of patronage of the church of East Kilbride, in Lanarkshire.⁴⁴ The

⁴¹ *Dryburgh Cartulary*, no. 113. There do not seem to be any royal confirmations of this agreement, and there does not appear to be a comparable charter in the *Melrose Liber*.

⁴² See discussion of these cases, *infra*.

⁴³ *Melrose Liber* no.110, 111, (de Moreville); no.112, (Wedale); Barrow, *Acts of William I*, no.236, (de Moreville), and no.253, (Wedale). See comments by Barrow regarding both royal charters, and discussion by Cooper.

⁴⁴ Barrow, *RRS, II, The Acts of William I*, no. 249(1182x1190; Glasgow v. Roger de Valognes re: East Kilbride).

contestants were Roger de Valognes, who claimed he had the right to name a parson to that church, and the Bishop of Glasgow who claimed that the see of Glasgow had for many years had the gift of the church without any objection or efforts to reclaim the right of patronage. The procedures described in the charter detailing the outcome of this dispute indicate that there was a recognition hearing before the king and his court, where witnesses, responsible older men and lawful witnesses testified. In the face of such evidence, Roger de Valognes renounced his claim to the right of patronage. The renunciation seems to have also included a ploughgate of arable land.

These proceedings are remarkably similar to those in England concerning the right to present the living of a church, although there is no reference to this in any of William I's charters. There are no indications that this matter was ever brought before an ecclesiastical tribunal, nor that anyone objected to the king's jurisdiction in this matter.

Mauchline and Blainslie

Up to the mid-1180s, the rule prevalent in England for most of the twelfth century and made explicit in the Constitutions of Clarendon,⁴⁵ that any case

⁴⁵ Constitutions of Clarendon, c. 9 (1164), <http://www.fordham.edu/Halsall/source/cclarendon.html>; this article states: 'If litigation arise between a clerk concerning any holding which the clerk would bring to charitable tenure but the layman to lay fee, it shall be determined on the decision of the king's chief justice by the recognition of twelve lawful men in the presence of the king's justice himself whether the holding pertain to charitable tenure or to lay fee. And if the recognition declare it to be

involving a dispute regarding property between a lay holder and religious should be brought before the king, seems to have been more or less followed without any problem in Scotland as well as England.⁴⁶ There are no extant records of litigated cases that deal explicitly with this aspect of jurisdiction prior to Innocent III. There appears to have been a generally more relaxed attitude towards jurisdiction, with neither side making it an issue until after 1200.

The two cases discussed here both involved the family of Walter son of Alan, Steward of the King, and his descendants. These cases highlight this more relaxed approach, not because they mark a shift in how such cases were conducted, but because they do follow the rule that disputes involving property previously granted in alms should be referred to an ecclesiastical tribunal, and where disputes are between a layman and a cleric involving property whose disposition has been contested, they should be heard by the king.

There are two cases with the family, one with roots at the beginning of William I's reign involving a grant by Walter son of Alan of the land of

charitable tenure, it shall be litigated in the church court, but if lay fee, unless both plead under the same bishop or baron, the litigation shall be in the royal court. But if both plead concerning that fief under the same bishop or baron, it shall be litigated in his court; yet so that he who was first seised lose not his seisin on account of the recognition that was made, until the matter be determined by the plea.' The argument here is not that the Constitutions of Clarendon actually applied in Scotland, merely that the procedures and rules regarding jurisdiction set forth therein have parallels in Scotland without the explicit texts such as is found in the Constitutions.

⁴⁶ There were some cases brought before judges-delegate where one party was a layman; see Ferguson, *Medieval Papal Representatives*, 209-212.

Mauchline,⁴⁷ although the dispute concerning it came to a head in 1204; the other case, of much later origin, concerns a quitclaim from Alan, son of Walter, datable to 1189x1193 regarding land on the west bank of the Leader, also known as Blainslie. The actions of the Abbey in connection with this piece of land were in keeping with their behaviour concerning other acquisitions by Melrose of the lands between the Gala and the Leader.⁴⁸

Mauchline

Mauchline was originally donated by Walter son of Alan, along with pasture bordering the Ayr River and in the forest, also on the north side of the Ayr; other specifications in the charter include a carucate of land to be cultivated and five marks to be paid by the monks to the Stewards annually. This gift was confirmed by King William I shortly after he began his reign. Although the charter clearly states that the gift was in alms, with the boundaries perambulated and described in detail, there were exceptions. Walter son of Alan reserved the beasts and birds of the forest from the gift, and indicated that he and his heirs had rendered forensic service to the king for 'all the aforesaid'.⁴⁹ It is this saving clause that became a problem later in the century.

⁴⁷ This is a donation by Walter I son of Alan, regarding Mauchline. *Melrose Liber*, no. 66; Barrow, *Acts of William I*, no. 78. The confirmation by Walter I's son, Alan is no. 67. See also Cooper, *Select Scottish Cases*, 4-6.

⁴⁸ *Melrose Liber*, no. 97; Barrow, *The Acts of William I*, no. 364.

⁴⁹ *Ibid*, no. 66. See also Cooper, *Select Scottish Cases of the Thirteenth Century*, 4-6.

In 1204 or shortly before, Alan son of Walter tried to reclaim the donated lands, basing his claim on this clause. The monks construed the clause narrowly, while the donor claimed it applied to all of the donations listed in the charter, which would allow him to reclaim the donated lands as 'forest'. The monks petitioned the pope, who nominated the Abbots of Jedburgh and Dryburgh and the Rector of Lilliesleaf as judges delegate.⁵⁰ The pope gave instructions to the judges-delegate to place Alan son of Walter under ecclesiastical censure, to take the necessary procedural and evidential steps and report to the papal curia. This was done and an opportunity for the parties to appear, but Alan son of Walter did not appear and judgement was rendered in his absence. Although Cooper notes that the pope issued 'a second mandate to the judges-delegate on 7 March, 1203-04 instructing them to carry out his decision and appending a reasoned judgment which was later embodied in the *Corpus Juris Canonici*,' the mandate of this date refers to things to be done, rather than a decision already made.⁵¹ The Pope did issue a judgement, however, which did become part of Canon law. It set out the

⁵⁰ Cooper, *Select Scottish Cases*, 5. Geoffrey, Abbot of Dryburgh and Radulf, Abbot of Jedburgh were probably the same as G. Berbur and R. de Burg, who appeared at the Vatican and are listed as the Abbots in the Pope's opinion, listed in the Decretals. See *Decretals of Gregory IX*, III, XXIV, Cap. VI. <http://freespace.virgin.net/angus.graham/GregDecr.htm>; D.E.R. Watt and N.F. Shead, *The Head of Religious Houses in Scotland from Twelfth to Sixteenth Centuries* (Edinburgh, 2001), 58, 117. But see W. H. Bliss, *Calendar of entries in the Papal Registers relating to Great Britain and Ireland: Papal Letters, Vol. I, 1198-1304*, (London, 1893), 16. This entry shows that the mandate was directed to 'G. de Gedeworde, G de Driburg, and Master J. rector of Lilleschae dated 7 March, 1204 (2 Non. Mar.), but the names of the parties are misspelled.

⁵¹ Cooper, *Select Scottish Cases*, 5. The only mandate for 1203-04 regarding this case in the Papal Register is the first one, dated 2 Non. March. The language in that mandate is clearly before any judgement has been rendered, nor does it appear that there was any judgement attached to the mandate. In addition, these mandates are not to be found in the Melrose cartulary, another example of editing by the compiler; one would think that papal letters to the Abbey would be considered important and be kept, especially if they refer to litigation over land and the judgement was in the monks' favour.

rule of law that where gifts are concerned, the most liberal construction should be applied, and any restrictions should be read narrowly; this rule was incorporated into the Decretals of Gregory IX in the *Liber Extra*.⁵² In the end, Alan son of Walter died before the matter was finally resolved, and his son simply renewed the original gift of his grandfather, mooted the judgement of the papal court and its enforcement.⁵³

Blainslie

The earliest charter on this land was a donation by David I to his foresters.⁵⁴ This property or a portion of it was subsequently granted by King William I to William son of Oein.⁵⁵ On or shortly after 8 March 1185, the king granted this land to Melrose Abbey.⁵⁶ Melrose Abbey was not the only one with interests in this area; there appears to have been lay holders who also claimed some property rights with regard to Blainslie, including the de Morevilles and the Stewards. After the royal grant to the abbey, Melrose obtained grants

⁵² *Decretals of Gregory IX*, III, XXIV, Cap. VI.

<http://freespace.virgin.net/angus.graham/GregDecr.htm>.

⁵³ *Melrose Liber*, nos. 72, 73, 74. Charter no. 72 is the confirmation of the donation of Mauchline from Walter son of Alan; no. 73 is a 'relaxation' of the payment of 5 marks annually; no. 74 is the confirmation by Walter son of Alan of the donation of the forest on the western banks of the Ayr that had been donated by his father.

⁵⁴ Barrow, *The Charters of David I*, no. 265.

⁵⁵ Barrow, *Acts of William I*, no. 581.

⁵⁶ *Melrose Liber*, no. 93; *William I*, no. 265. Barrow notes that no. 265 was issued at the same time as the confirmation of the Avenel grant, no. 264, which was probably confirmed shortly after Robert Avenel died on 8 March 1185. See notes to both charters.

concerning this land from the de Morevilles and confirmations from the king.⁵⁷ These grants do not seem to have been contested in any way.

The charter from Alan son of Walter and the royal confirmation regarding Blainslie show that different procedures were followed, and that there might well have been issues contested between the two parties. Alan's charter is a quitclaim of all claims and all rights he had in the pasture on the western part of the Leader. The charter was confirmed in the presence of the King and his full court, and enforcement is guaranteed by Alan's request to Bishop Jocelin and Earl David to append their seals to his quitclaim.⁵⁸ There is no indication that the land claimed by Alan son of Walter was ever given in alms, at least by him or his forebears, nor even that Melrose had made that assertion. The quitclaim itself and its language, as well as being brought before King William I and in his full court point to controversy, as does the enforcement clause. There is no indication that this matter was ever brought before an ecclesiastical tribunal, or even a question raised about where it should be heard and decided.

The handling of the two cases involving the Stewards demonstrates that both Church entities and the king were abiding by the same rules regarding jurisdiction applicable in England and made explicit by the Constitutions of Clarendon, even though there is no indication that these Constitutions were relied upon by either side, (and no contention that they did apply) and no

⁵⁷ Ibid, nos. 96, (Richard de Moreville), 95, 99, (William de Moreville), 96, 100 (William I; also nos. 301, 307 [the rubric refers to Blainslie, but not the text] in *William I*).

⁵⁸ *Melrose Liber*, no. 97.

mention was made of the jurisdictional basis for the procedures followed. The following case indicates that far from being an issue of contention, jurisdiction was flexible for most of the twelfth century.

Bowden

There were several cases where the parties were both religious entities, yet these matters were resolved either with the king's help or in his court and in his presence.⁵⁹ One of these was the long running controversy between Melrose Abbey and its neighbour Kelso Abbey over certain lands, including Bowden. The first indication in the records that there was a boundary dispute concerning these lands is found in the second general confirmation charter of William I to Kelso Abbey, which can be dated to 1189 or thereafter.⁶⁰ The last charter concerning this dispute is datable to 1210.⁶¹ This case is

⁵⁹ Barrow, *The Acts of William I*, nos. 35 (Balchristie), 105 (Durham v. Crowland), 249 (Glasgow v. Roger de Valognes re: Church of East Kilbride), 252 (Newbattle v. David Uviat re: Moorfoot), 260 (Glasgow v. Robert de Brus re: chirograph over several churches), 319 (Kelso v. Robt. of Kent, *et al* re: Innerwick), 430 (Glasgow Cathedral & Bishop William v. William Cumin re: Muckeroft), 435 (St. Andrews Priory v. Eva, widow of Wm de la Hay and his son David re: Falside), 440 (Kelso v. Melrose re: Bowden), 444 (confirmation of proceedings held in the court of the prior of Coldingham), 477 (King William I v. Brice Bishop of Moray v. Gilchrist earl of Mar re: Aberchirder), plus those cases discussed herein.

⁶⁰ The original grant was made by Earl David, confirmed by him towards the end of his reign, and then confirmed by both subsequent kings. The language used in these donation and confirmation charters is important. See, Barrow, *Charters of David I*, no. 14, (1120x21 or 1123x1124), the original foundation charter of the Abbey of Selkirk, later Kelso, where the boundaries of the original donation are described in detail, including *Botheldene cum suis rectis divisit in terries & aquis, in boscho & plano*; no. 183 (1147x1152), David I's confirmation of all grants to Kelso; Barrow, *The Acts of Malcolm IV*, no. 131 (25 March 1159 x middle of May, 1159), confirmation using the same language found in King David's charter; Barrow, *The Acts of William I*, no. 63 (c.1165 or 1166), confirmation which again uses the same language; no. 367, (1189x 1195, possibly 1193), a second confirmation from William I, referring to lands not previously mentioned, and also referring to the matter in controversy between Melrose Abbey and Kelso Abbey regarding boundaries, but not describing them; and finally, the two charters concerning the resolution of the dispute between Melrose and Kelso, nos. 440 (9 May 1204) and 493 (22 June, probably 1210).

⁶¹ *Ibid*, no. 493. All dates are from Barrow.

noteworthy because Pope Celestine III requested the king's intervention in a matter that, according to the general rule regarding jurisdictional matters should have been resolved before judges-delegate. The dating is significant: Pope Celestine III held office from 1191-1198.⁶² It is not until after Innocent III becomes pope that there are issues raised over jurisdiction. Even though the litigation over Bowden was protracted, lasting for over 10 years, it was resolved in the presence of the king and according to common law procedures instituted by the king. King William I held a preliminary hearing on 14 January 1203, where the parties agreed that the king should conduct an inquisition to determine the boundaries between Melrose and Bowden. After the inquisition, there was another hearing in the king's full court at Selkirk on 9 May, 1204, where a judgement was entered in favour of Kelso.⁶³ Even though judgement had been rendered, the controversy between the two houses does not seem to have been at end, since there is also a royal confirmation of the '*amicabilem pacem*' and chirograph made between the two houses regarding the land of Bowden and other parcels.⁶⁴

The jurisdictional question becomes more important in later cases as exemplified in the next two cases. While they both were finalised in the presence of the king, jurisdiction was clearly one of the biggest problems facing the litigants and over which a great deal of energy was expended.

⁶² While one may argue that Pope Celestine III was in fact, upholding the special privileges granted to the king by *Cum Universi*, other than the fact that he requested the king to act as judge in the matter after the issuance of the Bull, there is no evidence to support this.

⁶³ Barrow, *Acts of William I*, no. 440.

⁶⁴ *Ibid*, no. 493, dated 22 June, probably 1210.

Leuchars

Sometime in the period 1170-1180, Ness son of William gave the church of Leuchars with land and chapels and with all just pertinences in perpetual alms, to the canons of the church of St. Andrews.⁶⁵ Later, Orabilis, daughter of Ness confirmed this donation after becoming the Countess of Mar.⁶⁶ There are also confirmation charters from King William I, Bishop Mathew and Earl Duncan.⁶⁷ The donation is also noted in the general confirmation of churches and other property granted to St. Andrews. During the same time period, but probably slightly earlier than the donation of the church of Leuchars, Ness son of William had granted the church of Lathrisk to St. Andrews.⁶⁸ Although the general confirmation listed a donation by Ness son of William, it did not include the church of Lathrisk among them.⁶⁹ Ness and his daughter had also

⁶⁵ *St. Andrews Liber*, 287. Orabilis is not named as a grantor, but she and her husband, Adam son of Duncan are listed as witnesses, along with Matthew, bishop of Aberdeen and Stephen parson of Leuchars and others.

⁶⁶ *Ibid*, 287, 288. Both the donation of Ness son of William and the confirmation of Orabilis, Countess of Mar (the Earl of Mar was a subsequent husband to Adam, son of Duncan), are datable to 1172x1188. This confirmation by Orabilis is noteworthy because it states that both Bishop Matthew and Duncan earl of Fife were '*presente et teste*' and goes on to note that the donation was heard and conceded by Orabilis as heir of her father, and that she confirms with her seal. These actions would meet the requirements of assent and consent of the heir noted in the discussions concerning David and Henry. There are also separate confirmations by Bishop Matthew and Earl Duncan who used the same confirmation language found in Orabilis' charter, including reference to their seals. The specificity with which the knowledge of the heir concerning the donation is noted relates back to the discussion on assent and consent, *infra*.

⁶⁷ Barrow, *The Acts of William I*, no. 271, at 300; *St. Andrews Liber*, 289. Barrow dates this charter to 1175x1190.

⁶⁸ Barrow, *The Acts of William I*, no. 150; *St. Andrews Liber*, 224. Barrow dates this donation to 1173x1178. This precedes the joint donation charter of Ness and his daughter Orabilis regarding the church of Leuchars, noted below.

⁶⁹ *Ibid*, no. 333.

given another church at Lathrisk to St. Andrews. One of the witnesses to the second Lathrisk donation charter was Henry, *judex*.⁷⁰ None of the donation charters explicitly grant the right of patronage (*ius patronatus*) along with the churches.⁷¹

The relationship between the de Quincys and St. Andrews dated at least from the time of the marriage of Orabilis to Robert de Quincy, whereby he acquired Leuchars. They had a son, Saher.⁷² The de Quincy marriage had ended prior to her marriage to Adam son of Duncan, earl of Fife, her husband when they witnessed the donation of her father. Saher as Lord of Leuchars had a continuing relationship with this land and the church on it, as well as with St. Andrews.⁷³ For both donated properties, there are confirmations from King William I.⁷⁴

During the period 1205-1207, a dispute arose between Saher de Quincy and St. Andrew's Priory, over the patronage of the church in Leuchars. Both the donation of Ness and the confirmation of Orabilis refer to *omnibus iustis*

⁷⁰ *St. Andrews Liber*, 254-255. The date is obtained from Barrow, *The Kingdom of the Scots* (Edinburgh, 2003), 64, who listed Henry as *judex* for Fife and Fothlif. This is the only time Henry appears as *judex*. While it is interesting to note that this is a Norman name in a native role in the late twelfth century, it is not clear what the significance is.

⁷¹ Other terms which could have been used to denote patronage, such as *ius advocatio* or *donatio* do not appear either. See R.E. Latham, *Revised Medieval Latin Word-List from British and Irish Sources, with Supplement* (London, 1999), for various terms.

⁷² Saher de Quincy (1153x1219). For details of the de Quincy family, see Grant G. Simpson, *An Anglo-Scottish Baron of the Thirteenth Century, The Acts of Roger de Quincy, Earl of Winchester and Constable of Scotland*, Unpublished thesis presented for the Degree of PhD of the University of Edinburgh in the Faculty of Arts, December 1965.

⁷³ G. Donaldson and R.S. Morpeth, *A Dictionary of Scottish History* (Edinburgh, 1994), 177.

⁷⁴ For Lathrisk, see *St. Andrews Liber*, no. 224; *The Acts of William I*, no. 221. For confirmations concerning Leuchars, see *St. Andrews Liber*, no. 289; *The Acts of William I*, 300, at 337-338.

pertinenciis but neither use any phrase referring to patronage. Some time before 24 October, 1205, her son, Saher de Quincy had apparently put a relative, Simon de Quincy, in possession of the living.⁷⁵ St. Andrews objected to this as an infringement of their rights and complained to the Pope. The Pope appointed three judges delegate to decide the dispute,⁷⁶ but de Quincy had taken the matter before the king's court rather than before an ecclesiastical court, greatly upsetting the Church and Innocent III.⁷⁷ To have the king decide a dispute involving church properties was seen as an encroachment on the Church's liberties and jurisdiction,⁷⁸ and as 'contrary to the custom of the Church of Scotland.'⁷⁹ Altogether, Innocent III sent four letters regarding this matter.⁸⁰ In the midst of this dispute, Saher de Quincy

⁷⁵ The name Simon de Quincy appears several times in the charters of this period. Although he is most often described as '*clericus*' there are charters where he has no descriptor. As a result, there has been speculation that there was more than one individual with this name. See D.E. Easson, (trans. and ed.) *Charters of the Abbey of Coupar Angus, Vol. 1, Charters 1 to CXVIII, 1166-1376* (Edinburgh, 1947), 44, and charters cited therein. If there is only one Simon, and this appears to be so, he was not only a relative of Saher de Quincy, but a '*clericus de domini regis*' who witnessed at least two charters of William Malvoisin, bishop of St. Andrews c. 1201 and 1202x1204, (*St. Andrews Liber*, 106 and 155); but also a witness to two charters of the de Quincys, Earl Saher and his son, Roger in 1217x1219 (*St. Andrews Liber*, 256, 257). These charters can be dated to 1217x1219 because Roger is listed as the heir, meaning it is after Saher de Quincy's first born son, Robert has died, and before Saher himself dies in 1219. See Grant G. Simpson, 'An Anglo-Scottish Baron of the Thirteenth Century: The Acts of Roger de Quincy, Earl of Winchester and Constable of Scotland' Unpublished Thesis, University of Edinburgh, 1965, at 15, 21, 22, 60-62. These last two charters are crucial in determining that the dispute was settled in favour of the de Quincys; at least ten years after the settlement before the king, Simon de Quincy is shown to still be in possession of the living at Leuchars.

⁷⁶ *St. Andrews Liber*, 350.

⁷⁷ Saher de Quincy apparently took the case before the king between the time of the first papal bull and the second, dated 7 June 1206.

⁷⁸ G.W.S. Barrow, *The Kingdom of the Scots: Government, Church and Society for the eleventh to the fourteenth century* (Edinburgh, 2003), 89-90. But it was in keeping with the general rule that seems to have been followed when there was a dispute between a layman and the church over property that had *not* been given in alms, and of course, in keeping with the rules set out in the Constitutions of Clarendon.

⁷⁹ *St. Andrew Liber*, 351; Cooper, *Select Cases*, 8.

⁸⁰ Thomas Thomson, (ed.), *Liber Cartarum Prioratus Sancti Andree in Scotia* (Edinburgh, 1841), 350-352; see also, Barrow, *The Acts of William I*, nos. 271 (royal confirmation to St.

became earl of Winchester on 13 March 1207.⁸¹ Probably shortly thereafter and before the third mandate of June 1207, the matter was resolved in Saher de Quincy's favour in the king's court.⁸²

Although the Pope did appoint a third panel to hear the case and decide it according to canon law, it does not appear that any judges delegates actually heard the case. But the settlement reached before the king was unacceptable to the canons. They alleged that the king had used the threat of violence and terrorised them into accepting his decision.⁸³ The records do not specifically state the canons' displeasure, but the physical evidence could not be more explicit. As Barrow notes in his discussion of the royal confirmation, '[T]he whole document, including the rubric, has been crossed out with vertical and diagonal lines, and the surface of the vellum has been scraped; the whole has then been painted over with an obliterating agent. A substantial number of words between '*fili Willelmi*' and '*Testibus*' have been regarded as illegible, but a proportion of them might be recovered after prolonged study.'⁸⁴ Barrow

Andrews datable to 1175x1190) 300, 337-338, notes. The letters are respectively, a mandate naming the Abbots of Coupar, Arbroath and Lindores as judge delegates, dated 24 October 1205, a letter of rebuke dated 7 June, 1206, complaining to the panel that they were neglecting their duties to settle the matter in a timely fashion, a second mandate to a new panel of judge delegates including the Abbots of Melrose, Dryburgh and Jedburgh dated 9 June, 1206 and finally, after the case had been brought before the king and a settlement concluded, a third mandate naming yet another panel of judge delegates to retry the case according to canon law, dated 6 June, 1207.

⁸¹ Barrow, *The Acts of William I*, 440.

⁸² *Ibid.*, no. 491 and notes. The dating of the charter is 20 May 1209x1211, probably 1210, which is later than the papal letters and the probable date of the actual settlement. Barrow notes that there could have been two decisions, or a reiteration of the earlier decision contrary to the terms of the papal letters.

⁸³ *St. Andrews Liber*, 352. Also see Barrow's notes after no. 491 in *The Acts of William I*, at 448.

⁸⁴ *Ibid.*

goes on to comment that the 'very thorough-going obliteration of the text may have been due to the canons' indignation that the matter had been brought into the *curia regis* 'contrary to the custom of the Scottish church'.⁸⁵

Barrow further notes that this charter should have been included in the printed edition of the *St. Andrews Liber*, but was not. He concludes, 'in view of the date of this act, it must either represent a fresh decision of the *curia regis*, or reiterate the earlier decision contrary to the sense of the papal documents. The second possibility seems preferable since Saher de Quincy is not given the title earl of Winchester which he obtained 13 March, 1207'.⁸⁶

Lord Cooper reviewed this Leuchars case in his *Select Scottish Cases of the Thirteenth Century*, and noted that in addition to sending these mandates to three separate panels, the papacy expected the third mandate to result in what amounted to a court of review. The third panel of judges-delegate was to hold another proceeding, to review the actions taken by the king and the king's court, and then determine the matter in accordance with Canon Law.

⁸⁵ Ibid. On the other hand, it may be due to the fact that eventually, they got their way and thought that this previous, bad decision which no longer applied could be obliterated.

⁸⁶ Ibid. Since the charter is in the manuscript of the cartulary but no extant separate charter seems to have survived, it must be concluded that the obliteration took place sometime after the entry in the cartulary. On the other hand, it may be due to the fact that eventually, they got their way and thought that this previous, bad decision which no longer applied could be erased. Regardless of precisely why this occurred or the timing of the defacing of the charter, it is a very clear example of the canons' attempts to edit history.

Although Cooper seemed to conclude that the Priory retained the right of patronage, there is no record of the third panel of judges delegate actually holding any sort of hearing or overturning the decision of the king's court. The incumbent presented by Saher de Quincy, a relative named Simon de Quincy, did in fact hold the living of the Church of Leuchars. Simon de Quincy, parson of Leuchars, was a witness to charters as late as 1217-1219.⁸⁷ It appears that the patronage of this church remained with the de Quincy family until after 1280.⁸⁸ A parallel situation involved the other donation of the de Quincys, that of the church of Lathrisk. Although there is no documentation to support this, the records concerning Lathrisk may shed light on Leuchars. There is a charter datable to 1257 where Roger de Quincy relinquished the right of patronage (*ius patronatus*) for Lathrisk to St. Andrews, but the charter makes clear that prior to that time, he had thought he had the right to present the living. While it does not discuss Leuchars, it is possible that something similar occurred with regard to that church as well.⁸⁹ Thus, although Lord Cooper's conclusion that the right of patronage was with

⁸⁷ Cooper, *Select Scottish Cases of the Thirteenth Century* (London, 1944), 7-8. See also *St. Andrews Liber*, 254-257, for charters concerning Leuchars and listing Simon de Quincy as *persona de louchres*. At least two of these were after Saher de Quincy became Earl of Winchester, so after March 1207 and before he died in 1219; see also the papal bulls at 350-352; Gordon Donaldson and R. S. Morpeth, *A Dictionary of Scottish History* (Edinburgh, 1977), 177.

⁸⁸ See Ian B. Cowan, *The Parishes of Medieval Scotland*, SRS, Vol. 93 (Edinburgh, 1967), 131, where he notes that 'The patronage was claimed between 1206 and 1208 by Saher de Quincy, nephew of Ness and while this appears to have been resolved in favour of de Quincy, there are subsequent confirmations to the priory of certain teinds within the parish, which continued to be served by a parson in the late thirteenth century.

⁸⁹ *St. Andrews Liber*, 336, 337. See also, Grant G. Simpson, *An Anglo-Scottish Baron of the Thirteenth Century: The Acts of Roger de Quincy, Earl of Winchester and Constable of Scotland*, Unpublished thesis, (Edinburgh, 1965), 26-29. It is also possible that the canons used the Pope's determination in the Leuchars case (not from the third mandate) as justification for asserting their right to present in Latherisk. But there is no extant charter concerning a decision by a papal court after the king's judgment in favour of de Quincy.

the pursuers (the Priory) in 1294 may be correct, it had not remained with them for most of the thirteenth century.⁹⁰

The issue of jurisdiction takes centre stage again in the conflict between Melrose and the Earl of Dunbar. The course of this particular case shows that even though the lines were becoming more clearly drawn, and the Church more insistent upon its perceived rights of jurisdiction, the outcomes did not always follow the rules.

Sorrowlessfield

The pursuit of the Earl of Dunbar by the monks of Melrose Abbey over the land called Sorrowlessfield is perhaps the most important in this entire series. The jurisdictional conflict is explicit, but the resolution is equivocal. By the end of the case, it is still not clear which jurisdictional claims reign supreme.⁹¹

The dispute involving the Earl of Dunbar began sometime in the late twelfth century or early thirteenth with what appear to have been incursions by the earl's animals and men into the area thought to be common pasture, but to

⁹⁰ Cooper, *Select Scottish Cases of the Thirteenth Century*, (London, 1944), 7-8. See also *St. Andrews Liber*, 254-257, for charters concerning Leuchars and listing Simon de Quincy as *persona de louchres*. At least two of these were after Saher de Quincy became Earl of Winchester, so after March 1207 and before he died in 1219; see also the papal bulls at 350-352; Gordon Donaldson and R. S. Morpeth, *A Dictionary of Scottish History*, (Edinburgh, 1977), 177.

⁹¹ By the end of William I's reign, the question still had not been finally resolved and there were cases where jurisdiction was still an issue under Alexander II. See Ferguson, *Medieval Papal Representatives*, 187.

which the monks of Melrose claimed exclusive right.⁹² The chain of events suggests that the monks of Melrose, whose abbot had been one of the judges-delegate appointed by Pope Innocent III in the de Quincy case concerning Leuchars, may have felt that they would be treated more fairly if the matter were brought before an ecclesiastical tribunal rather than the king. But since the first attempt to litigate this matter occurred after 1200, there is the possibility that the choice of venue was influenced by the very active Pope Innocent III and his response to the Leuchars matter. Less likely, but still a factor since it was part of the current climate concerning relations between the church and secular power, was *Cum Universi*, which stated that matters in controversy should be decided either by Scots in Scotland or by direct appeal to the Pope.⁹³

Patrick earl of Dunbar was a powerful landholder and an intimate of William I's, as was Saher de Quincy. The earl, along with the bishops of St. Andrews and Glasgow had been witnesses to the settlement agreement between de Quincy and St. Andrews.⁹⁴ Thus, both parties in the Dunbar case were intimately familiar with the chain of events in the Leuchars dispute.

Considering the history of the de Quincy-Leuchars matter, it is not surprising that the monks of Melrose chose to proceed in a manner that was unlike their

⁹² *Melrose Liber*, no.101, 'The Attestation of Brice, Bishop of Moray'.

⁹³ John Dowden, *The Medieval Church in Scotland, Its Constitution, Organisation and Law* (Glasgow, 1910), 211, where he notes that 'the Pope states that the citing of the prior before the court of the king was "*contra consuetudinem ecclesiae Scoticanae*".' Any role *Cum Universi* played would have been indirect, but it should not be ignored as a potential influence.

⁹⁴ William (Malvoisin), bishop of St. Andrews, Walter, bishop of Glasgow, and the earl.

prior methods of securing their property interests. Instead of pursuing the matter in the king's court, as had been done in all previous cases concerning the determination of property rights, boundaries and claims, the monks appealed to the Pope, who mandated judges-delegate to handle the case.⁹⁵

Earl Patrick ignored the summons sent by the first panel of judges-delegate. Although they could have acted on Dunbar's failure to respond to the summons, they failed to do so out of fear of reprisals by the earl. Instead, they placed the earl's manors under ecclesiastical interdiction. This caused the earl to respond by filing objections to the jurisdiction of the tribunal.⁹⁶ He based the objection on three grounds: that he was a layman, that this was a lay holding, and that the plaintiff ought to pursue in the forum of the subject matter.⁹⁷ Lord Cooper notes that, "in claiming as he did the benefit of the common law (*juris communis*), the defender was doubtless indignant at the attempt of the monks to treat him differently from de Moreville and Alan, and even the "men of Wedale", all of whom had been sued in civil courts."⁹⁸

The tribunal was not persuaded, and found that in those parts a layman could be called into an ecclesiastical court if the matter involved lands given in pure alms. The tribunal had sent to the Pope for advice on this point, and it is

⁹⁵ The first panel of judges-delegates consisted of the bishop of St. Andrews (probably William Malvoisin), the archdeacon of St. Andrews (Ranulf de Wat), Dean of Lothian (Probably Andrew of Tynningame), see D.E.R. Watt and A.L. Murray, *Fasti Ecclesiae Scoticae Medii Aevi Ad Annum 1638* (Edinburgh, 2003), 379,393,412.

⁹⁶ Cooper, *Selected Papers 1922-1954* (Edinburgh, 1957), 84.

⁹⁷ *Melrose Liber*, no. 101, 88. 'Actor sequi debet forum rei'.

⁹⁸ Cooper, *Selected Papers 1922-1954*, 84.

implicit in his advice that he considered these lands to already have been given in pure alms, even though the earl was contending that they were lay holdings. Thus, the Pope had decided the main issue that formed the basis of the earl's defence before the case had proceeded even to proof.⁹⁹

The earl then objected to the jurisdiction of the tribunal based on the competence of the presiding bishop, who had treated the earl unfairly in another dispute involving the patronage of a church.¹⁰⁰ The earl appealed to the Pope on that basis. The Pope essentially said that if these objections were valid, the earl had grounds to object, and nominated a second tribunal.¹⁰¹

They were unable to resolve the dispute, and referred the case back to Rome, where a further hearing was scheduled to proceed.¹⁰² The earl, although he was given time to appear, failed to do so. This hearing was set to proceed in April, 1207. It does not appear that the earl fully submitted to the papal court's jurisdiction at any time.

At some point during this period, William Malvoisin, bishop of St. Andrews, had gone to Rome, and may have conferred with the Pope about this case.

⁹⁹ *Melrose Liber*, no. 101, 88. See also, Duncan, *Scotland: The Making of the Kingdom*, 288. Duncan notes that 'to admit ecclesiastical jurisdiction meant admitting tenure in free alms' which would mean losing the case to Melrose. Since there had been a '*recognitum*' in at least one earlier case concerning patronage, there is no reason why this procedure could not have been done here as well, although that had been in a royal court, not ecclesiastical.

¹⁰⁰ While it is tempting to connect this statement to the Leuchars case, there is no conclusive proof that it was that case to which Earl Patrick was referring, or precisely what the 'unfair treatment' was.

¹⁰¹ *Melrose Liber*, no. 101, 88. Members of this second tribunal were Abbot of Holyrood, Prior of Incheolm and the Rector of Dunkeld.

¹⁰² *Melrose Liber*, no. 101.

When the Pope issued a third mandate, this time it was to Brice, Bishop of Moray. This nomination may well have been at the suggestion of William Malvoisin.¹⁰⁵ The Pope's orders to Brice were to settle the dispute, and to give each side 15 days in which to nominate a judge on their own behalf. Failing the nomination (which in fact occurred, since neither side nominated anyone), the Bishop was to settle the dispute himself. Brice did proceed on his own.

Although the dispute was undoubtedly settled, precisely how or even if Brice accomplished this is not known. The charter entry describing the proceedings, entitled "The Attestation of Brice, Bishop of Moray regarding the agreement between us and Earl Patrick about certain land which is called Sorrowlessfield, which he transferred to us by agreed judgement", is very detailed as to the events up to the point of Brice giving the parties 15 days to nominate a judge on their own behalf. Then Brice simply indicated that neither had appointed a judge and related that Earl Patrick had conceded, in the presence of King William, his brother Earl David, and his honourable men and confirmed in his charter, that he had given all the arable land called

¹⁰⁵ Marinell Ash, B.S., M.A., *The Administration of the Diocese of St. Andrews, 1202-1238*, Unpublished Thesis submitted for the degree of Doctor of Philosophy, University of Newcastle upon Tyne (1972), 15-16. She states that Malvoisin was in Rome in 1207, which would have been during the time of these proceedings. Although there is no clear evidence that Malvoisin did in fact talk to the pope about this matter, jurisdiction was one of the bishop's prime concerns, as discussed throughout chapter 1 of Dr. Ash's thesis.

Sorrowlessfield, to God and the church of St. Mary of Melrose and the monks there.¹⁰⁴

There were no details about how the case ended up before King William and in his court, nor were there any details about how Brice got the parties to the point of agreement, if indeed it was Brice's doing rather than the king's. What did result from all this was a chirograph, which details exactly what the rights were for each side. There was also a confirmation charter, which was presented to the King, in his full court and before his honourable men. The terms of the agreement were set forth in Brice's Attestation and a charter from Earl Patrick. Earl Patrick's charter stated that Earl Patrick had given the disputed lands in pure alms for the good of his soul, and on behalf of himself and his son Patrick and his heirs, and included a warranty clause. William I confirmed this charter separately from the confirmation of the chirograph. The confirmation regarding Sorrowlessfield referred to the "*donacionem*" of Earl Patrick.¹⁰⁵

The monks got their charters and presumably quiet title, but the earl seems to have had his way regarding jurisdiction as well, since all were confirmed by the King, in the king's court. In looking at the terms of the agreement(s), it is clear that each side retained certain rights, and neither side really lost, since

¹⁰⁴ *Melrose Liber*, no. 101.

¹⁰⁵ *Melrose Liber*, charters nos. 101 (Attestation), 102 (Chirograph), 103 (Confirmation of the King), 104 (Charter of Earl Patrick about Sorrowlessfield [warranty]), and 105 (Confirmation of the King on Sorrowlessfield, referring to this transaction as a donation). Barrow, *Acts of William I*, nos 482 and 483.

the earl could use the pasture and they both agreed not to build any sheepfolds or cattle pens, and not to build any houses or huts on the pasture.¹⁰⁶

The royal charters granting the king's peace to religious entities, ordering sheriffs to 'do right' regarding complaints from ecclesiastical parties, and the granting of royal confirmations of donations, settlements and judgements at the request of the Church may all be viewed either as ways in which secular authority asserted itself against encroachments on its power by the church, or alternatively as the king doing the Church's bidding.¹⁰⁷ However one determines the motivation behind the various acts, this reciprocal relationship benefited both parties.

The Issues

Jurisdiction over cases involving property (including patronage) presents several issues. The first is who had it? When and to what extent? The second issue is whether a change in jurisdiction can be determined in the cases in the twelfth century and through to the end of William's reign. The third issue, perhaps the most important, is, if no change in the exercise of jurisdiction in such cases can be identified, what did change that gave rise to Leuchars and Dunbar?

¹⁰⁶ *Melrose Liber*, no. 101, p. 89-90.

¹⁰⁷ Alan Harding, *Medieval Law and the Foundations of the State* (Oxford, 2002), 131. Harding characterises the relationship between the king and ecclesiastical landholders as one of 'public authority, not private lordship.'

I. Who exercised jurisdiction?

Power is a fluid thing. It is never really 'held' by anyone.¹⁰⁸ If one conceives of power as something the whole of which is never localised in one place or one person, but a dynamic that shifts back and forth continually, then understanding jurisdictional issues in twelfth century Scotland becomes less problematic.

The subject of jurisdiction has been approached in a variety of ways by historians of both Scotland and England. Among those historians focusing on the twelfth century have been Hector MacQueen for Scotland and Warren Hollister and John Hudson for England.¹⁰⁹ MacQueen's interpretation of the motive behind the grants of jurisdiction is that these grants were not an expression of power so much as a relinquishing of it. '[R.]oyal grants to both secular and ecclesiastical landholders of the right to hold courts confirm the absence of a desire to claim exclusivity for the king and his officers in the administration of law, although they do suggest the currency of the idea of the

¹⁰⁸ M. Foucault, 'Two Lectures', in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, C. Gordon (ed.) (New York, 1980), 98. '[P]ower must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands... Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power... [they] are the vehicles of power, not its points of application.'

¹⁰⁹ These are not the only writers on the subject. A full historiographic analysis is not possible here, especially since so many have focused on other aspects of jurisdiction, such as those mentioned earlier in the context of 'feudalism'. Most of the authors that would be cited here are also cited elsewhere in this chapter; only a few are directly on point, and they will be discussed in detail, *infra*.

king as the font of justice in his realm, especially when his right to correct failures of justice in the grantee's court is asserted alongside the grant of jurisdiction'.¹¹⁰ He points out that '[R]oyal justice was nevertheless always ready to interfere with lords' autonomy...' implying that there was a certain element of friction between the king and his officials and the lords' administration of justice.¹¹¹

Hudson and Hollister have somewhat different view of the significance of grants of jurisdiction, to both the king and his men. They seem to be in agreement that the relationship between the king and his barons was less confrontational than MacQueen seems to be suggesting, and more cooperative in the administration of justice. Referring to the first part of the twelfth century in England, Hollister notes that there is a

community of shared interests served by the exercise of royal power such as Henry I's. The justice of the king's vassals helped to maintain the peace of the realm; should that justice be contested or fail, the king's justice could fill the breach: a royal writ ordering settlement in the shire court, a summons before a royal justice or court, or the visitation of a royal sheriff. Such assertive royal action by Henry I produced no known outcry, much less a revolt, and testifies to the harmony that existed between Henry and his barons, who participated

¹¹⁰ Hector MacQueen, 'Canon Law, Custom and Legislation: Law in the Reign of Alexander II', in *The Reign of Alexander II, 1214-49* ed. Richard D. Oram (Leiden, 2005), 221-251, 227.

¹¹¹ Hector MacQueen, *Common Law & Feudal Society in Medieval Scotland* (Edinburgh, 1993), 42.

in and benefited from the king's strong judicial arm. In the history of the development of the English common law, these innovations from the first third of the twelfth century reveal an advancement toward coherent, centralized government, which challenges the long-standing assumption of a fundamental disjunction between the legal history of the reigns of Henry I and Henry II.¹¹²

John Hudson points out that although some Normans had inherited sake and soke from their predecessors, 'the Anglo-Norman kings made further grants, to the financial and judicial benefit of lords. No doubt kings emphasized that all such rights derived from royal grant, either specifically of sake and soke or perhaps as a concomitant of office.'¹¹³ The consensus seems to be that there were reservations with regard to grants of jurisdiction. In Scotland as in England, a party could always appeal to the king for redress of an injustice, and the right to be the final word in this regard remained with the king.

As early as David I, Scottish kings were including sake and soke in their grants and confirmations.¹¹⁴ Both Malcolm IV and William I made grants including sake and soke, although not consistently, as Barrow points out.¹¹⁵

¹¹² Hollister, C. Warren, *Henry I* (New Haven, 2001), 359.

¹¹³ John Hudson, *The Formation of the English Common Law* (London, 1996), 44. But he points out that another view 'saw lords as deriving sake and soke from their very status.'

¹¹⁴ Barrow, *The Charters of David I*, no. 6 (while still an Earl), nos 31, 32, 63, 73, 82, 83, 84, 107, 144, all of them south of what would now be the border between Scotland and England; It is not until Malcolm IV that there are extant royal charters to Scots laymen in the Scots kingdom which grant sake and soke. See Barrow, *Acts of Malcolm IV*, no. 184; also, *Acts of William I*, Introduction, 48-50 and nos. 84, 116, 125, for some of the early grants to laymen.

¹¹⁵ Barrow, *Acts of William I*, 48.

According to Hudson, speaking of the Anglo-Norman world, sake and soke were some of 'the most common judicial franchises enjoyed by lords'; by the end of the twelfth century, 'sake means jurisdiction, that is court and justice'.¹¹⁶

These grants of jurisdiction were *delegations* of power, not a complete surrender of it to the grantees. The practice of reference back to the king for enforcement of rights, judgements, commands and settlements indicates that the king was not relinquishing all jurisdictional rights.¹¹⁷ The very fact that the king is *granting* the right to hold a court means that such a power is within his right and possession. What he grants he may rescind. And when he reserves the right to hear claims of failure to do justice, he is specifically retaining power over the administration of justice by those to whom he has granted such derivative power. Claim to ultimate authority over the administration of justice was attempted by Edward I with regard to Scotland, and it was ultimately unsuccessful.¹¹⁸ Ecclesiastical claims to universal jurisdiction and then within kingdoms, specifically to jurisdiction over church property disputes really were an on-going issue. There are a number of property disputes that were clearly decided by judges-delegate.¹¹⁹ It was not

¹¹⁶ Hudson, *Formation of the English Common Law*, 44-45.

¹¹⁷ Barrow, *Acts of William I*, nos. 6, 17, 24, 25, 27, 35, are only a few of the charters where William I exercised his jurisdictional powers to enforce.

¹¹⁸ See generally, E.L. G. Stones, (ed. & trans.), *Anglo-Scottish Relations 1174-1328, Some Selected Documents* (London, 1965).

¹¹⁹ Ferguson, *Medieval Papal Representatives*, 209-268. *Glasgow Register*, for example, has a number of charters indicating that disputes had been brought before judges-delegate.

an exclusive jurisdiction, nor was it clear that before the papacy of Innocent III had there been any real disagreements over the jurisdictional aspects.

By the mid twelfth century, in Scotland there were grants of jurisdiction derived from the crown and ultimately referable back to the king for enforcement and any failure of justice. But Ferguson has noted there were increasing numbers of cases brought before papal judges-delegates under Kings Alexander II and III. Under William I, even with the activity of judges-delegate, practically speaking, ultimate jurisdiction held by the king seemed to bring a number of cases before the secular court on a frequent basis.¹²⁰

The cases discussed above show that the issue of jurisdiction was not raised as a contested issue until after 1198. Prior to that time, cases were brought before William I involving property rights including patronage, irrespective of who the parties were.¹²¹ Examination of these cases indicates little basis for the claim by the Church in *Dunbar v. Melrose*, that under the common law of Scotland, cases involving disputes over property were heard only in ecclesiastical courts. To the contrary, often property disputes where both parties were church entities were heard before the king and his full court.¹²²

¹²⁰ Ferguson, *Medieval Papal Representatives*, 189.

¹²¹ See cases cited above, and those in fn 53, above.

¹²² Barrow, *The Acts of William I*, nos. 35 (Balchristie), 105 (Durham v. Crowland), 249 (Glasgow v. Roger de Valognes re: Church of East Kilbride), 252 (Newbattle v. David Uviat re: Moorfoot), 260 (Glasgow v. Robert de Brus re: chirograph over several churches), 319 (Kelso v. Robt. of Kent, *et al* re: Innerwick), 430 (Glasgow Cathedral & Bishop William v.

The cases set out above are almost entirely found after 1170, some of them indeed while the Church and the Scottish King were not in agreement on issues concerning the relationship between the two. But to assert, as Duncan does, that there were no cases where jurisdiction played a role unfortunately ignores both those that appear earlier than 1178 and after the reconciliation between Pope Lucius and William I.¹²³ Most of the cases discussed here in fact occurred after the reconciliation in the winter and spring of 1181-82.¹²⁴ With regard to the cases discussed in detail as well as those mentioned in passing, it appears that jurisdiction was shared on a flexible basis throughout the twelfth century, with neither side making an issue of it with regard to property disputes. Even after the election of Innocent III, the evidence shows that jurisdiction ultimately lay with the king in many cases. This may be in part due to the ability to enforce the judgements. The extent to which the church was able to enforce its judgements was limited to ecclesiastical

William Cumin re: Muckcroft), 435 (St. Andrews Priory v. Eva, widow of Wm de la Hay and his son David re: Falside), 440 (Kelso v. Melrose re: Bowden), 444 (confirmation of proceedings held in the court of the prior of Coldingham), 477 (King William I v. Brice Bishop of Moray v. Gilchrist earl of Mar re: Aberchirder), plus those cases discussed herein.¹²³ See Barrow, *The Acts of Malcolm IV*, nos. 149, 153, 173, 202, 233, 237, 239, 240, 251, 257, for what appear to be disputes between both lay and ecclesiastical parties. For William I, see Barrow, *The Acts of William I*, nos. 249 (1182x1190, Glasgow v. Roger de Valognes re: East Kilbride), 477 (18 Sept. 1203x1207; The King v. Brice, Bishop of Moray v. Gilchrist earl of Mar re: Aberchirder), 491 (20 May 1209x1211, prob. 1210; de Quincy v. St. Andrews Priory re: Leuchars), 562 (1202x1214; David de la Hay v. William Malvoisin, Bishop of St. Andrews re: land of Ecclesdovenauin and patronage of church of Errol), all regarding patronage issues; for property disputes, see nos. 35 (1165x1171, Balchristie), 38 (1165x1171, Command to Earl Duncan, *justiciis et vicecomitibus*, that Dunfermline shall have all its lands), 84 and comment (1165x1170, judgement to William de Vieuxpont against Delapré Abbey), 105 (1167x1170, Durham v. Crowland over town and church of Edrom), 173 (1175x1178, St. Andrews v. nuns of Haddington re church of Haddington. There was a chirograph between the two confirmed by the king). Although not explored here, it could be argued that the king had the right to exercise jurisdiction in all matters concerning property within his kingdom. He certainly did so with regard to these cases, even though one or both parties were the Church.

¹²⁴ Duncan, *Scotland: Making of the Kingdom*, 272-273.

censures (which were not to be dismissed lightly), whereas the king could actually do much more, and was sometimes called in to specifically enforce a judgement, as in the one rendered in the court of the Abbot of Coldingham.¹²⁵

II. Is there evidence of change in jurisdiction in these cases?

The second issue that should be addressed is whether these cases illustrate a change in who or what entity held jurisdiction at any particular time.

Although Ferguson says that the judge-delegate forum was a court of choice, there clearly were instances where this was not so, such as the Leuchars and Dunbar cases.¹²⁶ In at least one case, there was a direct conflict of interest in going before an ecclesiastical tribunal. Duncan of Arbutnott was called before the Synod of Perth in 1206 in a dispute with the Bishop of St. Andrews, but two of the members of the synod were of St. Andrews. While it was a synod of the diocese, such a direct bias should have deserved some comment. It does not appear that Duncan objected to this. Since Duncan was the king's tenant, it might have been a case where the king had indicated he would not support Duncan against the bishop of St. Andrews.¹²⁷ Since this case occurred at roughly the same time period as both Leuchars and Dunbar, it might simply have been a case of choosing which cases to support. Another

¹²⁵Barrow, *Acts of William I*, no. 444 (8 July, c. 1203x1207, perhaps 1204).

¹²⁶The pursuer in those cases was Melrose Abbey, and it was the Abbey's choice, but as indicated above, jurisdiction has two parts; it is not just the choosing of jurisdiction, but the acceptance of it or recognition of it that must be considered.

¹²⁷'Decret of the Synod of Perth, A.D. M CC VI', *The Miscellany of the Spalding Club v.* (Vol. 24) ed. John Stuart, (Aberdeen, Spalding Club, 1852), 209-213.

case, between Dunfermline and Philip de Mowbray, is slightly later than the main period here. It seems to have been resolved in the end before both ecclesiastical and secular entities, where the case started out before judges-delegate.¹²⁸ While a composite body was not unusual, where a case had started before judges-delegate and ended up being settled before the king (or the Queen, as in the Mowbray case), it usually seems connected to the importance of the secular litigant.

Ferguson notes that there was an increase in the number of cases brought before judges-delegate, but he does not take note of the earlier cases from both Malcolm IV and William I.¹²⁹ Duncan remarked that this battle raged well into the thirteenth century, and as late as 1273, the Scottish king was receiving complaints from the Church for hearing patronage cases.¹³⁰ Cooper and Duncan seem more in agreement that whatever the legal basis was, the king, 'at least in substance if not in principle' remained the victor in the jurisdiction wars well after William I's reign.¹³¹

The conclusion with regard to whether these cases show a change in who actually was deciding these disputes must be no. There was a change at least in attitude with regard to jurisdiction, however, especially in the last case,

¹²⁸ *Dunfermline Registrum*, no. 211; Ferguson, case no. 24 and text at 181, Dunfermline v. Philip de Mowbray, regarding patronage and tithes of Inverkeithing.

¹²⁹ Ferguson, 187-188. Of the 38 cases that could possibly be attributed to the reign of William I or before, only 13 seem to have been between a church entity and laymen.

¹³⁰ Duncan, *Scotland: Making of the Kingdom*, 290.

¹³¹ *Ibid.*

Melrose v. Dunbar. These changes may be attributed to the interplay of three factors: the effects of the Constitutions of Clarendon (or the lack of such a similar document), papal influence (including the agenda of Innocent III in extending the rights of the Church and the effect of *Cum Universi*, not so much as a direct influence, but as a factor in the climate of thought about the church's claims to jurisdiction vis-à-vis the king's), and the experiences of the ecclesiastics in the Leuchars matter.

III. What changed, giving rise to the contest in Leuchars and Dunbar?

The potential significance of the Constitutions of Clarendon has already been discussed in some detail. It is sufficient here to note that while Scotland did not have such a document, the actual practice during the twelfth century reflected those in England both before and after 1164. Certainly several of the cases where William I presided were of property disputes between lay holders and ecclesiastics. It should be noted that even if William I had thought that the article in the Constitutions regarding disputes over property rights was a reflection of customary law and a good idea, he is not likely to have enacted a copy-cat statute.¹³² Relations between William I and Henry II were at best tense during this period. Coupled with his subjection at the

¹³² MacQueen, 'Canon Law, Custom and Legislation' in Oram, (ed.), *The Reign of Alexander II*, 226. MacQueen notes that kings did legislate, 'no doubt with the advice and assistance of their counsellors, and that the resultant 'assizes' or 'statutes' were intended to and did have a general effect which might extend beyond the reigns in which they were created'.

Treaty of Falaise, it could be argued alternatively that such legislation was unnecessary, and that it would be further proof of England's lordship over Scotland. But it is clear that whatever the reasons, William I seems to have become more active in dispute resolution during the 1180s.

Cum Universi granted independence to the Scottish Church, and mandated that no one outside the realm of Scotland would decide disputes involving property claimed by the church, unless there was an appeal to Rome.¹³³ With the 'special privileges' for the Scottish King, local jurisdiction was protected. But the Bull does not directly say that either forum should be the exclusive one with regard to property disputes between secular and religious parties. There were several earlier papal letters that either stated this directly, or implied it.¹³⁴ The Scottish charters that can be dated to the period 1192-1214 do not show any indication of a change in attitude towards jurisdiction that can be attributed solely to this Papal Bull. Yet there was a change. Of the cases noted by Ferguson, out of the 13 that could be attributed to the period 1214 or before and which involve laymen, only three are firmly datable to the

¹³³ See Paul Ferguson, *Medieval Papal Representatives in Scotland: Legates, Nuncios, and Judges-Delegate, 1125-1286* (Edinburgh, 1997), 1-4 for a discussion of this bull.

¹³⁴ Robert Somerville, *Scotia Pontificia* (Oxford, 1982), no. 98, *Ad vestre discretionis*, (1175x1181) copy of a letter from Alexander III to the bishops of Glasgow and Whithorn; no.102, *Tua nos duxit*, (1180x1181), indicating that tonsured clerics should be exempt from secular jurisdiction; 108, *Cum de pastorum* (10 March 1182), letter to Bishop Jocelin regarding presentation of rectors to a vacancy. 109, (11 March 1182), another letter to Jocelin confirming 'the venerable custom observed in his church which provides that conflicts about patronage should be heard and judged by the bishop.' All of these occur during the dispute over St. Andrews between the king John and Hugh

period before 1198.¹³⁵ Even though the papal bull was important for the independence of the Scottish Church, it does not appear to have caused a change in actual practice with regard to jurisdiction. Its existence should not be ignored, however. It is an element in the political and social climate of that time, and would have had an influence on how the ecclesiastical community approached jurisdiction, especially after papal admonishments concerning resistance to secular jurisdiction. Such admonishments did not begin with *Cum Universi*, but had been part of the correspondence between the Papacy and various members of the Scottish Church since 1181.¹³⁶ Even so, neither the earlier papal exhortations regarding jurisdiction nor *Cum Universi* actually had much of an effect on the actual jurisdictional aspects of the cases discussed above. Something else was involved.

Several historians have addressed the importance of the bull, but few have placed it in context with other factors in relation to the property disputes where jurisdiction became an issue.¹³⁷ Hannay and Anderson¹³⁸ each have an article on it, but the discussions are related almost entirely to whether the date

¹³⁵ Ferguson, *Medieval Papal Representatives*, 209-268. 3 are datable to the 1170s, one to 1175x1199, one to 1183x1193/4, one to 1189x1209, and the rest to 1198 or later. Of these, three have been discussed in the text, and two of those were eventually resolved in the king's court.

¹³⁶ Robert Somerville, *Scotia Pontificia*, (Oxford, 1982), nos. 98, 102, 108, 109. There were also several papal bulls complaining about the presumptuous secular power: nos. 100, 101 (threatening King William with the pope's withdrawal of support for the independence of the kingdom), 141, 142, and letters of support for ecclesiastical actions with regard to patronage, nos. 139, 143. Many of these occurred during the dispute over St. Andrews between the king, Bishop John and Bishop Hugh.

¹³⁷ Ferguson, *Medieval Papal Representatives*, 1. Ferguson acknowledges that these were for the king, they certainly deal with issues of jurisdiction, but do not specifically state that the king shall have jurisdiction with regard to property disputes involving the church.

¹³⁸ R.K. Hannay, 'The Date of the *Filia Specialis* Bull', *SHR*, xxiii (1926), 171-177; A. O. Anderson, 'The Bull *Cum Universi*', *SHR*, xxv (1928), 335-341.

of 1188 and Pope Clement III are to be preferred to 1192 and Pope Celestine III as the origin of the document.

Ferguson has discussed the shift in the number of cases heard by judges-delegates versus the secular courts, as has Cooper.¹³⁹ Ferguson takes issue with the conclusions put forth by Cooper suggesting that there was a falling off of cases before the papal judges-delegate and a concomitant increase in secular cases. Part of the reason for this is their different methodologies, with Cooper looking at cases 'for which some resolution was known' and Ferguson casting a larger net, to include calendars of papal registers and cases that might have involved judges-delegate in a settlement agreement. Another reason might well be the greater and better record keeping that is evident from the records of the later part of this period. A.A.M. Duncan has addressed the issue of jurisdiction, specifically over land disputes, but found that there was no evidence in the twelfth century; he speculated that the events after 1178 may have had a chilling effect on ecclesiastical claims for at least a decade.¹⁴⁰ This is not borne out by the catalogue of cases collected by Ferguson. There was no significant decrease in the number of cases from before 1178 to the period after, even though the king seems to have been more active during that period.

¹³⁹ Ferguson, *Medieval Papal Judges-Delegate in Scotland*, 187-190; Cooper, *Select Scottish Cases*, introduction generally, and xxxvii-xli.

¹⁴⁰ A.A.M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1975), 288.

Recently, A.D.M. Barrell,¹⁴¹ Hector MacQueen,¹⁴² and Dauvit Broun¹⁴³ have examined the importance of the papal bull. They rightly focus on the main import of this document, which released the Scottish church from any claims by York for metropolitan status; none discusses in any detail, the effect on the ground with regard to jurisdictional issues in particular cases.¹⁴⁴

Barrell gives a thorough background to the political and ecclesiastical steps leading up to the issuance of the Bull. The actions of Henry II in the concessions he obtained from William I in the Treaty of Falaise were viewed by the Pope as 'unwarranted interference in church affairs'.¹⁴⁵ This was especially true considering the jurisdictional conflicts both before and as a result of the Constitutions of Clarendon, and the Beckett affair. Although the Pope was able to regain some of the losses of jurisdictional power, property disputes between the church and laity over land not given in alms would still be heard by the king and his justices. Up until then, the situation in Scotland

¹⁴¹ A.D.M. Barrell, 'The Background to *Cum Universi*: Scoto-papal relations, 1159-1192, *The Innes Review*, Vol. 46 (1995), 116-138.

¹⁴² Hector L. MacQueen, 'Regiam Majestatem, Scots Law, and National Identity', *SHR*, LXXIV, 1 (1995), 1-25; MacQueen, 'Expectations of the Law in 12th and 13th Century Scotland', *Tijdschrift Voor Rechtsgeschiedenis* LXX (2002), 279-290; and MacQueen, 'Canon Law, Custom and Legislation: Law in the Reign of Alexander II', in *The Reign of Alexander II 1214-1249* ed. Richard D. Oram (Leiden, 2005), 221-251.

¹⁴³ Dauvit Broun, 'Whose Independence? Bishop Jocelin of Glasgow (1175-99) and the Achievement of Ecclesiastical Freedom', Chapter 5, in *The Idea of Britain and the Origins of Scottish Independence*, (forthcoming).

¹⁴⁴ I am aware that there are some who will say that *Cum Universi* had no effect on disputes between the church and lay holders. But the evidence suggests otherwise, not so much in direct attribution, in other words, a claim of jurisdiction based on this papal letter, but in actual practice and as part of the general milieu of papal attitude expressed in the bulls during the period 1181-1192, culminating in *Cum Universi*. It is clear that the popes thought these cases should be decided in ecclesiastical courts, and supported efforts by the Scottish Church to exercise exclusive jurisdiction over these matters.

¹⁴⁵ Barrell, 'The Background to *Cum Universi*', *Innes Review*, Vol.46, (1995), 116-38, 137.

had been more amicable, with cases being heard by both the king and ecclesiastical tribunals. The Pope may have felt that the treaty, in placing the Scottish Churches under the metropolitan authority of York, and the fact that William I had acknowledged Henry II as his lord, would make it increasingly difficult for the Pope to exercise jurisdiction through his subordinates in Scotland. On the other hand, giving the Scottish church independence from England, and declaring that all property disputes should be decided by Scots and within the territorial jurisdiction of Scotland, indicates that the Pope was not really changing the jurisdictional 'map' with regard to these types of cases.

It seems more likely, considering the evidence, that it was the papacy of Innocent III that actually triggered an active change in attitude and had the most profound effect on jurisdictional matters between the secular and ecclesiastical courts. Innocent III was a much more energetic Pope when it came to protecting the rights of the Church, especially with regard to jurisdiction. Although he denied aspirations of a papal theocracy, with all earthly kings subordinate to him, his statements appear to contradict this.¹⁴⁶

In both the Leuchars matter and the Melrose v. Dunbar case, Innocent III spent considerable energy trying to protect what he saw as the Church's rights with regard to jurisdiction in these property disputes. He seems to have been more convinced of the validity of his position than the judges-delegate he

¹⁴⁶ Brian Tierney, *The Crisis of Church and State 1050-1300* (Toronto, 1999), 130.

assigned to the cases.¹⁴⁷ The biggest problem with regard to the pope's assessment of these cases is that he assumed that both involved lands actually given in alms when in fact, that was the issue to be decided. But the charter for Leuchars merely says *iustis pertinentiis*, it makes no mention of anything more specific.¹⁴⁸ And there was no indication that the lands in dispute in Dunbar had ever been given in alms.¹⁴⁹

MacQueen has published several works touching on jurisdiction. In his article on 'Expectations of the Law in 12th and 13th Century Scotland' he states that not only was the Church an important element in the formation of the Scottish common law, but that 'the Church was a crucial formant of "expectations of the law", not only because through its own canon law and ecclesiastical jurisdiction it was a provider of law, but also because it was a spiritual and moral critic of, and threat to, secular law and jurisdiction which could not be ignored.'¹⁵⁰ This threat was an on-going one which became more acute during the papal reign of Innocent III. This made the struggles seen within these cases all the more important. Any expansion of jurisdiction by ecclesiastical courts caused a decrease in secular jurisdiction, especially with regard to property claims. This may have been Innocent's intent.¹⁵¹ For

¹⁴⁷ *St. Andrews Liber*, 350-352; *Melrose Liber*, 100-102.

¹⁴⁸ Barrow, *The Acts of William I*, 271; *St. Andrews Liber*, 287-289.

¹⁴⁹ *Melrose Liber*, nos. 101-105.

¹⁵⁰ Hector MacQueen, 'Expectations of Law in 12th and 13th Century Scotland', *Tijdschrift Voor Rechtsgeschiedenis* LXX (2002), 279-290, 279.

¹⁵¹ Tierney, *Crisis of Church and State*, 128-131.

Scotland, the series of papal bulls leading up to *Cum Universi*,¹⁵² while all preceded Innocent's tenure, may have helped to shore up the groundwork for assertions of temporal jurisdiction over these types of disputes of which he took full advantage.¹⁵³

The jurisdictional aspects of both Leuchars and Dunbar show that this encroachment on the part of the Church was, at least in these two cases, justifiably resisted by both the litigants and the king. As indicated above, prior to Leuchars, Melrose had proceeded under secular jurisdiction with regard to the disputes involving land not previously given in alms, and proceeded against Alan son of Walter the Steward with regard to Mauchline before judges-delegate because those lands had been previously granted in free alms. In Leuchars, it seems to come down to a matter of construction. What precisely did the phrase *justis pertinentiis* entail? For that, there could easily have been a 'recognition' as described in the East Kilbride case. In any

¹⁵² MacQueen, 'Expectations of Law in 12th and 13th Century Scotland', 281.

¹⁵³ Papal bulls regarding the dispute over the bishopric of St. Andrews started in 1178x1180 and continued for several years. See Somerville, *Scotia Pontificia* (Oxford, 1982), nos. 90, 91, 92, all datable to 1178x1180 concern the dispute. But it is not until no. 98 (1175x30 August 1181) that the pope says anything specific about jurisdiction. No. 98 is a letter to the bishops of Glasgow and Whithorn about a privilege of protection granted to Holm Cultram, and telling them that if there were any claims against Holm Cultram about their possessions, they should be decided judicially and under the examination of these two bishops. It further admonished them not to allow the abbot or monks of Holm Cultram to be 'dragged from an ecclesiastical court into a secular forum on issues about their possessions'. This may be related to a dispute between Walter of Berkeley and Holm Cultram over the land of Kirkgunzeon which had first been granted to Holm Cultram by Uhtred son of Fergus, and then granted to Walter of Berkeley. The king held an inquest to determine who should hold the land. See Barrow, *RRS*, II, no. 256 and Barrow's comment. He dates this charter to 1180x1190. Thereafter, a flurry of papal letters reinforce the church's right to exercise jurisdiction in several matters, including criminal matters (no. 102), filling vacancies (108, 139), and conflicts about patronage (109, 143, 145). There were also the numerous papal letters concerning the controversy over St. Andrews, cited above.

event, one must presume that both Saher de Quincy and the Earl of Dunbar were well informed of the consequences of acceding to the demands of their opponent to submit to ecclesiastical jurisdiction. It would mean, as Duncan points out, conceding the fundamental issue in the case.¹⁵⁴ While the Pope did not have his way with regard to these two cases, there was an increase in matters brought before papal judges-delegate after 1200. There were still contests over jurisdiction.¹⁵⁵

Dauvit Broun has examined the role Bishop Jocelin of Glasgow played in obtaining independence for the Scottish Church. He characterises *Cum Universi* as the 'brainchild' of Jocelin and places it in context with not only an independent Scottish church, but the independence of the kingdom as well.¹⁵⁶ By comparing the events leading to the 'special daughter' status of Glasgow and then Scotland, with other exempt dioceses in Europe, Broun highlights the political aspects and implications of Jocelin's actions. If an archbishopric at St. Andrews could not be obtained, independence of the Scottish Church could be (and was) used to bolster the independence of Scotland.¹⁵⁷ In discussing the Treaty of Falaise, Broun notes that from the Pope's perspective, the threat of Henry II exerting control over the Scottish Church

¹⁵⁴ Duncan, *Scotland: The Making of the Kingdom*, 288. It should be noted that both of these men had holdings in England, and were probably well aware not only of the Constitutions of Clarendon, but of its significance in similar cases.

¹⁵⁵ Ibid, 288-290. Duncan details a number of instances during the reign of Alexander II. See also, MacQueen, 'Canon Law, Custom and Legislation', 232-233.

¹⁵⁶ Dauvit Broun, 'Whose Independence? Bishop Jocelin of Glasgow (1175-1199) and the Achievement of Ecclesiastical Freedom', chapter 5 of *The Idea of Britain and the Origins of Scottish Independence*, forthcoming.

¹⁵⁷ Ibid, 19. 'the statue of the kingdom as a whole was at issue.'

would have tipped the scales in favour of Jocelin's position.¹⁵⁸ By extension, if Henry II had succeeded in the subordination of both the Scottish Church and the kingdom to England, there is no doubt that the customary procedures that had been formalised in the Constitutions of Clarendon and followed informally in Scotland before and after 1164, would have been overtly adopted in Scotland. As it was, it took at least a decade and the papacy of Innocent III to assert the jurisdictional claims of the Church with regard to property disputes of various types in Scotland. Although the Church had always taken the position of superior jurisdiction, in Scotland there is no evidence that such a position was ever forcefully asserted with regard to disputes as it came to be under Innocent III. Indeed, even with the series of papal bulls exhorting the Scottish church not to submit to secular jurisdiction sent before *Cum Universi*, there is no evidence that the Scottish clerics actually changed their practice until after 1200. Neither these papal letters nor *Cum Universi* can be credited with being the sole cause or even a major cause of this change. They did, however, provide a background to the jurisdictional claims asserted by the pope in Leuchars and Dunbar. The position of the papacy in general and the continued assertion of exclusive jurisdiction in these earlier letters may have had its own momentum, so to speak.¹⁵⁹ In other words, if something is said often enough, and with enough authority,

¹⁵⁸ Ibid, 25.

¹⁵⁹ There is also the argument that the popes in this period were attempting to counter-act the effects of royal legislation such as in the Constitutions of Clarendon. Pope Alexander III, in the bull *Super anxietatibus* asserted that kings and princes had no right to arrange ecclesiastical matters, and warned Henry II not to force obedience from the Scottish Church to York, even though prior popes had demanded it, and it was the official position of the papacy that the Scottish church was under the metropolitan jurisdiction of York.

eventually it will be accepted. Coupled with a pope such as Innocent III, it was added ammunition in asserting ecclesiastical jurisdiction, and may be the basis for the language regarding the 'customs in those parts' in Leuchars and Dunbar.

There remains to be discussed whether the chain of events in the Leuchars case may have influenced the steps taken in *Melrose v. Dunbar*. As indicated above, up until Dunbar, all cases regarding boundaries and property rights involving lay holders were pursued by Melrose in the secular court. All of these matters were resolved before the king, including the quitclaim by Alan son of Walter regarding Blainslie. So what prompted Melrose to pursue Dunbar before judges-delegate? Leuchars had not yet been resolved, indeed it continued from 1205 until 1207, with the royal charter not issued until sometime between May 1209 and 1211.¹⁶⁰ It is not clear precisely when the Dunbar case started. Cooper places it at 1206-1208, while Ferguson dates the controversy from 1198x 1207.¹⁶¹ Whichever case concluded first, it seems likely that they impacted each other. Since the monks of Melrose had seemingly been comfortable before the king on earlier matters concerning lands between the Gala and Leader, there is no reason for them to have taken Dunbar to an ecclesiastical court unless they were influenced by something else. The three possibilities are: the papal bull giving the Scottish church

¹⁶⁰ Barrow, *Acts of William I*, 491.

¹⁶¹ Cooper, *Select Cases*, 9; Ferguson, *Medieval Papal Representatives*, 217-218. It should be noted that the earliest mandate was issued to the Bishop of St. Andrews, with Ferguson questioning whether it was William Malvoisin, whose tenure was from 1202-1238. If it was indeed William, then the case must be no earlier than 1202.

more independence and supporting its potential claims to jurisdiction *vis-à-vis* property, (this had had no effect for almost a decade before the earliest possible date of Dunbar); the papacy of Innocent III, which was remarkably active with regard to jurisdiction; or the experience of other ecclesiastic parties before the king. Since the Abbot of Melrose was one of the judges-delegate in the second panel of judges-delegate named in the 9 June 1206 mandate in the case against Saher de Quincy, it seems reasonable that Melrose was very aware of the actions of the king in the Leuchars case. This makes even more sense if Melrose petitioned the Pope after that date in the Dunbar case.¹⁶²

There are several possibilities for the change in attitude as well as practice with regard to jurisdiction seen in these cases. None can be viewed in isolation, either from each other or from the events of the day. Coupled with the drive for independence for both the Church in Scotland and Scotland itself, account must be taken of the customary procedures which changed, partly due to conflict with England, partly due to the success of the Church in first, making jurisdiction an on-going issue where before it does not seem to have been, and secondly, obtaining strong papal support (again, perhaps as a counter-weight to the aspirations of England). While *Cum Universi* cannot be said to have directly influenced the jurisdictional battle played out in these cases, it was a supporting factor in ecclesiastical claims to jurisdiction. Even

¹⁶² This is possible if the issuance of the first mandate to Bishop of St. Andrews and the archdeacons of St. Andrews and Lothian is dated towards the end of the possible initial period of 22 Feb. 1198x 17 Sept. 1207 set out in Ferguson, *Medieval Papal Representatives*, 217.

so, ecclesiastical aspirations were not fulfilled completely: cases where the king refused to recognise the church's claim with regard to property disputes continued well after the mid-thirteenth century. The twelfth century cases as well as the thirteenth century disputes demonstrate one salient element: jurisdiction is about many things, identity, authority, autonomy, the right to 'speak the law', but above all, it is about power.

CHAPTER VIII

CONCLUSION

An examination of disputes and the means of preventing them in twelfth and early thirteenth century Scotland necessarily includes other subjects, including the use of writing and increasing formulaic approaches with regard to the legal process. The trajectory towards the use of writing and systematisation has been discussed by many, but how well is the interface between these topics understood? The approach by most historians and by lawyers has been linear and progressive. But this one-dimensional perspective is inadequate, unsatisfactory and risks becoming teleological. With any linear, progressive narrative, there is a risk of focusing on those elements and events that 'fit' and discarding anything that appears anomalous. If these anomalies are discussed at all, there is a tendency to either treat them as oddities, evidence of a single instance of precocity, or to downplay their significance by consigning them to the odd bin without further exploration or discussion.

But these apparent aberrations should be seen in a wider context, as part of a number of options for the managing of disputes in use during this period. However small and narrow they may be, these documents are still windows through which the present may glimpse the past. The narratives and charters

that form the core evidence in this investigation show that, rather than a shift from a lack of systematic approach towards the more familiar legal system seen in the later thirteenth century documents, there were recognised norms and customs by which disputes were either prevented or resolved, motivated by an underlying concept of justice. For most of this period, and indeed, beyond, there was no single predominant and exclusive system. Examples range from the colourful and biased narrative of communal dispute resolution seen in Kirkness, to the early (for Scotland) but very clear evidence that David made procedural and evidentiary decisions that could affect the outcome of a dispute as seen in Horndean.

Complexity theory allows us to analyse these cases within the parameters of the process of decision-making rather than within the structured framework of a legal system. It is within this replicating, self-referencing process that we see a systematic approach at work within the variety of cases documented from this period. It also emphasises that the result, increasing use of the written word and a predominant, essentially exclusive system, was neither smooth nor predestined. Rather, it was dynamic and unpredictable.

Approaching the records from this perspective presents challenges to the way we have traditionally viewed the past. Instead of examining the legal past as a progression from lesser to fully mature system, it becomes more of a synthesis of a variety of systems to one that is at once inclusive of the array of methods

to resolve disputes, but exclusive with regard to the power and authority to control the process. In other words, power and authority became increasingly hierarchical and concentrated, while the spectrum of mechanisms was incorporated within this administrative hierarchy.

Complexity theory highlights the disjunct between the perception of a need for a single, fixed system and the reality of choices of access to justice operating in the twelfth and early thirteenth centuries. But there was a fundamental change during this period, in the expectations and perceptions of those who were affected by and sought justice through one or more of these avenues. What fueled this change, more than any other factor, was the use of writing. The essential integrity of the basic concept of justice, which had always been present, found in the increasing use of writing, a medium which enabled it to expand and become more clearly defined. The simple act of writing something down lends weight, authority and power to words.

Although words have power in and of themselves, the written word has a lasting impact that surpasses the constraints of time. When the terms of an agreement or the judgement by one perceived to have power and authority to dispense justice are memorialised in writing, expectations for future justice become crystallized. Thus, the crucial development during this period was not a fixed legal system where none had existed before (although there was a shift to a more systematic, formulaic approach), nor even the increased use of the written word, which has been thoroughly explored, but the change in the idea

and expectation of justice. This led to real changes in how the law functioned. Understanding how these perceptions and expectations changed requires us to examine the actions and words of those individuals involved in the particular disputes, and how documents were used and incorporated into the process.

These records not only portray the underlying events concerning particular transactions or disputes, but a whole host of attitudes towards concepts of justice, law, power and identity. Since the world of the twelfth century was still very much an oral based society, the texts should be read not only for the details of the transactions, but taking into consideration the oral mentality of the society which is evident in the phrases used and the descriptions of the procedures. Especially with regard to the earlier, less formalistic documents, the descriptions of what the participants did and said provides a window onto the way twelfth century Scotland thought about these concepts. The evidence from these case studies also points to a conclusion about the importance of the prevention and resolution procedures themselves: whether in the more horizontal framework of the communal decisions by the *judices* as seen in the Kirkness dispute, or the more hierarchical and centrally focused efforts by William I to settle disputes, these matters were a vital part of the life of the community. The records memorialising these transactions became just as important to the life of the community. Although not necessarily so at the beginning of the period under study, by the mid-thirteenth century, a charter

granting certain property rights became the symbol of those rights.

The shift in the perceptions and expectations of justice are most evident in the shift in the conceptualisation of disputes, due in part to the increase in the use of writing, which also affected the processes of dispute prevention and resolution. There was an increasing abstraction concerning the transfer of property, which may be seen in the evolving role of the charter itself. Early in this period, the charter more often than not reflected the *res* being transferred and was used as a record of the transaction, then as proof of the transfer itself, and again as proof of the rights asserted over the property. In effect, the charter itself became not just the symbol of the property transferred, in a sense, it *became* the property transferred, without which the owner (or one claiming to be) could not assert rights in that property.

There was a concurrent evolution towards concretisation of the rules by which such transfers were conducted and any disputes concerning them were resolved. Susan Reynolds has discussed the trend toward formalism, which she noted could not really take place without written records. Without a record of a prior transaction or ruling, precedent has little meaning.

Customary law relied almost entirely upon memories of spoken words and the traditions of the community. Once custom was written down, memories were perforce aligned with the records of prior actions. To deviate from the past violated tradition and invited censure. But conforming to prior methods

bolstered the authority and weight of current actions, and made them more acceptable. This is reinforced in the records by the ubiquitous references to prior charters, earlier assises, and to custom itself.

The records show that there were a number of individuals involved in any transaction. Even the most basic transfer of rights in property would have at least three entities participating: the donor/grantor, the donee/grantee, and the one(s) who witnessed the transaction. Most often there were these three, plus any additional witnesses and those from whom one or more of the primary parties sought confirmation of the transaction. All of these participants served a role in the prevention of future disputes over the property transferred.

Should a dispute arise, each would again play a significant role in the resolution of the contested matter, although not always in the same capacity. There would, however, be an additional participant, the decision maker, who may actually have been involved in the initial transaction as either a witness or a confirmer. It is in this role of decision maker that the evolutionary process occurring during the twelfth century in the approach to resolving disputes is highlighted. At the beginning of the twelfth century, the one who made the decision was perceived as one of a group of those learned in the law. While they may have had substantial positions in their communities, they were more often local figures rather than leaders of the wider realm. With the advent of David I and the administrative changes he initiated or effected, the decision maker was also an office holder who, by virtue of the office, held a

substantial position in the local community. Thus, the decision maker became a permanent fixture who was seen as a part of, yet separate from others in the community who might come before him to resolve a dispute. The power and influence of these offices extended beyond the immediate locality as well. Positions such as sheriff or justiciar were local, but also positions within the king's administrative hierarchy. Their duties included involvement in disputing processes, but were not limited to them. Any decisions they made could be 'corrected' by an appeal up the chain of these administrative offices, to the king himself. While there always seems to have been the ability to appeal to the king for justice, with David I's rule, the records show an increasingly formal procedural approach to seeking redress of a prior decision.

This should not be taken to be a radical or rapid change, however. While there was a shift to a more vertical, hierarchical system, the horizontal elements remained. This is seen most clearly in the role of the *judices*. Although the duties changed over time, they were not replaced outright. The role of the king likewise saw evolutionary changes, although probably more in the detail described in the documents than substantively. The roles of sheriff and justiciar show less evolution than the other officials, in part because these were imported offices that were already well defined and were used in much the same capacity in Scotland as elsewhere.

The same uneven, inconsistent evolution can be seen when examining the proceedings and the rules followed in conducting them. Although formal rules of procedure and evidence can be dated to the mid-thirteenth century, there is some evidence that as early as David I's reign, hearings were conducted according to recognised customs. These customs were not entirely consistent; rather they appear to have been mutable and varied at least in some details, although serving the same general purpose, such as the administration of the oath of the witnesses and jurors. There are also documents that reflect a more pragmatic and reasoned approach to what was considered adequate proof of a claim in property, and what was not. And the rules for transferring property rights as set out in *Glanvill* can be found early in the twelfth century in the charters of David I, and even before.

Approximately half of the charters granting property in alms indicate some kind of assent, consent or acknowledgement from the heir(s) of the donor. Whether this was a requirement must remain undetermined since the evidence can be, and has been, read to support either conclusion. But there were requirements concerning consent of the heir under certain circumstances, notably when it was a death-bed gift, or when the gift may have invaded the patrimony of the heir. There is no conclusive evidence that there was an absolute rule but there is evidence that there were consequences when consent of the heir was not obtained. The de Frivill case is the clearest example of this.

Barrow has a different interpretation of the consent clause with regard to King David I and his son Henry. His theory is that this was evidence of a joint kingship, joint government. While the argument is attractive, it is less persuasive when all the factors are considered. There are only three charters that refer to a joint gift from David and Henry, all in some way connected to St. Andrews, and all apparently drawn up by or at the behest of Bishop Robert. The other charters to which Barrow points for support of a joint kingship are gifts and confirmations of gifts to the Church. There are no documents concerning acts of government, which are joint acts of the king and his son. There are no grants to laymen in exchange for military service that have the consent of the heir. And the charters that do concern grants to religious entities that include some indication of consent on the part of the heir seem to be, for the most part, granting lands south of the Forth. The exceptions to this are the three charters concerning grants to St. Andrews and the gift of Balchrystie to Dunfermline. These can be explained by the fact that both David and Henry were present and it might simply have been more economical to draft one charter rather than two. More important than the act of jointly donating the property is that these charters do not reflect governmental acts. They are donations for the personal benefit of the donors, for the welfare of their souls.

Whether there was a hard and fast rule that was followed in Scotland

regarding the consent of the heir when donating lands to the Church may never be clearly answered. But that there were customs and norms, and potential consequences if the norms were not followed is clear.

The most complex issue that pervades the records concerning disputes from the twelfth century is perhaps jurisdiction. Many of the disputes involved competing claims to property rights by both lay and ecclesiastical holders. Often these property rights involved patronage, as well as cases over the payment of teinds. Fundamental to the claims to the right of advowson was the question of who had been presenting the living before the dispute arose? In England, two causes of action dealt with these issues, the *assise utrum* and *darrein presentment*. There were no such causes of action so called in Scotland. But there were procedures remarkably similar in detail to those in England that were used in Scotland to decide these issues. Up until 1198, these cases were often brought before the king in spite of the many papal letters and admonishments to Scottish ecclesiastics to assert the church's jurisdiction over disputes involving property rights affecting the Church. With the papacy of Innocent III, however, the church became more insistent on exercising jurisdiction in any cases perceived to affect its property rights. Jurisdiction meant much more than which court would hear particular cases. Issues of power, independence of the Scottish kingdom and the Scottish church from England, identity, and secular versus ecclesiastical control of

litigants were all at stake in the struggle for jurisdictional rights during the twelfth century. These were issues that had been present before and would continue to play a role in the relations between the Scottish king, the Scottish Church and the papacy. The cases discussed here merely highlight some of these issues and how attitudes changed with regard to them during this period.

As noted above, one of the most important shifts concerning disputes and their prevention or resolution was the change in the use of the written word, both in describing the transactions and in the increasing acceptance of written documents as integral elements in exchanges of property rights. The influence of writing is pervasive and informs all other topics. It changed how the participants proceeded to finalise their transactions, prove or contest property rights, record such transactions and finally how such records would be used in future. Documents became synonymous with identity, in the same way that property was. A person *was* the property he or she held. And charters, to a great extent, were the tangible, portable proof of that property.

Complexity theory does not offer a cure for the lack of records that plagues Scottish historians and lawyers. Nor should it be seen as the only way of viewing the legal past. But it does offer a different perspective of the records we do have, and an explanation for those anomalous records that heretofore have no 'fit'. It also challenges lawyers and historians to look inward when examining the past. If there is a lesson to be learnt from applying complexity

theory to twelfth century records concerning disputes over property rights, it is that historians must continually remind themselves that their perceptions of the past and interpretations are continually informed by their own milieu. All of their perceptions, ideation and conclusions are filtered through that particular prism. Complexity theory, however inexactly applied, highlights the mutable, non-linear and to a greater or lesser extent, the long-term unpredictable nature of legal decision making. It is this unpredictability that the imposition of the rule of law seeks to minimise. While it is more or less effective in the short term, circumstances change, people and their perceptions change. And the application of past rules to present conditions will continually change.

Some questions remain. Was the inquest of Glasgow really just a tallying of property? Or was it a 'friendly dispute', designed to clearly set out the boundaries between ecclesiastical and royal properties so that David could make grants for military service without infringing on the Church's rights? Why are there assent or consent clauses in most of the donations in alms south of the Forth, while so few appear in those donations north of the Forth? And why were the royal assent and consent clauses so rare after the early years of Malcolm IV's reign? Other issues that come to mind as a result of this investigation but have not been fully explored include how our perceptions of the legal past inform our own expectations of justice and how the advent of new media technology such as the internet impact the concept of justice. At

the very least, complexity theory should raise these questions whenever we examine the application of rules to facts in the rendering of justice.

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