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UNIVERSITY OF GLASGOW

DOCTORATE OF PHILOSOPHY

"The Origins and Development of the Jury System in Scotland"

by

Ian Douglas Willock, M.A., LL.B. (Abdn.)

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PREFACE

The sources of this thesis are enumerated in general in the Bibliography and in particular in the foot-notes. The work of others has been made use of to the extent acknowledged in the foot-notes. The portions of the thesis not so acknowledged may be taken as original.

ABBREVIATIONS

- A.D.A. - The Acts of the Lords Auditors of Causes and Complaints, 1466-1494. Ed. Thomson. 1839.
- A.D.C. - The Acts of the Lords of Council in Civil Causes, 1478-1495. Ed. Thomson. 1839.
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CHAPTER ONE

I. The Norman Setting

There can be few institutions of modern Scots Law which can show a longer or more continuous line of descent than the jury system. Admittedly, there have been many changes of aim and emphasis over the centuries. New roles have been found for it and old roles discarded. But there has been no distinct break with what has gone before. Like the natural species of Darwinian theory, the jury has continued to adapt itself to its environment and has survived every vicissitude of history.

Such institutions of comparable antiquity as are still extant - the sheriffdom, the parish, the burghs, feudal land tenure - can be traced back to the Normans, that hard-headed practical race with a genius for organisation, who left their mark over much of Western Europe, but nowhere with more lasting results than in Scotland. And it is to the Normans also that we must go to find the earliest identifiable embryo of the jury system.

The advent of the Normans to Scotland was not a process of conquest, but of permeation, to which opposition seems to have been almost entirely lacking. Of the legal organisation of the territories they infiltrated we know little and that little is largely conjecture. Politically, Scotland was still at the close of the eleventh century

a very new entity, whose boundaries were as yet indefinite. The former kingdoms of the Picts of the North, of the Britons of Strathclyde, only shared their common acknowledgment of one king with the prosperous incoming Angles of the South-East. There remained in a permanent state of disaffection the Galwegians of the South-west, Norsemen in the Western Isles, and Gaels in the Highlands. It was centuries before these disparate races were fused together into one people with a common set of institutions. But the Normans, with their outstanding administrative ability, initiated this process and within a surprisingly short space of time achieved unity over a wide area, ^{from} which the long disaffection of the outlying districts should not be allowed to detract from.

This goal was accomplished by a variety of means. First, there was the establishment of royal castles in strategic positions, such as Stirling, Roxburgh and Edinburgh, which guaranteed the peace of the surrounding country. In the protection afforded by these centres of royal power, burghs created by charter of the king, began to flourish. Their inhabitants were exempted from the restrictive demands of life on feudal estates and paid only a nominal ground-rent (sometimes remitted for the land on which they built their houses or work-shops. Within the area secured by the castle, they enjoyed a trading monopoly and introduced to the country-dwellers hitherto unknown commodities. In just one respect they had an obligation typical of feudal tenures,

that of giving attendance at stated intervals in the burgh court, but it was probably not considered in any way onerous. The government of these towns was carried on by propositi, nominees of the king and ancestors of the later provosts. In the surrounding rural areas the king's representative was the sheriff. He was as much an administrative, financial and military officer, as a judicial one. He saw to the collection of taxes and the raising of military forces, as well as holding courts at which all the barons of the sheriffdom were bound to be present. The existing simple system of land tenure was worked up into something much more elaborate, in which the enjoyment of land was divided among several persons hierarchically arranged, each owing to his superior a return for his land in the form of services or payment by money or in kind. Religious houses were planted in many districts, probably in the first place from purely pious motives, but serving also as centres of learning and economic improvement. Finally, an administrative order comparable to that governing civil society was impressed upon the church by the establishment of the Roman system of dioceses and parishes.

The personal element in all these innovations was largely, but not wholly, an incoming one. A series of inter-marriages between members of the ruling Scottish house and English nobility, beginning even before the Norman Conquest of England, had opened the way to influences from the south. But much the most significant union from

this stand-point was that in 1068/1070 between Margaret, a Saxon princess born in Hungary, and Malcolm III of Scotland. Though he himself had been reared in the court of Edward the Confessor, it was his wife's reforming zeal that led to the placing of Normans in many important positions and to the re-organisation of the Scottish Church. Under the rule of their sons, Edgar and Alexander I, and Malcolm's son, Duncan II, English influences were probably less marked, but with the coming to the throne of David I in 1124 they were intensified. He had lived as a young man at the courts of William Rufus and Henry I and through marriage acquired large estates in Huntingdon and Northampton, as well as holding in his own right lands in Cumbria. When he succeeded at the age of about forty, he had thus served a long apprenticeship in the art of government, but largely as it was practised in England. During David's reign of almost thirty years the Normanisation of Scotland proceeded rapidly. Noble families were introduced from England, such as the Bruces and Fitzalans (later to become the Stewarts), and endowed with valuable lands, in return for sharing in the work of government. New religious orders were brought from England or, more often, direct from France and Normans placed in Scottish bishoprics. Traders from the Low Countries, who had long been doing business along the eastern shore of Scotland, were encouraged to settle in the new burghs on very favourable terms. All this alien infiltration is difficult to reconcile with the apparent absence of native opposition to it. But the most probable

explanation appears to be that the Scottish thanes and earls, who might have been leaders of revolt, were won over by being given a share in the profitable new administrative offices that the king was creating and that the benefits of a rising standard of living rapidly percolated down to lower levels. The turbulent outlying reaches of Scotland remained of course scarcely touched by Norman civilisation for several centuries to come.¹

This then is the setting in which we can look for the first traces of the jury system.

1. On the coming of the Normans to Scotland see Ritchie: The Normans in Scotland, passim; also Barrow: Feudal Britain, chaps. VIII and IX

II. The Introduction of the Inquest from England: Perambulations

All rulers, except those who are in the most immediate contact with their subjects, require a means of informing themselves on the facts of situations which call for decision by them. The more a regime becomes centralised, the more is this need felt. Perhaps the most obvious means of fulfilling it is the appointment by the ruler of trusted agents, answerable to him, who will report to him on what he wishes to know. David I, in trying to weld together a still very disunited kingdom, saw the necessity for strong central government. In the persons of the Sheriffs, most of whom make their first appearance in his reign, he had a team of such agents dispersed throughout the country to assist him in this task.¹ But there was another mode of inquiry, which makes its first appearance in Scotland in David's time and which later, as sheriffs became more independent and self-interested, was to develop enormously. This is the inquest, in which it may be suggested, the kernel of the jury is to be found.

The Frankish kings of the Rhineland and Low Countries were from the time of Charlemagne in the habit of obtaining information on such matters as ability to pay taxes and later the commission of crime from an inquisitio of reliable men under oath.² The Normans who were good

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1. For detailed account of the emergence of the earliest Scottish sheriffdoms see Fife Appendix D. Also (subject to corrections there) Malcolm: "The Office of Sheriff in Scotland" S.H.R. xx, 129.
 2. Brunner: Entstehung der Schwurgerichte 87 et seq.

adaptors of other people's institutions, as well as innovators, took over this practice and developed it. Although the Anglo-Saxons of England were racially akin to the Franks, Holdsworth concludes, with Pollock and Maitland, that the inquest was not known there prior to the advent of the Normans, although no doubt conditions of life there were such as to form a favourable environment for it.³ Once established in England, however, the Norman kings made varied use of it in furtherance of their policy of unifying the country under a strong central authority. The most notable instance of this was in the compilation of the Domesday Book in 1086, when the chief men of each district were required to state the resources in men and material of every manor and its value. Later in 1166, under the Assize of Clarendon, it was enacted that the itinerant justices appointed by Henry II should, in the presence of the sheriff, inquire of local representatives whether anyone had committed certain named crimes in their neighbourhood since the accession of the king.⁴

In view of the strong ties between Scotland and England during the movement northwards of the Normans, it would not be surprising to find some traces of this device of government in twelfth century Scotland. And indeed one of the most celebrated documents of that century takes this form. It is a notitia from the Episcopal Register of Glasgow, written probably after 1250.⁵ It consists of a short history of the

3. Holdsworth I, 312-313; P. & M. I, 142. See also Hallam: The Middle Ages II, 285-287.

4. Stubbs: Select Charters (8th ed.) 143.

5. Lawrie 299.

See of Glasgow from the time of St. Kentigern, leading up to an account of the creation of David, then an Earl, as Prince of Cumbria and his anxiety to repress the disorders that he found there by restoring to the Church of Glasgow its former privileges. To this end he is stated to have made inquiry on the matter ("inquirere fecit"). He did so "auxilio et investigatione seniorum hominum et sapientiorum totius Cumbriae". There follows a list of places which the inquisitors swore to belong to the Church of Glasgow and then their names, five in all: "Uchtred filius Waldef. Gille filius Boed. Leysing et Ogge Cumbrenses iudices. Malden filius Eadulf". Finally there is a list of witnesses who heard and saw this thing ("huius rei").⁶ The events referred to have been placed between 1115 and 1124.⁷ Lawrie throws some doubt on the reliability of this record, suggesting that as no grant is recorded as having been made by the king, the names of the witnesses were fabricated by the scribe from persons known to have been alive at the time.⁸ But it may be that they are not to be thought of as witnesses to a charter, but as the members of a rudimentary court, fore-shadowing the later suitors of court. In any event Lawrie does not suggest that the report of the inquisition is itself a fabrication and its authenticity appears to be accepted by modern writers, such as Ritchie⁹ and Barrow.¹⁰

6. A.P.S. XII, 1; Lawrie 44-47; Glasgow Episc. I, 3-7.

7. J.P.T. Brown: "The Inquest of David: Text, Translation and Notes" - Trans. Glasgow Archaeological Soc. (N.S.) VIII, 103 and references there. 8. Lawrie 299. 9. op. cit. 151-2.

10. Regesta I, 51; Bulletin of the Institute of Historical Research Vol. xxix, 11.

David was no absentee landlord towards his English estates. As Ritchie demonstrates from the evidence of his presence at numerous ceremonies in England, "he was the greatest baron in England, holding the place of honour at meetings of the curia regis, taking his share in the central administration and in the conduct of local affairs, seeing from the inside how the country was governed under the "Lion of Justice" It seems very probable then that in the Inquest of Glasgow he was introducing into Scotland a practice which his English experience had made him familiar with. That this administrative device previously existed in Scotland is in the highest degree unlikely. We have seen that the English authorities believe that it was not to be found in Anglo-Saxon England.¹² Certainly there seems no trace of it in the Leges Quattuor Burgorum, some chapters of which may be of Anglo-Saxon and pre-Norman origin; nor in the few surviving fragments of Celtic Law.¹³

The absence of any similar Scottish inquests of the twelfth century does not necessarily imply that none were made, in view of the havoc wreaked upon the early Scottish records under, although not necessarily by, Edward I. But in any case, royal inquests were probably used at first sparingly and on great occasions. The inquest into the former wealth of Glasgow was after all a major act of

11. op. cit. 142.

12. *late evidence* rejecting a case of 997 in which twelve thegns appear to form a jury of presentment (Holdsworth I, 12 n. 10, 313; F. & M. I, 142)

13. See Leges Inter Breton et Scotos (A.P.S. I, 663); Cameron: Celtic Scotland; Seebohm: Tribal Custom in Anglo-Saxon Law, Chap. IX.

ecclesiastical and state policy, involving both the creation of a diocese headed by a bishop with a suitably-maintained cathedral and the pacification of the turbulent south-west which it was hoped this move would facilitate. At first the inquest was probably not a popular procedure. In England the placing of men on oath, a very solemn act not to be entered upon lightly, may have met with a certain resistance,¹⁴ when used for merely administrative purposes, and it is probable that similar popular sentiments were displayed in Scotland too. It is perhaps significant that two of those who "juraverunt" in the inquest of Cumbria were "judices", presumably judges or Briteamh under the Celtic system whose function it was to declare the law.¹⁵ Moreover, most Scottish kings in the twelfth century were themselves itinerant justices.¹⁶ Returns to a central chancery at the seat of government still lay in the future. It was only matters which were not self-evident to a travelling monarch who could pry into all that interested him that needed to be a subject of inquiry, matters of historic right, for example, and these would be rare under a regime which was expressly innovating in so many spheres. The miscellaneous enactments gathered together under the title of Assise Regis David do not contain any evidence of an inquest procedure, but in any event most of them are almost certainly

14. Plucknett 109.

15. Cameron, op. cit. 193; Pife lxvi.

16. "Twelfth-century Scotland was a kingdom without a capital" (Regesta I, 27). On the dispensing of justice by the kings in person see Ritchie, op. cit. 316.

of later date and this is undoubtedly true of the one which most clearly mentions a jury-of breves of mortancestor and novel dissasine.¹⁷ But in the records of the administration of their English possessions it is certain that the Scottish kings of the twelfth century were using the process of the inquest¹⁸ and it seems unlikely that they did not do so in Scotland also.¹⁹

Meanwhile, however, another device of government was making its appearance which was later to merge with the inquest as a specialised form of jury. When the Norman kings made grants of lands, they were accustomed to point out the boundaries of the territory, either by personally passing along the bounds, accompanied by their retinue, or by directing other trustworthy men to do so. Thus, on one such solemn occasion,²⁰ Henry, David's son (who predeceased him), accompanied by his father and the Abbot of Melrose, perambulated the lands and woods of Gattenside c. 1145, in confirmation of a prior grant by his father, and later issued his own charter of confirmation.²¹ And Malcolm conveyed lands to the monks of Newbattle, according to bounds drawn by several of his sheriffs and other good men, who "eis metas monstrantes perambulauerunt" and gave assise.²² Lesser men too conveyed lands by

17. cxxxv A.P.S. I, 325; P. & M. I, 144 n. 3; Cooper Cases.xlii

18. e.g. Regesta I, No. 153.

19. P. & M. loc. cit.

20. Cf. Barrow in Regesta I at 49.

21. Ibid. No. 41; Lawrie 109; Melrose 4.

22. Ibid. No. 41; Lawrie 109; Melrose 4.

22. Regesta I No. 198; Newbattle 122. Cf. also Lawrie 101-103. (Charter which David and Earl Henry appear to have agreed on the bounds of Lothians, whereupon they were perambulated by six men, clergy and laity).

this means.²³ Gradually however the function of these perambulations changed. From laying down boundaries de novo they became a means of determining the course of doubtful boundaries. In such cases the obvious persons to settle the question were the men who drew the original boundaries or, failing them, the oldest men of the locality who might have witnessed and remembered the event. Thus William confirmed the bounds of certain lands of Glasgow Cathedral "sicut M. (Malcolmus) Rex frater meus illam eis perambulare fecit et sicut ego per Ricardum de Moreuill constabularium meum et alios probos homines meos qui predicto perambulationi interfuerunt illam perambulacionem eis feci reiterare".²⁴

With the passage of time doubts turned into disputes, and these the original perambulators could not be called upon to settle, for they were dead. Again appeal was made to the king, but in his guise as fount of justice rather than as feudal superior. At first, and for some time in the most important cases, the king himself would be present and might personally trace the marches. Thus in a litigation between the monks of Melrose and Richard de Moreville in 1180 King William relates "Ego cum Episcopo de Glasgo et Fratre meo et comitatibus et probis hominibus meis perambulaui".²⁵ But if the king were to draw on the knowledge of local men, it would soon seem more reasonable

23. Newbattle 29 (Randolph de Sules); Glasgow Epis. I, 68; Kelso 55; Passalet 11.

24. Glasgow Epis. I, 28.

25. Melrose 102; A.P.S. I, 387-8; Chronica de Mailros 90.

and befitting the royal dignity that his informants should themselves carry out the perambulation which he would then recognise by charter. Thus in a dispute of 1184 between the monks of Melrose and the men of Wedale, we read that, although William was present, "per iuramenta fideliorum virorum facta fuit perambulatio et certa finium limitatio", upon which the king confirmed the marches drawn.²⁶ The oath-takers were the same Richard de Moreville, the King's Constable, and twelve other men.²⁷ But the monarch could scarcely be expected to attend every border dispute throughout the country. He also acted through his local representatives, the sheriffs. Thus in 1184 William declares that "precepto meo fuerat iurate et perambulate diuise de....." in presence of two sheriffs and other upright men.²⁸ These he goes on to confirm and orders that the lands be enjoyed in time to come freely and peaceably. But he does not allow matters to rest entirely on the word of the local men, who might be biased or mistaken. The bounds are "quas sicut tunc perambulate fuerunt et sicut carta Regis DD aulmei testatur."

At this stage, then, the procedure of perambulation has come very close to the existing, but probably rare, royal inquest. The main difference is that it can be invoked by individual subjects. It is not an instrument of royal policy, though subject to royal oversight.

26. Melrose 103.

27. "Qui eo die, praesente rege, super reliquis ecclesie nostre cum timore et tremore iuraverunt". Chronica de Melrose 93. Cooper confuses these two Melrose litigations (Cooper Cases xlviii).

28. Newbattle 15.

Then
 In the early thirteenth century it became possible to invoke a distinct process of law to determine disputed boundaries, quite apart from the renewal of a charter. On request to the king, his justiciar or sheriff would be ordered to inquire of honest and elderly men, who best knew the truth, where the boundaries lay. They would trace them before many witnesses and their findings would be returned for recording on the royal court rolls, where they would be available for reference in any future dispute. The earliest surviving example of such a judicial process of perambulation, according to McKechnie,²⁹ is the record of the settling of a boundary dispute between the Abbey of Arbroath and the Barony of Kynblathmund in 1219.³⁰ The perambulation was performed by seven men before many witnesses, including the Sheriff of Forfar, "secundum assisam/terre". Elsewhere this assize (in the sense of statute) is attributed to King David.³¹ If this is correct, it has not survived, the earliest authoritative mention of perambulation being in Regiam Majestatem.³² But it may be simply a tribute paid by later generations to David's reputation as a law-maker. With the growing judicialisation of the procedure of perambulation, ecclesiastical bodies made greater use of what they considered to be the less contentious method of arbitration to settle bounds.³³ It might however be combined with an

29. McKechnie 8.

30. A.P.S. I, 91; Aberbrothoc Vetus 162. For the recognition of another early judicial perambulation see Dunfermline 111 (1231).

31. "secundum legalem assisam regis David usitatum et probatum in regno Scotie usque ad illum diem" (recognition of the same perambulation in Sheriff-Court of Forfar in 1227) A.P.S. I, 91; Aberbrothoc Vetus 163. Also Dunfermline 238.

32. Reg. Maj. Suppl. No. 8. For a slightly different view see Cooper Cases 22.

33. e.g. Aberbrothoc Vetus 262 (1254). Cf. the earlier settling by the Justiciar of a boundary dispute between two abbeys (Coupar Angus I, 78-1223/4).

extra-judicial process of perambulation, the arbitors remitting the drawing of the boundaries to an assize and interponing their authority to its findings.³⁴

This appears to be an instance in which Scottish conditions evolved an appropriate remedy without any direct guidance from England. Lord Cooper links the process of perambulation with the English writ de rationabilibus divisiis, quoted twice by Glanvill, without asserting that one is modelled on the other.³⁵ And indeed it would seem improbable that the English action should be adopted in Scotland so speedily, for it was not until the mid-thirteenth century that other forms of action originating in the time of Henry II and Glanvill established themselves in Scotland.³⁶ Nor is this action ever referred to in Scotland (as are others) by its English name or anything approaching to it, but always as "perambulation" or "perambulacio".³⁷ Moreover, the English writ seems to have been rather a stunted one. Examples of it from thirteenth century cases are to be found in Bracton's Notebook,³⁸ but it was overshadowed by the more general writ of right and later by the various possessory assizes. Even Holdsworth and Pollock and Maitland do not find it worthy of discussion. Near counterparts did exist in England, however, for the Scottish brieve of division in the English writ de rationabili parte³⁹ and for the Scottish brieve of lining in the assize of neighbours in boroughs.⁴⁰

34. See the admittedly very exceptional dispute between Melrose and Kelso in 1202 (A.P.S. I, 389). Also (later) Banff Charters 21 (1388)

35. Cooper Cases 21. Glanvill IX, 14 (erroneously given as IX, 4 by Cooper) and XII, 16. 36. infra 44 37. cf. Brieves 42, 61.

38. Bracton's Notebook (ed. Maitland) Nos. 535, 1521, 1547.

39. Holdsworth III, 22.

40. Borough Customs (ed. Bateson) I, 249-251.

III. The Influence of Ecclesiastical Procedure

Before pursuing further the development of the jury in the thirteenth century it will be advisable at this juncture to consider its relation to another mode of inquiry, that used by the ecclesiastical authorities. Cosmo Innes, addressing his fellow-lawyers in the Advocates' Library about 1870, asserted his belief that "the bulwark of our liberties originated in Church Courts"; but perhaps out of consideration for his hearers, although certainly to the detriment of posterity, he would not trouble them "with an array of small facts from which I have made this deduction".¹ It will be suggested here that the inquisitorial method of the church followed in point of time the royal inquest, possibly helping to make it more acceptable, but that from the mid-thirteenth century the civil institution diverged from it sharply and thereafter their paths were quite separate.

We have remarked that the more a government is centralised, the more it stands in need of an efficient system of local inquiry. The Church under a series of great jurist-popes in the late twelfth and thirteenth centuries was in effect an international state, whose administration was concentrated to an unprecedented degree in its capital at Rome. It is a matter for wonder that in the state of communications at the time its government was carried on so efficiently.

1. Innes 213.

On any dispute being taken to the Holy See, the normal procedure was for the appointment of delegates to make inquiry into the true facts and report back to the Pope. Usually these were men who belonged to the country where the dispute arose, but who were free of any partial interest. They might be bishops, abbots, archdeacons, deans, canons, rectors, according to the gravity of the case. Thus in 1218/19 the Abbots of Coupar Angus, Scone and Dunfermline were directed to inquire into the life and morals of the Bishop of Moray, following complaint by the Archdeacon and Chancellor of the Diocese.² The previous year an inquiry was ordered into allegations that the Bishop of St. Andrews had exceeded the faculties granted to him by the Holy See in consecrating Bishops and in other matters.³ But the subject of these inquiries might also touch upon matters in which the state was an interested party too, and notably upon ecclesiastical property rights. In the few examples surviving from the twelfth century it appears that the ecclesiastical party was simply a petitioner like any other in the court of the sovereign. Thus the two boundary litigations involving the Abbey of Melrose and laymen (already discussed) were settled by the king,⁴ as was a dispute over land rights between the Bishop of Glasgow and William Comyn in 1200.⁵ These were cases in which the monarch's

2. "inquiratis super hiis sollicita veritatem et tam ea, que inveneritis, quam que idem episcopus ad sui excusationem proponet nobis...fideliter transmittatis". (Theiner: Vetera Monumenta Hibernorum et Scotorum No. XXII).

3. ibid. No. VI. 4. A.P.S. I, 387, 388. 5. ibid. 388-389.

interest as the original donor of the lands was clear. Another case which Cooper cites as being heard and decided in the royal court appears rather to be an example of an agreement privately reached between the parties ("concordia et compositio") on the patronage of the Church of Kilbride, being ratified and embodied in a charter of confirmation by the king after the historic facts on which it rested had been proved "per probos et antiquos homines patrie et legitimos testes".⁶ Even where both parties were churchmen, the "concordia" between them was arranged "coram rege David et Henrico filio ejus", after the king's barons had been consulted on the foundation and endowment of a chapel by Alexander I and a church which was in question.⁷ It appears then that the royal procedure of inquest was flourishing in the twelfth century before its papal equivalent made itself felt in Scotland and that even rights of patronage, as well as those of church lands, were settled by the king. Thus the jury is not derived from the ecclesiastical inquisition and, if anything, the former paved the way for the latter.

The transitional phase between full submission to the king and the imposition of papal delegates is illustrated in the important and perhaps unique litigation between the Abbeys of Melrose and Kelso over their boundaries in the opening years of the thirteenth century. After a special papal envoy had failed to settle this protracted question,

6. ibid. 386-387; Cooper Cases xlvi.

7. A.F.S. I, 359; Lawrie 146; Dunfermline 8.

King William himself was asked to do so. But he acted not as of right, but as an arbiter to whose jurisdiction the contending parties voluntarily submitted and whose award was confirmed by three Bishops. He settled the matter in the way he was by now accustomed to use in boundary disputes, by "diligentem inquisitionem per probos et antiquos homines patrie" and then pronounced his sentence to the parties. But this was also the way in which he was enjoined to try the question by Pope Celestine: "ut facta diligenti inquisitione de diuisis illis quod iustum esset inquirerem".⁸ At this stage then the royal and the papal inquest come together.

Thereafter many questions of ecclesiastical rights were determined by judges delegate appointed by the Pope, for example, regarding the tithes of a church,⁹ or rights of patronage¹⁰ or the origins of a monastery and its relationship to another¹¹ or the correct procedure in excommunication.¹² The case which Cosmo Innes placed most reliance upon, as "the foreshadowing of the trial of an issue by a jury under a competent judge",¹³ concerned the lands of Monachkennaran on the Clyde, which the monks of Paisley claimed to belong to their church of Kilpatrick, but which were occupied, apparently in good faith, by one Gilbert. The church and its lands had previously been granted to the

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8. A.P.S. I, 389; Melrose 137; Kelse 21. (Summarised in Cooper Cases 3).
 9. Chartulary of Lindores Abbey (S.H.S.) 43-45 (1211-1214).
 10. Incheolm 15-17 (1239).
 11. Charters of the Abbey of Croisragual 6-10 (1265).
 12. Theiner op. cit. No. 145 (1251).
 13. Innes 214.

Abbey by the Earl of Lennox, but other members of the family had attempted to regain possession of them and had conveyed Monachkennaran to Gilbert by charter. Three judges delegate were appointed by the Pope at the request of the monks. Before them a hearing was held in 1233, the details of which have been preserved.¹⁴ On the first day's hearing at Irvine the leading witness for the Abbey deposed that more than sixty years before he had known a certain Bede Ferden who lived in a house of reeds beside the Church of Kilpatrick and that he held that land of Monachkennaran of the church in return for entertaining visitors to the church. The witness himself had been entertained by him as a boy with his father. The second witness repeated most of these points and added that he had seen Bede's son possessing the lands by the same tenure as his father. The third witness must have been a decisive one, for he was a member of the Lennox family, who admitted that as Vicar of Kilpatrick he had allowed the lands of Monachkennaran to be alienated from the church "per defectum et negligentiam ipsius", so as not to offend his relatives. On the second day twelve witnesses were heard at Ayr for the Abbey, most of whom concurred with previous witnesses. The evidence for the other side, if any, has not been preserved. The judges found that the monks had sufficiently proved their case and awarded the lands to them, with thirty pounds of expenses, and requested the Bishop of Glasgow to enforce the sentence.¹⁵

14. Passelet 166 et seq. See also Cooper Cases 33; Innes 214-220.

15. Passelet 168.

Here then we are given a detailed insight into the inquisitorial procedure of an ecclesiastical court, such as we lack from contemporaneous lay tribunals. It suffices to make clear that the judges are wholly in control of the proceedings. There is no trace of the coalescence of the deponents into a separate formation. They remain individuals, making probably a brief statement on oath and then being subjected to such questioning on it or new topics as the judges cared to put to them.¹⁶ This may well be the form that a royal inquest, as in a perambulation, took, but, as we have seen, it appears that the latter pre-dated the ecclesiastical inquest in Scotland. It is probable, however, that these ecclesiastical proceedings, often involving laymen, strengthened the principle of an official inquiry of persons on oath, with all the implications that that carried, by making it more common and thus more familiar. As to the nature of the Monachkennaran proceedings, here the spiritual power was rather over-reaching itself, in presuming to arraign laymen before its tribunal, in order to determine the title to land; and indeed before the sentence could be enforced, the support of the secular arm had to be sought, excommunication having proved a brutum fulmen.¹⁷ These events occurred when papal claims were at their most elevated; but already in 1230 (if we accept the

16. e.g. "Interrogatus que alie terre pertinent ad ecclesiam, dicit quod..." (*ibid.* 167).

17. *ibid.* 169.

traditional dating) Alexander II had enacted a procedure by which a man who claimed to the king or his justice that he had been wrongfully dispossessed could have his rights adjudicated "throu leil men and worthy of the cuntre".¹⁸ They were called in this act "the said assyse", a term which pointed to the future development of the jury in the secular courts. Throughout the thirteenth century and through the War of Independence into the fourteenth, new civil remedies were being developed through the system of brieves, which pushed back the expanding jurisdiction of the church courts from the law of immoveable property. In these matters, which loomed larger as the feudal system grew more elaborate, the future lay with the civil courts and they very quickly veered away in new directions, while the church courts, until their destruction at the Reformation, retained almost unchanged their old methods for such limited purposes as they could be applied to.

Thus the life and miracles of St. Margaret were to be inquired into by means of an inquisition conducted by papal delegates.¹⁹ Bagimond's Roll, the assessment of the true value of Scottish benefices made by Bagimundus, a papal emissary about 1275, which was the basis of all taxation of the Church until the Reformation, may have been drawn up as the result of some process of inquisition.²⁰ In 1449 the Bishop

18. A.P.S. I, 400.

19. Dunfermline 185.

20. Fordun says "Omnes beneficiati, nullis exceptis, nec etiam privilegiatis, sub distractione juramenti et excommunicationis persolverent decimas" (Chronica (Historians of Scotland Series) I, 306, II 301). See also Robertson, Statuta Ecclesiae Scoticae lxvi; S.H.S. Miscellany VI, 3.

of Brechin conducted an inquiry into the rights of all the benefices of his diocese and for this purpose called together all his senior clergy.²¹ Laymen too might be called to speak on oath as to ecclesiastical rights, as in an inquiry by the Bishop of St. Andrews into the lands of the Church of Ellen in 1387.²² Sometimes in a matter of mutual interest church and state would jointly organise an inquest. Thus in 1371(?) Sir John Hay was appointed to settle a question which had arisen between Robert II and the Bishop of Moray as to which of them was patron of the Maison-Dieu of Elgin. He was to do so "per meliores et fidedigniores tam clericos quam laycos homines patrie".²³ An inquiry into the origins and purpose of a house of charity in Arbroath was conducted by the Professor of Theology and the Prior of the Dominicans, both of St. Andrews, appointed jointly by James III and the Bishop in 1464. Those summoned are described as an assize and include both clergy and laity, but they are required to answer a series of questions called "articuli", to each of which they respond as a body.²⁴ Many bishops and abbots were of course also temporal lords and maintained courts for their lands which differed little, if at all, from those of lay superiors.²⁵ But in one striking instance from the court of the ecclesiastical barony of Pittenweem in 1540 we find the question, who

21. Brechin II, 75-78.

22. Aberdeen Epia. I, 177 ("per probos et fideles patrie") cf. Coupar Angus I, 203 (parish bounds); Banff Charters 66 (abbey bounds).

23. Moray 127.

24. Aberbrothog Nigrum 141.

25. e.g. St. Andrews 417.

is lawfully entitled to succeed to a tenement of land in the town, determined in a manner not differing much from that used as to the lands of Monachkenmaran some three hundred years before.²⁶ Six out of eight witnesses were called in turn, put on oath, "I will declare the verite say far as that kennyt and suld be sperit at thame" and interrogated as to what they knew of the facts. Most concurred with the leading witness, a cleric.²⁷ Finally, we have a few examples of an inquest being used in the course of an episcopal or decanal visitation of parishes to report on such faults as adultery among their neighbours.²⁸

26. Isle of May cv.

27. For the civil procedure of the period see infra 43

28. John Cristisone 25, 53.

IV. Early Criminal Procedure

It is now time to consider the impact of these existing forms of procedure on methods of criminal trial. Here again we shall have occasion to look at the Church's ways of working, but more as a contrast than as an influence. The determination of guilt or innocence was invested by both Anglo-Saxons and Normans with an almost sacred character. God was invited, as it were, to intervene and by a sign indicate the truth of the matter. The methods evolved by which this sign could be manifested may strike us as somewhat superstitious. From English sources we know something of the nature of these so-called ordeals. A man suspected of a criminal act would be made to hold a bar of hot iron. His burnt hand was then bandaged for some days and if it healed in that time he was accounted innocent, if it festered, guilty. Or he would be plunged into a pool of water; sinking signified guilt, floating innocence.¹ Our Scottish records reveal some traces, though scanty, of the resort to these practices under the Normans in the twelfth century. In its oldest charter the Abbey of Holyrood received from King David the right to hold "examen...aque et ferri calidi quantum ad ecclesiasticam dignitatem pertinet".² Alexander I made a grant of jurisdiction in 1124 to the monks of Scone who were to enjoy "suam propriam curiam, scilicet...in ferro in fossa

1. P. & M. II; 598; Holdsworth I, 310; Plucknett 113.
2. Holyrood 3; Lawrie 116, 384; A.P.S. I, 358.

et in omnibus aliis libertatibus ad curiam pertinentibus".³ This right was later confirmed in charters in favour of the Abbey by Malcolm IV⁴ and William.⁵ The same reference to "ferrum et fossa" is to be found in a charter of confirmation by William to Arbroath Abbey of 1211-1214,⁶ repeated in later charters,⁷ one being of 1322, by which time it had certainly become an archaic stylistic phrase, with no practical significance. We have no certain knowledge how far these modes of trial were exercised in Scotland. But at least it seems that they were not confined to these monastic courts, for we do know of remedies for abuses connected with the ordeals. The Assize of William in one chapter requires that there be "na iugement....of watir or of het yrn bot gif the schireff or his seriant be thar at to se gif justice be truly kept thar as it aw to be".⁸ The form that such abuses took may be suggested by another rule of the same period to the effect that no lord was to take a bribe after an ordeal had been held, but to let the law take its appointed course.⁹ Dissatisfaction with the ordeals, because of the apparent ease with which offenders evaded justice, was also being felt in England around 1200.¹⁰

These ordeals were probably pre-Christian in origin, although

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3. Scone 4; Lawrie 43; 297 (where it is suggested that it may be a version of the later and genuine charter of Malcolm IV).
 4. Scone 9; Regesta 263-4; A.P.S. I, 364.
 5. Scone 22.
 6. Aberbrothoc Vetus 4 ("ferrum et duellum fossa et furcas").
 7. ibid. 72 (1214-1218), 211 (1322).
 8. A.P.S. I, 375 c. xii; cf. ibid. I, 634.
 9. ibid. I, 377.
 10. Holdsworth I, 311; P. & M. II, 599.

the Church was prepared at first to tolerate them, as a means of encouraging guilty men to confess their faults.¹¹ A slightly more refined form of the ordeal was probably introduced into Britain by the Normans, with whose code of chivalry it harmonised well. It took the form of a duel waged by the accuser and the accused in person, the latter, if he were the loser being hanged, if he were not already dead.¹² Provision was made for it, as an alternative to the other forms, in the grants to Holyrood, Scone, and Arbroath, which we have just mentioned. It is evident that until well into the thirteenth century it remained the normal mode of trial in serious offences. It was quite closely regulated. Wads or pledges were to be placed by the challenger before the combat as an earnest of good faith. In theft, robbery and other offences, these were only to be to the value of the loss suffered and not to cover the indignity sustained.¹³ The judges of Galloway laid it down that no-one was to intervene during the duel and that silence was to be kept throughout under threat of punishment.¹⁴ Where the cause of action was the drawing of blood below the breath, the defender might, immediately before joining battle admit it and pay damages.¹⁵

11. Flucknett 114.

12. In England battle was also used to determine title to land, the parties then being represented by champions. Evidence for this practice in Scotland is very meagre, but Neilson concluded that "it had at least some short existence there" (Trial by Battle, 87 et seq.)

13. A.P.S. I, 318.

14. ibid. I, 378.

15. ibid. 174-7. For an imaginative account of the judicial duel, built up from various sources, see Neilson, op. cit. 117-121.

The trial by battle probably never fell into such disrepute as did the other ordeals and indeed it was carried forward by the mediaeval tradition of chivalry into the sixteenth century as an occasional mode of trial for noblemen, the last recorded instance in Britain being, according to Neilson, in 1597 at Barnbogill Links.¹⁶ But already in the late twelfth and early thirteenth centuries it was being whittled away by the admission of exceptions and exemptions. It is plain that busy townspeople found challenges to a mode of trial, to which for the most part they would be ill-suited, exceedingly irksome. The Leges Quattuor Burgorum contain numerous clauses by which its burdens were eased for them. A king's burgess might challenge the liegeman of an abbot, prior, earl or baron, but might not be challenged by him.¹⁷ A burgess too old to fight might seek acquittal by the oaths of men who would swear to his innocence.¹⁸ A burgess fighting a country-dweller must first leave the town.¹⁹ The burgesses of Inverness, then in Moray, were specifically granted by William exemption from judicial duel ("bellum").²⁰ By an act attributed to the same king all burgesses were exempted from doing battle except in one of the pleas of the crown.²¹ A passage in Regiam Majestatem borrowed from Glanvill, permits any accused to decline battle, on the grounds of his being over sixty or in

16. ibid. 307. An attempt to invoke the old law in England in 1819 led to its statutory abolition.

17. c. xlii A.P.S. I, 335.

18. c. xxii A.P.S. I, 336.

19. c. xii A.P.S. I, 335.

20. A.P.S. I, 89 (No other examples have been discovered, but see Stair Sec. Introduction, 304).

21. A.P.S. I, 720.

some way maimed.²² In such a case he is to be purge himself by hot iron or water, a proviso which must give rise to doubts as to whether it was ever live law, for its importation into Scotland can scarcely be prior to 1230, granted the earliest possible date of that baffling work.

Ordeals of all kinds were thus on the way out, as far as enlightened towardwellers were concerned. They were altogether too barbarous. The exact years when this attitude was developing and receiving a certain amount of official tolerance are uncertain, but probably embraced the last years of the twelfth century and the first thirty years of the thirteenth. It was within this period that another and more drastic movement was being made against the ordeals, other than battle, one that can be dated very precisely. The Church, which had probably only associated itself with the ordeals in the hope of christianising them, had in various places withdrawn its support from them, until in 1216 the Fourth Lateran Council made a universal prohibition debarring clerics from assisting at these occasions. This was more than just a sign of clerical disapproval. It meant the removal of the element of divine sanction, the presumed existence of which alone made the ordeals acceptable. The effect in England, granted the communications of the time, was swift. In 1219 Henry III ordered his itinerant justices to convict in certain cases on suspicion, in view of what he depicted as the prohibition of the ordeals by the

22. Reg. Maj. IV, 3.

Roman Church.²³ Such convictions on what amounted to a half-proof were clearly unsatisfactory. But after a few years of experimentation, the justices hit upon a convenient means of determining guilt. People of the neighbourhood were already present at eyres in large numbers in order to report on oath those whom they believed to have committed crimes, a development, as we have seen, of the royal inquest. Sometimes these juries of presentment were also asked to declare whether an accusation by an individual was made maliciously or to decide to which form of ordeal a suspect should be submitted. It was not unreasonable, then, that they should be trusted a little further and asked to determine whether the accused was guilty or innocent. Juries of presentment were unwieldy bodies; so after experimenting with groups of various size and composition, the justices by the mid-thirteenth century picked out twelve men and took their group-finding as a final decision of the issue. Thus a petty jury emerged out of the larger grand jury of presentment. Finally in 1352, to avoid prejudice to a prisoner through petty jurors wishing to justify an indictment which they had subscribed to, the two bodies were kept completely separate and the prior presence of a petty juror on a jury of presentment was made a good ground of challenge.²⁴

Such, in very brief compass, is the commonly accepted explanation of the emergence of the criminal jury in England, as taught by the

23. See the document printed in translation by Plucknett (Plucknett 119) ("Cum prohibitum sit per ecclesiam Romanam iudicium ignis et aquae").

24. 25 Edward III, stat. 5, c. 3.

leading English legal historians.²⁵ It will be noted that, in typical English fashion, it was an expedient devised by the men on the spot in order to meet a pressing need. It was not directly a creation of the royal authority. What now of Scotland? As Lord Cooper remarks, "it is inherently probable that events in Scotland and in England followed similar courses, and that the change in instructed opinion which found expression at the Lateran Council made itself felt on both sides of the Border".²⁶ After a not unreasonable time-lag, we do indeed find a statute attributed to Alexander II in 1230 which grants to all who are accused of theft or robbery the right to be tried by "one gud and leil assyse", if they wish. If they are acquitted, the person bringing the accusation is to be fined; if they are found "foul", righteous doom is to be pronounced upon them. The act concludes with the emphatic words "fra this tym furth thar sal be na iugment done on hym thruok dykpot na yrn".²⁷

This act is however one of a series passed that year on criminal procedure. These must be considered too, in order to determine the

25. See on this topic Holdsworth 321-327; P. & M. II, 646-650; Plucknett 120-127. Ritchie appears to be in error when he writes "The Jury had its uses extended from oriminal cases to civil" op. cit. 183. As to its supposed association with Magna Carta, see McKechnie, Magna Carta (2nd ed.) 134-138.

26. Reg. Maj. (Introduction) 36.

27. Alex. II, chap. vi. A.P.S. I, 400. The Latin version is significantly different and makes what is thought to be true sense appreciably clearer. Thus "Et de cetero de eo non fiet iudicium per fossam vel ferrum" Cf. also the letter to William Malvoisin, Bishop of Glasgow, from the Archbishop of Lyons in 1200-1202, condemning the involvement of clerics in combat or ordeals of any kind (ibid. cccvi). Neilson suggests, on the strength of the (Continued on following page)

exact implications of this innovation. On the very same day a parallel proviso was introduced, apparently to meet another papal command. In 1216-17 Innocent III, in a letter to the faithful of the province of York and the kingdom of Scotland, had condemned the "pestifera consuetudo" whereby clerics were compelled by lay people to undergo duels personally and anathematized those who so treated them.²⁸ Presumably this command was honoured, but unmilitary clerics might still be faced with the need to do battle in order to sustain an accusation, so in 1230 the king of Scotland enacted, with the advice of his counsellors, that men of religion, widows "or any uthir that aw nocht to fecht" should complain to their lord or baillie, in presence of the sheriff, and the lord or baillie should by the inquisition of the stewart or a baillie and four good men of the town "enquyr be the aithes of leil men of the neibouris" ("per legales homines de visneto") who the malefactor was. "And gif be that inquisicioun the misdear be fundyn and convickyt he sal underly richtuis iugment".²⁹

Here several interesting points emerge. The administration of justice in Scotland is still very much the personal concern of the

(Footnote continued from previous page)

continued existence of duelling by clerics on the Borders in 1237 and Malvoisin's presence in Rome shortly before 1216, that he himself instigated the issue of the papal bull in order to quell this abuse on the Borders. The fact that it is addressed to the faithful of York, as well as of all Scotland, lends some support to this thesis, but does not detract from the probability that it was read in Scotland as imposing a universal prohibition. (op. cit. 122-126).

28. Glasgow Epis. I, 94; Robertson: Statuta Ecclesie Scotice II, ccxcvii.

29. Alex. II, chap. v. A.F.S. I, 399. Probably as an interim measure he had also ordered his sheriffs to see that the Melrose monks had a "pugnator" or champion in such cases as required it (Melrose 162)

monarch. He is faced with the need to find both a substitute for the judicial duel in certain limited cases. He will not permit clerics and widows to lay accusations indiscriminately without being obliged to prove them by battle. A safeguard is called for, if a privilege is not to turn into an abuse. It might be by a fine, as in the other act, but some priests are vowed to poverty. In seeking a solution his mind turns to the familiar royal inquest. Could it not be used to determine whether or not the accusation were a just one? Indeed, might not the "probi homines patriae" be trusted a little further and asked to determine the main issue of guilt or innocence? Such reasoning must remain speculative, but it is strengthened by the curious wording of the act, whereby the emphasis is placed on their "finding the misdoer" and only incidentally is it mentioned that they are both to find and convict him. Scotland, it is certain, never knew a jury of presentment until this tentative attempt at forming one was made. Once it was established, the unreality of allowing one body to test the verity of the indictment and another the almost identical question of guilt was realised at once. A Scottish grand jury appeared only for an instant, to give birth to and be merged in a petty jury. It is unlikely that by this date the English petty jury was so well established and widely known as to form a subject for imitation in Scotland. But the growing English practice of putting issues of civil law to the

determination of a team of jurors, not mere individual answerers of questions, may have served to make the idea of such a group in criminal procedure more acceptable. We know that the English writs of Glanvill's work were being studied and approved of in Scotland about this time, for this same spurt of legislation in 1230 includes the provision of a remedy for novel disseisin (or recent dispossession from land) which echoes the terms of the English writ.³⁰ Where wrongful dispossession was alleged, the justice or sheriff was to discover "throu leil and worthy men of the cuntre gif the man that plonzheis sayis uth" and these men are given the collective name of "the said assyse". Plainly they were now being viewed as a single entity. If then the trial of criminals by a jury of the neighbourhood were to be admitted in one special case, might the same "gud and leil assyse" not be offered in all cases of theft or robbery? And this was done in chapter vi.

At the same time it was thought necessary to state specifically that having undergone trial by an assize, such an accused need not also submit to ordeal. This novel procedure was to be fully its equivalent. But it is likely that the ordeal was never the most common mode of trial in Scotland and was on the wane even before 1216. As Neilson points out, "The ordeals of water and iron appear but seldom in the records of Scots law. There is not extant, it is believed, the account of a single case in which they were applied".³¹ Although,

30. A.P.S. I, 400.

31. op. cit. 79.

as we have seen, they are mentioned in twelfth century charters, they are always bracketed with "duellum". It is battle that the burgesses fought to be freed from in William's reign. It is battle that is minutely regulated. Only one reference has been discovered to exemption from the primitive ordeals. It may be as early as the reigns of David or Malcolm and is to the effect that no man of the Knights Templars is to be put to the ordeal pit, if they will stand pledge for him, unless he is a convicted thief and has the stolen object upon him.³² We seem to have no reference to it later than the act of William requiring the presence of the sheriff or sergeant at ordeals,³³ apart from the Glanvillian quotation in Regiam Majestatem IV, 3. It may well be that later in the century a transcriber, knowing that the ordeal vanished at approximately this time, altered the Scots version, either deliberately or through a misunderstanding, so as to convey that the ordeal was universally abolished at this time.

We have a likely culprit in the person of the compiler of the Ayr Manuscript, who probably wrote in the early fourteenth century.³⁴ He gave this act the precise heading, "Deletio legis fosse et ferri et institutio visneti", ignoring the plain fact that the terms of neither Latin nor Scots versions warranted it. Cosmo Innes noticed the

32. Regesta I, No. 287.

33. A.P.S. I, 375. Reg. Maj. IV, 17 concerning the death of a thief in the course of an ordeal, is taken from the Assize of William c. xv. (A.P.S. I, 375).

34. For views on this point, see A.P.S. I, 179; Brieves 4; Duncan: 1961 Jur. Rev. 207.

inconsistency and commented in the Record Edition, "There is little doubt that the correct reading of the conclusion is as printed; and it by no means supports that title".³⁵ Later he developed this point in the opposite sense to that adopted here in holding that this law marks the ordeal "in a state of transition".³⁶ It is suggested that it was rather in a state of extinction, and that it appeared thus to a writer some seventy years later who, having this knowledge, either mistranscribed the text or altered it, so as to make it appear that the coup de grace was at this point administered. Innes quoted in support of his thesis the enactment dealing with briefes of mortancestry and novel dissasine, which had been attributed by Thomson and him to David I, as showing a refinement incompatible with the rude ordeals.³⁷ When placed in its more probable setting of the mid-thirteenth century it continues to provide a valid argument - but one tending to confirm the disappearance of the ordeal by that time.

Neilson and Cooper appear to have been unduly swayed by a desire to find a Scottish equivalent to the English king's instructions in 1219.³⁸ The act of Alexander II chap. vi only fills the bill if the compiler's heading as to "deletio legis fosse et ferri" accurately represents its contents, which it does not. But if the ordeals were already moribund by 1216, then the withdrawal of the clergy would be

35. A.P.S. I, 43 n. 4.

36. Scotland in the Middle Ages 189.

37. A.P.S. I, 325.

38. Neilson, op. cit. 113; Reg. Maj. 36.

no catastrophe and need have left no record. In 1230 it would still be reasonable to mention the ordeals, which everyone knew to ^{have} produce a clear-cut answer that would be respected, in order to emphasise that the verdict of an assize would be just as effective. The assumption that Scotland must wait until a legal reform originating in Rome percolated through England is a gratuitous one, based perhaps on the admitted time-lag between some English legal developments and their adoption in Scotland. But these were voluntary borrowings; the papal edict was a peremptory one. Moreover Scotland dealt directly with the Holy See, not through England.

It is suggested then that the background to the Act of 1230 chap. vi, as summarised by the compiler of the Ayr MS, is as follows. "Institutio visneti" is correct, in as much as for the first time trial by a jury was offered to defenders in cases of theft and robbery. It arose out of an arrangement by which persons who were unable to do combat could have their accusations first approved and then tested by an impartial body and was strengthened by the new practice of remitting disputed civil issues to such groups. "Deletio legis fosse et ferri" is incorrect, for the ordeals were already moribund fifteen years before and the compiler, knowing that they had vanished at approximately this time, wittingly or unwittingly altered the Scots text so as to give the impression that the ban was explicit and total, but left the Latin in its original form. The implication in the whole heading that visnet

was a direct substitute for ordeal is also false, the two arising from different causes and at slightly different times.

The criminal assise now had a foot-hold; but its future was by no means assured. It still had powerful rivals. Trial by battle continued to be valid, though to a decreasing extent obligatory. Indeed its continuance is presumed in an act of the same year of 1230 which provides that in the pleas of the crown noble-born men may be represented in combat by a champion, but a base-born man must fight in person, unless his overlord offers him the services of a champion.³⁹ During the remainder of the thirteenth century judicial duels continued to be held, but chiefly on cases of some moment in which nobles were involved.⁴⁰ Only thereafter did resort to it become rare and exceptional. Although Neilson draws a sharp distinction between its use as a mode of trial and later as a courtly contest,⁴¹ there is no doubt that it was at least fully consonant with Norman traditions of knighthood and was probably reluctantly abandoned by noble families. Then the judges of Galloway, in an order which is certainly misplaced in the Record Edition under the Assise of William and which can in no way be said to be the act of anything resembling a "Parliament of Scotland",⁴² declared that the men of

39. A.P.S. I, 400-401. See on this act Neilson op. cit. 114, who comments that the dating of it in A.P.S. is "not unsatisfactory although by no means conclusive".

40. Neilson, op. cit. chapters 38-42.

41. ibid. chapter 49.

42. A.P.S. I, 378.

Galloway should only have "visnet" if they renounced the law of Galloway and asked for it, which may suggest that it was at first viewed as a privilege carrying certain dangers of abuse and only to be granted to those who would give up the separate laws of that region and become fully assimilated.

But the assize also had a more tenacious and more rational competitor in a form of trial which we have not so far had occasion to mention. It is wager of law (also used in ecclesiastical circles and known as compurgation), by which an accused person in order to clear himself would have to swear to his innocence and bring forward a certain fixed number of "oath-helpers" who would vouch that the oath he had taken was a true one. They were not concerned with the facts and might know nothing of them. Their function was to guarantee that the accused himself was a credible person. This form of trial was from an early date, possibly even prior to the Norman infestation, in so far as towns then existed, the favoured method of burgesses. The Leges Quattuor Burgorum contain many references to it, in both criminal and civil matters. Thus a burgess accused of a wrong by an "uplandis man" was to cleanse himself by the word of six burgesses, the other to have his assertion supported by as many men as his state demanded.⁴³ Disputes as to succession to heritage were to be proved by the "athis of xii lele and worthi men of the burgh".⁴⁴ Burgesses/^{excused} judicial combat

43. c. xxix A.P.S. I, 338.

44. c. cvii ibid. 354.

were to clear themselves in this way.⁴⁵ That this practice was something peculiarly associated with burgh life appears to be indicated by reference to it as "the law of burgh",⁴⁶ though it was probably not confined to burghs.⁴⁷ The probability then is that in the thirteenth century wager of law was well entrenched in the burghs and in a strong position to meet the new method of the assize. The absence of records (other than charters) prior to the fourteenth century must deter us from asserting dogmatically that the assize took no root in the burghs prior to 1400. But as will be shown later in some detail, the oldest Scottish burgh records, from Aberdeen, seem to demonstrate that there was a certain resistance to juries, both civil and criminal, in burghs, as being royal institutions which might be inimicable to the burghal interests and tended to set burghs against burghs.⁴⁸ Once it had established itself, as the records of several burghs from the fifteenth century show, it quickly became an organ of the more prominent citizens presaging or rivaling the town council, and took upon itself a host of responsibilities, civil and criminal.⁴⁹

That is to look far ahead. In 1242 battle, wager of law and visnet (or trial by an assize of the neighbourhood) were still alternatives, as Neilson demonstrates in a graphic account of a trial

45. c. xxii ibid. 336; c. xi ibid. 335.

46. c. xxxviii ibid. 340.

47. cf. A.F.S. I, 319 given as c. ix of the Assize of David, but probably later, which in permitting wager of law in certain cases makes no distinction of person. See also Neilson op. cit. 78.

48. infra 93 et sqq.

49. infra 99 et sqq.

of that year reported by the chroniclers.⁵⁰ Sir Walter Bisset was accused of murdering the Earl of Athole and burning his body. He offered to prove his innocence by combat with one of his accusers or by the oaths of his fellow-knights. But his judges proposed to put him to an assize, to which he protested that the people of the country were all prejudiced against him. Eventually, it appears, he was tried and convicted by an assize of his peers.

In 1244, the assize was further entrenched by statute, for in that year an act was passed by a great assembly of the leading men of the nation, the declared purpose of which was to provide a means of drawing up indictments fairly.⁵¹ Widening the scope of the act of Alexander II, chap. v, the Justiciar was to make inquiry by the oaths of three or four upright men and of the steward of each town who were the evil-doers of the district and who was harbouring them. All persons thus indicted were to pass through "a lele assyse". Perhaps as a result of the doubts in the cause célèbre two years before, it was declared that any knight thus indicted should "tholl and pas thuruch ane assyse of gud and leil knyghtis or ellis of fre haldaris of herit-age", an early reference to the privilege of trial by peers, though not the first. If this did not at once abolish the dual, it did at least indicate strong royal backing for the assize and equal support from his magnates. Only at this period, some eighty years after the

50. op. cit. chapter 39.

51. A.P.S. I, 403.

establishment of the grand jury in England, was regular machinery for the discovery of crime established in Scotland. It appears however to have worked only spasmodically and ineffectively.⁵² It never amounted to a jury and, moreover, the timing of its appearance rules out any possibility of its having been a formative factor in the creation of the Scottish criminal jury.

At this stage then, with the assize firmly established as the proper mode of trial in all major offences and enjoying royal favour, we must leave it for the present in order to study developments in civil procedure.

52. For examples of its operation see Douglas Book III, 11; Moray 212; Aberdeen Burgh I, 16, 110; Fasselot 273; Antiquities of Aberdeen & Banff IV, 85.

V. Early Civil Procedure

We have seen how the royal procedure of inquiry by means of a number of knowledgable and trustworthy men on oath was extended in the early thirteenth century to benefit landowners in dispute as to the line of their boundaries. Meanwhile information was no doubt reaching Scotland of the much more far-reaching employment in England of this device of utilising local knowledge. There it had first been conceded to his subjects by the sovereign in order to settle allegations of wrongful dispossession from land. This was effected by the assize of novel disseisin which was probably promulgated ^{by Henry II} at Clarendon in 1166. It was, as Pollock and Maitland say, "a new and startling principle",¹ for now royal protection was being thrown round those who were mere possessors and not necessarily owners of land, whatever their feudal rank. In so doing ^{the} ^{king} was encroaching on the prerogatives of the overlord, who was accustomed to determine such disputes in his own court as a matter of ownership, and usually by means of trial by battle. Some year later, perhaps in 1179, a more direct attack was made on ^{that} this institution in ^{as much as} that the defendant in such matters of right could have the question tried in a royal court by an assize of his neighbours instead of by battle. This form of inquest, perhaps because of the seriousness of the issue at stake, received the name of the "Grand Assize". ^{Moreover it was enacted} ^{that} then by the Council of Northampton in 1176 cases of disputed

1. P. & M. I, 146.

possession where the holder had died were ^{also} to be resolved also by an inquest to determine which of the contesting parties had the better right to possession.² For each of these remedies a means of invoking it was provided in a royal writ or breve, which by a stylised formula laid down its scope and procedure, and which was issued to complainants by the royal chancery. Glanvill, writing his Tractatus about 1188 ^{or thereabouts (or the unknown author of this work)} (~~if he was the author~~), gathered together these and many lesser writs and constructed around them his commentary.

If we discount the attribution of the Assize of David c. 35,³ the first reference in the law of Scotland to such remedies occurs in Alexander II's legislation of 1230, where any man complaining to the king or his Justice that his lord or anyone else has "dysceysit hym wranguisly and wykthoutin iugment" is to have the truth of his plea made known "throu leil men and worthy of the cuntre". If the "said assyse" find he spoke the truth, he is to be restored to his lands and the ejector fined. If the verdict goes against him, he is to be fined ten pounds.⁴ After a rather unhappy venture into English domestic politics on the side of the barons in their struggle against King John, Alexander had married John's daughter Joanna and thus became the brother-in-law of the young Henry III. Until 1233 the two countries were at peace. Around 1230, then, the times were favourable to the adoption

2. On these forms of procedure see ibid. I, 145-146. For a fuller account of the development of English Land law see Holdsworth III, Chapter I.

3. A.P.S. I, 325; Reg. Maj. Suppl. No. 20.

4. A.P.S. I, 400.

of English institutions and there seems no reason to doubt that this act was passed in that year as a tentative introduction of one English practice.⁵ Moreover, after a few years of friction, the outstanding differences between the two kingdoms were settled by the Treaty of York in 1237 and thereafter peace reigned until the War of Scottish Independence

Of explicit introduction of briefs of right and mortancestry we have no such record. But the act ascribed to David appears to regard both "breiffis of mortancestre and new dysseing" as already established,⁶ in laying down that they shall no longer be impleaded "be challenge of the party askand" but only by "an assyse of the gud cuntre", who are to be twelve in number. Their verdict, given according to the points of the brieve, is to be conclusive.⁶⁷ Obviously this act must be later than that of 1230, and its resemblance to the act of Alexander II chap. vi⁸ in emphasising the force and validity of a jury's finding in relation to the previous system, may plausibly suggest that its true date of origin is in the latter's reign soon after 1230. Another more explicit pointer to English influence is contained in the Leges Quattuor Burgorum, one of which is in form a response by burgesses of Newcastle, who state that when anyone is ejected from a tenement of land in the borough by one claiming to be heir of a deceased, possession is to be first restored to the occupier, whether he possessed "richtwisly or

⁵. It may be of interest to note that the two Kings spent the Christmas of 1230 together at York, according to Matthew Paris (Historia Anglorum I, 166).
⁶ S. (paco Cooper Cases xlii; "purport to be introduced").
⁷ A.P.S. I, 325.

unrichtwisly" until the matter is settled by law.⁷ & The procedure however is not detailed.

What exemplifications survive of this early process upon brieves? Little is to be found, apart from a few hints in chartularies, until a cluster of brieves and inquests around 1260. In 1233 there is mention of the raising of an action in the Sheriff Court at Traquair "per litteras regias" in order to have the title to the lands of Stobo determined. Before the action could be tried, however, the defender, the Bishop of Glasgow, agreed to pay to the pursuer a certain sum annually and the latter relinquished her rights to him.⁸ This can probably be considered the earliest example of the brieve of right. A more definite example of the operation of a brieve is to be found in 1254 when a widow appeared before the king and council at Stirling and admitted that ground which she had sought from the Abbey of Dunfermline in right of her late husband "per litteras regias de morte antecessoris" belonged to it, having been bestowed by King David, as a charter read out in the court proved.⁹ ^{ib} A few years earlier we gain our first knowledge of the terms of ^aroyal brieves of inquest from an example from Newbattle in which two sheriffs are directed to proceed to the pasture lands beside the river Leithen and take inquisition of its value "per sacramentum proborum et fidelium hominum patrie", its key-note being

8 V. c. xcix (A.P.S. I, 352). Dated by Mary Bateson to about 1270 (Borough Customs I, 232); see also Brieves 16.

9 G. Glasgow Epis. I, 111.

10 A.P.S. I, 425-6; Dunfermline 49; Cooper Cases 66.

a simple and direct form of wording.¹¹ Then in the cases around 1260 the jurors themselves emerge from their previous obscurity. Thus in 1261 we find the earliest example of what was to become much the most common of briefs, that of succession (later confused with that of mortancestor).¹² The Sheriff of Forfar is directed to inquire diligently and faithfully by the worthy and faithful men of the country whether five women, daughters of Symon, the late gatekeeper of the Castle of Montrose, are his legitimate and nearest heirs in that office and in certain land, and whether Symon died vest and seized in that land; and he is to send back the information, together with the value and extent of the land, to the king with the brief.¹³ This kind of brief, then, is to be a retournable one, upon receipt of which the chancery will grant warrant for the investiture of the heir in what is his due. Now the apex of the feudal pyramid is being elaborated. The king does not merely concede to his subjects the use of the procedure of inquiry in their own disputes, but as universal overlord he defends all his subjects in their feudal rights. But this is not pure altruism; he is at the same time consolidating his own position in the realm and diminishing that of his magnates. The jurors are now a single body who answer royal questions as one man, but their numbers are still indeterminate. Those named are the barons of seventeen neighbouring baronies, but also present are "magna pars

¹¹ 10. Newbattle 10. (a brief of extent) ^{12.} Infra 179.
¹³ 12. A.P.S. I, 100; Cooper Cases 77.

Thus in 1271 the Sheriff of Dunbarton, acting on a royal
writ, established by the oaths of fifteen men that
these sisters were the lawful heirs of their grand-uncle.¹⁵
This general means of determining the heir's identity had
no direct parallel in England.¹⁶

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proborum burgensium de Munros". But it is those who are "prenominati" who are sworn. One can imagine then that the most important men present formed the actual inquest, but they were not yet segregated from the bystanders and could freely draw upon their knowledge. By 1270 the retour of succession is assuming the standard form that was to become hallowed with the passage of centuries, asserting in turn that the claimant is heir legitimate to the deceased in the lands and of full age, that the deceased died vent in the lands by a certain tenure and that they are worth so much per annum.¹⁵ From 1262 there is an instance of what looks like novel disseasine, but is not named as such. The townspeople of Peebles complained that they had been dispossessed of their peat-moss and common lands by one Robert Cruik and the king ordered his Sheriff of Peebles to hold an inquest on the matter. This was done, and eighteen men on oath swore that Robert had interfered with the casting of peats and unlawfully took possession of a horse and some plants to a certain value and moreover had built a house for himself where the king's lieges used to gather.¹⁶ Herein lies one of the dangers of a jury system in the absence of firm judicial control. The men of inquest do not confine themselves to answering what they have been asked, but indulge in a spontaneous upsurge of denunciations.

If these few chance survivals are at all representative, the inquest procedure was still a highly flexible instrument and little

¹⁴ M. A.P.S. I, 102. For a simpler form of 1263, see ibid. (also Passalet 114)
¹⁷ M. A.P.S. I, 101; Cooper Cases 79; Innes 227. Passalet 191.
₀₅ ¹²⁷

had been taken from England except the broad principle that it should be made available to deserving subjects. Only the bribe of succession, which probably was largely, if not wholly, of native origin, was beginning to show early but unmistakable signs of ^{hardening into set forms,} rigidity. Even the names of English writs, when used at all, were applied very loosely. There was still a wholesome attitude of experimentation in the air. Thus a possible anticipation of the later assise magna of wilful error is to be found in a unique case in 1259 in which an inquest of twelve men swear before the two Justices of the Lothians that an inquest previously taken by the Sheriff of Peebles was performed with good faith and reason by reasonable men not open to suspicion.¹⁸ But two of the inquest make the reservation that one suspect person took part, namely a tenant of one of the parties, thus demonstrating that from the earliest times there has been no rule of unanimity in the Scottish jury system. Indeed that requirement, though commonly found in England in the thirteenth century, did not become a hard and fast rule until the reign of Edward III.¹⁹ / ^{Paragraph} Another case of novel character, but showing a practice which did not endure, is contained in the report of an inquest at Dumfries into the circumstances surrounding the killing of Adam the Miller by a certain Richard.²⁰ Thirteen named men and others relate how Richard was provoked by Adam's calling him a thief. A scuffle

¹⁸ 15. A.P.S. I, 98-99; Cooper Cases 74; Innes 225. See also infra ~~Ch. II. 184~~
¹⁹ 16. P. & M. I, 625-6. And see infra ~~Ch. II. 184~~ ~~Ch. II. 184~~
²⁰ 17. A.P.S. I, 97-8; Cooper Cases 58-9; Innes 223-4; McKechnie 11.

developed between them, in which Adam drew his knife and Richard in self-defence struck him with the side of his sword, whereupon Adam placed his arm round the sword and received a wound from which he died. Moreover they say that Richard was an honest man, but Adam was a reputed thief. There is no indication that Richard was on trial, and Cooper plausibly suggests that ^{the case} it repeats an English practice whereby a person charged with homicide might obtain a writ from the king charging the sheriff or coroners to inquire by an inquest whether or not the act occurred by misadventure. Upon their findings the exercise of the royal clemency would depend.^{18 21} If this supposition is correct, this case should be seen not as an irregular form of criminal process, (pace Dickinson in Aberdeen xxii n.4) but as one more instance of the king's applying the inquest principle to inform his mind preparatory to taking an administrative decision.

Even where the granting of an inquest to a subject might mean the diminution of their own rights, the kings from Alexander III were willing to oblige. Thus a common form of inquest concerns the mode of tenure by which a subject holds his lands and the return he makes for them. So twelve jurors found at Elgin in 1261 that Robert Spine held his garden there in right of his wife in return for providing the king with vegetables when he was in residence at the Castle of Elgin, and that the lands should descend to his wife's heirs.^{19 23} That brievé was raised by Robert, but the king himself might initiate proceedings

²¹
22. Cooper Cases 59; P. & M. 480-1. The inquest here appear to have given the king every encouragement to be merciful.

¹⁹
19. A.P.S. I, 99-100; Cooper Cases 77; Innes 225-7.

of inquiry when a subject's tenure was in doubt and he might be defrauded of his dues. But he was ready to abide by the decision of the good men of the locality.²⁴ Again, where the monks of Dunfermline denied that they were due suit for their lands to the court of the king's sheriff at Perth, a jury upheld their claim, apparently before the royal council, and the king declared them free of suit in perpetuity, a finding which, as we shall see might mean a considerable loss to the revenues of the sheriffdom and thus of the king.²⁵ And in a recently-discovered retour of extent we find the king in 1260 inquiring of an inquest of twelve the value of the lands of the Baridom of Carrick, which had fallen temporarily into his hands, the heir being an unmarried female child. These he later farmed to the Earl of Buchan at the exact value found by the jurors.²⁶ It is perhaps not too far-fetched to see in these proceedings the reality of the mediaeval political ideal of the constitutional monarchy, which the absence of any institution comparable to a modern parliament might lead us to discount. Another noteworthy feature is the coming together of both barons and burgesses on the one inquest,²⁷ the rivalry between town and country dwellers, leading to the virtual ousting of the sheriff's writ from the burghs, being a later development.²⁸

- ²⁴ A.P.S. I, 98; Cooper Cases 73-4; Innes 224-5 (held at Lanark).
²⁵ Dunfermline 51; A.P.S. I, 426; Cooper Cases 71.
²⁶ Milne: "An Extent of Carrick in 1260" (S.H.R. xxxiv, 46).
²⁷ As in the Montrose, Dumfries, Elgin and Lanark inquests.
²⁸ infra 74

By the close of the reign of Alexander III, we may conclude that a system had been founded whereby decisions in matters of civil and criminal law were left to trustworthy local people and underwritten by the monarch as a matter of course, even against his own interest, and that ~~even~~ in administrative matters ^{too} he habitually allowed his actions to be guided by their findings. Alexander II and III were very much sovereigns under and not above the law. But as we shall learn, the very closeness of jurors to local strifes was their weakness, as well as their strength, for it exposed them to pressures from partial interests, which the various protections thrown round them scarcely sufficed to restrain. / ^{Par.} Meanwhile the halcyon days of the Alexanders, looked back to with such regret by the chroniclers, were to be replaced by the disorders of the long War of Independence. English writs, though they were not adopted indiscriminately in Scotland, must already have been very familiar there, in view of the many families who held land in both countries, and who might thus come in contact with the procedure of both systems. ²⁹ Indeed in one instance the Sheriff of Lanark in 1262-3 conducted an inquisition as to whether a certain landowner was a minor in response to a precept of Henry III of England. ²⁶ ³ In the so-called "great cause" Edward I drew upon barons from both Scotland and England to help him to determine the succession to the throne of Scotland, but their number is very uncertain and whether they

²⁹ 29. E.g. Bain I, Nos. 2487, 2681.

³⁰ 30. Bain I, 2677. See McKechnie 13 for further examples.

were arbiters, auditors or advisers is equally in doubt.³¹ Men from both countries had already been employed under the laws of the Marches to perambulate the borders between the two countries.³² During the English occupation of Scotland the use made of the jury by the Scottish kings was continued by Edward I and II. Thus on complaint by the people of Galloway that they were suffering under an ancient and iniquitous law recently revived by the great lords, the king ordered that his lieutenant and chamberlain should make inquiry into the law.³³ Brieves of succession continued to be returned.³⁴ Criminal trials were held in Scottish towns under commissions of gaol delivery, but probably under a procedure of trial not differing much from that already in use in Scotland.³⁵ The English king, like the Scot, informed himself by means of an inquest of all he needed to know in administering a turbulent occupied territory, such as whether a man was loyal to him³⁶ or was communing with the enemy.³⁷ It was not the purpose of the English would-be overlord to wipe out all traces of Scottish law. Indeed he recognised its independent existence and ordered that its rules be collected and written down, except in so far as "against God and reason".³⁸

After the virtual securing of Scotland's independence at

31 27. See "Brus versus Balliol, 1291-1292" (S.H.R. xvi, 1).

32 28. Bain I, Nos. 832; 1699.

33 29. Bain II, No. 1874.

34 30. Bain II, No. 822.

35 31. Bain II, No. 1689.

36 32. Bain II, Nos. 1436, 1457.

37 33. Bain II, No. 1619.

38 34. Bain II, No. 1691.

Danneckburn in 1314, the time must have seemed ripe for the introduction of a number of reforms to improve the machinery of justice, including the system of briefes. Among a series of measures reliably dated to 1318 is one laying down that in briefes of right and of mortancestor and of novel disseasine defenders should be given time to consider their defences.³⁹ Another declares that no-one shall be ejected from his holding except under an appropriate breve of the king.⁴⁰ Another regulates the position where several persons are claiming to have been disseised in turn from the same property.⁴¹ The breve of mortancestry is extended to benefit the grandchildren of the deceased, this being one reform for which English inspiration can be claimed.⁴² It is clear then that the system of the serving by inquests of briefes sought by private citizens to defend their rights was thoroughly established and being more and more closely regulated.⁴³ The collections of briefes to be found in the Ayr MS, almost certainly of the reign of Robert I, and in the later Bute MS and Quoniam Attachamenta serve to confirm this.⁴⁴ To the early briefes many references are also to be found in Regiam Majestatem, a work to which we have so far made little reference. The reason is that we have been concerned to establish a tenable chronology of events. Some of the evidence used may itself have been of doubtful

³⁹ 38. A.P.S. I, 471.

⁴⁰ 36. Ibid. I, 473.

⁴¹ 38. Ibid. I, 470.

⁴² 38. Ibid. I, 472.

⁴³ 39. See on this Briefes 27 where Cooper professes to see in these reforms a general movement towards simplicity and a discouragement of chicanery. See also McKechnie 15. It was not until 1400 that reforms of comparable scope were introduced.

⁴⁴ 40. See Briefes again.

Its contents, in so far as they were effective at all, did not all necessarily take effect at one time, even though at one unknown date they were gathered together.

✓ Its contents, in so far as they were effective at all, did not all necessarily take effect at any one point of time, even though at one unknown date they were gathered together.

dating, but it is suggested that Regiam Majestatem is in this respect quite useless. This is not just because of the continuing differences of opinion as to the date of its compilation,^{44 45} but simply because it is a compilation and one made up from many sources. ✓ We are only interested in rules that were effectively put into force and it can seriously be doubted whether much of Regiam Majestatem, especially many of the Glanvillian passages, were ever live law in Scotland, despite the later veneration given to them. The Regiam is only of assistance to us in containing what the later Middle Ages believed to be the epitome of Scots Law and used to justify their own practices.

Enough has been said to demonstrate that, in the words of Pollock and Maitland, "we have here a plastic institution, which can assume diverse shapes in Normandy and England and Scotland".^{42 46} It is now time to consider separately the various courts which helped to mould it in Scotland and the various forms which it ^{assumed} took.

⁴⁵ 41. See Cooper Reg. Maj. 45 (later years of Alexander II); Richardson, 67 Jur. Rev. 162 (after 1240); Duncan, 1961 Jur. Rev. 216 (1318-1400).

⁴⁶ 42. P. & M. II, 625.

EXCURSUS

A Note on the Terminology of the Jury

The various terms used to describe a body of laymen employed to determine questions in courts have been the subject of some rather inconclusive observations. Dickinson noted that in the Pipe Sheriff Court of the early sixteenth century "Inquisitio" seemed to be reserved for the briefes of civil law and "assise" for criminal proceedings, though frequently, when a variety of cases were heard by the one jury, though not necessarily both civil and criminal, their names were headed "Nominum Inquisicionis et Assise".¹ But in his more recent work on the Aberdeen burgh records the same author admits to finding no trace of this distinction there at the beginning of the fifteenth century.² Indeed it has been noted that towards the end of the century, when a jury is called to serve briefes, it is described as "assise ad inquisicionem".³ It will be suggested that inquest was always confined to civil proceedings, while assise was used in criminal proceedings, but loosely also as to civil, the latter practice disappearing in the seventeenth century. This would accord with what has been suggested to be the course of development of the jury.

The inquest or "inquisitio" must clearly refer to those to whom

1. Wilsa c1
2. Aberdeen c1500 n.1
3. Aberdeen MS Burgh Records Vol. VI, 614, Vol. VII, 180 (1490). One even finds the expression "Assise Inquisicionis" ibid IV, 321 (1344)

questions are put. David "inquirere fecit" of the men of Gumbrie.⁴ Such a procedure becomes known in time as an "inquisicio". Thus William relates that he was instructed by the Pope "ut facta diligenti inquisicione, quod iustum esset inquirerem".⁵ By the time of the surviving records from c. 1260, "inquisicio" is still something that is "facta"; but there is mention of those who "iure inquisicionali interfuerunt" which may mean who were present at the taking of inquisition or less probably who were among the inquest.⁶ The men of the inquest are still thought of in the thirteenth century as individuals and when they are referred to it is as "iuratores"⁷ or "sentatores"⁸ (suits of court). So persistent are legal forms that even in the time of Balfour, and later Stair, the style of briefes implies the questioning of individuals, those who best know the truth.⁹ But in common usage, and then in court records, "inquisicio" comes to mean those of whom inquisition was taken, considered collectively. In 1398 a man is stated to have been convicted "per unam inquisicionem vicinorum suorum".¹⁰ By the second half of the fifteenth century a jury of fluctuating numbers and composition is a normal part of burgh administration and it is referred to as the "inquest"¹¹ or corrupted

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4. A.R.S. XII, 1 etc.
 5. A.R.S. I, 239 (1204)
 6. A.R.S. I, 99; Aberbrothoc Vetus 332 (1286).
 7. DunCormline 111 (1231)
 8. Aberbrothoc Vetus 332
 9. Balfour 644 et seq. Stair IV, 111, 5 et seq.
 10. Aberdeen 22
 11. Frentwich (from 1470) passim; Ayr MS Burgh Court Book 1426-1476.

to the "quest".¹² In barony courts too, where the functions of the jury were more civil and administrative than criminal, it was usually referred to as the inquest.¹³

At times the terms "inquest" and "assise" appear to be used completely interchangeably. Thus in a contested special service at the Spynie Regality Court judgment is given "be the mouthe of J.G. chanceler of the said assyse, in name of the hault inquest".¹⁴ At the trial of Hay of Dalgaty in 1598 an "Assise" is summoned so that the accused may be put to "the knowledge of an Inqueist".¹⁵ Even Sir George Mackenzie, who normally reserves inquest for civil proceedings and assise for criminal, when addressing the Justice-Court on the privilege of trial by peers, uses first one and then the other.¹⁶ Yet these remain occasional lapses. In a well-kept court record, such as that of the Regality of Broughton, the distinction is observed scrupulously, the jury being headed "assise" where they try criminally and "inquisitie" where they return a writ. And where one jury performs both functions both terms are used.¹⁷ The act of 1471 may seem to run counter to this in as much as it appears to be directed at providing a procedure whereby the errors of juries serving writs could be rectified by the Council and yet both assise and inquest are used in

12. Pachlen (from 1456) assise (where "assise" = corrupted to "ays" = is used apparently interchangeably with "quest")
13. Garrauth gairin. But for actions of Bloodwit "assise" was latterly used. (ibid. vol. n.5)
14. Spalding Club Miscellany II, 140.
15. Pitcairn II, 49
16. Justiciary Records I, 207
17. Thus "Assise Archibaldi Toddie et Inquisitie Jacobi Craufurde" (Garrauth 140)

this connection.¹⁸ But the passing in 1479 of an act specifically "touching the Reformation of false assises passed vpon criminale assises" and reaffirming an older procedure for the punishment of juries wilfully erring in their verdicts,¹⁹ seems to suggest that there was an ambiguity in the expression of the earlier act which led to uncertainty as to its scope and therefore that the words did have separate meanings at this time. The legal writers of the sixteenth and seventeenth centuries appear to reserve "inquest" for civil proceedings, while assise out of deference perhaps to the usage of their readers they apply to both civil and criminal juries.²⁰ But Mackenzie, while complying with this in saying "the proper Acceptation of the Word Assise, as it is now determined by Custom, is to signifie those who are chosen by our Law to determine, either in Civil, or Criminal Cases, the matter of Probation", used "inquest" himself in relation to civil procedure.²¹

Assise is derived by Skene and Mackenzie, and probably correctly, from the French and means originally a session, being associated with "assises".²² The Assise of Clarendon would be primarily the assembly there and only secondarily the enactment it produced. In Scotland too a single act was an assise.²³ The Chamberlain was directed to inquire

18. A.P.S. I, 100

19. A.P.S. I, 111

20. Mans Major V. 12.; Snathiswode 29-31; Halfour 287-8; 418 et seq.; Mackenzie: The Institutions of the Law of Scotland 231.

21. Matters Criminal, II. tit. 1; see note 20

22. D.V.S. n.v. "Assise"; Matters Criminal loc. cit.

23. Abrahamson Vetus 163; Dunfermline 238

into the observance of the "assise Pauls Vinu et Carvisio".²⁴ The Assise Regia David were all the acts of David's reign, though sometimes in translation the form appears not to be recognised as plural. The same name was applied to a smaller assembly who sat together to determine an issue. From the first they were a team and are referred to by this collective name.²⁵ Their finding was a clear-cut verdict and not information extracted from individuals on which others might act.

Although "juratores" is used at an early date, the term "jury" never took root until about 1800. Before then the occasional writer used it when addressing readers wholly or partly English.²⁶ Hume was the last Scottish writer to use "assise" consistently. Of his successors, Alison used both and Burnett preferred "Jury".

24. A.P.S. I, 630, 695.

25. "put him on a gud and lell assyse and the assyse sul mak hym clene"
(A.P.S. I, 400).

26. S.H.R. xix, 271; Innes: *Idem Juris Scotici*; Bankton IV, xxviii, 1

CHAPTER TWO

I. Judicial Structure

Before embarking on a discussion of the role played by the jury in various types of court, it may first be useful to give a brief outline of the judicial system of Scotland in the Middle Ages and after, and of the office-holders who operated it. Lord Cooper, with some justification, described this subject as "a rather chaotic welter of ill-defined and overlapping jurisdictions".¹ However, in one of Maitland's celebrated epigrams, "Dark ages are only dark because they are dark to us"; and we must do our best to find an intelligible pattern in what at first seems all obscurity and confusion. We have to believe that there was once an orderly plan for the administration of justice, though it may not have been continuously and consistently enforced, and that that plan is implicit in the records and awaiting re-discovery.

In mediaeval constitutional theory the sovereign was the sole fount of justice. William the Lion is commended by Giraldus Cambrensis "for upholding justice everywhere with equity".² A king, said St. Thomas Aquinas, should "be fired with zeal for justice, seeing himself appointed to administer justice throughout his realm in the name of God".³ Since he could not do so everywhere in person (though many monarchs did make at least token appearances as judges),⁴ he would delegate his judicial power

1. In his David Murray lecture "The Dark Age of Scottish Legal History 1350-1650" (in Selected Papers 219, 234).

2. Anderson II, 401.

3. De Regimine Principum Cap. XII (trans. Dawson); Cf. Reg. Maj., Preface.

4. e.g. James IV. See Mackie: King James IV of Scotland 51, 200. Cf. A.P.S. II, 208, 225.

to trustworthy local representatives. The feudal ladder of tenure provided such an organisation. With grants of land, the king would also convey certain of his rights to administer justice.⁵ Courts were of the essence of feudalism. The court, says Dickinson, "converts the group into a community".⁶ Everyone was bound to attend the court of his feudal superior. In this way, such was the theory, justice would be dispensed throughout the land by persons or corporate bodies owing their position to the favour of the king. If they dealt unjustly, the wronged party could appeal directly or indirectly to the royal source. In addition, there were royal representatives in the persons of the Sheriffs scattered over the country, usually in strategic positions guarded by royal castles. They were both administrative and judicial officials, and were bound to exercise oversight over the lesser jurisdictions within their sheriffdom, as well as holding their own courts. Burghs too were originally local centres of royal influence, established at first as trading-centres around castles by the king. They too had their courts; and in the beginning their officials, prepositi or ballivi, were appointed by the monarch. Finally, itinerant justices acted as the direct representatives of the king in punishing serious crime and in supervising the sheriffs, while the chamberlain was the overseer of the burghs and heard appeals from their courts.

Whether such a judicial system was ever contemplated as a whole

5. e.g. Aberbrothoc Nigrum 539 (confirmation of charter of William).
 6. Dickinson: "The Administration of Justice in Mediaeval Scotland"
Aberdeen University Review Vol. XXXIV, 338.

may be doubted; but each branch of it was at least at some period devised with the object of disseminating royal justice throughout the land, so that a common purpose underlay and united the whole structure. If all these parts of the judicial machine had operated efficiently, the law would have been administered effectively and judges themselves would have been answerable to a higher authority. Unfortunately, however, for a variety of reasons, achievement lagged far behind aim. We must now see how far each court fell short of, or diverged from, the ideal.

Although the distinction between civil and criminal jurisdiction was recognised at an early date,⁷ probably soon after 1200, it was imperfectly defined and had little bearing on the competences of the various courts, most of which exercised both forms of jurisdiction, and it can accordingly be disregarded for our purpose. We begin with the Sheriff Court as being perhaps the keystone of the edifice and formerly, as today, a court with the widest variety of functions.⁸ Sheriffs were first appointed in the reign of David I as part of that king's policy of strong central government and were usually attached to royal castles. As the king's agents they were responsible for the good government of their areas and saw to the collection of taxes, the raising of armed forces, and, at first, to the enforcement of particular laws such as those on trade.⁹ In their judicial capacity they tried actions arising

7. Reg. Maj. I, 1 "Placitorum aliud est criminale, aliud civile".
8. On the Sheriff-Courts generally see Stair Soc. Introduction, Chaps. xxv, xxvi; Fife Introduction, *passim*; Stair Soc. Sources Chap. 10; Malcolm; "The Office of Sheriff in Scotland: Its Origin and Early Development". S.H.R., xx, 129, 222, 290.
9. e.g. A.P.S. I, 86, 88, 89; II, 36.

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out of "wrangis" of all kinds, contractual and delictual, and presided at the serving of briefes.¹⁰ In criminal matters their jurisdiction was limited to minor cases of "trublonce" and to murder and theft, but only where the offender was taken in flagrante delicto. They prepared for the coming of the itinerant Justices by taking up dittay and presenting criminals. They also provided an appellate tribunal from inferior courts within their territory and were required to do justice where such a court had failed to do so.¹¹ Trials by ordeal or battle might only be held in their presence. Sheriffs were appointed by the king and remunerated by the fines and caceats, which they exacted and sometimes also by lands attached to the office. They had to keep careful accounts which were examined annually in the Exchequer.¹²

Herein lay the seeds of corruption for the office. It became a profitable prize to be competed for by local magnates, as well as being in its nature a source of power which was capable of abuse. Once a nobleman had attained to the office, he would try to keep it within his family. He would bequeath the charge to his heir and this being connived at by the king, the office would become hereditary. In time, despite legislation to the contrary,¹³ sheriffdoms were openly granted "in fee and heritage".¹⁴ Sheriffs now being usually the most powerful nobleman in the district were disinclined to concern themselves with the petty

10. Reg. Maj. I, 3.

11. Reg. Maj. I, 3, 5; e.g. Aberdeen Epis. I, 145.

12. D.V.S. s.v. Schireff.

13. A.P.S. II, 43; Observations James II, Parl. II, c.44.

14. "quhilk is the cause of great enormities and wranges" Skene: D.V.S. s.v. Schireff. See e.g. Cawdor 215.

details of litigation and would appoint deputies to do the work of the office,^{14a} a suitable arrangement no doubt being made for sharing the emoluments. Since sheriffs were such influential men in their areas, it would often happen that they had a direct or indirect interest in the outcome of a process. To avoid the suspicion of bias sheriffs in hac parte would be appointed on request by the King's Council to hear the particular case. This originally laudable practice was however itself abused and appointments were made on mere petition so that by evading the normal court procedure, an unfair advantage over opponents was obtained or collusive actions contrived. Supervision of the sheriffs was in theory exercised by the justice on eyre, who at the close of the proceedings was authorised in 1487 to inquire of an assize whether they had faithfully discharged their duties and to punish those who had not.¹⁵ Despite frequent admonitions that they should do justice "to rich and pur but fraude or fauer",¹⁶ most of them acquired a reputation for abusing their office which is testified to in literary as well as legal records.¹⁷ The Justices of the Peace appointed on the English model by an act of 1609^{17a} were in part aimed at restraining the sheriffs, whose consequent opposition to them led to their relative ineffectiveness.^{17b} The abolition of heritable jurisdictions in 1747 provided the opportunity

14a. This was made a matter of injunction by an act of 1540 (A.P.S. II, 358).

15. A.P.S. II, 177; cf. I, 571 (1398) Skene: D.V.S. s.v. Iter.

16. A.P.S. II, 8; S.H.S. Misc. II, 37, 42.

17. A.P.S. II, 250; Liber Fluscardensis I, 392 et seq (Historians of Scotland Series); Henryson: "The Tale of the Sheep and the Dog", 1258-1264.

17a. A.P.S. IV, 434.

17b. Stair Soc. Introduction 40-41.

for overdue reform. The dispossessed nobles and their appointees were replaced by practising advocates who were still styled sheriff-deputes, though now holding their commissions from the Crown, and who acted in most matters through local substitutes. These at first were usually legally unqualified, but in the course of the nineteenth century they became effectively the sheriffs, being appointed by the Crown from advocates or ^(less commonly) solicitors, while the sheriff-deputes, now styled sheriffs-principal, for the most part concern themselves with appeals from the sheriffs-substitute and, except in two cases, are permitted to continue in private practice.

The Justice-Court was unsatisfactory in a different way, namely, by reason of the infrequency of its circuits round the sheriffdoms.¹⁸ Like the Sheriffs, the Justices were permanent royal appointees, but being officers of the king's household were more amenable to his wishes. Their number and areas varied and some had power to appoint deputies, but from the early 14th to the 16th centuries there were usually only two, one each for the territories north and south of the Forth. Each was bound to travel with his entourage twice a year round the head-towns of each Sheriffdom in his region and there hold court, at which all the king's tenants-in-chief within the shire were bound to attend. The usual times were "on the grass and on the corn", in spring and autumn. This rule, however, seems to have been more honoured in the breach than

18. On Justiciary Courts in general see Stair Sec., Introduction, Chap. xxxi; Justiciary Cases, Introduction; Justiciary Records I, Introduction.

the observance, to judge by the frequent repetitions of it in statute.¹⁹ The justices' main function was to try the pleas of the crown, murder, rape, robbery and arson.²⁰ To these were added in the sixteenth century numerous statutory offences, some of a rather trivial character.²¹ Then too cases of treason, formerly tried in the Court of Parliament, were heard by them. Originally they also had a civil jurisdiction in questions appealed from the sheriff-court, but in the fifteenth century it became the practice to "false the doom" direct to the Lords of Council. Often in the thirteenth and fourteenth centuries they presided at perambulations of boundaries.^{21a} In 1524 the court was put on a semi-permanent basis by an act requiring that the justice or his depute remain continuously in Edinburgh or with the king.²² By this time the office of Justice General had been created and had become a hereditary title of the Earls of Argyll, which they retained until 1628 when the then Earl voluntarily limited it to his own lands.²³ With the establishment of a central court, where offences could be tried more promptly and professional lawyers were available, an increasing number of cases from all over the country were dealt with there. Justice-ayres became irregular²⁴ and the remoter parts of Scotland experienced an almost complete break-down in law and

19. A.P.S. II, 32, 35, 170, 225, III, 458, 577; cf. Quon. Att. c. 79.

20. A.P.S. I, 375, 711; Dalfour, Practicks 567; but see also the fuller list in Reg. Maj. I, 3. As to treason see the comments of Lord Clyde in A.D.C. (Stair) xxxiv; also Stair Soc. Introduction 340.

21. e.g. slayers of red fish, cutters of green wood, troublers of the kirk (Dalfour loc. cit.)

21a. e.g. Aberbrothoc Vetus 164; Dunfermline 238.

22. A.P.S. II, 286.

23. A.P.S. V, 77; R.P.C. (2nd) II, 364.

24. Cf. A.P.S. III, 458.

order. In 1587 a comprehensive measure was enacted, designed to remedy the situation.²⁵ Ayres were to be held twice a year in April and October in every shire by the Justice General or deputies appointed by him or by ad hoc justices appointed by the king from the Lords of Session or "weill experimentit advocattis". The country was divided in four quarters and two justices were assigned to each. New arrangements were also made for the taking up of dittay locally. This was a long step towards the creation of a professional judiciary in criminalibus such as had existed in civilibus since 1532. The appointment of the Justice Cler after 1532 from judges of the Court of Session was a smaller step in the same direction. Under Mary and James VI justices in hac parte were also frequently appointed from the ranks of sheriffs, trusted noblemen, and provosts and baillies of burghs, who were given the responsibility of stamping out rebellions, feuds and witchcraft by holding special criminal courts.²⁶ This was a dangerous practice, vesting, as it did, the fullest powers in local men who lacked the impartiality that might be expected of itinerant justices and there is no doubt that some of the great magnates used it to score off their clan rivals. Finally in 1672 the trend towards professionalism was completed, when recommendations by commissioners on the organisation of the supreme courts, civil and criminal, first made and ratified in 1670 in the form of Articles of

25. ibid. 459.

26. e.g. Chiefs of Grant III, 116; Spalding Club Miscellany I, 83; Ayr 52; A.P.S. III, 411 (Earl of Huntly). For the withdrawal of an excessively wide commission see ibid. 357.

Regulation, were enacted with some amendments in statutory form.²⁷ The justice-deputes were replaced by five of the Lords of Session, who with the Lord Justice General and the Lord Justice Clerk were to constitute the High Court of Justiciary. They were to hold session in premises of their own, four members forming a quorum, and to go on circuit in pairs once a year visiting certain appointed towns. Their procedure was also minutely regulated in articles which we shall have frequent occasion to refer to.²⁸ After 1747 the circuits became once again twice in the year.²⁹ Since 1887 all the judges of the Court of Session have also been Lords Commissioners of Justiciary.³⁰

The ineffectiveness of the justice-ayres was to some degree made up by the regality courts.³¹ These were the feudal courts of certain great magnates, lay or ecclesiastical, to which the king had made over not only the usual minor civil and criminal jurisdiction of baron courts, but also his jurisdiction over the pleas of the crown, which normally was reserved to the justiciars. The baillies of such courts had the right to repledge or recall a man belonging to the regality from any other court to which he had been summoned on finding security that justice would be done in the regality court. This was a right which was exercised even against the royal Justiciars^{31a} and it often led to wrong-

27. A.P.S. VIII, 80. See also Justiciary Records II, 30.

28. A.P.S. VIII, 88. 29. Heritable Jurisdictions Act, s. 30.

30. Criminal Procedure (Scotland) Act, s. 44.

31. On regalities see Dunfermline Regality, Introduction; Melrose Regality I, Introduction; Stair Soc. Introduction, 377 et seq.

31a. Kelso 444. Fife Appx. C.

doers evading due punishment. Certain regalities, such as St. Andrews, Dunfermline and the Canongate, even enjoyed their own chanceries, from which briefs were issued to the same effect as those of the royal chancery. Some had their own justice-ayres which proceeded round the main centres of population, the baillies then being styled justices and assisted by such officials as coroners and macers. They were in fact little kingdoms, aping the organisation of the true kingdom from which they were derived, but almost independent of it. In the charters granted to monasteries in the twelfth and thirteenth centuries jurisdictional rights of the widest character were customarily conceded,³² but it was not until the fourteenth century that the concept of the regality emerged by name, perhaps, suggest Webster and Duncan, through the work of Bernard de Linton, Abbot of Arbroath.³³ Thereafter they grew in number and influence, often when the monarchy was weak being extracted from the king or regent or granted by him to win a noble's support. Thus they came to form a seriously divisive element in the nation, especially where a lay regality was inherited by a nobleman hostile to the king. In the sixteenth century various steps were taken to bring these petty kings to heel. If they failed to do justice in punishing rebels or those who received them or committing slaughter or mutilation, the royal sheriffs were authorised to put the laws into execution within the

32. e.g. "concedo et eis liberam curiam suam cum sacca et socco cum tolli et theme et infangendethf et ferrum et duellum fossam et furcas" (AberbrothocVetus 4, 1211-1214).

33. Dunfermline Regality, 29. Of the contrasting expressions "realitas" and "regalitas" to describe the king's domain and the lands outwith it (Moray 198). Also A.P.S. II, 19, 32.

regality.³⁴ James VI enacted that all grants of regality made during his minority or by his predecessors without the advice of parliament should be revoked.³⁵ After the Reformation some of the ecclesiastical regalities reverted to the Crown, while others came into the hands of the nobility. In common with other heritable jurisdictions, they were abolished in 1747.

Barony courts also "enjoyed a slice of the King's rights of public justice",³⁶ but of a lesser degree. Grants in liberam baroniam cum curia originally carried rights of life and death implied in the phrase furca et fossa.³⁷ As regalities emerged, which might include baronies within their bounds,^{37a} barony courts began to decline in importance. Their criminal jurisdiction became limited to "bloodwits" and other minor assaults and to offences affecting the good husbandry of the land, such as the cutting of green wood or allowing cattle to stray. Their punishments declined to mere fines. In civil causes small debts, actions of delivery and arrestments to secure payment of fines or sums awarded were most common. But perhaps the most useful function of the barony court was its acting as a common forum where all the tenants had a voice and could discuss with the baron measures necessary for the general welfare, such as the upkeep of ditches and hedges and the use of the mill. Barons usually appointed a baillie to act as presiding officer of the court, though this did not debar them from attending

34. A.P.S. II, 347, 372.

35. A.P.S. III, 441.

36. Carnwath xxxix.

37. Jus Feudale I. xii. 16; cf. Heritable Jurisdictions Act, 1747, s. 17 (20 Geo. II c. 43) On baronies in general see Carnwath, Introduction; Stair Soc. Introduction, 374 et seq.

37a. e.g. Morton II, 154 (Regality of Dalkeith).

themselves and sometimes presiding too. They might even, while presiding act as pursuer or prosecutor,³⁸ a practice justified by the fact that the act of judgment was in theory a function of the members of the court. Many baron courts appear to have fallen into decay, until an Ordinance of Cromwell ordered their revival on the model of the English courts of the manor. They were given jurisdiction in cases of contract, debts, promises and trespass, except where the title to land was involved; and permitted to make bye-laws for the administration of the barony and, where these were broken, impose fines and distrain goods.³⁹ This enactment appears to have given baron-courts a fresh lease of life,⁴⁰ though some soon declined again. Stair, minimising their importance c. 1680, points out that they had no power to enforce their decrees by harning (outlawry), that not being courts of record, they could not receive deeds for registration and that by the process of advocacy the Lords of Session were accustomed to "call up" processes, civil and criminal, from such inferior courts "not only upon incompetency, but upon intricacy and importance".^{40a} In 1747 they did not share completely in the general abolition of heritable jurisdictions, but were permitted a minimal authority in civil actions not exceeding forty shillings in value and in criminal cases of assault and battery, punishment to be restricted to a fine of twenty shillings or three hours in the stocks.⁴¹ This jurisdiction appears still to be valid, though long in desuetude.

38. cf. Carnwath 48-9.

39. A.P.S. VI 11, 816.

40. cf. Stitchill 1.

40a. Stair II. iii 63.

41. Heritable Jurisdictions Act, 1747, s. 17; Boyd 407 et seq.

Regalities and baronies were in feudal theory inextinguishable. Hence when they fell into the hands of the king, through, for example, forfeiture, they continued to be distinct entities with their own courts, independent of sheriff and justiciar. Stewarts and bailies were appointed by the king to administer such regalities and baronies respectively and their territories were known as stewardries and bailieries. They held courts in which those holding land within the area were bound to give attendance. Their offices often became hereditary in the course of time and then, the original reason for the annexation being forgotten, they became virtually regalities and baronies once more.

Standing in contrast to these entities to which the monarch had devolved some or most of his rights of jurisdiction, there were the burghs.⁴² These, it is now generally agreed, were established by a deliberate act as centres of royal influence and were very often associated with, and protected by, a neighbouring royal castle. To encourage settlement in such places special trading privileges were attached to them and the inhabitants, being directly subject to the king, were free of all feudal exactions, except for the payment of an annual rent to him for the land on which their buildings stood. Kings later generally converted this right into a claim to an annual lump sum exigible from either the community as a whole or a tax-farmer. Besides such royal

42. On burghs, see Aberdeen, Introduction; Mackenzie; The Scottish Burghs. Edinburgh. 1949. Stair Society Introduction, Chap. xxix. Dickinson: "Burgh Life from Burgh Records" Aberdeen University Review Vol. XXXI, 214. As to their financial organisation, see Ayr Burgh Accounts (S.H.S.) Introduction. Also, with caution, David Murray: Early Burgh Organisation in Scotland (2 Vols.) Glasgow. 1924, 1932.

burghs in the strict sense, there were others erected by lesser magnates, but always with royal approval. At first these were limited to settlements in the neighbourhood of monastic and other ecclesiastical houses, such as Old Aberdeen and the Canongate of Holyrood, but from the fifteenth century many were created as speculative ventures by barons. A class of burghs of barony then came into existence, with which the older foundations were contrasted as royal burghs. As their personal representatives in the burghs, the kings appointed prepositi or ballivi, officers who may at first have been subordinate to or even identical with the sheriff.⁴³ At an early stage, however, the burghs threw off the domination of the sheriffs and by, at the latest, the early fourteenth century, these magistrates were chosen from the inhabitants.⁴⁴ As the office of sheriff became more and more a hereditary feudal dignity, the burgesses fought to confine his writ to the landward areas.⁴⁵

Like all mediaeval communities, the burgh must have its court, of which all the adult males were members. This body met in various guises and under the presidency of various officers and its composition might differ slightly; but essentially it was always a mass meeting of the inhabitants with the purpose of seeing to the common good of the community. This might be achieved by passing particular ordinances, appointing individuals to special duties, such as tasters of wine or

43. On this debatable question see Aberdeen xix-xxi; on the varying use of these and similar terms see ibid. cii n. 11.

44. ibid. lxxx.

45. See e.g. Elgin 27; Ayr 40, 42; Inverness 166; Aberdeen Charters 41; Maxwell: The History of Old Dundee, 38, 429.

inspectors of weights and measures, or merely discussing matters of common interest. But above all, the community gathering was a judicial body with power to punish those who disturbed its peace. Its jurisdiction was in practice confined to the lesser crimes, such as "flyting", "perturbacio ville", "pykrie", drunkenness and the like, which were usually punished by fines, though in the sixteenth century, as we have seen, commissions of justiciary were sometimes granted to burghs. In civil matters the usual briefes of mortancestry, tutory, idiocy and others were served in the burgh courts and the frequent boundary disputes were resolved. In time permanent councils emerged either from the inquests of these unwieldy bodies or from the guilds. Their members were to be appointed annually by the previous council,⁴⁶ though practice varied considerably from burgh to burgh. The whole community continued to meet at thrice yearly head courts. The magistrates were also appointed annually and by the council. They discharged the judicial business, with or without the help of a jury, until the end of the sixteenth century when juries gradually disappear from burgh courts.

Comparable to the Justiciar in his supervision of the sheriffs was the Chamberlain, who was supposed to visit the burghs on ayre once a year.⁴⁷ On this tour of inspection he had two main objects - to discover if the burgh was being properly administered by the magistrates and to hear appeals from its court or adjudicate on intractable local

46. A.P.S. II, 95 (1469).

47. On the Chamberlain-Ayre see Aberdeen cxlii-cxlv; Stair Soc. Introduction 392-3; S.H.R. xxxlii, 27.

disputes. As to the first, a list of seventy-eight Articuli Inquirondi in Itinere Camerarii gives some indication of the wide scope of the inquiry that was expected of the conscientious Chamberlain.⁴⁸ Presumably he was supposed to require the same standards of good management as he himself was accustomed to show in his primary duty, the purchase of necessaries for the royal household.⁴⁹ Thus at Ayr in 1425 we find him being requested by the community to view the Sandgate, a street which had recently been inundated by sand. This is done and Albany, the Governor, who on this occasion is with him, orders that the street be narrowed and the necessary remedial measures taken.⁵⁰ As a judicial officer the chamberlain heard appeals, both civil and criminal, from burgh courts, however trivial in nature. Cases might also be taken at the request of a litigant before the Chamberlain's court at first instance or remitted to it by the lower court. The evidence on these points however derives from one town, Aberdeen, over a short period of years and may not be typical. The Chamberlain also acted as presiding officer of the Court of the Four Burghs, a somewhat shadowy body which originally represented the burghs of Berwick, Edinburgh, Roxburgh and Stirling and seems to have determined doubtful points of law.^{50a} Later it was used as an appeal court from the Chamberlain Ayre and settled

48. A.P.S. I, 680-2 e.g. if lepers are secretly received in the town, if butchers buy animals other than healthy ones, if any keep strangers in their homes for more than a night and will not give security for them. See also ibid. 695.

49. S.H.S. Miscellany II, 32, 38.

50. Ayr, 79.

50a. A.P.S. I, 703, 704.

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disputes between the burghs, while its size was enlarged to include representatives of most of the burghs, though the old name was retained.^{50b} It eventually decayed and was succeeded by the Convention of Royal Burghs.

In the course of the fifteenth century a Lord High Admiral of Scotland was appointed, having jurisdiction over all matters to which seaman and merchants were parties and which arose out of the exercise of their trade and all offences committed by such persons. The Court of the Admiral sat in Edinburgh, but much of its business was discharged by admirals-depute, who were usually magistrates of sea-faring burghs. In imitation of it, the Regality of St. Andrews had its own admiralty court. In practice, however, the Admiralty Court did not succeed in exercising effectively such a wide jurisdiction, which would have encroached seriously upon that of the central courts and of the burghs. It fell into decay in the early eighteenth century and later its civil jurisdiction was merged with that of the Court of Session and its criminal jurisdiction with that of the High Court.^{50c}

Finally, as a kind of reservoir of justice, making up for the deficiencies of the courts, there remained the possibility of approaching the sovereign for an act of grace. But kings did not rule single-handed, but governed the realm with the assistance of trusted counsellors. In the twelfth and thirteenth centuries it is probable that they did act

50b. ibid. II, 246, 254.

50c. See Admirallatus, Introduction; Stair Soc. Introduction 346-7, 398-9. Macmillan: "The Admiral of Scotland" S.H.R. xx, 11; Beton: "The Vice-Admiral of Scotland" S.H.R. xx, 122. Macmillan: "The Scottish Court of Admiralty" (1922) xxxiv Jur. Rev. 38, 164. Boyd Book I. Martine: Reliquiae Divi Andreae 81 et sqq.

directly and personally in settling disputes, more often by arranging a compromise than by upholding one side or the other. But by the fourteenth century the duty of rendering advice to the king was being discharged by a number of still very fluid and overlapping committees, including "Parliament" itself, the precise relationship of which remains a matter for argument.⁵¹ Certain of these bodies were directed to hear disputes; at first, merely two auditors "ad audiendum et terminandum supplicaciones et querelas", later a larger "council general". Both were, it seems, regarded as emanations of parliament, but were unable to give a final judgement as parliament might, but only to make an order affording a remedy otherwise denied, such as ordering an inquest or settling interim possession. Parliament, as well as trying treason,^{51a} remained the ultimate court of appeal, to which, in theory at least, a doom might be falsed by way of baron, sheriff and justiciar. But more often redress was sought from it directly, such was the distrust of the territorial judges. When after the return of James I from captivity in 1424, an attempt was being made to repair the machinery of justice, it was enacted that complaints should not be laid before parliament which properly belonged to lower judges, except "gif the juge refusis to do the law evinly; then "the party plenzeand sall haf recourse to the king".⁵² The exception proved a very wide loop-hole and in 1426 the

51. On the central courts generally see Stair Soc. Introduction, Chaps. xxiii, xxiv; A.D.C. (Stair) Introduction; Hanney: College of Justice, Edinburgh, 1933, etc.

51a. On this see Maitland Thomson: "A Roll of the Scottish Parliament"

S.H.R. ix, 25.

52. A.P.S. II, 8.

first central court of appeal with fixed sittings was appointed to meet thrice a year to handle all the judicial business sent to the council in any guise.⁵³ In the next hundred years various schemes of such auditors of "querrellis" were devised with variable success. But the existence of some kind of central court, however defective, only served to encourage litigants to bring their causes before it, circumventing the lower courts. Finally in 1532, after much experimentation, a permanent College of Justice was set up, the members being the Chancellor, the Lord President, fourteen ordinary Lords, lay and clerical, and an indefinite number of extraordinary Lords. The Privy Council, however, though freed from day to day judicial business, continued to take an interest in the working of the courts as in every other branch of public administration. As Hill Burton well puts it, "The Council is the supreme rectifier, going by the law where there is law, and making law where there is none".⁵⁴ It did not hesitate to direct a lower court, and even the Court of Session, to hear a case, where it appeared that justice was being denied. The justices often turned to it for advice, when they were confronted with a difficult point of law or procedure.⁵⁵ Indeed, after the Restoration its open interference in original cases was one of the most unpopular aspects of royal despotism.⁵⁶

Beyond the secular arm and independent of it, there were the

53. ibid. 11.

54. R.P.C. (1st) II, xxvi.

55. e.g. Argyll 17 (as to the effect of a verdict recommending the remission of punishment); Justiciary Cases 78 (as to appropriate punishment).

56. See Fountainhall 298, 527; Erskine of Carnock's Journal, 54.

ecclesiastical courts.⁵⁷ These are of only indirect interest to us, but were of great importance in mediaeval Scotland, engrossing as they did in their jurisdiction many subjects which are now dealt with by the civil courts. They had an unchallenged authority over all questions of testaments and succession to moveables, testate or intestate, of the constitution and validity of marriage, of legitimacy and defamation, as well as over purely ecclesiastical matters such as benefices and clergy discipline. Besides, obligations fortified by an oath usually came before them and, where secular justice was suspect, they were often submitted to voluntarily by litigants. Before the Reformation jurisdiction was vested in the Bishop of each diocese, who appointed one or more Officials, sometimes assisted by Commissaries, with a limited commission, to exercise his judicial power in a court which in Scotland was usually called the "Consistorie" or "seinzie". After the Reformation, Commissary Courts were set up, staffed by Advocates and Solicitors, that at Edinburgh having sole jurisdiction in matrimonial matters and acting as an appellate tribunal, while others scattered throughout the country, dealt mainly with testamentary business. In the course of the nineteenth century the jurisdiction of the Edinburgh court was merged in the Court of Session and that of the others in the local sheriff court.

57. On the church courts see Stair Soc. Introduction Chap. xxvii; Liber Officialis Sancti Andree. Abbotsford Club, Edinburgh, 1845 - Preface. Such courts must be distinguished from temporal courts belonging to lands owned by bishoprics and monasteries.

II. Burgh Courts

Having surveyed, though necessarily in a somewhat cursory fashion, the development of the judicial structure of Scotland, we are now in a position to discover what role, if any, was played by the jury in the procedure of its various tribunals. In most courts a jury was to be found, in the widest sense of a group of laymen gathered together to discharge collectively some function in the administration of the law. But its composition and duties varied widely from court to court and from period to period. Its authority too was a variable quantity. To generalise, one might say that it was highest where the status and dignity of the court was lowest and that it tended to diminish as judges became men of some experience and a fixed procedure was elaborated.

Of the role of the jury in the burgh courts we have a good deal of evidence, since the records of more than a score of burghs prior to the seventeenth century have been printed. Unfortunately, most of them are no earlier than the sixteenth century and only Aberdeen possesses an almost unbroken series from 1398, together with one unique court roll of 1317.¹ Two documents on the conduct of the Chamberlain Ayre throw light on the common standards laid down for the administration of burghs in the early fourteenth century.² The Leges Quattuor Burgorum are also a valuable record of burgh practice, although their date has been convincingly shown to be no earlier than the thirteenth century and not

1. Printed in Aberdeen: Aberdeen Burgh (2 vols.); Spalding Club Miscellany V; Extracts from the Records of the Burgh of Aberdeen (2 vols.) (S.B.R.S.)

2. "De Articulis Inquirendis in Itinere Camerarii Secundum Usam Scocie" A.F.S. I, 680; "Modus Procedendi in Itinere Camerarii infra Regnum Scocie" ibid. 693.

of the reign of David, as some texts claimed and certain historians believed.³ The scope of their operation is also a matter of conjecture. In (large⁷) part they seem to be derived from the town custom of Newcastle by a process of borrowing of ordinances which was common in these times.⁴ They purport to apply in the four burghs of Edinburgh, Roxburgh, Stirling and Berwick, but to what extent they were adopted in other towns is uncertain.

The burgh was a small and tightly-knit community, jealous of its rights and suspicious of strangers. It was possible for its assemblies to reflect this compactness by their inclusion of all the burgesses of the town, that is to say, of a preponderance of the adult male inhabitants. All burgesses were entitled to be present, though as we shall see, it was only at certain courts that they were bound to be present. To give suit of court was an obligation as much in the burghs as in the baronies. At first sight, this is a little surprising. Burgh organisation is often regarded as being outside the feudal system,⁵ or at least an anomaly in it, where suit of court is a universal obligation. But in fact the court in the sense of a common meeting-place of a community seems to be an institution antedating and more widespread than feudalism. One might almost say that feudalism is an elaboration of the court principle for the needs of a land-based economy. Burghs then, being communities, must

3. ibid. 333; Mackenzie: op. cit. 21-31.

4. ibid. 28.

5. e.g. "there was no room for the government of towns in the feudal machinery" - Lord Acton, cited by Mackenzie, op. cit. 96.

have their commune forum; and indeed as compact entities with clear common interests and at the same time many occasions for conflict between individual's interests, they had a particular call for a court. The main or head courts were to be held thrice yearly, which it "behofis ilke burges for to be at".⁶ This rule of the Leges Quattuor Burgorum appears to have been followed at Aberdeen. The suits were called ("sectis vocatis"), the names of those absent recorded ("absentes patent in rotulis")⁷ and fines later imposed upon them ("Summa absentium a curia capitali tenta post festum beati Michaelis - xvs. ii d").⁸ The same "Lex" imposes a fine of fourpence for such an absence, unless the absentee was lawfully excused through being sick, out of the country or attending fairs. This fine is to be found too in the Aberdeen records;⁹ the forms of essonzie are not mentioned, but are commonly accepted elsewhere.¹⁰

This duty of attendance was owed to the curia capitalis or head court, a periodic meeting of greater solemnity than the normal, held usually three times a year and to be found in the sheriff, barony and regality courts, as well as in those of the burghs. At one of the burgh head courts the prepositus (or alderman) and baillies were appointed for

6. L.O.B. c. xl (A.P.S. I, 340).

7. Aberdeen 212, 220; cf. Peebles 111.

8. Aberdeen 210 (but apparently only if summoned (ibid. 216; L.O.B. c. xl) differing from the Sheriff head courts.)

9. "In primis quod summoniti personaliter ad curias seu ad primas prepositi et non comparentes ante ultimam vocacionem sectarum, nisi legitimus habeant essonius, soluent iiii d. sine remissione" ibid. 216. Cf. Aberdeen Burgh I, 387.

10. infra 259

the ensuing year, the date being "the fyrst mure nexte efter the feste of sancte Mychael", when they took an oath "to do ryght til all men"^{10a} This practice is followed in Aberdeen, where as well as these magistrates, various minor officials, such as Kirkmasters, tasters of wine and of beer, sergeants and a common council of about twenty-one are elected "cum consensu et assensu totius communitatis".¹¹ The hearing of an important property dispute at a head court in Aberdeen in 1317 may suggest that cases of moment not requiring an immediate decision, but one by jury, were deferred to such a court, where a sufficient attendance was assured.¹²

Suit of court then was clearly demanded at the head courts. But what of the lesser formations of the burgh court? These form an intricate series of over-lapping jurisdictions, complicated by their virtual identity with the guild courts. The Aberdeen record in the fourteenth and early fifteenth century is relatively clear in this respect. The normal meetings of the burgh court might be as a curia tenta per ballivos or as a curia legalis tenta per ballivos.¹³ The latter appears to be the more formal court and meets on a Monday with fair regularity once a fortnight. This practice accords with the rule in Leges Quattuor Burgorum c. xlvi "that fra xv dayis til xv dayis rynnys the mutis within the kyngis burgh" ("a quindena in quindenam"). Such a court however could not be held by the baillies alone; that

10a. L.O.B. c. lxx.

11. Aberdeen 100, 195 (The term "curia capitalis" is not used but the date and general character of the meeting seem to identify it as such)

12. ibid. 14.

13. ibid. cxvii.

would run counter to its status as the meeting-place of the community and is ruled out by frequent references to a continuation "propter debilitatem curie".¹⁴ Nor does it seem likely that all owing suit would be called so frequently, for that would make this court indistinguishable from a head court. The fact that those "absentes a curia balliuorum in diebus legalibus" were to be fined the same sum as those summoned to the head court¹⁵ would suggest that there was some form of summons to the curia legalis too. But it would be a selective one, for the numbers of those who "comparuerunt ad curiam tanquam sectatores" is small. At one such court it is specifically stated "Isti fuerunt presentes" - followed by twenty-four names;¹⁶ and at another "Isti comparuerunt ad curiam tanquam sectatores" - followed by eleven names.¹⁷ There, however, no business is recorded as having been done, nor on another occasion, when only fourteen were present, whose names are listed "quia pauci fuerunt".¹⁸ It would seem then that a certain minimum number of burgesses must be present on a dies legalis to constitute a quorum with the bailies, though, as we shall see, they did not necessarily take a very active part in the proceedings. They were summoned in some way, probably by personal approach by one of the town sergeants. There is evidence that a mode of summons for defenders was in operation, which was sufficiently definite as to give rise to a protest that the correct procedure had not been followed by the officers.¹⁹ Dickinson points out that a system of rotation of duties was already known for such community tasks as keeping

14. e.g. ibid. 34, 50, 58, 78.

16. ibid. 236.

18. ibid. 234.

15. ibid. 216.

17. ibid. 232.

19. ibid. 106.

watch and building the new tolbooth.²⁰

The character of the curia tenta per ballivos is more a matter of speculation. It met frequently, sometimes daily,²¹ or at intervals of a few days. Its business overlaps with that discharged in a curia legalis and sometimes it continues a case to such a court.²² But it never deals with matters proceeding on a royal breve, which are heard only in the head court or curia legalis.²³ There is little or no mention of the suitors of court; indeed, if it were not for one list of eighteen men who "wardauerunt",²⁴ one might imagine that the baillies constituted the court alone. On several occasions "propter debilitatem curie" a case is continued from such a court to a dies legalis, when presumably a larger attendance could be expected.²⁵ These were all actions over the possession of moveable property, claiming its return or its value, when judgments seem to be made "per teynt probacionem", that is, by the pursuer, and sometimes the defender also, leading the evidence of witnesses.²⁶ This mode of proof might be used at a curia tenta per ballivos, as well as at a curia legalis. It may be surmised that on such an elaborate mode of proof, where the possibly conflicting evidence of ten or more witnesses must be weighed up, the baillies, ex proprio motu or on the motion of a party, could order that "warda" or final judgment be given by a court in which a considerable, though not precise,

20. ibid. cxxii n.5.

21. e.g. ibid. 71, 79-80.

22. ibid. 77 etc.

23. ibid. cxxiii.

24. ibid. 65.

25. ibid. 77, 109; cf. 37, 58, 143 ("ad diem lune proximum futurum", Monday being the day on which the curia legalis sat).

26. ibid. cxxxv.

number of the members was present; and that this condition was not always fulfilled at a court tenta per ballivos, but was more likely to be satisfied at a curia legalis, where some form of summons was in use.

The procedure in civil actions in the burgh courts was of a surprisingly refined and time-consuming character.²⁷ It was customary for a defender only to appear at the fourth summons, for the first three were not peremptory. On the first occasion, he had to supply a burgh or pledge, a friend who would vouch for his compearance. On the second and subsequent summonses the sergeant attached property to the value of eight shillings and renewed the pledge.²⁸ In this way the pressure upon him to answer was gradually stepped up. Only if he ignored the fourth summons, would judgment be given against him in absence. When the parties joined issue, each again had to find a pledge that his story was true. There might be further continuations until the appropriate method of proof was determined. All these formal procedural stages and dealing with pledges whose charges had defaulted must have produced a need for more frequent court sittings than the thrice-yearly head courts and the fortnightly curiae legales. The Curia tenta per ballivos dealt with many such matters, though final judgment was usually given in one of the other courts, except where a claim was admitted or judgment by default given. It also handled such minor criminal business as cases of "perturbacio",²⁹ "verberacio",³⁰ undercutting of prices,³¹ selling

27. ibid. cxxxv-cxxxviii.

28. e.g. "Eodem die W.B. tercio die vocatus ad sectam T.I. non comparuit. Unde precipitur seriandis capere districcionem viii s. et dare ad plegium, et citare ipsum noviter ad proximum diem legalem tanquam quartum diem etc." ibid. 56, cxxxi et seq. Cf. Peebles 115.

29. Aberdeen 127 et al. 30. ibid. 118 et al. 31. ibid. 68 et al.

commodities outside the burgh,³² imposing a fine, where the wrong was admitted and continuing the case to a later court where it was denied.³³ It would seem probable then that these "baillie courts" were in supplement of what might be called the "statutory" meetings and held with the aim of speeding up business and dealing expeditiously with minor matters where there was no dispute or little was at stake. The body of the court would not be numerous at these frequent meetings and there seems to have been no question of summons. Yet no burgess could be excluded, for the curia was a meeting of the community just as much as the head-court and he was as entitled to be present as the baillies. So if by chance a sufficient quorum was present, important matters such as the giving of "warda" could be dealt with, instead of being deferred to the curia capitalis or curia legalis, where a quorum was assured. Further, it would seem that even when a magistrate was approached by parties in dispute, some of the community must be present to see justice done, for an ordinance of 1411 applies the fine for absence from courts to those "qui premunitus fuerit per sergiandos super viam ad veniend. coram proposito vel balliuis extra curias suas forte propter submittas causas vel actiones (-) repente supervenientes ut sepe accidit".^{33a}

In addition to these courts of the burgh, the Aberdeen records disclose the sittings of a body called the "prima", which met on Fridays under the presidency of the propositus or alderman. It appears to have

32. ibid. 61 et al.

33a. Aberdeen Burgh I, 387.

33. ibid. 119 et al.

been the immediate ancestor of the later guild court. At this stage it seems to have embraced the whole community, each burghess being a trader or craftsman of some kind. As Dickinson puts it, "the impossibility of separating the weal of the merchants (which pertains to the gild) from the weal of the burgh (which pertains to the council) is at this stage obvious on every hand".³⁴ Accordingly, it could, equally with the council, (to be discussed shortly) legislate for the good of the community and did so "cum consensu et assensu maioris partis de communitate ibidem congregata".³⁵ The subjects of these ordinances included laying down a tariff of fines not only in such commercial matters as forbidding entertaining forestallers, buying or selling on Sundays or receiving goods and persons from the south where there was plague,³⁶ but also in assaults, cursing or disorderly behaviour in court.³⁷ Even matters of procedure in the burgh courts as well as the prima were regulated by it.³⁸ It also tried offences against the approved practices of trade, probably overlapping here with the burgh court.

In all these courts, then, the pre-requisite of a jury system, an adequate body of laymen present in court, was in varying degrees satisfied. But of the later uses of the jury there is little trace. The principle of deciding matters of fact or law by a small determinate committee of the members of the court is in the period covered by Dickinson's Aberdeen volume just beginning to be resorted to. It was

34. Aberdeen cxiv.

35. ibid. 215; 197; Aberdeen Burgh I, 387.

36. Aberdeen 179, 211, 216.

37. ibid. 216.

38. ibid.

in the prima court that the assize seems to have been best established. Offenders against the burgh's trading statutes were tried by assize, as many entries bear witness.³⁹ But as the records of this court are very brief and many convictions are listed with no mention of the mode of trial, it is impossible to say categorically that there trial was always by assize. The members of the assize are not listed at this stage, but at one court the names of nineteen who "comparuerunt ad primam"⁴⁰ are given, so that one can assume that the assize which served at that court did not exceed that number. In some cases the accused are remitted to the sheriff, perhaps for trial or, after trial in the prima, for punishment,⁴¹ presumably because they were burgesses "rare manentes" outwith the burgh but within the sheriffdom. Offenders, if they chose, could put themselves in the will of the prepositus and accept his fine without trial.⁴² Civil cases are not common in the prima, but in one such case there is an interesting introduction of the assize principle. Two parties in dispute over a plot of earth submitted to the determination of six compositors. They called the parties and made them swear in the presence of the magistrates that they would abide by their decision. This was, as one of the compositors then announced, that the magistrates should call to the next meeting of the prima neighbours of the town and

39. e.g. "Foristallatores finientes post conuiccionem Assise cum preposito" ibid. 183; cf. ibid. 222-230. A further possible instance is to be found on p.22 where the alderman accuses a man of breaking the act on the purchase of wool and he is convicted "per unam inquisitionem vicinorum suorum". (ibid. cxxxv).

40. ibid. 223.

41. ibid. 227-229.

42. e.g. A. "posuit se in voluntate prepositi de regratacione denariatorum" ibid. 184.

choose from them an assize agreeable to both parties and that the parties should abide by the assize's decision. These detailed arrangements recorded in the usually taciturn records suggest that here an innovation was being made, which had to be carefully regulated.⁴³

Occasional condensed accounts are to be found of the visits of the Chamberlain and these indicate that some use was made in his court of the assize. It is to be found convicting and acquitting of the wrongous withholding of property⁴⁴ and of rent, but the record is too scanty to allow one to say that this was its only use. Some of the offences it tries seem to be very trivial, such as were competent in the burgh court and prima and there is some evidence of the continuation of a case from the burgh court to the "Iter Camerarii".⁴⁵ There seems to be no trace of the great assize, which should report on the administration of the burgh,⁴⁶ though a fine is imposed on the baillies⁴⁷ for an offence the nature of which has been obliterated.

In the burgh court in all its three forms the assize seems to be only one method of trial among several and an infrequent one. There is only one entry of a kind which becomes very frequent in the Aberdeen and other burgh records, namely, the detailed award of punishment by an assize, presumably after it had established the guilt of the offender.⁴⁸

43. ibid. 185. 44. e.g. ibid. 198, 199. 45. ibid. 34.

46. A.P.S. I, 701.

47. Aberdeen 198. On this document generally see S.H.R. xxxiii, 27.

48. "Repertum est et ordinatum per assisam quod E.S. est relegenda per centum annos et diem, et si iterum ad villam veniat ferrum ferlote affigetur in gena sua". Aberdeen 142.

Robert W. Reynolds is
successor to Knapp property
(see p. 180)

On one occasion a case of deforcement was to be tried by an assize "proborum hominum et iuratorum", but the accused came in the will of the baillies.⁴⁹ A man who admitted not doing all he could to arrest persons damaging a wood was put to the trial of an assize on denying that he himself damaged growing trees or authorised others to do so.⁵⁰ Thus trial by jury is a procedure rarely resorted to in criminal matters, others such as compurgation and taynt probation by witnesses being available. In civil matters references to assize or inquest are even fewer. It is a surprising feature of the record that there are scarcely any instances of the service of brieves, which are common in later records. They were nevertheless competent, for to the 1317 roll is attached a royal brievé, addressed to the prepositus and baillies of the burgh, which is read in open court and contested.⁵¹ Significantly, however, it is agreed that the parties should first try to compose their differences within fourteen days. Only if they fail, is the brievé to be put to "duodecim viris burgi fidedignis (sig) et non suspectis" together with two named superiors, whose function is not stated. This was in fact done and a verdict returned. Another inquest of 1317 "sufficientem" in size, is formed to report on the age of a girl and after consulting one another they say that in 1314 she was fifteen and thus, they add,

49. ibid. 117 (Dickinson treats of this case and another which does not seem to be heard by assize at all (ibid. 65) as instances "determined by an assize" (ibid. cxxxv).

50. ibid. 92.

51. ibid. 7, 15.

of full age to contract, pledge, buy and sell land and possessions "secundum leges burgorum Scocie". This is done not on a brieve, but by the baillies "de potestate sui officii".⁵² An "assisa super cognitione panis et cervisie" is frequently appointed, and always in the curia legalis, to fix the price of wheat and barley.⁵³ Its members or their number are not recorded. The name "assisa" becomes transferred to their ruling and persons are accused of "fraccio assisae panis".⁵⁴

One must hesitate before drawing deductions on the basis of these scanty records, even as to practice in Aberdeen, and certainly avoid assuming that other Scottish burghs followed an identical process. However, since no other considerable burgh records prior to the fifteenth century are extant or likely to be discovered, it seems permissible to make a few cautious comments upon what those that we have disclose of the jury. The "assize of bread and ale" is something of a "red herring". It exemplifies the common practice of entrusting the performance of an administrative duty to a team of men, just as others were appointed tasters of wine or liners of boundaries. Its only bearing on the jury is in perhaps making more acceptable the introduction of such a team for taking judicial decisions. But at the burgh level there is no evidence of a development from these group administrative functions to group judicial functions. Instead one gains the impression that the idea of entrusting judgment to only a portion of the burghesses in their

52. ibid. 5. 53. ibid. 27, 34, 75, 108, 129, 134, 137, 138.
54. e.g. ibid. 76.

own court is something alien to burgh tradition. To entrust the management of the court and the passing of sentence where guilt was admitted to baillies was another matter. These men were now appointees of the whole community and hold office only for a year. But an assize may have seemed to breach the solidarity of the community and lead, as it certainly did, to allegations of partiality. Amicable composition by which the disputing parties freely submitted their differences to the arbitrament of their neighbours was much more in keeping with burgh tradition than the setting apart of a group to condemn their fellows.

The assize principle however could not be kept out for ever. Through three channels it pressed in. First, it was required in the service of royal briefes, which we have seen to be competent in the burgh court, though they were more commonly addressed to the sheriff. Then too it was demonstrated in operation, both in criminal and civil cases, when the Chamberlain came on ayre, as he appears to have done regularly around 1400. Perhaps most potent of all, it had already established a foot-hold in the prima, whose membership was almost co-extensive with that of the burgh court. Why it should do so in one earlier than in the other is not clear. It may be that the trade guilds followed the practice of guilds in larger more advanced burghs. The time-lag in any case may have been short. The Leges Quattuor Burgorum are notably silent on trial by assize, though they mention probation by witnesses.⁵⁵ That the court of the prepositus led and even dictated

55. c. 30. A.P.B. I, 338.

the way for the court of the ballivi is suggested by what is for this argument the most significant entry in the Aberdeen volume. In 1405 the prima enacts as follows: "Ita in curiis balliuorum nulla probacio acceptabitur nisi tant probacio et littera sigillata, residuum vero ponetur ad assisam".⁵⁶ What does "residuum" mean? If it simply means that all cases not tried in the burgh courts presided over by the baillies, as distinct from the court of the prepositus, are to be tried by assize, it does not seem to do more than ratify existing practice. In the prima, though this would be of interest. But it seems more probable that it is an enactment for the burgh courts alone (which, as we have seen, was within the competence of the prima) and restricts modes of trial there to probation by witnesses and writings under seal, thus, suggests Dickinson,⁵⁷ excluding compurgation and oath of party. All cases where neither of the two approved methods of probation are^{ly} offered are to go before an assize. On what evidence, then, was the assize to judge? Probably merely on such direct or indirect knowledge of the circumstances as they themselves together possessed.

Thereafter there is a slow but steady increase in the work done by assizes or inquisitions. How much this affected the curiae tentae per ballivos it is hard to say, for in the second volume of the Aberdeen MSS records (1408-1414) only curiae legales and capitales are mentioned. The third volume has been lost, but in the fourth volume the curiae tentae per ballivos return, making use of the assize, as do all the

56. Aberdeen 217.

57. ibid. cxxxiii.

other court formations of the town by that time. They try lengthy lists of men accused of not paying the price fixed for wheat and malt, of being forestallers and regrators,⁵⁸ both in the court of the alderman or prepositus and in the curiae legales of the baillies. They try minor breaches of the peace, such as "perturbacio",⁵⁹ stone-throwing,⁶⁰ the drawing out of a knife,⁶¹ and disrespectful behaviour towards officers.⁶² They try cases of unjust deforcement of money or goods.⁶³ There are also some rather doubtful indications of their indicting persons for trial at the Chamberlain or Justice Ayre.⁶⁴ An "Inquisicio" certainly appears to have been formed to denounce offenders against the laws of trade in the alderman's court.⁶⁵ Of civil functions there is little evidence until the fourth volume, commencing in 1442, in which the service of briefes of inquest, found in the roll of 1317,⁶⁶ makes a re-appearance. Inquests usually of eleven, thirteen or fifteen men are listed "qui jurati dicunt quod quondam obiit vestitus et saisatus in" etc. in the usual form and continue to be of frequent occurrence.⁶⁷ Their temporary absence may best be accounted for by the scrapiness of the burgh records prior to volume four, the keeping of which was a matter to be inquired upon by the chamberlain.⁶⁸ It seems

58. ibid. 224, 226, 228, 229, 230 (1406); Aberdeen MS Burgh Records (Town House, Aberdeen) I, 280 (1406), II, 19, 20 (1408).

59. ibid. I, 303 (1407), II, 23.

60. ibid. I, 303.

61. ibid. II, 21, 39 (1408).

62. ibid. II, 40.

63. ibid. I, 280, 283.

64. ibid. II, 16, 48.

65. ibid. I, 306.

66. supra 92

67. e.g. Aberdeen MS Burgh Records IV, 271, 287, 321.

68. A.P.S. I, 682.

possible but less likely that having once been addressed to the baillies, they were later diverted to the Sheriff. Burgesses "tunc manentes" are remitted to him for trial,⁶⁹ but of their own privileges the burghs were very jealous.⁷⁰ It is also possible that inquests were recorded in volumes now disappeared, as is presumably the record of the curiae tentae per ballivos of 1408 to 1414.

The fourth volume too reveals a new and significant development contained in the repeated phrase "assisa ordinavit quod ..." Now, it seems, the assize has become a body with an identity of its own, not content just to answer questions put to it, but presuming to take the initiative with a will of its own. It directs in procedural matters that satisfaction be made within eight days,⁷¹ that evidence be brought⁷² and that a dispensation be obtained.⁷³ It gives orders as to the equitable disposal of disputed property.⁷⁴ Whether or not it imposes punishment in the fifteenth century is doubtful. There is, it is true, the very specific entry of 1400 imposing a sentence of banishment,⁷⁵ but no other has been noted till 1408 and in some cases, at least, it is clear that the punishment is fixed by one or more magistrates, with or without the council.⁷⁶ Around 1490, however, assizes begin to devise elaborate punishments often designed to humiliate the offender or bring

69. e.g. Aberdeen 227 et seq.

70. See S.H.R. xx, 140-141.

71. Aberdeen MS Burgh Records IV, 270.

72. ibid.

73. Aberdeen Burgh I, 23.

74. Kennedy: Annals of Aberdeen II, 471-2.

75. supra

76. Kennedy op. cit. 472-3, 475. Aberdeen Burgh I, 416-7.

home to him in a practical way his offence.⁷⁷ But the language of the reports makes it plain that the finding of guilt or civil liability rested with the assize, even if the size of a fine were left to the baillies. In 1439 "Decretum fuit per assisam et datum pro iudicio" that someone was to be fined for the wrongful detention of a hogshhead of wine.⁷⁸ The frequent resort "ad amicabilem compositionem probozum hominum" has disappeared.⁷⁹ Instead, disputes between parties, as well as crimes, are as a matter of course, submitted to a jury who speak with the authority of judges. They even hear counter-charges of "strublenca" brought against a baillie and an officer by an accused.⁸⁰ It may well be that the example of the Chamberlain Ayre, which seems to have been at its most flourishing in the fifteenth century, encouraged them to take collectively a more active role in court proceedings. The Chamberlain (or his deputies) was required to empanell an assize to report on the judicial conduct of the baillies and officers of court and (perhaps another assize) to try cases remitted or appealed to him.⁸¹ This perhaps helped to create the impression that the assizers were in some sense the masters of the magistrates. At least they did represent what

77. e.g. a woman who threatened to have a priest banished must ask his forgiveness in presence of the court, go on Sunday to the high altar of St. Nicholas in presence of the people and offer him a pound of wax, and if convicted of abusing any "famous" person again will be fined ten marks and must make amends to the injured party. Kennedy op. cit. 474.

78. ibid. 471. 79. Aberdeen 161. 80. Aberdeen Burch I, 416; Kennedy op. cit. 473.

81. Aberdeen Burch I, 372, 379, 400; A.P.S. I, 695.

was by now coming to be regarded as the power from which the baillies derived their authority, no longer the king, but the community of the burgh, a trend which was to be carried further in the sixteenth century. Moreover, the baillies were chosen by the community from among themselves and held office only for a year. This was then a period in Aberdeen when burgh democracy was in the ascendant, between the earlier overlordship of the monarch and the later predominance of oligarchical families. But jurors themselves might occasionally require to be disciplined. Thus in 1434 eight members of an assize who had left the court before proceedings were finished were adjudged to be "in amerciamiento curie", though whether they were so condemned by other assizers or by the magistrates is not apparent.⁸²

Meanwhile other developments were taking place in the government of burghs and now evidence is available in a wider range of burgh records. The account they give is confusing in the extreme. A variety of bodies with judicial and administrative functions spring up - councils, dasesnes, quests, assizes, guilds, whose spheres of responsibility seem to over-lap. Moreover each burgh seems to differ in the number and relationship of these groups. However, a faint pattern can perhaps be discerned amidst the chaos and is put forward here with some hesitation. In the larger burghs, particularly those with a powerful guild, a council, under this or other names, emerges at first as a body of elder statesmen, the guardians of the burghs laws and traditions and then as an active body supervising the activities of the magistrates and executive officers of

82. Aberdeen Burgh I, 391.

the community. In this it is supported by the legislation of parliament and the burgh court becomes limited to judicial matters. But in certain small burghs the court has no rival and in it the assize, while not abandoning its judicial functions, expands itself into an administrative body taking cognisance of every aspect of the burgh's welfare. Only in the seventeenth century do the councils with the support of the central government oust the assize. In other burghs again, court and council seem to exist alongside one another or to struggle for a time for supremacy, victory however always going to the latter.

The origin of the burgh council is perhaps to be found in a provision of the Leges Quattuor Burgorum, which enacts that "In evir ilk burgh of ye kynrik of Scotland ye mare or aldirman of that ilk burgh sal ger xii of ye lelest burges and of ye wysast of ye burgh suer be thair gret athe that all ye lawis and ye usyt custumys lauchfully thal sal zeme and mantone eftir thar power".⁸³ The emphasis on the universal application of this law suggests that this was not one of these of the four burghs, which were voluntarily adopted by others, but a royal enactment added to them by a compiler; though the mention of the "mare" may imply an English derivation. In Aberdeen we find twenty or twenty-one "communes consiliarii" being chosen along with the prepositus, baillies and officers at the Michaelmas head court.⁸⁴ They approve of

83. L.Q.B. c.cxii (A.P.S. I, 355).

84. Aberdeen 100, 196, 208, 217 (misplaced).

ordinances affecting the common weal of the burgh,⁸⁵ though sometimes, perhaps in the gravest matters, the assent of all the community present may be taken.⁸⁶ They support the magistrates in attaching the property of those who will not pay their dues to St. Nicholas Church.⁸⁷ They choose jointly with the bishop compositors to settle matters in dispute with neighbours of the town.⁸⁸ They have their own domus consilii separate from the pretorium.⁸⁹ The same persons may be members of the council for several consecutive years.⁹⁰ From their number the prepositus and baillies are usually drawn and they may return to the council again after their year of office.⁹¹ In this way a certain continuity was preserved despite the short tenure of office of magistrates. The council was a kind of senate of the leading men of the burgh; not perhaps at first a very active body, but the guardian of the interests of the community.

In the course of the fifteenth century, the council becomes more and more an emanation of the guild. The important men of the community are the merchants. The interest of the guild and of the community, formerly hard to distinguish, begin to diverge. As early as 1400, as we have seen,⁹² ordinances affecting the whole town were passed in the

85. ibid. 197.

86. ibid. 211.

87. ibid. 196-7.

88. ibid. 178-9.

89. ibid. 185.

90. Thus Willelmus de Camera, father and son, are members of all the councils in n. 84 (supra).

91. Thus Laurencius de Leth, a councillor in 1399 and 1400 becomes alderman in 1401 and is a councillor again in 1405.

92. supra 89

prima of the guild. By 1439 - and perhaps earlier - the consiliarii are elected in the curia gilde⁹³ and this guild monopoly continues in effect into the eighteenth century.⁹⁴ The council became a burghal aristocracy and it was a self-perpetuating one, for in 1469 an act of parliament declared that "because of gret truble and contensione... throw multitud and clamor of commonis sympil personis" the old council should each year choose the new and together they should choose the magistrates;⁹⁵ regulations which were interpreted in widely differing ways in the various burghs.⁹⁶ In 1503 it was enacted that no new burgesses were to be admitted without the consent of the council, thus strengthening its oligarchical character.⁹⁷ Earlier their control of trade had been recognised in an act which authorised the alderman and council to fix the prices of manufactured goods, taking into consideration the cost of the material and the labour and to make known their decision to the "commons".⁹⁸ The object was to curb the monopoly of the crafts; the merchant councillors were interested parties too. It is easy to see how class divisions were thus created.

There is no record of the Aberdeen council having consisted of twelve men, but a link with the L.O.B. may be seen in a passage quoted

93. Aberdeen NS Burgh Records IV, 179 but see Aberdeen ciii.

94. Miscellany of Scottish Burgh Record Society 166.

95. A.P.S. II, 95.

96. See "Setts of the Royal Burghs of Scotland" in Miscellany of Scottish Burgh Record Society. Black: The Privileges of the Royal Burrows (Edinburgh, 1707) 11 et seq.

97. A.P.S. II, 107.

98. ibid. 13 thus reducing the power of the deacons.

by Dickinson in which the guild enacts that the alderman may make no decision affecting the weal of the community without the "counsaille and assistance of xij persounes at the leste of the counsaile".⁹⁹ But in other burghs a body styled the "dusane" or "duodene" makes the connection more apparent.¹⁰⁰ In Edinburgh it too was chosen at the head court of the guild,¹⁰¹ but it consisted of from thirty to forty members, despite its name. Reference is often made to "the dusane and the counsaile"¹⁰² of the town; but these are probably old and new names for the same body, provost and deacons being included in the council, for members of the dozen failing to appear when summoned are to be fined for their absence from the council, a fine which may go "consortibus consilii ad vinum".¹⁰³ The term "dousson" is also to be found at Peebles, as will be discussed below.

A chapter of the Leges Quattuor Burgorum also requires the appointment of at least four wise and discreet men as liners to settle disputed boundaries in the burgh.¹⁰⁴ Such "liniatores" to the number of nine, eleven or thirteen are also appointed at the head court in Aberdeen, along with the consiliarii", c. 1400.¹⁰⁵ After 1444 they are appointed by the curia gilde.¹⁰⁶ Finally in 1520 they merge with the council, the heading "liniatores" being followed by "consilium ut supra",

99. Aberdeen cxiv. 100. Marwick: Edinburgh Guilds and Crafts 21.
101. Edinburgh I, 1, 2. 102. ibid. 6
103. ibid. 4, 64.
104. c. cv A.P.S. I, 353; Balfour Practicks 439. David Murray op. cit.
II, 107. 105. Aberdeen 100, 196, 209, 218.
106. Aberdeen MS Burgh Records V, 683; continuing till 1519 (ibid. X, 121)

and in the next year a single list of twenty-one "nomina consiliares et limitatores in burgo" (sic) is given.¹⁰⁷ In Edinburgh there seems to have been a similar development where the dozen is described as "duodecim consules et limitatores" and "duodene et limitatores terrarum burghi".¹⁰⁸ Dickinson suggests that they may be connected with the twelve "burgess witnesses" to any alienation of land within a burgh.¹⁰⁹ The functions of the dozen seem rather to argue a development from L.Q.B. c. cxii; but the fact that L.Q.B. c. cxi deals with the giving of sasine before neighbours, no number being mentioned, might suggest that an imperfect understanding of the Leges led to the two institutions of liners and guardians of the law being confused and thus facilitated their ultimate merger. But the development of those who witnessed the giving of sasine by others into those who themselves marked disputed boundaries would still require to be explained. It may be a more plausible explanation that liners were appointed in implementation of L.Q.B. c. cv which required four to be chosen by the alderman, that this body and the council grew in numbers over the years, both being appointed at the head court, and eventually it was decided that the one group might well fulfil both functions.

The "gangand assize", which is found in a few burghs, is probably, as Beveridge tentatively suggested,¹¹⁰ another name for the

107. ibid. x, 121, 360.

108. Edinburgh I, 2, 3.

109. A.P.S. I, 720; Aberdeen lxxxvi.

110. Dunfermline Burgh I, xvii.

liners. It echoes the phrase "ganging the marches".¹¹¹ At Aberdeen in 1448 at the chamberlain ayre "it is ordanit that ix or x of the best of the toune sal pass with a parte of the gangand assis and see the venales and otheris fautis and perprisis of the toune, and quhar thai fynd prepriss merke it, and put it in writ, and charge thame to reforme it within xi dais, and forberne under payne of perprisioune of the king".¹¹² This is a reference to purpresture or encroachment on the king's domains, including highways and streets in burghs, an obvious concern of liners.¹¹³ A similar function appears to be exercised by such an assize at Ayr, for in 1450 there appears amongst a miscellaneous list of regulations "Item yai haf ordanit yat all mydinis with in ye stretis & uenell be had away be ye vi day of zwle vnder payn of ten Ss as war ordanit be for ye chalmerlan lik ye gangang assize fund".¹¹⁴ It must be admitted that in Dunfermline in 1492 five liniatores, as well as a "gandand assize" of four, are appointed.¹¹⁵ But when next a "gangand assize" is chosen, there are no liners.¹¹⁶ Much later in 1573 a gangand assize ratifies the acts and statutes of Dunfermline.¹¹⁷ By then it was perhaps an archaic name perpetuating the association of the council and liners. Yet in 1638 something of its old purpose seems to have been revived, for the council of Dunfermline then appoints, among other officials,

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111. cf. S.N.D. s.v. gang; but Dickinson takes the view that it means a continuing assize elected for a year (Aberdeen lxxxv).
112. Aberdeen Burgh I, 401. The council also concerned themselves with such matters. (ibid. 36, 37).
113. Balfour, Practicks, 442-4. 114. Ayr MS Burgh Court Book 110.
115. Dunfermline Burgh I, 39. 116. ibid. 86.
117. cited Aberdeen lxxxv n.4.

"the gangand assyse and lyners of the stallange roll", that is, of market stalls.¹¹⁸

The original function of the consiliarii is well illustrated as continuing in the fifteenth century by the following episode. A question arose in Aberdeen as to the rights of succession to the estate of a burgess who had been married twice and left two families. The "prepositus ballivi et consules" of the burgh wrote to their opposite numbers in Edinburgh, Dundee and Perth inquiring as to their practice in the matter. The magistrates and "consules" of these burghs sent their considered replies, in two cases citing the Leges Quattuor Burgorum, though Edinburgh first consulted "men of Law".¹¹⁹ In Edinburgh, where the connection of the council with the guild was particularly strong, much of the legislation issued by it was concerned with the regulation of trade.¹²⁰ The councillors also ratified with the provost and baillies the regulations proposed by the various crafts.¹²¹ In Aberdeen too they regulated trade with the alderman and baillies (sometimes with the chamberlain),¹²² but also concerned themselves with matters of concern to every inhabitant, such as the keeping of the night-watch and defensive measures against the English.¹²³ They appointed to offices¹²⁴ and saw to the maintenance of services in the parish church.¹²⁵ They signed contracts in the

118. Dunfermline Burgh II, 205.

119. Aberdeen Burgh I, 26, 28, 29; Edinburgh I, 24.

120. ibid. 37, 52, 53.

121. ibid. 26 et seq.

122. Aberdeen MS Burgh Records IV, 33 (1434) Aberdeen Burgh I, 396, 425.

123. ibid. 59, 61-2.

124. ibid. 20, 45.

125. ibid. 15, 20, 407.

name of the burgh.¹²⁶ They were not, however, an exclusive body, set apart from the rest of the community, but rather a kind of "inner circle" of it, for often the community or a part of it is associated with these enactments.¹²⁷ In purely judicial matters, they seem at this stage to have played little part, the assize system still flourishing. But where two of the baillies fell out with each other, the alderman and "hale counsaile" heard the dispute and then ordained the parties to live in friendship in time to come.¹²⁸

To exemplify in marked fashion the contrasting system of burgh government, whereby a council and assize both discharged administrative duties, we may take the burgh of Peebles, whose printed court book goes back to 1456. Here the keeping of records, as in most of the small burghs, was far from perfect. But it appears that although the names are only occasionally listed, at both the head courts and the more frequent meetings of the burgh court an assize, usually called "qwest" or "sys", was formed which dealt with all matters coming before that sitting of the court. Thus at a court in 1457 an inquest of fifteen was empanelled and both found a man to be heir in certain burgh lands and appointed a priest to a certain altar.¹²⁹ They frequently make ordinances affecting the common welfare, such as on breaking the price of bread,¹³⁰ appointing

126. ibid. 22 (for building of the Bridge of Dee).

127. e.g. "the alderman, diverse of the counsaile and communitie present for the tyme" ibid. 52. In a matter of special importance, such as measures against the plague, "the hail toune" might be called to ratify them. ibid. 66; Peebles, 312.

128. Aberdeen MS Burgh Records V, 175 (1453).

129. Peebles 121-2.

130. ibid. 150.

a schoolmaster,¹³¹ on disturbing the peace by fighting.¹³² They also fixed the price of wheat and malt.¹³³ They give orders to the baillies to attend to the maintenance of church, bridge and streets.¹³⁴ Their activities in criminal law are relatively slight and they usually remit the passing of sentence to the baillies.¹³⁵ But besides the inquest or assize, there was in Peebles a "dousane". Dickinson says that "the "dousan" and the "quest" appear at times to be one and the same".¹³⁶ He cites (1) a passage where the "choosyng" of the "dousan" is followed immediately by the "delyverans and statutis of the quest" and (2) a passage where "the hail communitie...ordanit...that thair salbe xriiij of the best nyghtburis of the towne chosing and sworne to soit one accions belangand the vtilite and comoun profit to the towne, and als to soit and resseafe the cont of thair comoun guddis....". This is followed by twenty-four names and then orders are made "be the balyais and the gret dosane, the quhilk the namys ar abon writyn".¹³⁷ This sounds suspiciously like the "quest", but it is thought that it nevertheless was a distinct body for these reasons. The composition of the inquest varies from court to court,¹³⁸ while the dozen is chosen at the Michaelmas head court, apparently for a year.¹³⁹ Moreover in a dispute between the clergy of two churches as to which was due certain

131. ibid. 155.

132. ibid. 164-5.

133. ibid. 166.

134. ibid. 218

135. ibid. 217, 232.

136. Aberdeen lxxxvi.

137. ibid. Peebles 166, 199.

138. ibid. 121-2 (3rd and 17th October 1457).

139. ibid. 164, 166 (1470 and 1471).

annual rents it was claimed that the matter had already been settled "be the eldest and of the best with the chosseyng doussane sytand and decretand thairapon".¹⁴⁰ This seems a reference to the dozen sitting with an inquest "of the eldest of the gud town" in a matter affecting the "utility and common profit" of the town and therefore shows that the two were separate bodies. The first passage cited does not exclude the possibility that both a 'quest' and the dozen were present. By the mid-sixteenth century the dozen has developed as elsewhere into a council and the following citations (some of them also made by Dickinson) leave no doubt that assize and council were then distinct institutions. Yet despite the official backing given to burgh councils, the assize seems to have the upper hand, for they can ordain the baillies and council "to vesy and sicht quhair J.P. desyris the chep to be biggit and lat him half it be ane sufficient rowae, nocht hurtand the hie passage and kingis steit",¹⁴¹ And despite the fluctuating composition of the assize, it seems to be the more permanent body, for in 1571 it ordains the baillies to "elect ane counsaile to decerne opone all actiones concernyng commoun offaris".¹⁴² The same entry suggests that although the spheres of the two groups overlapped in both administrative and judicial matters, their relationship was not one of rivalry. It is surprising that conflicts did not arise, when one finds that both bodies regulate the conduct of the town's night-watch¹⁴³ and that the baillies

140. *ibid.* 134-5.

141. *Peebles* 328 (recalling the association of lining with the council).

142. *ibid.* 335.

143. *ibid.* 339, 343, 344.

also had a hand in the matter "with advise of ane certane honest men".¹⁴⁴

The appearance of a council alongside an existing inquest system can also be studied in the MS Burgh Court Book of Ayr, 1428-1478. In Ayr "the haill communitie" acts occasionally in matters of major importance, for example, in consenting to the letting of the town's customs,¹⁴⁵ and the annual accounting of the officers.¹⁴⁶ But most ordinances and direct commands to the officers are made by the variable inquest. But perhaps because of the difficulty of so fluctuating a body exercising oversight, a permanent "commissio generalis" is appointed, probably for a year and comprising the provost, baillies and fifteen others.¹⁴⁷ There can be little doubt that this is the ancestor of the town council in Ayr; indeed there are some references to a body called the "counsel".¹⁴⁸ Moreover on several occasions the "counsel", in the sense of advice, of the commission is to be taken, suggesting the origin of the modern name. But at this stage the duties of the council seem largely to be confined to what the inquest deposes to it. Thus the treasurer appointed to safeguard the common good funds is only to disburse them "with ye counsell of ye standand commission".¹⁴⁹ Again in appointing four men to purchase for the common profit goods arriving by sea, they declare they are to "ask counsel and be avisit with a part of ye best & worthiest of ye standand commission".¹⁵⁰ But once established, a continuing group would soon show its advantages.

144. ibid. 336.

145. Ayr MS Burgh Court Book 1428-1478 (transcript in School of Scottish Studies, Edinburgh) 153.

146. ibid. 113.

147. ibid. 116, 153.

148. ibid. 89.

149. ibid. 178.

150. ibid. 122.

In Haddington too, which had both a "court of counsell" and a "burro court", the annually elected council of the one and the variable assize of the other worked together in apparent harmony. Thus the assize orders the baillies to "convenc ye Greit counsall and ye maist honest nybouris" to consider matters affecting the commonweal, this being a larger body than the ordinary council.¹⁵¹ In a time of plague, after the council had ordained that no-one should be admitted from outside the town without a testimonial from his lord, the assize helped to enforce their regulation by ordering that a man should be sent to inform the neighbouring "gentillmen" of it.¹⁵² But they too make regulations on the same topic, such as that no-one shall travel to Edinburgh or Leith.¹⁵³ Both groups appear to use the baillies as whipping-boys and did not hesitate to direct threats at them. Thus the council ordains the baillies to enforce certain acts "as ya will answer on your aythis and yat incontinent but delay".¹⁵⁴ The "sys" directs them to test the weight of bread on sale "as thai will answer to God",¹⁵⁵ and as to the enforcement of acts goes so far as to warn them "failland yairof you will maik na mair service to ye toune".¹⁵⁶ The scanty records of Banff c. 1550 also reveal a council and assize both capable of passing ordinances.¹⁵⁷

151. Haddington I, 64; P.S.A.S. II, 389.

152. ibid. 394.

154. Haddington I, 58.

156. Haddington I, 43.

153. ibid. (of Selkirk 54).

155. P.S.A.S. II, 396.

157. Banff I, 25-28.

But it is in the burgh of Selkirk that the assize appears to have reached the zenith of its authority. There trade was slight and guild and crafts developed late. Consequently, no council seems to have emerged until the late sixteenth century and owing to the loss of the records between 1545 and 1635 the circumstances of its emergence are uncertain.¹⁵⁸ *Correct?* But the records from 1503 to 1545, now (1963) in process of publication by the Scottish Record Society, reveal a kind of golden age of burgh democracy. The assize exercises a detailed supervision over every aspect of the community's affairs. The baillies and other lesser appointees are merely their executive officers. If they are lax in the discharge of their duties, they are soon called to order. Thus they find that the baillies are "in the falt of the wauch of the gud towne becaus thai will nocht puncis and tak thair unlaws".¹⁵⁹ They are enjoined to hold criminal courts "as accordis of thair offices".¹⁶⁰ An alderman who exceeded his term of office is told by the inquest that they appointed him "bot for ane yer, the quhilk yer was completit at Mychelmas at last past."¹⁶¹ Sometimes they are recorded as addressing the baillies in a tone in which reproof and mock formality are curiously mingled. Thus: "Alsua schiris balyeis, the inquest plenyis of yow becaus ye tak nocht youris of samyn and other thingis for the common well of the burgh eftir the tenor of our actis maid of befor".¹⁶² The subject-matter of an administrative nature treated of by the inquest

158. Craig Brown: History of Selkirkshire II, 52, 164; Stair Soc. Sources 108.

159. Selkirk 17.

160. ibid. 38.

161. ibid. 22.

162. ibid. 35.

is of a very varied character, including frequent measures concerned with the keeping of the watch¹⁶³ and the avoidance of plague,¹⁶⁴ the keeping of markets and testing of weights and measures,¹⁶⁵ the collection of money for the upkeep of the parish church¹⁶⁶ and the raising of taxes due to the crown.¹⁶⁷ They appoint the magistrates for one year's service followed by an accounting¹⁶⁸ and admit burgesses with the concurrence of the baillies.¹⁶⁹

Yet the same body also discharges a wide variety of judicial business. They serve the usual briefs of succession, terec, etc.,¹⁷⁰ and themselves act as liners.¹⁷¹ They try civil actions involving, for example, the fosterage of a child and wintering of a cow,¹⁷² and disputes over the possession of heirship goods.¹⁷³ They hear evidence in such matters, this appearing to be the normal mode of probation, where a claim is not admitted,¹⁷⁴ and this testimony is sometimes recorded in a rough fashion. They do not hesitate to construe charters and other evidents of ownership.¹⁷⁵ Even procedural matters, which one might expect to be determined by the presiding baillie, are settled by the inquest (such as whether a witness is competent¹⁷⁶ or where the onus of proof lies).¹⁷⁷ They are aware of the jurisdiction of the ecclesiastical courts and where goods claimed seem "deid manis gudis and testit gudis",

163. <u>ibid.</u> 17, 40.	164. <u>ibid.</u> 54.
165. <u>ibid.</u> 78, 79.	166. <u>ibid.</u> 110.
167. <u>ibid.</u> 112; Selkirk MS Burgh Court Book f.196 r.	
168. <u>Selkirk</u> 95, 96.	169. <u>ibid.</u> 82, 94.
170. <u>ibid.</u> 29, 39, 49, 59.	171. <u>ibid.</u> 57.
172. <u>ibid.</u> 41.	173. <u>ibid.</u> 30, 75.
174. <u>ibid.</u> 19, 30, 34, 75.	175. <u>ibid.</u> 17, 59.
176. <u>ibid.</u> 16.	177. <u>ibid.</u> 33, 98.

they direct the party to "follow it befor ano sperituall juge or ellis aggre".¹⁷⁸ Only occasionally do they admit to being at a loss and then they have resort to the advice of "men of law".¹⁷⁹ Criminal cases are surprisingly few, taking into account the numerous punishments which are set out in the ordinances of the assize. But when they do occur, the assize determine guilt.¹⁸⁰ The application of punishment is probably not their business. Fines are often stated to be due to the baillies and an offender may be found "in one amerchiament and in wyll of our alderman and bailyes".¹⁸¹ The baillies are upbraided "becaus thai will nocht punis and tak thair unlaws".¹⁸² On one occasion the inquest invites the community to "gef oup all and syndry regratouris, pikaris, theiffis and resettouris", with what results is not apparent.¹⁸³ It may be that assizers, who were prepared to lay down general penalties for the breach of regulations, shrank from actually imposing them on their fellows. There is an echo of the old ideal of the amicable settlement of all disputes in a decision by the inquest that parties who were in dispute are to be submitted by the baillies to the decision of four persons, chosen two by each party. Failing agreement, an oversman is to be appointed by the baillies after consultation with the parties. If either will not abide by the decree, the matter is to be brought into court.¹⁸⁴

178. ibid. 98.

179. ibid. 41, 89.

180. ibid. 22.

181. Selkirk MS Burgh Court Book 15th April 1532.

182. Selkirk 17.

183. ibid. 92.

184. ibid. 56.

This omniscient body gives every impression of continuity and a consciousness of its own group-identity, features more readily attributable to burgh councils than to the assizes we have met elsewhere. What then was its composition? Surprisingly, it seems to fluctuate very considerably from court to court. Taking the period between December 1534 and October 1535, we find that no less than sixty-four men served as assizers on at least one occasion. At a total of probably sixteen courts only one person served thirteen times, no-one else served more than nine times and the average was five. The assizes varied from seven to twenty-five in number, the commonest numbers being fourteen, fifteen and sixteen. (No preference was shown for odd numbers). Of the sixty-four thirty-seven were assessed for purposes of royal taxation in 1530/31, when there were ninety taxpayers in all.¹⁸⁵ The tax, however, appears only to be paid by the heads of families, while the assize lists include many persons of the same surname, some marked "senior" and "junior".¹⁸⁶ The whole adult male population was probably considerably more than ninety. Certainly a list of the "Comunitas burgi de Selkyrk" made in 1513 contains 160 names.¹⁸⁷ From this information it seems possible to deduce that most assizers were drawn from the ranks of the more substantial citizens and their adult sons, but that not all such persons felt this obligation and of those that did participate some

185. Ibid. 112.

186. For an account of the collection of such "stents" or extraordinary taxes see Ayr Burgh Accounts (ed. Pryde) cv-cxi.

187. Selkirk 21.

were much more regular in their attendance than others. It is noticeable that some of the most assiduous were those who had been baillies in the past, or would be in the future, or both. There was thus perhaps twenty-five citizens who were in fairly close touch with the conduct of burgh affairs and who approximated to the council which was being developed elsewhere.¹⁸⁸ Yet a difficulty remains, in as much as business might be carried over from one court to the next, when there would seem no guarantee that the same assizers or any of them would be present. Thus in 1513 an inquest of fifteen ordains that witnesses shall be called a fortnight later before the magistrates "and schaw to the said inquest be thair gret athis what sall be operit at thair to caus the verite be knawn....that thaireftir we maye deliver".¹⁸⁹ At the next court two weeks later there is an inquest of twenty-six, which includes at least thirteen of the former assize.¹⁹⁰ It may be then that those who had begun to hear a case made a special effort to attend when next it was called. But the fiction seems to have been maintained that the inquest, though so much larger, remained the same. Probably every inquest, whatever its composition was regarded as the voice of the community. Only the co-operation of a proportion of the assizers in seeing a case through to completion could make the system work. The same problem would arise when a question was remitted to men of law. Again, it is hard to see how an assize permitted to fluctuate could exercise the

188. cf. Dickinson's similar findings as to the incidence of Sheriff Court jury service (Pife, Appx. B).

189. ibid., 22.

190. Selkirk MS Burgh Court Book, 7th June and 21st June 1513.

degree of supervision over their baillies that some of the entries seem to imply, or how changes in regulations could be avoided from court to court. Only a hard core of regular members could make this feasible. We have no information of the method of summons in use at Selkirk, but at Haddington the community was summoned to head courts by a hand-bell.¹⁹¹ For such courts at Selkirk the same method may have been in use, but for the regular courts at roughly fortnightly intervals, the wide fluctuations in the size of the inquests, which range from three to forty, would suggest that any burgess interested might attend and that numbers rose and fell with the nature of the cases and the season of the year. The inquest would comprise those who attended without having any office. A rubric "Burgenses presentes in illa curia. Inquisitio" affords some confirmation of this.¹⁹² It seems incredible that a system of individual summons could produce such wide fluctuations.

Such a system could not but give rise to inconveniences, as suggested above, although admittedly there is no trace of continuations "propter debilitatem curiae". So in 1535 an important innovation was made. An inquest of fourteen "with avisiamment of alderman and bailyeis hes chossing ane inquest of the best and vorchtyste unsuspectit men to depend and pas with our bailyeis....to decreit, decerne rycht and wrang, and in all uther causis pertening to the fredome and proffet of the gud toun effectuslie for ane yeir to cum..."¹⁹³ Twenty-nine men were then put on oath. In this way continuity was assured and it seems safe to

191. Haddington 99.

192. Selkirk 35.

193. Selkirk MS Burgh Court Book 198v.

say that this body became in time recognised as the council of Selkirk, which the central authorities required of it. By the time of the inquiry into the setts of the royal burghs of Scotland in 1708 the government of Selkirk had come into the hands of merchants and craftsmen, as in most of the other burghs.¹⁹⁴

A similar course of development appears to have been undergone at another small burgh, that of Prestwick. From the beginning of the records in 1470 an inquest of variable size discharges every kind of duty, such as the appointment of magistrates and officers,¹⁹⁵ the serving of briefs of succession,¹⁹⁶ the punishment of petty offences,¹⁹⁷ the settlement of civil claims¹⁹⁸ and the making of ordinances for the common good.¹⁹⁹ On one occasion they even try a baillie who was alleged by the overmen (later provost) to have given sasine without his consent and that of the community. The inquest found him guilty and deprived him of the freedom of the burgh, but they were overruled by the "commonite" which rescinded the act and restored the baillie to his freedom.²⁰⁰ By this date (1551-2) there can be no sense of the inquest being identified with the community. It is a committee of it and answerable to it. But earlier in 1513 we read now in an accusation of theft "the baillies tuk a sensment of the court & the hail sensment fand...."²⁰¹ It may be then that all present in court formed the inquest, except where there a large attendance of the burgesses was present. At some date towards the

194. Miscellany of the Scottish Burgh Records Society 203.
 195. Prestwick 30. 196. ibid. 43.
 197. ibid. 52. 198. ibid. 54-5.
 199. ibid. 66. 200. ibid. 62.
 201. ibid. 44-5.

close of the sixteenth century the inquest at the head court began to elect a council, as well as oversman baillies and officers and thereafter it fell into a gradual decline.²⁰²

Another burgh in which a council developed late is Kirkcaldy. There is no mention of such a body in the earliest surviving records of 1562 to 1566. Though the evidence is very scanty, an assize appears to be chosen at both head courts and others and to pass local measures and try criminal cases.²⁰³ By the commencement of a continuous series of records in 1582 however a council of twenty-four has emerged which is elected, together with the magistrates and officers at the Michaelmas head court.²⁰⁴ It gradually assumes the administrative functions of the assize. An assize however is still chosen at the head court and may give instructions to magistrates and council.²⁰⁵ Indeed in 1588 "the haill assyse", learning of a proposal to appoint a provost, an office previously unknown in the burgh and considering this "wald be ane perpetuall servitude and slauerie to this toun", enacted that no provost should ever be admitted and no magistrates other than baillies.²⁰⁶ They ordained that their act "be ratifiet and approvan be the baillies, counsall and communitie" and that the baillies and councillors shall execute it with "pounding and warding". More than forty persons signed this resolution, including the members of the assize. It is clear then

202. ibid. 85.

203. Kirkcaldy 16, 65-69.

204. ibid. 70, 79.

205. ibid. 73, 151.

206. ibid. 118, the explanation no doubt being that elsewhere the office of provost had fallen into the hands of local nobility (cf. Glasgow I, 1 (Lord Boyd); Faisley cv (Earls of Abercorn); Lanark 58 (protest against Ballantyne of Corehouse); Haddington 98 (Earl of Bothwell); Dunfermline ^{Burgh} 11, 17 (Sir Robert Halket). This abuse was attacked by
(continued on following page)

that for some years after the appearance of a council, it was looked upon as a body subject to the will of the community and merely facilitating the discharge of business. Residual power remained with the community and was actively exercised through the assize elected by it at its assemblies. In Dunfermline too in the early years of the seventeenth century the assize elected at the head court still gave orders on matters also within the scope of the council, but some of its members sat on the assize.²⁰⁷

In the later years of the sixteenth century and the first part of the seventeenth century, for reasons which are not obvious, the use of assizes in both administrative and judicial matters fell into a decline. The only evidence of a positive suppression of the assize does however offer one reason for such action. It comes from Edinburgh where in 1584 the magistrates and council pronounced thus: "Vnderstanding that diuersis persouns quha hes passit vpoun assysis be wilfulness and ignorance and suatymes be collusion and favour hes purget and elongit syndric persouns quha hes bene notories criminall and giltie, quhairby the toun hes bene defrawd it of thair vnlawes and sic evill persounes and uthers be thair exampill hes tayne occasioun to continew in thair wicketness; for remeid quhair of it is thoct expedient, statute and ordanit, that all crymes of strublanche, straike, drawing of wawpouns and of bluid; quhair no mutilatioun, demembring, nor deyth

(continued from previous page)

an act of 1609 which confined magistrates to "mercheandis and actual traffickeris inhabiting within the saidis burghis alanerlie". A.P.S. IV, 435.

207. Dunfermline Burgh II, 18, 31.

hes followit and siclyke all contraventions and brekking of the townis statutes and lawes sall at the instance of the townis collectoris of the vnlawes be summerlie tryet fra thine furth be the probatioun of twa or thre honest witnessis, and the sam being sufficientlie verefeit and provein, the offendouris to be vnlawet and puncisset in thair bodeis and guidis as gif thai had bene putt to ane assyse and thairby convict of the offence".²⁰⁸ There seems no reason to doubt that this ruling was put into force. Elsewhere no such open ousting of the assize is apparent and its disappearance may have come about simply through a declining interest in the often trivial affairs handled in burgh courts creating a willingness to entrust them to elected officials. Competition between the council and assize in administrative matters may have lead to the weakening of the latter as a judicial body too.

In Aberdeen, as we have seen, the assize in the course of the fifteenth century worked itself into a dominating position in the burgh court (though the names of the members are not always listed).²⁰⁹ This position continues until the second decade of the sixteenth century, when its activities become limited to the serving of brieves and to oriminal cases where the accused denies the charge and, it would seem, submits to an assize. Thus where persons are accused of "strublancc and blood", "ilk one of thaim is guiltit be the said assise abone writtin admittit be thaim in jugment", whereupon they are found "in amercisement

208. Edinburgh IV, 370-1.

209. supra 106

of curf" and doom is pronounced by the dorpster.²¹⁰ The punishment, once devised in loving detail by the assize,²¹¹ may be modified by the baillies and council (at least in a case of breach of trading regulations)²¹² and finally is determined by the baillies alone.²¹³ Even at head courts as many as fifty persons are recorded as absent;²¹⁴ an assize may be empanelled to deal with a case arising in the course of the proceedings,²¹⁵ but if no need for it arises, none will be formed.²¹⁶ Thus the baillies are in complete control of the proceedings. After 1550 assizes appear only very rarely in criminal cases, apart from those where magistrates are acting under a commission of justiciary, as described below. In the serving of brieves, however, they continue, being presumably summoned ad hoc. One inquest may serve as many as three brieves at the same court.²¹⁷

Aberdeen was in this respect probably giving a lead to other cities, though whether it was a lead that deserved to be followed is perhaps open to question. In Glasgow an inquest was still trying criminal cases, as well as serving heirs in 1574.²¹⁸ In Paisley the baillies are found to be hearing a civil dispute and a case of "trubulance" in 1595 and 1596.²¹⁹ In certain other burghs the assize as a judicial

210. Aberdeen MS Burgh Records XIX, 357, 272.

211. e.g. their "cragis" to be put in the "gowfis", to remain in the Tolbooth till next Sunday, then to go before the procession at high mass and offer two candles, asking forgiveness of those attacked, of the baillies and community and to find caution - Kennedy, Annals of Aberdeen II, 481 (1544).

212. ibid. (1546). 213. ibid. 485, 487 (1554, 1561).

214. Aberdeen MS Burgh Records XIX, 95. 215. ibid. 96.

216. ibid. XX, 1. 217. ibid. XXII, 599 (1557).

218. Glasgow I, 4, 8. 219. Paisley 161, 170.

institution flourished until well into the seventeenth century. Kirkcaldy and Dunfermline both had courts of trublance ("curiae turbulantie") in which a simple direct justice was administered in an assize of neighbours to those who had disturbed the peace of the burghal community. Thus where a man troubled his neighbour and afterwards, being put in ward, broke the lock of the tolbooth, the assize ordered him to restore the lock "als gud as thai war", pay a fine of eight shillings, remaining in ward till this was done; and threatened that if he repeated the offence, he would lose the freedom of the burgh and be banished.²²⁰ Again where two men were charged with fighting, the assize convicted both, but willed the baillies "to reduce theme all to friendschipp and caus them drink togidder".²²¹ As late as 1643 assizes try two cases of minor assault described as "ryot" and both convict and fine the offenders.²²²

To the magistrates of certain burghs royal commissions of justiciary were sometimes granted for specified purposes. Thus the provost and baillies of Aberdeen were constituted justices in hac parte in 1596 for the suppression of witches²²³ as were those of Kirkcaldy in 1604.²²⁴ Irvine received commissions for such trivial offences as "pykrie" (theft) and reset.²²⁵ In such cases, of course, the whole procedure was modelled, so far as the local authorities were capable of

220. Kirkcaldy 81; cf. Dunfermline Burgh II, 25.

221. ibid. 32.

222. ibid. 195-6.

223. Spalding Club Miscellany I, 83 et seq.

224. Kirkcaldy 154.

225. Irvine 52, 59.

it, on that of the Justice Court itself, however minor the offences might be. Commissions contained warrant to cite "ane assis to sufficient nowmer of the said burgh and foure halffis about lest suspect that best knowis the veritie in the said matter ilkane under the paine of fourtie pundis".²²⁶

But although such trials would always be by jury, it is more than doubtful if the procedure followed in such temporary tribunals reached the degree of elaboration to be found in the Justice Court by 1600 or if anything approaching uniformity was attained throughout the country. Thus at a Justice Court at Inverness, in a trial for murder, in 1614, presided over by the baillies of the town, the jury retired and examined the witnesses alone,²²⁷ a highly irregular procedure which seems to have been habitually followed in the Inverness courts²²⁸ and was not unknown elsewhere.²²⁹ Such commissions of justiciary may have served to prolong the employment of jurors in burgh courts as such, for example, in Inverness and Kirkcaldy. But the main trend in burgh organisation in the seventeenth century is of a concentration of authority, both in judicial and administrative matters, in a small self-perpetuating caucus of the wealthier burghesses. The change may be fittingly symbolised by a quotation from Selkirk, once a stronghold of burgh democracy. By

226. ibid.

227. Inverness 122.

228. ibid. 71 (The Inverness magistrates also claimed to be Sheriffs within the burgh, a claim which the Sheriff of Inverness naturally disputed - ibid. 166, 77).

229. Carnwath xci; Kennedy: Annals of Aberdeen I, 86; Stirling 26; Pitcairn II, 377.

1708 municipal affairs there are so openly the preserve of the prosperous that "as they decrease in their substance (they) are turned out from being councillors and always those of the greatest substance brought in".²³⁰ In a case appealed to the Justiciary Court in 1783 the accused, who had been convicted of assault and wounding by the magistrates of Edinburgh, claimed that on such a charge they must be tried by a jury. The court ordered that information be laid before it as to the current practice in inferior courts in cases of comparable gravity. This showed that "in the royal burghs, the town of Ayr alone excepted, such instances of the interposition of juries had seldom or never occurred";²³¹ so fast had the memory of the hey-day of the burgh assize faded.

230. Miscellany of the Scottish Burgh Records Society 203.

231. M.7301; cf. M.3447.

III. Baron Courts

Baron courts too were, like burgh courts, the meeting-place of the whole community, where every kind of question affecting the well-being of the barony was brought for decision. There was no hard and fast line between administrative and judicial matters; all were the concern of this commune forum. Attendance at the court of the baron or feudal superior was part of the return made by a vassal for his land holding, just as the baron in turn owed suit to the sheriff court in the territory of which the lands lay and to the justice ayre. As in the burgh and sheriff courts, curiae capitales were held three times in the year and ordinary courts at more frequent intervals. The frequency of attendance that was exigible varied with the terms of the holding.¹ The giving of suit might be performed by sending a representative² and the more important men would usually discharge their obligation in this way. Since this burden was attached to each parcel of land and one man might hold several in different baronies, it would otherwise have become rather onerous. But one representative could be sent by several persons owing suit.³ In this way a purpose of the institution, to secure a sufficient attendance of members of the court, must have been in danger of being frustrated. Where suit had not been given in person or vicariously, the absentee stood to be fined in respect of each of his holdings. Sometimes the personal presence of the vassal would be demanded; but it too seems to have been

1. e.g. Aberbrothoc Nigra 2-3. See generally Hamilton-Grierson: "The Suitors of the Sheriff Court" S.H.R. xiv, 1; Rife Lxxii (the principles of suit being applicable in all courts); Garnath lxxviii; Mockenzie Observations. James V, c.71.

2. For the form of appointing a suitor, see Kelso II, 145.

3. S.H.R. xiv, 6; Aberdeenshire Sh.Ct. II, 9.

undermined by the mediaeval assumption that the performance of any duty could be delegated to someone else and thus became indistinguishable from suit. Where both suit and presence were required, the vassal must both attend in person and send a suitor otherwise he incurred the fines.⁴

Yet even here the obligation might, at least by the seventeenth century be delegated. Thus Skene writes: "For he wha aucht baith sute and presence in onie court, suld nocht onlie send an sutour to decide actions and causes conform to the law, but also suld compar personally, or send an attorney, quhilk also he sal do quha aucht presence allanerlic".⁵

But a suitor appears to be no more than a species of attorney. Where the existence of an obligation of suit was disputed, it might itself be the subject of inquiry by means of an inquest.⁶

These principles applied equally to all grades of feudal court, but in the barony courts giving suit was perhaps felt to be less burdensome than in the sheriff courts, where long lists of absentes are to be found.⁷ The issues in the barony court were more local, the procedure less formal, and it may be that its concern with matters of good husbandry, as well as judicial questions, gave it a wider popular appeal. But one lord who held lands of another might prefer to incur a fine rather than give suit of court to him.⁸ The first step at any sitting of a barony court was, as in more important tribunals, the calling of the roll of suitors and

4. Garnath xc.

5. D.V.S. s.v. Actornatus

6. Hist. MSS. Comm. 5th Spt. 621 (1255); Brechin I, 113; Aberbrothoc Volus,

7. c.g. Pife I; S.N.R. xiv.16 (Linlithgow) 190.

8. cf. the frequent absences of Robert Lord Maxwell from Lord Somerville's court of Garnath (Garnath 3, 10, 23, etc.), Fines might be very trivial (6/8d. at Colstoun - Trans. East Lothian Antiquarian & Field Naturalists' Soc. II, 131) or severe (£10 in 1627 at Balnagown, but 40/- in 1661 - Macgill: Old Ross-shire and Scotland II, 35, 48).

fining of those who did not answer, usually after being called three times.⁹ Suitors on being entered for the first time must be admitted by the judge and put on oath.¹⁰ An early form of suitor's oath is reproduced elsewhere.¹¹ The suitors present were not mere spectators of the activities of others; they themselves constituted the court. Its decisions were their decisions, its judgments their judgments. Originally this was so in a quite literal sense. An act contained in the Assise Regis David directs that the baillie of any baron shall, on a cause coming to judgment, "pae furth of the court and the fre tenantis seyteris of the court sal mak iugment tharapoun and then the baillie agaiyno callit the iugment be the seyteris maid sal be geiffin furth."¹² This procedure was to be followed by justices, sheriffs and aldermen too, though there is less evidence of its having been followed by them. It is difficult to believe that the king's justices at least submitted to an arrangement that so degraded their office. In the barony courts, however, there is evidence that even in the sixteenth century the role of the presiding baillie vis-à-vis the members of the court was a fairly humble one.¹³ On the other hand, in the earliest surviving records of a barony court of 1335, the lord himself, though a party to the dispute, appears to preside and to give judgment through the dempster "with console of the nobillis and of his curt."¹⁴

9. "sectis vocatis curia firmata absentes patent per rotulum" - Carmath passim; ibid 161.
10. Carmath 119, 141
11. infra 316 A. P. S. I, 683
12. A. P. S. I, 317-8 13. Carmath passim; infra
14. Hist. MSS. Comm. 3rd Rpt. 410

Where the superior was a great magnate, lay or religious, a baillie or baillies would always be constituted to act for him. His connection with the court would then be a nominal one and his interest mainly a financial one. Thus in 1527 the Abbot of Arbroath appoints the provost and a baillie of Aberdeen to be his baillies in the barony of Torry, half the unlaws being "to thair utilitie" and half "till inbraying till our was".¹⁵ Again, where a lord set his lands, he would probably also cede his rights of jurisdiction to the lessee as his baillie for the same period.¹⁶ Where the landlord was not an absentee one, he would usually still appoint one or more baillies to exercise jurisdiction, either in his absence or concurrently with him. Thus at Corshill (1666-1719) of 185 courts, the presiding officers of which are recorded, on seventy-eight occasions the laird (or twice his lady) and baillie sit together, on eight occasions the laird alone and on ninety-nine occasions the baillie alone.¹⁷ At Gornwath in the sixteenth century a similar sharing of duty is to be found, except that there on a few occasions two baillies presided.¹⁸

The relationship of the laird, the baillie and the suitors of court was an intricate one, not free from ambiguity. But first we must see how an inquest emerged from the ranks of the suitors. There is no hint of such an institution at the court of Sir Patrick Gray in 1385. "The court"

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15. Antiquities of Aberdeen and Banff III, 248-9; Aberbrothoc Nigrum 463; of, Inchcolm 68; Newburgh 521.
 16. e.g. R.M.S. II, 81 (1450)
 17. Corshill 251-253
 18. Gornwath lxxviii n.5

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decrees "with the consale of many gude men their beand,"¹⁹ In the next century, however, there is mention of an assize of twenty-one of "the gentillys of the cuntre" at the head court of the barony of Slains in 1436, who determine a disputed title to land.^{19a} The meagre records of the barony court of the Knights Templars at Merton reveal the choosing of an inquest in 1459 and 1461 as a preliminary at two of the three courts recorded, on one occasion the names, numbering seventeen, being listed.²⁰ To that assize is attributed an order that a litigant should offer proof at a court two weeks thence. But the court may still act as a whole, and possibly always does so in determining matters of proof, for in the absence of an assize "decretum est per assensamentum curie quod T.D. legitime et sufficienter probavit terram esse suam".²¹ In 1505 at a barony court in Aberdeenshire we find a procedural question whether a man had been duly summoned or not referred by the baillic to "the ward of an assize."^{21a} In the complete records from Carnwath of 1523 to 1542 we find that an inquest (as it is usually called) is invariably appointed at the commencement of each court and that it handles all the business, civil and criminal, arising at that court. The numbers fluctuate so widely between eleven and twenty-nine, even numbers not being excluded, that it would be easy to imagine that all the suitors present constituted the inquest. Yet on some

19. Hist. MSS. Comm. 3rd Rpt. 410.

19a. Spalding Club Collections 394.

20. Hist. MSS. Comm. Various Collections V, 80.

21. Ibid. 81.

21a. Aberdeenshire Sh.Ct. I, 118. And see James Young No. 133 (submission by tenant to verdict of assize at barony court of Keith in 1488) also ibid. No. 895 (assize at barony court of Scraling in 1497).

occasions, where an inquest has been empanelled, it is nevertheless a larger body which acts. Thus in an action for the wrongful withholding of a cow, it was answered that it was "testit gero"; whereupon "my lord put it to ane interloquitur of the hail court & put furth the partels & the hail court fand at it was ane sufficient answer that he suld answer in the spirituall court quhair rycht var".²² It seems, then, that full authority still rested with the whole body of members of the court, but that for convenience its exercise was habitually, though not exclusively, delegated to what Dickinson has called "a committee of the cultors."²³ At Athcaruir in Lanarkshire an assize was in use at the barony court in 1536^{23a} but by the early seventeenth century it seems only to be empanelled for certain specific purposes. Thus at Colstoun in East Lothian it is only used in criminal offences denied by the accused.^{23b} A fragment preserved by Kames from the baron court at Crainshaw shows the survival of an assize there in 1611, but such "jury-trials" disappear by 1632, he reports.²⁴ At Urie in Kingairdineshire the court at its irregular meetings between 1601 and 1639 is almost solely concerned with the management of the estate and only once is an assize recorded.²⁵ But in two remote Highland areas the practice of forming one assize at the beginning of each court sitting to deal with all cases, civil and criminal, there arising seems to persist into the seventeenth century.^{25a}

22. Cornwall 19; cf. ibid. 4.

23. ibid. sciv.

23a. Yester House Writs, 157

23b. Trans. East Lothian Antiquarian & Field Naturalists' Soc. II, 129, 130, 133

24. Historical Law Tracts 287 n.

25. Urie 17.

25a. See Taymouth 365 et seq. and Maogill: Old Ross-shire and Scotland II, 31-37. (a very condensed record). A curious feature of the former record is that the same assize serves at the courts of two different baronies belonging to the one lord, which were held on the same day.

How did the formation of this "inner circle" of suitors come about? It is perhaps significant that "The Forme and Maner of Baron Courts", an anonymous treatise, probably of the second half of the sixteenth century, printed by Skene in his official compilation of Rexiam Majestatem and the other "auld lawes" of 1609, makes only two mentions of an assize; one (c.46) referring to the sheriff court and the other (c.78-81), concerned with assize as alternative to battle, in terms more appropriate to the higher courts. Otherwise it deals only with the suitors of court. Nor is there any trace of the jury in statutes affecting the baron courts until the Cromwellian legislation.²⁶ The introduction of the assize in baron courts, then, appears to be a spontaneous development, but it is not an unnatural one. The baron would assist at the courts of sheriffs and justices, where in criminal trials and in the serving of brieves an assize or inquest was an indispensable part of the procedure. Equally, the suitor sent by the baron to the sheriff or justice courts would also usually be a member, and perhaps a prominent member, of the baron's own court.^{26a} It would not be surprising if they regarded such a jury as an essential element in any proper court, even where the numbers present were so small that all must be made jurors. Barony courts did not, it is true, have the jury, so to speak, foisted upon them, in the form of royal brieves of inquest, which were only addressed to royal officers, such as justiciars, sheriffs and (in theory) burgh magistrates.²⁷ But informally, disputed or dubious

26. infra.

26a. of. Soltre 30 (1271); Dunfermling 222; Aberbrothoc Vetus 332 (1286)

27. Where, of course, a lord of regality had been conceded a chancery of his own, brieves from it would customarily be directed to the baillies of the constituent baronies (see Gambuskenneth 121; Garnkath 1, n. 3.)

questions were undoubtedly referred to the decision of "fideles homines", thus providing a model for all the business of the court. For example, in 1374 the Lord of Yester called together all his tenants to inquire as to the terms of the holding of one of them whose charters had been burnt. From them he chose an assize of thirteen before whom superior and vassal made their assertions. They then retired to discuss the matter and returned a verdict showing the form of holding and reddendo.²⁸ Again, the Liston records show the taking of inquest of sixteen men as to the number of animals which the hospital of Lector was had the right to pasture on a certain hill.²⁹ Gradually such references to the small group became the regular mode of procedure in baron courts.

In the early seventeenth century many baron courts had fallen into decay as judicial institutions, probably because of the lack of impartiality which their very local character might produce. But they were given a new lease of life^{29a} by an act of the Commonwealth, which, in markedly English terms, declared that every area "called known or reputed to be a Manor" should have a court baron to try cases of "contracts, debts, promises and trespasses" arising within the manor, not exceeding forty shillings in value or raising questions of freehold or title. It was also empowered to make by-laws for the good management of the manor and to fine and distrain for breaches of them. The court was to be held by the "Sutors" and a "Jury" was always to be empanelled.³⁰ A number of printed barony records attest to the revival of the barony courts which this act produced, its effect

28. Yester House Writs 25-28.
29a. Page Dickinson (Carmath)
ivl.n. 3.)

29. Hist. MSS. Comm., Various Collections,
V. 83.
30. A. P. B. VI ii, 816.

being felt long after the restoration of the monarchy. But in few of these did the inquest survive as an active body for very long. At Forbes in Aberdeenshire, where the records begin in 1659, the bailie is at first in full command. Then from 1664, assizes varying from eight to twenty-five in number are found, usually for the specific purpose of trying cases of "bleeding" or assault to the effusion of blood.³¹ Lesser offences were tried by the bailie alone. At Stithill, on the establishment of the baren court in 1655, an attempt is made to set up a continuing inquest of fifteen "to pass voyces upon Inquest or Jury in all matters questionable within the said Barony".³² They are chosen by the bailie and, as officers of the court, take the oath de fidelis administrationis officiali. Two years later the usual difficulties in securing attendance must have arisen, for "it is statute, enacted and ordained that all these fyfteen men elected for the Inquest be all personally present at ilke Baren Court", under threat of fine, unless they presented a valid excuse twelve hours before the meeting of the court.³³ As a body giving judgment in judicial matters and advising on ordinances, the inquest appears to last for only a few years. By 1663 an inquest is sworn ad hoc to determine cause of blood³⁴ and after 1667 it ceases to be mentioned. At Corahill too the inquest system, though given a trial, does not seem to have been a success. From the beginning of the court book in 1666 until 1669 inquests are empanelled at most sessions, but only in order to determine disputed ordi-

31. e.g. Forbes 249, 255, 271, 308.

32. Stithill 1.

33. Ibid. 11.

34. Ibid. 29.

inal cases found by the judge to be "dubious."³⁵ Thereafter they are found no more. At Urrie, where the barony court was revived in 1667, only one assize is to be found, sitting in a case of resect.³⁶ If these examples are typical, one may conclude that juries were given a trial in the revived barony courts, but that although the functions they were given varied, they eventually proved uniformly unsuccessful. Certainly in the eighteenth century records from the courts of Pintray and Balgair and various courts in Withedale there is no mention of an inquest.^{36a}

One reason for this lack of success and for the subsequent decline of barony courts may have been that, however much the reality might be disguised, the lord and his tenants stood in a relationship of superior and inferior and that where the interests clashed, as inevitably they must on occasion, the lord's will was almost certain to prevail. But in the earliest times the lord's standing in the court was a very equivocal one. It was his court, but he stood to lose it if he did not assist the king in prosecuting wrongdoers.³⁷ He could insist that his vassals attend or be represented, but only within the terms of their infeftment. His interest in the revenues of the court was recognised,³⁸ but judgment was a function of the whole body of the suitors.³⁹ We even find him in the role of litigant in his own court. Thus Sir Patrick Gray appeared in his

35. o.g. Corhill 79, 87.

36. Urrie 86

36a. Third Spalding Club Miscellany I; Balgair; Trans. Dumfriesshire & Galloway Natural History & Antiquarian Soc. (3rd. ser.) xv, 12.

37. "he sul tyme his court for evilmer" A.P.S.I. 377, 635.

38. ibid. 375.

39. ibid. 317.

own baron court of Longforgan claiming that certain lands within the barony should be in his possession and after the defenders, though elaborately cited, had failed to appear the court found for Sir Patrick. There is no mention of a baillie acting as presiding officer.⁴⁰ At an instructive litigation in 1332 the apparent partiality of such procedure was specifically raised. In a process in the (temporal) court of the lands of the Bishop of Aberdeen "*super ostensione cartarum*",⁴¹ one John Crab claimed that he held his lands of the Bishop, while the Bishop replied that he did so only "*iniuste*", because (*inter alia*) alienations of ecclesiastical property could only be made for the benefit of the church and with the consent of the chapter. The court found for the Bishop. Crab then appealed to the Sheriff, one of the grounds alleged by his attorney being that "*tres personae debent esse in iudicio, scilicet iudex, actor et reus*", whereas "*dominus episcopus fuit iudex in propria causa et pars etiam igitur iudicem nullum*" (*sig*) and so had no power to give such a judgment. The Bishop's spokesman replied that the three persons were "*curia iudicans, prolocutor domini prosequens et Johannes defendens et sic sufficientem fundatum iudicium*". In other words he relied on the doctrine that the lord is a person distinct from his own court.

40. Hist. MSS Comm. 3rd Rpt. 410; see also Rollment I, 314 (1413) (Earl of Lennox suing in his own court a tenant for "wrongous manuring"; here however there was a judge).

41. Aberdeen Epis. I, 143 et seq.

At Carnwath in the first half of the sixteenth century the independence of the court from the lord has still some reality. This is assisted by the appointment of a baillie in 1530, significantly at the suggestion of the inquest.⁴² He thereafter presides over the court, in place of Lord Semerville. The invariable appointment of an inquest also helped to emphasise that judgment was a function of the body of the court. This was particularly to be desired in criminal prosecutions, for offences such as "pykrie"⁴³ or the spilling of blood⁴⁴ or the "brekin of his fens"⁴⁵ were usually at "my lord's instance," and he was also a frequent pursuer in civil litigation, such as the withholding of rent and other dues⁴⁶ or the labouring (ploughing) of his land.⁴⁷ In both civil and criminal contested cases the regular procedure was that "thairroftir the Inquist past forth of curt and gart call diuers wetnes and preifis thairwith beand xply awysit come in curt agane haifand god befor thair ons deliuerit all in ene wose and said"⁴⁸ In this way their independence from the presiding officers was affirmed, though at the expense of justice not being seen to be done. They were also not slow to give instructions to "my lord" as to procedure to be followed by his "seriant"⁴⁹ and show no hesitation in acquitting persons prosecuted by him. But the imposition of punishment might be a matter for the lord or, more often, his baillie. An inquest, in convicting some-one pursued by the lord, often "put him in my lord's will"⁵⁰, a procedure which seriously detracted from the appearances of impartiality. Even where this was not done, the record is

42. Carnwath 128. 43. ibid. 15. 44. ibid. 88, 121.
45. ibid. 115. 46. ibid. 176. 47. ibid. 167
48. ibid. 49. ibid. 6. 50. ibid. 152

remarkably vague on the matter of punishment, usually only stating that the accused was found "in the bludwyt" (or as the case might be), whereupon "the balze gart gif dume in dew forme".⁵¹ In one of the courts of Duncan Campbell of Glenorchy in 1527 we even find a tenant pursuing the laird for some straw which he claims to be due to him.^{51a}

In the post-Cromwellian records the inquest is not only less frequently to be found, but appears to hold a position markedly inferior to that of the presiding officer, who is now openly a judge and referred to as such. Thus, as we have noticed, an inquest at Corshill is formed only during a short period and in order to try criminal charges remitted to it by the judge "finding the matter dubious."⁵² Indeed on one occasion the judge himself, after hearing evidence, "found the parties both in wronge" and therefore referred the same to the Inquest to cognosce therintill" who decreed that the accused be "put in one unlaw, to be made at the Lairdis discretione".⁵³ ^{7th, reversed} The making of by-laws for the management of the barony was always a matter for the lord or his baillie alone.⁵⁴ But whereas in the sixteenth century they are usually designed to further good neighbourhood (for example, sharing out the available pasture,⁵⁵) or to carry out purposes of the state, (such as preparation for war,⁵⁶), in the seventeenth century they often seem to be aimed at securing to the lord the maximum return from his lands. Thus at Forbes the majority of the entries comprise orders by the baillie to the lord's tenants. Thus

51. ibid. 152, 154.

52. Corshill 80

54. e.g. Carmvath 210-212.

55. ibid. 210

51a. Taymouth 386

53. ibid. 86

Taymouth 352.

56. ibid. 164.

at one single court they are told to be ready "upon demand" to repair the banks of burns, to pay "teind silver" from their crops, to pay their share of a royal "stent" or tax, to keep their arms at the ready, to plant their kail-yards, to send men to lead in peats to my Lord Forbes "and yet no weak persons be send for yet effect", and each command under the threat of some punishment.⁵⁷ At Cozshill too the laird and his baillie lay down some severe sanctions. For example, persons walking on top of a new dyke or pulling stones from it were to be fined ten pounds and sit in the stocks until the fine was paid.⁵⁸ Moreover in enforcing a variety of penal acts, forbidding for example, the shooting of hares, the cutting of green wood, the burning of moors, the laird was accustomed to summon all his tenants and hold as confessed those who were either absent or who declined to swear to their innocence, whereupon the appropriate fine was to be recovered from each offender.⁵⁹ No doubt conditions varied considerably from barony to barony, depending on the temperament of the laird, and it is unwise to generalise from only a few records. But the rapid decline of these courts in the eighteenth century, and especially after 1747, suggests that their passing would not be regretted among the tenants.

57. Forbes 320-321.

58. Cozshill 83-4. Cf. also the detailed regulation of the tenants' moral and social conduct engaged in by Sir John Clerk through the courts of Lasswade and Loanhead in the late seventeenth century. (Clerk of Penicuik's Memoirs 240-2).

59. Cozshill 212; see also ibid. 198, 206, 214.

To a certain extent, too, the baron court inquest may have been undermined by the burlew men, with whose functions they partly overlapped.⁶⁰ These were men of the barony chosen by the laird or judge⁶¹ and sworn⁶² to see to the enforcement of the laws of the barony and to settle disputes arising between neighbours. In some places they seem to have held their own burlew courts⁶³, but elsewhere they probably acted in a very informal way. Their orders, however, had the force of law, being adopted in advance by the laird.⁶⁴ No doubt they incurred some unpopularity in the course of performing their duties and there are some indications to this effect,⁶⁵ but from the point of view of the laird they were a useful means of ensuring that his dictates were carried out and enforcing the law between one court sitting and the next. In several baronies they outlived the inquest and are to be found in the eighteenth century.⁶⁶

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60. For a full account of Burlew Men see Garnwath Appendix A.
61. Balgair 5, 8 (although there is doubt as to whether the lands of Balgair were ever erected into a barony (ibid., 3) the procedure in the court of Balgair appears to follow that of barony courts.)
62. ibid. 8; Stitchill 2; Gorshill 91.
63. e.g. at Leith (See Book of the Old Edinburgh Club, xv.365); Urie 24; D.V.S. s.v. Burlew.
64. Stitchill 253.
65. Forbes 253; Garnwath 210; Gorshill 77 (but see Urie 157 where the tenants request the appointment of burlew men.)
66. e.g. at Leith, Balgair and Urie. James Innes asserts in 1872 that they are "not yet extinct in some Northern districts" - Innes 254.

IV. Regality Courts

Turning now to the regalities, we should expect to find in the courts of these superior baronies a more refined procedure akin to that of the king's own superior courts on which they were avowedly modelled. But regalities varied greatly in size, dignity and origin. The more ancient ones, usually associated with religious houses, had the widest powers of jurisdiction, both as to territory and subject-matter. Those created in the fourteenth and fifteenth centuries were often merely the barony or baronies of a lord, which had been elevated by the sovereign as a favour or under coercion. Such grants were liable to be taken back when the lord quarrelled with the king. Several acts revoked regalities which had been erected without the consent of parliament.¹ Consequently the newer lay regalities tended to lack the stability and the traditions of the older mainly ecclesiastical foundations. These latter had built up over centuries a pattern of procedure not differing from that enjoined by the king on his own courts, and perhaps following it more faithfully and regularly than they did. But since most of the surviving records derive from such courts, we must beware of assuming that their orderliness was to be found in all regalities.

The attendance of a number of persons adequate to constitute the court and provide an assize was ensured by the same rules of suit and presence as we have already discussed in relation to baronies.² To give suit or suit and presence in the regality court was part of the return which vassals made for their land.³ As elsewhere, the usual frequency

1. A.P.S. II, 236, 357, 501, III, 441.

2. supra 126 et sqq.

3. Aberbrothoc Vetue 190.

was attendance at the three head courts in the year and at other times if specially summoned.⁴ This burden was however no greater, and perhaps less, than that bearing on persons outside the regality, for the inhabitants of the regality were exempt from attendance in the sheriff courts⁵ and even from justice and chamberlain ayres.⁶ Indeed, if they were summoned to such courts on a criminal charge, they could be recalled by the process of replegation to a court of the regality to which they were properly subject,⁷ a pledge called a culreach being exigible, though perhaps not always taken, that justice should be done upon them there.⁸ Nevertheless, it was a process that was much abused and led to the passing of various legislation limiting it.⁹ By the same token, lords of regalities (often the superiors and community of a religious house) were usually under no obligation to send suitors to the royal courts in respect of their lands, though attempts were sometimes made by sheriffs to compel them to do so.¹⁰ Royal charters to religious foundations usually excused them "ab omne secta curie"¹¹ and lesser benefactors customarily did likewise.¹²

4. Aberbrothoc Nigrum 2 ("ter in anno et sepius si necesse fuerit"); Moray 197; Dunfermline 254.

5. Dunfermline 312; Melrose II, 601 ("but for spuilze").

6. Kelso II, 444; Newbattle 231.

7. Aberbrothoc Vetus 164; Moray 161; Dunfermline 312; Justiciary Records 69, 129.

8. A.P.S. I, 708; Quon. Att. c. 8; Reg. Maj. Suppl. No. 12.

An officer might be appointed to exercise the right of replegation at any court in the country, (Kelso II, 444, Aberdeen Epis. II, 308), but any suitor might do so, though uninstructed by his lord, (Quon. Att. c. 15).

9. A.P.S. II, 208, III, 435, 577. 10. Dunfermline 51, 312; Holyrood 186.

11. e.g. Aberbrothoc Vetus 211; Moray 226.

12. e.g. Newbattle 6, 7.

Of the early procedure followed in regality courts we have little evidence, but it is likely to have been at least as elaborate as that of such barony courts as might be found within its bounds. We saw that the assize had emerged in the barony courts from the general body of suitors by at latest the early fifteenth century.¹³ The regality courts which were of greater dignity were hardly likely to lag behind them. There is mention of assizes at the justice-ayre of the regality of Atholl held at Logierait and Perth in 1433.¹⁴ As the sheriff was not judge competent in regalities, briefes respecting lands in the regality were addressed to the lord and his baillies and were served by inquest in the regality courts.¹⁵ Where too a regality had its own chancery to issue briefes of inquest, those who served them in the courts of the regality and of its baronies would in so doing become habituated to acting in the select group that was the assize. Thus as early as 1384 the Lordship of the Carlioch in Aberdeenshire belonging to the Earls of Mar enjoyed its own regality chancery.¹⁶ In 1440 an attempt was made to remedy the deficiencies of the system of royal justice ayres by making it a matter of obligation for lords of regality to hold their own justice ayres throughout their territory.¹⁷ In this way too the procedure of the royal

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13. supra 13. 14. Coupar Angus II, 27. 15. Jus Feudale II, 17. 26.
16. Aberdeen Epis. I, 167. Regality chanceries, however, seem to have remained the exception rather than the rule. Mackenzie says "Several Regalities in Scotland have Chappel and Chancery of their own" (Observations James I, Parl. 9, Act 130). Regalities which did have their own chancery include Dunfermline (Dunfermline Regality 143), Broughton (Canongate passim), St. Andrews (Martine, Reliquiae Divi Andreae 65), Kelso (Kelso II, 409), Harbertshire (Cambuskenneth 121), Arbroath (Laing Charters No. 723).
17. A.P.S. II, 33; cf. Aberbrothoc Nigrum 460.

courts was followed in these judicatures, so far as they were capable of it.

Certain of the surviving regality records of the sixteenth century, indeed, give an impression of a highly elaborate and refined procedure. The pre-Reformation Regality of Dunfermline Court Book 1531-1538 reveals quite complex pleadings and the regular intervention of procurators on behalf of parties. But the jury is not overawed by this learning and it maintains a key role in the proceedings, civil and criminal. An assize of from thirteen to twenty-one, fifteen being the most common number, is empanelled at the beginning of almost every court. In criminal cases, it determines guilt or innocence, but leaves the question of punishment to the presiding judge.¹⁸ In civil claims, however, their finding may take the form of a suitable award or forfeit to be paid.¹⁹ In an action over the measurement of grain brought by tenants to the mill, as well as assailing the tenants, they deliver that they and not the miller should measure the grain in future.²⁰ They also serve briefs of succession, though infrequently, and on these occasions appear to be summoned ad hoc.²¹

An equally formal procedure is to be found in the post-Reformation Court Book of the Regality of Broughton 1569-1573. This is understandable for this territory of the Abbey of Holyrood was adjacent to the burgh of

18. Dunfermline Regality 101, 115.

19. ibid. 105, 106, 116.

20. ibid. 118.

21. ibid. 114, 143.

Edinburgh, where advocates and procurators were plentiful, and its baillies during this period included David MacGill (later King's Advocate and a Lord of Session) and Sir John Bellenden, the Justice-Clerk.^{21a} Hence lengthy procedural debates are not unknown.²² An assize is used at some but not all criminal trials, for sometimes the baillie acts alone. Punishment appears to be a matter for the baillie²³ (though the record is not always conclusive on this point) and doom is pronounced by a dempster. Their civil functions as an inquest are limited to serving the brieves of succession, tutory and lining of "my lord commendatar of Halierudhous". Their number reflects the emergence of fifteen in the Justice Court in the same decade,²⁴ for that number is by far the commonest, there being twenty-six juries of fifteen, ten of thirteen, two of eleven and one (on a brieve of lining) of twelve. There is no distinction in this respect between civil and criminal proceedings. Indeed the one jury can both try an accused and serve a brieve.²⁵ The distinction between Assisa and Inquisitio is strictly observed²⁶ and where the jury is acting in both guises, both words are used.²⁷ A chancellor is appointed, who is identified by the letter "C" beside his name.

The records of the Regality of Spynie in Moray for 1592²⁸ also reveal an active jury system, both in trying crimes, including the

21a. Brunton & Haig 91, 179.

22. Canongate 433-434, 345-347.

24. infra 305

26. supra 98

27. Thus "Assisa Archibaldi Toddie et Inquisitio Jacobi Crawfordis" (Canongate 140).

28. Spalding Club Miscellany II, 119.

23. ibid. 198.

25. Canongate 140.

gravest,²⁹ and in serving briefes.³⁰ The Melrose Regality records of 1605-1609, on the other hand, given an impression of informality and the record-keeping is careless.³¹ A jury is regularly formed, but the criminal cases it deals with are very trivial and it is not over-scrupulous in dealing with them. Thus "the inquest fyles R.H. in ane brall for striking of J.F. in respect he has bein oft tymes sumound and nocht compeirand and lafull tym of day past".³² It also handles the neighbourhood disputes of an estate, as where two tenants in dispute over a wall, submitted to the decision of seven neighbours, whose finding they asked the baillie and inquest to ratify, which together they did.³³ Apart from the serving of briefes, the functions, procedure and relation of judge and jury are not greatly different from those of baron courts. The act of 1587 annexing the temporalities of the church (with certain named exceptions) to the Crown³⁴ seriously undermined the system of regalities, in as much as many of the major ones were, contrary to theory, merged with the Crown's superiority and while existing vassals of regalities had their whole position in law preserved, their successors must enter by a breve from the royal chancery served before the sheriff in whose territory the lands were situated.³⁵ Others were returned to favoured nobles. Thus Melrose became a lordship and passed through the hands of various nobles during the seventeenth century.³⁶ The Heritable Jurisdictions Act of 1747 finally extinguished the surviving regality courts.³⁷

29. ibid. 120. 30. ibid. 140. 31. Melrose Regality I. 32. ibid. 74.
33. ibid. 32. 34. A.P.S. III, 431.
35. ibid. 434; Forbes, Treatise of Churchlands and Tithes 118-119.
36. Melrose Regality I., Introduction.
37. 20 Geo. II. c. 43.

V. Sheriff Courts

When we turn to the sheriff courts, we find a pattern of development resembling in broad outline that of the burgh and barony courts. From the general body of the court a more compact group emerges, which for a time exercises some degree of direction over the conduct of the court, as well as giving judgment, before being first brought under control and then eliminated by the sheriff. The attendance in court of a number of persons adequate for the proper discharge of business was secured in the first place by the obligation to give suit or suit and presence, the main features of which we have already discussed.¹ The sheriff was originally, and for long in theory, the king's permanent and resident representative in each shire and his court was the king's local court. Hence those who were bound to be present in it, personally or by a delegate, were the royal tenants in chief of the shire, those who held land of the king in capite. By the same token, the sheriff enjoyed an appellate jurisdiction from the courts of the king's vassals in his sheriffdom² and they were bound at least to invite him to be present at the sittings of their courts.³ The obligation to assist at the sheriff court was laid down in the vassal's charter and could not exceed its terms.⁴ Usually it amounted to attendance at the three head courts held at Yule-tide, Easter and Martinmas.⁵ The person obligated must on those

1. supra 126 et seq.

2. Reg. Maj. I, 3; III, 17. Quon. Att. c. 13; A.P.S. I, 598; II, 246, 254 (1503). For recorded examples see Aberdeen Epis. I, 143 (1382); A.P.S. I, 552 (1385).

3. Reg. Maj. Suppl. 2. See also A.P.S. I, 283.

4. A.P.S. I, 732. The existence of a contested obligation might be proved by inquest (Hist. MSS Com. 5th Rpt. 621; Dunfermline 51; Brechin I, 113).

5. Fife xv. e.g. R.M.S. III, No. 2167.

occasions come without specific summons; to other courts he must be cited.⁶ Those who failed to give the suit or presence that they were due were liable to be fined for their absence. By the sixteenth century, and perhaps earlier, it is apparent that for the greater lords, spiritual and temporal, the giving of presence was an irritating duty and the fines imposed were no deterrent to their absence.⁷ Their suitors too were not always conscientious in their attendance. Thus at the Linlithgow Sheriff Court in 1562 the "absentes" included fifteen lords, two abbots, two bishops and two priors.⁸ In the Fife Sheriff Court Book the record of each head court is regularly prefaced by a list of thirty or forty "Nomina Absencium", each having the letters "s" and/or "p" to indicate the owing of suit and/or presence. The same names frequently recur, demonstrating that any sanctions taken were inadequate.⁹ Consequently, as we shall see,¹⁰ the burden of serving in the courts tended to fall on a small body of men, usually the lesser lairds. Moreover, in Fife the intermediate courts,¹¹ and on one occasion even a head court,¹² had sometimes to be continued "for debilitate of court".

Originally giving judgment in civil or criminal matters was the function of the whole body of the suitors. Several early enactments

6. Quon. Att. c. 33; Balfour 275.

7. The usual fine was forty shillings, exigible in respect of both suit and presence. (Fife lxxxii; Balfour 277). But whether it was regularly collected by the sixteenth century is very doubtful.

8. Linlithgow MS Sheriff Court Book (G.R.H.) II, 24r (despite an act of 1540 that "absentes to be amerced with all rigor" A.P.S. II, 358).

9. Thus the laird of "Bordland Sauling" was absent from nineteen out of a possible twenty-three head courts. (Fife, passim).

10. infra 161

11. e.g. Fife II.

12. ibid. 227. But, as Dickinson demonstrates, "debilitate" did not depend wholly on lack of numbers but also on the absence of suitably-qualified suitors (ibid. xxv).

testify to this. Thus the Assize of King David, already quoted,¹³ required that the sheriff should leave the court while the suitors were reaching their decision.¹⁴ *This practice of course, fell out as a good one.* Perhaps this practice was given up, for in the later Quoniam Attachiamenta it is laid down that where the sheriff is suspected by one of the parties, the latter may move that he should retire while the matter is being discussed and only be recalled "ut audiat iudicium"...."quod nullum iudicium reddi debet nisi sedente iudice in curia".¹⁵ But the same chapter emphasises that he cannot alter the finding of the suitors, nor advise them in any way except where they are "legis minus scientes". Furthermore, the individual nature of the responsibility of the suitors of court for their judgments is stressed by Quoniam Attachiamenta c. 13, which enacts that where a unanimous judgment of a sheriff court is "falsed" before the justiciar, each suitor shall be fined by him ten pounds.¹⁶ As late as 1540 the judicial function of the suitors seems to be implied by the proviso in the act of that year to reform the sheriff courts that the suitors were to be "honest and qualifeit men hable to decide vpoun any cause conformand to the auld law".¹⁷ Since it was a function of the suitors of court to make judgment, it was for them, or one of them, to pronounce judgment also. This was so even

13. supra 137 14. A.P.S. I, 317-8. 15. Quon. Att. c. 16.
16. "quod quilibet sectator representat personam baronis quo facit sectam".
(But in barony courts only one fine was to be exacted, in respect of the baron himself, the poorer people who attended there not being expected to be so familiar with the law) of. Quon. Att. c. 36.
17. A.P.S. II, 358. of. Aberdeenshire Sh. Ct. II, 9 ("sufficient qualifeit personis abill to pas upone ane assise"). Balfour 275.

where there was an assize to formulate the verdict in the first place. The assizers at the court of the Earl of Lennox in 1413 record that after reaching their verdict they "saw and harde that D.J. a soytoure of the foirsaid courte, with the counsell and assent of all the soytouris of it gair for dome. That...."¹⁸ And in a case in the Sheriff Court of Inverness in 1398, in the absence of the "judex de feudo", a suitor present "assumptus fuit in judicium et dedit judicium".¹⁹ But in practice the suitor who pronounced doom nearly always held the office of dempster, the successor of the old judices of pre-Norman times, who were repositories of the unwritten laws. He would hold lands in virtue of the office, (as might the sheriff and mair), and hence was both suitor and dempster, but his particular function obscured the general one.²⁰ The suitors, as members of the court, on being entered by their principal (who probably appeared in person), took the oath de fideli administratione officii, as did the mair and clerks of court.²¹

In the second half of the twelfth and the early thirteenth century judgment may have been made by the whole body of the suitors in literal compliance with the Assize of David. If so, all forensic record of it

18. Rolment I, 314.

19. Moray 209.

20. Thus Bisset speaks of "ane soytour and the domester of the said courte", clearly referring to the same person (Rolment I, 308). Sometimes "suitor" is used in the sense of dempster (e.g. Balfour 275; James Young No. 111; Gavin Ros 114; Ayr MS Burgh Court Book passim) On this topic generally see Pife lxvi et seq; S.H.R. xx, 230-232.

21. Pife 12, 14, 67 etc; Aberdeenshire Sh.Ct. I, 110-112, II, 9. According to Quon. Att. c. 36 suitors must be examined as to their fitness at three courts.

has been lost. We must, in any case, be wary of assuming that what was enacted was always put into effect. What does survive is a persistent legal fiction that, even where there was an assize or inquest to settle the terms of the verdict and even though a single dempster would pronounce it, judgment was the act of all the members of the court. We have just seen examples of this assumption in statute. But occasionally one encounters a shadowy recognition of it in reports of actual litigations too. Thus in perambulations of the fourteenth and fifteenth centuries, where the interests of magnates, lay or ecclesiastical, were at stake, even although the partition was performed by an assize, it was common to summon all the great men of the neighbourhood and to record their presence in the notarial instrument of the perambulation as evidence that "omnia rite acta". For instance, in a dispute in 1395 as to the boundaries between the lands of the priory of Loch Leven and of the Barony of Kynnymond, in the presence of the Duke of Albany and the Sheriff of Fife "copiosa multitudine prelatorum procerum nobilium et aliorum plebiorum tam vicecomitatum de Fyff quam aliunde congregata", an assize was elected which traced the boundaries and pronounced judgment; whereupon the Prior (who was Andrew de Wyntoun) sought an instrument, which inter alia listed by name the leading clergy and laity who were present "et multis aliis nobilibus et plebis viris testibus rogatis et requisitis in testimonium omnium premissorum".²² Again, as

22. St. Andrews 2-5. Cf. the similar practice in early charters.

we shall see shortly, some of the more powerful members of the court were developing by the late fifteenth century into assessors who sat with the sheriff and advised him on the conduct of business. In an appeal by the Bishop of Moray against a sentence of the Sheriff of Inverness in 1398 it was argued that the court in which judgment was given was no court "quia in tali curia debent esse vicecomes vel locum suum tenens: tres vel quattuor sectatores: clericus de feudo: et iudex de feudo", whereas in fact only one suitor was present.²³ Three or four was presumably the minimum, but it is noteworthy that at this period a figure of suitors far below that necessary to produce an assize could apparently form a lawful court.

But whatever legal theory might say as to the constitution of the court, the reality of the assize or inquest must be taken into account. Mere convenience must have made it desirable that from the unwieldy mass of the suitors of court - of uncertain numbers and varying competence - a small group of knowledgable people should be chosen, from whom a clear-cut decision could more reasonably be expected. ^{And} But, as we have seen, royal policy was working towards the same end. Brieves directed the taking of inquisition not by anyone who happened to be present in the court, but "per meliores et fidedigniores et antiquiores patriae" (or some such phrasing).²⁴ Criminal assizes were to be

23. Moray 208-9.

24. Dickinson has argued that "patria" has a precise signification, namely the sheriffdom; "the voice of the jury is the voice of the whole body of the court; it is the voice of the county or sheriffdom". (S.H.A. xxiv 240).

composed of those "who best know the veritie". And so the actual decision-making both in civilibus and in criminalibus came to be done in the Sheriff-Court by "a committee of the suitors".²⁵

When the jury system first made its appearance in the Sheriff Courts, it was probably thought adequate that suitably qualified persons should be drawn from those already present by virtue of their obligation of suit and presence. Thus Regiam Majestatem I, 12 speaks of the election of twelve lawful men "de vicineto vel de curia". If some were ignorant of the matter, others more knowledgable were to be called to court to make up the number. In 1286 inquisition was taken by the Justiciar and others as to the rights of pasturage of the barony of Panmure "per tresdecim sectatores baroniarum comitatis de Aneguz et alios fideles patrie".²⁶ No mention of specific summons seems to survive from this period. If however the best qualified people were to be put on juries, in compliance with the royal mandate, it would seem desirable that they should be selected before the holding of the court and individually summoned. This was in fact provided for in an act of 1400, which, after narrating the injustices caused to the king's lieges in their holdings by ignorant jurors, ruled that brieves should only be served "per magis ydoneos et digniores" summoned and called on fifteen days warning at the instance of the sheriff.²⁷ A century later this

25. On the relationship between jury and suitors see Glassford: Remarks on the Constitution and Procedure of the Scottish Courts of Law (Edinburgh, 1812), 242 et seq., a remarkably prescient work, considering its date.

26. Aberbrothoc Vetus 332.

27. A.P.S. I, 575.

act was modified to permit the sheriff in brieves of inquest to summon jurors on shorter notice or even to choose persons present in the tolbooth unsummoned.²⁸ This would no doubt include suitors at head courts and the important act of 1540 refoaming procedure in the lower courts certainly seems to envisage that the suitors form still a reserve of jury man-power, for they are to remain until the court ends "to pas vpoun inquestis and assises and assist to the kingis sheriffes and stewardes and balzeis in the administratioun of justice".²⁹ As to civil proceedings on brieves there is ample evidence that the selection of the members of the inquest was made by the presiding judge. Thus a sheriff in hac parte records how in 1485, in a case of division of lands, "I personallie passit to the grunde....and ther in the presence of the saidis parteis... in plane court chesit ane wourdy assise of the best and wourdiest that thar was present...."³⁰

It is less clear that assizers were customarily summoned and selected individually for the serving of each brieve or for other civil proceedings, at any rate until well into the sixteenth century. Dickinson treats specific summons as the norm, arguing that "the status of the jury, partly witnesses and partly judges, would seem to preclude the possibility of a jury sitting on any action other than that for which it had been summoned ad hoc."³¹ He goes on to point out cases where certain men on jury lists are marked as having sat in one or

28. A.P.S. II, 245, 253 (1503); Skene, D.V.S. s.v. Breve de Morte Antecessoris.

29. A.P.S. II, 358.

30. Iag Charters 53.

31. Pife xciii.

other case only.³² It is true that there are cases where returns were quashed by the Council as not having been delivered by "the best and worthiest of the country"³³ but Dickinson's statement seems rather too sweeping and not to take all the evidence into account. Thus he himself quotes the record of three sittings of the Sheriff Court of Angus in 1495, where we read of an "assisa iurata ad inquisitiones et alia acta".³⁴ If this was general, then the jury was not at that time picked for its knowledge of any particular case and the case of 1485, cited above,³⁵ seems to show its being chosen from among those who happened to be present, anticipating the act of 1503. Moreover, at most sittings in the Fife record a jury of normal dimensions is listed and proceeds to serve several brieves and perform other business.³⁶ Certainly there are instances where jurors are stated to have confined themselves to only one case, but these should be seen as the exceptions that prove the rule. Another factor pointing to an absence of specific summons is the recurrence of certain "professional" jurors (to be discussed shortly); for it is difficult to believe that they could have direct knowledge of the affairs of all the families on whose brieves they sat. A clue to the reconciliation of this conflicting evidence, at least as to the Fife record, may be found in an episode there in 1517. An

32. c.g. ibid. 97, 110. And on one occasion two assizers asked for their absence from an inquest to be recorded (ibid. 154).

33. c.g. Lamont Papers 25; A.D.C. 34.

34. Aberbrothoc Nigrum 289, 290, 291.

35. supra n. 30.

36. c.g. one of fifteen served four different brieves and (less two members) delivered in a case of wrongous occupation, involving the construction of charters (Fife 168-174).

inquest of thirteen had served brieves of succession to two different deceased persons. Thereafter one David Stewart protested that since he was present "to serue the breuis of inquest pertenyng to James lundy of balgony lyke as he was commandit be the kyngis lettres that it suld turne hyme to na preiudice howbeit he comperit nocht quhen he war summond agane to that effect". Nevertheless he and six others (three of whom had served on the inquest of thirteen) were there and then summoned by the maikr to appear at the Easter head court to serve Lundy's brieve. Stewart and two of the others did so appear and in an inquest of fifteen served another brieve. When Lundy's brieve was heard, an interested party complained that an inquest on it had been chosen in 1514 and eventually after much wrangling the dispute was remitted to arbitors.³⁷ These events suggest that in the Fifte court, at this period at least, only a few assizers with presumed knowledge of the facts were summoned to each sitting to serve each brieve and that they were merged with others called for their acquaintance with other matters to form a composite inquest of the size then thought proper (usually thirteen or fifteen), the number being made up, if need be, from the suitors of court. This assize would decide all civil questions coming before the court at one sitting and in this way it would be sure to contain a nucleus of persons acquainted with the circumstances of each case, as well as others (such as the three on the original inquest of thirteen) who could presumably bring fresh minds to the judicial, as distinct from the factual, side

37. Fife 60-69, 91.

of the jury's function. This will accord with Dickinson's observations as to 'debility' implying the absence of qualified suitors. In this way too respect would be paid to the acts of both 1490 and 1503, on the one hand, by the selection of the "most suitable" assizers, and on the other, by the judge exercising his choice among those present in court.

This may have been only a local device and practice may have varied from court to court and period to period. It certainly seems to be the case that where important issues were to be settled by inquisition a carefully-selected jury would be called. Thus in a cognition proceeding on royal letters as to the rights of the Burgh of Cupar in the waters of the River Eden, the Sheriff of Fife "gert call the personis quilkis were lachfully sumound tharto of before be one precepte lachfully execute & Indorsyt".³⁸ In a comparable litigation of 1542, concerning fishing rights in the River Uthan, the Sheriff of Aberdeen ordered the summoning by his sergeant of more than forty persons to pass upon inquest.³⁹ The Sheriff's primary responsibility for the nomination of those to be summoned is illustrated by another entry from Aberdeen, where he "ordanit precepts to be direct to summond certane famous personis to be chosin be him with consent and assent of (the laird of Midmar)....quilkis personis sal be of the four quarters about the said landis of Mydmar" which were to be divided by them.⁴⁰

38. ibid. 106. See too Brechin I, 138 (1450) (inquisition by Sheriff as to rights of market "vocatis diuersis nobilibus..patric")

39. Fraser Papers 183.

40. Aberdeenshire Sh. Ct. I, 80 (1509).

No doubt the local knowledge of the laird (who was not a party to the proceedings) served to inform him as to the best qualified persons. Perhaps by the second half of the sixteenth century this practice was becoming general. An excerpt from the Aberdeen records of 1559 demonstrates the summoning of a full named inquest of fifteen on a procept of the sheriff specifically to serve a widow's brieve of torce, a case of no great significance except to the parties.⁴¹ The text-writers of the sixteenth century appear to concur in holding the selection of an assize from those specifically summoned and from those present in court to be equally competent and none of them suggest that either method was in disuse.⁴² Even in the late seventeenth century Stair remarks that "it is left arbitrary, to summon the inquest on what days the Judge, server of the brieve, pleaseth; or presently, if there be persons of inquest present in the tolbooth, unsummoned".⁴³

The summoning of assizers in criminal cases is likewise not free from obscurity, but it seems probable that the principle that they should be drawn from the neighbourhood of the crime was followed more faithfully than the corresponding rule for inquests and that they were summoned ad hoc. As we have seen, the one jury in the Fife Sheriff Court might deal with all civil matters at one sitting. Criminal

41. Aberdeenshire Sh.Ct. I, 187.

42. Balfour, after citing the act of 1400, blandly states "And act in the contrare heirof is maid be King James the feird" (Practicks 421). See too Skene D.V.S. loc. cit.; Hope, Major Practicks V. 12. 14.

43. Stair III. v. 30.

cases are not very common, the gravest ones being reserved to the Justice-Court and the more trivial ones being tried in burgh and barony courts. But in all the relatively few criminal cases in Fife⁴⁴ the assize tries the case and no other, civil or criminal, with one exception. This suggests that the choosing of persons who genuinely knew something of the facts was still thought to be essential in criminal causes, while in civil causes, at the risk of offending the Council, it was only paid lip-service to. An entry from the MS Sheriff Court Book of Fife of 1576 seems to substantiate this. A jury of fifteen served a brieve of inquest and another of seventeen a brieve of idiocy, but although thirty-two persons were thus present, a case of blood-wyte had to be postponed because "ther wes nocht ane sufficient nommer of assyse present quhilkis best knew the veritie in the said matter".⁴⁶ Moreover, as Dickinson points out, the absence of any territorial designation of many criminal assizers may suggest that they were local men.⁴⁷ In one case their local origin is particularly clear, for in the trial for sheep-stealing of a man living at Pyotstoune, near Kettle, five of the assize came from Kingskettle, four from Hole of Kettle (now Kettlebridge) and six from other identifiable places in the vicinity. For two others no address is given.⁴⁸ On the other hand a criminal assize at Aberdeen contains many of the names of those who commonly served brieves and

44. Fife 15, 83, 192, 210, 214, 222, 266.

45. ibid. (two criminal trials).

46. ibid. xciv. 47. ibid. 389. 48. ibid. 15.

came from all over the shire.^{48a}

Just as some suitors of court were assiduous in their duties and others were habitual absentees, so too some men were much more frequently to be found on the inner circle of the suitors, the jury, than others. Professor Dickinson has made an exhaustive analysis of the composition of the civil inquests in Fife 1515-1522, which reveals that certain men became almost "professional jurors".⁴⁹ Out of forty-nine inquests one juror is found to serve on thirty-five occasions and five others between twenty and thirty times. He reports the same phenomenon in the Fife Sheriff Court Books of 1563/4 to 1564/5 and in the Aberdeen Sheriff Court Books. Reinforcement of the latter finding may be obtained from the inquests printed in Volume III of the Antiquities of the Shires of Aberdeen and Banff. Of thirty-three inquests, mostly services of heirs, between 1500 and 1510 printed there, William Fraser of Philorth served on eighteen, Thomas Fraser of Stoneywood on twenty-one and Alexander Irvine of Drum on seventeen. Mere geographical proximity to the seat of the Sheriff Court does not appear to explain this fact. Drum and Stoneywood are in the neighbourhood of Aberdeen, but Philorth is in the part of the county most remote from it, some fifty miles away, as is Pitsligo, the seat of John Forbes, another frequent assizer. Dickinson reports that the Fife jurors also come from places near to and remote from the caput of Cupar.⁵⁰ Nor do they seem to be drawn from the

48a. Aberdeenshire Sh.Ct. I, 91.

49. Fife Appx. E.

50. ibid.

neighbourhood of the person or lands in question. The Aberdeen volume referred to comprises the records of parishes in the Presbyteries of Ellon, Aberdeen, the Carlioch and Turriff, but the jurors are not by any means confined to these territories. Thus of an inquest concerning lands and fishings at Banchory-Devenick, four miles from Aberdeen, in 1509 probably only three came from within a ten mile radius of Aberdeen.⁵¹

The surviving fragment of the Sheriff Court Books of Dumfries of 1537-1538 printed by Sir Philip Hamilton-Grierson, shows in six inquest lists the same preponderance of a few names, irrespective of whether the court was held at Dumfries or Penpont.^{51a} One is led to the conclusion that certain men quite voluntarily performed more than their share of jury service. It may have been out of a sense of public duty or because of a feeling of self-importance which they derived from it. More basely, it may even have arisen from a desire to attain to the position of Sheriff-Depute. These officers, who were appointed by the Sheriff-Principal and generally held office at his will, discharged much of the Sheriff Court business in the sixteenth century and were generally drawn from the class of jurors, we have seen, the small laird holding in capite.⁵² In the first place, they were probably assiduous in giving suit of court and thus were likely to be put on assizes and inquests. Gaining

51. Antiquities of Aberdeen and Banff III, 256.

51a. Trans. Dumfriesshire & Galloway Natural History & Antiquarian Soc., 3rd Ser., V, 85.

52. Thus two Alexander Irvins of Drum (father and son) were Sheriff-Deputes of Aberdeen in the late fifteenth century (Aberdeenshire Sh.Ct. I, 436-438; William Meldrum, eulogised by Sir David Lindsay, was Sheriff Depute of Fife (Fife liv, lviii). In the records of Dumfries (supra), where the Sheriff was Robert, Lord Sanguhar, a Crichton, two of the three Sheriff-Deputes were Crichtons and the name figures frequently in the jury lists. (Further a sign of nepotism.)

experience in this way and being known to be willing to serve, they would be an obvious choice when an ad hoc jury was made by the sheriff or sergeant to be summoned by the latter. There is evidence from more than one source of protests by assizers that they were simple men not fit for the responsibility,⁵³ which might suggest the recognition of a class of persons who were so fitted. Although Orkney and Shetland at this time preserved many Norse judicial practices, overlaid by a veneer of feudalism, it is of interest to note the existence of a formalised system of professional jurors there. In Orkney there were "Lawrikmen" drawn from the wealthier udal land-owners of each parish, among whose duties was that of acting regularly as "dittay-men" or assizers in the Sheriff-Courts of the Earldom of Orkney and other courts.⁵⁴

Just as some of the more assiduous attenders among the suitors developed into regular jurymen, so too the more wealthy or experienced might come to be relied upon by the sheriff for advice, even where there was no jury. It is one more instance of the principle that judgment is a function of all the members of the court, but emphasises that some by virtue of their personal qualities carried more weight than others and so were given special respect. Thus an action in 1506 which was "gret & doutwys" to the assize was three times continued because "the principale barones mast of knowledge and undirestandin ar not present".⁵⁵

53. Dunfermline Regality 63; Pitcairn I i, 155; I ii, 95;
Gavin Ross 114.

54. See Clouston: "The Lawrikmen of Orkney" (S.H.R. xiv, 49, 192).

55. Aberdeenshire Sh.Ct. I, 51.

The Sheriff of Forfar in 1295 acted in settling interim possession, continuing a case and finally giving judgment "with advice of the barones ther present",⁵⁶ that is, not of mere suitors, but of those holding lands in capite.⁵⁷ The Sheriff of Aberdeen fixed a day for accused "to comper befor him and the baronis thar till underly the law for the Ditty of thift".⁵⁸ In the Fife Sheriff Court those performing this advisory function are often styled "assessouris". They can hardly be the assize, for on many occasions when assessors are mentioned no assize was empanelled.⁵⁹ Nor do they seem to be assessors in the sense of two or three named persons appointed to sit with the judge as his colleagues. They seem rather to be another name for the more important members of the court present. Thus "the schiref foirsaid avisyt with the baronis & assessouris decretyt"⁶¹ and "the schiref deputis foirsaid avisit with the baronis frehaldaris & assessouris to thame decretit".⁶² Dickinson cites similar examples of the advisory role of the assessors from the MS Sheriff Court Books of Lanark 1548-1550 and Linlithgow 1541-1561, demonstrating that this practice was not confined to Fife.⁶³ A minute from the Aberdeen Sheriff Court of 1574 mentions that "the Shreff deput for the tyme hes no assissors".⁶⁴ This may suggest that by that date assessors were in some places no longer a vague circle of advisers, but

56. Aberbrothoc Nigra 289-291.

57. On the development of the concept of the baron, see Carnwath xiv et seq.

58. Aberdeenshire Sh.Ct. I, 95; cf. ibid. 88 (Sheriff and barons find arrestment of no avail).

59. e.g. Fife 105, 137.

60. As was laid down for the Justice Court in 1491 (A.P.S. II, 225). For an example from a church court where lay and ecclesiastical interests clashed see Soltro 71 (1475).

61. Fife 137. 62. ibid. 162.

63. ibid. xci, n.l. 64. Aberdeenshire Sh.Ct. I, 263.

individuals singled out and holding some kind of office. This might be done by a sheriff in imitation of the occasional foisting on him by the Privy Council of assessors in criminal cases where the central authority was not assured of the judge's ability or readiness to do justice.⁶⁵ In this case, however, he would obviously take care to select amenable colleagues. Such persons must have approached to the Sheriff Deputes who were occasionally appointed ad hoc, perhaps because of their special understanding in a difficult case.⁶⁶ Assessor may even have become another name for such persons.

Where among so many over-lapping groups and personalities did the controlling force in the sheriff courts lie? To some extent this would depend on the characters of the persons concerned. But the trend seems to have been for power to become concentrated in the hands of the Sheriff-Deputes, who in the course of the sixteenth century became increasingly the effective exercisers of the shrieval office. Earlier the sheriff seems to be rather a primus inter pares among the members of the court and indeed in the feudal hierarchy he was no more than that, a local land-owner like the others, but singled out to hold this royal office. In the thirteenth and fourteenth centuries and even later centuries when ad hoc courts were often held in important civil causes by the Justiciar or other emissary of the king he was just one magnate present among

65. e.g. R.P.C. (1st) VI, 367 (1602) (four persons nominated assessors to Sheriff-Depute to aid him with their advice); cf. R.P.C. (1st) IV 214 (1587).

66. e.g. Abordeanshire Sh.Ct. I, 446-7 (1558).

many⁶⁷ and acted on the instructions of the judge. The absence of any surviving systematic records prior to the sixteenth century may have been due, as Littlejohn suggests,⁶⁸ to their being regarded as the private property of the sheriff. In that case one might have expected the records to have been preserved in family charter chests. Although there is ample evidence from the retours in services of heirs that sheriff courts were functioning in the fourteenth and fifteenth centuries, it may be that they only did so spasmodically and that not until the sixteenth century were they regularly sitting and organised.⁶⁹ In earlier years the military and financial side of the Sheriff's office perhaps overshadowed his judicial duties.

The earliest continuous surviving sheriff court records reveal that juries were in the early sixteenth century doing much more than declaring affirmative or negative, innocent or guilty. Indeed in a slightly earlier case from the sheriff court of Berwick, held pro tem in Edinburgh, virtual anarchy seems to have reigned, each member of an inquest of fifteen giving his own individualistic opinion as to rights of property claimed in Berwick by Melrose Abbey. What action followed on the basis of so many conflicting voices does not appear. But this

67. e.g. St. Andrews 3; Aberbrothoc Vetus 163; Aberbrothoc Nigrum 95-97.

68. Aberdeenshire Sh.Ct. I, xxvi; cf. Maitland Thomson 143. Later court volumes seem to have been treated by sheriff-clerks as their own property (Stair Soc. Sources 115).

69. Littlejohn, asking if Aberdeen records prior to 1503 took more than "the fugitive form of separate papers and mere jottings"; shows the existence of a court book in 1491, but concludes that the volume of 1503 "is a very early example of such records as were put together in book form". (Aberdeenshire Sh.Ct. I, xxv).

case is perhaps unique.^{69a} Although the conduct of the court was normally the function of the sheriff, consulting if necessary the barons,⁷⁰ once an assize was empanelled, it seems to have arranged matters very much as it chose. Thus at Aberdeen in a case of the wrongful use of lands, the assize, being uncertain how long this had continued ordered the summoning by the pursuer of witnesses to speak to this point. On another occasion the assize, having difficulty with a case, simply continued it to another court when more competent persons would be present.⁷² Their verdicts tend to be rather diffuse in an attempt to cover all the consequences of a wrongful action. Thus in a case of unlawful occupation of another's land, the offender is found to have "done vrang" in ploughing the land and taking the crop and must return the crop to the rightful owner, pay a fine in court, and desist from such conduct in the future.⁷³ By the sixteenth century sheriff court juries habitually withdrew to consider their verdict, both in civil⁷⁴ and in criminal cases.⁷⁵ But where a contentious question was being decided informally by the whole court or by the sheriff and barons, it was customary for the parties to withdraw.⁷⁶ The same practice is also to be found in the Court of Parliament.⁷⁷ There is no evidence however of the extreme democracy of some baron and burgh courts, in which the

69a. Melrose II, 694 (1480).

70. Aberdeenshire Sh.Ct. I, 79, 100 "of his office". 71. ibid. 75.

72. ibid. 51. Cf. Brechin I, 112 (1448) "quia multa ardua in dicta curia erant agenda....barones et alii de assisa deliberauerunt et proposuerunt quod in proxima curia capitale darent responsum...." (Sheriff Court of Kincardine).

73. Aberdeenshire Sh.Ct. I, 80, 57, 100. 74. e.g. Fife 107, 198.

75. e.g. ibid. 48, 211, 215.

76. Aberdeenshire Sh.Ct. I, 88; for a slightly different interpretation see Fife 321.

77. A.P.S. II, 23.

assize withdrew and examined witnesses alone.⁷⁸ Later in the sixteenth century sheriffs seem gradually to have established firmer control over their courts. As sheriff-principals receded into the background, their deputies became the effective judges. In 1540, although sheriffs (and other judges) were ordered to sit in person, except when lawfully excused, they were also required to appoint as deputies "gude and wise substancial men of best fame knowlege and vnderstanding and experience".⁷⁹ Though complaints about the incompetence of the sheriffs did not cease,⁸⁰ they began to act more in the character of judges. Juries were formed only for certain classes of case, such as criminal trials, appraisings, and the service of heirs; otherwise the sheriff judged alone, and certainly all procedural questions were determined by him. This change has been attributed to the act of 1540 directing sheriffs in all personal actions to "mak sic process in all thingis as is usit befor the Lordis of counsaile and sessioun Notwithstanding ony auld lawis or constitutionis maid thereupoun of befor".⁸¹ If this is so, it was not an instantaneous process. As late as 1575 a Pife Jury, apparently ex proprio motu, "all in one voice contenewit thair deliuerance....to the effect that in the mentym thair mycht be forder resolut and awysit thairwith".⁸² And in

78. see supra 137

79. A.P.S. II, 358.

80. Cf. the bold protest of a dissatisfied litigant that his action called for a hearing by the Court of Session, the Sheriff of Perth and his deputies being "of our small knowlege and undirstanding" (A.D.C. Public 610). See also ibid. 615. (Misquoted in Stair Soc. Introduction 357).

81. A.P.S. II, 358. Stair Soc. Introduction 354, 419.

82. Pife xcix n.2.

1557 a Sheriff Principal made a protestation in a particularly protracted action that the jury and not he or his deputies were to be held responsible for what was done in the case.⁸³ But it is certainly true that the role of the suitors and jury did eventually decline. The continuing reluctance of those obliged to attend courts to give such attendance⁸⁴ may also have helped to elevate the position of the sheriff. The earlier important role played by the jury depended on the willingness of men of responsibility to attend in sufficient numbers to allow the formation of a jury. Although adequate juries could usually be empannelled for the more serious crimes or in brieves of inquest (which might be regarded as a favour done to a friend) the routine business of the court was left to the presiding sheriff.⁸⁵

Criminal trial by jury on indictment continues in the sheriff court until the present day, the procedure being largely common law and following that of the High Court described in Chapter IV. The service of heirs by an inquest acting on a brieve from chancery was abolished by the Service of Heirs Act of 1847.⁸⁶ Certain other forms of brieve, though remaining competent in the sheriff court have long fallen into desuetude.⁸⁷ The trial of personal actions by juries was

83. Aberdeenshire Sh.Ct. I, 129.

84. See the absences from Aberdeen head courts c. 1600, varying from 45 to 90. (Ibid. II 3-6).

85. For examples of seventeenth and eighteenth century sheriff court practice see Renfrewshire I & II.

86. 10 & 11 Vict. c. 47.

87. infra 201

partially revived by the Sheriff Court Act of 1907,⁸⁸ but limited to claims against employers or arising out of accidents in the course of employment. The procedure is comparable to that introduced into the Court of Session in 1815, but the number of jurors is only seven.⁸⁹ Diminishing use has been made of this facility in recent years and the Strachan Committee on Civil Jury Trial in 1959 recommended its abolition.⁹⁰

88. 7 Edw. VII c. 51, s. 31 and Sch.

89. For a full description of civil jury trial in the sheriff courts see Dobie: Sheriff Court Practice 339-354.

90. Cand. 851.

VI. Admiralty Courts

The surviving records of Admiralty Courts are scanty, but suffice to demonstrate that the jury, at least in the fifteenth and sixteenth centuries, was used in both civil and criminal proceedings. Originally jurisdiction in disputes among shippers rested with the magistrates of coastal burghs. Helwod states that it was the Dean of Guild, "a judge of many hundred zeirs awld in this lande", who exercised this jurisdiction.¹ With the creation of the office of High Admiral of Scotland, probably at the beginning of the fifteenth century,² the Admiral obtained the right to try all maritime cases throughout Scotland.³ However, in the fifteenth century it seems to have been his practice to employ the magistrates of sea-ports by granting them a special commission to try admiralty cases. Thus in 1450 a "Curia Admirallatus" was held in the tolbooth of Aberdeen, "per Gilbertum Menais et Johannem de Fife deputatos domini Georgii de Crichton domini de Carnye militis admiralli Scocie".⁴ Both were leading citizens of the town, John Fyfe being provost in 1437, 1440, 1448, 1451 to 1453 and 1456 to 1458 and

1. "The Sea Law of Scotland" (S.T.S. Miscellany Volume, 23 at 77).

2. Wade states that the first Admiral on record is Henry Sinclair, Earl of Orkney, who died in 1417 (Admirallatus xiii). See also Macmillan: (1922) xxxiv Jur. Rev. 39.

3. Macmillan loc. cit.; Relement 216. His jurisdiction was finally exhaustively defined by an act of 1681 (A.P.S. VIII, 351; Boyd 2-5).

4. Aberdeen MS Burgh Court Book V, 127.

Gilbert Menzies (presumably the same) being provost in 1426 to 1428 and 1439.⁵ At an Admiralty Court in the burgh of Irvine in 1499 the judge was a local baron, John Kennedy of Cofe in Carrick,⁶ who was deputed by John Lord Kennedy, himself a Vice-Admiral acting with the authority of the Earl of Bothwell, High Admiral. He was unable to produce his commission to act when called upon to do so and this was the subject of several notarial protestations.⁷

Thus it is not surprising to find that under such judges the procedure appears to follow that used at the same period in other courts within the burghs. In the Aberdeen case of 1450 an assize of thirteen local men was empanelled to hear a civil case between the masters of a war-ship from Dieppe and a ship from Trailesond (in Holland) concerning the capture of the latter.⁸ Following the local practice of the time,⁹ the assize assumed the direction of the proceedings and, after hearing witnesses, they remitted the case to "our said seuerone lord and his conseil, be thaim to be decidit and endit" and meantime ordained the admirals depute to keep the Dutch ship and its cargo in security. Their frank admission that "thai haue herd seildom or neuer sic matteris declarit" indicates the rarity of such proceedings. At Irvine in 1499 in an action concerning the arrestment of a ship from Brittany an

5. Kennedy: Annals of Aberdeen II, 231; Aberdeen Burgh I, 6. The following year John Vyfe was justice-depute at the justice-ayre, his colleague on this occasion being John Marr, provost in 1453 (Aberdeen MS Burgh Court Book V, 137; Kennedy, loc. cit.) and a member of the assize in the admiralty case.

6. Cuthbert Simon 13 (He does not appear in Irvine or R.M.S.)

7. Cuthbert Simon 13-15.

8. Aberdeen Burgh I, 19; Aberdeen MS Burgh Court Book V, 127.

9. supra 97

assize was also formed, though their precise function is not apparent.¹⁰

In the sixteenth century there was probably a concentration of admiralty jurisdiction in the High Court of Admiralty, situated in Edinburgh, a development in conformity with the centralisation of other civil and criminal courts there.¹¹ The surviving records of this court in the years 1557 to 1561 give us a view of the procedure followed in a more permanent and professional forum. Once again, the jury is found playing a part, but a limited one subordinate to that of the judges, who are now usually styled Vice-Admirals and may be assisted by assessors.¹² The court habitually met in the tolbooth of Edinburgh, but commissions might still be granted to local judges where the witnesses resided far from the capital.¹³ Criminal cases are uncommon, probably because of the width of the justice-court's jurisdiction, but were nevertheless competent. In such cases trial was by assize of fifteen, who withdrew to consider their verdict, the sentence being a matter for the judge and assessors.¹⁴ If they failed to compare when summoned, they were liable to be fined ten pounds.¹⁵ At a trial of English pirates in 1610 the assize consisted of seven merchants and eight skippers, who might have been expected to show some degree of prejudice against the accused, but who nevertheless remained

10. Cuthbert Simon 12-15.

11. Edinburgh was in any case a convenient locus for the majority of the sea-ports of Scotland, most of which were then situated on the estuary of the Forth. Cf. R.P.C. (1st) II, 86 (1571) where Edinburgh is described as "the cheif seit of justice for all the subjectis in this realme alswell in causis criminale as civile and ecclesiasticall".

12. Admirallatus 36, 223.

13. ibid. 60 (commission to Commissary of Caithness).

14. ibid. 223; Pitcairn III, 107.

15. Admirallatus 142.

unchallenged by any of them.¹⁶ In civil cases a jury appears to have been used only spasmodically and then in cases arising out of the disposal of prize vessels and goods. An interesting feature is the fact that they speak to the existence and details of maritime customs, in reaching their verdict. Thus one inquest states that "of the usse and consuetude of seyfair usit and observit in all tymis bygone past memor of man" the skipper of a war-ship capturing a prize vessel should have of it the best cable and the best anchor.¹⁷ The jurors were themselves probably all sea-faring men, as their addresses seem to confirm. Certainly in the Admiralty Court of the Regality of St. Andrews in the seventeenth century fines were imposed for absence from court when summoned on "all maisters and skippers within the boundes of the Regality".¹⁸

By the eighteenth century the criminal jurisdiction of the court had effectively passed to the High Court and its civil jurisdiction was dispersed among powerful families, such as the Earls of Morton in Orkney and Shetland, and among the burghs of Edinburgh and Glasgow.¹⁹ Boyd in his work of 1779 makes no mention of the jury in the surviving civil functions of the Admiralty Court.

16. Pitcairn III, 107.

17. Admirallatus 5. Cf. ibid. 16, 81.

18. Regality of St. Andrews Admiralty Court Book (G.E.N.) 5.

19. Macmillan in (1922) xxxiv Jur. Rev. 38 at 43.

CHAPTER THREE

I. Introduction: Process upon Brieves

Having watched juries at work in different types of court, we now alter our vantage-point in order to study the various tasks which they were set. Their criminal functions can perhaps best be discussed separately in the form of a resumé of the course of the typical criminal trial and this will be attempted subsequently. For the present, it is proposed to discuss their functions in civil law, the most deserving of attention being the process on brieves.

As we have seen, the taking of inquisition was a common feature of mediaeval government. Rulers, faced with the need to make detailed decisions, informed themselves on the relevant facts by getting their local officers to question those who were best acquainted with the matter and then took action on the basis of the answers they received. The uses to which this device could be put were legion, so long as it remained unhedged about with procedural requirements. But certain types of inquiry were constantly recurring. Precedent is such a force in human affairs, and especially in the law, that stereotyped ways of dealing with these developed, which in time were felt to have binding force in themselves. Thus forms of action came to limit the scope of such inquests, just as in England they cramped the growth of new remedies in tort and contract.

In Scotland this procedure of inquiry was initiated by brieve. In a wide sense a brieve is simply a formal letter, in the name of the king or other ruler, ordering certain named persons or the lieges in general to take some action or refrain from it. But in the narrower and more common usage it is a command "which initiated a process by submitting a written issue to a sworn assise presided over by the official to whom it was directed".¹ The fourteenth century Ayr and Bute MSS contain a wide variety of styles in both senses.² Thus some, such as de morte antecessoris,³ require the taking of inquisition "per probos et fideles ac antiquiores patrie"; others contain direct commands, such as de respectu⁴ which sisted process during the absence of a person who was a party to it. Some, such as the brieve of succession,⁵ are of infinite application; others, such as the appointment of a janitor to a monastery of which the king was patron,⁶ must have been of rare, if not unique, occurrence. There is no hard and fast line between what we should call administrative and judicial functions. The styles all exemplify exercises of the sovereign authority which was vested in the king.

Brieves were drawn up under the supervision of the director of the chancery in the chancery (sometimes called the chapel) of the king's

1. McKechnie 6.

2. Printed with an introduction by Lord Cooper in The Register of Brieves (Stair Soc. Vol. 10); (hereafter referred to as Brieves).

3. Brieves 40.

4. ibid. 47.

5. ibid. 41.

6. ibid. 51.

household. Some lords of regality too, imitating in this as in other respects royal organisation, established their own chancery.⁷ Brieves which required the taking of inquisition were of two kinds; retourable brieves, where the verdict had to be returned sealed to the chancery, in order that further appropriate action might be taken upon it, as, for example, the issuance of a precept of sasine, following upon the service of a person as heir in certain lands; or non-retourable, where the verdict itself contained the action to be taken, as in a perambulation of boundaries, where the members of the inquest themselves traced the marches and recorded their findings in the verdict, to which the judge interposed his authority. These classes of brieve are also distinguished as non-pleadable and pleadable respectively, the expectation being that in the normal case the verdict to be returned would simply establish a question of fact which would not be contested and so would not require to be pleaded before a judge, whereas the pleadable brieve was in its nature contentious, arising as it did from a dispute between two parties.⁸

Many of the Scottish brieves are clearly inspired by English royal writs. Indeed Stair believed quite erroneously that they were introduced by James I on his return from captivity in England in 1424, in imitation of the forms in use there.⁹ But many forms of brieve

7. supra /¹⁴³ For examples of the brieves of an important regality, see St. Andrews Formulare I, No. 217.

8. On this terminology see Erskine IV. i. 3; Stair Sec. Introduction 413.

9. Stair IV. i. 4; IV. iii. 4. Craig, however, who is convicted of the same error by McKechie, appears to assert only that the king introduced "the office of chancery and the instrument of sasine" (Jus Feudale II. 2. 18). Elsewhere he writes "brieves were extensively (Footnote continued on following page)

were in use in Scotland during the two centuries prior to that date. Perhaps ten of these have English counterparts which are reproduced by Glanvill. Thus the Scottish brieve of novel disseisine, (de nova disseysina) causing an inquiry to be held into allegations of unjust ejection from land, is akin to the English assize of novel disseisin.¹⁰ The Scottish brieve of right (de recto), the general means of determining the title to land, reflects the English writ of right.¹¹ The Scottish brieve of mortancestor (de morte antecessoris), directing an inquest into a claim that the bearer was heir to lands wrongfully held by another, is in that original sense an adaptation of the English assize of mort d'ancestor.¹² The brieve of perambulation and its urban equivalent, the brieve of lining, the brieve of extent, causing an assessment of the value of lands to be made by inquest, and the brieve of terce, by which a widow claimed her one-third share in her late husband's heritage, were also all to be found in Scotland in the thirteenth and fourteenth centuries.¹³ But ^{by} the close of the fifteenth century the institution of the brieve as a flexible and growing legal device was at an end. An act of 1491 laid it down that "na breues be gevin to na party bot eftir the forme of the breues of the chancellary seit in auld tymes of

(Footnote continued from previous page).

used in Scotland in earlier times, and our muniments contain many and varied examples of them" (ibid. II. 17. 25). See also Brakine IV. i. 3, where Stair's error is corrected, and Brieves 30.

10. Brieves 15, 40; Glanvill XIII, 32-35, Quon. Att. c. 53.

11. Brieves 13, 39; Glanvill XII, 1-3; Quon. Att. c. 57.

12. Brieves 13, 40, 41; Glanvill XIII, 1-3; Quon. Att. c. 52; De Unione 316.

13. McKechmie 8-10.

befor and that the forme of chancellary be observit and kept without inouacioun or siking of new termes".¹⁴ Besides, the gradual establishment of central courts, culminating in the foundation of the Court of Session in 1532, led to the emergence of the summons as the main initial writ, its most distinctive feature being that instead of giving a mandate to inferior judges to act, it summoned the defenders directly before the supreme court. Moreover, in affording a general remedy in cases of disputed title to heritage, the Court of Session dispensed with the cumbersome brieve de recto.¹⁵ Brieves were thus not extinguished, but they were confined to seven firmly-established styles, the utility of which continued until modern times. These have been described as "the seven classical styles"¹⁶ and they form the groundwork of the treatment of the subject by Balfour, Stair and Bankton.¹⁷ Three of these were retourable - the brieve of the service of heirs (known by various names), the brieve of tutory and the brieve of idiotry or furiosity. The remaining four were non-retourable - the brieve of perambulation, the brieve of division, the brieve of lining and the brieve of trees. It is proposed to concentrate attention on the brieve of the service of heirs, as being that in most frequent use and most formalised in its procedure, and on the brieve of perambulation, as being typical of the

14. A.P.S. II, 224.

15. Stair IV. iii. 4.

16. McKechnie 8, 16; De Unione 320.

17. Balfour 644 et seq. Stair IV. iii. 5 - 14; Bankton IV. xiv. 11-12.

three which are concerned with the tracing of boundaries.

For the former the term briefe of successioun will be employed. The authorities are by no means agreed on this matter of terminology. Balfour writes of "The general brief, or the breive of successioun".¹⁸ Skene refers to it as "Breve de morte antecessoris...Or the briefe of successioun, or of consanguinitie...Or breve inquisitionis...Or the briefe of inquest".¹⁹ Craig calls it "Breve de morte antecessoris"²⁰ and Hope the "breive of mortancestrie".²¹ Stair seems to avoid giving it any particular name, though in the side-notes it is called "Brieve of service".²² Bankton uses the modern terminology of general service and special service, as well as "Brieve of mort-ancestrie".²³ Erskine, noting the confusion, writes "Though all our briefes are executed by the intervention of juries and inquests, yet the brief for serving heirs has got the special name of the brief of inquest, as far back as the reign of Robert III, c.l."²⁴ He goes on to show that "Though the brief of inquest sometimes gets the name of the brief of mortancestry, these two were originally distinct".²⁵

18. Balfour 644.

19. D.V.S. s.v. De Morte Antecessoris

20. Jus Feudale II. 17. 26.

21. Major Practicks IV. 5. 7; V. 3. 1.

22. Stair IV. v. 16.

23. Bankton III. v. 14; IV. xiv. 11.

24. Erskine III. viii. 59.

25. ibid. III. viii. 62; cf. Stair Sec. Introduction 172.

II. Retourable Brieves

It was the purpose of the brieve of succession to determine by the verdict of a sworn inquest whether the bearer of it was lawful heir to a deceased person. Prior to the sixteenth century, the question always arose in determining the succession to lands, which on the death of the person infeft in them, reverted to the feudal superior. The retour of the inquest, on being returned to chancery, warranted the issue of a precept of sasine ordering, in the case of lands held of the sovereign, the sheriff or other royal officer and in the case of lands held of a subject, that subject-superior, to infeft the heir in the approved manner.¹ Until that was accomplished, he was only heir-apparent. In royal burghs, however, burgage tenure required no retour to chancery, for the baillie before whom inquisition was taken was himself authorised to infeft the heir directly by a formal ceremony and instrument thereon.² The growth of various interests in land falling short of full infeftment, such as the lease,³ led to a demand for a process of recognition as heir, short of service to specified lands. A service was also required such as would enable an heir to use precepts granted to his ancestor, but not yet used to obtain infeftment,⁴ to

1. Known respectively as a Precept from Chancery and a Precept of Clare Constat. The former was more common than the latter, for subject-superiors usually know their own vassals well enough not to require such proof. But it remained a useful form of compulsion in case of disagreement between superior and would-be heir. (See Stair Sec. Introduction 171).

2. ibid. 176-177.

3. Rankine, Leases (3rd ed.) 158.

4. Stair Sec. Introduction 172.

obtain possession of heirship moveables and to pursue and defend actions engaged in by the deceased before his death.^{4a} Erskine relates as possibly the earliest example of this a case of 1532, where a sheriff without an inquest declared a person to be heir, in pursuance of a royal letter narrating that the heir had been unable to purchase a brieve, because his ancestor had alienated all his heritage before he died.⁵ Thereafter the ordinary process by means of an inquest was adapted to provide a mode of determining mere relationship, without reference to any lands. This became known as a general service and the older form of service to certain heritage was by contrast called a special service. These terms persist to this day, although the procedure by jury has been dispensed with.

The procedure for obtaining service as heir to a deceased person in specified lands was, with special reference to the role of the inquest, as follows. A person claiming to be heir to a deceased who had died vested in lands, in accordance with the rules of succession to heritage,⁶ purchased from the chancery of the king (or in the case of the lands of certain regalties from the chancery of the lord of regality) a brieve of succession.^{6a} This was addressed to an inferior judge, most commonly the sheriff of the shire within which the lands lay, or the provost

4a. Skene, D.V.S. s.v. Brieve de Morte Antecessoris; Balfour 645.

5. Erskine IV. viii. 65.

6. It was only in 1868 that the testamentary disposition of heritage became possible (apart from the device of the special destination).

6a. For the fees payable see R.P.C. (1st) vii, 169-170 (1606).

and baillies in the case of burgh lands⁷ and was authenticated by the chancery quarter seal. It required him to take inquisition "por probes et fideles homines patrie" on all the points of inquiry detailed below and to send to the chancery their findings under his own seal and those of some of the members of the inquest, together with the original brieve.⁸ On receiving the brieve from the bearer, a sheriff had two immediate duties, to arrange for the proclamation of the brieve and for the summons of suitably qualified jurors. The proclamation had for its object the drawing of the attention of any of the lieges who might be interested parties in the succession to the lands that the raiser of the brieve was asserting his right to them. This duty was one of the many performed by the sheriff's officer, usually known as the sergeand or mair. An act of 1503 regulated the procedure.⁹ It narrated first, in the manner of the period, the "great abusoun" which it was directed at curing, namely that "there has bene ane abusoun of the crying of the kingis

7. "The judge ordinary is the sheriff in his own shoriffdom, the steward in his own stewardry, and the lord of regality in his own regality" (Jus Feudale II. 17. 26.) And, Craig continues, "Magistrates of inferior rank to these are not competent to act under brieves - at any rate, not under the brieve of mortancestor. There are however some burghs which have shrieval powers within their own boundaries, such as Edinburgh and Perth". In the Aberdeen burgh records, although occasional royal brieves are to be found in the fourteenth century, it is not until c. 1450 that brieves of inquisition become frequent enough to suggest that they were normally served in the burgh court (Aberdeen MS Burgh Records Vol. IV; Aberdeen Burgh I, 14). But in the sixteenth century numerous burghs exercise this power (e.g. Selkirk 31, 64; Inverness I, 137; Elgin I, 119; Mark Carruthers 7 (Dumfries); Gavin Ros (Ayr); Frestwick 43, 55

8. Brieves 41.

9. A.P.S. II, 245. An act of 1587 named certain towns as the place of proclamation for the stewartries (e.g. Perth for Strathearn and Menteith) (A.P.S. III, 453).

brevis in stewartrijs and balserijs quar thair war criit at ane hill na
confluence of pepill being thair".^{9a} Therefore all brieves of inquest
were to be proclaimed openly at the market-cross of the head burgh, where
people would be gathered. The act of proclamation was to be witnessed
by officers of court. (This is probably an early example of judicial
decision being re-enacted in legislative form, for Balfour quotes cases
of 1491 and 1500, which declare that brieves must be publicly proclaimed
on pain of nullity.¹⁰) The "crying of the brieve" was clearly by this
time a matter of established practice and it is also referred to in an
act of 1429 where it is laid down that brieves shall be "cryit on xv
dayis warning", except at the head court of a sheriffdom or burgh,
when they could be served "incontinent", presumably because of the
obligation of suit and presence.¹¹ The act of 1503 however was under-
stood to confine this privilege to the summoning of the inquest and the
proclamation must precede the service by fifteen days.¹² The importance
attached to this formality, even in the mid-fifteenth century is
emphasised by an example from the burgh of Ayr, where in 1466 a brieve
was held not to have been lawfully cried, because the sergeand had
only one witness, two others present being rejected as not lawful
witnesses.¹³ The fee for proclaiming a brieve at the market cross of

9a. of. A.D.C. 243; A.D.C. (Civil) 422, 457.

10. Balfour 421. 11. A.P.S. II, 19.

12. A.P.S. II, 245; Stair III. v. 30.

13. Ayr MS Burgh Court Book 1428-1478 f. 105. Cf. also ibid. f.102.

Aberdeen in the sixteenth century was forty pence, payable presumably by the raiser of the brieve, of which the heritable mair of fee kept sixteen pence, the actual duty being performed by his deputies.¹⁴ Quite often proclamations of brieves and other announcements seem to have been made from the tolbooth door, which was usually reached by an outside fore-stair forming a more convenient platform than the steps of a small cross.¹⁵ After proclamation, the brieve was returned to the sheriff, usually by the raiser, bearing upon it an indorsement of the proclamation.¹⁶ Alternatively the proclamation might be verbally verified by the officer and witnesses.¹⁷ Of the due proclaiming of the brieve the raiser was entitled to receive an instrument, which might be of importance if the service was later challenged,¹⁸ for failure to proclaim the brieve, as the law required, was a frequent ground for the quashing of retours.^{18a}

The summons of an inquest was also carried out by the court officers. The choice of suitably qualified persons rested primarily with the judge,¹⁹ but as those forming the inquest would have to be admitted by the party (or parties, if the service was contested) he

14. Fife Appx. F. Cf. A.P.S. II, 17.

15. e.g. Gavin Ros 63 (Ayr); Fife 193; Canongate 365 ("at the tolbuith stair as use is") ibid. 42, 79 (at the Tolbuith windo as use is") Kirkcudbright I, 102, 174 etc.; Laing Charters No. 422 (Rothsay) Cf. Inverness II, 10 (calling of roll of suitors at tolbooth stair).

16. Gavin Ros 85.

17. D.V.S. loc. cit. Kirkcudbright II 304, 361.

18. ibid. III, 415; Elgin I, 119.

18a. e.g. A.D.C. 10, 212, 223, 243.

19. A.P.S. II, 245; Skene, D.V.S. s.v. Breve de Morte Antecessoris; Aberdeenshire Sh. Ct. I, 80; Lag Charters 53.

would usually consult him or them as to appropriate names. Sometimes the choice seems to have been left to the sergeants, who thus won for themselves a reputation for choosing poor and illiterate people.²⁰ An act of 1400, which was designed to prevent the defrauding of persons of their heritable rights through briefs being served in semi-secrecy, declared that briefs must be served only "per magis ydoneos et digniores sub promuncione xv dierum ad hoc summonitos et vocatos".²¹ The act of 1503 however specifically amended the previous one in permitting judges of briefs of inquest to call jurors on as short notice as they pleased or even to select them from among persons already present in the tolbooth.²² The duty of acting on inquests does not on the whole seem to have been a popular one, particularly in burghs where the more responsible and elderly inhabitants were no doubt frequently called upon to give their services in this way. At Rutherglen in 1512 certain freeholders were recorded as having contumaciously absented themselves, although cited to attend.²³ The Blackfriars of Perth at the period of the friars' lowest popularity shortly before the Reformation found themselves unable to gather an inquest to settle a dispute with the community of Perth over rights in a garden. They had to obtain letters from the king, which narrated their "hevy dampnage and skaith" thereby,

20. Gavin Ross 114.

22. A.P.S. II, 245.

21. A.P.S. I, 575.

23. Gavin Ross 2.

and ordered the best and worthiest of the sheriffdom of Perth to pass on inquest.²⁴ But before the size of the inquest became stabilised at fifteen members at the end of the sixteenth century, it was probably of little account if some of those called absented themselves and such instances of justice being impeded are uncommon.

The selection of an inquest from among those present or summoned was also a matter for the presiding judge.²⁵ His nominees were however subject to challenge by the party or parties, on the numerous and varied grounds to be discussed later.²⁶ Thus as early as 1309, in a dispute on annual rents between the monks of Lindores and the townspeople of Newburgh, a man was removed from the inquest as having been a servant of the abbot.²⁷ The majority of brieves of succession being uncontested, this was not usually a matter of such moment as in the pleadable boundary brieves. But the opportunity to challenge must always be afforded. A failure to put "the best and worthiest of the country" on an inquest, as commanded by the brieve, was a "wringwis and unordurly proceeding" that warranted the quashing of the retour, and it was the sheriff (or other judge) who was summoned by the aggrieved party as being responsible for the formation of the inquest.²⁸ In the sixteenth

24. Milne: Blackfriars of Perth 229.

25. Gavin Ross 2.

26. infra/Balfour 420. See e.g. Laing Charters No. 365 where a challenge on the ground of relationship and its rejection by the sheriff was notarially recorded. See also Yester House Writs 99.

27. Newburgh 475.

28. A.D.C. 34. Cf. ibid. 38 and Yester House Writs 127 where the quashing was on the ground of the inclusion by the judge of persons related to an interested party, despite a protest in the latter case. In inter vivos claims, at Carnwath, pursuers are occasionally found on the juries trying their own cases (Carnwath xvii n.1).

century it usually numbered thirteen or fifteen men, "sed semper in impari numero".^{28a}

The stereotyped narration of the inquest's findings in the retour tells us little about the manner in which the verdict was reached, as distinct from its contents. But a few details can be gleaned from other less taciturn records. The inquest must first be put on oath, otherwise their deliberations were of no avail.²⁹ The indispensable nature of the oath is illustrated by a notarial protestation in which a man asserts that he should not be prejudiced by the finding of a jury, for he was not sworn upon it or, if he was, he was absent when the members arrived at their decision.³⁰ The brieve was then read out to them, probably by the clerk of court.³¹ The raiser of the brieve and anyone opposing it then in turn stated their claims and presented their evidence in support. The proof of infeftment would always take the form of deeds of title (unless a convincing reason were shown for their non-production) and might be supplemented by the verbal evidence of witnesses. Originally, no doubt, the jurors could in fact, as well as theory, be expected to speak from their own proper

28a. D.V.S. loc. cit.; Jus Feudale II. 17. 27. For a fuller discussion see infra 298

29. Jus Feudale II. xvii. 29.

30. Gavin Ross 149; cf. Balfour 427.

31. "The quhilk gude assise the gret atht sworne herde the processe forsaide rede" (Spalding Club Collections 394 - dispute as to ownership of land and right to nominate suitor); "...petiit dictum breue perlegi et ad assisam procedi et determinari..." (Cougar Angus II, 28 (1434)). See also Melrose Regality I, 25. But a protest at Dunfermline that the choosing of the assize before the reading of the brieve should not prejudice a party suggests that the reading may sometimes have preceded the empanelling (Dunfermline Burgh I, 71).

knowledge, but at least by 1400 parties were in use to refresh their memories by evidence, while by the early sixteenth century, an inquest could decline to state the lands in which the deceased had died seized or their value, if their minds had not been informed by lawful evidence.³² Documentary evidence usually took the form of a charter or charters in favour of the ancestor or of the later instrument of sasine recording the giving of sasine, both demonstrating that the ancestor was infeft in the lands in question.³³ If the jurors were not satisfied with the evidence produced or the lack of it, they might be authorized specifically to proceed by the Lords of Council.³⁴ Only thus could they feel themselves secure against a subsequent summons of error before the same Lords. The importance of some form of documentary evidence is illustrated by a case in the burgh court of Dumfries in 1563, when an inquest at several hearings insisted that they must be shown sufficient documents of title before they would serve a man in certain lands carrying rights of church patronage, and that despite threats that they would be enclosed until they did return a verdict.³⁵ The other main point of proof, namely, the propinquity of the claimant to the deceased remained a matter for the personal knowledge of the jurors and was according to their understanding.³⁶ Where adequate writs had not been

32. 32. Yester House Writs 111 (1512). Cf. Fife 259 (apprising).

33. 33. e.g. Helkirk 59; Canongate 204; Balfour 429.

34. 34. A.D.C. (Public) 326; cf. Yester House Writs 111.

35. 35. Mark Carruthers 7-11.

36. 36. Malrose Regality I, 25.

produced, the jury might content themselves with declaring the claimant to be heir but postponing the giving of sasine until the exact extent of the lands had been established.³⁷ The destruction of many documents of title by fire during the English invasion of 1544-5 is said to have led to the retouring of lands at as little as one-sixth of their former value.³⁸ Originally, the presentation of such evidence in court was no doubt done very informally, but with the increasing use of procurators to represent parties from the early sixteenth century, more formal legal pleadings were made and the force of the evidence argued before them. Occasionally these pleadings were reduced to writing. Thus in a memorandum the Laird of Yester lists the various holdings, their situation and alleged value, in which he desires to be served as heir to his grandfather and explains that certain of the lands are now in the hands of the King "in default of my fader and me nocht persewand our rychtis".³⁹ Sometimes the introduction of professional lawyers led to lengthy procedural debates even before the inquest was empannelled.⁴⁰ The admission of witnesses does not seem to have been common, jurors themselves being witnesses. Thus when an inquest proposed that a witness should be admitted to inform them as to the contents of an imperfect letter of tack the sheriff refused to allow this.⁴¹ But in action as to the possession of certain disputed lands

37. Prestwick 55 (1538).

38. Highland Papers III, 159.

39. Yester House Writs 140. Cf. Antiquities of Aberdeen and Banff IV, 379.

40. e.g. Canongate 345, 433.

41. Gavin Ross 115.

the inquest were informed "cum veredictis et recitationibus plurimorum antiquiorum patrie", though they themselves were supposed to be "elders".⁴² Whether jurymen were always capable of understanding the import of the evidence produced before them is very doubtful and there are occasional protests as to the illiteracy of an inquest.⁴³ On the other hand, as we have seen,⁴⁴ in certain areas the barons (i.e. lairds holding in chief) became virtually professional jurors, and presumably were capable of coping with documentary evidence.⁴⁵ In some places, such as Selkirk, jurors were not averse to taking the advice of lawyers, not just as pleaders in open court, but as advisors in arriving at a verdict. Thus an inquest there declines to state whether a man is heir to his brother's daughter or not "quyll thai be avysit with discretfull men of law".⁴⁶ In Orkney and Shetland the mysterious compilation of Norse Law, known as the lawbook, was referred to by juries to determine disputed points.⁴⁷ Other written evidents which an inquest might have to take into account included royal letters of dispensation permitting service to be made where the claimant was below the age of twenty-one,⁴⁸ or where the ancestor had not died at faith and peace with the King.⁴⁹ Before their

42. Coupar Angus II, 45.

43. e.g. Gavin Ros 115; Orkney and Shetland I, 220.

44. Supra 160

45. Cf. the act of 1496 requiring barons' and freeholders' sons to be taught Latin and law "throw the quhilkis Justice may reigne universalie" (A.P.S. II, 238)

46. Selkirk MS Burgh Court Book, 30 April 1533.

47. "All the saidis parties allegeances and evidentis be us avisitly and riplly considerit hard seyn and undirstandin, havand God before ey, hes delivirit, decretit and be the chaptare of the lawbuke rodd thereon for final dome givin that.....". - Orkney and Shetland I, 253.

48. e.g. Fife 54; Gavin Ros 108. (Criticized by Craig as undermining the jurors' oath: Jus Feudale II.20.2.)

49. A.P.S. II, 207; Lag Chartere 15 (after the defeat and murder of James III at Sauchieburn in 1488).

retiral, some degrees of coercion might be applied to the inquest in the form of a protest on behalf of a party that if they did not find in his favour, they would be pursued for committing wilful error.⁵⁰ Probably, however, such protests never became a matter of common form in services, as they did in important criminal cases.⁵¹

On the completion of the hearing of evidence the inquest retired to consider their verdict alone.⁵² Probably they took with them for further scrutiny all the documents produced and founded on by the party or parties during the hearing,⁵³ or copies thereof.⁵⁴ From among their own number they elected one man to speak for them in the delivery of the verdict.⁵⁵ He was thus known as the "prolocutor"⁵⁶ or "fore-speaker"⁵⁷ and later as the chancellor.⁵⁸ A practice is also to be found occasionally, which probably reflects the older procedure by which all decisions were taken by everyone present in court and which demonstrates that the inquest was still thought of as representing the whole body of

50. Gavin Res 115.

51. infra 319

52. Of. Couper Angus II, 45 ("extra curiam procedentes...et iterum ad curiam reuoluentes").

53. "The quhilk gude assise...yede out of the courte haffande that processe with thaim" (Spalding Club Collections 394).

54. Gavin Res 109 (juror requesting copy of dispensation on behalf of inquest).

55. "with hale consent laide thar speche upon W.R." (Spalding Club Collections 394).

56. Couper Angus loc. cit. (1445).

57. infra 336. In the retours of inquests, as distinct from other civil proceedings, he is not mentioned specifically until the late fifteenth century, nor does he seem to have borne any special responsibility in actions of error before the Council (see A.D.C. (Civil) passim).

58. e.g. Canonate 67; Melrose Regality I, 8.

the suitors; for the jurors would on retiring themselves hear in private the claims and evidence of the parties, thus forming, as it were, an inner court.⁵⁹

The same procedure is commonly followed in civil claims at Carnwath and we have noticed its occasional occurrence in criminal cases too.⁶⁰

An example of an exceptional type of procedure, whereby those on whose word the service proceeds are treated purely as witnesses, is to be found in the court of the barony of Pittenweem, belonging to the priory there.⁶¹

In 1540 rights of succession to a garden in Anstruther, a burgh of barony belonging to the priory had to be determined.⁶²

Obviously, royal briefes were not effective there and it was open to the court to decide such questions in any way it chose. It might have done, as did some regalities, through a procedure on briefes issuing from a chancery of its own. Instead, witnesses were summoned, the first two of whom (one being significantly a priest) deponed as to the precise relationship of the claimant to the deceased and for the extent of the ground referred to charter evidence. The remaining four witnesses are said to have concurred ("deposuit ut supra"). The charters were not produced by those holding them and in their place the register of the priory was resorted to. Judgment was given "be interlocutor of the hail court and manifest probacioun". Thus, perhaps

59. Spalding Club Collections 261 (briefe of right - 1457).

60. supra 137; Pitcairn III, 576

61. Isle of May cv.

62. Anstruther Easter and Wester were only erected into royal burghs in 1585 and 1587 respectively (A.P.S. III, 421, 583).

because of influence from the canonical procedure to which the brethren of the priory were accustomed, the witnesses were not permitted to form themselves into an independent body rivalling the authority of the judge. Judgment was the function of the whole court, which probably meant in effect of the judge. The only other comparable case of this type which has been encountered occurs in an inquest in the sheriff court of Berwick, being held in Edinburgh, where on a claim by the monks of Melrose to have the extent of their rights to ground in the town of Berwick and fishings in the Tweed one of the verdicts is in the normal unanimous form, while on the other claim a "deliberatio inquisitionis" is given, in which the opinion of each member of the "assisa" of fifteen is given separately, some concurring in the leading opinion and some diverging from it in details.⁶³ Presumably the majority view prevailed and it may be that the usual stereotyped retour often concealed considerable divergences of opinion.

In the normal case the inquest's function seems to have been the simple one of answering "affirmative" or "negative" to the points of the claim of the raiser of the brieve, in whole or part, leaving no point unanswered.⁶⁴ These heads of the claim in turn reflected the questions put in the standardised form of brieve of succession. As listed and commented upon by Craig,⁶⁵ these were as follows. 1. Who

63. Melrose II, 693.

64. Balfour 426.

65. Jus Feudale II. 17. 30-40.

died last vest and seized in the lands or other interest as of fee? The presumption was that an ancestor shown by documentary evidence to be infeft continued to be so for the rest of his life, unless evidence to the contrary was adduced. The lands were usually sufficiently identified by their name and the sheriffdom or stewartry in which they lay or in the case of burghal land by the name of the burgh and reference to some local land-mark. 2. Who is feudal heir to the deceased? - a question combining fact and law. 3. Of whom is the land held in chief, that is, who is the superior? 4. Under what tenure is the land held? For every feu a stipulated return must be made, either nominal, as in the various picturesque demands of blench farm, or real, as in feu farm, and ward and relief. 5. What is the annual value of the lands? This Craig explains as being necessitated by a custom whereby the heir paid to his superior as the price of his investiture the fruits of the land for one year. To avoid disputes as to the value of this right all lands were valued in an inquisition known as "the old extent", which was subsequently revised to take account of the fall in money values, this second valuation being known as "the new extent". The precise relationship between the two is not free from obscurity and is the subject of a learned monograph by Thomas Thomson in the form of a memorial submitted for the complainer in the case of Cranston v Gibson

dealing with the qualifications necessary for the exercise of the parliamentary franchise.⁶⁶ 6. Whether the claimant is of full age, for if he was under twenty-one and the tenure was a military one, then in the absence of a dispensation, the superior was entitled to the fruits of the lands during the vassal's minority, wherewith he could obtain a substitute for the latter's services. 7. In whose hands are the lands at present? This may be the superior, but might be for example a widow or widower exercising rights of terce or courtesy, respectively, or a person without title. 8. How long has that state of possession lasted? This would usually be from the date of death of the deceased vassal. 9. "qualiter, per quem, quam ob causam, et a quo tempore?" - a rather puzzling sequence, which Craig explains as being merely exogetical of what has gone before.

The answer of the inquest through their chancellor probably took in the first instance a verbal form,⁶⁷ the written retour being extended in Latin by the clerk of court conform to their findings. It was authenticated by the jurors (or a majority of them) and the presiding judge exhibiting their own seals⁶⁸ and was then sent to the originating chancery along with the original breve, so that the two might be compared.⁶⁹ Thereafter the appropriate precept would be

66. Printed in Briefves 133, with an Introduction by Professor J.D. Mackie. See also Rankine's Land-Ownership (4th ed.) 218 et seq.

67. Cf. P.S.A.S. II, 386 ("Then the balse sperit how thay fand of the fyrste tenement quilkis answerit we fynd..."); Spalding Club Collections 394 ("with opyn voyse out gaff").

68. As required by an act of 1400 (A.P.S. I, 575); otherwise the retour did not make faith (Jus Feudale II. 17. 41). See also A.P.S. II, 19

69. D.V.S. loc. cit.

issued directing action to be taken in implement of the verdict, usually by the giving of sasine. Such services generally appear to be unanimous (though the unanimity may have been more apparent than real and arisen out of a desire for a clear-cut answer⁷⁰), but that a majority verdict was competent is demonstrated by the protracted case at Dumfries in 1563/4, in which the service was finally made by the inquest "saifand J.C. and J.M. quia tuk to the adversis thoraucnt".⁷¹ The pains taken by the Council to distinguish those committing wilful error from those dissenting therefrom also implies this.⁷² An inquest would sometimes try to protect itself against such an accusation by having a protest recorded that if they had erred it was in ignorance and not wilfully.⁷³ Sometimes service as heir was followed immediately by a ceremony in which the new vassal swore fealty and did homage to his superior in the presence of the pares curiae. This practice seems to have been most common where the superior was an ecclesiastical personage or community.^{73a}

A typical retour of special service on a brieve of succession would read as follows: "Inquisicio facta apud ... (place and date) ... coram ... (judge and office) ... per hos subscriptos ... (fifteen names) ... Qui jurati dicunt quod quendam ... (deceased and relationship to

70. infra 378

71. Mark Carruthers 12.

72. infra 396

73. e.g. Malrose Regality I, 8 (1606).

73a. e.g. St. Andrews 417; Baxter: Copiale Prioratus Sanctiandree 111; Moray 377; Aberdeen Epis. I, 60.

claimant) ... obiit vestitus et sasitus ut de feudo ad pacem et fidem domini nostri regia de terris ... (description of lands) ... Et quod ... (claimant) ... est legitimus et propinquior heres dicti ... (deceased) ... de dictis terris Et quod est legitime etatis Et quod dicte terre valent nunc ... (so many pounds) ... per annum et valuerunt ... (so many pounds) ... per annum tempore pacis (i.e. of old extent) Et quod dicte terre tenentur in capite de supremo domino nostro rege per seruicium warde et releuii Et nunc existant in manibus dicti domini nostri regis legitime et per seipsum per spacium ... (period of months or years) ... aut eodcirca ratione warde per decessum dicti (deceased) Datum et clausum sub sigillo officii dicti ... (judge) ... et sigillis quorundam eorum qui huic inquisicioni intererant".

In lands held under burgage tenure there was no brieve from chancery and no retour, but the magistrates of royal burghs were authorised to take cognition as to the relationship of the claimant to the deceased and his title to the ground claimed and thereafter to infeft him directly. This was so even where the magistrates had the powers of sheriffs. The whole proceedings were recorded in an Instrument of Cognition and Sasine.⁷⁴ By the latter part of the fifteenth century cognition was taken of a sworn inquest who answered certain stereotyped questions very much as did the inquests in the sheriff courts and regalities (though the points of inquiry were fewer).⁷⁵ The verdict

74. Stair Sec. Introduction 177.

75. See Aberdeen MS Burgh Court Book Vol. VI (passim), where the verdicts are particularly full. In e.g. Selkirk and Peebles they are much briefer.

was recorded in the court rolls and no sealing was required.⁷⁶ When the assise of the burgh courts declined to the point of extinction, a simplified procedure was evolved whereby the claimant (or his procurator) went to the ground with two witnesses where they met one of the baillies and the town clerk. The ancestor's infeftment was produced and the witnesses satisfied the magistrate as to the claimant's relationship to him. The baillie then granted sasine by the approved ceremony and the proceedings were recorded by the clerk in an Instrument of Cognition and Sasine which was evidence both of propinquity and entry.⁷⁷ In the latter part of the nineteenth century burgage tenure was in several stages assimilated to feu-farm. In many burghs the finding by an inquest that a man was heir in certain burgh lands also implied approval of his admission as a burgess. The one verdict would warrant both the infeftment and the admission as burgess.⁷⁸ The latter might be performed more formally at a head court.⁷⁹

The other forms of retourable brieve require only brief treatment, being in procedure akin to the brieve of succession. The purpose of the brieve of tutory was to determine who, in the absence of an appointment by will, was entitled to be tutor-at-law to a fatherless pupil-child. Except in military tenures, where the superior enjoyed the right

76. M. 14081 (1544).

77. Craigie: Scottish Law of Conveyancing (3rd ed.) 822; Menzies: Lectures on Conveyancing 850.

78. e.g. Selkirk 31; Prestwick 43.

79. See David Murray: Early Burgh Organisation II, 236.

of tutelage, the person so entitled was the nearest agnate of at least twenty-five years of age, the agnates being, in Scots law, "persons, male or female, related to each other through the father, although females intervene".⁸⁰ The brieve directed the taking of inquisition by a sworn inquest of "probi et fideles homines patrie" as to who was the nearest agnate "i.e. consanguineus ex parte patris" to the child and heir of the deceased, whether he was above twenty-five years old, whether he was provident in his own affairs and capable of caring for the administration of those of another, whether he was himself heir to the child and if so, whether the custody and upbringing of the child might be more suitably left to someone on the mother's side.⁸¹ Sometimes a competition might arise between claimants as tutor-at-law and as tutor-testamentary. Thus at Aberdeen in 1507/8 forespeakers sought to halt proceedings on a brieve of tutory by producing an alleged testament of the deceased purporting to nominate a tutor. The assize sisted proceedings until the court of the Bishop of Aberdeen had pronounced on the validity of the appointment.⁸² Where neither a tutor testamentary nor a tutor at law had been appointed, it was open to anyone to petition the crown for the appointment of a tutor-dative. At a case in the Broughton Regality Court it was asserted that such an appointment debarred a subsequent appointment of a tutor at law. The judge however, after

80. A.P.S. II, 106 (1474). Fraser on Parent and Child (3rd ed.) 252.

81. Dalfour 648; Stair IV, iii. 6. The final point gives effect to an early rule that an heir should not be placed in the charge of any person standing in direct succession to his inheritance (Reg. Maj. II, 47). For an example see Fife 63.

82. Aberdeenshire Sh. Ct. I, 110. For an instance of the confirmation of tutors-testamentary by a sheriff, see James Young No. 1493.

hearing a lengthy debate, permitted the claim to go before an inquest.⁸³ On the retour being returned to chancery, a decree was issued without further reference to an inferior judge nominating the person designated by the inquest and this formed his title to act.⁸⁴

People labouring under a defect of the mind, whether innate or supervening, were also subject to the supervision of tutors or curators. Originally the sovereign had the right to safeguard (probably in his own interests) the property of an imbecille or insane person.⁸⁵ But by the fifteenth century it had become the practice for the nearest agnate to be appointed tutor following upon a process upon brieves⁸⁶ and this was confirmed by an act of 1585.⁸⁷ In the standard form of this brieve the inquest had first to answer the delicate and possibly dangerous question whether the alleged incapax was "incompos mentis, fatuus et naturaliter idiota" or alternatively whether he was "incompos mentis, prodigus et furiosus", the latter wording covering apparently someone who was merely extravagant.⁸⁸ There then followed questions as to how long the condition had persisted (in implement of an act of 1475),⁸⁹ the relationship of the claimant, his age, and whether he was a fit person for the appointment.⁹⁰ The retour formed a warrant for the appointment.

83. Canongate 345 (1571-2).

84. Stair IV. iii. 9. The style is printed in Balfour 648-9.

85. A.P.S. I, 617.

86. e.g. Antiquities of Aberdeen & Banff IV, 91 (1491).

87. A.P.S. II, 396.

88. Stair Soc. Introduction 128.

89. A.P.S. II, 112.

90. See the styles in Balfour 648; Stair IV. iii. 7.

The brieve of succession survived until 1847, when it was replaced by the current procedure of a simple petition to the sheriff, either for general or special service, supported by an affidavit. On decree being granted, it is sent to the Keeper of the Registers, who issues an extract of it.⁹¹ The brieve of tutory remains competent, though in 1849 replaced by a statutory procedure, which was itself rarely used.⁹² As to brieves of idiotry and furiosity the common law procedure was in 1868 replaced by one utilising the civil jury trial facilities of the Court of Session, the petition being addressed to the Lord President.⁹³ This too has in practice been superseded by a petition to the sheriff, (supported by medical testimony and an inventory of the estate), in which the appointment of a curator bonis is craved.

91. Service of Heirs Act (10 & 11 Vict. c. 47) and subsequent legislation.

92. Pupils Protection Act (12 & 13 Vict. c. 51).

93. Court of Session Act (31 & 32 Vict. c. 100).

III. Non-retourable Brieves

By contrast with those brieves in which the returning of a verdict to the chancery was of the essence of the procedure, there were others where no such retour was necessary, for the action warranted by the finding was put into effect immediately it was made known. Nor was there any need to summon interested parties, for these brieves were all concerned in some way with the equitable division of heritable property already disputed between two or more claimants. Actions for wilful error, too, were unknown on non-retourable brieves.¹

Probably the most common occasion for the invoking of the process upon such brieves was a dispute as to their boundaries between neighbouring proprietors in rural areas. It was, as we have seen,² one of the earliest instances of the employment of the jury principle and one which was to survive into the nineteenth century and of which even now traces linger. But, though the most frequent, it was not the only means of determining such disputes. The decision of arbiters, chosen in equal number by each side, was often resorted to in order to avoid "strepitus judicialis", especially where one or both of the parties was an ecclesiastical body.³ But in such cases the procedure of drawing the

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1. infra 388 They were, however, competent in the theoretically distinct actions of molestation (A.P.S. III, 446).
 2. Supra 12. Perambulation is described by Barrow as "the best-recorded activity of sheriffs and justices in twelfth-century record". (Regesta I, 49).
 3. e.g. Aberbrothoc Vetus 262 (Bishopric of Aberdeen and Abbey of Arbreath). See also Aberbrothoc Nigrum 274; Moray 236 et seq. Inchcolm 17. Coupar Angus II, 44 also appears to be a case of arbitration, for (Footnote continued on following page)

bounds and recording them did not differ from the process upon a brieve; the difference lay only in that the basis of the award was the mutual submission of the parties and not the command of the sovereign. Within baronies the petty boundary disputes of tenants were usually settled in the seventeenth and eighteenth centuries by annually-appointed officials called birlawmen.⁴

Two brieves were available in order to bring disputes as to rural boundaries to a decision. They were the brieve of perambulation and the brieve of division and they are not easy to distinguish. Strictly speaking, the brieve of division was used only in order to effect a division where land was held in common, as for instance by heirs-portioners;⁵ whereas the brieve of perambulation was designed to clarify a boundary which ex hypothesi already existed. But the procedure used in each was so similar that sometimes they seem to be confused.^{5a} In view of this close connection, it may be permissible in discussing the brieve of perambulation, as the typical form of the non-retourable and pleadable brieve, to refer occasionally to the related brieve of division.

(Footnote continued from previous page).

although the boundary-drawers are called an assize, there was no brieve and the verdict was voluntarily submitted to by the parties. The boundary was the middle of the River Ericht; hence there was no actual perambulation.

For a much later example of an amicable settlement between two neighbouring proprietors see Hunters of Hunterston, 65 (1681).

4. e.g. Balgair 10; Perbes 230. Supra 140. 5. Stair IV. 111. 12.

5a. Cf. Dryburgh 276 ("perambulation and divisione of the Marches") and Fife 5.

The practise of the Anglo-Norman kings of Scotland, such as David I and William the Lion, of granting by charter to favoured noblemen and religious houses, large tracts of land, which were only very imperfectly described therein, inevitably led to many boundary disputes in the twelfth and thirteenth centuries. They might reasonably have been referred back to the royal grantor or his successor for settlement, but instead the practice was followed of requiring the elder men of the district to state and demonstrate where, in the common understanding of the neighbourhood, the marches truly ran. Sometimes, however, in the most important of such disputes the king himself would be present, either, to take part in the perambulation⁶ or to act as presiding judge,⁷ or he might later confirm the findings of the perambulators.⁸ Alternatively, the findings might receive a kind of royal assent by being confirmed in one of the king's courts and recorded on the court rolls.⁹ By these means the sovereign was at least associated with the particularising of the boundaries of his tenants-in-chief. Sometimes the actual tracing of the bounds was performed by quite humble men,^{9a} but confirmed by the subsequent recognition of the magnates of the district.^{9b}

The procedure of perambulation at this time seems to have been a

6. e.g. A.P.S. I, 368.

7. ibid. 389 (also Kelso 21) The king here was acting on papal letters and took inquisition as to the disputed bounds.

8. e.g. Newbattle 15 (1184).

9. e.g. Aberbrothoc Vetus 163; Spalding Club Collections 337.

9a. Cf. the Celtic names "Gillethomas, Gillecostartin, Gillemartin", etc. in Dunfermline 111 (1231).

9b. ibid. and Spalding Club Collections 337 (1236).

precise one, although its details are not now known; for there is frequent reference to an "assisa/terrae" (in the sense of a statute) which is attributed to David I.¹⁰ The twelfth and thirteenth century perambulations usually proceed on a royal precept, in essence a command of the sovereign like the brieve, but probably not yet stereotyped in its terms.¹¹ But by the reign of Robert I there is evidence that the established procedure is following on a standardised brieve from chancery.¹² The same deed exemplifies the growing practice for perambulations to be conducted by supposedly impartial royal justiciars, either the permanent officers enjoying that title or noble men specially constituted as such for the occasion.¹³ From the same reign the Aberdeen Episcopal Register contains an example of royal letters commissioning Sir John Gordon to hold as justiciar a perambulation of the boundaries of the lands of the Bishop and Sir John Forbes and commanding the inhabitants of the sheriffdom of Aberdeen to assist him in every way.¹⁴ From probably the same period there has survived, as part of the Ordo Justiciarie, the form of a precept by a Justiciar, who has received a royal brieve of perambulation, in which he commands the sheriff of the district to summon to the capitale messungium of the

10. Aberbrothoc Vetus 162, 163; Dunfermline 238. It still remains in Stair's form of the brieves of perambulation and division (Stair IV. iii. 12, 14).

11. e.g. "precepto meo iurate et perambulate diuise...." (Newbattle 15) (1184); Dryburgh 37; Dunfermline 111.

12. "Tandem predicti Religiosi breue perambulacionis --- in forma capelle impetrauerunt" (Dunfermline 238).

13. "Justiciarios specialiter per Regem assignatos" (ibid).

14. Aberdeen Epis. I, 187.

lands the parties and all the freeholders of his territory holding of the king in capite.¹⁵ The development of more refined procedure is also evidenced by a passage of doubtful provenance¹⁶ which declares the perambulation to be void if the parties have not been cited or the lands have been perambulated already (except where the king is a party), if the marches are not mentioned in the brieve or are wrongly described, if an interested party or the judge is absent, if the army has been mobilised, if a person called is under age. Moreover any royal order may for a given reason quash the perambulation.¹⁷ From the reign of Robert I also we have in gremio of the record of a perambulation in 1325 the exact terms of the royal brieve on which it proceeded.¹⁸ This in its voce signatae proves to be substantially the same as the styles recorded much later by Balfour and Stair¹⁹ and it may serve as an introduction to a chronological account of the process on a brieve of perambulation in the sixteenth century, with special reference to the role of the inquest.

The procedure was commenced by the purchase of a brieve from the royal (or in appropriate cases a regality) chancery. This took the

15. A.P.S. I, 707; Balfour 434.

16. Reg. Maj. Suppl No. 8 (Printed by Thomson as Regiam Majestatem IV, 18 (A.P.S. I, 635) and by Skene as David II, Chap. 20).

17. Pace Cooper, who translates "will stop the process". (Of Skene's "cassia and annullis the perambulation").

18. Aberbrothoc Vetus 310.

19. Balfour 650; Stair IV. iii. 14. Cf. St. Andrews Formulare I, 253.

undernoted form²⁰ and was addressed to a royal officer, in the thirteenth and fourteenth centuries usually a justiciar, but thereafter increasingly to the sheriff within whose territory the disputed lands lay.²¹ On receiving it from the ruler this judge was bound to summon, through his court officers, on forty days warning, fit persons to form an assize to an ad hoc court held on the lands.²² Originally, as we have seen, all the tenants-in-chief of the shire were called,²³ and from among them an assize acceptable to both parties was chosen.²⁴ But in practice the summons probably came to be restricted to a small number, so that no more persons would be troubled than was strictly necessary.²⁵ An act of 1579 narrates that they had come to be chosen from "men of small rent or leiving and sum of thame having na heritage and siclike be sindrie personis quha kennis not the landis debetable naither yit dwellis in the cuntrie neir the samyne", for so the expression "probi et fideles homines

20. *Jacobus, Dei gratia, Rex Scotorum, A. justiciario nostro etc.* Mandamus vobis et praecipimus, quatenus per probos et fideles ac antiquiores homines patriae, juste, et secundum assisem terrae perambulari faciatis rectas metas et divisiones, inter terras de F. cum pertinentiis, quae sunt A. B. ex parte una, et terras de G. cum pertinentiis, quae sunt E. F. ex parte altera, jacen. in baronia de T. et infra vicecomitatum nostrum de K. Et sicut dictae divisiones et metas juste, et secundum assisem terrae, perambulatae fuerint, ita eas de cetero faciatis firmiter observari; tantum, inde facien. quod pro vestro defectu amplius inde justam querimoniam non audiamus.

(Balfour 650).

21. Sometimes a sheriff might be temporarily created justiciar (e.g. Brechin I, 26).

22. Balfour 435.

23. A.P.S. I, 707.

24. e.g. Aberbrothoc Nigrum 96 (1457).

25. e.g. Aberdeen Epis. I, 244.

"patrie" had been misinterpreted. Consequently it was enacted that, where there were no documents of title from which the parties' rights might be deduced, all members of perambulations should be drawn from "honest substantial men" who owned heritage and lived in the same sheriffdom as the lands, or failing them from those within the adjacent shires.²⁶

The establishment of the Court of Session led to the creation of a new form of action overlapping with the brieve of perambulation. A party whose boundaries were being infringed by a neighbouring proprietor would complain to the Lords of Session and obtain from them a summons of molestation. But to inform themselves as to the positions of the boundaries, the Lords would make a remit to the appropriate Judge-Ordinary to take cognition thereon. He did so in the manner to which he was accustomed, that of the perambulation. But in one respect Parliament introduced an innovation for such actions of molestation. By an act of 1567²⁷ the inquest, who, it was confirmed, should be employed in these cases, were to be drawn from persons within the parish where the lands lay or those adjacent, the majority of whom held four ploughs of land or three hundred marks of yearly rent, and the rest to be "substantial famous and honest yemen". The question who was to summon the inquest was not explicitly answered, but it was stated that in cases of "mutual molestations" that is, where both parties had taken a summons,

26. A.P.S. III, 144; Stair IV, 111. 14.

27. A.P.S. III, 445; Observations James VI, Parl. II, Act 42; M.7407.

the inquest was to be drawn equally from those summoned for each party.^{27a}
 If insufficient persons appeared to make up one half of the assize, the
 vacancies on that half could be filled by the judge from among such
 qualified persons as he chose. The "odman" was to be picked by lot.²⁸
 The clear implication was that the citation of an inquest where there was
 only one summons was a matter for the pursuer and this conclusion is
 drawn by Stair, who suggests that to avoid unfairness time should be
 allowed for the other party to take out a summons too, if he so desires.²⁹
 In the context of the times, to entrust the summoning of a jury to one
 party was not so outrageous as it might seem, for, as we shall see, it
 was the practice in the sixteenth century for the prosecutor to summon
 the assize in criminal cases; and where two assizes were produced by a
 public and a private prosecutor, arrangements such as those outlined
 above were made.³⁰ The elaborate grounds for challenging jurors served
 to minimise the abuse of this power.³¹

To return to the process of perambulation, on the appointed day
 the court was fenced and the brieve produced by the raiser and read out
 along with the precept of summons and its execution.³² Any exceptions

27a. This had been held to be "incontrair the common prattik and
 consuetude of the realm" in a case in 1542 (A.D.C. (Public) 518).

28. Presumably from among those already empannelled. In the quite
 possible event of an equal division of votes, he would exercise t--
 votes to break the deadlock. At a case of this kind in 1609 two 29.
 odmen (additional to the jurors already chosen) were appointed, 032.
 for each side, which would scarcely seem to be a solution of the
 problem. But the record is incomplete (Antiquities of Aberdeen and
Banff IV, 147). For a further discussion of this problem, see
infra.³⁶⁹ of Aberdeen and

29. Stair IV, xxxvii, 4.

30. infra 245

31. infra 276 et seq.

32. Halfour 436; Spalding Club Collections 337.

to the brieve, such as inaccurate descriptions of the lands or persons, were then heard.³³ If no reason were proponed against the actions proceeding, the assizers were chosen by the judge, each being subject to challenge by both parties.³⁴ The consent of the parties to the assize was usually recorded.³⁵ Sometimes, however, where there was no real hostility between the parties, but merely dubiety as to their marches, yet it was not desired to resort to arbitration, they themselves would draw up an agreed list of assizers to be summoned, though presumably still with the approval of the judge. In such cases the judge was not permitted, without the consent of the parties, to replace a man who did appear not/by another.³⁶ At one amicable case of this kind seven assizers were elected by each party and two different boundaries were drawn by each group of jurors, presumably favouring their sponsor.³⁷ The size of the developed inquest of perambulation was variable, but tended to be larger than the average jury, figures such as twenty-five and twenty-seven being common.³⁸ In the earlier phase the number was as small as seven³⁹ or twelve.⁴⁰

On the assize being admitted, they were put on oath.⁴¹ Then the

33. ibid. 348.

34. e.g. St. Andrews 3; Aberdeen Epis. I, 244; Balfour 437.

35. "cum consensu et assensu dictarum partium" (Dunfermline 355).

36. Balfour 419.

37. Antiquities of Aberdeen & Banff III, 128.

38. e.g. Laing Charters No. 113; Dunfermline 355.

39. Aberbrothoc Vetus 162 (1219).

40. Dunfermline 111 (1231).

41. "the holy evangell twechyt" - Melrose 544; MacGill: Old Ross-shire and Scotland I, 213.

pursuer stated his claim and argued (by himself or through a procurator) in favour of it. This stage of the procedure is usually briefly dismissed in some such phrase as "allegationibus ac iuribus parcius ----- propositis"⁴² But an occasional written statement of these arguments survives to demonstrate the homely character of such pleadings. Thus in a dispute between the Bishop of Aberdeen and Lord Forbes in 1391 a memorandum of the Bishop's case, besides drawing on the evidence of charters and rental books, points out that "John of Forbes is fadre was a gude man wise mychty and manly in his tyme and had he trowit ony richt he had nocht lattyn it bene unfollovit in his tyme". An etymological argument is drawn from the name "Lurgyndaspok" occurring on the lands and meaning the bishop's leg, "whilk name was nocht likly it suld haf war it nocht the bischopis".⁴³

These were not however mere assertions. They would be supported by the evidence of witnesses and documents. Thus in a court of the Regality of Lauder we read that "the sayd assyse gert be swerne mony worthy diuerse men to make outhfast relacione".⁴⁴ Mackenzie denies a suggestion by Hope that in view of the terms of the act of 1579 restricting the assisers in perambulations to landed men, witnesses in such cases should also be limited to landed men. He asserts that

42. St. Andrews 3.

43. Aberdeen Epis. I, 248 (also in Antiquities of Aberdeen & Banff IV, 378).

44. Melrose 544.

practice "allows any habile Witnesses in Perambulations and all other Heretable Debates".⁴⁵ Documentary evidence usually took the form of charters. Thus at a perambulation in 1537 "ane Band and Charter of the saide lands" of 1319 was produced and read out.⁴⁶ According to the narrative of the act of 1579 this practice was then declining, for "thair is mony and sundrie breiffis of perambulation quhairin the raisaris foundie thame selffis upoun no boundit evident bot intendis to verifie and preif thair clame be the personis of inqueist".⁴⁷

Only after both parties had been afforded this opportunity to state and substantiate their claims did the actual perambulation of the lands go ahead.⁴⁸ It took the form of the whole inquest, accompanied by the other members of court, walking or riding along the boundary which they found to be the true one. As they went, they might mark it by driving into the ground posts or "proppis" or placing in position boundary-stones or making ditches.⁴⁹ Whether or not these artificial indicators were created, the finding of the assize was always perpetuated also in the form of a written verdict which the disputants could preserve in their charter-chests for future reference. This described in detail

45. Observations James VI. Parl. 6 Act 79.

46. Kinloss 144.

47. A.P.S. III, 144.

48. "eftir that thair had herde and sene thair relacionis mad the awayis and clamys on ilke syde herd the sayd assyze detourmynt the marchys begynand...." (Melrose 545).

49. Brechin I, 150 et seq; Aberbrothoc Nigrum 89, 96; Inchcolm 18; Dalfour 436. But sometimes these markers might be placed later by court officers in accordance with the verdict (Bamff Charters 101).

the course of the boundary by reference to markers or to natural features of the landscape such as streams, woods, marshes, springs or the timeless landmarks of standing-stones.⁵⁰ The verdict would be delivered by one of the assize,⁵¹ later dignified by the title of "monstrator",⁵² and by 1537 taking the usual name for the leading man of a jury, namely chancellor.⁵³ After being committed to writing, it was authenticated with the seals of the judge and some of the assizers, in the manner required for a retour.⁵⁴ Alternatively it might be notarially executed.⁵⁵ In some courts doom seems to have been formally pronounced by the dempster, but probably this was not general.⁵⁶ Tracing the marches over difficult terrain and in inclement weather must have been an exhausting process and one which sometimes could not be completed within one day.⁵⁷ But there is evidence of the provision of a tent for the protection of the jury while they were formulating their decrees⁵⁸ and of the holding of the court in a barn situated on the lands.⁵⁹ From time to time it might be necessary to renew markers, placed many years before, which had been moved or

50. e.g. St. Andrews 3; Moray 456; Aberbrothoc Vetus 164; Aberbrothoc Nierum 89, 96; Dalfour 435, 437; Yester House Writs 130.

51. St. Andrews 4 ("per os predioti A.J. unius dictorum iuratorum").

52. Laing Charters No. 113. 53. Kinloss 144.

54. e.g. Aberbrothoc Vetus 310. 55. St. Andrews 2-5.

56. Kinloss 144.

57. "Et quia nox supervenit recessimus et pro ampliori avisiamento continuaverimus usque in exastinum" (Brechin I, 147); "laborantes usque ad solis occasum" (Spalding Olub Collections 337); Melrose 520.

58. R.P.C. (1st) VIII, 378.

59. Cambuskenneth 86.

obliterated. In such a case a new perambulation might take place, restoring as it went the old indicators.⁶⁰ The annual riding of the marches of burghs had, and has, for its object the preservation of the boundary in its existing form.

Where the brieve was one of division (or departison) the assizers' function was not to identify and mark existing boundaries, but to make an equitable division of land held in common. This entailed studying the dimensions and character of the lands and then measuring off appropriate portions of it, in accordance with the rights of the parties. This, we learn, was done by the use of measuring-ropes.⁶¹ Where part of the lands was exposed to the sun and part not, it was the custom for the judge to make the allocation among the parties by drawing lots.⁶² Sometimes many separate plots of land required to be divided, requiring of the assize lengthy labours.⁶³ Evidence of title might have to be studied too, as a preliminary to the partitioning.⁶⁴ The finding of the jurors was embodied in a instrument drawn up by the Clerk of Court and closed with the seal of the Sheriff and the inquest.⁶⁵ Though a division might be made informally without a brieve, it would not have binding force.⁶⁶

60. e.g. Coupar Angus II, 64 (where the bounds were those of the abbeys of Scoon and Coupar and they were amicably renewed by the Abbot and two monks from each house).

61. Cambuskenneth 86 ("mensurauerunt per cordam et ulnam").

62. Melrose 521. cf. Aberdeenshire Sh. Ct. I, 80; Banff Charters 22.

63. Cambuskenneth 86; Melrose 519.

64. Melrose 520.

65. Balfour 441; Banff Charters 22.

66. Balfour 440.

Though boundary-marks might be placed by the perambulators, they were not always allowed to remain in situ. Despite proclamations by Justiciar and Sheriff that the marches were not to be violated⁶⁷ and despite letters of cursing calling down divine vengeance on those who infringed the bounds of religious houses by removing the march stones,⁶⁸ disgruntled parties were wont to take the law into their own hands and move the markers to where they alleged they ought to be or simply to occupy the disputed land. The latter gave rise to innumerable civil actions for wrongous or violent occupation;⁶⁹ the former was a quasi-criminal offence, which sheriffs were bound to punish. In one notorious case of this nature concerning the land of Monmuir in Angus disputed by the Bishop of Brechin and John of Cullace the latter was first warned to desist from wrongous occupation of the land found by a perambulation to be the bishop's.⁷⁰ Later it was reported that the bounds set by the assize had been interfered with.⁷¹ Corn sown on the disputed ground was then arrested by the Sheriff's mair.⁷² Another Cullace, Thomas, was warned by royal letters direct to the Sheriff of Angus, on complaint by the Bishop, to desist from intromitting with the boundaries and to attend before the king and his council at the next Justice-aire in Dundee

67. Aberbrothoc Nigrum 97; Laing Charters No. 113.

68. Spalding Club Collections 383.

69. See Aberdeenshire Sh. Ct. I, 73 et seq.

70. Brechin I, 162.

71. "Lapis fuerunt destructe et lapides proiecti in aqua de Cruok fossata repleta terza" (ibid. 164).

72. ibid. 177.

to answer for his previous misdeeds,⁷³ with what result does not appear.

Very often, particularly in the earlier centuries, the perambulated boundaries were embodied in a new charter, granted either by the king or other common superior of the parties⁷⁴ or by one party to the other.⁷⁵ Indeed this is often the only surviving record of early perambulations. A perambulation might also be followed by a separate admission of its findings and a promise to abide by them, granted by the unsuccessful party.⁷⁶

From the sixteenth century a practice grew up whereby briefes, mainly of perambulation and division, but sometimes of succession too, were directed to the masters of court as officers of the supreme judicature, the College of Justice. A common ground for this procedure in that century was alleged partiality on the part of the judge through relationship, bond or enmity. Again where the lands in question were situated in more than one shire, it was thought improper that a single sheriff should preside. In cases of special complexity, especially actions of molestation, the Lords of Session sometimes appointed one of their own number to be judge.⁷⁷ The entrusting of jurisdiction to the masters was extensively debated in a case in 1772, when it appeared to be regarded

73. ibid. 183, II, 80.

74. e.g. St. Andrews 210; Newbattle 123.

75. e.g. Morton II, 86; Kinloss 146.

76. Aberbrothoc Nigra 140 (burgh of Forfar).

77. Stair IV. iii. 18; Bankton IV. ii. 13; IV. vi. 16; Erskine III. viii. 64.

by the judges as still competent.⁷⁸ This somewhat improper practice was abolished in 1821.⁷⁹

Perambulations by burgesses of the bounds of their burghs date from mediaeval times⁸⁰ and still survive in certain border towns, but as they were carried out by the whole community, rather than a selected inquest, and did not proceed upon a brieve, they are not directly relevant to our topic.

We conclude with a brief account of the salient features of the remaining non-retourable brieves. The brieve of terce was used by a widow to assert her right to the life-rent of one-third of her deceased husband's heritage.⁸¹ It was obtained from chancery and an inquest was summoned in the customary way, as well as the heir to the lands.⁸² The points to be answered by the jurors are more akin to those of non-pleadable than pleadable brieves, but as the parties were already identified, there was no necessity for a retour to chancery. They first affirmed that the claimant was married to the deceased, though this need only be by habit and repute;⁸³ then that her husband died on a certain date vest

78. Cathcart v Rocheid II. 7663.

79. 1 & 2 Geo. IV, s. 11.

80. See e.g. Passalet 406; Selkirk 77; Damff Charters 97 (Alyth); MacGill: Old Ross-shire and Scotland II, 88, 113 (Tain).

81. Reg. Maj. II, 16; A.P.S. II, 401; Balfour 105, 335.

82. For the form of the brieve see Balfour 649; Stair IV. iii. 11. Earlier forms of English origin are to be found in Reg. Maj. II, 16.

83. A.P.S. II, 243, 252.

and seized in certain lands. The divisory character of the brieve then became apparent, for of these lands the inquest must assign her a reasonable terec or third. As in the brieve of division, the allocation of the sunny and shadowy portions of the land was determined by cavill or lot.⁸⁴

The crowded living conditions of mediaeval Scottish burghs were naturally productive of many boundary disputes, and for their settlement a royal brieve of lining was provided, closely following in procedure the perambulations of rural lands. While the brieve of lining is to be found as early as the Ayr and Hute MSS⁸⁵ and there is mention of the production of such brieves in Dunfermline in 1493,⁸⁶ the same duty of determining disputed boundaries seems often to have been performed more informally by an inquest drawn from the members of the burgh court; and we have noticed that in some burghs office-bearers called liners were appointed for this purpose.⁸⁷ The omniscopotent inquest at Selkirk accepted as one of its regular duties the marking of disputed boundaries in the town by means of stobs or posts.⁸⁸ In order, no doubt, to avoid such neighbourly quarrels the council at Kirkcudbright in 1583 ordered eleven men to "pas andlyne all the yairds of the toun and siclyk to pas and deill and lyne the lands beneath the toun and prop the samin

84. See also v. supra nos. 84; v. supra nos. 85, 86.

85. Brieves 48, 62. See also St. Andrews Formulare I, 253; Balfour 649; Stair IV. iii. 13.

86. Dunfermline Burgh I, 43.

87. Supra 103. See also James Young Nos. 1645, 1791.

88. Selkirk 57, 82; cf. Haddington 131.

86. Dunfermline Burgh I, 43.

87. Supra 103. See also James Young Nos. 1645, 1791.

88. Selkirk 57, 82; cf. Haddington 131.

as the samin was delt afeir".⁸⁹ Authority might be lent to such informal linings by their being recorded in a notarial instrument,⁹⁰ but for greater solemnity a brieve from the royal chancery was desirable.

The full procedure on a brieve of lining is demonstrated in several detailed accounts.⁹¹ Though pleadable, the brieve was publicly proclaimed.⁹² Preliminary pleas might be heard as to its competence.⁹³ Jurors were individually summoned by the court officer at the instance of the presiding magistrates.⁹⁴ Of these a common, though not invariable, number empanelled was twelve,⁹⁵ a number which by the mid-sixteenth century was almost unknown in other forms of the jury and which may be connected with the burgh "doussan".⁹⁶ The parties would then submit to the inquest a statement, verbal or written, of their claims, supported by their charters and sasines.⁹⁷ The inquest, having taken the oath and elected a chancellor, then proceeded to the lands which they viewed in relation to the evidents and then, by measuring the property and buildings⁹⁸ and by inserting posts in the ground,⁹⁹ delineated the lawful rights of each party. They then returned to the Court and through the mouth of their chancellor delivered their findings, which

89. Kirkcudbright I, 186.

90. Melrose 594 (1469) (Burgh of Leith - no mention of brieve).

91. Inverness II, 34-38, 50; Canongate 323; Maxwell: The History of Old Dundee 154-156 (hereafter "Dundee").

92. Inverness II, 34, 35; Dundee 154.

93. Dundee 154; Kirkcudbright II, 740.

94. Inverness II, 35 (eighteen in number).

95. Inverness II, 37; Canongate 323.

96. Supra 103

97. Inverness II, 37; Dundee 155.

98. Canongate 323; Inverness II, 50 ("havand lynit the samyn withe rid and raip").

99. Canongate 323; Selkirk 57; Melrose 595 ("cum liniis suis et paliis ligneis infixis").

would then be recorded verbatim in the court books¹⁰⁰ and/or in a notary's protocol book.

Besides their strict function of drawing a just line, the liners might also make binding orders as to future relations between the adjoining proprietors and as to their use of their property. Thus they find that a spout encroaching on the boundary is to be removed, that a stair-case built on the boundary is to be used by both proprietors, that a wall blocking a passage-way is to be taken down.¹⁰¹ In conclusion, they might admonish the parties to observe the bounds and make use of their property in accordance with the rules of good neighbourhood and the burgh laws.¹⁰²

100. Inverness II, 50.

101. Dundee 155; Inverness II, 50.

102. John Poular II, 33; Canongate 323.

IV. Miscellaneous Forms of Cognition

In discussing the origins of the jury many instances have already been given of its early function as an instrument by which rulers of all kinds obtained factual information on the basis of which they might take administrative decisions. It may, however, be convenient at this point to gather together these examples of the non-contentious uses of the jury, in order to demonstrate their great variety. A few of them proceeded on recognised briefs; most did not.

In many cases the point to be determined was the genuineness of a right asserted by a legal person, whether individual or corporate body. Mediaeval society was permeated with hereditary offices of all kinds, often carrying with them considerable emoluments in cash or kind. We have already seen examples of this in the office of sheriff, but the principle was by no means confined to the judicial and administrative spheres. Often disputes would arise as to the identity of the person entitled to succeed to such an office or as to its privileges. An account in Norman-French of the various offices in the king's household in the early fourteenth century concludes with the instruction that all those who claim to hold an office of fee from the king are to have their rights tried by their title-deeds, if they have any, failing which, by a good assize of their peers and good people who know the matters best.¹

1. S.H.S. Miscellany II, 37, 43 ("par bone assise de lour peers & par bons genz qe miels seient les choses").

This may be illustrated by a case of 1310, in which Robert I commands one of his justiciars to make inquiry "per fideles et meliores patrie" on the rights of the Constable of Crail. Twenty-seven knights and burgesses were empanelled and gave detailed replies as to the Constable's right to hold the castle of Crail, detain prisoners, exact tolls, and collect royal rents, all matters, one would imagine, contrary to their own interests.² Lesser magnates too imitated the same procedure and in 1410 we find the Prior of Coldingham ordering his baillie to summon an assize and inquire into the dues of the forester of Coldingham. These were revealed to include a suit of clothes fit for a gentleman at Christmas and food and drink at the Prior's house.³ Where it was necessary to prove the title of a claimant to a vacant hereditary office, this would usually be effected by adding an additional point of inquiry in the brieve of succession, which would be answered by the inquest. Thus an inquest in 1514/15, as well as finding the bearer of the brieve to be the legitimate and nearest heir to the deceased in certain lands, declared him to be his successor also "de officio constabularie burgi de Cupro et forestarie nemoris de falkland" with all the pertinents of the offices.⁴ An inquest at Nairn in 1596 returned Campbell of Cawdor to a vast assortment of lands and to the office of Sheriff of Nairn.⁵

2. H². Hist. MSS Comm. 5th Rpt., 626.

3. ibid. 647.

4. F⁴. Fife 3.

5. G⁵. Cawdor 215. Cf. Laing Charters No. 1663 (Constable of Dundee)

Sometimes, however, the usual form of service was employed simply to establish title to an office alone. Thus in 1514 an inquest was held by the Sheriff of Forfar, acting on royal letters, at which fifteen jurors swore that a deceased person and his ancestors were "fabri communis domus fabrilis domini de Brechin" (hereditary blacksmiths of the lordship of Brechin) and held the right to receive grain and sheep from certain husbandmen and enjoyed rights of pasture and that the son of the deceased was his legitimate and nearest heir in this office, to which retour they added their seals.⁶ The separate questions of the succession to rights and their nature are dealt with together in a curious retour of 1428 in which the office of hereditary custodian of the relic of St. Fillan (the head of a crozier, carried at the Battle of Bannockburn) was settled on the son of the last holder and the properties of the relic as a means of tracing stolen goods were declared, as well as the nature of certain dues carried by the office.⁷

The personal status of men as bondsmen or free was also in the early mediaeval period a frequent subject for determination by an assize of the country. It was laid down in Regiam Majestatem that a lord asserting a man to be his serf should obtain a brieve de nativis and pursue it before the sheriff, the status of the defender being decided either by the oaths of his free kinsmen or by an assize.⁸ Thus when

6. Spalding Club Miscellany V. 291.

7. Taymouth xxxv (also in Spalding Club Miscellany III, 239).

8. Reg. Maj. II, 11. For the form of the brieve de nativis see Quon. Quon. Att. c. 56 and Briefves 36.

the Bishop of Moray appeared in the Sheriff Court at Banff complaining that three men about to be tried were his own nativi et legii homines, the matter was put to an assize who upheld the Bishop's contention.⁹

The duty of giving suit in a superior's court and the frequency of the obligation was also a matter for the determination of an assize, who would speak from their own experience in witnessing a suitor appearing to represent certain lands.¹⁰ Thus on the Bishop of Brechin complaining that, though he owed no suit for his lands to the Sheriff and Justice Courts of Kincardine, he was being fined for absence, the king directed the sheriff "yat be ye eldest worthyast and yaim yat best knowis within ye said bailzeri se inquyr yarupoun with maturite and diligence". An assize of fifteen lairds declared that they had never heard or seen any Bishop of Brechin being called for his lands.¹¹

Burghs, as well as individuals, might have their rights determined by an assize. In 1518 the baillies, council and community of Cupar obtained from the king letters directing the Sheriff of Fife to take cognition as to their rights of shipping in the estuary of the River Eden and Motray Water and "eftir the publicacione of ald charteris with diuers evidentis documentis and probacionis" the assize of barons and freeholders found that the inhabitants of the burgh had enjoyed the freedom to sail their vessels without hindrance in the estuary "past

9. Moray 161 (also in Spalding Club Collections 477).

10. Aberbrothoc Vetus 190.

11. Brechin, I, 113-115. See also Fife Appx. G (1517)

memour of man".¹² In that example the persons interfering with the burghesses' rights are not identified. But in an earlier case of 1372 there was an open conflict between two neighbouring burghs, Ayr and Irvine, as to their rights of trading in the surrounding districts. After an inquest had found in favour of Irvine's claim, a charter of confirmation embodying its findings was issued by Robert II.¹³ Renfrew and Dunbarton in 1429 fell into a similar state of strife over the fishings in the Clyde and took the matter to the Chamberlain, then the king's representative in his dealings with the burghs. He got the sheriffs of the shires of Renfrew and Dunbarton to call an assize of "the Lordis and the Gentilles of the Countree", (presumably from both counties), who heard the burghesses' allegations and evidence and then declared a fair division of the disputed rights, on which the Chamberlain published his decree.¹⁴

Ecclesiastical dignitaries and communities give the impression of having been particularly tenacious of their full legal rights. Bishops, besides employing the principle of inquisition in the internal administration of their sees,¹⁵ often had resort to it, as an

12. Pife 106.

13. Irvine 11. Cf. Prestwick 113; MacGill: Old Ross-shire and Scotland I, 369 (Tain).

14. Hamilton: Descriptions of the Sheriffdoms of Lanark and Renfrew 28.

15. e.g. Brechin I, 19 (senior clergy consulted as to rights of benefices); Coupar Angus I, 203 (parishoners consulted as to parish boundaries); Hist. NBS Comm. 9th Rpt. 187 (parishoners consulted as to lands attached to parish church); Spalding Club Collections 310 (parish dues).

alternative to arbitration, when they quarrelled with lay persons. Rights of patronage to a benefit were such a source of conflict and in 1371 (?) a dispute between the king and the Bishop of Moray was settled by an assize composed of both clergy and laity.¹⁶ Sometimes the hereditary patronage of a church would be a point retoured by an inquest of succession.¹⁷ Often the circumstances of the foundation of an ecclesiastical institution would become obscured with the passage of time and doubts that arose would be cleared up by inquiry of elderly men of the district; for example, as to the duties owed by a chaplain, the size of his stipend, and the lands from which it was due.¹⁸ An unusually full account of such an inquiry has survived from 1464 concerning the origins and purposes of a house of charity (domus elemosinaria) in Arbroath. Questions put to the inquest include: "si domus elemosinaria sit de fundacione regis episcopi vel alterius domini vel abbatis et conuentus?"; "qualis est magister et quomodo domus est gubernata?"; "si sciunt de litteris fundacionis?" - to which the unanimous answers of the jurors are appended.¹⁹ The assertion of ecclesiastical dues was also a frequent occasion for recourse to an inquest. The collection of tithes, either in the form of every tenth sheaf from the harvest or of a commuted money payment, raised many

16. Moray 127.

17. Laing Charters No. 1663.

18. Moray 319, 325, 326; Lamont Papers 22.

19. Aberbrothoc Nigrum 141. See also ibid. 57 for a comparable inquiry into a property in Edinburgh owing hospitality to the Abbot.

points of contention; and inquests were used to determine such questions as the value of the grain and the persons having right to them.²⁰

Certain bishops also claimed the right to a tenth of all court dues, such as fines and forfeitures, and all feudal casualties, such as payments of ward and relief and maritagium falling to the king within their dioceses. These too were asserted on occasion by an inquest to have existed "a tempore quo hominum memoria non existat".²¹

In various subsidiary ways inquests were used to defend rights in land, besides their primary function in establishing title thereto. Thus when charters were lost, through for example, their destruction by fire, an assize might be raised to swear that they had heard and seen the missing documents as to the claimant's rights read in court,²² or simply that from their own direct knowledge they knew the extent of his lands and the dues exigible from them.²³ The giving of assize by a formal ceremony on the lands might later be the subject of dissension and inquiry, those present as witnesses being questioned as to what had occurred.²⁴ Payments due to a mill and who were thus thirled were also questions put to inquests,²⁵ as were rights of pasture.²⁶ In all these ways, the original function of the jury as an instrument used by rulers to obtain reliable information on which action could be taken remained to the fore.

20. St. Andrews 330; Brechin II, 104.

21. Aberdeen Epis. I, 69. See also ibid 54, 58, 73; Brechin I, 172.

22. Familie of Innes 64 (1376).

23. Yester House Writs 27 (1374); Balfour 425; Aberdeen Epis. I, 141 (1382)

24. Lag Charters 52.

25. Brechin II, 83; Aberbrothoc Niarum 115.

26. Sanff Charters 46, 48; Hist. MSS. Comm. Various Colls. V, 82.

A number of functions of the jury demanded of it not a statement of fact, but an exercise of judgment in the form of a valuation of property. In the *briefe of succession* the value of the lands under the old and new extent was one point to be answered, but not one which appears to have given much difficulty, the crucial questions being rather the identification of the heir and the manner of his tenure. But in some procedures the valuation of lands or moveables by a jury was of the essence. The earliest of these was the *briefe of extent*, by which the Crown established the value of lands, usually for purposes of taxation. It is to be found in 1249 when Alexander III directs two sheriffs and others to proceed to the pasture land near Innerlotham and take inquisition of its extent "per sacramentum proborum et fidelium hominum patrie" and to make a return of its size and value under their seals.²⁷ An actual verdict on what was probably a *briefe of extent* survives from 1295, when the lands of Kilravock were retoured at Nairn to the value of twenty-four pounds, with their mill, breweries, quarries and wood "per bonos et fideles homines patrie non suspectos", fifteen in all who spoke unanimously.²⁸

Such inquests, though probably never frequent, continued to be held into the seventeenth century, as the *retours* in Thomson's

27. *Reubattle* 90. See also *McKechnie* 10 (where only one sheriff is mentioned).

28. *Cawdor* 3 (also in *Moray* 471). For a further thirteenth century example, see *S.M.R.* xxxiv, 46. Cf. *Briefes* 43, 62.

Inquisitionum Retornatarum Abbrevatio indicate,²⁹ Thus in 1549 the Regent Arran and the Lords of Council "understanding that our auld enemies of Ingland intendis the spring of this yeir to invaid our realme quhilkis may nocht guidlie be resistit without ane generall taxt of men and money quhilk taxt can nocht be maid unto the tyme the saidis Lordis knaw the valour and extent of all lands within our realme" directed the Sheriff of Aberdeen to "convein ane condigne assyes of the maist famous men within the boundis of your office" to retour all the lands of the shire. The importance of the occasion was stressed by the barons of the shire being summoned under pain of being put to the horn.³⁰ A large assize of thirty-three was sworn and after hearing evidence from the lairds concerned, or their chamberlains, retoured all the lands of the county. A similar large-scale inquest of extent was held on the lands of the Mearns in 1554 with the participation of seventeen jurors, although the precise occasion of it is uncertain.³¹ Another comparable duty was imposed upon juries by an Act of Sederunt of 21st December 1723 which required Sheriffs to summon annually in February persons of suitable knowledge within the shire and draw from among them an assize of fifteen, who would determine the prevailing price of grain in the shire, either from their own knowledge or evidence given, the figure being of

29. II (Inquisitiones Valorum).

30. Spalding Club Collections 113-121.

31. Brechin II, 365.

importance where treads and other dues in kind had been commuted to a monetary payment.³² This practice still persists.

While normally the jury's activity was confined to the stage of trial or inquiry, in one respect they had a part to play in the execution of judgments. This was in the process of appraising (or comprising), by which lands belonging to a person against whom decree had passed was attached by an officer of court in satisfaction of the judgment. It was established at an early date that this procedure could only be resorted to when all recourse against moveable goods had been exhausted.³³ A firm order of process was established by an act of 1469 which laid it down that after lands attached had failed to find a buyer, the sheriff should choose thirteen men who would value them and make over to the creditor a proportion corresponding to the value of the debt. The land remained redeemable for seven years.³⁴ A retour authenticated with the seals of the sheriff and jurors and affirming the value of the lands embodied their findings.³⁵ Where the lands were in several shires or the sheriffs' impartiality was challenged, a master of the court was from the sixteenth century appointed to preside as sheriff in hac parte and was remunerated out of the appraised lands.³⁶

32. For examples from the late eighteenth and nineteenth centuries see Renfrewshire II, 42 et seq; M.4415, 4420.

33. A.P.S. I, 734, 735, II, 96. For later examples of the observance of this rule see Yester House Writs 139; Laing Charters No. 590. Although poinding was the usual form of diligence against moveables, the plemishing of a farm might be appraised in one act along with the land. (Hist. MSS. Comm. 8th Rpt. 308).

34. A.P.S. II, 96; Erskine II. xii. 3.

35. Fife 102.

36. Hist MSS. Comm. Various Collections V, 49; Orkney 162; Erskine II, xii.4.

The inquest in such cases was not unreasonably drawn from the more lettered members of the community and the act of 1469 required that they should be "the best and worthiest of the shire".³⁷ Indeed an apprising which ought to have been held in Argyll was for lack of "erudite men" there transferred to Renfrew.³⁸ Apart from the intelligence demanded of the jurors, it was desirable that they should be men of some substance, able to withstand the pressures that might be put upon them or the unpopularity they might incur. Thus an assize at Dunfermline was challenged on the ground that they were "simpill and sober of reputatione and substans to pass on this or sic caissis".³⁹ They themselves had earlier protested that they were "simpill men . . . and the actione intentit grit and aganys ane grit and noble man" and so they must be allowed to consult others having more understanding.⁴⁰ Another Fife assize of apprising protested through their chancellor that they were ignorant of the value and had been given no evidence of it.⁴¹ The statutory number of thirteen seems to have been honoured more in the breach than the observance and was usually considerably exceeded. Originally appraisings were carried out upon the lands, which were viewed by the assize.⁴² By the later sixteenth century however the procedure, now taking place in a tolbooth, had become more judicialised and the

37. A.P.S. II, 96.

38. Lamont Papers 62.

39. Dunfermline Regality 75.

40. ibid. 63.

41. Fife 259.

42. Aberdeenshire Sh. Ct. I, 83 (1507).

jurors followed the usual practice in criminal trials or the service of
brievés of hearing evidence and reading documents, electing a chancellor,
withdrawing to consider their verdict and returning to voice it unanimously
or by a majority.⁴³ The public offer of the estate to purchasers
provided for in the act of 1469 was in practice altered to an offer after
valuation at the valued price.⁴⁴

The introduction in 1815 of civil jury trial into the Court of
Session by the Jury Trials Act⁴⁵ is not dealt with here, being essentially
an importation from England with no roots in the historical development
of Scots Law.⁴⁶

43. For full descriptions of the jury's role see Orinoy 162; Laing
Charters No. 590.

44. See e.g. Aberdeenshire Sh. Ct. I, 85-6.

45. 55 Geo. 3 c. 42.

46. See Report of the Strachan Committee on Civil Jury Trial, p.5.
(1959 Cand. 851).

CHAPTER FOUR

Introduction

We have delayed until now to deal with the role of the jury in those courts with which it is most closely associated in the public mind, namely the superior criminal courts charged with the trial of serious crime. It is there that the jury system has attained to its greatest degree of refinement and it is there that it remains of the greatest significance at the present day. In discussing this topic it seems best to study in turn each stage of the criminal process in which the jury has a part and to consider chronologically the development of these aspects. In so doing it will not be possible or even desirable to isolate the criminal courts completely from other jurisdictions; nevertheless, the main theme will be the jury's role in the trial of grave crimes.

I. Summons

The first topic which seems to call for discussion is the means by which the attendance in court of a number of jurors adequate to the nature of the case was secured. So long as suit of court was demanded and obtained, no difficulty was presented. The men "that best knowie the veritie" would already be present in the common forum of the community, be it burgh, barony, shire or regality, and prepared to

fill whatever role was required of them.¹ But as communities became numerically larger and the sense of unity and joint purpose decayed, attendance at court was felt to be a burden to be evaded if possible. It was permissible to discharge it by proxy² and one man might be present in court as representative of several persons who owed suit but not presence.³ Even the imposition of fines did not deter suitors from absenting themselves.⁴ As early as the end of the fourteenth century courts were being continued at Aberdeen "propter debilitatam curie".⁵ The minutes of the head courts in the Sheriff Court Book of Fife are always prefixed by a list of "Nomina Absencium", containing as many as forty names.⁶

This abuse threatened the very existence of the jury system. A remedy was sought in permitting the judge to make up a deficiency of assizers by choosing any he thought fit and who were available. Thus an act of 1488 on the conduct of justice-ayres in burghs directs the judge to pick first "nichbioreis that best knawis the verite". But "gif sa many be nocht present that thair may be sufficient nomer, it salbe lefull to him to cheiss ane assiss of the said heid burgh or to eike the nomer as he thinks maist expedient for the gud of Justice".⁷

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1. e.g. "the caus was put til ane assise of the best and worthiest nychtburis and burgessis than beand present" (Spalding Club Miscellany V, 25).
 2. Fife lxxvii. 3. Aberdeenshire Sh.Ct. II, 9 where he is forbidden to represent more than three suitors.
 4. Quon. Att. c. 33. See infra 254
 5. Aberdeen 34, 77, 134; cf. Fife 11; Rolment III, 46-7.
 6. Fife 1 etc.; it was only at head courts that attendance must be made without summons (Balfour 275).
 7. A.P.S. II, 208. For a Sheriff Court instance of this practice see Fife xvo, n. 4.

Such a practice was used exceptionally in the Justice Court in Edinburgh too. Thus at the trial of Archibald Douglas in 1586 only nine assizers appeared and a royal precept was issued directing that they were to be made up to "ane perfyte nomer" from "aie gentillmen as mycht be gottin summond, ather within the burcht or at the bar".⁸ (Arnot regards these circumstances with suspicion and infers that the trial was a collusive one designed to secure an acquittal for the pannel.)⁹ In 1606 we find Lord Oliphant offering himself for trial on the appointed day in the absence of pursuers and assize and objecting to a continuation on the ground that "thair is ane sufficient number of noble men in this burgh to pas vponne his Assyse", which confirms that notice could be dispensed with. But the judge continued the case until a later justice-ayre.¹⁰ Mackenzie speaks of this practice, which he calls summons apud acta as still being competent in his day,^{10a} but Hume doubts whether it could have survived the regulation of 1672 that the pannel should have due notice of the summoning of all the assizers.^{10b} As to the serving of brieves, there is a similar provision in acts of 1503, permitting judges to compel persons present in court to serve on inquests and to dispense with the usual fifteen days notice.¹¹

8. Pitcairn I ii, 148.

9. Arnot 11-13.

10. Pitcairn II, 513; cf. the English practice of "praying a tales", (as) as illustrated recently in R. v Solomon [1957] 3 W.L.R. 915.

10a. Matters Criminal II, xxiii, ii.

10b. infra 249. Hume II, 306.

11. A.P.S. II, 245, 253.

A general remedy for the absence of qualified assizers was, however, found in authorising officers of court at the instance of prosecuting parties to summon a sufficient number of suitable persons to the court from whom an assize could be selected. There appears to be no surviving legislation bringing this somewhat surprising provision into effect. But it may well be that it was simply a natural and useful development of the existing practice whereby it was the responsibility of the party pursuer to get the accused into court, together with witnesses to prove his guilt, if he chose that method of probation. Jurors were themselves a species of witness and the prosecutor alone could call witnesses; hence it would not seem so outrageous that he should summon the assize also. Letters original were "purchased" by pursuers and contained warrant for the summoning of a sufficient number of assizers. Self-help is a characteristic of most primitive systems of procedure; the state did provide officers of court, but it was up to the injured party to organise the hearing of his case with their assistance.

By contrast, under the relatively refined system of brieves, the responsibility for summoning a civil inquest rested with the presiding officer of the court.¹² A brieve in the narrower sense was in form an order from the king or other magnate to his judicial representative, requiring him to take inquisition "per probos et fideles et antiquiores homines patrie" as to the lawfulness of a right

12. Skene: D.V.S. s.v. Breve de morte antecessoris; Balfour, Practicks 420.

asserted by someone.¹³ In burgh and barony courts he probably always did so through members of the community already present, but in the more formal sheriff and regality courts individual summons seems to have been usual. As part of a comprehensive enactment of 1400, directed against the secret serving of brieves to the detriment of interested parties, or by ignorant men, no sheriff or other royal minister was to execute any brieve of inquisition except in open court by fit and worthy men of his territory who had been summoned on fifteen days notice.¹⁴ It was this statute which was modified in 1503 to permit the presiding officer to dispense with such notice and summon jurors on as short a warning as he pleased or even to choose them from men who happened to be in court.¹⁵ By contrast, too, English criminal procedure always entrusted the calling and choice of the jury to officers of the court.¹⁶ A system of royal justice much stronger and more efficient than that of Scotland made this possible.

In the informal burgh and barony courts it did not prove necessary to adopt the drastic remedy of allowing pursuers to summon the assize. There the "quest" usually dealt with all cases, civil and criminal, raised on the same day;¹⁷ the number forming it was a flexible one,¹⁸

13. McKechnie 5-6. 14. A.P.S. I, 575. 15. ibid. II, 245, 253.

16. Juries Act, 1825, s.20 (6 Geo. 4 c.50).

17. Salkirk and Peebles passim; Carnwath xcv; supra 112

18. infra 117

but if the total number of persons present was clearly inadequate, then the court must simply be continued until another day. But in the Justice-Court, whether sitting in Edinburgh or on ayre, such haphazard methods were clearly unsatisfactory. Their sittings, particularly on ayre, were intermittent; to ensure that a pannel was put to trial on the appointed day, it was necessary to summon an assize individually. The earliest surviving statutory reference to summons of the assize at the behest of the party pursuer treats it as a well-established rule in complaining of collusion between messengers and purchasers of criminal letters and is concerned merely to control it.^{18a}

The need for such regulation arose out of the exactions of the messengers-at-arms, a term embracing both the messengers of the supreme courts and the mairs or sergeants of the shoriffdoms.¹⁹ They were an understandably unpopular class of official. Even the due discharge of their duties of summoning accused persons, defenders and witnesses and attaching property in execution of judgments²⁰ was not calculated to endear them to the populace. But they also had the reputation of being open to bribery and oppressive towards those who would not or could not pay. As early as c. 1400 the taking of bribes by sergeants in return for removing persons from an assize was an abuse to be inquired upon by the Chamberlain.^{20a} The explanation of this state of affairs is to be found when at last steps were being taken not

18a. A.P.S. III, 143; Stair Society Introduction 440.

19. Fife lxii, Appx. F. 20. Cf. A.P.S. II, 462.

20a. A.P.S. I, 682; Cf. ibid 696.

merely to punish tyrannous messengers but to raise the status of their profession. In an act of 1587 "for reformation of the extraordinary newmer and monyfauld abuses of officiaris of Armes" it was admitted that excessive numbers of dishonest men of low education had taken office. Accordingly, the total number of messengers of all kinds throughout the kingdom was limited to two hundred, each assigned to a certain court. They were only to be admitted after examination and finding sureties and to be answerable for the execution of their duties in the court of the Lord Lyon.²¹ This act was apparently not put into immediate effect, for in 1592 another had to be passed declaring that unworthy messengers were to be deprived of office and no more were to be admitted until their number was reduced to the figure previously fixed.²²

Among the more refined forms of oppression practised by these messengers there was the preparation of assize rolls containing excessive numbers of names, - chosen by themselves - which they would strike out on receiving a bribe from those named. The result was that assizes tended to be composed of poor and ignorant men and that sometimes cases had to be continued for lack of assizers. Thus in 1531 twenty-five messengers were convicted of common oppression. It was alleged that "quhen thai mak sumoundis vpon personis to pass vpon Inquestis or Assise thai sell, takkis buddis and rewardis of Gentill menne and causis thaim to abide at hame". Instead, they

21. ibid. III, 449.

22. ibid. III, 555.

"summond and causis cum furthe pover and simple persons that has na thing to gif thaim to let thame abid at home, quhilkis has na knaulege to decide vpon ony douteum materis".²³ Another officer admitted falsifying the execution of a summons and eleven more were declared fugitive.²⁴ In 1538-9 no less than thirty-three messengers were convicted and deprived of office.²⁵

An obviously abortive attempt was made in 1527 to remedy this abuse,^{25a} but it was not until 1569 that anything serious was done to remove the possibility of this particular wrong. In that year the Lord Lyon King of Arms, Sir David Lindsey, carried out an extensive reform of officers of Court and ordered that messengers should summon no more assizers than were listed in a bill which they should receive signed from the party pursuer, the clerk of Justiciary or the Treasurer, under threat of losing office and being punished at the King's pleasure.²⁶ In 1574 the Privy Council approved these and other changes and gave orders for their enforcement.^{26a} In 1579 this reform was made more specific in an act which narrated the evil consequences of these corrupt practices, which it observed, produced almost as much profit for the officers as would have satisfied the victims of the crimes being pursued. Messengers were now forbidden to summon more than forty-five persons, as listed on a roll subscribed by the party pursuer, except where the latter showed good cause why more should be called.²⁷ If they exceeded the appointed number, they were to be deprived of office

23. Pitcairn I i, 154. 24. ibid. 155. 25. ibid. 217.
25a. Balfour 305. 26. R.P.C. (1st) I, 660.
26a. R.P.C. (1st) II, 365-7. 27. A.P.S. III, 143-4.

and suffer such other penalties in person or property as the King might decide and their surety was to forfeit five hundred marks. These penalties must have proved an insufficient deterrent, for in 1584-5 the Privy Council took note of the continuing abuses of the officers and invited the lieges to lay their complaints before the Treasurer.²⁸ Then in 1587, as part of the act "for the furtherance and furthsetting of the criminal justice", the same prohibition on the summoning of more than forty-five persons was repeated, but without the somewhat imprecise exception in the earlier act. Now too the sanction was increased and any officer who called more than that number or struck out or inserted a name "for gratitude or gude deid" was to be brought before the Justice and punished by death as a common oppressor.²⁹ Even this draconian threat could not have stamped out the abuse, for around 1635 several cases are to be found in which private prosecutors were charged along with messengers with having in collusion summoned excessive numbers of assizers and then excused them for a consideration.³⁰ The bribes taken vary considerably with the rank and means of the unfortunate victim, and may be in cash or in kind.³¹

The figure of forty-five was probably settled upon as a

28. R.P.C. (1st) III, 720.

29. A.P.S. III, 460.

30. R.P.C. (2nd) IV, 148, V, 184, 231; Hume II, 299, n.1.

31. e.g. "20s and a pint of 2s. ale", "a chopin of wine", "a long piece of tobacco" (received by the messenger, who was here charged alone) - R.P.C. (2nd) V, 231; "four pecks of oats", "2 dozen keilling and a goose" - R.P.C. (2nd) IV, 148.

multiple of fifteen, which, as we shall shortly see,³² was by 1579 becoming recognised as the most appropriate, though not invariable, size for a jury in the Justice Court. It in turn may well have served to confirm the use of the number fifteen. However it was arrived at, it seems to have established itself not only as a number which must not be exceeded, but as the normal number of persons to be summoned. The style of the criminal summons made repeated emphasis of the point in directing officers of court and others "that ye summond an Assize hereto, not exceeding the Number of 45 persons.....whose names ye shall receive in the Rolls, subscribed by the Complainers".³³ Mackenzie gives it as a number which must not be exceeded under threat of punishment for those responsible, but if it is, the summons, he holds, is not thereby rendered bad.³⁴ Both he and Hope, in quoting the two statutes of 1579 and 1587 regard the privilege of exceeding the number of forty-five as still effective in their times. According to Hope, it is to be exercised with the permission of the judge;³⁵ for Mackenzie, however, it is "the Lords", together, who consent.³⁶ Neither mentions the possibility of the death penalty, but only the penalty of five hundred marks. The former had probably fallen into desuetude, which may explain the continued flouting of this legislation. Hume refers to forty-five as "that ordinary number", but cites cases where the fact that less than forty-five were summoned or that some of the forty-five

32. infra 305

34. ibid. II. xxiii. ii.

36. loc. cit.

33. Matters Criminal II. xxi. iv.

35. Major Practicks VIII. 15. 4.

had died was found not to be a good objection on the part of the pannel, since, as he points out, it was a safeguard to the prosecutor rather than to the accused "to ensure the attendance of a sufficient number of competent and unexceptionable persons".³⁷ But the very fact that such objections were raised illustrates how firmly forty-five had become established as the number which ought to be reached, though not exceeded. To the whole forty-five summoned Hume applies the name of the great assize.³⁸ This usus fori was confirmed by the Act of 1825 on jury trials, which made forty-five the normal number to be summoned to the High Court, Jury Court and other courts sitting in Edinburgh, and to the Circuit Courts, and also regulated the proportions of the total number to be drawn from each county.³⁹ Provision was made for the calling of a larger number, where circumstances warranted it, as might seem reasonable to any of the judges.⁴⁰ Lord Royston had argued in the previous century that the older acts applied only to the Justiciary Court and that accordingly there was no reason why more than forty-five persons should not be summoned to Circuit Courts, as he felt ought to be done.⁴¹ Alison notes that this was in his time done repeatedly and that it was in all cases usual to summon sixty-five persons to the Glasgow Circuit, presumably because of the expected volume of business.⁴² The discretion vested in the judges was exercised in a general form by an Act of Adjournal of 22nd June 1831 which required

37. Hume II, 299. 38. ibid. 300. 39. 6 Geo. IV c. 22 ss. 5-8.
40. ibid. s. 15. 41. Hume II, 299 n.2.
42. Alison II, 382.

the Sheriff of Edinburgh to return sixty-five names where more than three cases were set down for trial on one day or more than three persons were named in one indictment.⁴³

To entrust the summoning of assizers to private prosecutors was on the face of it a dangerous practice, but it was to a large extent controlled by the elaborate system of challenges of assizers who might for any reason favour the prosecution.⁴⁴ But towards the close of the sixteenth century an increasing number of crimes were being prosecuted by the King's Advocate, acting in the public interest, either alone or jointly with the injured party. In an act of 1579 reference is made to an existing practice of prosecution by the Advocate, alone presumably in cases of a public nature, and persons who unjustly laid information leading to such prosecutions were to be punished.⁴⁵ In 1579 too the Advocate and the Treasurer, as being concerned with fines and escheats, were authorised by the Council to initiate prosecutions even where the party wronged was a private individual and was unwilling to raise proceedings himself.⁴⁶ The comprehensive original legislation of 1587 made the same point, specifying in particular "slaughteris and utheris crimes".⁴⁷ Gradually public prosecution became the norm rather than the exception, though of course private prosecution has never died out, but remains competent both under particular statutes and at common law.⁴⁸

43. *ibid.*

44. *infra* 276 *et seq* 45. *A.P.S.* III, 144.

46. *R.P.C.* (1st) III, 173.

47. *A.P.S.* III, 456.

48. *J. & P. Coats Ltd. v Brown* (1909) 6 *Adam* 19; *M'Bain v Crichton* 1961 *J.C.* 25. On the history of public prosecution in general

see Normand: "The Public Prosecutor in Scotland" (1938) 54 *L.Q.R.* 345;

Omond: *The Lord Advocates of Scotland: Stair Society Introduction* 434-5.

The dual interests of the injured party and the public prosecutor were at times in competition and even open conflict, for the tactics adopted might differ according to the real aims of the parties. Thus the Crown might be willing to grant a pardon on receiving a suitable composition, before or after conviction, but would not always see that the victim was compensated. One of the points at which conflict arose was the summoning of the assize. Where public and private prosecutors were conjoined, which had the right to supply the messenger with the list of persons qualified to serve? Private prosecutors would be reluctant to give up a privilege which they had come to regard as a means of securing a favourable jury. At the trial of Hume of Spot in 1582 for complicity in the murder of Darnley, two rival rolls of assizers were in fact produced in court and two groups of prospective assizers were present. One had been called on a roll subscribed by the Justice-Clerk, the Treasurer and the King's Advocate. The other roll was signed by the Advocate only. Although there was no private prosecutor, information leading to the taking of the proceedings had been laid by an informer, another Hume, and the pannel alleged that he had been responsible for supplying the names on the second roll and that it ought not to be received. The Justice, with the advice of his assessors, circumspectly solved the dilemma by ordering that names should be drawn alternately from each of the rolls.⁴⁹ The same clash of interests appears more dramatically in a trial at the Regality Court

49. Pitcairn I ii, 107. See also Aberdeenshire Sh. Ct. II, 134 (1620)

of Spynie in 1592, where the private prosecutor intervened at the beginning of the proceedings to protest that although it was he who had induced the bailie (who was also the judge) to put the accused to trial for the slaughter of his servant, yet he had not been given an opportunity to summon an assize by means of an officer "according to the practie and forme usit be the justice in criminal causes, quha giffie the summondis to the partie persewar and to na other". Accordingly, he claimed, the assize summoned was not a lawful one and a precept to call a fresh assize should now be issued to him. But his plea was unsuccessful, being rejected by the bailie on the grounds that he had issued the precept before he was aware of the pursuer's interest and that the pursuer had acquiesced in this action through his servants.⁵⁰ These cases throw an interesting light on the lack of public confidence in the impartiality of jurors. They were still thought of as witnesses and it was important to ensure that they were men who knew one's side of the story and were likely to favour one's cause.

Throughout the sixteenth century prosecution was still regarded as primarily a matter of private concern, to be engaged in or abandoned at the discretion of the offended party. The key position in which the pursuer was thereby placed is emphasised by a record of 1580 that "the said matter for lack of assysouris (was) continewit to whatsoever day it plesit the persewar to summond an assise thereto".⁵¹ There was, it is true, a slight deterrent against too free a use of the right of

50. Spalding Club Miscellany II, 120.

51. Pitcairn I ii, 99.

private prosecution in the responsibility for the expenses of the assize, should they find the pannel innocent, which was imposed on the party pursuer by an act of 1535.⁵² But wealthy prosecutors were in any case prepared to pay the costs of assizers and in this way might obtain an ascendancy over them, even before the trial began. Thus in the trial of Hay of Delgaty for adultery it is asserted in challenging certain assizers, kinsmen of the Earl of Erroll, who raised the criminal letters, that "he hes causit the Assyis to be summond, vpoun his expenssis", besides writing to certain of them before they were formally summoned. He had now bidden them remain in town for some days "as they wald do him singuler pleasour". The assizers were nevertheless admitted.⁵³ In the next century, with the gradual decline of private prosecution and rise of public prosecution, such complaints are heard less frequently, but by no means disappear. Thus in 1633 two pannels accused of slaughter petitioned the Privy Council to order their prosecution should be desisted from, for the blow was not struck by them, though they saw the fight, and "it is verie hard to hazard their lyffes and fortouns upon the unconstant and ignorant voices of ane country assise who ar commounlic chosin be the partie persewar and ar persons for the most part at his devotion".⁵⁴ The campaigns of the governments of Mary and James VI against particular abuses, notably the universal curse of witchcraft and the endemic unrest of the Highlands and Borders, also served to make public prosecution the norm.

52. A.P.S. II, 350 (subject to the discretion of the Justice and his assessors).

53. Piteairn II, 49-50 (1598).

54. R.P.C. (2nd) V, 167.

In such cases special commissions would be granted to local magnates or to the magistrates of burghs constituting them as Justices in hac parte with all the powers of the Justice Court and authorising them as judges inter alia to summon an adequate number of assizers of "sik persones as best knawis the veritie in the said matter".⁵⁵ There no question of private injury arose; the harm was presumed to have been suffered by the whole community. But the Advocate, as an officer of the central courts, did not normally take part in such proceedings. The interest of judges in the summoning of suitable assizers is recognised in an instruction of the Privy Council in 1620 ordering to inform the Council, the Justice-General and Deputes, the Treasurer and all other royal magistrates and officers of the names of "suche faithfulle and unsuspect witnessis and assise to be summonsd in all crymes and disorderis as salbe fundin to be most meite and able for trial and probatioun of the same and for eschewing of such as are ather seiklie, aigait, or unhable to travell, or ignorant of the factis to be tryit".⁵⁶ The continued association of witnesses and jurors is striking.

After the Restoration, the King's Advocate emerged as the normal prosecutor of serious crime. The privilege of summoning the assize, dangerous enough in the hands of a private pursuer, seemed when exercised by him to weigh the scales of justice even more against

55. Highland Papers I, 158 (1596). Cf. Chiefs of Grant III, 116 (1555); Warrender Papers I, 112 (1571-2); Spalding Club Miscellany I, 117 (1597).

55. 56. R.P.C. (2nd) XII, 720. Warrender Papers I, 112 (1571-2); Spalding Club Miscellany I, 117 (1597).

56. R.P.C. (2nd) XII, 720.

accused persons, who were in any case at a disadvantage in many respects. However, when the High Court of Justiciary was established in 1670, it was provided among a number of "Articles of Regulation" that "The persons to pass upon assizes be listed and their names and designations insert in one roll, to be signed by the said Judges or their quorum" and this rule was passed in statutory form in the "Act concerning the Regulation of the Judicatories" of 1672.⁵⁷ A quorum, according to Louthian, consisted of four Lords in time of Session and three Lords in time of Vacance.^{57a} Sir George Mackenzie, who was then in opposition, claims the credit for this reform,⁵⁸ though in his Matters Criminal he offers a somewhat meagre defence of the older system.^{58a} The Advocate may be presumed to be without malice or interest, he says, (a considerable assumption); assizers are either witnesses or judges, and as to both the pursuer has a choice (which as to witnesses was no longer limited to the pursuer and as to judges was not of any significance in criminal law); and assizers are in any case subject to challenge (a privilege of which decreasing use was being made). Mackenzie appears to be trying to have his cake and eat it, to pose as both a protagonist of reform and a defender of the old order. It was in any case not clear until 1690 whether the judges were required to draw up the list of assizers personally, as well as

57. A.P.S. VIII, 88.

57a. Louthian 36.

58. "Sir George prevailed to get an Act of Parliament made, whereby the nomination of the Jury was referred to the Judges" - Works I vii; II, 352.

58a. Matters Criminal II xxiii ii; cf. Observations James 6 Parl. II c.88.

approving of it by their signatures. An Act of Adjournal of 13th November in that year entrusted this task to the Clerk of Court under the supervision of one of the judges.⁵⁹ By this date Mackenzie was in exile in Oxford. In Hume's time this duty was discharged by the Clerk of Court alone and by implication this practice seems to be recognised in the Jurors Act of 1825.⁶⁰ At present the responsibility for summoning a sufficient number of assizers rests with the Clerk of Justiciary, where the trial is in the High Court, and with the Sheriff-Clerk, where it is in the Sheriff-Court.⁶¹

The actual execution of the summons might be performed either by personal citation of the assizer or by delivery of a copy summons at his residence.⁶² The latter, being simpler, was no doubt more often used. Thus an execution in a quasi-criminal case of spuilzie dated in 1542 records that the messenger "warnit and chargit" at least forty-two persons "at thair duelling places to compeir day and place within writtin to pass upon this inquist".⁶³ At one time, according to Hume, penalties for non-compearance were only exacted when citation was personal, but this was no longer the practice in his time.⁶⁴ In 1674 the High Court by an Act of Adjournal instructed the Macers of Court to show each assizer, as they summoned him, the roll of assizers, so that he might satisfy himself that his presence was indeed required.

59. Hume II, 299.

61. Renton and Brown 81.

63. Fraser Papers 183.

64. Hume loc. cit.

60. 6 Geo. IV c. 22, especially ss. 8 and 9.

62. Hume II, 300; Louthian 44; for the style of the summons and execution c.1750, see ibid. 91. Also A Treatise on the Office of a Messenger (Anon.) Edinburgh 1753.

If he failed to do so and the assizer absented himself, he was not to be fined.⁶⁵ Since the roll could only be exhibited where the citation was personal, this probably accounts for the reluctance of the courts to impose fines for absence where the citation was not personal, though Hume does not draw this deduction. Execution seems commonly to have been made before witnesses.⁶⁶ An act of 1686 required that all citations be in writing and subscribed by the executing officer and witnesses under pain of nullity.⁶⁷ It was held however in two decisions in 1743 and 1746 that that act applied only to parties and citation of assizers was good, though only authenticated by the messenger alone.⁶⁸ The customary notice was fifteen days - the same *induciae* as for pannels, defenders and witnesses, which is found as early as Quoniam Attachamenta.⁶⁹ But where the accused was caught in flagrante delicto of murder he might be put to trial immediately.⁷⁰ Consequently, in such cases the assizers too could not claim the usual warning and the same was of course true where they were called ex astantibus.⁷¹ The Act of 1672 seems to have rendered such procedure incompetent in instructing that the names of those summoned, as well as of the prosecution witnesses, should be supplied to the pannel, so that he might have an opportunity of deciding whether or not to challenge them.⁷² As to jurors this requirement is now embodied in the Criminal Procedure (Scotland) Act of 1887, s. 38,

65. Justiciary Records II, 295; Hume *loc. cit.*

66. e.g. Fraser Papers 183. 67. A.P.S. VIII, 586.

68. Hume II, 300.

69. Quon. Att. c.2.

70. Hume II, 60; Matters Criminal II, xii, iii; Pitcairn II, 446, 458.

71. Hume II, 306.

72. A.P.S. VLXI, 88; Fountainhall 238.

which entitles the accused to be supplied with a copy of the assize-list on his requesting it.⁷³ Citation of jurors is now effected by forwarding to each a notice of citation by registered letter.⁷⁴

73. 50 & 51 Viet. c. 35.

74. ibid. s. 23, sch. B.

II. Penalties for Absence

To discourage neglect of the duty of jury service penalties were provided by statute. Failure to attend personally or by representative in the court of a superior to whom one owed suit, whether it be a head court or a sitting to which one had been specially summoned, had long been a matter for punishment, on paper at least. It was stipulated in Quoniam Attachamenta that a suitor might use up to three essoncies or excuses and then must appear to justify them. If he failed so to attend, he might be fined. He might also be fined if he did not provide caution when ordered to do so on putting forward an essencie.² The Ordo Justiciarie contains the following terse instructions "Fyrst call the soytours....syne call the soytis agane/ ande jlka man twys/ and ilka lard ande his soyt/ gif ony be absent amercy jlk one be thame self."^{2a}

That these somewhat imprecise provisions became a matter of customary interpretation in the courts is made clear by the consecrated words which preface so many court minutes: "The court fensit, the sutis callit, absentis amerciat".³ In the Aberdeen Burgh Court at the beginning of the fifteenth century the fine became stabilised at a mere fourpence.⁴ The procedure is thus minutely described in "The Hener to Hauld Courtis", an account of procedure by a clerk in the reign of Mary. "Than sall the clerk wryte in his buik all thame that compeiris nocht absentis and samony as enteris nocht befoir the arysing of the court

1. Quon. Att. chap. 33. 2. loc. cit. 2a. A.P.S. I, 707.
3. Cf. "curia affirmata et sectis vocatis, absentes patent in rotulis"
Aberdeen 212.
4. Aberdeen 216. Cf. ibid. 209, 210, 219, cxvii; Aberdeen Burgh I, 387.

the dempstar sall gif dome one thame sayend ABCD this court schewis for law And I gif for dome that ze and ilkane of zow are in ane unlaw and amersiaement of court sic as ze aucht to tyne upoun law for zour absens fra this court As the heid court as ze that aucht suit and presens to the samin for zour Landis of etc. And that I gif for dome etc."⁵ When the assize developed as a committee of the suitors, its members still being suitors, continued to be subject to the same penalties.

Whether or not such fines were normally recovered may be doubted. Where the court was regarded as a source of revenue by a superior, an attempt would no doubt be made to collect them; but where the offenders were numerous and the sums small, the expense of collection might well make it unprofitable to do so. Then the pronouncing of doom would simply serve as a reservation of the rights of the court. In the records of the head courts of the Sheriffdom of Pife about thirty names appear regularly in the lists of "Nomina Absencium" and the same names recur frequently.⁶ It is not clear whether a fine was normally exacted; but if it was, it was an ineffective deterrent. Poindings and distrains were on occasion carried out on the goods of those who failed to appear as assizers before the justice-court.⁷ But to evade the difficulties of recovering a multitude of trifling sums, the fines

5. Pife, Appx. 1. It seems odd that suitors should apparently be able to satisfy their obligation by attendance at any time before the court rose, thus evading assize service.

6. Ibid. passim.

7. L.H.T. IX 501 (1566).

incurred by a family or clan to the Crown over a period might be remitted on payment of a lump sum to the Exchequer. Thus in 1498 James IV remitted fines incurred by members of the Clan Grant for non-entry to justice-ayres in consideration of their payment of four hundred merke and their assistance in capturing certain offenders.⁸

The size of the penalty varied considerably from court to court until it was fixed by statute. The uncertainty is illustrated by a case of 1559 in the Aberdeen Sheriff Court where a man who had been duly cited to attend the court as an assizer left without being discharged, "quhairfor he is in amerciament of the court sic as he aucht to tyne of law".⁹ The Sheriff Court Book of Fife 1515-1522 puts the fine at ten pounds,¹⁰ though the editor reports that in later manuscript volumes it drops as low as forty shillings.¹¹ A commission of justiciary granted to the magistrates of Irvine in 1572 orders the summoning of an assize under the pain of forty pounds and another in the same year puts the penalty at only ten pounds.¹² A similar commission to the magistrates of Ayr in 1583 also makes it ten pounds.¹³ A summons of assizers and witnesses in the name of the Earl of Huntly as Sheriff-Principal of Aberdeen puts the penalty for non-attendance at twenty pounds in both cases,¹⁴ as does the Admiralty Court of the Regality of St. Andrews;¹⁵ but in the Court of the High Admiral of

8. Chiefs of Grant III, 43. Cf. Pitcairn I 1, 131 (1525).

9. Aberdeenshire Sh. Ct. I, 187. In the same court and in the same year the fine is put at ten pounds. (ibid.)

10. Fife, 69.

11. ibid. xcvi.

12. Irvine 59.

13. Ayr 53.

14. Fraser Papers (S.H.S.) 183 (1542).

15. Regality of St. Andrews Admiralty Court Book 1671-1730 (M.S. G.R.H.), 5, (applicable to all masters and skippers within the regality).

Scotland a fine of ten pounds is imposed as threatened in the summons.¹⁶
In the Justiciary Court, before Parliament intervened to regulate the matter, an usus fori seems to have established itself that the penalty should be forty pounds.¹⁷ In Edinburgh "because the prouest and baillies hes bene evill seruit in tymes bygane quhen thay had ado with assissis or inqueistis" a more direct form of pressure was devised. Those who refused to come when summoned by the town sergeants were to have their goods poided to cover a fine of eighteen shillings.^{17a} Even the severe penalty of horning was competent, though probably seldom imposed.^{17b}

It would seem to be a glaring defect in a system of trial by jury that those summoned for duty could ignore the citation almost with impunity, for the penalty was variable and its exaction uncertain and it rested only on the general principles of suit of court. Only the ample numbers habitually summoned or owing suit served to conceal this weakness. However, properly organised, such fines could form a substantial part of the revenues of a court, which was too often considered as primarily a source of profit. It was this aspect rather than the administering of justice which led James VI to legislate for a more efficient system of fines. There were three of these provisions, each of them part of a comprehensive measure designed to tighten up the collection of escheats of various kinds. The first in 1587, in an act "for the help and augmentation of the kingis maiesties rentis", simply calls for a more

16. Admirallatus 142 (1560)

17. Pitcairn I 11, 154 (1586), 204 (1590). In the latter example the offenders are said to be "unlawit in the panes content in the Actis of Parliament. Viz. Fourtie Punds". If such an act ever existed, it must form one of the many lacunae in the statutes at this period. (See Stair Soc. Sources chap. I).

17a. Edinburgh II, 160 (1551); repeated ibid. III, 61, 86, 222.

17b. M.14423 (1586); Dunfermline Burgh II, 78.

rigorous enforcement of the existing law; viz. "In justice airis or particular diettis the hail assyiseoris be callit for and the absentis amerchiat to move thame to mak the better obedience".¹⁸ Five years later, "for furthering of the payment and inbringing of the kingis casualities", it was required that an extract of the unlaws imposed in justice courts and ayres be sent to the Royal Treasurer or his clerk within six days, so that letters might be directed for their collection, which was to be carried out without composition.¹⁹ Finally, in 1593 it was laid down that, in consideration of the decline in the value of money, the fine on those failing to answer a summons before the justice should be one hundred merks.²⁰

The King's resolution to eschew all compositions was not a lasting one, for in 1598-99 he remitted it to his Treasurer to make such arrangements "according to the qualitis of the persons and other circumstanceis".²¹ So marked was the royal interest in the revenues of justice that this official was, equally with the King's Advocate, empowered to initiate prosecutions where the injured party declined to do so,²² though there is no record of his having acted alone in this role.²³ He might also be required to attend to the summoning of assizers, should a private prosecutor neglect to do so.²⁴ In 1623 mention is made of the Treasurer's Depute "for uplifting of the fines

18. Act 1587, c.54. A.P.S. III, 457.

19. Act 1592, c.30. A.P.S. III, 555.

20. Act 1593, c.13. A.P.S. IV, 18.

21. R.P.C. (1st) V, 527.

22. Act 1587, c.54. A.P.S. III, 457.

23. Stair Soc. Introduction 435.

24. R.P.C. (1st) V, 8.

and casualties of the said court" of the Commissioners of the Middle Shires (or Border counties). To him those who failed to appear when summoned upon a general assize were ordered to pay "ane hundreth merkis" - some indication of the continuing importance of this function; and he is authorised to obtain letters of horning - a grave, though over-worked, sanction - to ensure the payment of the fines.²⁵ One hundred merks remained the normal penalty in the Justice-Court,²⁶ though there are instances where it is exceeded on no clear authority.²⁷ It was copied in the Sheriff-Courts and that it was still a reality in 1753 is illustrated by the report of a Sheriff-Court trial at Glasgow in that year, when the Sheriff fined five missing assizers one hundred merks each and went so far as to order their imprisonment until the fine was paid, relenting only in the case of one absentee who was certified to be sick.²⁸ Louthian in 1752 quotes the following form of unlaw which, he states, was pronounced by the Clerk of Court and repeated by the Macer, on the Court being craved by the Lord Advocate to impose a penalty: "The Court shows for Law, that -, -, and -, and each of them, are in an Unlaw and Americament of One Hundred Merks, for not compearing to pass upon this Assize, as they who were lawfully cited for that Effect. A.C. I.P.D."^{28a} The penalty was not changed when the jury system was comprehensively reformed by the Jurors (Scotland) Act 1825²⁹ and it still remains valid.³⁰

25. R.P.C. (1st) XIV, 712.

26. E.g. Justiciary Cases 213 (1632); Justiciary Records I, 187 (1666); R.P.C. (3rd) XIII 252 (1688).

27. Justiciary Records I, 120, cf. *ibid.* II, 268.

28. Trans. Glasgow Arch. Soc. (1st ser.) II, 297.

28a. Louthian 49-50. 29. 6 Geo. 4 c.22. 30. Benton and Brown; 115.

III. Exemptions

Not unnaturally, when faced with the prospect of performing an inconvenient, possibly costly, and even dangerous duty or, alternatively, of incurring a fine, many men, either as individuals or collectively, sought to be lawfully exempted from serving on juries or at least to evade a particular obligation. The "Auld Lawes" gave considerable attention to the question of essonzies or excuses; and among those specified as open to defenders were sickness, sudden or prolonged, absence abroad or on a pilgrimage or at a fair, and being in the King's service.¹ The law as to the ascertainment of such excuses and their effect was expressed in considerable detail.² As to those owing suit of court, it was laid down that they might use three essonzies, but must attend on the fourth "day" to justify them.³ The excuses available to suitors are not specified, but it seems probable that at least those afforded to defenders were open to suitors and so to those summoned as jurors also.⁴ Thus of the persons called to serve on an inquest in the Sheriff Court of Aberdeen in 1559 all appeared except two; one of them "was seik and verifiit be ane testimoniall of his curat and be uther famous witness in judgement"; the other, for whom no lawful excuse was made, was fined ten pounds.⁵ The same method of verifying an absence

1. Reg.Maj. I. 8; Quon.Att. chap. 4, 57, Cf. L.O.B. c.xciii "it is to wyt that na essonzie takis stede in the burgh in till the mote of land bot gif a man be seyik and pruffyt be wytnes or than he be in the kingis service or at he has passyt to certane fayris".

2. Reg.Maj. loc. cit.

3. Quon.Att. chap. 33, "day" meaning sittings of the court and not successive days.

4. Fife xcv.

5. Aberdeen Sheriff Court I, 187.

was authorised to be used "Gif a pur man fall suddandly seik" (without restriction as to the capacity in which he was summoned).⁶ On one occasion when the number of assizers who failed to appear was unusually large, the trial of the Earl of Orkney in 1615, Pitcairn cites a number of maladies put forward as excuses, such as "sairnes in his right leg," "ane grit dollour" "ane grit seiknes", and each is verified by ministers, with or without elders.⁷ The same mode of verification was also used by pannels in original cases.⁸

To circumvent the inconvenience and uncertainty attached to obtaining exemption from specific summonses to jury service, the practice arose of petitioning the king for a general exemption from presence on any assize or inquest. At first these exemptions were reasonably circumscribed in their operation. Two of the year 1510 have survived which excuse servitors of the Earl of Huntly from giving suit and presence for their lands in the Sheriff-Court of Aberdeen.⁹ One was for five years, the other, which specifically excuses from service on inquests and assizes in that court, without time limit. But later such licences were granted with remarkable liberality. The Register of the Privy Seal contains numerous examples in the middle decades of the sixteenth century. In many cases the royal letters recite with a pathetic and, one suspects, exaggerated wealth of detail the ailments or other excuses put forward in the petition. Thus in 1566 Maister

6. A.P.S. II, 18.

8. ibid. II, 42, 64 (1598)

7. Pitcairn III, 318.

9. Aberdeenshire Sh. Ct. I, 105-6.

Thomas Meinzeis of Durme being "haviile vexit and tormentit with the panefull discais of gravell and divers utheris infirmities and seiknesis" was relieved from all obligations to jury service.¹⁰ Usually, too, as in the above example, the petitioners would make the most of their opportunity by seeking at the same time to be exempted from "gaderingis, assemblies, wappinschawingis, radis, oistis, veris" and other forms of military service.¹¹ The latter concession was usually granted only on the applicant undertaking to supply another man in his place.¹² Favours of this kind were freely given, often without any cause being assigned, to members of the royal or a noble household, merely, it seems to avoid disturbing the domestic routine. Thus an exemption granted in 1542 to Thomas Merilees, cordiner (shoemaker) to James V, covering exemption not only from assizes and military service, but also from certain taxes, was renewed in the widest terms in 1548-9 when he was acting in the same capacity to the Governor, Arran.¹³ Such personal exemptions, unlike the territorial ones to be discussed shortly, were generally absolute in their terms as to place and without limit as to time and followed some such formula as "fra all compering to ony courtis and fra passing upoun inqueistis and assisis thairin in ony actionis, criminall or civile".¹⁴ Presumably exemptions as proceeding from the

10. R.S.S. V ii No. 3020.

11. e.g. R.S.S. II No. 3042. (This may often have been the primary object).

12. e.g. R.S.S. V i No. 335 Cf. Haddington I, 103 where a man presented to the magistrates an exemption from "oustings, weapon schawings and all appearances in Sheriff Justice or other Courts for returning brieves, his son to take his place" (1544).

13. R.S.S. II No. 4568; R.S.S. IV No. 45. Cf. R.S.S. II No. 1505.

14. R.S.S. IV No. 45. For an example of one limiting service to within the grantee's own shire, see Hist. MSS. Comm. 6th Rep., 693 (1584).

King were effective to excuse from service; but they had to be produced; and there is one reported case where a man merely asserted his exemption and on being compelled to join the assize protested that his privilege should not thereby be prejudiced.^{14a} Alternatively, such a person might safeguard himself by having his exemption read out in a court to which he was likely to be summoned and then recorded in the court books.^{14b}

These concessions appear to have been made purely on the ex parte statements of the petitioners. Granted the unpopularity of jury service, it was a situation wide open to abuse and one that could not be allowed to last. Matters were brought to a head when exemptions had been granted so copiously as to form a serious hindrance to the administration of justice. The precocious James VI, on taking up the reins of government, tackled the problem as part of his general drive to improve the machinery of justice. He began in sweeping fashion by revoking all licences granted by himself or his Regents. The minute of the Privy Council narrates candidly that "be inoportune sute and informatioun gevin" His Majesty had been persuaded to grant exemptions too freely, with the result that parties were "frustrat and delayit of justice"; yet, so it was alleged, many of the exempted persons "ar hail and abill of thair bodyis".¹⁵ Nothing, however, was done to prevent further licences being granted or to lay down on what principles they should be given. More were in fact conceded,¹⁶ though perhaps

14a. Pitcairn I i, 418 (1559)!

14b. Gavin Ros 149.

15. R.P.O. (1st) III, 544.

16. e.g. Hist. MSS Comm. 6th Rep. 693 (1584); R.P.O. (1st) IV 339 (1588).

not so liberally as in the past; and in 1594-5 the problem seems to have been again pressing, for an ordinance was then issued declaring that individual annulments of licences should render them of no force in any court.¹⁷ Finally in 1596 the question was regulated by Act of Parliament.¹⁸ There is the same melancholy admission of past errors, but this time the emphasis is on the inconvenience caused to the Crown in the prosecution of criminals. It is accordingly enacted that persons of legal age and able to travel should not be excused by any exemption from passing on assizes. The act holds out the promise that the next parliament will "sett down sum solide ordour thairanent", but no such regulation of the practice appears to have been made. Personal exemptions continued to be given. Thus in 1599 Lord Livingstone, being appointed guardian to the king's daughter, Elizabeth, was excused from both military and jury service.¹⁹ The exemption, however, was not a perpetual one, but limited to the period of the guardianship. However, among the duties imposed on Justices of the Peace by the Act of 1609 c.14 which established and regulated this office was that of giving to the Justice and other magistrates the names of "faithfull and unsuspect witnesses and assysouris for eschewing that sic as ar ather aged seiklie or vnhable to travell or Ignorant of the factis to be tryit be not vniustlie vexit or vnnecessarlie drawin frome thair awin housses and afferis for materis whereof they ar not hable to gif ony light".^{19a}

17. R.P.C. (1st) V, 206.

18. A.P.S. IV, 115; R.P.C. (1st) V, 370.

19. R.P.C. (1st) V, 558.

19a. A.P.S. IV, 434-5.

By thus relying on local knowledge of personal circumstances, it was apparently hoped to avoid the deceptions practised upon the central authority. The old practice of requiring testimony of the disability asserted seems to have been revived. Thus an exemption was granted in 1617 to two brothers "so faible, waik and unable of persons, pairtlic by seikness and pairtlic by aige, that they are not able to travall ane myle or tua frome thair awne houses without hasard of thair lyves", which disabilities were verified by a testimonial from the minister and elders of their parish.²⁰ Such personal exemptions become increasingly rare and presumably the growth of public prosecution led to greater discretion being used in the selection of suitable persons as assizers. There was also an increasing reliance on Edinburgh assizers, which, while not popular there,^{20a} did serve to minimise complaints founded on the expense of travel. Nevertheless in 1635, a knight, Sir James Lockhart of Lee, found it expedient to be formally excused from jury service.²¹ When a new Privy Council was constituted in 1631 and again in 1684 one of its specified powers was the granting of exemptions from armies and assizes.²²

Apart from such individual complaints it was a recurrent source of grievance amongst the inhabitants of burghs that they were often called to Edinburgh to serve on assizes in the Justice-Court and thereby incurred heavy expense. Thus the burgesses of Perth complained in 1556

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20. R.P.C. (1st) XI, 9. 20a. Justiciary Records II, 63 (1671)
21. R.P.C. (2nd) VI, 156 (He was the head of a distinguished family - the father of Lord Lee and grand-father of Sir George and Sir John Lockhart).
22. R.P.C. (2nd) IV, 189; R.P.C. (3rd) IX, 34.

that "in this trublus tyme bypast ye Inhabitantis thair of hes bene put to grite and exhorbitant expenssis be summunding and compelling of thame...to compeir befoir our Justice".²³ The preamble to the Act of 1587 c. 57 on justice-ayres refers to the "grite trouble and noiddies expense of the kingis liegis" in being called to Edinburgh.²⁴ Often these protests were linked with complaints concerning the oppressive conduct of messengers-at-arms.²⁵ In order to escape this burden many burghs sought and obtained exemptions from assize service of varying scope. The earliest of these appears to have been that granted to the burgesses of Ayr in 1471, which is exceptionally wide in its terms in as much as they were excused from service in courts of any kind outside the burgh, whatever the circumstances.²⁶

As well as escaping the long journey to Edinburgh of which they complained, they also took the chance to be exempted from summons to the Court of the Sheriff of Ayr, with whom the community had a long-standing feud.²⁷ Even this concession is treated as being declaratory of an existing privilege granted by James II in 1459.²⁸ This however appears to cover only compearance as witnesses ("tamquam testes") and

23. Pitcairn I, i, 418.

24. A.P.S. III, 458.

25. e.g. A.D.C. (Public) 520. Cf. supra 23. 26. Ayr 36.

Pitcairn I i, 377.

27. ibid. The struggle did not end until the Sheriff renounced his jurisdiction over the Burgh in 1557 (Ayr 42). The Burgh of Irvine had a similar quarrel with the Sheriff of Ayr and claimed to be exempt from his assizes and inquests: (Irvine 42.) There was a similar dispute between the Sheriff of Moray and the burgesses of Elgin (Elgin 27).

28. Ayr 32.

to apply only to the tenants and inhabitants of Alloway belonging to the burgh. Assizers were certainly more than witnesses by 1471 and this seems an interesting example of the extension of a privilege under the guise of a declaratory act. The privilege, however acquired, was tenaciously defended. Letters under the Signet in 1574 and again in 1580 narrate that the inhabitants are still summoned to compare in Edinburgh and elsewhere; and the grant by James II is once again invoked to command the Justices, Sheriffs and their officers to desist from this practice.²⁹ Protestations are still to be found thereafter in which burghesses claim that no punishment should follow their absence from assizes in the Justice-Court held in Edinburgh,³⁰ even where the case was one of murder alleged to have been committed by an Ayr man on an Ayr man.³¹

When this common grievance of townspeople was made the subject of a general enactment in 1567, however, it was the exemption of the inhabitants of Dundee that was avowedly taken as the model. They had complained in 1526 that their business was interrupted and they were put to great expense in travelling to Edinburgh to serve on assizes; and accordingly their liability was limited to cases heard within the burgh or two miles round "unless in actions of neighbours". This presumably meant that they could still be called to Edinburgh if the parties in a criminal case were inhabitants of Dundee, for it was one of their complaints that they were often ignorant of the cases which they were

29. Ayr 48, 51.

30. Ayr 111, 115.

31. Ayr 115.

called to judge in Edinburgh. (Civil cases demanding a jury would be heard locally). Further, they were only to be called in sufficient numbers, presumably so that their time would not be wasted through a deficiency. Messengers who did not comply with these rules were to be deprived of office and to be compelled to make good the loss incurred by those summoned.³² The rival town of Perth claimed and received an exemption in 1556, on pointing out that Dundee was a wealthier place than Perth and better able to support the burden.³³ In this case there was the usual licence in the widest terms covering all courts and all actions, civil and criminal, in all time to come, but the limiting factor was that the inhabitants could be called if a crime had been committed in Perth or one mile around. A similarly-worded concession was made to the burgh of Cupar in 1557.³⁴ In 1567 Parliament extended this form of privilege to all burghs in Scotland and, as in the Dundee licence (which is referred to in gremio) there was the same two-mile limitation in effect "except the deid be evidentlie knawin to thame" - "deid" appearing to cover facts giving rise either to civil or criminal proceedings. The same threats as before were also aimed at Messengers at Arms.³⁵ In the Act of 1596 "anent exemptionis fra assyiss" this Act of 1567 was amended in as much as the inhabitants of the burghs were to be "na forder astrietit nor oblist to pas vpoun assyiss of ony personis bot quhen the cryme quhairupoun the personis to be accused is

32. A.D.C. (Public) 520 (letters of 1526 produced in 1542 for transumpt)
33. Pitcairn I 1, 418. 34. R.S.S. V 1 No. 245.
35. A.P.S. III, 44.

committit within the space of foure mylis to the burgh quhair the saidis personis summond to pas vpoun assise duellis."³⁶

This general licence does not appear to have altogether restrained the messengers,³⁷ nor to have deterred burghs from seeking individual exemptions. Thus in 1587 the community of Dumfries, who had, in addition to the usual arguments, pointed out the danger to their property from "thevis and brokin men" in their absence, were granted an exemption in consideration of the "dangerous passage and large space" between their town and Edinburgh and the services rendered by them to the Lord Warden of the Marches. It relieved from jury service except in civil cases heard within the Sheriffdom of Dumfries or in criminal cases where the act was committed within the same territory.³⁸ Presumably they were still liable to be called to the capital when a crime committed in the shire was tried there. Aberdeen too had its valued exemption from assizes³⁹ and Glasgow rewarded its provosts generously when they obtained renewal of this privilege for the citizens.⁴⁰

With the exception of the Ayr licence, which was in a class by itself, such exemptions did not exclude the possibility of a local assize being called to Edinburgh when a crime committed in their neighbourhood

36. A.P.B. IV, 115. 37. Ayr 48, 51. 38. R.P.C. (1st) IV, 106.

39. Pitcairn I 1, 377 (1555); III, 379 (1615); Familie of Innes 127; Aberdeen Burgh II, 17 (1574). "...lykwayes ressave the townis exemption fra passing upon assyses with letters of publicatioun thairupoun, an act of advocatioun upoun the admitting thairoff be the justice quilk is a mater of gryt consequence"; -

Aberdeen Council Letters I, 144; Aberdeen Charters, 93 (1592).
40. Glasgow I, 461, 466.

was pursued there. Thus in 1627 thirteen assisers were called to the capital from Inverurie to serve as a jury in a prosecution for mutilation at the instance of the injured party, the alleged act having been committed in Inverurie some fourteen years previously.⁴¹ Such local juries however became increasingly rare in the Justice-Court in the course of the seventeenth century and the burden on the inhabitants of Edinburgh and the Lothians was correspondingly increased. Thus in 1627 a merchant and burgess of Dundee was tried before a jury of Edinburgh burgesses for a killing committed in Dundee, although no doubt the attendance of a jury of Dundonions could have been compelled.⁴² This was a prosecution at the instance of the Lord Advocate and it would appear that in such cases an Edinburgh jury was usually called, while private prosecutors would summon people from their own locality, perhaps hoping for a sympathetic hearing from them. Had the provisions of the Act of 1587, c.57, regarding the holding of justice-ayres in each shire twice a year been put into regular effect, the just grievances of the people of both the capital and the small burghs would have been satisfied.⁴³

41. Justiciary Cases, 67.

42. ibid. 65.

43. A.P.S. III, 458. Dickinson (Pife xciv) quotes Mackenzie as stating that "in his time the exemption of burgesses was in desuetude" (Observations James IV, Act 1). His actual words are "By the twelfth Articl. Iter Justic. The Burrows had liberty to repledge their own Burgesses from being upon assizes; which priviledge is here regulated; but now the priviledge it self is in Desuetude; for all Burgesses are oblig'd to pass upon assizes, except the Chirurgeons of Edinburgh"....

The Act however relates that justice has been defeated through the practice authorised in Ordo Just. c.12 (A.P.S. I, 707) of burghs repledging from justice-ayres their members accused before the court. To avoid their escaping retribution the justice is authorised to try (Footnote continued on next page)

In 1671 the Lords of the new High Court were informed that "the inhabitants within the Burgh (soil. of Edinburgh) are exceedingly troubled by being frequently cited to pass upon Assizers (sic) and that through the importunity of Parties and neglect of the Macers to the Court there are some few persons that are always troubled and others go free". Accordingly, the magistrates of the city were required to draw up a list of all citizens qualified to serve as jurors, so that the burden should be more equally shared.^{43a} Mackenzie claims this as a reform initiated by himself, adding that the assizers ought to be named in turn by reference to their addresses.^{43b}

During the sixteenth and seventeenth centuries exemptions were also given to entire professional groups, as a mark of royal favour or of their importance to the community. A Letter of Exemption of 1567 excused all qualified chirurgions in Scotland approved by the deacon of their craft in Edinburgh from passing on inquests and assizes in actions civil and criminal, "except as far as appertenis to the judgement of thair awin craft".⁴⁴ It was ratified under the Privy Seal in 1613,⁴⁵ embodied in an Act of Parliament in 1670⁴⁶ and re-affirmed by the High

43. Continued from previous page.

them himself, giving them an assize letter wholly of strangers or of those of the burgh "that best knowis the veritie" and making up any deficiency from persons outwith the burgh "for the gud of Justice". Act 1488, c.9 (A.P.S. II, 208). Accordingly Mackenzie's observations on repledging from assizes do not seem to be germane. The exemptions were not so much in desuetude as no longer having to be asserted, in as much as trials in Edinburgh were usually before Edinburgh assizes and in circuit and other criminal courts before persons drawn from the neighbourhood (cf. Argyll/Passin)

43a. Justiciary Records II, 62. 43b. Works I, vi. 44. R.S.S. V ii,

45. Justiciary Records II, 267.

No. 3515.

46. A.P.S. VIII, 38.

Court in 1799.⁴⁷ Mackenzie comments that this concession was "because of their necessary attendance upon sick persons"⁴⁸ and "because of the peremptoriness of the employment".⁴⁹ Even this royal support did not deter the importunate officers of the High Court and in 1674 the Incorporation of Chirurgeons and Chirurgeon Apothecaries of Edinburgh had to petition the Lords of Justiciary to restrain those who "daily troubled and molested" them.⁵⁰ The request was granted and thereafter the physicians do not seem to have been harassed in this way. This concession was coupled with exemption from military service, as in many grants to individuals. In the charter granted to the Royal Fishing Company by Charles I in 1631 its members were granted, among other privileges, that of exemption from service on assizes and inquests.⁵¹ The officials and workmen of the Royal Mint were similarly excused in 1670.⁵²

Besides those who by virtue of their occupations enjoyed such specific exemptions, there were others whose avocations or offices were such that usage excused them from jury service. Indeed by an act of 1425 "officiars of ony courte" (a rather ambiguous expression) were forbidden to act as assizers.^{52a} Magistrates appear to have been exempt, even from the Justiciary Court and reasonably so, in view of their role as judges. Two Edinburgh baillies served in 1566 on an assize, but protested that in so doing they should not prejudice the privilege of

47. Hume II, 306.

49. Matters Criminal II, xxiii, vi.

51. A.P.S. V, 243.

52a. A.P.S. II, 9.

48. Observations James IV, Act I.

50. Justiciary Records II, 265.

52. A.P.S. VIII, 46.

their office for the future.⁵³ An assize in Edinburgh in 1607 included Alexander Dunbar, Sheriff of Murray (Moray), without protest on his part,⁵⁴ but he was not conspicuous as a judge for a devotion to procedural regularity.⁵⁵ The assize that tried Thomas Ross, the pasquiller, in 1618 included the Sheriff-Depute of Kirkcudbright and the Sheriff-Clerk of Dumfries.^{55a} A Councillor claimed exemption in 1596 and was apparently excused;⁵⁶ but many of those who served in the trials of noblemen as their peers were certainly Councillors. Lawyers of various degrees formerly served on assizes. A notary, who acted as chancellor, served on the jury which came from Inverurie to the Justice-Court in 1627.⁵⁷ Another served at Perth in the Gowrie Conspiracy trial in 1609.⁵⁸ A "writer in Edinburgh" (James Campbell, possibly a native of the district), served at Inveraray in 1675⁵⁹ and another writer at Edinburgh in 1609.^{59a} There are several cases, too, where persons described as 'of the Bar' acted as assizers.⁶⁰ But in 1600 James McGill pleaded that as "ane ordinar Advocate" he should not have to serve and was excused by the judge "fra all assyesses" for his life-time.⁶¹ Arnot, writing in 1785, records

53. Arnot 377. They may have been treated as officers of court who were specifically excluded (A.P.S. II, 9; Act 1425 c.6).

54. Pitcairn II, 528; Stewarts of Pothergill 117. It is perhaps noteworthy that he was not chosen as chancellor.

55. Cf. Pitcairn II, 143-5; R.P.C. (1st) II, 353.

55a. Pitcairn III, 452. 56. ibid. II, 10, et. seq. 57. Justiciary Cases 67.

58. Pitcairn II, 148. 59. Argyll xviii, 48. 59a. Pitcairn II, 559.

60. ibid. I i, 451. The names given, "James Glenne" and "John Lockart", are not however listed in The Faculty of Advocates (S.R.S.) at this period, but they may refer to practitioners who were not members of the as yet loosely organised Faculty. (See Stair Soc. Introduction, 29)

61. Pitcairn II, 112. (Son of James McGill, the Clerk Register and opponent of Mary, both of Nether Rankeillour: see D.N.B.)

that "those who follow the profession of law are never called" and adds in a foot-note "The Faculty of Advocates claims an exemption; and those who practise at the bar are undoubtedly entitled to it".⁶² In 1811 the judges formally upheld the claim to exemption made by members of the Faculty and of the Society of Writers to the Signet and gave instructions that neither they nor any "other members of the College of Justice" should be called as jurymen in time coming, except by special order of the court.⁶³ This was in fact done at a trial in 1812 in which nine "members of the College of Justice" acted as jurors when an elaborate series of frauds was alleged to have been perpetrated in order to obtain service as heir to a peer.⁶⁴

The clergy prior to the Reformation were certainly excused, and probably debarred, from sitting in judgement in criminal causes. Chapter 18 of the Fragmenta Collecta excludes "a probacione et acquietacione" "clerici contra laycos et e converso".⁶⁵ Dalfoour summarisèes decisions in 1517 and 1519 to the effect that "Na spirituall or kirk man may personallie sit in jugement in any criminal actioun, or blude".⁶⁶ When sentence of forfeiture of life and property was passed by Parliament in 1475 on the Earl of Ross, it was done "remotis omnibus et singulis dominis prelati dicti parliamenti ac ceteris clericis infra sacros ordines quibuscunque constitutis".⁶⁷ In 1545 Cardinal Beaton, for

62. Arnot 244. 63. Hume II, 305-6. 64. ibid. I, 156.

65. A.P.S. I, 744. 66. Practicks 30.

67. A.P.S. II, 111; Hope, Major Practicks I, 4, 87; Hume says erroneously "Earl of Fife" - II, 305. See also A.P.S. II, 186.

himself and other clergy present in Parliament, declared that any vote they gave in a trial for treason should only be taken as referring to whether the acts alleged were relevant to the crime and not as to the infliction of punishment.^{67a} Hume remarks that Lord Royston in his Notes says that there are several instances of the contrary between 1556 and 1558, but that he himself was not able to trace them.⁶⁸ A pardoner who sat on several assizes in the Dunfermline Burgh Court was probably a layman and so did not infringe the rule.⁶⁹ Soon after the Reformation the entry is to be found "Andro Forester, Minister, one of ye assize, protestis his compearance hurt nocht his privilege" - that is, comments Pitcairn, "pleads his cloth".⁷⁰ At a trial for unlawful assembly in 1596-7 the inclusion of two men on the assize was challenged, one as being a "Prelat", the other as a "kirk-man".⁷¹ The Lord Advocate answered that they ought to be admitted "in respect of the present estait of the Kirk", possibly implying that they were merely titulars. It is not clear whether this argument prevailed. At a Justiciary Court in Ross-shire in 1627 "Mr. Wm. Ros, parson of Kincardine" appears to have been an assizer, but possibly such niceties of procedure were not observed in these parts.⁷² Fountainhall states that when a Covenantor was tortured in the boots at the Privy Council, "the Bishops in this as a sanguinary case, retired forth of the Council".⁷³ The mediaeval

67a. A.P.S. II, 456.

68. Hume II, 305n.

69. Dunfermline Burgh I,

70. Pitcairn I ii, 24 (1571).

xxi.

71. ibid. II, 14.

72. Old Ross-shire and Scotland II, 34.

73. Decisions I, 111; Historical Notices I, 269 (1680).

privilege, then, if such it be, seems to have been preserved by the Reformed Kirk and Hume was able to write with some confidence at the close of the eighteenth century "In fine, certain it is, that for these two centuries at least no churchman has been summoned to serve on any jury in a criminal charge".⁷⁴ He goes on to note that "for very different reasons" (which he does not specify) the same was true of butchers who formerly were summoned, but now were not.⁷⁵

The Jurors (Scotland) Act 1825, sec. 2,⁷⁶ exempted the following categories from jury service: all judges of the supreme courts, sheriffs, magistrates, ministers of religion, parochial schoolmasters, practising advocates, writers to the signet, solicitors and procurators, clerks of court, gaolers, university professors, practising physicians and surgeons, customs officers and officers of court. To this list minor additions have subsequently been made.⁷⁷

74. Hume II, 305.
76. 6 Geo. IV c. 22.

75. ibid.
77. Renton and Brown: 78-9; 80-1.

IV. Grounds of Challenge

Besides those who did not serve as jurors because they did not wish to, there were other potential jurors who were banned ipso jure or excluded by the action of the parties, even if they were willing. The records speak of these bars always in terms of objections which may lawfully be proponed against the admission of a man on an assise and even Hume discusses the question from this stand-point alone.¹ But it may confidently be asserted that certain categories of persons could not serve as assizers, though no challenge was made to them or even if the parties were to consent. Such persons included the outlaw, who, as Hume points out, "has no character in law to defend himself against any prosecution, and much less to determine on the guilt or innocence of another";² the person declared infamous and so excluded from bearing witness in any court, and the person awaiting trial on a criminal charge. Such people bore a legal stigma and were ipso jure debarred. In this category of the infamous, lunatics and the feeble-minded were also formerly included.³ They, together with the deaf and/or dumb could never be admitted by consent of parties, though their disability might have to be drawn to the attention of the court by one of the parties. Apart from these groups, there were many others who

1. Hume, II, 301-4.

2. ibid. 301.

3. Fragmenta Collecta c.19 (A.P.S. I, 744) But exceptionally, at the trial of the Catholic Earls for treasonable plotting with the Spaniards, the Advocate produced an interlocutor of the Lords of Session that infamous persons, minors and accomplices should be competent witnesses in causes of treason and heresy. (A.P.S. IV, 57).

would only be excluded on the motion of one of the parties and on grounds which were not instantly verifiable. Accordingly it is around such objections that most of the law on exclusion of assizers accumulated, some of it being of a highly refined character.

All the bars already mentioned are included in a terse but remarkably exhaustive list of exclusions printed in Fragmenta Collecta c. 18,⁴ which seems to anticipate all those that were elaborated later. There are Scots and Latin versions which do not accurately reproduce each other. The list purports to cover equally those who are excluded from assizes, from proof (as witnesses) and from acquittance (probably as compurgators). As translated by Hamilton-Grierson⁵ the Latin list comprises boys under fourteen, lunatics, thieves, adulterers, those who had been "dungyn about the kirk" or through the town, poor, perjured, infamous and convicted persons, persons redeemed from justice, accomplices, churls, bondsmen, clerks against laymen and laymen against clerks, the father, son, brother, father's brother, and every relation by marriage within the fourth degree, the lord and his bailie, every one wearing the adducer's livery, or being his adviser or of his retinue, or holding land of him in feu or payment of rent, every party to the charge, every enemy and ill-wisher, and every hired (soil. bribed) witness, every one not admissible as an accuser, outlaws, every one accused of crime until cleared of the charge. (The term

4. A.P.S. I, 744. Considered by Hamilton-Grierson to be of Romano-Canonical origin (Rolement III, 80).

5. Loc. cit. For a very early instance of the challenge of a juror see Newburgh 475 (servant of abbey) (1309).

"outlaw" is presumably intended by the translator to cover excommunicated persons "lyand in cursyng".) The Scots list is more specific as to the relations excluded and bars those related by affinity up to the ninth degree. Balfour provides a similar list of those who may be repelled from passing on any assize and also from bearing testimony or witness,⁶ adding appropriate citations of authority, some of which have now disappeared. Hope provides a more compressed list, but writing at a time when the assizer's role as witnesses had almost become a thing of the past, he applies it only to probation by witnesses.⁷ Mackenzie, however, affirms that "they (assizers) are Witnesses in so far as they may condemn on proper knowledge without any other Probation; and therefore whatever exceptions may be proponed, either against judge, or Witness, are admitted against Assizers".⁸ Both Balfour and Hope include women in their lists, but Mackenzie gives a few exceptional cases where they have been admitted as witnesses.⁹

We may now examine more closely those heads of exemption which did not remain shadowy references in early manuscripts, but which were developed in some detail in late mediaeval times. Of the various persons excluded, some were on the grounds of the lack of partiality which they were assumed to feel, some because of some disability or infirmity of their own, and some because they were excluded by operation of law.

6. Practicks 377-9.
8. Matters Criminal II,
xiii, vi.

7. History of the Assizes 314, 322, 2.
9. Op.cit. II, xxvi, iv.

The first of these classes was much the largest. Canonical procedure with a healthy distrust of human nature was not content to receive cum nota the evidence of suspect persons and those who had an interest of their own to further. It excluded as witnesses completely all who stood in such a relationship to one of the parties that they might be prejudiced in his favour or against him. And jurors in their capacity as witnesses came under the same ban. Of such persons those related by blood or marriage to one of the parties were perhaps the most suspect. The leading authorities concur in making the forbidden degrees for witnesses and assizers the fourth degree. This is exemplified by Mackenzie as cousins german, thus making it clear that the computation is by the Roman and not the canonical method.¹⁰ The mention of "nyne degrees" in the Fragmenta Collecta is nowhere repeated, and may be a misreading. The difficulty of making such computations accurately may be illustrated by a civil inquest of 1527-8 in which a protest was made that one prospective member was "within gre defendand" to the raiser of the brieve. Her procurator replied that the "pretendit greis ... was nocht recht comptit, nor of veritie", which submission the Sheriff upheld.¹¹ Again in 1610 it was alleged that a man could not serve on an assize because "his wyfes guidame and the persewar's

10. Op.cit. II, xxvi, vii.

11. Laing Charters No.365. The editor queries "defendand" and offers "descendand" as an alternative reading, but the former is clearly correct and is derived by Mackenzie from the French "défendre".
Loc. cit.

mother was sisteris". The man on oath swore that they were related by blood, but in what degree he did not know. The Justice's decision is not recorded, but his difficulties in such cases are obvious.¹² By the middle of the sixteenth century such challenges had become an abuse and a hindrance to the administration of justice. An Act was therefore passed in 1567 which in the usual fashion of the time recounted first the evil to be cured, namely the "facile repelling" of jurors on grounds of consanguinity or affinity, and then enacted the remedy, that such persons were not to be rejected if they were related to the opposing party in the same or a nearer degree.¹³ This remedy does not seem to have been a very effective one and was probably of most use in civil cases where friends and relatives were often put on the inquest simply because of their personal knowledge.¹⁴ Criminal justice continued to be impeded. In 1590 a trial for witchcraft had to be postponed until the next justice ayre in Aberdeen owing to the large number of assizers who were 'cassin' - quashed or rejected.¹⁵ In criminal cases the possible forms of challenge seem to have grown more and more elaborate. Thus at an Edinburgh trial for murder and cattle-thieving committed in Moray each of the prospective assizers was the subject of a lengthy debate between counsel for the accused and the King's Advocate, one of those summoned being examined on his prior behaviour. In certain cases "deidlie feid" as well as relationship is alleged and sometimes the feud is on the part of the person

12. Pitcairn III, 96. 13. A.P.S. III, 44. 14. supra
15. Pitcairn I II, 209. Cf. ibid. II, 11; C.S.P. XII, 465.

with whom relationship is alleged. Thus James Rutherford is claimed to be "sister sone to the laird of Tarbet, quha is vnder deidlie feid with John Roise (the pannel) for the slauchter of vngle Allester Roise".¹⁶ Family ties are so strong that the enemy of one man is presumed to be the enemy of all his family and retainers, who are thus thought to be incapable of an impartial judgment.

Family feuds of this nature were particularly prevalent in the Borders and Highlands, and formed one of the main obstacles to the efforts of James VI to pacify these regions.¹⁷ Thus in 1602 the fact that a man was a burgess of Jedburgh, whose citizens were alleged to be in "deidlie feid" against "the hail name of Trumbill" (Turnbull, the pannel's name) was put forward as a ground of challenge.¹⁸ Complaint was made to the Privy Council in 1583 that the Warden of the Marches had permitted two Turnbills with whom he was 'seconds and thriddes of kin' to challenge and decline certain assizers even without allegations of feud, and when nevertheless they were "fylit" according to the practice of the Borders, he protected them against the consequences of the verdict.¹⁹ The Commissioners of the Marches informed the Council in 1605 that they had difficulty in drawing an impartial assize from a twenty-mile vicinity of a crime or of the parties' dwellings because "all within the said bounds partake in the

16. Pitcairn II, 143-5 (1600).

17. Cf. R.P.C. (1st) I, 185 (1561); R.P.C. (1st) IV, 299 (1588); A.P.S. III, 461 et seq (1587).

18. Pitcairn II, 420.

19. R.P.C. (1st) III, 622.

feud." The Lords replied that they should take the freest men of the country without restriction of area, repelling only those against whom feud was proved.²⁰ Similar exceptions were also proponed against judges.²¹ Quarrels between families in the North-East also tended to be inveterate and violent. The family of the Dunbars, who were hereditary sheriffs of Moray, were notorious for their perversions of justice.²² At a trial in 1600 it was alleged that the Sheriff of Moray had acted as a party in a prosecution there being "doidlie feid" between him and "his kyn and freindis" and those of the panel and so no-one within the appointed degrees of relationship to him could be an assizer.²³

Such loyalties, which were so inimical to the impartial administration of justice, often rested on more than relationship. The nobles would demand of their tenants the signing of a "bond of manrent", in which the latter undertook to support their lord in all his disputes. In one unusually specific deed of this kind, the retainer promises the Earl of Arran that he "sall serf him leilly and treullie with my kyn and freyades that will take my part in peax and weir at his will and warnyng and sall tak ane afauld plane part with his lordschip in all and sundry his actionis, materis, causis and querelis, leueful and honest, movit or to be movit".²⁴ A similar evil was the "bond of maintenance", a kind of treaty by which two families agreed to support one another in all their contentions. Thus James Earl of Arran and Robert Lord Boyd

20. R.P.C. (1st) VII, 710.

21. Pitcairn II, 81.

22. R.P.C. (1st) II, 353 (1574)

23. Pitcairn II, 143.

24. Hist. MSS Comm. 11th Rpt. Appx.

Pt. vi, 31 (1515). See generally S.H.R. xxiv, 165 and (1911) Jur. Rev.

agreed in 1548 to "tak thair trow and afauld parte in all and sundry thair actionis caussis querrellis and debaitis honest and lefull aganis quhatsumevair personis in the law or by the law, the Crown of Scotland alanerly except".²⁵ Such pacts turned litigation into a continuation of raids and skirmishes. It became a common-place for retainers to come to a court in armed droves to molest and intimidate the assize or inquest in a case to which their lord or one of his allies was a party. Thus the Earl of Bothwell writes to Sir Patrick Waus (a Senator of the College of Justice, as well as laird of Barnbarroch) "We ar sumound to vnderly the law ... for the slauchter of vmquhile D.H. Thairfoir we will maist ernistlie craue your (l.) presens the said day, accompaneit with your (l.) freindis and servandis, to the defence of our lyves, quhilk we sall nocht spair to hasard for your l. quhensoever the alyik occasion sal be offerit".²⁶ In similar circumstances Waitland writes to a friend that I "have written to all my friends to be present to see I have justice."^{26a} When persons under such vows were put on assizes in cases involving the interests of their associates or their enemies there was little hope of an impartial verdict. Frequent complaints were made to the Privy Council of the injustices done or feared to be done by "ane led assize" or "ane verrey suspect assize outwaillit be the said Erll of sic persones that dar not utherwayis declair except they know it to be his pleasour".²⁷

25. Boyd Papers 181.

26. Correspondence of Sir Patrick Waus II, 307. Cf. ibid. 311 and 519 (packed inquest of apprising). 26a. C.S.P. II, 1196.

27. R.P.C. (1st) III, 144 (1579); cf. ibid. 570 (1583); R.P.C. (1st) IV 284 (1588) ("usurpit and conjurit assisouris").

Various attempts were made to stamp out this practice. As early as 1457 an act was passed forbidding "commotioun or rysing of comownys in hindering of the common lawe" and the entering into bonds of manrent by burgesses.²⁸ By another act of 1555 all "liggis" (leagues) were declared null and also all bonds of manrent and maintenance, with the considerable exception of those that were heritable or given as assythment for slaughters. Persons making such pacts in the future were to be punished by imprisonment.²⁹ The Privy Council also from time to time ordered the rigorous enforcement of these acts and even intervened to forestall particular attempts to influence courts.³⁰ Thus in 1582 three litigating parties were ordered to come to court in a peaceable manner and to bring no more than twenty-four retainers each.³¹ On another occasion the Privy Council, being warned of possible trouble of this kind at a perambulation, limited each side to twenty-four retainers "in quiet maner, without armour".^{31a} That this should be an attempt to minimise the problem is some indication of its size. In 1579 the Council gave power to judges to continue diets from one day to the next until convocations of armed men intimidating courts should disband.^{31b} The custom of bands did not die out immediately however, indeed the "general bands" allying the nobility to James VI in his struggle against disorders in the Borders and Highlands served to preserve

28. A.P.S. II, 50.

29. A.P.S. II, 495.

30. R.P.C. (1st) III, 487 (1582)

31. ibid.

31a. ibid. II, 629 (1577).

31b. ibid. III, 173 (1579).

it.³² As late as 1627 there is a complaint to the Council against Lord Herries who, it is alleged, proposes to hold a trial in which not only the baillie but all the assizers are "tennants of his lands or domesticks of his hous or persons within degrees desendent (sic)³³ to the said lord in consanguinitie or affinitie."³⁴ And in 1627 the community of Inverness protest against the oppression of two of their number by the Earl of Murray in a court the members of which were all "his awne creaturis directit and led be him to his awin humour".³⁵

The same search for impartiality led to the exclusion of persons concerned with the prosecution. This was the subject of statutory regulation as early as 1425 in an Act which forbad officers in any court or any man that indicted another to be upon an assize, under penalty of ten pounds.³⁶ Presumably officers might not act as jurors in actions in any court, while accusers were debarred only from particular cases in which they had acted. Presumably, too, those who presented criminals were thus excluded, as well as injured parties prosecuting with or without the King's Advocate. In England the neutrality of the jury had been safeguarded nearly a century earlier by the exclusion of members of the grand jury.³⁷ The Scottish measure is but one small sign of the determination of James I on his return from captivity in 1424 to give Scotland firm government, and it may well

32. A.P.S. IV, 73.

34. R.P.C. (2nd) V, 283.

36. A.P.S. II, 9.

33. See note 11 (supra)

35. R.P.C. (2nd) VIII, 381.

37. 25 Ed.III. St.5. c.3 (1351-2);
Holdsworth I, 324-5.

have been a product of his English exile. The rule here laid down does not however seem to have been universally applied. In a case in 1564 pursuers were permitted by the Lord Justice-Clerk to serve on an assize, after the pannel had requested this, though it was emphasised that this action was not to be used as a precedent.³⁸ In 1595 a Sheriff-Depute complained to the Privy Council that he had put a thief to trial by a jury composed of fifteen persons who dilated against him as being those who knew best the circumstances of the terms of the dittay, but that despite their knowledge they had been induced to acquit the accused.³⁹ On the like grounds Lord Blantyre was at the trial of Lord Balmerino in 1635 successfully challenged as having by a remark prior to the trial indicated his intention to convict the accused, though a similar objection to the Earl of Dumfries was repelled when he denied the allegation.⁴⁰ When the scholars of the Royal High School, Edinburgh, were put on trial for the murder of Bailie MacMorren in the course of a prank, the Council ordered that the assizers be drawn from landed gentlemen from outside the city, the townspeople being assumed to be prejudiced, and that a Justice-Depute should sit with the city magistrates to whom a commission of justiciary had been granted.⁴¹

Non-age could also give rise to a challenge, though the precise age at which it would be effective was for long in doubt. Although normally the objections against assizers coincided with those against

38. Pitcairn I, 456.

40. State Trials I, 470;
Justiciary Cases 231.

39. R.P.C. (1st) V, 232-3.

41. R.P.C. (1st) V, 236 (1595).

witnesses, this was not so in respect of minors who might be witnesses, but not assizers.⁴² Mackenzie goes so far as to equate assizers with judges in this respect and to hold that in accordance with the Act of 1592 c.50⁴³ they could not hold office under the age of twenty-five, and he cites in support a case of 1616 in which an assizer was repelled as being under twenty-five.⁴⁴ The same case is mentioned by Hume who declares however that he can find no other instance of such a disqualification.⁴⁵ Mackenzie's argument was however used in a case in 1596-7 when it was argued of the laird of Ruthven that, being under twenty-five, "as he may nocht be a juge nor a tutour, na mair can he pas on ane assize".⁴⁶ In fact, however, he admitted to being under twenty-one and was rejected on that account, so the example is not a clear one as to the crucial age. Again in 1605 an assizer was objected to as being not of perfect age, viz. fourteen when the crime was committed. The advocate protested that his present age was the relevant one; this he gave as 'outwith XXV'. Ultimately, however, he was rejected as being a tenant of a party.⁴⁷ By the early seventeenth century it was clearly acknowledged that persons under twenty-one were debarred from sitting on assizes,⁴⁸ but doubt as to the position of those between that age and twenty-five continued for two more centuries. In the case of Menzies⁴⁹ the High Court had the opportunity to clarify the law when a verdict was

42. Matters Criminal II, xxvi, v.
 44. Matters Criminal II, xxiii, vi
 (not in Pitcairn)
 47. ibid. 490.
 49. Hume loc.cit.
 47. ibid. 490.
 49. Hume loc.cit.

43. A.P.S. III, 569
 45. Hume II, 302.
 46. Pitcairn II, 13569.
 48. Hume II, 302 and
 there. 13.
 49. Hume II, 206 and cases cited
 there.

challenged on the ground that a person under twenty-one and two persons under twenty-five had served on a jury. The Court however, in setting aside the verdict, rested its decision on the minority of the one assizer alone. No upper age-limit seems to have been observed and as we have seen a man of eighty-two found it necessary to petition for an exemption from jury service in 1635.⁵⁰ Finally, both limitations were fixed definitively at twenty-one and sixty by the Jurors (Scotland) Act, 1825, sec. 1.

Ignorance in the sense of lack of knowledge of the factual background of an action enters into the very nature of the early jury system and is considered elsewhere. There are however, occasional instances of protests against assizers merely on the ground of their alleged low intellectual calibre. Thus in 1606 a woman accused of witchcraft petitioned the Privy Council that the Sheriff of Berwick should be discharged from putting her to trial before an assize of "unlearned and simple men, quha ar of opinion that the simple name of a witche is sufficient to convict any persone of witchecraft and nauther know thay the proper definitioun of witchecraft, and quhat may infer sic a cryme againis ony persoun". This request was apparently granted.⁵¹ In 1644 there was a similar appeal by women about to be tried as witches that they had been made "odious to the ignorant comones" who were to be their assizers.⁵²

50. R.P.C. (2nd) VI, 156.
52: R.P.C. (2nd) VIII, 102.

51. R.P.C. (1st) VII, 238-9.

Under both Catholicism and Protestantism persons who had incurred the sentence of excommunication suffered as one of their consequent disabilities exclusion from assizes and inquests.^{52a} After the Reformation the Act of 1572 "Anent the trew and haly Kirk" ordered the compilation of a catalogue of "disobedientis obstinat or relaps personis" who had been declared excommunicate. Those on this blacklist were debarred from sitting in judgement or acting as witnesses or assizers in any case involving one professing "the trew Religioun" and those who were challenged on this ground could clear themselves only by producing a testimonial that they acknowledged the Kirk.⁵³ A late instance of such a challenge occurred in the Baron Court of Terregles in 1761 when an accused farmer through his agent demanded that the Baillie and other members of the Court produce a certificate to attest that they were not Roman Catholics and so disqualified from serving.⁵⁴

52a. Cf. A.P.S. II, 33 (1449) ("cursit" persons not to be heard in judgment)

53. A.P.S. III, 71-2; Register of St. Andrews Kirk Session xx; Matters Criminal I, iv, iii.

54. Innes Review VIII, 132.

V. Trial by Peers

A more specialized form of challenge depended on the ancient right to trial by one's peers or equals. It was to be found wherever feudalism took root and thus throughout most of Western Europe.¹ In England it was given a kind of sanctity by being incorporated in the 39th chapter of Magna Carta, but is first adumbrated in the reign of Henry I.² In Scotland, as early as the Assize of David I, if we accept the traditional dating, the principle was received and worked out with remarkable explicitness. There it is enacted that "na man aw to thol iugment fra a les persoun than fra his peir that is to say an erl be erlis baroun be barounis vavassour be vavassour burges be burges bot a les persoun³ may be jugit be a mar persoun and nocht a mar be a les persoun" Much later the principle is repeated in the same wording (with the exception of the last clause, which is redundant) in Quoniam Attachiamenta, chapter 67. The Leges Burgorum acknowledged the same rule in regard to burgesses.⁴

It may be doubted, however, whether trial by peers was ever adhered to with the precision suggested in the Assize of David. No doubt as a more elaborate hierarchy of aristocracy was built up, it would become increasingly difficult to provide a man of title with an assize of his exact equals on the feudal ladder or even of equals and superiors. Perhaps the first sign of a breach of the principle is to

1. See Keane: Judgment by Peers, Oxford 1949.
2. McKechnie, Magna Carta (2nd ed.) 377 et seq.
3. A.P.S. I, 316; cited P. & M. I, 173.
4. c.7; A.P.S. I, 334.

be found in the important procedural Act of Alexander II, chapter 14, which said that knights should be tried by an assize of knights "or ellis of fre haldaris of herytage".⁵ Fountainhall observes in the 17th century that "of old with us the great Barons, which have the nobility, and the small ones, did not differ specie".⁶ Certainly from the period when court records become plentiful, there are abundant instances of persons of rank being tried by assizes composed, in part at least, of their inferiors. Burgesses, in particular, being resident adjacent to the meeting-places of courts, were not infrequently called to try landed persons, as for example at a trial in Walkland in 1599 (*infra*). The assize at the trial of Lady Fowlis for witchcraft in 1600, as also that of Hector Munro of Fowlis, consisted in large part of burgesses of Tain and Dingwall, who might well be expected to acquit members of an important local family of such a charge, as they in fact did.⁷ At a trial in 1600 it was claimed by the Advocate and apparently upheld, in answer to an objection to an assizer, that "ane burges may be a pair to ane landit man".⁸ And in 1667 it was asserted that "Burgesses and others are daily admitted by the late practise to pass upon Barrons Assizes".⁹

Lairds of small estates, having no titles, commonly sat on the assizes of titled noblemen. Thus they formed a majority of those who tried William Lord Ruthven, the Lord High Treasurer, in 1580.¹⁰ Three

5. *A.F.S.* I, 403.

6. *Fountainhall* I, 530.

7. *Pitcairn* I, ii, 200, 204.

8. *ibid.* II, 145.

9. *Matters Criminal* II, xxiii, vii. 10. *Pitcairn* I ii, 91.

men styled as "lairds" served on the assize which tried Huntly, Bothwell and other nobles for high treason in 1589.¹¹ At the trial of Lord Balmerino for libel the assize consisted of five earls, one viscount, two lords, six knights and one landed man.¹² When two of the king's household were accused of having fought together at Falkland Palace, while the king was in residence, they were tried by a jury of surprisingly low degree, including a cellerman, a pantryman, a porter, and various burgesses of Falkland, although one of them was a knight, Sir John Ramsey.¹³ It is clear then that if the rule expounded in the Assize of David was ever faithfully observed, its impracticability led to its becoming a privilege to be ignored or asserted by the defence, according to the tactics that they were adopting; and where the assize was drawn from a locality in which the pannel had influence, he would be wise to submit to trial by his inferiors. As Hume says, it is "of the nature of a personal privilege and purely at his disposal".¹⁴ A challenge on this ground might also be a delaying move, as at the trial of Douglas of Spott in 1667, when a lengthy debate on the proposed assizers who were not barons was "judged by the hearers to be for gaining of time in order to procure a remission".¹⁵

Further problems arose in addition to the mere scarcity of persons of like or higher degree. In the remote Shetlands the plea was heard; and an accused claimed that "he would haife ane conding

11. ibid. 178.

12. State Trials I, 476.

13. Pitcairn II, 92.

14. Hume II, 304.

15. Justiciary Records I, 201.

essyse agreabill to his bluide and rank". The prosecutor replied that "he could be jugit be ane essyse of the countrimen of Yettland quhair the falt and cryme is committit without ony respect of degreis, in consideration of the preetikes usit in the lyk caussis of befoir". The decision between the two conflicting principles is not given, but as the trial took place two days later and the accused had offered to remain in ward until his request was met, it seems likely that he was successful.¹⁶ A man who is simply described as "ane gentilman of the Lard of Aldeis house" claimed that the assize chosen did not contain a sufficient number of his peers, a claim which the judge rejected "in respect of the caus and parteis present persewaris and defendaris". Here, added to the equivocal status of the dissatisfied gentleman, there was the difficulty that three others of indeterminate status were being tried along with him.¹⁷

It was in fact a highly imprecise rule and it gave rise to a celebrated debate in 1667 at the trial of Douglas of Spott, in which both Sir George Lockhart and Sir George Mackenzie acted for the pannel. There is a full report in Justiciary Records¹⁸ and Mackenzie himself cites the arguments at length.¹⁹ It was claimed for Spott that he was a baron, that is, one who has been granted by the sovereign jurisdiction over the tenants on his lands along with his infeftment, and that he had the right to be tried by his fellow-barons only. The debate ranged

16. Shetland, 42.

18. I, 200 et seq.

17. Pitcairn I ii, 39.

19. Matters Criminal II, xxiii, vii.

widely over such matters as the authority of Quoniam Attachiamenta, the impracticability of finding sufficient noblemen of equal rank with the accused, and the changed status of the assize since the early acts were passed. In the end the Justices reached an apparent compromise, holding that the majority should be "of the Laird of Spott his owne qualitie, viz. barouns holding of the King, and the rest landit gentlemen, holding either of the King, or of ane uther superior be chartir".²⁰ In the case of Mackintosh v. Fraser of Culbockie in 1675 the Justices repelled an attempt to have the same privilege extended to the heirs-apparent of barons.²¹ Later the baron's privilege was modified by the judges so that it sufficed if a majority of the assize were merely landed men whether they held directly of the Crown or of a subject.²² Those who were infeft in security only or held by some lesser feudal tenure did not enjoy the privilege.²³

The Scottish peculiarities of this principle came to an end with the Treaty of Union in 1707 which declared in Art. xxiii that the peers of Scotland should enjoy the same privileges as the peers of England and the future peers of the United Kingdom, including modes of trial; that is to say, they were to undergo trial in cases of treason, felony or misprision of either by the entire body of their fellow-peers eligible to sit in the House of Lords, forming for this purpose the Court of the Lord High Steward.²⁴ To facilitate the adoption of this

20. Hume II, 303.
22. Hume loc. cit.
24. A.P.S. XI, 412.

21. Matters Criminal loc. cit.
23. Matters Criminal loc. cit.

English procedure in Scotland an Act was passed in 1707 which provided that a special ad hoc bench of Justices should be set up to take inquisition by a grand jury of twelve who might be commoners of the correctness of the bill in the same manner as the English Justices of oyer and terminer.²⁵ Unlike the Scottish rules, this was a privilege that could not be waived by the accused.

Thus after the Jacobite Rebellion of 1745 the rebel Scottish nobles, Lords Kilmarnock, Cromartie and Balmerino, were convicted by their fellow peers in the House of Lords, the indictment having been found good by a grand jury drawn from the County of Surrey.²⁶ (Simon, Lord Lovat, however, was impeached by the House of Commons before being convicted by the Lords,²⁷ and the same procedure with its unfortunate political over-tones was resorted to in the trial of the Scottish rebel nobles, Carnwath, Kenmure, Hairne and Nithsdale after the Fifteen).²⁸ Uncertainty as to the appropriate procedure in such trials and a feeling that injustice might be done to Scots ignorant of English Law led to the passing in 1825 of an amending act which stated inter alia that in crimes committed by peers in Scotland the indictment should in all respects be such as is competent in the High Court of Justiciary, that its relevancy should be tested by Scots Law and that the trial should in matters of procedure and evidence follow so far as possible the practice of the High Court. Moreover Scottish judges might be summoned

25. 6 Anne c. 23.
27. ibid. IX, 587.

26. State Trials VI, 2.
28. ibid. IX, 615; Mackay; Trial of Lord Lovat (Notable English Trials).

to be present together with English judges on such occasions.²⁹ If this Act had ever come into common use, the employment of the English terms "felony" and "misprision" to describe those offences to which the procedure was applicable would no doubt still have caused difficulties. The matter was adumbrated in the trial of the Earl of Mar in 1850-31.³⁰ He was charged with assault by pointing a gun at a person and "violently, wickedly and feloniously" discharging it. When the defence asserted that the use of the word "feloniously" rendered the act charged a felony and thus triable only by peers, a new libel was served omitting the debatable word. In cases of lesser gravity than those embraced by the acts Scottish peers remained subject to the jurisdiction of the Scottish criminal courts and cases of this nature were not infrequent.³¹ The privilege of trial by peers was finally abolished by the Criminal Justice Act 1948, ss. 30 and 81.³²

The common law privileges of landed proprietors were continued in a new form by the Jurors Act of 1825.³³ Two classes of jurors were created; the first, to be enrolled in the General Jury Book kept for each county, consisting of persons having in their own right, or of their wife's, estate to the annual value of at least £5 or personal estate amounting to at least £200; the second, to be enrolled in the Special Jury Book, consisting of persons paying cess in the area from which the jury is drawn on £100 of valued rent or paying assessed taxes to the

29. 6 Geo. IV c. 66; Alison, II, 14 et seq.

31. ibid.

32. 11 & 12 Geo. VI c. 58.

30. ibid. II, 17.

33. 6 Geo IV c. 22.

Crown on a house of the yearly rent of £30. The assize normally was drawn from both books in the proportion of two common to one special juror, but in the case of a landed proprietor, a jury the majority of which were landed men drawn from the special list could be demanded. The term "landed proprietor" was not defined in the act, but Alison observes that it belongs to those "properly so-called, and not every petty feuar or portioner in a village".³⁴ Unlike trial by peers it was exercised at the discretion of the accused; and if it were not asserted, it was taken to have been tacitly waived and the verdict held good. This ancient privilege too, along with the whole class of special jurors, has recently been abolished by the Juries Act 1949, ss. 28(1)(2).³⁵

34. II, 387.

35. 12 & 13 Geo. 6 c. 27.

VI. Number of Assizers

The number of persons forming the Scottish criminal jury fluctuated considerably before stabilising itself at fifteen. In England the petty trial jury of twelve men had emerged from the jury of presentment by the reign of Edward I.¹ But a century earlier twelve was the common, though not invariable, number in the grand assize to determine matters of title to land and in the various forms of possessory assize.² Glanvill's account of the determination of rights to land or services³ is substantially reproduced in Regiam Majestatem I, 12 which speaks of the choosing of "duodecim legalium hominum de vicineto vel de curia".⁴ Likewise Glanvill's description of the procedure in the recognition of mortancestry⁵ is followed in Regiam Majestatem III, 28 according to which again "twelve free and lawful men of the neighbourhood" are to be selected. The brieves of mort-ancestor and novel disseasine are coupled together in Regiam Majestatem Suppl. No. 20, which insists that in both cases the question is to be settled by an assize of twelve "de bona patria" and by no other method.⁶

As has already been discussed, the dating of these early laws is highly problematical, but at no period is there any evidence of a strict adherence to the number twelve in these civil questions, nor in the

1. Wells: "The Origin of the Petty Jury" (1911) 27 L.Q.R. 347; Holdsworth, I, 325. 2. ibid. 327 et seq.

3. Glanvill II, 13, 14, 16, 17.

4. of. Regiam Majestatem I, 13.

5. Glanvill XIII, 2, 7, 9, 10.

6. Also printed (certainly erroneously) as part of the "Assise Regis David" in A.P.S. I, 325.

later special and general services. Thus taking as an example the cluster of inquests from the years 1259 to 1270 gathered in the Formulae Agendae,⁷ we find that only in one case was the verdict given by twelve assizers. There the ownership and reddendo of a garden at Elgin was in dispute and the matter was decided by twelve substantial men of the town and neighbourhood.⁸ In the other reports the numbers vary from eight to eighteen and in some cases the number is made quite imprecise through the names being followed by such a phrase as "et aliorum" or "et ceteros liberos et legales homines patrie", indicating that the exact total was of no great significance. Of seven named inquests of the fourteenth century contained in the Registrum Episcopatus Aberdonensis Vol. I none were of twelve members. Likewise, of eight inquests of the fifteenth century in the Registrum Nigrum de Aberbrothoc all were of more than twelve jurors. In the Sheriff Court Book of Fife of the early sixteenth century there is no trace of the number twelve in either civil or criminal juries and indeed only four out of some sixty are of even number.⁹ The Sheriff Court Records of Aberdeenshire of the same period do disclose at least three instances of an inquest of twelve, but two of these were appraisings and the third a case of spoliation, both matters of a quasi-criminal character.¹⁰ The same records however testify to the explicit rejection of the rule of twelve. In an action for ejection and spuilzie in 1555 the decision had been given by a jury of twelve. The

7. A.P.S. I, 97-102.

8. ibid. I, 99.

9. Fife xvii n. 3.

10. Aberdeenshire Sh. Ct. 83 (1505), 84 (1508), 53 (1507).

unsuccessful party appealed to the Court of Session, which in reducing the verdict held that this practice was contrary to "the law and consuetude of the realme" whereby "all inquestis aucht and suld be chosen in od novmer".¹¹ Later writers concur in making thirteen, fifteen or seventeen the normal number of jurors in civilibus - "semper in impari numero".¹²

Professor Dickinson has written: "In early times twelve appears as a common number".¹³ He cites the Elgin garden case (supra); a peculiar and perhaps unique case of 1259 in which twelve men swear (two with reservations) that the verdict of a previous inquisition was "fideliter et rationabiliter facta et per personas rationabiles";¹⁴ and a perambulation of 1231 by twelve "juratores".¹⁵ The latter practice was certainly not always followed at that period, for "the earliest recorded process of perambulation"¹⁶ involved an inquest of only seven.¹⁷ Few other examples have been observed. It is true, of course, as Dickinson shows,¹⁸ that Bain's Calendar of Documents Relating to Scotland contains numerous instances of inquests of twelve, but these appear all either to date from the period of English occupation of much of Scotland c. 1300¹⁹ or to concern the debatable border country.²⁰ They proceed

11. ibid. 442; Antiquities of Aberdeen and Banff IV, 231-2; A.D.C. (Public) 482. Cf. Pitcairn II, 10.

12. Craig: Jus Feudale II, xvii, 27; Skene: D.V.S. s.v. Breve de morte, Assisa; Balfour, 420. 13. Fife xviii n. 2. 14. A.P.S. I, 98.

15. Dunfermline No. 196. 16. McKechnie, 8.

17. Aberbrothoc Vetus No. 228, 229; A.P.S. I, 91.

18. Fife loc. cit. 19. Bain II, Nos. 1420, 1435, 1675, 1681.

20. Bain III, Nos. 1148, 1636, 1670.

on English royal writs, usually emanating from Chancery at Westminster.²¹ Thus, however they may accord with the procedure set out in the "auld lawes", they are representative of an alien and hostile system. Indeed, granted the political enmity between Scotland and England during and after the War of Independence, it is at least conceivable that the avoidance of the number twelve was on political rather than juridical considerations. On the other hand, in the inquests of the burghs, with their varied administrative duties, the figure of twelve became quite common.²² The connecting link was again imitation of English laws, as in the Leges Quattuor Burgorum and the Statuta Gilde. There is too an instance of a jury of twelve in the records of a Chamberlain Ayre at Aberdeen in 1448, where three men were accused of disobeying a baillie.²³

We turn back now to our main theme, the assize in criminal procedure. As has been discussed, the presentation of suspected criminals was never so highly organised in Scotland as in England and there was no coherent institution comparable to the grand jury out of which a trial jury might grow. The Scots assize derived directly from the practise of drawing information on a variety of topics from trustworthy local people, without the intermediate stage of a jury of presentment having clearly-defined functions. In such questions the number present fluctuated considerably according to local circumstances, whereas in England the presentment jury consisted in the thirteenth century of a

21. e.g. ibid. Nos. 1636, 1670.
et scq.

22. supra 92,100; Aberdeen lxxxiv

23. Aberdeen Burgh I, 400.

The term "dusane" used of a burgh council certainly derived from "duodecim" but it could consist of a much larger number than twelve (Murray: Early Burgh Organisation I, 174 n.1).

determinate number - twelve. It is not surprising then, that until at least the mid-fiftenth century the Scottish assize was of a very elastic size. It is true that in the "Assize of King David" persons accused of theft are stated to have the option of combat "vel purgationem duodecim fidelium hominum"²⁴ and persons accused of felony or crimes involving life or limb are to purge themselves by the oaths of twenty-four men and in other cases by the oaths of twelve men, but these seem certainly to be references to trial by compurgation.²⁵ The number of twenty-four appointed for the assize of error in Regiam Majestatem I, 14, while probably chosen as a multiple of the twelve they would try, is a further instance of the imitation of English procedure described by Glanvill.²⁶ Evidence is lacking as to whether this number was adhered to or not, but it is significant that the Act of 1475 c.4²⁷ on the reform of the assize of error in criminalibus changed the number of the great assize to twenty-five.

The earlier printed criminal records are all from local courts - burgh, barony and sheriff - and the numbers of the assize fluctuate sharply from court to court. Even within one court there are variations from day to day reflecting the rise and fall of interest among those under the duty of attending. The early burgh records, such as those of Aberdeen,²⁸ seldom record the names of individual assizers. But by the latter half of the fifteenth century fuller

24. c. 2 A.P.S. I, 317; Quon. Att. c. 61.

25. c. 11, A.P.S. I, 319; Quon. Att. c. 75.

26. Glanvill II, 19 (The reference to the number is a Scottish addition to Glanvill's text, but it became well-established in England also - Holdsworth, I, 339).

27. A.P.S. II, 111.

28. Aberdeen passim.

minutes begin to be kept in some towns. The selected cases of a criminal or quasi-criminal nature printed by Kennedy show the assize fluctuating between thirteen and seventeen during the years 1445 to 1549.²⁹ In Stirling the number ranges from 15 to 21 between 1521 and 1547;³⁰ in Selkirk from 7 to 26 between 1503 and 1531 with one possible instance of three.^{30a} In Prestwick lists of assizers are rare, but from 1470 to 1514 the numbers eleven, fifteen and seventeen are to be found.³¹ The Inverness practice remained very erratic into the seventeenth century, varying from nine to twenty-one between 1603 and 1620.³² But Wigtown, for some unknown reason, appears to have anticipated even the Justice Court in making fifteen the usual number.^{32a} When the court is constituted as a curia capitalis, there is some tendency for fifteen assizers to be empannelled.³³ The gangand assize, a boundary jury drawn from the suitors in burgh courts, is usually a compact body of from four to seven men.³⁴

In all these courts there is from the earliest records a distinct and growing preference for odd as against even numbers, plainly a reflection of the Scots rejection of the English rule of unanimity, for a majority verdict demands that there be no possibility of an equal

29. Annals of Aberdeen II, 471 et seq. 30. Stirling I, 11 et seq.

30a. Selkirk passim. 31. Prestwick 2, 44, 46.

32. Inverness II, 16 et seq.

32a. Burgh Court Book of Wigtown 1512-1535 (MS G.R.H.) the names being arranged in three columns. There are occasional instances of thirteen, eleven and nine.

33. e.g. Prestwick 2 (1470), Stirling 5 (1520), 50 (1547-8), Dunfermline Regality 94, 100, 110, 115 (1533-34).

34. Dunfermline Burgh I, xvii, 39, 86; Aberdeen lxxxv.

division of votes. Professor Dickinson, drawing upon the Sheriff Court Book of Fife, says that "by 1535 there seems to have been a definite rule that there had to be an odd man".³⁵ Indeed all the original juries in the period covered by his work (1515-1522) were of odd numbers from eleven to seventeen. Of the seventeen cases selected by Kennedy only two have an assize of even numbers.³⁶ At Carnwath Barony Court, although, as Dickinson notes, "no rule was followed as to uneven numbers",³⁷ odd numbers form the overwhelming majority. Again, in the Regality Court of Dunfermline out of twenty-one assizes listed by Webster and Duncan between 1531 and 1538 only five were of even numbers. At Haddington the difference is even more striking. In the period from 1530 to 1555 only seven out of 146 juries in the burgh court and ten out of twenty-eight in the court of council were of even number, while the ten juries of the head court were all of odd number.³⁸ In Orkney and Shetland, however, where the feudal system of courts was still an innovation in the second half of the sixteenth century, the practice of the Norse courts of making no distinction between odd and even numbers of reithmen persisted when they were converted into assizers.³⁹ But in the early seventeenth century it appears that these remote courts were beginning to come into line, for the Court Book of Shetland 1602-1604 shows a preponderance of odd numbers from nine to seventeen, fifteen

35. Fife xvii.

36. Annals of Aberdeen, loc. cit.

37. Carnwath xciv.

38. Haddington Burgh Court Book 1530-1555 (MS G.R.H.)

39. Johnston: Orkney and Shetland Records I; Records of the Earldom of Orkney 1299-1614 (S.H.S.) passim.

being the most frequent. By 1612-1613 fifteen is the only number found.^{39a} These however are exceptions and from about 1530 it would seem safe to apply to criminal assizes the pronouncement of the Court of Session in quashing a return that "all inquestia aucht and suld be chosen in od novmer".⁴⁰

In the course of the sixteenth century, for reasons that one can only speculate upon, the practice of the Justiciary Court which had earlier been very fluid, began to harden in favour of the number fifteen as the normal size of the criminal jury. It would be interesting if the practice could be shown to have begun in the Court of Parliament and the trial for treason of Alexander Boyd in 1469 before fifteen noble assizers might lend some credence to this suggestion.^{40a} However, at another treason trial in 1481 there were sixteen assizers^{40b} and the evidence is too slender to support such a conclusion. Of the assizes listed in Pitcairn from 1530 to 1565 those of fifteen members are approximately as frequent as all others combined. Thereafter they outnumber all others in roughly the proportion of two to one until 1596, thirteen being the next most common number. In a trial in 1596/7 at which only twelve assizers appeared, a continuation was granted in respect of the "insufficient number of Assyis" (sic.).⁴¹ And at the trial of Archibald Douglas in 1586 when only nine assizers appeared, warrant was

39a. The Court Book of Orkney and Shetland (ed. Barclay) 25, 35, 59, 61, 68, 92.

40. A.D.C. Public 482.

40b. A.P.S. II, 137.

40a. A.P.S. II, 186; Boyd Papers 134.

41. Pitcairn II, 10. cf. ibid I.1, 452.

granted for the number to be increased to "one full number", seventeen, presumably "pro rei gravitate".⁴² Finally fifteen becomes the invariable rule, except in a very few cases where the jury were drawn from country districts.⁴³ The practice having been established by the supreme court, the lesser judicatures gradually followed suit, though in some instances after a considerable time-lag. Thus at the series of witchcraft trials held in Aberdeen in 1596/7 the numbers ranged from seventeen to twenty-five, twenty-one being most common, although the court was nominally a justiciary one.⁴⁴ Well into the seventeenth century the Sheriff Court totals at Aberdeen still veer violently between fifteen and twenty-five.⁴⁵ In the Regality Court of Spynie between 1592 and 1601 the range is from fifteen to twenty-one.⁴⁶ In the Baron Court of Forbes in the mid-seventeenth century the number of fifteen was usually adhered to, but there are occasional lapses into a smaller figure, probably caused by a shortage of qualified persons present.⁴⁷ At the Baron Court of Stitchell, the printed records of which date from 1655, the number of fifteen seems to have been faithfully adhered to.⁴⁸ Likewise the Argyll Justiciary Records of the late seventeenth century disclose, according to their editor, no other assize total.⁴⁹

42. *ibid.* I ii, 148.

43. e.g. an assize of 13 comes to Edinburgh from Wairn in 1620 (*Pitcairn III*, 485) and another of 13 from Inverurie in 1625 (*Justiciary Cases* 69).

44. *Spalding Club Miscellany I*.

45. *Aberdeenshire Sh. Ct. II* (*passim*).

46. *Spalding Club Miscellany II*.

47. *S.H.S. Miscellany III*.

48. *Stitchill passim*.

49. *Argyll xviii* (One of 14 on p. 110 may be a transcription error).

The evidence of contemporary writers bears out this gradual emergence of the number fifteen as the norm of the jury and its eventual supplanting of all other numbers. Thus Bellenden and MacGill, writing for the instruction of the young Queen Mary, observe that a mode of dealing with treason is "faire mettre le criminel en la connoissance d'une assize de treize, quinze ou plusieurs personnes non suspects, qui sans suspicion peuvent connoistre de la cause".⁵⁰ In mentioning that twenty-five is the number of the grand assize, they comment that this is "doublant le nombre de la premiere assize".⁵¹ Skene, too, writes in 1597 of the assize "ordinarie in use" as "ane little Assise, of the number of 13 or 15 persons".⁵² Craig, however, only a few years later, is more precise. "We form a panel of fifteen", he says, "our neighbours a jury of twelve to sift the evidence against the accused".⁵³ Writing of civil juries, he observes "The inquest usually consists of fifteen men, and often of seventeen if the matter is a serious one, but sometimes of only thirteen, the number always being unequal".⁵⁴ Of the anonymous writers of short descriptions of court procedure, the earliest in the reign of Mary speaks of "ane Inqueist and assyise of maist honest and famous men of the barony to the number of xiiij xv xvij xix or xxj".⁵⁵ Another, in the late sixteenth century, apparently an Englishman, says

50. Discours Particulier 20.

51. ibid. 22.

52. D.V.S. s.v. Assisa.

53. De Unione 306.

54. Jus Foudale II xvii 27 (Olyde trans.) (The tense appears to have been changed from present to past in translation). Cited N. 8581. Cf. Gadzearth v. Sheriff of Ayr N. 14422 (1583) where in an apprising one of the inquest of fifteen having maliciously absented himself, the Lords permitted the judge to replace him.

55. Fife Appx. I.

plainly "The number of the jury is 15".⁵⁶ A third, however, writing shortly after the Union, is quoted as writing cryptically "a full number eythor of 13 or is founde out".⁵⁷ "Is", one suspects, to be a misreading for "15". Mackenzie seventy years later still says cautiously "an ordinary Assize uses to consist of fifteen persons, but they (sic) may consist of more, or fewer if the number be unequal", citing an instance of thirteen as long ago as 1614.⁵⁸ Elsewhere he writes "When the Assizers are called, fifteen of them are marked and the Dittay is then read"⁵⁹ and this probably represents the position in his time more correctly.⁶⁰ Finally, Innes, writing for the instruction and edification of his English readers in 1733, says "the assize consists of fifteen sworn men" without any reservation.⁶¹

The reason why fifteen thus became the norm of the criminal jury is not easy to identify. Probably it was never a matter of conscious innovation. Certainly there appears to be no recorded legislation on the matter.^{61a} Kames suggested that the large number of fifteen judges of the Court of Session "were appointed with a view to the practice of the preceding courts and in order to prevent the necessity of trying causes by juries", the Court being "the grand jury of the nation in

56. S.H.R. xix, 159.

57. ibid. 271.

58. Matters Criminal II, xxiii, v.

59. ibid. II, xxiii, ii.

60. Justiciary Records I, 323. Thus in 1669 it was argued that "15 of an Inquest be necessary to a Verdict".

61. Idea Iuris Scotici 10.

61a. An order of the Privy Council, however, authorises Justices of the Peace to punish persons contravening certain Statutes, "they being first tryed by a condigne assize of xiii or fiftene persons"
R.P.C.(1st) XI 223 (1611).

civilibus".⁶² This is certainly erroneous, for civil inquests long survived the formal establishment of the Court of Session in 1532 and besides the clear emergence of fifteen also post-dates it, as we have seen. But even correcting the time sequence, there is no evidence to link the two events and suggest that the size of the jury imitated that of the supreme civil court. The emergence of fifteen can be adequately explained simply as the product of a process of natural selection. Clearly the number settled upon would be an odd one to make possible the majority verdict which seems always to have been part of the Scottish practice. Of the odd numbers commonly found in the first half of the sixteenth century thirteen, fifteen and seventeen are much the most frequent. Of these figures fifteen was the mean and increasingly that most often resorted to. The statutory appointment of forty-five persons as the number to be summoned for assize duty, being a multiple of fifteen, probably reflects the common use of fifteen in the assize by 1579.⁶³ But it in turn may well have served to confirm the practice. Common usage hardened into binding custom. The recognition of fifteen persons as the appropriate size for the criminal jury is best regarded as a symptom of the gradual stabilising of the judicial apparatus of Scotland. In mediaeval times the widespread decentralisation of government in Scotland left little possibility or even desire for uniformity on such points of detail. Nor would it have been feasible

62. Historical Law Tracts 285.

63. Act 1579 c. 14. A.P.S. III, 143.

to insist upon a fixed number of assizers, so long as the attendance of the suitors of court remained a rather casual matter. But when the central government grew stronger and a more or less permanent supreme criminal court was established, the tidy administrative mind sought first to lay down a rule and then to enforce it everywhere. The number itself was not important; fifteen was simply a not inconvenient choice, as being uneven and already commonly in use; what mattered was to lay down a rule and follow it. This practice still rests solely on common law.

VII. Court Procedure

Having dealt with these preliminary questions of summons and qualifications, we must now take up the large question of the procedure in court, as it touches the jury. The first step was the fencing or constitution of the court, by which it became "an assembly competent to proceed to justice".¹ If it was a court where suit or suit and presence was enforced, the roll of suitors was then called and those absent fined.² From those present the assize was selected. In the developed procedure of the Justiciary Court, however, from the late sixteenth century up to forty-five persons were individually summoned and from them the assize of fifteen or so were chosen.³ The pursuer or ^{the} Advocate had then to satisfy the court that the pannel and the assizers had been duly summoned, by producing the assize roll and the letters criminal suitably endorsed by the macers as to their execution.⁴ Any objections to the citations were heard at this point. The indictment was then read by the Clerk of Court to the prisoner and he was required to affirm or deny it. No set form for this declaration appears to have been in use until the late seventeenth century and the records usually say merely that after reading of the dittay "the pannell acknowledget and confessit or denyit the samin to be of verritie".⁵ Under the Commonwealth the records sometimes read "The pannells pleade not guiltie",^{5a} but after the

1. Carnwath xviii; Hamilton-Grierson: "Fencing the Court" S.H.R. xxi 54.

2. supra. 253

3. supra. 242

4. Justiciary Cases 64, 68, 71, 143, 264, etc. Pitcairn I, i, 169. P.S.A.S. lxi, 46.

5. Justiciary Cases 223, 295; P.S.A.S. loc.cit. Hume II, 271 n. 1. "His graunt or deniall" S.H.R. xix, 158.

5a. MS Minute Book 5 June 1655, 1 July 1655 (G.R.H.)

Restoration the old forms crept back. At a trial in the Spynie Regality Court we read how the judge "be interloquitor ordanis the defender to answer to the dittay negatiue or affirmatiue".⁶ But by Mackenzie's time the terms "guilty" and "not guilty" are used by the Justice in addressing the accused.⁷ Sometimes the plea of guilty might take the form of an adherence to a deposition in which the crime was confessed by the pannel.⁸ Alternatively, he might retract it.⁹ Whatever form his plea might take, the accused must still go before an assize under the procedure of the Justiciary Court;¹⁰ and this was so, even if he made his plea of guilty in the presence of those who would form the assize before they were empannelled.¹¹ Thereafter there might be a debate on the relevancy of the indictment, the question being, in Hume's words, "Does the libel contain such a charge as is regular ex facie, and ought to be remitted to the knowledge of an assize?"¹² This might, at different periods, be purely extempore or on the basis of existing written pleadings. Usually, but not invariably, it preceded the empannelling of the assize.¹³

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6. Spalding Club Miscellany II, 139 (1597).
 7. Matters Criminal II. xxi. vii. Cf. from a burgh court "the sd. J. being interrogat giltie or no giltie" - Dunfermline Burgh II, 270 (1664).
 8. e.g. Justiciary Records II, 115, 116 (where the confession was subscribed in court by the accused and, on behalf of those who could not write, by the judges). Hume II, 272.
 9. Fountainhall 364.
 10. Hume II, 274 (aliter in England)
 11. ibid. 275.
 12. Hume II, 277.
 13. e.g. Justiciary Cases 249; Justiciary Records I, 119, 284, II, 1, 124. But see ibid. I, 166, II, 34 where with seeming illogicality it was pleaded that the accused "cannot pass to the knowledge of an Assize" when the assize had already been sworn. If, as it appears, the pleas for the accused were on these occasions debated and repelled in the presence of the assizers, they may well have become prejudiced against him.

It is true that Mackenzie says at one point "the Debate upon the relevancy must be in presence of the assize",¹⁴ referring to the Act of 1587, but such a practice seems to have been rare and, as Hume emphasises, "the cognisance of the relevancy of the charge is the province of the Judge alone".¹⁵ The members of the future assize may be present as individuals during the debate, but only exceptionally and, he would seem to suggest, irregularly as an empannelled assize. This stage of procedure is deserving of a more extended discussion and will be dealt with more conveniently in the context of the jury's verdict.¹⁶

Thereafter, unless the accused chose to evade trial by "coming in the king's will"¹⁷ (or appealing to the king's mercy), the assize was picked from among those summoned. The selection of the assizers was prior to Mackenzie's time left to the King's Advocate, but Sir George claims to have "prevailed to get an Act of Parliament, whereby the nomination of the jury was referred to the Judges", thereby securing a more impartial choice.¹⁸ The actual selection was made by the presiding judge, marking certain names.^{18a} This function is now discharged by the Clerk of Court, who selects the jurors by ballot, the procedure being minutely regulated by the Jurors Act of 1825, s. 17.¹⁹ At this point, any of the assizers might be challenged on one or more of the

14. Matters Criminal II. xxiii. 11. 15. Hume II, 277. 16. Infra.³⁶⁰
17. e.g. Pitcairn II, 32 "inqwyrigif he wold abyde ane Assyis thairfore, or cum in his Majesties will for the samin"; Cf. ibid. III, 74.
18. Works II, 352. (The citation is to a brief work entitled "The Form of Pursuing Treason". However it is apparent from its content that much of it applies to criminal trials in general). Also ibid. I, vii. Cf. State Trials IX, 52. "The Lords proceeded to make Choice of the following Assizers". 18a. Louthian 48, 106.
19. 6 Geo. IV. c. 22. As to special arrangements when a jury of one sex is requested, see Renton and Brown, 79-80.

many grounds which have already been described,²⁰ and it was for the presiding judge to admit or reject them. Later, according to Mackenzie, the defence was permitted to reject up to thirty of the forty-five assizers called without any cause shown.²¹ Yet of such an enactment, says Hume "there is no trace or vestige, save in that author's own assertion".²² Indeed the Articles of Regulations, which certainly do embody other reforms which Mackenzie claims as his own, such as giving the last word to the defence, specifically require that a list of the Assizers be provided "to the effect, the Party may know what to object against the saids Assizers".²³ The challenge of assizers was a tactic which flourished greatly in the early seventeenth century; but by the time of Mackenzie advocates were more preoccupied with the subtleties of pleading than with the possible prejudices of assizers, and the assize is usually recorded as having been sworn "no objection in the contrary".²⁴ The current law allows to each person on trial and the prosecutor five peremptory challenges, for which no reason need be assigned, as well as an unlimited number of challenges on cause shown.²⁵

The development of the oath taken by assizers is perhaps worth special mention at this juncture. In the middle ages resort to the taking of oaths was frequent and so long as society was permeated by religion, it was an effective means of securing the accuracy or

20. supra. 276

22. Hume II, 301 n. 3.

24. e.g. Justiciary Records II, 34, 65 (1671); Fraser Papers, 24.

25. Renton and Brown 115.

21. Works II, 352; Hume II, 301.

23. A.P.S. VIII, 88. cf.

Fraser Papers 24 (1698).

genuineness of what was sworn to. The taking of a solemn oath by assizers was of particular significance, for it supplied the element of divine sanction in determining disputes which had been lost with the abandonment of trial by ordeal and battle. Then, as still today, it comprised two elements; the recitation of a set form of words and the simultaneous touching of some object, sacred in the eyes of the oath-taker, by which he added binding force to his words. In the mediæval period this visible confirmation was usually provided by the Book of the Gospels²⁶ and sometimes by the relic of a saint held in veneration,²⁷ or some other sacred object.²⁸ Such an oath is usually described in Scotland as "the gret bodilie aithe"²⁹ or "iuramentum corporale", since some bodily action is required, normally touching the article,³⁰ but sometimes kissing it³¹ or simply raising the right hand.³² It is thus distinguished from the less common oath undertaken in the form of a notarial instrument.³³ The use of the Gospels as the customary seal of an oath survived the Reformation,³⁴ but was gradually supplanted by the whole Bible.

Such visible solemnities were not limited to the oath-taking of assizers, but were also used by witnesses, deponents, officers of court,³⁵

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26. "Quibus personis (scil. inquisitionis) hinc Subire" Antiquities of Aberdeen Evangelicis ut moris est Antiquities of 30. Laing No. 185.
27. "Magno iuramento interveniente, capite 32. Carnwath 50, 53; Louthian, 49
II, 213 (1493). 34. e.g. Inverness II, 122 (1614)
28. e.g. "ane croce" Fife 190; Bain II No. 478 - oresser in fealty ceremony.
29. e.g. Aberdeen Burgh I, 430; "tactis Sacrosanctis Dei Evangelicis
iuramentum prestiterunt Corporale Subire" Antiquities of Aberdeen
& Banff III, 9. 30. Laing No. 185.
35. Balfour 281-2; 823 (fealty). 32. Carnwath 50, 53; Louthian, 49.
33. Rolment III, 161. 34. e.g. Inverness II, 122 (1614).
35. Balfour 281-2; Fife 407.

etc. Assizers, however, enjoyed a special form of verbal oath suited to their functions. The earliest recorded form of oath for suitors of court is only to be found in Latin and is as follows: "Quod ipse veram et fidelem recordacionem in illa curia faciet. Et quod legale et fidele iudicium dabit secundum scientiam sibi a Deo datam. Et quod in omnibus aliis articulis ad officium sectatoris pertinentibus secundum intellectum suum legaliter et fideliter deseruiet durante tempore"^{35a}

A burgh assize in 1460 swore by their great oaths that "thai suld lolili and trewly be the wytand declar thairfore".^{35b} The usual form administered in criminal cases in the sixteenth and early seventeenth centuries, as recorded by Skene, is as follows:

"We sall leill suth say, and na suth conceal, for nathing be may, sa far as we are charged upon this Assise, be God himself, and be our part of Paradise, and as we will answer to God upon the dreadfull day of judgment".³⁶ Pitcairn cites the same oath in the context of an actual case in 1610³⁷ and it is to be found in other works with only minor changes of wording.³⁸ Rogers quotes it in the form of "a gingling rhyme" effected by the substitution of "dome" for "judgment", so as to rhyme with "upon" - a useful aide-memoire perhaps.³⁹ By Mackenzie's time the assizer's oath seems to have become briefer. He quotes it as

35a. A.P.S. I, 683.

36. D.V.S. s.v. Bona Patria.

38. e.g. S.H.R. xix, 158.

35b. Peebles, 138.

37. Pitcairn III, 107.

39. Social Life in Scotland II, 40-41.

follows: "That you shall all the truth tell, and nae truth conceal, in so far as you are to passe upon this present Assize; swa help you God".⁴⁰ He has probably curtailed it to its essentials; prefixed by "You fifteen swear by Almighty God and as you shall answer to God at the great Day of Judgement" it remains the form in use to this day".⁴¹ For the benefit of jurymen who have conscientious scruples against the taking of oaths the Jurors Affirmation (Scotland) Act 1868⁴² was enacted, providing a solemn form of declaration. It was repealed and re-enacted in the Oaths Act 1880, which provides the current form.⁴³ Originally it would appear that the oath was administered to each assizer individually. This, at least, would appear to be the significance of an entry in Pitcairn recording that the assize were "all sworne be thair grit aithis ordourlie be thair nomes".⁴⁴ But Mackenzie relates that in his time they were taken in groups of five and swore the oath as a group.⁴⁵ The same was true in the middle of the next century.^{45a} The modern practice is for all fifteen jurors to be sworn simultaneously. The oath appears always to have been administered by the Clerk of Court, whereas witnesses were and are sworn by the judge.⁴⁶

With a view to discouraging the bribery of assizers an act was

40. Matters Criminal II. xxiii. vi; cf. Observations James I. Parl. 13 Act 138 (where he omits the final phrase).

41. Renton & Brown 116 (cf. Hume II. 309 who points out that it "seems more suitable to a witness than to a judge"; Alison II. 391).

For another version which is in essentials the same, see Louthian 48.

42. 31 and 32 Vict. c. 39 s. 1. 43. 51 & 52 Vict. c. 46 ss. 2, 6.

44. Pitcairn I. 11, 148.

45. Matters Criminal II. xxiii. vi.

45a. Louthian 48, 106.

46. Renton & Brown 116.

passed in 1436 requiring that judges should require them to swear that "thai nother haf tane na sai tak mede na budds of ony party" and to disclose the size of any bribes which they had received.⁴⁷ This proviso is cited by Hope,⁴⁸ but not by Balfour, and Mackenzie states that it was only used when the judge or parties were "jealous" (i.e. suspicious) of the assizers.⁴⁹ Before the clerk of the assize became bound to mark the votes of each member on the verdict, assizers would sometimes voluntarily take an oath of secrecy as to the manner in which they reached their verdict. Thus where a pannel, on being convicted, had entered a protest for wilful error, the chancellor of the assize protested that any member who disclosed his vote "suld be haldin and repute perjure and defameit; and that becaus the hail Assyise and Clerkis of the samin war sworne vponne the Halie Ewangell, vponne thair awin motoyve will, to keip secrete the samine".⁵⁰ The putting of an assize, criminal or civil, on oath was an essential solemnity, the omission of which rendered a retour liable to be quashed. Thus Alexander Myln in his Vitae Episcoporum Dunkeldensium describes a litigation in which an opponent of Bishop Brown contrived to have an unsworn juror put on an inquest of perambulation, in consequence of which the whole retour was quashed.⁵¹ Again, in a bill of suspension arising out of the striking of fiars prices

47. A.P.S. II, 23.

48. Major Practicks VIII. 15. 2.

49. Matters Original II. xxiii. 6; Observations James I Parl 13 c. 138. Cf. Louthian, 49.

50. Fiteairn I, i, 450 (1564). Cf. Selkirk MS Burgh Court Book, 18 June 1532.

51. Rentals Dunkeldense (S.H.S.) 307; Vitae Dunkeldensis Ecclesiae Episcoporum (Bannatyne Club) 34. Cf. Jus Fudale II, xvii, 29, ("No credit is allowed to any judge, witness or inquisitor without the sanction of a solemn oath"); Balfour, Practicks, 427.

in 1760, it was argued inter alia that "it does not appear that the jury were put on oath", to which it was replied that "every thing must be presumed to be rite et sollemniter actum". The bill was refused, on what ground does not appear.⁵² Although no instance of it has been discovered, a failure to put a whole criminal assize on oath would presumably render its verdict a nullity. But Hume mentions a case in 1809 in which five of the assize were not sworn, yet objection was only taken to the omission when sentence was about to be passed on the day following the delivery of the verdict, when the assize had already been discharged. On the question of the competency of the verdict being certified to the whole court, the judges repelled the objection, finding that the defence could not impeach the authenticity of the court records after having treated the assize as a properly-constituted one throughout the trial (though when the omission came to their notice is not clear).⁵³

At this stage it was customary throughout most of the seventeenth and much of the sixteenth centuries for the prosecution or the defence (and sometimes both) to apply a form of coercion to the assize by threatening them with attain for wilful error, should they acquit or convict the pannel.⁵⁴ The jury were relieved from this form of intimidation in 1689. Once empanelled, the jurymen were cut off from

52. M. 4416.

53. Hume II, 308 n. 1; Burnett 482, lxix.

54. Infra.

all social contact until they returned their verdict, so that they might apply their minds to the evidence laid before them free from any extraneous influences. Nor could the composition of the jury be altered, except for some good cause and with the consent of the accused.⁵⁵

There followed the unfolding of the probation before the assize, the first step being the reading over to them of the dittay, which might be acknowledged by the prosecutor (if present and a private person) to be of verity.⁵⁶ If he refused to do so and showed himself unwilling to proceed with the prosecution, the pannel might have his appearance and readiness to undergo trial recorded and protest that he should not be summoned again.^{56a} The pannel might also renew his denial of the dittay.^{56b} Again it must be stressed, since our modern practice is so different, that every person put on trial must be convicted or acquitted by a jury, whether or not he had previously admitted the charge.⁵⁷ Such was the weight attached to trial by jury. It was only in 1828 that an Act permitted the accused to receive his sentence immediately on entering a plea of guilty.⁵⁸ In this way the time-consuming practice whereby a jury had to be appointed to hear the accused's confession and find him guilty in terms of it was dispensed with.⁵⁹ It remained, of course, possible for an accused to change a plea of not guilty to one of guilty at any stage of his trial, and in that event the jury must still return

55. Hume II, 309.

56. e.g. Pitcairn II, 376; III, 59. Justiciary Cases 223.

56a. Justiciary Cases 265.

56. e.g. Pitcairn II, 376; III, 59. Justiciary Cases 223

56a. Justiciary Cases 265.

56b. ibid. 223.

57. Hume II, 274; Louthian, 47.

58. 9 Geo. IV c.29, s. 14.

59. Alison II, 367.

a formal verdict of guilty. This reluctance to set aside what had become rather a formality may be explained by the strong feeling in the sixteenth and seventeenth centuries that trial by jury was of the very essence of criminal procedure. It is voiced, for example, by Skene when he says "be the law of this Realm, all crimes sould be decided and tryed be ane Assize, Stat. Alex. c.3".⁶⁰ It was strengthened by the Act of 1587 "for the furtherance and furthsetting of criminal justice" which required that "the haili accusatioun writtis witnesses and uther probatioun and instructioun quhatsumeuir of the cryme salbe allegit ressonit and deducit to the assyse".⁶¹ And at a time when confessions, often obtained by torture, were a common mode of proof, it was a safeguard, though an inadequate one.

The belief that jurors were in some sense still witnesses as well as judges also lingered long. In 1633 an assize could still be threatened with prosecution for wilful error if they acquitted "in respect the maist pairt of thame ar cuntrie men and knowis the pannell his vicious lyf and conversatioun and that his guiltines of the particular thiftis contenit in his ditty is sufficientlie knowin to thame".⁶² When in 1609 an advocate for the defence sought permission to have six witnesses heard, the Lord Advocate protested "that thair is na necessitie to the Assyse to ressaue ony witnessis, becaus thal ar

60. D.V.S. s.v. Assisa. The statute is presumably that of Alexander II, c. 14 (A.P.S. I, 403).

61. A.P.S. III, 460 (though the emphasis was probably on the next phrase "in presence of the pairtie accusit"). Cf. Matters Criminal II. xxiii. viii.

62. Justiciary Cases 223. Cf. Hume II, 310 n. 1.

witnessis thame selfis, and duellis within this burgh, and understandis that this fact was comittit be the pannell, in maner contenit in the Dittay".^{62a} Craig described the juror as "while not exactly a judge, or a witness, yet combining the functions of both".⁶³ For Mackenzie too he had the same dual character. "They are judges", he wrote "in so far as they consider probation led by others and judge whether proved or not proved: they are Witnesses in so far as they may condemn, upon proper knowledge, without any other Probation".⁶⁴ But he went on to question whether they might still be regarded as witnesses, particularly in view of the Act of 1587 which required that all probation should be led in presence of the assize and pannel.⁶⁵ For Hume, however, there is no question but that the assizer has long since shed his role of witness, for as he says "that notion gave way to the safer, and more salutary one, of his sitting purely as a judge, to decide according to the sufficiency of those evidences of guilt, which shall be openly laid before him."⁶⁶

These evidences might be laid before the assize in a variety of forms of probation. First and simplest, the accused might admit in their presence his guilt, sometimes by admitting the truth of the dittay,⁶⁷ but more often by adhering to a confession previously emitted by him. Usually this would have been done before one of the Justices⁶⁸

62a. Pitconim III, 60.

63. Jus Feudale II, xvii, 29.

64. Matters Criminal II. xxiii. vi.

65. ibid. II, xxiii, viii.

66. Hume II, 310.

67. e.g. Justiciary Cases 297. Louthian 46 (in which case it was recorded on the back of the indictment).

68. e.g. Justiciary Records II, 25.

or members of the Privy Council⁶⁹ in answer to questions put to him by the King's Advocate.⁷⁰ Or he might simply have renewed before them a confession made to Justices of the Peace or other lesser magistrates or a kirk session.⁷¹ The written record of his admissions signed by him or by the presiding officer on his behalf⁷² would be read over in court and he would be invited to acknowledge it and also, sometimes, to re-sign it.⁷³ A dilemma was posed for the authorities where the accused refused to confirm his confession to the assize. Was the Act of 1587 to be flouted in this respect or was a criminal to escape conviction? Charles II displayed the discomfiture of his regime when he wrote to the Council in 1675 complaining that after "diverse persons guilty of great and horrid crimes" had emitted confessions before them, they would withdraw them at their trial, whereby "juries, for the most part consisting of persons altogether ignorant of law, are apt to be stumbled" and so the malefactors escape by their "frivolous pretences". The Council were asked to form a committee with the Justices to consider whether signed confessions should not be declared to be relevant probation which could not be retracted.⁷⁴ On at least two occasions judges, faced with an obdurate prisoner, found that a confession made before the Justices or the Council was judicial and could not be retracted in court.⁷⁵ But a pannel might still be

69. ibid. I, 188; II, 115.

70. Matters Criminal II, xxiv, 111.

71. Justiciary Records I, 47; Argyll 104; for further examples see Hume II, 312.

72. Cf. A.P.S. VIII, 462.

73. e.g. Justiciary Records II, 115; of. Pitcairn III, 349;

"Bo his girt aith gevin and prostrat upone his kneys Patiflet and approvet his hail former depositiones maid be him to be of veritie"
P.S.A.S. lvi, 52.

74. R.P.C. (3rd) IV, 333.

75. Hume II, 313.

acquitted, as where an assize protested "in respect they did neither hear the party confess the said crimes, nor the alleadged confession of the pannel, given in for probation thereof, owned be the pannel, nor otherwise proven".⁷⁶ The dubiety appeared to be resolved by an act of 1685 which stipulated that in cases of treason all signed confessions made before Commissioners of Justiciary should be "as probative to assizes as if the same had been emitted in presence of the assize", the Act of 1587 notwithstanding, and assizers who acquitted despite such a confession were to be liable to a process of error.⁷⁷ Otherwise, however, the Act was to continue in full force, the implication being that it was only in regard to treason (which in the reign of James II was admittedly a compendious term) that a previous confession could not be retracted and need not be renewed before the assize. The exact position, however, seems to have remained obscure after the Revolution of 1689. Sir John Nisbet inquires in 1698 as one of his "Doubts" "If a Confession being emitted and signed before the Judge in the Criminal-Court may the Pannel Retract and not adhere to it before the Assyse, so that the Inquest cannot proceed on it as an evidence and clear Probation?"⁷⁸ Stuart roundly replies in 1715 "The Confession of a Criminal must be emitted before the Assize in Judgment; or otherwise is not probative: And tho' it be emitted before the Judge; yet it may be retracted before the

76. ibid. 314.

77. A.P.S. VIII, 462. (Of the instructions given by the King to Queensberry, his Commissioner: "You are to passe an act for making Confessions before the justices probative to juries" Hist. MSS Comm. 15th Report Appx. 8, 91).

78. Darleton 24.

Assize".⁷⁹ Mackenzie's treatment of this question is obscure, but writing before 1678, he seems to hold that confessions made before a competent judge are probative, though no assize be present, since the custom of all nations, which statute should be presumed not to derogate from, is to this effect.⁸⁰ In the course of the eighteenth century, confessions or declarations, as they now came to be called, continued to be used, but by case-law were fenced about with safeguards for the protection of the accused. The statement must be made before a magistrate;⁸¹ it must be emitted voluntarily by the prisoner while in his sound mind;⁸² he ought to be warned that he need not speak, but that if he does what he says may be used as evidence at his trial.⁸³ The fact that it was properly obtained must either be admitted by the pannel himself or proved in court by two witnesses.⁸⁴ A statement confessing guilt was not in itself sufficient to warrant conviction, but must be supported by other evidence.⁸⁵ Such a statement was not made on oath, it being for long felt that a man should not be thus tempted to perjure himself and so risk eternal damnation. It was an article in the Claim of Right that "the forcing of lieges to depone against themselves in capital crimes is contrary to law, however the punishment is restricted".⁸⁶ Nor of course could an accused give evidence at his own trial, on the same principle of "nemo tenetur jurare in suam turpitudinem", until the

79. Steuart 45.

81. Alison II, 557.

83. ibid. 564.

85. ibid. 578; Louthian 47.

80. Matters Criminal II. xxiv. iv.

82. ibid. 561.

84. ibid. 557.

86. A.P.S. IX, 39.

passing of the Criminal Evidence Act of 1898 made his evidence on oath competent, though not compellable.⁸⁷ Judicial declaration prior to trial remains competent, and its revival in a compulsory form has recently been advocated.⁸⁸

Behind the academic debate on the competency of the accused's utterances, there lay throughout most of the seventeenth century and earlier the harsh reality of torture. Was a statement extracted under physical pain to be given credence or not? To us it seems obvious that it should not, but formerly there was also an opposite opinion that the very fact that evidence had been extorted was an earnest of its truth, the deponent having no leisure for fabrications. If he obstinately declined to say what was expected of him, it was simply an indication that the torture was not severe enough and so he was still capable of provarication. Thus where a man and his sister, suspected of murder, persisted in denying it, the Lords of the Privy Council declared of them that they believed that by "their constant denyall of the truthe they shall eschew bathe tryall & punishmente" and authorised the Justices and the Advocate to examine them under torture.⁸⁹ When the English Ambassador in arranging for Archibald Douglas to return to Scotland to stand trial for the murder of Barnley tried to ensure that he would not be put to torture, he was told that it was unbecoming to the king's honour to enter into conditions with a subject "especially in the form

87. 61 & 62 Vict. c. 36 s. 1.

88. Smith 231; Smith: British Justice: The Scottish Contribution 130-131.

89. R.P.C. (1st) XI, 281.

of the trial of one charged with so horrible a kind of murder, which cannot be tried but by torture."⁹⁰ A poignant entry in Pitcairn at the height of the witchcraft persecutions shows the Master of Orkney begging the judge "to remember the Assyse that the said Alesoun (an alleged witch who had implicated him) was, be vehement tortour of the caschielawis,⁹¹ quhairin shes was kept be the space of fourtie-aucht houris, compellit to mak the said pretendit Confessiounes".⁹² Another accused "produceit ane instrument of his declaratiounes of innocencie, and that he deponit and confest all thingis be exquisite tortour".⁹³ The assize, to their credit, seem to have penetrated to the truth of the matter, for they acquitted him of being art and part in the counterfeiting of coinage, but convicted him of harbouring the counterfeiter. In the Cromwellian period and at the Restoration there seems to have been some revulsion from the use of torture,⁹⁴ but in the persecution of the Covenanters it returned with an unparalleled ferocity. Hume says that he does not find "that torture ever became an ordinary instrument of inquisition, or one which even the Court of Justiciary, and much less any of the inferior courts, could presume to employ, without the warrant of a consultation with that supreme and superintending Chamber" (the Council).⁹⁵ But in the 1680's its use, though unauthorised, became a matter of course

90. Moyse 49; cf. ibid. 197.

91. The leg put into a metal frame which was heated. Cf. A.P.S. IV, 396.

92. Pitcairn I, ii. 375 (1596).

93. ibid. II, 78 (1598-9).

94. P.S.A.S. xxii, 255 (1661) (witch to be tried "upon volunteer confession without any sort of torture or any indirect means used against her to bring her to any confession").

95. Hume II, 314.

in serious crimes. It was one of the charges made by the Estates against James VII⁹⁶ and in the Claim of Right it was asserted that "the useing torture without evidence or in ordinary crimes is contrary to law".⁹⁷ Finally it was abolished completely in 1709 by the Act 7th Anne, c. 21.S.8 "for improving the Union of the Two Kingdoms". Although attempts as related above might be made by the defence to cast doubt on evidence obtained under torture, it always seems to have been admissible, there being sufficient protection, Mackenzie suggests, in the requirement that the pannel should acknowledge his confession before the assize.⁹⁸ In 1542, however, a sentence of forfeiture of the estates of Lord Glamis was reduced, when he pleaded that it proceeded on a confession emitted by him under torture when he was accused of plotting the death of James V. with his mother.⁹⁹

Probation might also be made by witnesses. Such was by no means the invariable procedure, its use being for long hampered by the elaborate network of challenges devised to exclude the testimony of any witness who conceivably might be lacking in impartiality.¹⁰⁰ Furthermore, it was only in 1672, continuing a practice permitted at the discretion of the Justices since 1661, that the defence was given facilities to

96. A.P.S. IX, 34.

97. ibid. 39.

98. Matters Criminal II. xxiv. iii. Mackenzie took a more moderate view of the virtues of torture than his sobriquet of "Bloody" might suggest. Op. cit. II. xxvii. Lang; Sir George Mackenzie Appendix A.

99. A.P.S. II, 422. Cf. Pitcairn I, 1, 187.

100. Halfour 377 et seq. Matters Criminal II. xxvi; Hume II, chap. xiii.

summon witnesses of its own and was given the right to receive a list of the Crown's witnesses.¹⁰¹ The witnesses must be examined in presence of the assize. As Mackenzie says "Witnesses must in our law be received in presence of the Pannel, and Assize, that the Pannel's presence may overawe the Deponer, and that the Assize may judge by the Deponer's countenance, gestures, and assurance, how far he should be believed."¹⁰² But Crown witnesses would usually have already been precognosed before a magistrate or before one of the Justices who might later preside at his trial. The deposition then uttered by them might simply be read over in court and their adherence to it would be invited.¹⁰³ They were by no means bound to adhere to these precognitions; indeed they could require that they be cancelled before the trial.¹⁰⁴ Since all the probation must be laid before the assize, it was normally essential that every witness be present in court. But as this was regarded as a protection for the accused, it could be, and on one occasion was, waived by him in writing and the deposition was admitted.¹⁰⁵ There were even a few exceptional cases where, without consent, depositions were received of persons whom the assize never saw. They are cited by Hume, who clearly regards them as a grave irregularity.¹⁰⁶ Usually the assize were content to listen to the examination by the Advocates, but occasionally they would intervene, though it might be to the displeasure of the judge. Thus, Fountainhall records how an assize "complained

101. A.P.S. VIII, 88; Matters Criminal II. xxii. i. Cf. Fountainhall 238 where the pannel's advocate protested that he had been given insufficient time to examine the list, contrary to the Act.

102. Matters Criminal II. xxvi.

103. Justiciary Records I, 74.

104. Hume II, 80.

105. Justiciary Records II, 33-34.

106. Hume II, 390.

why such pains should be taken to wring and elicit a testimony, when he (the accused) had so often told that he did not remember the expressions. And they being reproved for meddling too much, they boldly replied, that the probation concerned them and their consciences to see it were fair and equal¹⁰⁷. In the eighteenth century assizers were permitted to suggest to the judges questions to address to witnesses.^{107a}

A further form of proof, though one probably not sufficient in itself, was that by means of presumptions. These were indications tending to point towards guilt, though not conclusive in themselves. Thus the compiler of the work known as Justiciary Records comments of a woman accused of child-murder that there were two strong presumptions against her, that she did not call for help at the birth of the child and that she threw the child's body into the North Loch, and yet the assize acquitted her.¹⁰⁸ Mackenzie does quote cases where he says the pannel was convicted on presumptions alone, though he appears to consider the question whether this was proper to be an open one.¹⁰⁹

One of these was another child-murder case in which the only evidence was again parturition alone and the burying of the child, but there the woman was convicted.¹¹⁰ In another curious case of the same nature, there was in addition to the presumptions a confession before one of the Justice Deputes. The assize rejected the confession and acquitted the pannel, but remitted her to the consideration¹⁰⁸. Justiciary Records I, 28
¹¹⁰. Pitcairn III, 269.

107. Fountainhall 519. Erskine of Carnock's Journal (S.M.S.) 51, 54. 54.
 107a. Southey 110. 108. Justiciary Records I, 28.
 109. Matters Criminal II. xxv. iv. 110. Pitcairn III, 269.

of the presumptions".¹¹¹ The Justices, while noting that she had been "cleansed", ordered that she be whipped through the High Street and banished from the Sheriffdom, as if they were determined that she should not escape all punishment.¹¹² During the seventeenth century the practice grew up of incorporating such presumptions hypothetically into the indictment. After debate these presumptions would be repeated in lengthy interlocutors by the judges along with their consequences in law, assuming they were found proved.¹¹³ In this way, as will shortly be discussed, the jury came near to losing their position as masters of the facts.

Probation might also be made by writ or by real evidence, neither of which require special discussion in relation to our subject. In one specialised type of offence, forging and uttering, the assize seems to have been reduced to a mere cipher approving the decision of others. Thus in the important case of Robert Binning, an Edinburgh writer, who was accused of forging decrees and letters under the royal signet, the documents were first improven before the Lords of Session in a civil process, who then in an Act of Sederunt remitted him to the Justice Court for trial. There the finding of the Lords was read to the assize per modum probationis and on this evidence alone he was convicted.¹¹⁴

This procedure was still in use in the time of Hume, who comments that "it is quite singular in this respect that it comes before the Criminal

112. ibid. I, 49.

114. Justiciary Records I, 38. Cf.

ibid. 57;

Matters Criminal II, xxvii.

114. Justiciary Records I, 38. Cf.

ibid. 57;

Matters Criminal II, xxvii.

111. Justiciary Records I, 47.

113. Hume II, 281 et seq.

Court in the shape of a concluded process as to the matter of proof".¹¹⁵

When the probation, in whatever forms it had been led, was concluded, the assize were addressed by counsel for both sides. In the seventeenth century they often did so with a considerable display of rhetoric. Mackenzie writes of them as speaking "in a full harangue"¹¹⁶ and he has left us a specimen of his ideal of oratory addressed to a jury in Idea Eloquentiae Forensis Hodiernae.¹¹⁷ It was a tradition that they were addressed as "good men of Inquest" or assize.¹¹⁸ The prosecution spoke second until 1670 when, as Mackenzie records with some self-satisfaction, he prevailed with Parliament to give the defence the last word.¹¹⁹ From this proviso, however, the then common trials for treason were omitted. This reform was included in the Articles of Regulation of 1672.¹²⁰ A summing-up of the issues by the presiding judge does not appear to have been a regular feature of Scottish criminal procedure until the late seventeenth century, although it was always competent for him to deliver one. The speech of Archbishop Spottiswoode to the jury at the trial of John Ogilvie in 1616 is an earlier example which has survived,¹²¹ though not one in which the issues of law were much discussed. The increasing complexity of interlocutors instructing the assizers on the

115. Hume I, 161.

116. Works II, 352; ibid. I vii.

117. trans. An Idea of the Modern Eloquence of the Bar, 81.

For further examples of the forensic oratory of this period see State Trials IV, 301 & V, 600.

118. Matters Criminal II. xxiii, ix; Spalding: Memorials of the Troubles I, 403. Balfour, Practicks 444. Cf. Yester House Writs 140 where a man seeking service as heir addresses the inquest as "Scirris baronis and gudmen of Inquest."

119. Works II, 352. ibid. I vii.

120. A.P.E. VIII, 88.

121. Pitcairn III, 348; State Trials VII, 160-1.

consequences in law of such facts as they might find proved made such an oral address more of a necessity.¹²² Where the testimony of witnesses had not been reduced to writing, and the punishment did not extend to loss of life or demembration it became a matter of obligation in an act of 1747-48,¹²³ and in 1782 it was extended to all jury cases.¹²⁴ After the trial of Katherine Nairne in 1765 it was agreed on her behalf that this practice was contrary to the rule that the defence be "the last speaker" but this objection, says Hume, "met with the reprehension it deserved".¹²⁵ Earlier the Act of 1587 required the assizers to raise any doubt that might be in their minds before leaving the court and while still in the presence of the parties, so that they would not have to emerge to ask for advice which might not be impartial.¹²⁶ Before the jury retired to consider their verdict in seclusion, they might again be threatened with trial themselves if they convicted or acquitted.¹²⁷

122. Hume II, 398. See also Kennedy: Annals of Aberdeen II, 255.

123. 21 Geo. II. ch. 19, s. 8 "and that immediately before the assize or jury shall be enclosed the evidence shall be summed up by the judges before whom such trial shall be had or one of them".

124. 23 Geo. III. ch. 45, s. 5.

125. Hume II, 398 n; State Trials X, 515; Trial of Katherine Nairne, 161.

126. A.P.S. III, 461.

127. e.g. Justiciary Records I, 327; Matters Criminal II, xxiii. xii.

VIII. Consideration of Verdict

The assize now withdrew from the court to consider their verdict alone. Once the jury had become an organised and cohesive force which had a distinct identity and could act as one and were no longer the whole body of suitors of court or a large and indefinite part of them, then they would naturally wish to discuss among themselves the evidence they had heard. In the serving of briefs where their role was one of answering certain specific questions of fact, they were slower to withdraw than in criminal matters, where they had to consider the more elusive matter of guilt or innocence.¹ Originally this seclusion was sometimes achieved by the presiding officer - justice, sheriff or baillie - withdrawing, while the suitors decided on the verdict.² But by the sixteenth century a physical withdrawal of the jury seems to have become universal in criminal matters, indeed long before the first statutory requirement to this effect in 1587.³

The comfortable accommodation of the jury during their withdrawal appears to have been as much neglected in the past as at the present time.⁴ Usually no definite room seems to have been provided for them and they simply went wherever they could be alone. Thus at the rather hasty trial of the feuding courtiers at Falkland the court sat "in templo" and the assize merely "removit furth of Court to ane quiet place

1. Supra. 191

2. A.P.S. I, 317.

3. ibid. III, 461.

4. Journal of Jurisprudence X, 52-3.

of the said kirk".⁵ At Inveraray they are said sometimes to have moved to "ane quiet part",⁶ but often they were allowed to use "the Kirk of the said Brugh adjacent to the said tolbooth".⁷ In so doing, they were acting contrary to Quoniam Attachamenta, c. 86 which forbade the holding of courts in churches, churchyards or other consecrated places.⁸ On Justice-Ayres special arrangements might have to be made ad hoc and there is reference in the accounts of the Ayre of Jedworthe (Jedburgh) to an item "Pro firma (rent) domus Assise xx s."⁹ In the mid-sixteenth century one Patrick Burn had a gift for life under the Privy Seal entitling him to guard the door of the assize-house during Justice-Ayres and Justice-Courts,¹⁰ a duty later discharged by Macers.^{10a} At Perth the "over-hous" of the Tolbooth¹¹ was used, and at Aberdeen, at least in the Sheriff Court, it was the Council-house.¹² In perambulations, where the inquest might be exposed to inclement weather, there is evidence of the provision of a tented pavilion in which they could hold their consultations.¹³ At the Justice-Court in Edinburgh, where one might have expected some permanent accommodation to have been made available, the assize customarily resorted to the Council House of the

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5. Pitcairn III, 91-93 Cf. Justiciary Cases, 293 ("Kirk of Dalkeith").
6. Argyll 49. 7. ibid. 110, 112, 115, 117, 133.
8. Cf. Balfour, Fracticks 273 (though in fact many secular activities were carried on in churches before and after the Reformation).
9. Pitcairn I, 1, 22. Cf. Jur. Rev. III, 204-5.
10. R.S.S. II No. 3747; L.H.T. VII, 482; IX, 462.
10a. Louthian 51-2. 11. Pitcairn II, 155.
12. Aberdeenshire Sh. Ct. I, 283.
13. R.P.C. (1st) VIII, 378.

Tolbooth;¹⁴ but sometimes they were banished to "ane secrett place in the eird of the said Tolbooth"¹⁵ or even to "ane left in the Tolbuith".¹⁶ The place is at times simply referred to as "the assize-house" or "the inquest-house".¹⁷ On the establishment of the High Court of Justiciary in 1672 the assize (inter alios) were to have distinct places allotted to them.¹⁸

The first duty of the assize on retiring was to elect a chancellor to lead their discussion and act on their behalf in delivering the verdict. They did so by majority vote,¹⁹ as in the verdict itself, though usually the choice was unanimous. The act of 1587 seems to envisage that this election should take place before the assize left the court-room, but in practice this point does not seem to have been adhered to.²⁰ No doubt this too was in the first place a natural and spontaneous act by which the most learned or powerful or senior man present was put in a position of leadership by the others, a practice which in time received official recognition. His status is well conveyed by the old term "forspeaker" or in Latin "prolocutor",²¹ a term also applied to the advocate for a party.²² The expression is regularly used in the cases in Kennedy's Annals until 1538, when the word "chancellor" first makes its appearance.²³ In Dunfermline it is first found in 1521.^{23a}

14. State Trials I, 480; Pitcairn I ii, 377; ibid. II, 377.

15. ibid. I ii, 379. 16. ibid. II, 75.

17. ibid. I ii, 210; Justiciary Cases 28, 54, 69; State Trials I, 310; A.P.S. III, 461. 18. A.P.S. VIII, 88.

19. e.g. Justiciary Cases 212; Pitcairn II, 84; cf. S.H.R. xix, 158.

20. A.P.S. III, 461; Hume II, 403.

21. e.g. Brechin I, 114 "prolocutor" (1448); A.P.S. II, 186 "proloquutor" (1469) Lenark 4 "forspeaker" (1438). Couper Angus II, 46 "prolocutor" (1445). 22. Pitcairn passim.

23. Annals of Aberdeen II, 474-9. 23a. Dunfermline Burgh I, 208.

It presumably derives from the practice of appending to retours and verdicts the seals of those present or some of them. The term "monstrator" is also to be found, though rarely.²⁴ In the eighteenth century English influence began to creep into Scottish criminal law, thanks to ardent anglicisers such as Hugo Arnot,²⁵ and brought with it the term "foreman" which in time came to be universally used, just as "jury" replaced "assize". Hume, however, writing in the 1790's, retains the terms "chancellor" and "assize".

During the seventeenth century the chancellor's presidency of the jury seems to have been in danger of being usurped by the clerk of court. Despite the strict provisions of the Act of 1587 to the effect that "nather clerk nor vtheris" was to be present with the assize when they retired,²⁶ a former practice whereby the clerk accompanied them and might with his superior knowledge and experience influence them, seems to have persisted.²⁷ Admittedly, when verdicts had to accord with complex interlocutors, and instructions by the judges were not obligatory, the lay assizers may have stood in need of some guidance. This practice was again condemned by the Articles of Regulation of 1672,²⁸ yet Mackenzie in 1678 frankly admits that "de facto the Clerk sits still with them, and it was thought fit that he should do so; because they being oft ignorant and unacquainted with the forms and procedure of that Court, they should have some person to regulat them and none so fit to

24. Laing Charters No. 113 (1434).

25. who explains "chancellor" to his readers as "foreman" Arnot 154.

26. A.P.S. III, 461.

27. S.H.R. xix. 271.

28. A.P.S. VIII, 88.

do it as the Clerk"; though as he concedes, "the Clerk was worth ten and did influence too much".²⁹ But elsewhere, in his account of the Scots law of treason, he claims it as an achievement of his own that he secured that the assizers should choose their own clerk.³⁰ By the early eighteenth century, however, the intention of the Parliament seems to have been carried out and the Clerk of Court was excluded. Instead juries began to choose a clerk of their own, whose function it was to compose and write out the verdict agreed upon by the majority.³¹ In the mid-eighteenth century, to assist him in doing so, a formula showing the style of a verdict was provided by the Court.^{31a} This practice continued until an Act of 1813-14, which gave recognition to the preparation of the verdict by the clerk and chancellor, but said that it might be dispensed with when the jury were unanimous.³² A further Act of 1828 enacted that written verdicts be discontinued if, as was by then almost always the case, the verdict were returned before the court adjourned.³³

Naturally little is recorded of the conduct of the assize's deliberations. Then, as now, the manner in which they arrived at their verdict was beyond scrutiny, although, as we shall see, the way in which each member voted might be elicited in order to determine liability for wilful error. Until the sixteenth century the discussion probably turned purely on the assizer's recollection of the evidence. But by

29. Matters Criminal II. xxiii. x.

30. Works II, 352; I, 7.

31a. Louthian 51, 113.

31. Hume II, 417.
32. 54 Geo. III. c.67. s. 1.
33. 6 Geo. IV. c. 22. s. 20; Alison II, 637-8; Cf. Maclaurin 166, where the clerk to the jury had erred in transcribing the names of the assizers.

the middle of that century the form of verdicts seems to imply that the dittay and the written depositions of witnesses (then increasingly used in the Justice-Court as a mode of probation) were, after being read to the assize in open court, taken and considered by them in reaching their verdict.³⁴ This argues a literate jury; and by this period assizers in the supreme court being for the most part lairds and merchants were probably well able to cope with this written matter. In the seventeenth century they continued to handle an increasingly complex mass of material, as court procedure became more and more a written one.³⁵ Mackenzie gives the following account of the assize's activity in his own day, when they also had interlocutors to contend with. "The Debate and Examinations thus ended, the Jury are enclosed, and get in with them the whole Debate, interlocutory Sentence and Depositions in Writing, signed by the Judges, Clerk and Witnesses. This instructs them fully on how to proceed; and after they have chosen a Chancellor (or Foreman) and a Clerk, they read all the Process, and debate fully upon it."³⁶ James Innes, writes in 1733 that "The Depositions thus wrote out, and subscribed, are properly the only subject Matter of the Assizers Cognition". As a record, they are to be preferred to "their own imperfect Notes, or lubricious Memories".^{36a} In 1765 a defence counsel, contemplating a reference to the whole court to prevent sentence being

34. Pitcairn I.1, 491 (1567-8); I.ii, 7 (1569), 107 (1582).

35. e.g. Justiciary Cases 28 ("seuerall dittayis").

36. Works II, 352; cf. State Trials VI, 791.

36a. Idea Juris Scotici 15.

passed, asks for time to consider the records "which till now have been in the Hands of the Jury".³⁷

In burgh courts, as we have noticed, it was not uncommon for the assize to examine witnesses in person during their retiral³⁸ and such a practice is even to be found exceptionally in the Justice-Court.³⁹ But the normal practice in the latter court seems to have been that the jury were dismissed to consider their verdict alone. This practice was made obligatory by the Act of 1587, which relates that wrongs had been done by the "solisting, hosting and minassing" of assizes after they were enclosed, the accusers and others "havand libertie to pas to the said assyse and to produce to thame sic writtis and witnesses and uther probatioun as thai pleasit to verific the cryme outwith the presence of the pairties accusit".⁴⁰ To remedy this abuse, it was enacted that should the accuser or any other person whatever "informe, solist, reasone, dispute, speik or repair to the said assysis" the accused was to be declared innocent of the crime, this acquittal being a good defence if he were brought to trial again. This corrupt practice is described as being prevalent in cases of treason, but its correction was applied to all crimes whatever.

Such a drastic remedy argues a clamant need and there are many instances of the coercion and intimidation of juries, even after the

37. State Trials X, 513.

38. supra 124

39. Pitcairn III, 575-6 (contrary to the Act of 1587).

40. A.F.S. III, 460.

passing of the Act. Perhaps the most dramatic example is in a civil case of perambulation where the assize were considering their verdict in a tent and the supporters of one of the disputants "pullit up the waist part of the pinnis and standeris of the said pavilyeon and outtit the haill towis and cordis thair of, with intention to smother and murder the said persons of inquest within the same, so as to render their decree ineffectual".⁴¹ These allegations however were not sustained by the Privy Council. The practice of calling together bands of supporters to bolster up one's cause, civil or criminal, has already been referred to.⁴² To the examples already given, one from the Reformation period may be added. In 1563 the Baillies and council of Edinburgh ordered "all nychtbouris, bayth merchant and craftismen, to be vpoun the hie streit the morne be viij houris in thair best array in feyr of weir for seruing of our souerane justice and to remane vpoun the samyn hie streit unto the end of the justice court set for the Bischop of Sanctandrois and the vtheris kirkaen quhilkis ar to thole law for saying mes", the ostensible reason being to prevent disturbances by friends of the accused.⁴³ In circumstances such as these it must have been difficult for assizers to bring impartial minds to bear on the evidence and they also had the threat of prosecution for wilful error hanging over them. Mackenzie mentions that in his own time practice permitted members of the assize to emerge in order to obtain guidance from the justices and that although

41. R.P.C. (1st) VIII, 378.

42. supra 283

43. Edinburgh III, 161.

this might seem in breach of the letter of the Act of 1587, it was excusable since that Act was aimed at preventing "impressing or suborning the Assize", of which presumably the judges were not to be suspected.⁴⁴ In his Observations he cites a case of 1682 in which the Lord Advocate^(himself) had spoken to the assize after they were enclosed; the verdict was not declared null, however, on the Justices declaring that he had spoken in their presence and only in order to resolve some doubts entertained by the assizers - a procedure which would seem to be directly contrary to the Act, particularly in view of the hectoring attitude adopted by prosecutors about this time.⁴⁵ The question whether a verdict obtained after an assize had been influenced in such a way might be reduced, if the assizers did not choose to exercise their right to assoilzie, is raised by Mackenzie and tentatively answered in the negative.⁴⁶

In the course of the late seventeenth and eighteenth centuries the requirement of the seclusion of the assize was interpreted in a number of cases very stringently. They were locked in and guarded by a macer of court and any legitimate communication as with the judges must be made through him.^{46a} The time taken by jurors in important cases to reach their verdicts seems to have lengthened, yet any break in their deliberations was strictly forbidden, nor ought there to be any adjournment of the diet once the assize had been sworn. And of course any unauthorised communication with the jury continued to be frowned

44. Matters Criminal II. xiii. x, Justiciary Records II, 245.

45. Observations James VI Parl. II c. 91.

46. ibid.

46a. Louthian 51-2.

upon even although there was no suggestion of solicitation. Thus at a trial in 1672 it was claimed for the pannel that the verdict should not be applied since two of the assizers had emerged and conversed with people before the verdict had been committed to writing and sealed.⁴⁷ The then new Lords Commissioners of Justiciary rejected this argument in as much as the infringement occurred after the voting had been concluded. But they would apparently have been ready to reduce the verdict if the communication, though innocent, had taken place before the vote and they also affirmed that it was competent for them to consider the verdict, the power granted in the Act of 1587 to the assize not derogating from their own authority. In a Sheriff-Court trial in 1739 the intercourse complained off did take place before the vote and involved both a juror emerging from the jury-room and conversing and a Sheriff-Officer entering it more than once. The verdict was declared null.^{47a} In 1754 several assizers absented themselves from the court-room, but in the absence of evidence that they had discussed the case, the proceedings were not declared null.⁴⁸ The same decision was reached in similar circumstances in the case of Robert M'Donald in 1821.⁴⁹

The ban on any adjournment of the proceedings was also stringently applied. As early as 1434 eight jurors were fined in the burgh court of Aberdeen for leaving the court before the diet was duly concluded.⁵⁰

47. Justiciary Records II, 79 et seq. Hume II, 407; Matters Criminal II. xxiii. x. (Mackenzie gives a different date for this case).

47a. Maclaurin 86.

48. Hume II, 402.

49. Shaw 43.

50. Aberdeen Burgh I, 390.

In 1525 an assize sitting in Edinburgh was debarred by the Justice on instructions from the Chancellor and Lords of the Council from leaving the Tolbooth until they had either convicted or acquitted the accused.⁵¹ And when a case was continued the assizers were bound to remain in town until it was resumed.⁵² In a witchcraft trial of 1591 after a hearing lasting three days, the jury remained up all night considering their verdict.⁵³ Eventually, there could be no adjournment of any case, prolonged though it might be, once the assize had been sworn, such was the interpretation placed on the Act of 1587. At a trial in 1669 there was an attempt to prevent an assize being enclosed on the ground that the pannel had not been put to the knowledge of the assize immediately after the probation ended, but that the assize was dismissed and ordered to enclose the next day "contrary to this inviolable law and practice of this Court".⁵⁴ This plea does not seem to have been successful, on the ground that the probation was not in fact closed. Hume, however, says that cases of adjournment are very rare, there being but one instance, the trial of Lord Provost Stewart in 1747 for neglect of duty.⁵⁵ The evidence there was so protracted that after the court had been sitting for forty hours certain of the assizers asked for and were granted an adjournment for ten hours, but only with the consent of the accused.⁵⁶ Hume, with a spartan disregard for comfort, says that "any such indulgence is plainly of bad example, and is founded in considerations of

51. Pitcairn I 1, 131.

52. ibid. 79 (1512).

53. ibid. I 11, 295.

54. Justiciary Records I, 322.

55. Hume II, 400; State Trials IX, 589 et seq.

56. ibid. 654.

convenience, rather than necessity".⁵⁷ At the trial of Janet Ronald in Perth in 1763 one of the assizers became ill while the prosecutor was making his closing speech and the judges learning that there was no hope of his immediate recovery, adjourned the court until the next day, but against the will of the prisoner. When the court resumed, the defence objected to the trial being proceeded with, but nevertheless it continued and the pannel was convicted. Again the defence protested and on the case being certified for the opinion of a full bench of the High Court, it was held that a new trial ought to have been granted and that as the jury had separated during the proceedings they must be declared void and the pannel acquitted.⁵⁸ At the trial of Katharine Nairne in 1765, where the hearing of evidence lasted for thirty-six hours, it was afterwards alleged that there had been a break in the probation during which the assizers moved about the court-room and some spoke to the prosecutor and the witness then being examined. The defence claimed before the whole court that judgment should not pass on the verdict, arguing from the recent case of Janet Ronald, but it was held that although dispersed, the jurors remained always under the supervision of the court.⁵⁹ In the case of Lundie in 1868 a juror again took ill during the examination of witnesses and by consent of the parties another juror drawn from the list of those summoned was substituted. The whole jury was then sworn and in their presence each of the witnesses who had already given

57. Hume log. cit.

58. MacLaurin 211; Hume II, 399.

59. State Trials X, 479; Hume II, 401-2; Trial of Katherine Nairne 157 et seq.

given evidence had his testimony read over to him by the presiding judge and took the oath once more.⁶⁰ Until recent times, if the parties did not agree to such an arrangement, the prosecutor could only desert the diet pro loco et tempore with the right to institute fresh proceedings⁶¹ or ask for an adjournment until the juror had recovered.⁶² With respect to the latter a more lenient attitude was shown in the nineteenth century than in the case of Janet Ronald. But under the Administration of Justice Act of 1933, c. 19 it is permissible for the court, on the application of prosecution or defence, to continue the hearing, so long as at least twelve jurors are still present. In that case a verdict of guilty can only be returned if at least eight of the jurors vote for it.⁶³

Where a hearing continues for more than one day, the jury need not now be kept in isolation, unless the charge is a capital one, or there are other special circumstances to warrant it. In such a case they are maintained in a hotel at public expense under the care of court officials.⁶⁴ During any adjournments whether over-night or during the day communication by a juror with any outsider on the subject of the trial is an irregularity, but not necessarily a fatal one.⁶⁵

The treatment of assizers is now much more lenient than formerly. Mention has already been made of the notorious trial of Lord Provost Stewart. The assizers, in begging for an adjournment, protested that "several of the Assizers were already greatly fatigued, and one or two

60. 1 Coup. 86.

61. Crossan 1 Coup. 383.

62. McGarth 1 Coup. 260; cf. Laird and Hosie 1922 J.C. 17.

63. 23 & 24 Geo. V. c. 41.

64. Renton & Brown 117; e.g. the trial of Peter Manuel (1958); Journal of Jurisprudence XI, 135.

65. Smart 1938 J.C. 148.

of them were altogether unable to hold it out any longer, without some Relief: that the Assize could not imagine it to be the intention, either of Prosecutor or Pannel to kill or destroy them; which behoved to be the consequence, should they insist on finishing the Trial at one Sederunt".⁶⁶ Although they were granted their adjournment, they gave in all ninety-four hours of service in this case.⁶⁷ In the Nairno trial, although a short break in the hearing was allowed, the assize still heard evidence for thirty-six hours and served in all for forty-three hours.⁶⁸ In cases of lesser magnitude jurors at times deliberated through much of the night, after a day spent listening to evidence and oratory. Moyses relates how at the trial of Bethwell and Crawford "the assize continued to in the tolbooth till two o'clock in the morning, his majesty and the chancellor remaining all the time in the inner council-house."⁶⁹ At a trial in 1591 they remained in consultation all night.⁷⁰ At the trial of Baillie of Jerviswood in 1604 "the assize inclosed neir about 12 at night, and sate till 3 in the morning".⁷¹ By contrast with English practice, the jury were not incarcerated without sustenance until they returned a unanimous verdict. They were furnished with meat and drink^{71a} and could emerge as soon as a majority decision was reached. Indeed an entry in the royal accounts suggests that when the assize was of nobles special steps might be taken to alleviate the tedium of their task, perhaps with ulterior motives.⁷²

66. State Trials IX, 654.

68. ibid. X, 516.

70. ibid. 255.

71a. Louthian 51.

72. Piteairn I i, 305; L.H.T. VII, 329 ("Wyne brocht in to the Lordis being vpose his Inqueist").

67. ibid. 680.

69. Moyses 155 Cf. Piteairn I ii, 178.

71. Fountainhall 592.

When the assize had completed their discussions, it was for the chancellor to convey their verdict to the judges. Originally he did so orally, the records usually stating that the verdict was "delivered by the mouth of chancellor of the said assize"⁷³ or "per os prolocutoris"⁷⁴ Balfour states that "Ilk lauchful judgment should be gevin and zeildit cleirly out of one mouth, and be one toung".^{74a} The Act of 1567 required the assize "to return their answer be the mouth of their chancellair to the judge".⁷⁵ This oral verdict would then be noted in the records of court by the clerk. To facilitate prosecutions for wilful error it was sometimes the practice to mark opposite each assizer's name "(f.)" or "(ac.)" for "fyllit" or "acquit".⁷⁶ After 1578 it became customary for the chancellor to authenticate this record with his own signature.⁷⁷ The division of the votes was known to the accused, who might make a narrow majority in favour of conviction the basis of a plea for leniency.⁷⁸ Oral verdicts continued to be delivered in the Justiciary Court into the seventeenth century, the form in Justiciary Cases 1624-1659 being "Thay all in one voce be the repoirt and declaratioun of the said chancellor fand".⁷⁹ But on the restoration of the courts after the Commonwealth the practice of judicial direction

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73. e.g. Fife 48, 135-6 etc.; Kennedy: Annals of Aberdeen 473, 475; Carnwath 184, 203 etc.; Aberdeenshire Sh. Ct. I, 370; II, 47.
74. Aberdeen Burgh I, 21. 74a. Practicks 281. 75. A.P.S. III, 460.
76. MacLaurin xxix; Fife 82; Pitcairn I i, 448, III, 101. For an informal memorandum to this effect see ibid. II, 52 n. 1.
77. MacLaurin xxxii; Pitcairn I ii, 142; II, 490. On one occasion he is reported as having signed the dittay instead (Spalding Club Miscellany I, 184).
78. Justiciary Cases 224; Justiciary Records I, 33.
79. Justiciary Cases 54, 69. Cf. ibid. 204.

of the jury by means of elaborate interlocutors may have led to written verdicts, which must agree with the terms of the ditty. Thus in 1663 George Graham was found guilty of reset, though charged with theft, and the verdict was set aside by the Council.⁸⁰

Hume, however, denies that the verdict was ever given viva voce by the chancellor, while quoting forms of verdict of the kind given above which he suggests are misleading.⁸¹ He does not however state his authority for this assertion. The linguistic evidence for an oral deliverance is even stronger than he admits. Skene, discussing the "proportatio assisae" or deliverance, links it with the "suth-saying" of the oath.⁸² The word "verdict" itself seems etymologically to imply a speaking truly. No trace has been found of any language suggesting a written verdict until after the Restoration. In earlier times, granted the admitted illiteracy of many assizes, a rule that verdicts should be written would have been difficult to apply. In some civil cases the oral nature of the verdict is quite explicit. Thus the chancellor of an inquest in 1436 "playnly and with opyn voyse out gaff and saide that the processe was suthfaste".^{82a} It is true that, as we shall see in regard to the expression "all in one voice", phrases in legal records are sometimes perpetuated long after they have lost their face meaning. But that does not explain why the Act of 1587 seems to pre-suppose emphatically an oral deliverance. In any case it would only push back

80. Justiciary Cases I, 80.

81. Hume II, 415 n. 2 (one of these is even more emphatic than usual in referring to "the mouth and speaking of" the chancellor).

82. D.V.S. s.v. Proportatio, Varda.

82a. Spalding Club Collections 394. Moreover, the inquest "with hale consent laide thar speche on W.R." as chancellor. Cf. the formal wording of retours "Qui jurati dicunt". For an emphatic illustration of the oral nature of a decision taken by the whole community see Aberdeen Burch 1.104

in time the point at which, oral verdicts were made and gave rise to the deep-rooted linguistic usage. The explanation may be that in the Justice-Court the more lettered assizers began to make notes of the verdict, which they read from while the court rolls were still signed by the chancellor as the effective record. Some of these casual writings may have survived and been seen by Hume.

Whatever the truth may be, there can be no doubt but that the practice of giving in written verdicts was established by 1672, for by the criminal procedure act of that year the chancellor was required to mark how each assizer voted "on the same paper wherein the Verdict of Assize is written". After the verdict was pronounced, the written record of it was to be closed and sealed with the seals of the court, of the chancellor, and of as many of the assizers as the chancellor should think fit. It was never to be opened again except by order of the judges and if the clerk in whose keeping it was did so without authority, he was to be deprived of office and otherwise punished as the judges might decide.⁸³

This regulation was plainly designed to facilitate trials for wilful error.^{83a} Nevertheless, it does not always seem to have been complied with, perhaps deliberately. Thus the assizers who were tried for acquitting Somerville of Urats and others charged with being present at the Battle of Bothwell Bridge had to be interrogated by the Privy

83. A.P.S. VIII, 88.

83a. Mackenzie Observations Charles II Part 2 Act 16.

Council as to the manner in which each voted, since the chancellor had neglected to mark the votes on the verdict.⁸⁴ Although the act of 1672 is not clear on this point, it is certain that the written verdict was sealed in the assize-room, opened and read out in court.⁸⁵ Then after its terms had been copied into the court records, it was sealed up again, as required by the act.⁸⁶ The division of votes appears also to have been recorded in the court records.⁸⁷ Although the original purpose of this proviso was to indicate who if any should be charged with wilful error, after that procedure was abolished it continued, as Hume points out, to have a salutary purpose in preserving the verdict in a trustworthy form, which might be referred to, should there be any allegation that the court records had been tampered with.⁸⁸ At a trial for error in 1681 the original verdict was unsealed by order of the judges and used as a form of probation before the great assize.⁸⁹ The content of the written verdict will be discussed when the various forms of deliverance open to the assize are considered.⁹⁰ For the present, it can be noted that it contained a sederunt of the whole assize, a record of the election of the chancellor and, from the late seventeenth century, of the clerk, a short description of the charge, followed by the operative part, the finding of the assize upon it.⁹¹ The document was signed by the chancellor and clerk,⁹² or occasionally by the whole assize.⁹³

84. Fountainhall 298.

86. Hume II, 411.

88. Hume II, 411.

90. infra 370

92. e.g. State Trials VI, 791, x, 137, 513.

93. Arnot 154.

85. R.P.C. (3rd) XIII, 252.

87. Justiciary Records II, 211.

89. ibid.

91. Hume II, 415 et seq.

The verdict after the re-organisation of the criminal courts might only be received in presence of the whole assize,⁹⁴ even although, as often happened, they were ordered to return their verdict at a certain hour the following day and were thus free to disperse once it had been signed and sealed.⁹⁵ This requirement was secured by the names of the assizers being called out in court, those absent being fined.^{95a} In this way some restraint was placed on a chancellor who might be tempted to falsify the verdict arrived at by the assize. However, in the document headed "The Manner of Holding Justice Courtes in Scotland" it is twice stated categorically that "After the assize is impannelled they returne no more into the court but send their foreman alone, whom they call their chancellor, who pronounceth the verdict in all their names".⁹⁶ This account has the appearance of being written by someone with an imperfect understanding of what he observed and cannot be wholly relied upon. The practice it describes was probably rare and irregular. In one case reported by Pitcairn we are told that the assize "having votit and resolutit thairwith, callit the Justice to Judgement", but this may mean no more than that they told him that they were ready to deliver their verdict.⁹⁷ Once the verdict was received and recorded in the presence of the assize and pannel it could no longer be challenged on the ground that it did not accurately represent the division of opinion among the assize.^{97a}

94. Hume II, 410; Matters Criminal II. xxiii. xi.

94. Hume II, 410; Matters Criminal II. xxiii. xi.

95. e.g. State Trials X, 137, 512.

95a. Louthian 52, 114.

96. S.H.R. xix 158, 159.

97. Pitcairn II, 78.

97a. Maclaurin 372 et sqq. Hume II, 412 (Case of Janet Nicol).

In 1814 the older practice was restored by statute. The preamble relates that the requirement that all High Court verdicts should be executed in writing by the chancellor and clerk of the jury while they were enclosed was productive of delays and mistakes defeating the ends of justice. Nor, as Hume points out, could any verbal statement be made in court in explanation of the written verdict.^{97b} Accordingly, it was declared permissible for verdicts upon which all the jurors were agreed to be delivered orally by the chancellor and recorded, either with or without a withdrawal from the court. That the jury might settle on their verdict without leaving the box was also an innovation.^{97c} In 1825, by the statute usually known as Sir William Rae's Act, this facility was extended to all trials except where the court required that a written verdict be returned. Where the verdict was not unanimous, the fact was to be announced by the chancellor and recorded.^{97d} The verdict once recorded should be read over to the jurors so that they may assent to its terms.^{97e}

The jury's function in the supreme criminal court was solely to pronounce on guilt and innocence or proof and lack of proof. There it had probably never been more than that, though in some of the lesser courts, as we have seen, they might impose sentences as well as regulating procedure.⁹⁸ But occasionally a justice-court assize would overstep their allotted sphere and render advice to the justices on matters

97b. Hume II, 413.

97d. 6 Geo. IV c. 22 s. 20.

98. supra 98

97c. 54 Geo. III c. 67.

97e. Renton & Brown 123.

of punishment. Thus in the Argyll Justiciary Court in 1673 an assize convicted two persons of adultery, but "by pluralitie of votts assolzied the saide pannells from the punishment contained in the acts of parliament in respect they nevir knew it was putt in practice of before". The Justice found that they were exceeding their province, but decided to take the advice of the universal overseer, the Privy Council, before passing sentence himself.^{98a} The jury at the Edinburgh trial of Gilderoy and his fellow-robbers appended to their verdict: "and as concerning the punishment to be inflicted upone A.F. and C.F. for their former crymes, for the quhilk they ar convict in respect of their confessioun, remittis their punishment to the justice, to consider of their minoritie". The justice took the advice of the Lords of Council, but in the event the young men suffered the same fate as their comrades - drawn backwards to the place of execution and there hanged.⁹⁹ Similarly, but with more success, the jurors intervened to mitigate the sentence on an accused "in respect of his young zeiris, being allanerlie fyftene zeiris of age".¹⁰⁰ But at a Justiciary Court in Ayr in 1603 the assize spoke for severity and after convicting the pannel of theft, added that they were "esteiming him (for the maist part) worthie of death". The judges agreed and he was sentenced to be hanged.¹⁰¹ Recommendations for mercy became not infrequent in the latter part of the eighteenth century, when polite society began to look upon the harsh sentences which

98a. Argyll 17.

99. Spalding: Memorials of the Trubles I, 441.

100. Justiciary Cases 263.

101. Scottish Journal II, 139.

could still be inflicted as relics of a barbarous past which it was anxious to forget.¹⁰² Arnot refers to a feeling when he wrote that such recommendations were too often ignored by the Crown in considering whether to exercise the royal prerogative of clemency, more weight being given to the views of the judges.¹⁰³ Sometimes assizes in the seventeenth and eighteenth centuries would append to their verdicts some such conclusion bearing on punishment as "finds liable to an arbitrary punishment" or "guilty of the pains of death". Hume castigates severely "such strange and slovenly language" and holds that, unless the verdict is a special one and otherwise good, such verdicts confounding guilt and punishment are void.¹⁰⁴

After the verdict had been returned, its contents might provoke a protestation from the dissatisfied party, demanding prosecution of the assize for wilful error. Thus an accused who had been convicted in 1564 "protestit for wilfull and manifest Errour; remeid of law, and for costis, skaithis, damage, and interes that he sal happin to sustene or incur thairthrow, Criminalie or Ciuile".¹⁰⁵ The effect of such prosecutions will be considered shortly.¹⁰⁶ An accused who had been acquitted was entitled to receive a testimonial of the court stating that he had been tried at a certain time and place for a certain crime

102. e.g. The Northfield murder trial where the jury made a recommendation to mercy towards one of the accused in respect of his youth and the presumed influence of his mother, the co-accused. Both were pardoned. Black Calendar of Aberdeen, 79.

103. Arnot 245.

104. Hume II, 425.

105. Piteairn I 1, 450.

106. infra 386

and found "quite, fre and clene" by an assize.¹⁰⁷ An example of this practice is to be found in which the Earl of Huntly as Justiciar of Scotland south of the Forth certifies the acquittal of Robert Montgomery on a charge of slaughter in 1498.¹⁰⁸ Although it was only the Justice on aire who was under this obligation, another example of such a certificate has survived, which was issued by the Justice-General of the Regality of St. Andrews in 1534-5 stating of the pannel that he "inculpabilis repertus et quietus fuerat".¹⁰⁹

In the course of the eighteenth century judges began to excuse jurors who had sat through lengthy trials from further service for a period. Thus after the exceptionally protracted trial of Lord Provost Stewart in 1747 the clerks of court were asked by the judges "to put them in mind not to insert any of the said Fifteen their Names in any Roll or List of Assize for the Space of five Years".¹¹⁰

107. A style for such a "littera testimonialis" is to be found in A.P.S. I, 707. See also Balfour 573; Moray 212.

108. Memorials of the Montgomeries, Earls of Eglinton II, 57.

109. Wemyss Charters II, 156.

110. State Trials IX, 680.

IX. Forms of Verdict

The history of the three modern Scottish verdicts holds a particular interest in view of the frequent controversies that have arisen as to the desirability of the apparently anomalous verdict of "not proven".¹ Certainly its appearance was a pure historical accident and if it is to be regarded as an institution to be valued, it can scarcely be claimed as a manifestation of the genius of Scottish criminal jurisprudence. At first the jury's role was simply to decide on the guilt or innocence of the accused. Their verdict was a general one and there seems to have been no set form by which they conveyed it. The rudimentary early burgh records reveal a wide variety of terminology. Guilt is most often signified by "convictus"² or "convicit",³ sometimes by "in wrang"⁴ or "had done wrangis",⁵ and very rarely by "gilty".⁶ The finding may be merged with the award of punishment as in the phrase "findis baith ye parties in ane merciment".⁷ Innocence is usually conveyed by "made qwyt"⁸ or "deliuerit innocent",⁹ less commonly by made "elene and eskies".¹⁰ Sometimes a conviction is announced in an almost apologetic tone. Thus the inquest at Carnwath say that they "cannoicht quit Jhone the grame of tribulane of my lordis court".¹¹ In the Justice Court the terms "fylit",

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- p. 111 ref ?
1. See the references in Wilson: Not Proven, Introduction.
 2. Aberdeen Burgh I, 4 (1410).
 3. Kennedy: Annals of Aberdeen II, 473 (1488), 476 (1508); Stirling 24 (1525), 31 (1527).
 4. Belkirk 22 (1513).
 5. ibid., 37 (1516).
 6. Frestwick 2 (1472-3).
 7. ibid., 52 (1527); cf. Kennedy: op. cit. II, 471 (1439).
 8. Peebles 124 (1457).
 9. Frestwick 23 (1473).
 10. Belkirk 14th July 1534 (not yet published); Trans. Dumfriesshire & Galloway Natural History & Antiquarian Soc. 3rd Ser., II, 203.
 11. Carnwath 12, 13 (1524); cf. Fife 211 (1521), 266 (1522); Aberdeenshire Sh. Ct. I, 53 (1510).

"convict" and "culpable" were in common use in the sixteenth century to express guilt, while "clene", "innocent", "acquitt" and "clangit" signified an acquittal.¹² In the early seventeenth century the combination "fylet, culpable and convict" became for a time the standard expression of guilt¹³ and "clene, innocent and acquitt" for innocence.¹⁴ Similar three-fold verdicts are also to be found in the Sheriff-Courts.¹⁵ In the Court of Parliament the forms "quittum fore et innocens et innocentum" for innocence and "reum criminosum et culpabilem" for guilt are to be found.^{15a} Isolated examples of "Giltye" are found surprisingly as early as 1595-7 in the Spynie Regality Court.¹⁶ The word is also used in an Edinburgh burgh ordinance of 1584, excluding certain cases from trial by assize and "nocht giltye" is found in 1570 in a verdict of the Canongate burgh Court (also in Edinburgh).^{16a} In the Justice Court it makes its appearance about 1609 but usually remains in combination with the older-established forms of wording.¹⁷ In the reign of Charles II it began to be used alone,¹⁸ but sometimes still "culpable" is added.¹⁹ Likewise not guilty is to be found,²⁰ but may be prefixed by "clene" or

12. Pitcairn I passim.

13. e.g. Justiciary Cases 213.

14. e.g. ibid. 69; Pitcairn III, 493.

15. e.g. Wife 136, 150.

15a. A.F.S. II, 137, 186.

16. Spalding Miscellany II, 130, 132, 140.

16a. Edinburgh IV, 370; Canongate 188.

17. e.g. "giltye, culpable and convict" (Pitcairn III, 60, 329;) see also ibid. 107 "Clean, Innocent and Not Guilty" (Justiciary Records I, 37).

18. Justiciary Records I, 45, 81, 307; II, 25, 98, 104.

19. ibid. I, 184.

20. ibid. I, 299, 312, II.

"cleaned".²¹ MacLaurin, noting the appearance of this practice, derives it from the innovations of the Cromwellian period²² and later writers have adopted this suggestion.²³ As has been shown, it is to be found earlier in the supreme courts. However it is true that there it was first used as a plea under the Commonwealth and that it is followed for a time in the barony courts which were re-established under the Protectorate.²⁴ In the remote Argyll Justiciary Court until 1680 guilty is the finding where it proceeds on the strength of a confession alone,²⁵ but the older forms such as "fyled culpable and convict",²⁶ "cleansed and acquitt",²⁷ "fris and quite"²⁸ persist. When the record is resumed after a gap in 1691 "guilty" and "not guilty" are found to have replaced them.²⁹ But in general it is not until well into the eighteenth century in circumstances to be discussed shortly, the modern forms "guilty" and "not guilty" firmly established themselves.

At the Restoration, however, the matter had been complicated by the introduction of special verdicts finding certain facts "proven" or "not proven". The practice arose in this manner. By the early seventeenth century it had become customary in the Justice Court to compose indictments of great complexity, in which the facts alleged against the pannel were listed as the minor premise of a syllogism, the

21. ibid. I, 19, 147; II, 121. Even in 1681 Fountainhall relates that the Council questioned erring assizers whether "they voted fyles and condennes, or clenges and assoilzies" (Fountainhall, 298).

22. MacLaurin xix.

23. e.g. Wilson, op. cit. 10.

24. Stitchell 7 (1656); S.H.S. Macellany III, 266 (1666) (Forbes Baron Court).

25. Argyll, 49, 56, 73, 76, 88.

26. ibid. 12, 14, 43, 119, 125.

27. ibid. 110, 129.

28. ibid. 99.

29. ibid. 129 et seq.

major premise being a statement of the punishable character of such conduct in general and the conclusion that the pannel ought to be punished for his commission of it.³⁰ In such cases as trials for witchcraft the description of the various incidents referred to might run to a score or more articles.³¹ To declare whether or not the facts alleged had been proved and thus whether or not the accused was guilty was the function of the assize. To simplify matters they might do so by referring to the charges by their numbers.³² Unfortunately it is not so easy to keep facts and law rigidly apart and the practice grew up for defence advocates to plead before the probation began that even if proved, the conduct charged was not sufficient in law to constitute the crime libelled in the major premise. In other words, they challenged the relevancy of the indictment. They did so by submitting elaborate arguments called informations in which points of law and assertions of fact - as yet unproved - were mingled. There might be a series of exchanges between the parties, each salvo being termed in turn the duply, triply, quadruply, etc. From some time after 1600 these arguments were dictated to a clerk of court, until an Act of 1695 restored the older practice of an oral debate.³³ On its conclusion, informations summing up the arguments were to be given in first by the prosecution and then by the defence in reply. If anything new appeared in these writings, the judges might hear the

30. See the example printed by Mackenzie in Matters Criminal II. xxi. iv.

31. e.g. Justiciary Cases 96 et seq.

32. e.g. "clengis the pannell of the hail poyntis ... viz. 1,2,3,4,5, and sext poyntis and fyllis hir in the sevint" R.P.C. (2nd) VII, 477 (1640-1); cf. ibid. VIII, 70; Aberdeenshire Sh.Ct. II, 26 (1603).

33. A.P.S. IX, 365.

parties again viva voce, the debate being minuted by the clerk. At first the judges were content simply to find the dittay in an interlocutor relevant or irrelevant; but after the Restoration the practice developed of issuing lengthy special interlocutors detailing the effect to be given to all the facts that might be proved in the course of the probation. Maclaurin attributes this change to the case of Marion Lawson in 1662 in which a woman was accused of murdering her new-born child.³⁴ The jury were unwilling to convict on the evidence, which consisted of her confessions, judicial and extra-judicial, but being uncertain of the presumptions arising from it, "remitted her to the consideration of the Justices", who ordered her to be whipped.³⁵ Thereafter, Maclaurin says, the Lord Advocate took even more care in the framing of dittays to detail every circumstance that might come out in the evidence and the judges in turn pronounced on its legal effect by declaring certain hypothetical findings sufficient or insufficient to support the crime charged. Juries in their turn, having in most cases respect for the superior knowledge and experience of the judges, constructed their verdicts on the model of the interlocutors. Verdicts termed special, as distinguished from the existing general verdicts, were then produced which related the facts found proved, often at considerable length, and likewise the facts found not proved. But the actual inference of guilt or its absence was left to be drawn by the judge. The jury merely found each of the charges

34. Maclaurin xix-xxii; Stair Soc. Introduction, 442.

35. Justiciary Records I, 47, 49.

proven or not proven.³⁶

This natural development is depicted by Arnot as a deliberate device on the part of the crown authorities to obviate the reluctance of assizes to return verdicts of guilty against the Covenanters.³⁷ This is probably less than a half-truth. Certainly the full flowering of the not proven verdict was not attained until the eighteenth century, when the persecution of the Covenanters had ceased. But there is no doubt that it was a development that was welcomed by Mackenzie, who was Lord Advocate from 1677 to 1687 and again in 1688. He forcefully argued in Matters Criminal that "the justices (should be) Judges both to the Relevancy and Probation" and would thus dispense with criminal juries. Among his reasons were that relevancy and probation were so closely linked that they were best considered together, that "Assizers with us, are oftentimes ignorant persons" (which in the High Court of Justiciary was probably untrue),^{37a} that it was a dangerous principle that assizers should be permitted to judge from their own private knowledge, that law was now a science in which the judges were presumed to be learned and no longer as ignorant as the assizers, and finally that "the most learned and polisht kingdoms and Common wealths" (among which England apparently was not to be numbered) had no juries.³⁸

For some years in the first two decades of the eighteenth century

36. e.g. MacLaurin, 14, 23. And see Hume II, 422; Arnot, 175; Journal of Jurisprudence XXXIII, 620.

37. Arnot 174.

37a. cf. Justiciary Records I, 275.

38. Matters Criminal II. xxiii. iv.

the verdicts of guilty and not guilty seem to have fallen completely into abeyance. But at the trial of Samuel Hale for homicide in 1726 the jury were satisfied that the accused had made out his defence and brought in a general verdict of not guilty without question from the bench.³⁹ Two years later, however, in the cause célèbre of Carnegie of Pinhaven, charged with the murder of the Earl of Strathmore, the jury's right to return such a verdict was emphatically re-established. There seems little doubt on the evidence, but that Carnegie had killed Strathmore, but he claimed that he did so in the course of a drunken quarrel with no intention to cause his death and so had not committed murder. Lengthy informations were submitted for the pannel and debated. Finally, according to the practice of the time, the Lords drew up an interlocutor finding rather ambiguously that Carnegie had "by premeditation and forethought felony" wounded the Earl, whereby he died, but allowing him "to prove all facts and circumstances he can, for taking off the aggravating circumstances of forethought and premeditation". He was then remitted to the knowledge of the assize, though it might seem that without the hearing of evidence their task had been accomplished for them. Robert Dundas of Arniston, later Lord President, in addressing the jury, asked for a verdict of not guilty, assuring them that it was a competent verdict still, and by a majority of twelve to three they found as he proposed. Unfortunately, no record was kept of this speech and the contemporary reports in a small

39. Hume II, 422.

volume entitled The Trial of James Carnegie of Pinhaven⁴⁰ and in State Trials IX make no mention of it. Hugo Arnot, however, writing nearly sixty years after the event, produced a highly-coloured version of the address from a few brief surviving head-notes, filled out with the recollections of Arniston's son, who was also Lord President.⁴¹ The language used, containing such phrases as "weak jurymen, trembling under the rod of power", seems more redolent of the romantic radicalism of Arnot's own time. Certainly, the case of Carnegie does not appear to have been regarded immediately as of an epoch-making character. Five years later, James Innes, admittedly an Englishman, mentions only the verdicts of proven and not proven.⁴² Bankton (1751), Louthian (1752) and Erskine (1773) make no mention of the case; Maclaurin (1774) does not report it, but refers to it in his introduction, stressing that the jury "only resumed a power that had anciently belonged to them".⁴³ Later writers, however, have followed Arnot in his estimate of the case,⁴⁴ though Hume prefers to stress the introduction of intention as an ingredient in murder rather than the form of the verdict.⁴⁵

Certainly, in retrospect, the case of Carnegie is of great significance in calling a halt to a process of attrition which might have led to the total extinction of the criminal jury. It did not however mean the end of special verdicts of proven and not proven. Innes says

40. 3rd ed. Edinburgh 1763.

41. Arnot 189-191.

42. Idea Juris Scotici 15.

43. Maclaurin xxi.

44. e.g. Tytler: Memoirs of Kames 35; Brunton and Haig 507.

45. Hume II, 422.

in 1733 "the Question Proved, or Not, is put by the Chancellor of the Assize, and carried by Plurality of Voices".⁴⁶ Louthian says that they may find "the Libel or Indictment is proven or not proven, or the Pannel guilty or not guilty, or that such and such Things are proven or not".⁴⁷ Thus at the trial of Captain Porteous in 1736 the jury passed a lengthy verdict finding each stage in the commission of the offence "proven".⁴⁸

Hume found it still worth while to discuss special verdicts,⁴⁹ but Alison in 1833 describes them as having "now become in a great measure obsolete".⁵⁰ Macdonald, noting that "verdicts finding facts and unaccompanied by any general finding are now unknown in practice", suggests that they would probably not be received until general findings had been added.⁵¹ The gradual decay of special verdicts is probably to be attributed to the abandonment by the judges of the practice of issuing special interlocutors on which the special verdict might be conveniently based. It was much simpler to find either guilt or innocence than a long series of facts proved or not proved. The abolition of written verdicts finally put paid to the special verdict.⁵²

The verdict of not proven, as we know, did not fall into the limbo of legal antiquities. It had so impressed itself on the mind of the layman during its brief span of life that it continued to be used and by Hume's time had acquired a new shade of meaning. As he puts it, "Not

46. Idea Juris Scotici 15.

48. State Trials VI, 791.

50. Alison II, 647.

52. supra 353

47. Louthian 112.

49. Hume II, 425 et seq.

51. Macdonald 341.

uncommonly, the phrase not proven has been employed to mark a deficiency only of lawful evidence to convict the pannel; and that of not guilty, to convey the jury's opinion of his innocence of the charge".⁵³ That description might still hold good today. The consequence is that the verdict of not proven carries with it a certain stigma, as if the jury wished to record their disapproval of the accused and his behaviour.

In M'Arthur v. Grosset, where a magistrate had declined to hear evidence for the defence and found the charge not proven at the close of the prosecution's evidence, Lord Cooper did not dissent from this view of the import of the verdict submitted by the appellant's counsel and considered that justice would be done by the substitution of a finding of not guilty.⁵⁴

Permitting the jurors a three-fold choice of verdict has the disadvantage that they may so divide themselves that there is no clear majority for any one verdict. Since the foreman is not required to report the state of the voting, but only whether the verdict was unanimous or by a majority, it is possible that injustice may have been done in this way unobserved. At a sheriff-court trial in 1958, however, defence counsel with the permission of the Sheriff inquired through the Sheriff-Clerk as to the size of what had been reported as a verdict of guilty by a majority and was told by the foreman that six jurors had voted for guilty, five for not guilty, and four for not proven. Counsel submitted that this amounted to an acquittal and the Sheriff directed that a

53. Hume II, 422.

54. 1952 J.C. 12; but for another view of this case see Smith 228.

cf. McGuire v Brown 4903 S.W.2d 95 (Iowa 1993)

verdict of not guilty should be recorded.⁵⁵

There does not appear ever to have been a firm rule in Scotland that every member of an assize must vote in one way or another. By contrast, the English criminal jury, besides having to return a unanimous verdict, might be kept without food or drink until they had made their deliverance.^{55a} Thus each man was constrained to vote. In Scotland

it was at least possible to return a verdict of non liquet, certainly in civil and perhaps in criminal matters. It was, however, a practice which was tolerated rather than approved and one which might be overridden. Balfour states that in the serving of briefes an inquest which refuses to deliver affirmative or negative may be charged by letters raised at the instance of the parties to convene on another day and make a deliverance. And if it is obscure, they may be obliged to re-inclose until they produce a clear judgment.^{55b} Thus in a protracted case of

*These
deliberations
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apprising of lands in the Dunfermline Regality Court in 1532 the assize refused to deliver, protesting that they were "simpl men chossin heyr on and the actione intentit grit and aganyis one grit and noble man and thai culd nocht gudly decern heyrintill quhill thai var reconcilat with vtheris hewand vnderstandyng heyrintill". Letters were obtained from the Council, charging them to deliver on pain of twenty pounds and of being inclosed until they did so, but it was only after they had been further threatened by means of royal letters with being put to the horn

55. Lord Adv. v Nicholson 1958 S.L.T. (Sh. Ct. Repts.) 17.

55a. P. A.M. II, 626.

55b. Balfour 287; cf. Hope, Major Practicks v. 12.4.

that they gave their valuation; a significant illustration of the unenviable position of jurors where the interests of local magnates depended on their verdict.^{55c} Again in another case of apprising in 1529, where the inquest "after long communicatioun past furth of the tolbut and deliverit nouth affermatife nor negatife", the party doing diligence complained to the Lords of Council and obtained from them letters summoning the assizers to convene again and remain in the tolbooth until they had produced a verdict, which a portion of them did.⁵⁶ In Donypace e. Lord Oliphant the refusal of one man, the chancellor, to vote, on the ground that "nane of the saidis pairties hes justlie decernit in the matter" resulted in an equal division of votes and he was compelled by the Lords of Session to deliver one way or the other.^{56a} A complex situation arose in the later case of Chiesly v Baillie in 1675, where cognition was to be taken of marches. Half of the inquest was summoned by each party and the odd man was chosen by lot in accordance with the act of 1587.⁵⁷ They heard three witnesses for each party and two who were put forward by both. On the vote being taken, six held that the land was common, eight were non liquet and the chancellor declined to vote, since the inquest were not equally divided. The Sheriff refused to grant decree on such a deliverance
and/

55c. Dunfermline Regality 63, 66-68, 75-76, 77-80, 82-83. Cf. Gavin Ros 189

56. Yester House Writs 139. For a further example of this form of coercion see Fife 259, where (also in an apprising) the chancellor complained that the assize were ignorant of the value of the land, but were ready to act if they were given evidence of it. See too Aberdeenshire Sh. Ct. I, 126, 137 (service of terce) and Fife xcix n.1.

56a. M. 14422; Balfour 288.

57. A.F.S. III, 446.

and the case was advocated to the Court of Session. It was argued for the party favouring commony that in Scotland, unlike England, the members of an inquest were not compelled to vote and that the opinion of those who did choose to vote should be given effect to. The other side replied that six could in no way speak for fifteen, who, it was agreed, were necessary to form a quorum. The Sheriff ought to have appointed another day for the inquest to make a clear deliverance. The Lords held that where the greater part of the inquest were non liquet the verdict was null and they ordered both parties to lead probation before themselves.⁵⁸ There appeared, however, to be no doubt as to the competency of individual jurors in civil cases delivering non liquet.^{58a} In criminal cases no examples of individual assizers delivering non liquet have been found. Indeed, in one exceptional case, with political implications, the Chancellor and Lords of the Council directed the Justice to "cause ye assise proceed and depart nocht furthe of ye Tolbuthe, quhill thair had owtther maid thame quyte or fylit thame of ye said slauchtir".⁵⁹ Mackenzie deduces from the requirement in the Articles of 1672 that the chancellor should mark whether each assizer condemned or assolized that such a verdict was not competent in criminalibus.⁶⁰ However, the brevity and paucity of criminal records prior to 1500 is such that the possibility of such a verdict cannot be excluded.

The sometimes erratic and confused verdicts delivered by assizes, especially during the period when they had to be written, were

58. M. 12740; Observations James VI, Parl II, Act 42. 58a. Cf. A.D.C.&D.
59. Piteairn I i, 131 (1525). 125
60. Observations Charles II, Parl 2, Sess. 3, Act 16.

controlled to some extent by the possibility of a bill of suspension being brought before the High Court on the sentence of an inferior court⁶¹ or of a reference of a case by judges on circuit for the consideration of^{the} whole court.⁶² It is an obvious and natural requirement that the verdict should be consistent with the terms of the indictment. The Criminal Procedure Act of 1887 has introduced numerous instances where a verdict may depart from the wording of the indictment, such as conviction of an attempt on an indictment charging with a completed crime or conviction of breach of trust and embezzlement on an indictment charging with theft.⁶³ This has reduced the possibility of error in the general verdicts which are now the rule. But when special verdicts were in use, it frequently happened that the facts found proven, departing from the special interlocutor, if any, did not amount to the crime libelled against the pannel. When jurors no longer had the guidance of special interlocutors, the opportunities for error were multiplied. Hume considered it necessary to devote considerable space to such inept verdicts, analysing and classifying the various pit-falls awaiting the unwary jurors. Thus the finding might establish guilt of a lesser offence than, but one of the same character as, that charged. But it was settled after a debate in the case of Thomas Muir in 1798 that a verdict of culpable homicide was competent on a charge of murder.⁶⁴

61. Hume II, 494.

62. ibid. 27; MacLaurin, 87.

63. For a full list see Renton & Brown 125-7.

64. Hume II, 433.

Or the facts found might not be linked by some such phrase as "as libelled" to the indictment, so that the pannel appeared to be convicted of the offence, but not of the particular instance of it libelled.⁶⁵ Sometimes the facts found proved might not amount to any crime at all. Thus on a charge of riotous assembling the jury found it "proven" that the pannel was "guilty" of demanding a document from a depute-lieutenant "in a strong but respectful manner". It was found by the whole bench that no judgment could pass on such a verdict.⁶⁶ The case of William Munro in 1799 exhibits several of these deficiencies. He had been charged with the theft of mail by "feloniously abstracting" it from a mail-bag. The jury found him "guilty of abstracting" the mail, but did not find him guilty of theft or refer to the indictment or use the word feloniously. As the defence was that the pannel admittedly did abstract the mail, but not in order to appropriate it but merely to obtain the postages, the verdict was found bad, in spite of the use of the word "guilty".⁶⁷ Any verdict must of course also be consistent within itself. Thus in Hamilton and Others v. H.M. Adv.⁶⁸ three men were charged with formulating a scheme to defraud, while acting in concert, there being four separate charges in the indictment. They were all found guilty of the fourth charge, and such a finding necessarily implied participation in the whole fraudulent scheme, yet the other charges had already been found not proven as to certain of them. On an appeal the convictions of all the accused were quashed.

65. ibid. II, 434.
67. Burnett 127, xxv.

66. ibid. II, 430.
68. 1938 J.C. 134.

X. Majority Decision

From at least the fifteenth century the verdict of the jury in Scotland has been determined by majority vote. This is a further instance in which Scottish procedure has differed sharply from that of England and the numerous countries which have adopted it. It is not, however, a feature which calls for any elaborate explanation. It is rather the English rule of unanimity - "that preposterous relic of barbarism", as Mollam called it¹ - that requires to be accounted for. Pollock and Maitland have attempted to do so by pointing to the desire for a clear-cut decision, comparable to that produced by the former ordeals, and to the inchoate notion that a man, in being tried, was being "put on his country"; and the community, like a corporation, spoke with a single voice.² In England the practice was facilitated by the emergence of the number twelve ~~prior to~~^{after} 1300 as the appropriate size for the trial jury.³ It was a determinate and reasonably small body; and so long as its members came from a single closely-knit community and thought alike, it was not too much to require unanimity of them. It was not until the mid-fourteenth century that this usage matured into a firm rule,⁴ but long before then, as Pollock and Maitland write, "in a thousand cases the jury is put before us as speaking with a single voice".⁵

1. The Middle Ages (1872 ed.) II, 406.

2. P. & M. II, 623 et seq.

3. supra 30

4. Holdsworth I, 318.

5. P. & M. II, 626.

In Scotland the position in this early mediaeval period is not free from obscurity, but it seems probable that verdicts were arrived at by taking what we would call today "the sense of the meeting". A vague practice whereby the dominant opinion in the group became the voice of the community, but the dissenter was not entirely suppressed, lingered on much longer than in England and in time hardened into a rule whereby, instead of being coerced into agreement, his right to differ was recognised. In the fourteenth century political relations between England and Scotland were not, such as to encourage the borrowing of English usages.

For this thesis the evidence is admittedly sketchy and in part negative, but nevertheless, it is thought, adequate. In Scotland, the sense of community and of individual identity ran very strong, unencumbered by the levelling influence of itinerant royal justices as in England. Particularly was this true of the burghs, all of which were by modern standards no more than villages in size and population.⁶ The compactness of life in these townships was mirrored in the single legal personality of the communitas, in which the individual personalities of all the adult male inhabitants were subsumed. This corporate personality exercised itself through the burgh court, in which, as we have seen,⁷ all the business of the community was transacted, administrative, executive and judicial, and of which all the burgesses were members. The community acted as one in granting charters of lands, in making payments and

6. For a recent discussion of this topic see Aberdeen xlv.

7. supra 82

issuing receipts, and even in creating a pledge of itself in security.⁸ The records of the acts of courts, when they are not bare memoranda, make frequent references to the taking of decisions by "the hail communitie" or "the nychtburis".⁹ Thus when the community chose to act through an inquest or assize - a committee of the suitors of court - it is not surprising to discover that their findings should be recorded in words suggestive of complete and general agreement. It does not exclude the possibility that this may at times have been something of a legal fiction, though no doubt in most instances the closeness of the community life would leave no room for two opposed views of fact to arise. In the rural areas there is the same emphasis on the patria, the homeland, which Dickinson identifies with the sheriffdom.¹⁰ Inquisition is invariably made "per probos et fideles ac antiquiores patrie" or some such formula. A man accused puts himself on his country and a good assize. The deliverance of that assize is thought of as the voice of the whole neighbourhood.

In this connection there is surely much significance in the phrase "all in one voice" or some variant of it, which figures so commonly in records of decisions of all kinds from the fifteenth century. It has not been observed earlier than 1472,¹¹ but the paucity of burgh records

8. Aberdeen xlix - li.

9. e.g. "ordinatum fuit per maiorem partem communitatis ibidem congregatam" (Aberdeen 211-1401); "J.L. was chalangit be the balyhais and the commonite of the forsayng .. of his fader guide" (Peebles 131-1459); "ye haile comunite" find four persons "common rebellouris and opressouris", (Prestwick 24-1474).

10. S.H.R. xxiv, 240.

11. "una voce nullo discrepante" (Irvine 20).

before that date and the abbreviation of those that survive and have been printed is such that its use before then cannot be ruled out. Thereafter it is found repeatedly and in many contexts. The magistrates and council of Glasgow act in 1574 "all in one voce".¹² "Jugis arbitratouris" at Perth in 1532 decree in a family feud "all in one voce but discrepance".¹³ It is used by Parliament in the Act of 1475 authorising the King and Justice to summon jurors and inquire "gif thai accordit al in a voce".¹⁴ And it is used in innumerable verdicts and retours. David Murray, discussing this phrase, speaks of it as "not mere words of style". He continues "The one voice, the common decision, the one act, the consensus in idem placitum, created community".¹⁵ It seems then to be an expression engendered by a sense of community and probably takes its origin in the murmur or shout of approval, which would be the normal mode of taking a decision when all proceedings were in public and all participated in them;^{15a} just as even today resolutions may be passed at public meetings by a chorus of "ayes", while the minority is not bold or numerous enough to make itself heard.

It does not, however, in itself, imply unanimity. This is evident from numerous instances where the remainder of the verdict excludes such a possibility. Thus at Peebles in an administrative matter we read

12. Glasgow I, 8.

13. Lamont Papers 40.

14. A.P.S. II, 111.

15. Early Burgh Organisation in Scotland II, 115.

15a. Cf. 'una voce dicentes et clamantes' Boyd Papers 165. But at an Ayr burgh head court in 1475 each man seems to assent individually to the appointment of a clerk, viz. "Ye hale cominte heard present and consentend yairto ilke man be his awn voce" (Ayr MS. Court Book 1428-1478 f. 139a).

"The hail inquest all in one voce, except A.F., fyndis it necessare that the custum be ropit to the maist availl".¹⁶ In a witchcraft trial at Aberdeen the entry is found "The hail assise, in one voce, for the maist pairt, (except thrie, to wit, T.D., P.H., and W.M.) be the mouth of J.S. chancellor, convictis..."¹⁷ Even in the Justice Court a similar formula is found.¹⁸ When it is desired to stress that in fact there was no opposition, the phrase "but (without) ony variance" (or an equivalent) is sometimes added.¹⁹ In the Sheriff Court Book of Fife the same emphasis is conveyed by the words "but variacione or discrepans".²⁰ However, this odd verbal usage is of assistance to our argument in demonstrating the persistence of the notion of the voice of the community. Even when it had to be so qualified as to lose its face meaning entirely, it continued to be invoked. It is surely an example of one of those consecrated phrases beloved of men of law which long outlive their original meaning, being preserved by the weight of tradition and the solemnity of the occasions on which they are used. Thus its persistence and widespread application in the sixteenth century argue a long prior period of use for which recorded evidence is lacking. The introduction into trial for wilful error of a distinction between those who erred and those who did not may have led to demonstrations of solidarity by jurors expressed in

16. Peebles 333 (1571).

17. Spalding Club Miscellany I, 102 (1597). Cf. Aberdeen Burgh I, 104 (1522)

18. Justiciary Records II, 98, 104 (the expression may be that of the compiler of the MS. there printed).

19. e.g. Inverness II, 72. See also Aberdeen Burgh I, 144 (1532).

Stitchell 7 (1656); Spalding Club Miscellany I, 110 (1597).

20. Fife xviii, 135, 150. Cf. Carnwath xciv.

the phrase "all in one voice", but it does not account for the appearance of the phrase in quite different contexts. The "one voice" then will refer to the general consensus of opinion at the gathering; the dissenter is not compelled to submit to it - his voice is simply lost among those of the majority.

There are indeed occasions where the unanimity of the finding is stated plainly. Thus at Inverness in 1295 the value of lands is determined "per bonos probos et fideles homines patrie unanimi assensu".²¹ A verdict of an inquest in 1320 as to whether lands were held in regality is given "unanimiter".²² Another in 1341 on the right to second teinds is given by men "qui omnes et singuli jurati ... deposuerunt".²³ Jurors in 1374 gave "all agreeing" a verdict on the contents of lost charters.²⁴ From this an argumentum e contrario may be drawn to suggest that where unanimity is not mentioned, there was in fact no unanimity or at least that no exact tally was taken of the opinion of each man present. It may be significant too that habitually only a proportion of an inquest attach to the retour their seals. The phrase "sigilla quorundam eorum qui dictae inquisitioni intererant appensa sunt" becomes almost a fixed style.^{24a} However this practice does not necessarily imply a lack of unanimity. It may be that no more of the jurors

21. Cawdor 3.

22. Melrose Regality I, xv.

23. Aberdeen Epis. I, 69.

24. Yester House Writs 27. See also St. Andrews 3 (1395) ("unanimi et concordi consensu eorum nemine discordante"); Antiquities of Aberdeen & Banff III, 263 (1397); Aberdeen Epis. I, 245 (1446) ("na-man discrepand"); Aberdeen Burgh I, 18 (1449); Spalding Club Collections 283 (1457); Peebles 172 (1474); Prestwick 25 (1475); Aberdeen Burgh I, 36 (1477) ("na man ganestand").

24a. Following A.P.S. I, 575.

possessed seals of their own and cases where only a small minority of the inquest affixed their seals would seem to confirm this explanation.²⁵

It is really no occasion for surprise if the records do not make mention of a dissenting or doubting minority. These acts were not committed to writing for the enlightenment of posterity. Retours were warrants for action - such as for the infeftment of the person served as heir in the lands and by the tenure sworn to. He sought a clear-cut answer; divided voices would only encourage other interested parties to challenge his right. As Balfour puts it, "Ilk lauchful judgment sould be gevin and zeildit cleirlic out of ane mouth, and be ane toung".²⁶ The public interest was also "ut sit finis litium". In administrative inquisitions the answer must be precise if the action that was to follow upon it were to win acceptance. The "quest" or the Council of a burgh making ordinances for the common welfare must do so without qualification if they are to be obeyed.^{26a} In perambulations, particularly, the disputing parties asked for an unambiguous boundary. Unless they were agreed as to the precise nature of their dispute, there might be an infinite number of opinions among the inquest and it must have been difficult to achieve even a majority decision; hence the common use of a small group of arbiters, whose deliverance would be taken to be as binding as that of the ambulatores acting on a brieve. An interesting

25. e.g. Couper Angus II, 46.

26. Practicks, 281. But see Melrose II, 694.

26a. In 1480 the Aberdeen Council took the drastic step of ordering that the "gainstandaris" of an ordinance for the building of walls should bear the expense of their erection. (Aberdeen Burgh I, 37).

attempt to overcome this difficulty is to be found in 1388 in Angus where the fixing of the boundaries is entrusted by the seventeen assisors to four liners whose division the assize adopt as their own finding.²⁷

A further reason militating against the disclosure of a dissenting minority is the emphasis in the procedure of the lesser Scottish mediaeval courts on the amicable reconciliation of conflicting views. Thus the record of a boundary dispute in 1281 tells how the "lis mota sopitur pro bono pacis et finali concordia".²⁸ At Aberdeen in 1317 a day is appointed for the parties "ad concordandum in amore".²⁹ If disputing parties were made aware that the jury was itself divided over their quarrel, the harmony that was one of its objects would not be achieved. Consequently it appears to have been thought unseemly that dissension among the assize should be displayed in open court. Thus at Haddington in 1425 we are given this graphic description of procedure: "than A.H. one of the sayd ballis sperit at the sayde assyse gife thai war accordyt qwhilkis answerit za and than the balze spirit qwha suld say their concordance".³⁰ At Peebles we read that the assize "come hyn agayn accordit theirapon".³¹ Dalfour states that inexperienced assizers should be warned by the judge to be fully accorded on their verdict before giving judgment.³²

27. Ramsay: Benff Charters and Papers 21.

28. Aberbrothoc Vetus 164.

29. Aberdeen 8.

30. P.S.A.S. II, 386.

31. Peebles 138 (1460).

32. Practicks 281.

Finally there can be no doubt that, as in England, the replacement of trial by ordeal and by battle in criminal cases by the more rational methods of assize and compurgation would be accompanied by a demand that these institutions should produce as clear-cut and unmistakable an answer as their more primitive fore-runners. Compurgation, where the oaths of a determinate number of persons must concur, met that requirement. For several centuries it remained a rival of trial by assize;³³ assizes would not survive in criminalibus as an alternative unless they could provide equally definite verdicts.

On the other hand, account must be taken of the very persistent tradition that the assizers were witnesses, trustworthy local people, preferably of mature years, who spoke from their own knowledge. In the process upon brieves this was quite literally what happened. Conflicting evidence is weighed, other things being equal, by the number of witnesses speaking to it. Once the court accepts one version, the other is of no consequence. In the same way, it may be suggested, dissenting jurors when the majority failed to win over, were entitled to their opinion, but would not expect it to be reported by the forespeaker to the judge along with the majority view. The institution of arbitration, which, as we have seen, was through ecclesiastical influence frequently resorted to and was an alternative to the assize in boundary disputes, also preserved the principle of majority decision, with indeed the provision of an overman to obviate equal divisions of opinion.

33. Aberdeen cxxxiii; Peebles 118.

We may conclude then that at no time was a positive affirmation of unanimity, as in England, a sine qua non. Verdicts were arrived at by taking the general sense of the meeting without the sharp cleavage of a formal vote. The dissenter was free to disagree with the majority without vitiating their finding, but equally without his dissent being treated as of any consequence. This rather ambivalent situation was brought into question by the passing of two acts in 1471 and 1475 designed to facilitate inquiry into erroneous verdicts. As will be more fully discussed shortly,³⁴ provision was made in Regiam Majestatem I, 14 for the punishment of assizers "temere jurantium". By the fifteenth century it was probably falling into desuetude, but these two statutes gave it a new lease of life. If, as we have concluded, assizes, civil and criminal, need not be unanimous, and if they were to be subject to punishment for delivering an erroneous verdict, it would seem just that some effort be made to discover the view held by each juror. It is some indication that a right to dissent was already de facto recognised that the act of 1475 does make such provision without any suggestion of sanctioning an innovation.³⁵ It is limited to criminal actions and allowed the King and his Justice to call before them an assize who had absolved an accused and inquire as to how each of them voted if not "all in one voice". Those who were in favour of an acquittal, if they refused to admit their fault, might themselves be put on trial before a larger assize. The Act of 1471,

34. infra 386

35. A.P.S. I, 111.

which appears to have been directed towards errors in civilibus, does not admittedly make provision for thus separating the sheep from the goats.³⁶ But quite soon the practice of the courts extended this facility to civil cases too. In 1491 it was held in the case of Arthur Forbes c. Dischington and others that where members of an inquest on the serving of a brieve had opposed the deliverance and made a protestation of their dissent, they should not suffer punishment for the error committed by the majority.³⁷ By 1501 the Lords of Council were taking the trouble to summon the jurors and inquire how each of them voted.³⁸

It may confidently be conjectured that it was this procedural development that brought out into the open the then latent rule of majority verdicts. From now onwards there was no hesitation in admitting that a verdict, civil or criminal, was reached by a majority, though no doubt most continued to be unanimous. The frequent use of "all in one voice", even when dissenters have to be admitted, stresses the sense of solidarity which the threat of punishment engendered in jurors.³⁹ Procedural accounts, such as the "Relation of the Maner of Judicatores" mention it as a feature of Scottish procedure that "the verdict is accordinge to the voyces of the greater number";⁴⁰ and that "the prisoner is convicted or cleered by pluralitie of voices".⁴¹ Craig, in

36. ibid. 100.

37. Balfour Practicks 287.

38. A.D.C.(Stair) 133, 159. In 1563-4 the dissent of two men in the serving of a brieve is recorded by a notary (Mark Carruthers 10). See

39. Of Pitcairn I i, 450 (1564).

also A.D.C. & S. 123

40. S.H.R. xix 271.

41. ibid.

making the same point, says that this rule follows "the principles of the civil law, in which the verdict of the majority is both final and deemed unanimous" and that it is also consonant with canon law.⁴² This may well be true, although no evidence of direct imitation has been discovered.

The only points which remained in doubt were what was to be done when the jury were equally divided and whether an effective majority might be as small as one or two votes. The first question, as we have seen,⁴³ encouraged the exclusive use of odd numbers, usually thirteen, fifteen or seventeen, and when practice finally settled on fifteen the problem was solved provided all voted. But at first there was a tendency to treat the chancellor, perhaps by analogy with arbitration, as an overman, who should only vote to decide an equal division of opinion. Thus in the case of Donspace v. Lord Oliphant in 1554 he is referred to as "chancellor and odman".⁴⁴ In a perambulation the remainder of the inquest were equally divided and the chancellor declined to vote, but on the case being referred to the Lords, was compelled by them to do so.⁴⁵ The author of the "Manner of Holding Justice Courtes in Scotland" goes so far as to say on two occasions that "the chauncelor hath 2 votes".⁴⁶ Lowther in his "Account of a Journey into Scotland" (1629) also states that he "hath two voices".⁴⁷ Both these commentators were strangers,

42. De Unione 306.

43. supra 303

44. A.D.C. (Public) 436.

45. Balfour Practicks 288; M. 14422.

46. S.H.R. xix 158, 159.

47. Hist. MSS Comm. 13th Report, Appx. 7, 75.

and surviving lists of assizes in which the division of votes is recorded do not support them.⁴⁸ It seems probable that this was a provision applicable only so long as an assize of even number was still possible and designed, by imitation probably of arbitration, to obviate an equal cleavage of opinion. Once assizes became invariably uneven it would fall into desuetude, but the recollection of it would be fresh enough to be discovered by these observers. The only evidence of such a rule occurs much later in the case of Janet Nicol, where seven of the jury, including the foreman, found the libel proved, seven found it only proved as to one item, and the remaining juror, who voted last, was in favour of a verdict of not guilty. The foreman then exercised a second vote in the same sense as the first. The court declined to receive evidence as to proceedings in the jury-room, so the propriety of this practice was not settled.⁴⁹ The foreman was in any case probably simply acting on his own initiative in the dilemma in which he found himself. In the procedure appointed by an act of 1587 for actions of molestation, it was laid down that where both parties had begun proceedings and summoned assizers, the judge should choose half the assize from each list and "ye edman salbe chosin be cavill" (i.e. by lot).⁵⁰

The case of Donypace c. Lord Oliphant seems also to have established by implication at least that a valid verdict might be

48. Fife 82; Pitcairn I i, 448, II, 52 n. 1, III, 101.

49. Maclaurin 373-4 (1767).

50. A.P.S. III, 446; MacKenzie, Observations James VI, Parl. II, Act 42.

reached by a majority of one vote only. As Erskine says, "The narrowest majority operates as strongly against the pannel as for him".^{50a} Such majorities seem to have been accepted without question as valid exercises of the jury's function, even in oriminal cases carrying a capital sentence.⁵¹ Sometimes, however, the narrowness of the verdict being known, it was used as an argument for remitting or reducing sentence. Thus in 1633 a man made a supplication to the Privy Council stating that as his "convictioun went upone on or two of the assysouris voces" the judge gave him the benefit of a general pardon, but nevertheless he was still lying in prison.⁵² And in 1662 the Council was petitioned by an accused who asserted that his conviction was carried by the vote of one assizer only and that he admitted to being misinformed. They appointed two of their number to hear the parties and report to the Lord Chancellor.⁵³

The topic of the majority verdict is not in itself discussed by Hume or Alison: so much was it taken for granted by them.

50a. Erskine IV. iv. 101.

51. Arnot 149 (1678).

52. Justiciary Cases 224.

53. R.P.C. (3rd) I, 192; Justiciary Records I, 33.

XI. Wilful Error

Even when the jury had returned their verdict, whether civil or criminal, they still had a certain responsibility for it, for if it could be proved that they had acted perversely in defiance of the weight of evidence, they themselves might be punished for wilful error. This was an ancient procedure which was perhaps understandable under a rudimentary judicial system before the role assigned to the jury was fully clarified. In a system of justice which was still predominantly localised, it constituted also a rough attempt on the part of the central government to create uniformity of decision and to overcome the interests of local magnates and factions. But in its criminal form it was used by the later Stewarts to help to pacify the country and ultimately became a weapon of royal despotism.

Attaint for wilful error rested initially on Regiam Majestatem, Book I, Chap. 14,¹ which provided, without distinction between civil and criminal causes, that jurors who either admitted to wilful error or were convicted of it by an assize of twenty-four "homines legales" should forfeit all their moveable goods to the king, be imprisoned for at least a year, lose in perpetuity the protection of the law and remain infamous.² These severe penalties are said to be in deterrence of the abuse of oaths by others.

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1. Based on Glanvill: II, 19 (For the corresponding English development of the writ of attaint, see Holdsworth I, 337-347.)
 2. Skene in his edition of Regiam Majestatem, confines the operation of I, 14 to "them quha passes vpon the assize of the brieve of richt, or of anie other brieve". But in his own time brieves of right (if still in use) were excluded by the act of 1471 as being pleadable.

Reported cases of trial for error are rare prior to the series of acts passed in the late fifteenth century, but one notorious case of perversion of the procedure deserves mention.³ King James II, on reaching majority, sought to have reduced in his own interest a service of 1438 retouring Thomas Lord Erskine as heir to his father in the lands of Mar. For this purpose seven men, presumably the survivors of the inquest, were summoned before the King, his Chancellor and members of his Council at a Justice-Ayre held in Aberdeen in 1457. Five of them were questioned individually and confessing that they had been persuaded "per blandia et ficta mendacia" they came in the King's will. Without any explicit quashing of the retour, other than the mere assertion of its invalidity by the Chancellor, Erskine was then offered a new brief of succession which he accepted. The new inquest of twenty-one included the five confessed perjurers of the earlier one and it held that Thomas was not heir to his father in the lands of Mar. This display of royal despotism in a faint legal guise emphasises the unenviable position of members of assizes and inquests who found themselves drawn into the feuds of great magnates. They must often have acted "partly through fear and partly through persuasion", as Hope says, recounting the case, in informations in a later litigation concerning the Earldom of Mar.⁴

The somewhat elastic provisions of the "auld lawes" were reinforced by two statutes of 1471 and 1475. The first of these seems to be

3. Antiquities of Aberdeen and Banff IV, 205.

4. Spalding Club Miscellany V, 276. For a critical analysis of this episode see Crawford & Balcerres: The Earldom of Mar I, 282-296.

confined to civil matters. It narrates that "for ye eschevyn of maneswering of fals Inquestes and Assises in gret hurtyn of our souerane lordes lieges and specially be ye inquestes in thar heretage" anyone aggrieved by the partiality, malice or oppression of a jury, except in a pleadable brieve, may summon the jury before the Council and prove to them the ignorance or falset of the jury. If he does so successfully, the decision of the jury is to be of no avail and its members are to be punished in accordance with the rules in Regiam Majestatem. But if the complainer is found to be in the wrong, he is to forfeit ten pounds and pay the expenses of those he summoned.⁵ Pleadable brieves where defenders were called, such as the brieve of division, thus remained unchallengeable, the reason being, Kames suggests, that they were contentious and the act of liti-contestation obliged the parties to accept the verdict.⁶

Mackenzie seems to have regarded this act as, potentially at least, applicable to criminal verdicts;⁷ and the ambiguity as to the intended scope of the Act of 1471 contained in the words "Inquests and Assises"⁸ may have led to the passing of the Act of 1475 which, in its opening words, makes it plain that it is "twiching ye Reformacione of fals assise passand vpon criminalis accens...." only.⁹ To have permitted the King's Council to over-ride the verdict of criminal assizes would have been a dangerous innovation making a mockery of the independence of the jury and the inscrutability of their verdict, a principle first enunciated in

5. A.P.S. II, 100.

6. Historical Law Tracts 281-282. See 176^{supra}. Cf. Stair III.v.42.

7. Observations James III, Parl 6, Act 48.

8. See 58^{supra}.

9. A.P.S. II, 111.

Quoniam Attachiamenta, Chap. 82. It would, moreover, have weakened the position of the Justiciars and Sheriffs. A quarter of a century later the independence of the machinery of criminal justice was affirmed in the case of The King v The Sheriff of Fife, where it was held that the Lords of Session were not competent to judge in criminal causes and if the deliverance of an assize were challenged before them, they should remit the matter to the Justice and his Deputes to be tried by a great assize.¹⁰ So the verdict was allowed to stand, whether or not the assize were found to be in error.

The procedure appointed was as follows. The King and his Justice called before them an assize that had absolved an accused and inquired how each of them had voted. Those who were for acquittal might be accused, again before the King and his Justice, and if they admitted their fault, they were to be punished according to the "auld law". If they still denied it, a great assize of twenty-five notable or noble persons was to be summoned and that assize was to be shown the same probation as the first.¹¹ If they found that the pannel had been wilfully acquitted, those who voted thus were to be punished, again conform to the old law, but the offender was to remain "qwit".

The act is only concerned with unjust acquittals. Mackenzie speculates that the reasons were that no assizer would condemn unjustly, but might show favour in absolving; that if they were punished for

10. Balfour, 266.

11. A rule implicit in Quon. Att. c. 82.

condemning, assizers would never risk doing so; and that being unpaid, they should not be treated too harshly.¹² These reasons are not very convincing and probably this bias was prompted by the monarch's personal interest in the preservation of good order, which the assizers' sympathy for or fear of a pannel might militate against. Mackenzie was nevertheless of the opinion that if an assize were to condemn "without any shadow of probation", they might be pursued under common law.¹³ The wording of Balfour's report of The King v The Sheriff of Fife would seem to envisage an assize of error on a conviction¹⁴ and Regiam Majestatem I,¹⁴ certainly does not exclude the possibility; but there appears to be no record of such a practice. It is not clear whether a minority of assizers who voted for an acquittal could still be subject to attaint for wilful error, even although, their opinion not prevailing, the pannel did not go free. Mackenzie, ever a rigorist, believed that they could be, since they were guilty of perjury and the old law was directed against those "temere jurantes super assisam", but he admitted that the Justices did not incline to this view, for in practice error was only pursued when the accused did go free.¹⁵ Hume later recorded that "the course of practice... does not record a single instance of indictment for a rash conviction".¹⁶ That being so, the menacing of assizers by defence counsel with threats of prosecution for wilful error should they condemn¹⁷ was more bluster, designed to counteract the contrary threats of the prosecution, which did have some substance.

12. Observations James III, Parl 8, Act 64.

13. ibid. Matters Criminal II. xxiii. xii. 14. Balfour, 266.

15. Observations, loc. cit. After 1672 the votes could have been discovered from the verdict. 16. Hume, I, 408. 17. See supra 319

Such was the scheme originally laid down in statute. How did it work out? Quite soon two amending acts were necessary. The first of these in 1491¹⁸ declares that in a summons of error the parties challenged shall be called to compare personally and that if they fail to do so, the case will be heard without a second or third summons. The raisers of briefes of error must also have given trouble by their non-appearance, for if they have failed to appear they are threatened in the same Act with a penalty of forty shillings and the payment of the expenses of the parties summoned before they will be heard in judgment again on the same brieve. The second Act in 1496¹⁹ declared that all summonses of error must be raised within three years of the process and retour complained of, otherwise the right would be lost in perpetuity. Summonses then depending were however safeguarded and persons aggrieved by retours made more than three years previously were permitted to challenge them during the three years after the passing of the Act. It would seem unreasonable that rights acquired on the strength of services should be perpetually subject to question and this enactment appears to put a fair limit to the right of challenge. In 1617, however, a distinction was made between the reduction of retours and services and the punishment of the erring jurors. The time limit for the former was extended to twenty years, it being asserted that "the trew meaning and Intention" of the Act of 1494 was to protect the jurors and not to prejudice heirs in their rights of

18. A.P.S. II, 227.

19. A.P.S. II, 238.

succession. The members of the inquest, on the other hand, remained subject to prosecution for wilful error for three years only.²⁰ The heirs of deceased assizers were not liable for the error of their predecessors; but though some of an assize had died, the survivors might still be pursued for error.²¹ Bankton points out that this Act, applying only to future retours, was statutory not declaratory, despite its phraseology.²² By an Act of Sederunt of 1591 "noble persons" was interpreted for the purposes of the great assize to mean landed men, even though inferior in rank and dignity to those whom they were trying - a breach of the principle of trial by peers.²³

The statute of 1471 came close to providing a general recourse for civil appeals on the merits. The published Acts of the Lords of Council 1478-1495 and Acts of the Lords Auditors 1466-1494 give some impression of the broad interpretation placed upon the scope of the Act. The Lords of the King's Council, under one guise or another, were already supporting the burden of a general oversight over all judicial organs in Scotland and were in use to declare instruments "of na vale".²⁴ The Act seems to have given an immediate impetus to actions in which the judge alone is summoned to account for some procedural defect and, on his failing to satisfy the Lords, the retour is quashed. Thus a brieve is reduced because persons related to the principal party were put upon the inquest;²⁵ and similarly, when the inquest included persons from other shires and

20. A.F.S. IV, 544. (The Act of 1496 is here erroneously referred to as of 1494).

21. The King c. Ninian Bannatyne Practicks 288.

22. Bankton III. v. 92.

23. Skene, D.V.S. s.v. "Assisa"; Erskine IV.iv.101; Observations, Loc. cit.

24. A.D.A. 3 (letter of bailserie - 1466). 25. A.D.C. 38; A.D.C. Civil

not "the best and worthiest of the country";²⁶ and even where those who "knew best the verity of the matter" were not chosen.²⁷ When the defect challenged lay in the retour itself, the persons of inquest with or without the judge were summoned. Sometimes the error was a procedural one, a failure to observe the requirements of the relevant acts. This was so when the annual value of the lands was not given²⁸ and when no distinction was made between the old extent and the current value.²⁹ But the Lords were prepared to go beyond remedying such procedural defects and quash retours which were erroneous in matters of fact, thus apparently usurping the role of the inquest. They so acted when an inquest found that lands were in the hands of the King, when in fact they were in the hands of another party,³⁰ when they served a man as lawful heir to a person who was still living,³¹ when they erred on a point of personal relationship³² and when they did not give the correct value of lands, "as was sufficientlie previn before the Lords".³³ They even intervened when the inquest appeared to have determined without the production of evidence that a widow had a right to certain lands by joint infeftment³⁴ - an indication that in matters of form of title at least the principle of speaking from personal knowledge was outmoded.

The main concern of the Lords in such cases appears to have been to declare the faulty retour null and authorise the taking of a new

26. A.D.C. 34, 38; A.D.A. 74; of. Lamont Papers 25.

27. A.D.C. 25.

28. A.D.C. 154.

29. A.D.C. 269; A.D.C. Civil 377.

30. A.D.C. 260.

31. A.D.C. 425.

32. A.D.C. 42.

33. A.D.C. Civil 133, 393.

34. A.D.A. 65, 127.

briefe by the offended party. The punishment of the erring assizers was a matter of secondary importance and where they had plainly made a mistake in good faith, they were found to have erred "ignorantly" and there is usually no record of punishment.³⁵ Even if the error was a wilful one it was sometimes left to the King's pleasure to decide whether or not the laws "de pena temere jurantium" should be applied.³⁶ Compositions for forfeitures of moveables incurred are common³⁷ and even total remissions are to be found.³⁸ There are however occasional instances where the incarceration of the members of the inquest was ordered, where they had delivered "unrighteously" and in some way aggravated their error. In one case there was clear evidence of collusion between the baillies appointed in hac parte and the inquest to defraud the complainer.³⁹ In another they had injured the interests of the King by retouring lands as held in blenchfarm instead of ward and relief.⁴⁰ In a third case the same inquest had erred twice in the same matter, serving without evidence being produced, and they failed to appear when summoned before the Lords Auditors.⁴¹ In each case the jurors were ordered to be warded in Blackness Castle (near Edinburgh) and, in addition, in the last example, their goods were declared forfeit to the King, with the exception of five shillings from each of them which was reserved to cover the expenses of the complainer.

35. A.D.C. (Stair) 133, 159. Cf. Stair III.v.42 ("if there be a probable cause for the inquest, as by production of writs containing wrong extents, they will be declared free of wilful error").

36. A.D.C. 269.

37. e.g. L.H.T. V, 106, 107 (1517); A.D.C. & S. 122

38. Antiquities of Aberdeen and Banff IV, 100-101 (1556).

39. A.D.C. 100.

40. A.D.C. 19.

41. A.D.A. 163.

There is little evidence of the erring men of inquest being tried by a great assize for their "rash swearing" in conformity with Regiam Majestatem I, 14. It is true that Stair states "Retours are ordinarily annulled and reduced by a great inquest, of forty-five, who do inquire, not only concerning the verity, and sufficiency of the retour, but also concerning the ignorance and malice of the members of the first inquest, whereby they become criminally censurable as temere jurantes super assisam".⁴² But he later adds "Though it be the ordinary way to annul retours by a great inquest, yet the Lords do sometimes sustain reductions thereof as erroneous by witnesses before themselves, without a great inquest".⁴³ The only cases which he cites in these passages were both of the latter kind. While it may^{be} that the criminal liability of assizers consequent upon a quashing of their retour could be determined by great assize, there is no evidence of the retour itself having been reduced in this way. Nor were criminal verdicts. The number of forty-five seems in any event a mistake for twenty-five. Other writers of the seventeenth century when treating of the reduction of retours seem to assume that it is effected by decree of the Lords of Council and Session⁴⁴ and Dallas in his Styles implies that ~~the~~ both the reduction of the retour and the punishment of the assizers is the province of the Lords.⁴⁵ Hope alone mentions one case where "the Lords sustained the pursuit, and fand it

42. Stair III. v. 43.

43. ibid. III. v. 44.

44. Spottiswoode 31-33; Mackenzie, Institutions of the Law of Scotland 231.

45. Dallas 898 (Per Decretum Dominorum Concilii et Sessionis decerni et ideo in eorum corporibus et bonis per leges praxin et consuetudinem hujus regni puniri in terrorem aliorum).

navayes necessar that the matter should be tryit be ane great inqueist".⁴⁶ He does not however cite authority for such a procedure and in fact says that the act of 1475 "hes place only in criminalls".⁴⁷ It seems then that the procedure referred to by Stair, though possibly competent, was seldom resorted to.

If those who served on juries were to expose themselves to punishment, it must have seemed only right that some effort should be made to determine exactly which of them had voted for the erroneous verdict, for, of course, it need not have been a unanimous one. The Act of 1471 directed that the whole inquest should be summoned before the Lords and punished if found at fault, but it made no provision for exculpating those who opposed the verdict. The criminal Act of 1475 did make such provision for determining the manner in which each individual member had voted and it is apparent from the records that this became the practice in civil actions of error also. Thus Balfour reports a case where it was held that if a man at the time of serving the brieve opposed it, he should incur no liability for any error committed by the others.⁴⁸ Later in an action of error raised against an inquest which had retoured royal lands as held in blenchfarm, two of the inquest appeared and protested that they had not served the brieve in the form in which it was retoured, whereupon the Lords ordered that the whole inquest should compare "that ilk of thaim being apone the said inquest may depone be himself quhilk of thaim

46. Major Practicks VI. 38. 39.

47. Ibid. VI. 38. 32.

48. Arthur Forbes c. Dischington (1491) Practicks 287.

made the brief til be servit and the maner tharof and how mony of thaim said and deliverit in one voce and quhat utheris wayis thai deponit that the maner of thair errour may be understand be the saidis lordis and quhether it was wilfull errour or ignorant; and as it beis foundin, thaim to be punyst for the samyn according til the kingis lawis and the Act of perlimanet made tharapone of before".⁴⁹ In an earlier case where none of the inquest appeared, one of them was found not to have erred "because he said against all the said persons"; nevertheless they were all remitted to be punished "at the king's will", the finding presumably acting as a recommendation to mercy.⁵⁰ Sometimes those forming a minority attested their dissent from the verdict by the production of a notarial instrument, which appears to have been treated as conclusive by the Lords.⁵¹ On one occasion this grace was extended to two persons who had refused to commit themselves either way.⁵² In 1561 an inquest which had served a second son instead of the eldest son was assoilzied on proof that the latter was at the time of the service and seven years before out of the country and generally reputed to be dead;⁵³ but it seems certain that for many years before then jurors erring in good faith were not visited with the full pains of the law which the wording of the Act of 1471 would seem to permit. Indeed this practice was so much relied upon that chancellors in certain

49. A.D.C. (Stair) 133. Cf. ibid. 159; Balfour Practicks 287.

50. A.D.A. 42. Cf. ibid. 43.

51. A.D.C. & S. 123, 125. 52. ibid. 125.

53. A.D.C. & S. 123, 125 (s.v. "Retour" No. 2) Cf. ibid. No. 4.

53. M. 14081 (s.v. "Reto

courts began to record a protest as a matter of course that any error their inquest might have committed was done "be ignorance and nocht in wilfulness".⁵⁴ Sometimes the royal protection would be thrown around them in advance, in as much as where any unusual procedure was sanctioned, such as service in respect of lands in another sheriffdom or of a person under age, the jurors would be declared free of any process of error.⁵⁵

The principle of the inviolability of the jury's verdict had thus no place in non-pleadable briefs and the lords were in effect prepared to substitute themselves for the original inquest and replace their verdict with one of their own. The primary object was to set the record right and only secondarily to punish those at fault. In this respect there is a total contrast with the assize of error in criminalibus. There the verdict stood, however unjust, and the purpose was to punish those responsible for it and thus to discourage others from delivering perverse verdicts. That the two main Acts were not always clearly distinguished a century later is evident from a complaint to the Privy Council in 1591 requesting that a writ of error be issued to reverse a verdict of an assize conform to the Act of 1471.⁵⁶ The petitioner alleged that certain persons who had slain his brother, learning that he was to raise criminal letters against them in Edinburgh, forestalled him by prevailing on the Sheriff-Depute of Aberdeen to stage a trial before a jury who "for the

54. e.g. Melrose Regality I, 8, 14.

55. Aberdeenshire Sh. Ct. I, 288; Spalding Club Miscellany II, 214.

56. R.P.C. (1st) IV, 688.

maist parte wilfullie, temerariousslie, partiallie and be favour" acquitted them. The Act in offering remedy to persons "grovit be ony assies" might have seemed to lend some authority to the intervention of the Council in such a matter. In fact, however, the Lords dealt with it by remitting the assizers to the Justice to be tried by a great assize and presumably the acquittal stood. Robert Howes, Elizabeth's Ambassador to Scotland from 1577 to 1583 and later as Treasurer of Berwick employed on many missions to Scotland, writes to Burghley that "the assize of error to reverse the verdict in favour of Barbara Napier is proclaimed" and observes "thus to reverse the verdict is lawful, but a great rarity not hitherto practised".⁵⁷ This alleged witch was not however condemned.⁵⁸ Skene in the same period wrote "the man that is clenged, albeit wrangously, cannot be filed againe or punist; for he being anis quite, he is ever quite for that crime".⁵⁹ Later Kames declared categorically "No verdict pronounced in a criminal cause was ever reviewable"⁶⁰ and no positive evidence to the contrary has been uncovered. Mackenzie, it is true, does cite the case of George Grahame in 1663 as an example of the annulling of a verdict by the Council,⁶¹ but that was a highly exceptional case in which the lengthy form of verdict then in use did not accord with that of the indictment. In effect, then, there was no verdict and the Council acknowledged this in assolziesing the pannel.

57. C.S.P. X, 520.

58. Pitcairn I ii, 244.

59. D.V.S. s.v. Assise.

60. op. cit. 282.

61. Observations James III, Part 6, Act 48; Matters Criminal, loc. cit. But cf. Rune II, 431; Justiciary Records I, 80.

In 1672 the Act of Regulation removed the necessity of questioning assizers as to their votes perhaps some time after the event, by requiring that the Chancellor of the assize should mark on the verdict the votes of each assizer.⁶² This practice was not unknown in the previous century⁶³ and it then drew a protest from a Chancellor to the effect that any members of his assize disclosing that he had dissented from the conviction or the discussions of the assize should be held perjured and infamous;⁶⁴ a bold gesture which, however, could hardly be expected to prevail against the will of the Council.

In practice assizes of error were usually directed against juries which in acquitting an accused had defeated some aspect of state or royal policy. The same case of Barbara Napier may serve to illustrate this point. It was one in which the royal well-being was being threatened in a peculiarly direct way, for Barbara Napier was accused of (inter alia) having put a spell on James VI, who had a horror of witchcraft. The majority of the erring assize which acquitted her of that charge were called before the King in person, who addressed them in a lengthy speech which throws significant light on the way in which this institution was regarded by the rulers of seventeenth century Scotland.⁶⁵ He first justified the novelty of his sitting in judgment personally as being a custom which had only been allowed to lapse owing to the minority of his predecessors. He then condemned the tendency for assizes to

62. A.P.S. VIII, 88.

64. Ibid. 450.

63. Pitcairn I 1, 448 (1564).

65. C.S.P. X, 522-525; see also Pitcairn.
I ii, 244.

pronounce acquittals, even contrary to the weight of evidence, thus defeating the ends of justice. Instead - and here he put his finger on one of the gravest weaknesses of the Scottish judicial system - "let a man commyt the most filthie crymes that can be, yet his freendes take his parte, and first keepe him from apprehension and after by feade or favour, by false assisse or some other waie or other, they fynde moyne of his escape from punishmente". This was particularly to be deplored in offences so widespread and odious as witchcraft. Then, after some remarks on the specialties of probation in cases of witchcraft, he concluded: "In these matters I desyre helpe least our country become most infamous for this cryme when the records of such witches shalbe found and no remeady thereof mencioned". Altogether it was a remonstrance more in sorrow than in anger and the erring assizers were persuaded to come in the King's will instead of standing trial by great assize. The King, being satisfied that their error was not wilful, excused them from all the penalties that they had incurred.⁶⁶ Thus although the assize of error was certainly a cumbersome remedy and notably lacking in elegantia iuris, it could be and was used as a threat to counter the evil effects of prejudice and fear which so often undermined the whole principle of jury trial at this period.

Of the harm done by partial juries in the outlying parts of the country, where family and clan loyalties still ran strong, the case of Irvine of Lynturk may serve as an illustration.⁶⁷ An Aberdeenshire

66. Pitcairn I ii, 247.

67. Justiciary Cases 241 et seq.

assize, of which Irvine was chancellor, had acquitted James Gordon on a charge of communing with rebels who had been outlawed for oppression committed by them against the Laird of Frendraucht and his tenants. They had certain evidence to support their verdict in that it appeared that the rebels had foisted themselves upon Gordon against his will. Moreover, some of the assizers were burgesses of Aberdeen, not likely to be coerced or swayed by the family loyalties of the country districts. Nevertheless, such was the reputation of this turbulent part of Scotland for partial justice that the authorities decided to make a public example of these not obviously culpable assizers. They were charged not only with committing wilful error but also "to the great contempt of his Maiestie and of his hienes royall authoritie Hes done what in now lyis to foster the said publick rebellious in the Northe by proclameing Libertie in so far as in now lyis to all his Maiesties subiectis to intercommoun with the saidis rebellis". But after several lengthy debates on the relevancy and much citation of continental doctors, the Lords of the Secret Council, "being loathe to dyve further in this business" ordered the Justices to proceed no further and the assize escaped with an admonition from the Lord Chancellor.

As an example of the abuse of the process of attaint during the Covenanting period we make take the notorious trial of an assize of fifteen who had acquitted Somervell of Urats and other landed men for being present at the Battle of Bothwell Bridge in 1679.⁶⁸

68. Fountainhall 298.

The jurors were brought one by one before the Privy Council and questioned on the manner in which each had voted, for the requirement of the then recent Act of Regulation as to the marking on the verdict of the vote of each member had not been observed. Some were freed on stating that they had voted for a conviction; others admitted that they had acquitted and asked for pardon; some prevaricated and said they could not remember. The remaining seven, heroically in Fountainhall's estimation, proclaimed their "absolvitor" and were remitted for trial by twenty-five nobles, mostly army officers, and on being convicted were imprisoned, fined and declared infamous. In such a period of virtual civil war it was perhaps impossible to empanel a completely impartial jury in a case with any trace of political colouring, but such persecution of assizers tended to bring the whole judicial system into disrepute.

Fountainhall comments on the above case that "There was never any of those Assises of Error that ever took effect in Scotland before this" meaning presumably those that reached the stage of trial by great assize and conviction.⁶⁹ It is true that the exaction of the full pains of the law was rare, because few such prosecutions reached the stage of trial, the accused preferring to "come in the king's will", and of those that did a high proportion ended in acquittals, a result perhaps influenced by the very severe penalties which might be imposed under the old law, if a conviction was obtained. But there were exceptional

69. log. cit. Skene too observes "The Great Assise .. is not commonly used in this Realm" D.V.S. s.v. "Assize".

cases where the law ran its full course. Thus in 1510 a whole assize of seventeen was sentenced to imprisonment for a year and a day, and further at the King's will, to forfeit to the King all their moveable goods, including cattle, and to remain perpetually infamous and perjured.⁷⁰ Another assize, of whom only seven were tried, received the same sentence in 1537.⁷¹

The Assize of Error shared in the general revulsion from the absolutism of the Stewarts. One of the Articles of Grievance approved by Parliament in 1689 reads "That Assyses of Error are a grievance"⁷² and, as Hume says, "the abuse was thenceforward at an end".⁷³ Just how effectively this pronouncement - on which no statute followed - over-ruled the earlier legislation may be questioned, but it is a point that is most unlikely ever to be tested. Certainly the practice of accusing jurors of returning an erroneous verdict, whether in civil or criminal cases, has been in desuetude since 1689.⁷⁴ Retours and services continued to be challengeable by an action of reduction, the judge and clerk of court, as well as the successful party, being convened before the Court of Session by the party aggrieved.⁷⁵

70. Pitcairn I i, 72; Hume 409n.

71. Pitcairn I i, 203.

72. A.P.S. IX, 45.

73. Hume I, 410; Erskine IV. iv. 101.

74. Cf. Bankton, III. v. 92; Erskine, loc. cit. The style for the "Summond of Error" was however included in Dallas' Styles, published in 1697, but written between 1666 and 1688 (vide title-page).

75. Bankton III. v. 93; Cf. Dallas 896.