

**PARLIAMENT AND SOCIETY IN SCOTLAND,  
1560-1603**

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**VOLUME 1**

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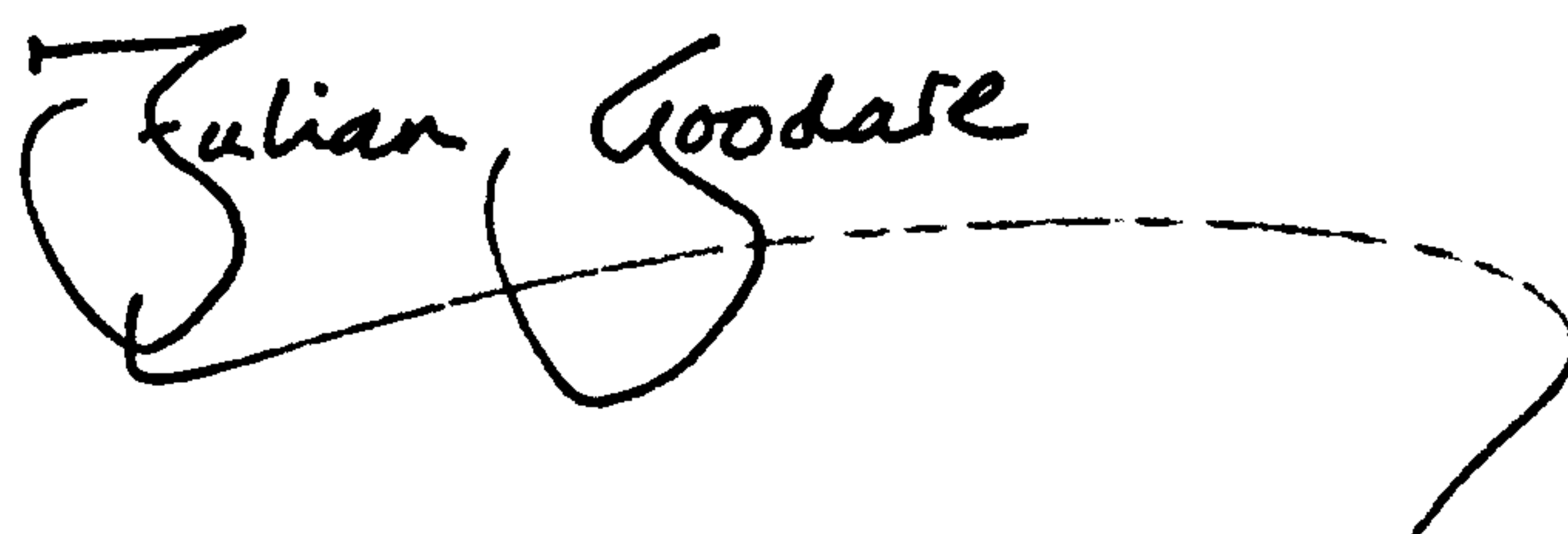
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## DECLARATION

I declare that this thesis is entirely my own work, and that no part of it has been previously published in the form in which it is now presented.

A handwritten signature in black ink that reads "Julian Goodare". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Julian Goodare

May 1989.

## ABSTRACT

Scottish government, with parliament at its centre, was reconstructed in this period in a more centralized, absolutist mould. This led to a rejuvenation of parliament, which had been declining in the early sixteenth century. However, it also led to the growth of a parliamentary opposition that increasingly hampered the government.

Parliament was a forum for the governing class to make policy, and for lobbying by interest groups, especially the three traditional estates. Burgesses, nobility and church all had their own assemblies feeding demands into parliament. Lairds (who entered parliament in 1587) and lawyers also developed lobbying mechanisms. Lobbying meant that private and public acts of parliament became inextricably interlinked.

Administration and implementation of laws depended more on central institutions, bureaucratic and professional, like the emerging exchequer; these often conflicted with traditional local agencies of government. Statute law superseded the old medieval law codes; attempts to codify the latter failed.

Inflation, and social trends like feuing, defeated attempts to reverse the decline in the crown's landed income. Parliamentary taxation became regular and far heavier, but attempts to revise the outdated assessment system failed, leaving tax rates hopelessly unequal. An increasing proportion of crown revenue was drawn from the commercial classes. Fiscal crises became regular and crown indebtedness desperate; the crown exploited a newly-emergent financial sector.

Intervention in the economy continued to shore up the regulated, open market. Most laws regulated producers and merchants in the interests of the ruling class as consumers, focusing on an export licensing system; but there were moves (in policy on debt and usury, for instance) to encourage production and commerce.

Social control was maintained, in a society increasingly divided ideologically, by official propaganda and new forms of censorship. Military policy was oriented towards suppressing internal dissent. A standing army was beyond the state's means, but with the decline of the old 'common army' there was an active quest for alternatives.

Parliamentary action highlighted the period's shifting class divisions. With growing poverty and unemployment, the social threat of large-scale vagrancy led to the enactment of a poor law which, though ineffective in many ways, did allow the urban vagrancy problem to be tackled. However, despite parliament's ambivalence about the feuing that was undermining the feudal property structure, nothing effective was done to curb the resulting evictions or rent rises. The nobility's financial problems were alleviated by crown pensions, though they found it hard to abandon their traditional semi-independent status; but these pensions rested on the insecure basis of parliamentary taxation. Government was increasingly active - but increasingly unpopular.

## Chapter 1

## INTRODUCTION: PARLIAMENT AND THE POLITICAL SYSTEM

Sir wee have sene ane marvelous thing,  
 Be our judgement;  
 The thrie estaitis of this regioun,  
 Ar cummand backward, throw this toun,  
 To the Parliament.'

This is not a history of parliament; that has already been done. Rait modestly described his *Parliaments of Scotland* as a 'pioneer work', calling for further research; in fact, he had achieved a monumental summary of a large body of knowledge which he and other historians, led by Hannay, had developed about the workings of the Scottish constitution.<sup>2</sup> Rait's work has endured, and we simply do not need to re-invent the wheel - or the distinction between parliament and general council.

Nor is this a 'History of Parliament': a work on the agglomerate-biography plan pioneered by Namier for the eighteenth century, and adopted by Neale for the Elizabethan parliament.<sup>3</sup> At the time of writing, the publication of a Scottish work on the same lines is awaited. This will be invaluable in telling us who parliament was; it

1. Lindsay, 'Thrie estaitis', 227.

2. R.S. Rait, *The parliaments of Scotland* (Glasgow, 1924).

3. *The history of parliament; the house of commons, 1558-1603*, 3 vols., ed. P.W. Hasler (London, 1981); J.E. Neale, *Elizabeth I and her parliaments*, 2 vols. (London, 1953-57).

may also help us to understand what parliament was, a question that is addressed from another angle in this chapter by way of introduction; what it will not tell us is what parliament did, and that is my overall theme.<sup>1</sup>

What parliament did, clearly, was to pass laws. Yet the parliamentary statutes themselves have remained surprisingly neglected. This, then, is a study of those statutes; of government; of policy-making and its implementation in a changing society. This is an approach which has been responsible for some of the best work on Scottish history - that on religion, and in particular on the polity of the church, that area of religion with which the government was most actively concerned.<sup>2</sup> Education has also been well served by this approach.<sup>3</sup> But there are many similar topics to investigate; what role did the central legislative assembly play in the evolution of other areas of policy? Then more needs to be done on the role of parliament in the governmental process as a whole. A final point, obvious but often overlooked: government has also to be considered from the point of view of the governed.

What was parliament? It was not a thing. True, well-developed institutions do seem to take on a life of their own: the history of

1. Cf. G.R. Elton, 'Studying the history of parliament', *British Studies Monitor*, 2, no.2 (1971), 4-14, for an approach to the question with which this study has much in common - as well as some significant differences. See also J.H. Hexter, 'Parliament under the lens: reflections on G.R. Elton's "Studying the history of parliament"', *British Studies Monitor*, 3, no.1 (1972), 4-15.

2. G. Donaldson, *The Scottish Reformation* (Cambridge, 1960).

3. J. Scotland, *The history of Scottish education*, 1 (London, 1969).

France would have been very different if the magistrates of the parlement of Paris had been less tenacious of their institutional privileges.<sup>1</sup> But even if Scotland had been a fully integrated kingdom; even if its government had been centralized; even if its administration had taken a firm grip on the nation's life; even if political activity had been carried on within a well-defined constitutional framework, and had had law-making as its chief purpose; even if a parliamentary majority had been an essential attribute of government: even then, parliament would not have been a thing, but a meeting-place. As it was, the Scottish parliament was a somewhat ill-defined crossroads where certain leading members of the ruling class gathered to transact a variety of business. At its best the Namierite approach can highlight this, by bringing out the social status and the vested interests which members of parliament brought to the assembly from outside. Rait, meanwhile, shows how parliament acted in ~~in~~ a <sup>of</sup> constitutional sense: how it as an institution related to other institutions. I would like to show parliament, not as subject or object, but as channel. If the following chapters serve any purpose, they will show the Scottish governing classes using parliament as their chosen forum in which to confront a variety of social and economic problems, and hammering out agreed solutions which we see as they emerge in the form of legislation.

If Scotland's leaders continued to find a use for the forum they called parliament, this in itself is remarkable. The sixteenth century was

1. J.H. Shennan, *The parlement of Paris* (London, 1968).



an unprecedentedly bad time for parliaments. Many nations in western Europe were dispensing with their medieval assemblies; a parliament of growing importance was an unusual phenomenon.' Why did parliament flourish?

This question is linked with the well-known phenomenon of 'new monarchies' in western Europe, which were often able to govern without representative assemblies. In Scotland, the beginning of 'new monarchy' has been identified in the late fifteenth and early sixteenth century (in the reign of James IV<sup>2</sup>), in the late sixteenth century (in the reign of James VI<sup>3</sup>), and in the early seventeenth century (in the successful 'pen government' which followed the union of crowns<sup>4</sup>). These differing perspectives can in fact be reconciled. The reign of James IV is significant for establishing the political harmony which was an essential precondition for successful government (to many political historians, political harmony equals successful government, but not in these pages).<sup>5</sup> The reign saw politics increasingly centralized at court, and focused on a new-style privy council and the person of the monarch - aided by the king's willingness to travel and bring the court to the localities. The foundations for a more fully integrated kingdom were laid by smashing the semi-independent lordship

1. A.R. Myers, *Parliaments and estates in Europe, to 1789* (London, 1978).
2. R. Nicholson, *Scotland: the later middle ages* (Edinburgh, 1974), 539-41.
3. G. Donaldson, *Scotland: James V - James VII* (Edinburgh, 1965), 155.
4. A.G.R. Smith (ed.), *The reign of James VI and I* (London, 1973), 1.
5. N. Macdougall, 'The glory of all princely governing': the kingship of James IV', *History Today*, 34, no.11 (November 1984), 30-36.

of the Isles, though nothing was as yet put in its place. The state's military and naval power, independent of the magnates, was promoted. And finally - the key point for our purposes - parliament faded away rapidly. The fifteenth century had seen parliament meet more or less annually, but while 13 parliaments met between 1486 and 1495 there were only three between 1496 and 1505, and only four (plus a general council) in the following decade. Attendances were down too: fifteenth-century parliaments could have over 100 members, but after 1490 none exceeded 60. The nadir was reached in 1527, when only 27 turned up.' This really was the period when, in Lindsay's words, 'the thrie estaitis gangs all backward'.<sup>2</sup>

None of this was unusual: over much of western Europe, medieval assemblies were going out with the tide, and more effective means of political consultation and political integration were emerging at royal courts. The French estates general, beset by provincial rivals, succumbed early to the pressure; new-style monarchy no longer needed it.<sup>3</sup> The English monarchy was finding its parliament less and less useful in the early sixteenth century, and the declining frequency of the English parliament mirrors the Scottish situation closely.<sup>4</sup>

1. Figures on parliaments are from *APS*, ii-iv, *passim*. Counting parliaments is not straightforward: when does a reconvened assembly become a new one? All such 'continued' parliaments are counted as two, no matter how many times they reconvened. See also Appendix A for parliaments between 1560 and 1603.
2. Lindsay, 'Thrie estaitis', 237.
3. P.S. Lewis, 'The failure of the French medieval estates', *Past and Present*, 23 (November 1962), 3-24.
4. C. Russell, *The crisis of parliaments: English history, 1509-1660* (Oxford, 1971), 39-40.

England, unlike France, developed a new role for parliament at the time of its break with Rome, though even here there were pressures to develop alternative forms of legislation - the statute of proclamations - which would have made parliament disposable.'

Scotland's parliament initially owed its survival not to new constitutional developments, but to an enforced reversion to old ones. At Flodden, much of the achievement of James IV's reign perished: its complex, glittering court centred on the royal household, its political harmony and its state-directed military programme. Renewed political instability meant more work for parliament in finding agreed solutions for a variety of problems concerning the regency and the succession. In the 1530s there was once again some reason to think that parliament might have outlived its usefulness: the court of session emerged to take over much of its legal business.<sup>2</sup> But the crisis of the Scottish parliament was over, and in fact the 1530s saw slowly increasing attendances and a temporary recovery almost to annual parliaments. Possibly this had something to do with the need to define the country's religious orientation - conservatively, as it happened - in response to the Reformation challenge.<sup>3</sup> It has also been pointed out that

1. J. Hurstfield, 'Was there a Tudor despotism after all?', *Freedom, corruption and government in Elizabethan England* (London, 1973), 33-40. Elton disagrees: G.R. Elton, 'The rule of law in sixteenth-century England', *Studies in Tudor and Stuart politics and government*, i (Cambridge, 1973), 271-74. Both writers dramatize 'despotism' more than would be necessary in the Scottish context. Elton does not allow that there would still have been a 'rule of law' even if proclamations had been allowed to supersede statute; but Louis XIV ruled according to the law.
2. P.J. Hamilton-Grierson, 'The judicial committees of the Scottish parliament, 1369-70 to 1544', *SHR* 22 (1925), 12.
3. J. Wormald, *Court, kirk and community: Scotland, 1470-1625* (London, 1981), 22.

medieval assemblies were more likely to survive in small countries where their members were more familiar with one another and had no alternative regional forums.<sup>1</sup>

Not that the reign of James IV was unique: his adult successors all had royal households of much the same type, with the potential to replace parliament in the political system. The most frequent parliaments thereafter were in the periods of the most extreme government weakness, with no court to focus on and a nobility scrabbling for political solutions - the early minority of Mary, and the 1570-73 civil war. Conversely, something very different was happening by the end of the sixteenth century: only six parliaments in the 18 years 1586-1603. Clearly there was no longer much pressure to hold parliaments for political or judicial reasons. Sir James Melville in the 1590s even held that over-frequent parliaments could give rise to grievance, an unlikely complaint in earlier times: most likely he associated frequent parliaments with the political tribulations which he felt should now be a thing of the past.<sup>2</sup>

Medieval parliaments had been frequent as a matter of course. In 1399, there was a demand for annual parliaments, so that the lieges might be 'servit of the law'.<sup>3</sup> Such parliaments thus had a judicial basis - government was a matter for adjudicating among conflicting

1. V.G. Kiernan, *State and society in Europe, 1550-1650* (Oxford, 1980), 4.

2. Melville, *Memoirs*, 378.

3. A. Grant, *Independence and nationhood: Scotland, 1306-1469* (London, 1984), 150.

claims to power and property rather than for what was going to be done with that power:

The principall point, sir, of a kings office,  
is for to do to everilk man justice.'

But by now parliament had a new role: as a legislative tool. Given time, James IV might have developed non-parliamentary methods of legislation, but now it was too late. Parliament had proved its continued usefulness in a difficult period, there was no constitutional alternative to parliamentary legislation in sight, and the need for legislation was growing. From the 1580s, the Scottish parliament becomes almost a different assembly. Medieval parliaments had often passed no legislation, and no parliament before 1579 enacted as many as 50 statutes; but after that date, few enacted less, and many exceeded 100. This was what Rait meant when he pointed out that the medieval record of doing everything in the name of parliament could allow parliament to emerge as an essential component of an assertive, centralizing government.<sup>2</sup> It seems that we are back with 'new monarchy' after a long period of political tribulation.

It is time to define this 'new monarchy'. The concept has been cavalierly lumped with discredited ideas about the taming of an uncivilized, over-mighty baronage;<sup>3</sup> but a tool of some kind is needed

1. Lindsay, 'Thrie estaitis', 187.

2. Rait, *Parliaments*, 46-47.

3. J. Wormald, *Lords and men in Scotland: bonds of manrent, 1442-1603* (Edinburgh, 1985), 4.

to measure the pressure for development that was clearly building up in the Scottish governmental system. The monarchy coped remarkably well with royal minorities, external war and internal political turmoil; but these were undeniably barriers to governmental expansion. As soon as these barriers were lifted, things would start to change. How?

'New monarchy' may be imprecise, but it can be equated with the first stirrings of what has been described as absolutism - a concept which has been developed with considerable sophistication by Anderson.' Beginning in the fifteenth century but not seen at the same time everywhere, absolutism reordered the relationship between the feudal nobility and the crown in the nation-states of western Europe. From being the greatest among many feudal landlords, the crown was transformed into the head of a national bureaucracy with a relationship to the people that was both direct and mediated through the nobility in their new roles as government ministers and estate managers.

It was Anderson's own belief that Scotland did not reach the stage of absolutism.<sup>2</sup> But why should Scotland, very much in the mainstream of other western European developments, have avoided this one? James IV was clearly heading in that direction. So was James VI - and not just because he believed in the divine right of kings, characteristic though that was. His government - and his parliaments - began to do more

1. P. Anderson, *Lineages of the absolutist state* (London, 1974), 22 and passim.

2. Anderson, *Absolutist state*, 137, 141. Anderson's arguments on Scotland are not central to his overall theory, which is more applicable to Scotland than he himself suggests. A critique of Anderson, which however employs a confused definition of absolutism, is in T. Dickson (ed.), *Scottish capitalism* (London, 1980), 26-27.

and more. The nobles had their feuds submitted to royal justice, and the law was professionalized.<sup>1</sup> Military action became the exclusive preserve of the state.<sup>2</sup> The crown lands, which had made the king a feudal magnate in his own right, evaporated; parliamentary taxation grew into a major branch of government revenue.<sup>3</sup> Legislation expanded into new areas like social welfare.<sup>4</sup> The central bureaucracy of government expanded and spread its influence into local communities; there was more government, and more of it was central government. Meanwhile, attendances at parliament slowly increased until by the early seventeenth century there could be over 170 people packed into the Edinburgh tolbooth.<sup>5</sup> Was parliament the handmaid of absolutism? Yes and no.

One of the political roles that parliament played has survived with little change down to modern times: it was an organ for constant reaffirmation of the legitimacy of the government and governing class of the day. Political leaders have always needed a stage on which to demonstrate the legitimacy of their actions. Other members of political classes have always been concerned to ascertain what actions by political leaders are legitimate. The result is a probing of the

1. K.M. Brown, *Bloodfeud in Scotland, 1573-1625* (Edinburgh, 1986), ch.9.

2. Chapter 7.

3. For crown lands, see chapter 4; for taxation, see chapter 5.

4. Chapter 8.

5. R.K. Hannay & G.P.H. Watson, 'The building of the parliament house', *SOEC* 13 (1924), 11.

boundaries of political legitimacy in order to define it. Governments today tend to acquire an organized and self-defined opposition, often presenting itself as an alternative government, to focus attention on this frontier region; much political debate (nowadays conducted through communications media, but then a matter for direct participation) has always in effect been concerned with drawing and redrawing a line showing the limits of acceptable government action. The nature of the opposition in sixteenth-century Scotland was more diffuse than it is now, but its function was much the same: to provide a safety-valve indicating when the government was in danger of crossing the boundaries of what the political community regarded as lawful authority. Tracing these boundaries is as useful to historians as it was to contemporaries, and the best guide to the terrain is the changing function of the political opposition.

Questions of legitimacy are bound up with the nature of monarchy. The monarch as ultimate symbol of political legitimacy still had a long future in the sixteenth century. Especially with Scotland's long royal minorities, the symbol might almost as well have been an inanimate object, like the conch shell in Golding's *Lord of the flies*. Indeed, when political differences became so severe, in 1570-73, that the factions could not even agree on the ultimate source of authority, it is hard to say which faction had the more impressive symbol: the queen's party, whose parliaments were held with the correct regalia and who could refer to an adult monarch even if she was unfortunately absent, or the king's party, who could produce an infant but no regalia.'

1. G. Donaldson, *All the queen's men* (London, 1983), 121.



It was usual for the contending factions to agree about the monarch, however, which is why extra-parliamentary opposition so often took the form of the loyal rebellion.<sup>1</sup> The last successful exponents of this technique in its pristine form, the 1582 Ruthven Raiders, protested undying loyalty to the king as they kidnapped him. Their quarrel, they averred, was merely with the duke of Lennox and his crypto-Catholic adherents. Such 'evil counsellors' act as a lightning-conductor in all monarchies, allowing opposition (even if violent) to reach its target without wrecking the entire structure.<sup>2</sup> It happened that the long run of royal minorities ended in the 1580s, and kidnapping an adult monarch was rarely successful; Mary in 1567 had to be deposed before the opposition faction could rule, and the earl of Bothwell's impotence with the king in his hands in 1593 is striking. The state's growing monopoly of political violence also reduced the scope for such derring-do, but noble opposition was never short of extra-parliamentary outlets - dissatisfied nobles could always take their grievances to the king at court. After all, daily government was not channelled through parliament, and the command of a parliamentary majority was still only a by-product of a power game carried on elsewhere. Scotland was not unusual in this. In England, parliament was central to the rise of Thomas Cromwell; but when events at court caused his downfall, parliament dutifully attainted him. Similarly, parliament played almost no part in the tooth-and-nail struggle between Essex and Cecil in the 1590s. So when we find the Scottish parliament forfeiting the Gordons in 1563, and four years

1. Brown, *Bloodfeud*, ch.5.

2. L. Hair, *Primitive government* (Harmondsworth, 1962), 143.

later obediently agreeing that 'sic spott may be takin fra thame' after some legalistic hair-splitting over the form of the original summons, we need feel no surprise.'

The Gordons' restoration shows that parliament had a role to play even in violent political convulsions - but only after the event. It needed no parliament to start the 1570-73 civil war, but only parliament could patch things up again at the end. To be sure, parliament was only ratifying a settlement, the pacification of Perth, negotiated elsewhere - but is the parliament chamber a normal venue for such negotiations in any age? Parliamentary protection was a vital matter for the queen's party, who had been branded as traitors and could not afford to lay down their arms without high-quality guarantees.<sup>2</sup> An even more significant reconciliation statute - gold-plated because it benefited the winning side - was the act of oblivion of 1560.<sup>3</sup> At first it covered only named individuals, like the pacification of Perth, but in 1563 it was made general and a standing commission was appointed to administer it.<sup>4</sup> Once a prudential time had elapsed, rebels would usually return to find a buyer's market for parliamentary restorations - though it is true that we do not know the actual price they paid.

1. *APS*, ii, 573, c.23.

2. Appendix A, no.32.

3. R. Keith, *History of the affairs of church and state in Scotland*, i, ed. J.P. Lawson (Spottiswoode Society, 1844), 325; Leslie, *Historia*, ii, 448.

4. *APS*, ii, 535-36, c.1; 536-37, c.2; acts of the lords interpreters of the act of oblivion, 1563-69, SRD, PA9/1.

However, since the axe, gibbet and stake regularly testified to the price exacted for opposition in England, Scotland's opposition factions could count themselves lucky. Parliament was not there to wreak vengeance, but (within certain limits) to let bygones be bygones. In short, parliament was a forum for limiting violent opposition, but also for regulating it - and therefore necessarily for legitimizing it.

This is because a rebellion was essentially a feud writ large. There was no clear dividing line between large feuds and small rebellions; wrangles over the local organs of a decentralized government apparatus could draw the government into feuds, as when in 1585 the Maxwell-Johnstone feud became by degrees a Maxwell rebellion.<sup>1</sup> All Highland rebellions began as feuds. The absence of government machinery in the Highlands meant that any opponent of a government-backed clan like the Campbells was liable to be branded a rebel.<sup>2</sup> No other form of rebellion was possible, for there was nothing else there to rebel against. The point is that the bloodfeud, under certain circumstances, carried its own legitimacy: it was deprecated, but also tolerated; people shook their heads when one was started, but they understood that it had to be done; while prosecuting the feud, they searched for ways of patching it up, of bringing it to a peaceful end with honour intact all round.<sup>3</sup> It was thus with rebellions also - and the patching up was done in parliament.

1. K.M. Brown, 'The making of a *politique*: the counter Reformation and the regional politics of John, eighth Lord Maxwell', *SHR* 66 (1987), 156-57.
2. T.C. Smout, *A history of the Scottish people, 1560-1830* (London, 1969), 105.
3. Brown, *Bloodfeud*, ch.2.

One view of parliament's place in the arbitration of political disputes and resolution of civil strife is to be found in Buchanan's *De jure regni*, written in the aftermath of a successful rebellion. Buchanan, of course, favoured any opposition by temperament, and this opposition (now government) in particular; but his words reflect the essence of parliamentary restorations, which was to favour former rebels by reconciling rather than punishing them. Buchanan aimed to restrict the king's right to punish: 'I would give the people the right to prescribe the limits of the authority that they have vested in him, and I would ask that he, as king, should abide by these limits... what affects the joint safety of all should have the backing of an open general council acting with the king'. It was parliament, with its diverse representation from different estates, that he had in mind: 'roughly in accordance with our standing practice, selected people of all classes should assemble to advise the king'. Buchanan was, however, an Athenian democrat at heart: 'Then when they have agreed on a measure, it should be referred to the people for approval.'

By 'the people' Buchanan undoubtedly meant (as in Athens) nothing more subversive than the entire political nation - the ruling class, in fact. Even so, it was a point that would have stuck in the throat of his royal pupil. Otherwise, however, James VI had a quite similar view of the ultimate outcome of political conflict. True, conflict implied rebellion, which was 'unlawfull' even against a tyrant; but it was also understandable and even no more than a tyrant should expect.

1. Buchanan, *De jure regni*, 41.

Crucially, 'the fact will remaine as allowed by the law.' Considering the 'facts' that the Scottish parliament allowed to remain after rebellions, this came close to saying that parliament was entitled to sanction rebellion.

The political opposition could only turn to violence so long as the nobility retained the capacity for military action independent of the state. By the close of the sixteenth century, this was coming to an end. The rebellion of the Catholic earls in the 1590s met with the traditional response from parliament - a crescendo of threats and forfeitures, followed by a diminuendo of reconciliation;<sup>2</sup> why this should have been the last is beyond the scope of this study, but it was. Even before then, there are good reasons why we can detect stirrings of a specifically parliamentary opposition.

The turning-point was perhaps in the mid-1580s.<sup>3</sup> The last royal minority was drawing to an end, and 1584 ushered in an aggressive, proto-absolutist regime headed by the earl of Arran - a regime which, with the Black Acts, wielded statutes against its adversaries in a new way. Opposition came from the newly-established presbyteries which claimed an authority independent of the state: the reply was an act which confirmed the royal power over 'all statts alsweill spirituall as

1. King James VI, *Basilicon doron*, i, ed. J. Craigie (STS, 1944), 57-59.

2. *APS*, iv, 4-5; 55-61; 124-30, c.1.

3. Cf. H. Lea, *John Maitland of Thirlestane and the foundation of the Stewart despotism in Scotland* (Princeton, 1959).

temporall'.<sup>1</sup> Those who had been 'curiouslye travelling to have introduceit sum innovatioun' in parliament (by changing the clerical representation to get rid of bishops) were reprov'd.<sup>2</sup> All jurisdictions and assemblies (presbyteries were not actually specified) were banned unless specifically approved by parliament.<sup>3</sup> Arran made a bid for the moral high ground of the debate by asserting the power of the king (through bishops and commissioners) to deprive ministers for offences ranging from heresy to simony;<sup>4</sup> had not the ministers themselves asked for a statute on 'deposition of ministers' in 1581?<sup>5</sup> All this was preceded by a measure which the presbyterians must have found insufferable: an act guaranteeing liberty of preaching according to the 1560 confession of faith.<sup>6</sup>

The Arran regime took a new and distinctively authoritarian attitude to parliamentary procedure. The acts were rushed through with the minimum of debate: the lords of the articles (the committee that prepared, and eventually came to dominate, parliamentary business) were elected on 19 May, and the 49 acts of the parliament were voted and passed on 22 May.<sup>7</sup> Some of the royal guard were provocatively stationed 'within the bar of the tolbuith', drawing a protest from the

1. *APS*, iii, 292-93, c.2.

2. *APS*, iii, 293, c.3.

3. *APS*, iii, 293, c.4.

4. *APS*, iii, 293-94, c.5.

5. Calderwood, *History*, iii, 522.

6. *APS*, iii, 292, c.1.

7. Moysie, *Memoirs*, 50.

Earl Marischal who claimed the hereditary right to regulate this sensitive area.<sup>1</sup> The lords of the articles were sworn to secrecy, and the English news service learned what had happened only when the leading opposition ministers fled to Berwick.<sup>2</sup> In August 1584 Arran held another parliament, in which all his proposed acts were railroaded through by reading and voting on them as a block - there were protests, but in vain.<sup>3</sup> Arran himself was toppled through lack of a broad political base, but the Black Acts survived his fall; the ministers tried to get them repealed in the parliament of December 1585, but failed.<sup>4</sup> The act on royal supremacy was being reissued as late as 1596-97.<sup>5</sup>

The next few years saw the construction of a wider political consensus on the lines Arran had laid down. An active parliament had proved its usefulness, and continued to be an integral part of the government. This, indeed, is part of the explanation of why parliament survived after 1584: when the time came to reconstruct the Scottish polity with an adult king at its head, the trend was towards increasing rather than reducing the breadth of the political consensus. Arran had clearly feared parliamentary opposition, even though he did not hesitate to use parliament; after his fall, a broadly-based administration succeeded in marginalizing the opposition to remove even this residual fear of

1. *APS*, iii, 291.

2. Calderwood, *History*, iv, 62-63; William Davison to Francis Walsingham, 27 May 1584, *CSP Scot.*, vii, 155-57.

3. Davison to Walsingham, 24 August 1584, *CSP Scot.*, vii, 290.

4. Melville, *Diary*, 229-44.

5. *APS*, iv, 103; 106-07.

summoning parliament. Harmony prevailed.

Harmony between an absolutist crown and its assembled parliament was no more than the crown expected. Henry VIII famously boasted that 'we at no time stand so highly in our estate royal as in time of parliament, wherein we as head and you as members are conjoined and knit together in one body politic'.<sup>1</sup> Similarly Jean Bodin, the great theorist of absolutism:

The sovereignty of a monarch is no way altered or diminished by the existence of Estates; on the contrary, his majesty is the greater and more illustrious when his people acknowledge him as sovereign, even if in such assemblies princes, not wanting to antagonize their subjects, grant and permit many things to which they would not have consented without the requests, prayers and just complaints of their people.<sup>2</sup>

Thus, the fifteenth-century French monarchy had been seen as weak because it lacked a strong estates general.<sup>3</sup> Thus, too, James VI could confidently promise in 1587 to treat parliament more respectfully than Arran had done: he would not 'prejuge the libertie of frie voiting and reasoning of the saidis estaitis'.<sup>4</sup> The last thing he expected was that the estates' free discussion might lead to conclusions different from his own.

In fact the political consensus proved less enduring than, in the late 1580s, there had briefly been reason to hope. The government's role

1. G.R. Elton (ed.), *The Tudor constitution* (2nd edn., Cambridge, 1982), 277.

2. Quoted in Anderson, *Absolutist state*, 50-51.

3. Lewis, 'Failure of the French medieval estates', 3.

4. *APS*, iii, 443, c.16.



was expanding, and a state of a new type was being constructed: this could not be done without strains, and strains led to the emergence of a new kind of opposition.' For the political system, the implication of government expansion was that policy questions, rather than patronage ones, became relatively more prominent: it was less a matter of who was in power, more a matter of what they did with it. And what they did, they increasingly did through parliament. They were probing the boundaries of governmental legitimacy, not just through the question of whether such a noble should be thrown off the gravy train (though gravy train politics continued to be important), but of whether such a task should be carried out by government agencies. And if the opposition were going to object, they had ultimately to object in parliament. It might almost be said that a parliamentary opposition had to emerge before parliamentary government.

It is true that in the fifteenth and even fourteenth centuries there were well-attended parliaments to which the opposition did come - and were able to use parliament successfully as a weapon against the government. This happened in 1472 and 1473, when parliamentary critics were able to frustrate the king's grandiose and potentially costly foreign policy schemes.<sup>2</sup> The crown already possessed some absolutist potential in the fifteenth century. But relatively little opposition was about government policies of this kind; the political programme of most medieval opposition groups began and ended with the belief that they, not those currently in power, should be on the gravy

1. C. Tilly, 'Reflections on the history of European state-making', *The formation of national states in western Europe*, ed. C. Tilly (Princeton, 1975).
2. N. Macdougall, *James III: a political study* (Edinburgh, 1982), 93-97.

train. The Home family did not care what James III intended to do with their Coldingham priory revenues when they resisted his attempts to annex the priory.' Besides, medieval politics was more decentralized; less of it took place at court. Even when the overlordship of the Sinclair earldom of Orkney was being transferred to Scotland and the crown was taking unusual and direct initiatives to obtain the earldom for itself, political events were still to a large extent dominated by rivalries between different branches of the Sinclair family.<sup>2</sup>

The large parliamentary attendances of the fifteenth century, as well as the direct evidence, suggest that parliament was accepted as the place where government supporters and opponents both met to define the limits of legitimate government policy. There was a particularly large turnout in 1472, for instance.<sup>3</sup> When parliamentary attendances declined in the early sixteenth century, this was partly a general loss of interest in parliament, but probably government supporters continued to come. If the government was in good odour, there might be a good turnout; if it was no better thought of than it deserved, there might not. Opposition operated through court intrigue, or failing that military action. It was when opposition nobles boycotted parliament, in the hope of denying recognition to the government's actions (or of saving their own skins), that parliament was in jeopardy. The

1. N. Macdougall, 'Crown versus nobility: the struggle for the priory of Coldingham, 1472-88', *Essays on the nobility of medieval Scotland*, ed. K.J. Stringer (Edinburgh, 1985).
2. B.E. Crawford, 'William Sinclair, earl of Orkney, and his family: a study in the politics of survival', *Nobility of medieval Scotland*, ed. Stringer, 243.
3. Macdougall, *James III*, 93.

parliament of 1566 was to be the forum for forfeiture of a group of exiled nobles; their sympathizers had no hope of blocking this through the normal political process, and instead turned to conspiracy even before the parliament met.<sup>1</sup> The extreme examples of small parliaments wielded by a faction are the partisan parliaments of the 1570-73 civil war: one parliament of the queen's party, which forfeited two hundred of its opponents, was attended by only three nobles.<sup>2</sup>

That was the last gasp of the old ways. The 1579 parliament which savaged the Hamiltons was perhaps the weapon of a faction, but it was attended by a wide range of nobles and carried out some broadening of the political spectrum by restoring many former Marianists; the 1584 parliaments were the same. From the 1570s, and still more after 1584-87, parliament was normally the forum for reconciliation of rival parties, and this breathed new life into parliament itself as the forum for normal politics to be carried on. Once more, a single assembly gathered within itself all shades of ruling-class political opinion. But times had changed since that had last happened, the strains of new-style government were taking their toll, and new ways for the government to interact with the opposition had to develop. Without an official parliamentary journal or unofficial diaries, we cannot hope to trace the evolution of habits of opposition precisely. However, a range of opposition strategies can be identified. All of them focused on government policy, not on patronage; all accepted that parliament was the legitimate and supreme political forum.

1. J. Goodare, 'Queen Mary's Catholic interlude', *Mary Stewart: queen in three kingdoms*, ed. M. Lynch (Oxford, 1988), 166.

2. Appendix A, no.26.

The most striking way of expressing opposition while acknowledging parliament's right to legislate was perhaps to lobby for the complete cancellation of a planned parliament, as the small barons did successfully in a convention of March 1595.<sup>1</sup> It is not clear what they objected to: it was probably taxation. Acting as they did within the framework of a convention, this clearly accepted the legitimacy of such forums, in contrast to the conspirators of 1566.

It was unusual, then as now, for the opposition to be able to use parliament so successfully as to be able to secure the passage of its own legislation. But it happened. In 1579, two acts restricted the right of <sup>the</sup> crown to interfere in the business and membership of the court of session.<sup>2</sup> Appointments to the court were the subject of an even more stringent opposition measure in 1592.<sup>3</sup> Even this success, however, is overshadowed by the achievement in the same parliament of two acts in favour of presbyteries, particularly the Golden Act which recognized the presbyterian system for the first time.<sup>4</sup> A number of other ecclesiastical acts in the parliament probably represent concessions to the opposition.<sup>5</sup>

What the opposition usually aimed at was the blocking of official measures they did not like. And mostly what they did not like was

1. John Colville to John Carey, 18 March 1595, *CSP Scot.*, xi, 553.

2. *APS*, iii, 152-53, c.37; 153, c.38.

3. *APS*, iii, 569, c.50.

4. *APS*, iii, 541-42, c.8; 542-43, c.9.

5. E.g. *APS*, iii, 543-44, c.11; 544, c.13; 548, c.17; 553-54, c.27; 582, c.82; 586-87, c.89.

taxation. Revision of the outdated tax assessment machinery was a vital matter for the government, but this was shipwrecked by a series of determined conventions of estates in 1599-1600.<sup>1</sup> Thereafter, government officials trembled to introduce taxation proposals: lord advocate Thomas Hamilton was highly relieved in 1606 to get the tax through just the lords of the articles, even though the king's list of nominees to the articles had been accepted in its entirety.<sup>2</sup> What is particularly significant is the ability for concerted organization that the opponents of taxation displayed.

When an act could not be stopped in its tracks, there was still the possibility of disabling it. The radical commission which prepared legislation for the December 1567 parliament intended that its ban on Catholic office-holders should include heritable posts; parliament would have none of it.<sup>3</sup> A convention of 1583 cut a proposed tax from £100,000 to £20,000 on the grounds that the attendance was insufficient.<sup>4</sup> In 1606 the process began among the hand-picked lords of the articles themselves. The act on episcopacy had to be watered down with what the king was assured were 'verie few verie tolerabill exceptions', less than had been feared.<sup>5</sup> In 1612 a tax of £800,000

1. For opposition to taxation, see chapter 5.

2. Privy council to James, 6 July 1606, *Melros papers*, i, ed. J. Hope (Abbotsford Club, 1837), 19-20.

3. *APS*, iii, 38; 24, c.9.

4. *APS*, iii, 328-30; Roger Aston to the earl of Leicester, 19 April 1583, *CSP Scot.*, vi, 400.

5. Privy council to James, 4 July 1606, *Melros papers*, i, 16.

was demanded, but parliament would grant only £240,000.<sup>1</sup> The parliamentary opposition was able to take full advantage of the ethos of negotiation and compromise embedded in the political culture.

But after about 1587 the stakes were higher for both sides. Domination of parliament was crucial to the government's drive towards absolutism - neither side could ignore or bypass it. Much of the opposition was stifled, finding it far harder to score points freely than its medieval counterpart had done. From the 1590s, English ambassadors' reports carry the unmistakable flavour of 'court' versus 'country' with which they were also beginning to be familiar at home. One such report of government unpopularity was made in February 1600.<sup>2</sup> Within months the central pillar of the government's policy - tax assessment reform - had been demolished by an organized opposition.<sup>3</sup> This was achieved largely without active noble leadership (though the role of the earl of Gowrie is thought-provoking - seemingly the only noble who had an ideological commitment to the principles of opposition). Such a success was rare, though; parliament was not sufficiently in control of its own business to bargain with the government, making supply dependent on redress of grievances. So there were no addled parliaments, as in England, with government and opposition permanently deadlocked and neither able to take a legislative initiative. The occasional opposition victories - in 1579, 1592 and 1600, for instance - were portents for the future, but usually

1. Calderwood, *History*, vii, 165; *APS*, iv, 475-76, c.12.

2. George Nicolson to Robert Cecil, 6 February 1600, *CSP Scot.*, xiii, 621.

3. Chapter 5.

the government would force its measures through however controversial.

Many historians have taken this stifling of opposition to mean that parliament was weak. Rait began it.' He wrote, of course, at a time when a hundred English constitutional histories sang in a swelling chorus of how the rise of the Commons had tamed a would-be autocratic crown, and he felt compelled to apologize for the Scottish parliament's failure to seize the initiative in the same way.<sup>2</sup> Even Wormald, otherwise hostile to any suggestion of a weak parliament, has largely accepted the Rait interpretation of parliament's subservience to the crown after 1587.<sup>3</sup>

But were the English and Scottish parliaments so very different? In both countries, parliament was the place where the opposition asserted itself and decisive political struggles took place. Rait's perception that the English parliament had been successful in its opposition, whereas the Scottish one had failed, was misleading. With hindsight we can see that absolutism was doomed to defeat in England, and that its enemies would use parliament as a weapon in their victory; but in the 1630s it looked as if the crown, having lost the struggle to control parliament, might well succeed in extinguishing it. Scotland experienced the same struggle. It never came to the point where a decision to suppress parliament had to be taken - a higher priority

1. R.S. Rait, *The Scottish parliament before the union of the crowns* (London, 1901); for an early dissentient voice, see J.A. Lovat-Fraser, 'The constitutional position of the Scottish monarch prior to the union', *Law Quarterly Review*, 17 (1901), 252-62; Rait, *Parliaments*, 46-47.
2. Cf. A.F. Pollard, *The evolution of parliament* (2nd edn., London, 1926).
3. J. Wormald, 'James VI and I: two kings or one?', *History*, 68 (1983), 195-96.

was to suppress the general assembly - but the crown was moving in that direction. In 1630, calling a parliament was automatically considered something that the government should avoid if possible.<sup>1</sup> Parliament was the opposition's natural forum: the crown was never comfortable with it after the honeymoon of 1587; and the opposition, organized through parliament and newly-created committees of parliament, eventually took control of the state. Before the collapse of absolutism in 1637-38, the government had usually succeeded in controlling parliament and choking off the opposition through that series of manipulative expedients chronicled so despondently by Rait;<sup>2</sup> but only just. In England, the lid blew off the pressure cooker in 1610-14; it was scarcely possible to summon parliament thereafter without intolerable challenges to the royal prerogative. In Scotland, it was not impossible for an absolutist regime to summon parliament - it was merely difficult. The lid was still on, but the political system was increasingly distorted from the build-up of identical pressures. The safety-valve of parliament had been interfered with, some time in the 1580s, with consequences that would prove catastrophic.<sup>3</sup>

Much of the English opposition drew ideological and constitutional sustenance from historical precedent - especially Magna Carta. It

1. M. Lee, *The road to revolution: Scotland under Charles I, 1625-1637* (Urbana & Chicago, 1985), 99.

2. Rait, *Parliaments*, 367-74, 390.

3. R. Mitchison, *Lordship to patronage: Scotland, 1603-1745* (London, 1983), 31.



has been pointed out that there was no Magna Carta in Scotland.' However, for our purposes that is not the end of the question, but the beginning. For one thing, there was no English Magna Carta either until the 1590s - if by Magna Carta we mean a 'liberty document' to which opponents of an absolutist crown appealed.<sup>2</sup> Mackenzie did not have to search far in the Scottish records for Magna Carta lookalikes - principally the statute of 1579 (inspired by the opposition, as I have argued) ordering the court of session to do justice impartially and not to admit any 'privat writing, charge or command' (from king or privy council) to the contrary.<sup>3</sup> Government encroachment in the administration of justice was a live question in this period, and parliament did not necessarily see things the government's way.

Of course, the 1579 statute was just a statute, not a Promethean liberator. But the English common lawyers saw the great charter simply as the statute 9 Henry III.<sup>4</sup> The Scots were not short of their own constitutional precedents, either: they could appeal to the whole sweep of their history as depicted by Boece. The pen of Buchanan developed this into a veritable pageant of tyrants and the just deserts which they inevitably received at their people's hands.<sup>5</sup> Mackenzie also cited a medieval precedent: an act of 1372, ratifying an earlier

1. W.D.H. Sellar, 'The common law of Scotland and the common law of England', *The British isles, 1100-1500*, ed. R.R. Davies (Edinburgh, 1988), 88.
2. F. Thompson, *Magna carta: its role in the making of the English constitution, 1300-1629* (London, 1948), ch.8.
3. Mackenzie, *Observations*, 198; *APS*, iii, 152-53, c.37.
4. Thompson, *Magna carta*, 197.
5. Buchanan, *History*, vols. i-ii.

one of David II, that no justiciar, sheriff or royal officer was to execute any royal warrant 'against the statutes or the form of the common law'.<sup>1</sup> According to Innes, this was included in many collections of the old laws, but not in John Skene's edition of *Regiam majestatem*.<sup>2</sup> It was not in James Balfour's 'Practicks' either. This negative evidence suggests that it was either forgotten, or someone suppressed it; we know that Skene was capable of suppressing laws that derogated from the powers of the crown.<sup>3</sup>

When reflecting on their traditionally-guaranteed constitutional rights, what the Scots most frequently thought of was not a charter of liberty for all, but the liberty - or rather liberties - which they possessed as members of a definite estate in society. This, indeed, was the essence of the medieval parliament: an assembly of the privileged classes, defending the special local rights of their estate against both common people and crown.<sup>4</sup> In Scotland, the re-affirmation of such privileges was a regular parliamentary proceeding, a reminder if one were needed that the impact of Scottish statutes was enhanced by repetition.<sup>5</sup> Balfour cited no less than 23 statutes ratifying the liberties of the church.<sup>6</sup>

1. *APS*, i, 547.

2. *APS*, i, 15; for more on the old laws, see chapter 2.

3. Thomas Hamilton to James, 23 January 1607, *Melros papers*, i, 24-25.

4. Kiernan, *State and society*, 4.

5. For a discussion of the repetition of statutes, see chapter 2.

6. Balfour, *Practicks*, i, 23-25.

These church liberties were never defined, which is perhaps why parliament ceased to ratify them after 1578;<sup>1</sup> their vague generalities had become a liability. In April 1567, the ministers produced a shopping list of what they wanted in what they said was the customary act on church liberties: explicit ratification of Protestantism and of the act of oblivion, and statutory action on education, poor relief, fornication, adultery, incest and sabbath-breaking.<sup>2</sup> In December 1567, there was a ratification of the church's 'civile privilleges', but these were simultaneously admitted to be debatable: another act set up a commission to investigate the jurisdiction that the church should have.<sup>3</sup> From the early 1580s, instead of the 'church liberties' formula we get acts reaffirming specific Protestant legislation: in 1581, no less than 31 such acts were confirmed.<sup>4</sup> This fulfilled the same reassuring function but allowed the government to retain control of what it was ratifying.

In a feudal age, the nobles had less need of sectional freedoms: the whole of society was their privileged playground. There was one act ratifying their 'privilleges and liberteis', in December 1567, but it would be hard to say what it meant: if heritable jurisdictions were implied, they were not mentioned, and they could anyway be held by non-nobles.<sup>5</sup> Balfour did not mention the act, though he cited the

1. *APS*, iii, 95, c.3.

2. Petition to the queen, April 1567, *CSP Scot.*, ii, 323.

3. *APS*, iii, 32-33, c.31; 24-25, c.12.

4. *APS*, iii, 210-11, c.1.

5. *APS*, iii, 33, c.32.

ratifications of church and burgh liberties which adjoined it in the parliamentary record.<sup>1</sup>

The function of the statutes guaranteeing burgh privileges is the clearest: the royal burghs were the most in need of protection, largely against crown encroachments.<sup>2</sup> Unlike the nobles, the burgesses knew exactly what their privileges were - principally the monopoly of overseas trade, and the right to elect their own burgh officers.<sup>3</sup> They persuaded parliament to ratify their liberties nine times between 1563 and 1594.<sup>4</sup> This endlessly-repeated act was so much part of parliament's routine business that it must have been slightly worrying if it failed to appear. There is no record of such a statute in 1560, although Edinburgh asked for one after having twice in 1559-60 had a burgh council foisted on it;<sup>5</sup> it is true, however, that the surviving statutes of this parliament appear to be incomplete.<sup>6</sup> The burghs' privileges could be defended in detail, as when in 1592 they won from parliament a reduction in the powers of the admiral's court.<sup>7</sup> Various royal burghs, some new and some established, began to obtain individual

1. Balfour, *Practicks*, i, 25, 48; *APS*, iii, 32-33, c.31; 33, c.33.
2. M. Lynch, 'The crown and the burghs, 1500-1625', *The early modern town in Scotland*, ed. M. Lynch (London, 1987), 67-68.
3. Chapter 6.
4. *APS*, ii, 543-44, c.24; iii, 33, c.33; 59, c.7; 102, c.11; 145-46, c.23; 354, c.14; 578, c.74; iv, 28, c.33; 71, c.35.
5. *Edin. Recs.*, iii, 70-71; M. Lynch, 'The two Edinburgh town councils of 1559-60', *SHR* 54 (1975), 132-33.
6. Appendix A, no.1.
7. *APS*, iii, 580, c.79; for more on this, see chapter 3.

ratifications in the 1590s.<sup>1</sup>

While the royal burghs were concerned to maintain their independence from the crown, they also sought privileges from parliament against non-burgess rivals.<sup>2</sup> In 1581, for instance, the trading monopoly of the west-coast burghs was re-affirmed.<sup>3</sup> The wording of this act must have been disappointing, for in 1584 Glasgow and Dumbarton were co-operating (a remarkable fact in itself) on seeking out past statutes on the subject.<sup>4</sup> A crucial addition to the 1592 burgh liberties act provided for the escheat of the moveables of non-burgesses infringing the overseas trade monopoly.<sup>5</sup> The royal burghs immediately raised a tax to exploit this statute in the courts.<sup>6</sup>

All this illustrates the continuing vigour of the medieval conception of society as separate estates.<sup>7</sup> But while the institutional vigour of the estates was great, the social reality they were expected to embody was shifting. It has been argued that the estates represented the

1. E.g. *APS*, iv, 79, c.55.

2. Cf. M.P. Rooseboom, *The Scottish staple in the Netherlands* (The Hague, 1910), 49.

3. *APS*, iii, 224-25, c.27.

4. *Glasgow Recs.*, i, 114.

5. *APS*, iii, 578, c.74.

6. *RCRB*, i, 371-72.

7. Myers, *Parliaments and estates*, 9.

political nation, not sectional interests;' if this had been true in the fourteenth and fifteenth centuries, it was so no longer, as the search for privileges which by their nature were exclusive suggests. The institutional, not individual, identity for members of parliament was very strong; it was common for the estates to hold separate meetings during a parliament.<sup>2</sup> When the small barons were added to parliament, they came in as another estate - though in their case we shall see that it was only the outward form that was traditional.

Distinctions between estates - particularly those between burghs and barons - were actually less definite than they once had been. In 1587 it had to be enacted that each member should occupy only one estate, that 'quhairin he commounlie professes him self to leif and quhairof he takis his styll'.<sup>3</sup> Some wealthier merchants were beginning to move into the countryside, buying estates.<sup>4</sup> There is also evidence of lairds encroaching on the smaller burghs' parliamentary representation.<sup>5</sup> This was happening in England too, on a larger scale, perhaps because of the stronger institutional link that the Commons provided.<sup>6</sup>

1. Grant, *Independence and nationhood*, 169.

2. Rait, *Parliaments*, 402-04.

3. *APS*, iii, 443, c.16.

4. J.J. Brown, 'The social, political and economic influences of the Edinburgh merchant elite, 1600-1638' (Edinburgh PhD, 1985), ch.7.

5. R.S. Rait, 'Parliamentary representation in Scotland', *SHR* 12 (1915), 123.

6. J.E. Neale, *The Elizabethan house of commons* (2nd edn., London, 1963), ch.7.

If the institutional strength of the separate estates was so great, did this reflect adversely on their strength when brought together in parliament? Were they, in fact, rivals to parliament?' Each of the three traditional estates took an organized form which might have been inimical to parliament: the convention of royal burghs, the conventions of the nobility, and (as a truer representative of the church than the clerical estate in parliament) the general assembly.

However, though these forums could be alternatives to parliament, it is rarely useful to see them as rivalling it; they might do so, but usually they were complementary institutions. They could be helpful in sorting out certain matters without bothering parliament - resolving internal disputes, and making rules (which might or might not be subordinate legislation) for the conduct of their own business and allocation of their own resources. All these forums (even, usually, the general assembly) knew their place: they were willing to submit serious internal disputes to the supreme court of parliament. Moreover, they sought parliamentary legislation to protect themselves against other interest groups in society, thus recognizing parliament's function as the supreme arbiter of the political system. Instead of seeking to cut itself free of parliament, each estate aimed to develop channels through which it could lobby parliament for what it wanted.

The sophisticated lobbying of the convention of royal burghs is notorious. The parliamentary representation of the burgess estate was unquestioned, and if it was regulated this was done by the convention

1. Rait, *Parliaments*, 9-19.

itself. Indeed, in this period the convention of royal burghs increasingly was the burghess estate.<sup>1</sup> As a result the burghs had a direct input even to the lords of the articles: in 1597 the convention of royal burghs instructed the burghesses on the articles in their negotiations with the other lords on bullion import regulations.<sup>2</sup> The convention of royal burghs tended to meet before parliament to agree on a concerted lobbying strategy, and many lists of requests to parliament are recorded.<sup>3</sup> The burghs were even ordered not to give in articles to parliament other than through the convention, and burghs that refused to toe the agreed line in parliament could be disciplined.<sup>4</sup>

The burghs, as we have seen, regularly sought parliamentary legislation to protect their institutional privileges. There were also internal disputes which the convention of royal burghs could not handle. The long-running precedence dispute between Perth and Dundee is a good example of a hot potato which the convention tried to get rid of - even though parliament was just as reluctant to make a decision. In the end, it seems, the court of session was landed with the question.<sup>5</sup> Then there was the Edinburgh struggle between merchants and crafts for representation on the burgh council: the decret-arbitral which resolved this in 1583 was eventually ratified by parliament (though not

1. J.D. Mackie & G.S. Pryde, *The estate of the burghesses in the Scots parliament and its relation to the convention of royal burghs* (St Andrews, 1923).

2. *ACRB*, ii, 21-22.

3. E.g. *ACRB*, i, 75-77, 197, 240-41, 468; ii, 89.

4. *ACRB*, i, 469; Rait, 'Parliamentary representation', 123-24.

5. Appendix E.



in the earliest possible parliament, that of May 1584).<sup>1</sup>

The burgesses' elaborate lobbying shows that they stood outside the corridors of power. The estate most at home there was the nobility. If the nobles stood little in need of acts confirming sectional privileges, no more did they need a sophisticated institution to gain access to governmental structures. Just as there were conventions of the royal burghs, however, there were conventions of the nobility. They are normally invisible as a constitutionally-defined sectional interest, for in a feudal society the crown's authority was bound up with the nobility (and not with the burghs, however much the latter felt that they ought to be taken seriously as tenants in chief); but conventions of the nobility can be identified by looking carefully at the records of conventions.

The earl of Mar claimed, in order to defeat a 1598 scheme for regular twice-yearly conventions, that conventions were parliaments in all but the ceremonies.<sup>2</sup> If he meant the formal conventions of estates, he was certainly right. But Craig, considering conventions at the same date, was doubtful about their powers: he suggested that their acts had once had the validity and authority of statutes, but no longer did.<sup>3</sup> He perceived conventions and parliaments to be divergent - and he, too, was right.

1. *APS*, iii, 360-64; cf. M. Lynch, *Edinburgh and the Reformation* (Edinburgh, 1981), 63-64.

2. Nicolson to Cecil, 16 December 1598, *CSP Scot.*, xiii, 353-54.

3. Craig, *Jus feudale*, I.8.10.

The solution to this paradox is the emerging, if never clear-cut, distinction between ordinary conventions and conventions of estates. Conventions of estates, which evolved in the mid-sixteenth century, were the only bodies that shared with parliament the right to impose taxation, and to decide on war and peace.<sup>1</sup> They could legislate, up to a point, but tended not to; taxation formed a growing proportion of their limited business.<sup>2</sup> But there were more and more conventions that lacked one or more estates and were never intended to be conventions of estates. We have seen that parliament declined in frequency as its legislative importance increased; the reverse happened with conventions. In the 28 years from 1560 to 1587 there were 31 conventions; in the next 15 years there were 49.<sup>3</sup> Of the 25 of the latter with recorded sederunts, only three had more than ten burgesses present, and these were definitely conventions of estates with agendas of direct commercial interest: one, in 1594, voted a tax, and the other two, in 1597, imposed customs on imports. For our purposes it is more significant that the average burgess attendance for the others was less than four, and that seven had no burgesses at all. Moreover, nine had no bishops, and none more than three. The bishops had been eclipsed; the monastic commendators had been assimilated to the peerage as actual or prospective lords of erection; a handful of burgesses might turn up through personal involvement in the politics of the day; it is clear that these conventions were really conventions of the nobility.

1. *APS*, ii, 543, c.20.

2. R.K. Hannay, 'General council and convention of estates', *SHR* 20 (1923), 110-11.

3. Appendix A.

The nobility were summoned, not to legislate, not to tax, not to take legal decisions, but to discuss politics - mostly gravy train politics. The nucleus was usually the privy council; not always, but the indefinite constitutional form is less important here than the concrete political function. In April 1593 a convention met, 'gathered of fewe chosen persons at th'apetytes of the present courtiers'.<sup>1</sup> Its main business was day-to-day political questions, and it also discussed in outline some of the matters to be brought before parliament in June. Another example comes from November 1596, when a proclamation referred to the 'ordour tane at the Conventioun at Falkland upoun the xii day of August last, and thaireftir ratifeit be ane uther Conventioun of the Esteatis, at Dunfermling the penult day of September last bipast'.<sup>2</sup> At the August meeting, which was thus distinguished from a convention of estates, there had been 11 nobles present. The act it issued was in the name of 'the kingis majestie and lordis of his secret counsaill', speaking of the king as 'haveing at lenth reessonit and conferrit with the saidis lordis of his secret counsale and sindrie of his nobilitie, and with sum of the ministerie, being alsua personalie present'.<sup>3</sup> These ministers had been invited, but with them came the uninvited and unwelcome Andrew Melville, who took this opportunity to call the king 'God's sillie vassall'.<sup>4</sup> The proceedings combined informality and exclusiveness (though the latter failed on this occasion); the nobles wanted unrestricted access to the king for themselves, and this sort of

1. Robert Bowes to Lord Burghley, 19 April 1593, *CSP Scot.*, xi, 80.

2. *RPC*, v, 328.

3. *RPC*, v, 310-11.

4. Melville, *Diary*, 369-71.

relaxed convention suited them exactly.

Conventions like this fulfilled many of the functions of the medieval parliament - elite political contact to sort out routine problems. They were a kind of annual general meeting for the feudal ruling class. They made few laws - if they wanted a law they would get the next parliament to enact it; and they had no need of formal lobbying. The conventions were just like those of the burghs in the way they dealt with internal disputes among their members: in the nobility's case, these disputes were of course feuds. Reconciling feuds involved wide-ranging negotiations, and from the 1590s the king took an active part.<sup>1</sup> Many of the discussions must have taken place at the frequent conventions of these years, and at least one convention (in July 1602) was held specifically to negotiate the ending of a single feud.<sup>2</sup>

The general assembly is slightly anomalous in this discussion of estates, but it has to be included here as the church's alleged institutional rival to parliament.<sup>3</sup> Its membership, unlike that of the convention of royal burghs, was not that of the parallel estate in parliament - the clerical estate had little to do with the assembly, or indeed the church. The assembly was dominated by ministers who kept a distance from parliament, and backed up by nobles, barons and burgh representatives who were often the mainstay of parliament.

1. Brown, *Bloodfeud*, 216-18.

2. Nicolson to Cecil, 4 July 1602, *CSP Scot.*, xiii, 1014-15; Brown, *Bloodfeud*, 171.

3. Cf. E.E. MacQueen, 'The general assembly of the kirk as a rival of the Scottish parliament, 1560-1618' (St Andrews PhD, 1927).

The general assembly has been described as a court parallel to, and of equal status with, parliament: however, the evidence cited (that there was no appeal from general assembly to parliament) does not support this.<sup>1</sup> There was no appeal from the court of session or the privy council either; the idea of an appeal on a point of law was alien to sixteenth-century legal practice.<sup>2</sup> Arguably the general assembly did start life technically independent of (if not parallel to) parliament; all the church courts operated, as in medieval times, without parliamentary sanction.<sup>3</sup> But this did not last. The 1560/67 act abrogating the pope's authority was a negative sanction against an alternative jurisdiction, and in 1567 parliament gave the church powers over admission to benefices.<sup>4</sup> In 1584 the Black Acts positively asserted crown authority over the church. Still more decisive, because the church generally accepted its legitimacy, was the Golden Act of 1592. From then on, whenever the general assembly met, whenever church courts admitted and deprived ministers, or imposed penances and excommunication for breaches of moral discipline, they did so by a right conferred by parliament.<sup>5</sup> The Golden Act, welcome as it was at the time, merely transferred the royal supremacy from episcopacy to

1. D. Shaw, *The general assemblies of the church of Scotland, 1560-1600* (Edinburgh, 1964), 20.
2. *Introduction to Scottish legal history*, ed. G.C.H. Paton (Stair Society, 1958), 22. For example, see the permissible grounds for advocacy of an action from the sheriff court to the court of session (such as the sheriff's kinship to the pursuer): Balfour, *Practicks*, ii, 340-42.
3. Apart from the regular statutes ratifying the liberties of the church; see above, p.29. There were statutes on doctrine from 1560, and earlier ones against heresy (which is, perhaps, not quite the same thing) and on barratry.
4. *APS*, ii, 534-35, c.2; iii, 14, c.3; 23, c.7.
5. *APS*, iii, 541-42, c.8; 542-43, c.9.

presbytery.<sup>1</sup> When the general assembly later developed a procedure for ministers and readers to use for the settlement of disputes among themselves, this was explicitly arbitration rather than legal process.<sup>2</sup>

What would happen when there was a conflict between the jurisdiction of the assembly and that of parliament? The assembly could not win such a conflict on strictly legal grounds, but the political consensus on the legitimacy of this was limited. For the presbyterian radicals responded to statutory encroachment by elaborating the doctrine that the church as a whole was independent of secular jurisdiction. This was essentially a political and ideological claim rather than a legal fact - though the distinction is of limited value when legal facts were so often established by political trials of strength between rival jurisdictions. Once the general assembly began to assert the explicit two-kingdoms doctrine (on specific issues, not as an overall programme), it could indeed rival parliament.

The power of the assembly, in its own view, recognized few limits: take, for instance, an order of 1576 that salt pans and mills were not to work on the sabbath.<sup>3</sup> This would have had to be backed up with excommunication, but would a secular court really have followed this with putting to the horn (outlawry) as statute required?<sup>4</sup> In 1571 the order went out to excommunicate magistrates who failed to enforce the

1. Donaldson, *Scottish Reformation*, 223.

2. *BOK*, iii, 815, 861-62.

3. *BOK*, i, 377.

4. *APS*, iii, 76\*, c.14.

morality statutes.<sup>1</sup> What would have happened if a sheriff (the civil magistrate who was supposed to enforce excommunication<sup>2</sup>) had himself been excommunicated? Just possibly, if central government was also dissatisfied with the sheriff concerned, this would have been welcomed, but the excommunication of magistrates was a perilous issue.<sup>3</sup> The government's reaction would have depended, not on the letter of the law, but on the political facts of the case. Here, as so often, the question of legality turned on the balance of power at a particular moment between a number of loosely-connected, ill-defined and sometimes competing jurisdictions.

The progress of the Reformation could be hastened or retarded by a network of locally-entrenched vested interests; there was always tension between general assembly, parliament, and local courts.<sup>4</sup> The excommunication question brings out the ill-defined boundaries of church-state jurisdiction. A statute of the Reformation parliament ordered church jurisdiction on excommunication to be transferred to a temporal court, no doubt the projected commissary court.<sup>5</sup> This might have been a logical sequel to the jurisdiction of the official's court

1. Calderwood, *History*, iii, 37.

2. *Sheriff court book of Fife, 1515-1522*, ed. W.C. Dickinson (SHS, 1928), p. xxxix.

3. Balfour, *Practicks*, ii, 565.

4. M. Lynch, 'From privy kirk to burgh church: an alternative view of the process of Protestantisation', *Church, politics and society: Scotland, 1408-1929*, ed. N. Macdougall (Edinburgh, 1983), 93-94.

5. Keith, *History*, i, 325.

on the question;<sup>1</sup> but it seems not to have happened. On the knottier problem of secular enforcement of excommunication, a statute in 1573 required horning by the civil magistrate (the court of session was specified: were sheriffs and burgh magistrates included or excluded?) to follow excommunication within 40 days, as had been done before the Reformation.<sup>2</sup> But the next parliament made horning for desertion of a spouse a necessary *prelude* to excommunication (which in turn preceded divorce).<sup>3</sup> Local authorities had their own ideas about these jurisdictions, and the burgh council of Edinburgh had not waited for parliament: it ruled in 1571 that it would enforce excommunication with banishment.<sup>4</sup> In rural areas, power to enforce excommunication was given in 1595 to crown commissioners in parishes - who existed largely on the drawing board, partly no doubt because they rivalled established jurisdictions.<sup>5</sup>

Faced with multiple jurisdictions which either overlapped or left yawning gaps, it is understandable that the general assembly often took its own initiatives rather than wait for the secular arm. Its orders were of no less penetrating efficacy if they bypassed the machinery of the law - the latter was often a broken reed. Sanctions like penance and excommunication, wielded by a powerful network of local church courts, could often achieve more than a parliamentary statute bristling

1. S. Ollivant, *The court of the official in pre-Reformation Scotland* (Stair Society, 1982), 149-55.

2. *APS*, iii, 76\*, c.14.

3. *APS*, iii, 81-82, c.1.

4. *Edin. Recs.*, iii, 283.

5. *RFC*, v, 200; for the parish commissioners scheme, see chapter 3.



with fearsome penalties but lacking effective means of enforcement.' In practice the general assembly's tireless agitation could be a welcome support to the secular arm. Once the assembly had secured a statute banning pilgrimages in 1581, Stirling presbytery was still waiting for action eighteen months later against those visiting its local holy well. Lord Doune, steward of Mentaith, had a commission to implement the law but was doing nothing, and the presbytery's representations to him produced no effect. So they took action themselves, 'to the glorie of God and executioun of the kingis majesteis lawis'. A long series of pilgrims was hauled before the presbytery for breaking what the minutes later tended to describe as 'Goddis law' rather than the king's.<sup>2</sup> If by doing this the church was rivalling parliament, it might have been embarrassing for the secular magistrate but surely parliament, which had passed the law, would have had to congratulate them.

There is evidence of co-operation between parliament and assembly at the centre too. Not on the assembly's internal affairs: unlike the convention of royal burghs the assembly never sought parliamentary assistance on this, and there was an increasing tendency for the crown to intervene unasked to exploit the assembly's internal divisions.<sup>3</sup> But the assembly was keen to get parliament to follow its lead on all sorts of matters. It often tried to set a good example: the assembly's approach to the problem of feuding in the 1570s was a

1. For more on executive institutions, see chapter 3.

2. *Stirling presbytery records, 1581-1587*, ed. J. Kirk (SHS, 1981), 115-16, 120, 130.

3. W.R. Foster, *The church before the Covenants* (Edinburgh, 1975), 14-16.

combination of central petitions for government action and direct, local initiative with commissions to reconcile adversaries.' The general assembly took lobbying seriously, arranging to meet before parliament so that proposals for statutes could be agreed, just like the convention of royal burghs. In October 1581, for instance, this is how the statute against pilgrimages was obtained. The assembly adopted the demands of the synod of Lothian, which also wanted: marriages to be unlawful without banns, parents' consent and due order of the church; the death penalty for all adultery, not just if it was 'notour' (a notoriously amorphous definition); suppression of Sunday markets; and manses and glebes for ministers at abbey churches.<sup>2</sup> It was said that these demands had all been rejected by parliament;<sup>3</sup> certainly there was public friction between the Lennox regime and the church, but this is an overstatement. Among other acts favouring the church in this parliament, a commission to improve stipends was set up.<sup>4</sup> Parliament acceded to an earlier assembly's demand that patrons of parish churches should present qualified ministers.<sup>5</sup> It banned pilgrimages and superstition.<sup>6</sup> It attempted to clarify the law on adultery, though in a less bloodthirsty way than had been urged.<sup>7</sup> These statutes are reasonably typical of the broad range of

1. Brown, *Bloodfeud*, 185-86.

2. Calderwood, *History*, iii, 590.

3. Occurrents in Scotland, 24 November 1581, *CSP Scot.*, vi, 92-93.

4. *APS*, iii, 211, c.2.

5. *APS*, iii, 212, c.4; Calderwood, *History*, iii, 466-68.

6. *APS*, iii, 212-13, c.6.

7. *APS*, iii, 213, c.7.

church-state co-operation on Reformed doctrine and social control.

Rivalry between general assembly and parliament was nevertheless real enough. Or was it? As I have said, parliament was not a thing - and neither was the assembly. Parliament and general assembly were both divided bodies, containing supporters of government policy as well as opponents. The real rivalry was between those who backed the government's policies - in whatever forum - and those who resisted. The appearance of institutional rivalry is created because there was an effective opposition majority on many issues in the assembly and on few issues in parliament.

So the royal supremacy was not a matter of specific statutes (like the Black Acts) legitimately passed or not passed; indeed it was not ultimately a concrete thing which did or did not exist. It was a shifting political quantity measured by the crown's current ability to get statutes passed even if a parliamentary opposition party emerged to contest them, and then get them obeyed in the teeth of the general assembly's opposition party. Both tasks could be difficult at times. But though there was vigorous resistance to some royal policies, objections to the principle of royal intervention were rare, as the Golden Act illustrates. Even the radical ministers found parliament useful in the many areas where there was consensus; if the policy was acceptable, it was usually acceptable for parliament to pass a law on it. There was never general agreement on the idea that parliament had no right to legislate for the church, and anything short of that meant

that there was a royal supremacy - if the government could make it stick.

There were two strands to the knotted question of church government. Entangled with the struggle between Brastian royal-supremacists and Melvillian two-kingdoms theorists was the higher-profile contest between episcopalians and presbyterians (largely the same people). If the practical right of the government to make rules for the church was usually accepted by both parliament and assembly, this acceptance was much greater (especially in the assembly, but in parliament too) for certain specific policies - those, like the Golden Act, that promoted presbytery at the expense of episcopacy. The radical ministers, if they believed in the two-kingdoms theory, should have rejected the Golden Act; if on the whole they welcomed it, it was because their commitment to presbyterianism was stronger. This too needs to be investigated, because in practice the struggle over bishops was a struggle over mechanisms of lobbying and contact with government.

Successive governments tried with greater or lesser success to promote an episcopalian church. Amid the torrents of ink spilt on the tribulations of presbyterianism, it is hard to pick out just why they should have held with such determination to the uphill task. For the pre-Reformation period, and up to 1587, the answer seems to be that it was the nobility who wanted bishops.<sup>1</sup> The episcopal style of life blended harmoniously with that of the secular magnates, and when it ceased to be useful it could perform one last service by immolating

1. D.G. Mullan, *Episcopacy in Scotland: the history of an idea, 1560-1638* (Edinburgh, 1986), 34-35.

itself decorously to the nobles' profit. But when the last feu, tack and pension had been squeezed out of the last tulchan bishop, and the act of annexation had gathered the skeletal superiorities to the crown, the authorities can no longer have been wooing episcopacy for its money; it must have possessed some other attraction.

This seems to be that bishops were more suited to working with the grain of government. This is what old-style bishops had done: as magnates. But the post-1587 ones were different - because the government itself was different. They were ministers, and thus professional people rather than aristocrats. They were not particularly rich.' They owed their position and authority to the crown, and not to any noble patron or church court (still less to any congregation). What the government wanted was loyal administrators, and the new bishops were heavily involved with central government, and central government's encroachment in traditional local jurisdictions: 'the bishops became lords in parliament, counsell, checker, sessioun, lords of temporall lands and regaliteis, patrons of benefices, commissioners in the king's high commissioun'.<sup>2</sup> They had to work hard: hardest of all under Charles I.<sup>3</sup> Not surprisingly they were not loved by the nobles.<sup>4</sup> They were the civil servants of absolutism.

By contrast, the more radical ministers had lobbying problems. Their

1. Mullan, *Episcopacy in Scotland*, 127.

2. Calderwood, *History*, vii, 90.

3. Cf. Lee, *Road to revolution*, 57.

4. Foster, *Church before the Covenants*, 32-39.

leaders relied on education, professionalism and ideological commitment for their status, all of which were alien to an aristocratic regime.' Neither nobles nor crown had intrinsic sympathy for them, and they could be populist and confrontational; too much time spent campaigning in the streets could harm their prospects in the corridors of power. Their lists of demands were calibrated to be just a little too much for the government to accept; they were adept at exploiting rejection of their demands, and every list seems to contain one or two items (but no more) that were political non-starters. However, there were courtier ministers, and perhaps more attention should be paid to them: did they try to rein in this tendency in order to be taken seriously? Even James Melville played the courtier for a while, though he kept his distance: 'I sought it nocht', he protested.<sup>2</sup>

The insurgent regime of late 1567 might briefly have been an exception to this rule. It began with hopes that the radical ministers would take over the bishops' traditional role in the government. John Knox would come in from the wilderness to share power with a godly regent. Briefly, the very distinction between civil magistrate and church was blurred. In the excitement of 25 July, the day of the queen's enforced abdication, a convention met in the main tolbooth of Edinburgh, and a general assembly in the over tolbooth; the attendance is recorded only for the latter, but many of the 'nobilitie, prelattis, baronis, and commissaris of burrowis' in the convention must also have been among

1. R. Mitchison, 'The social impact of the clergy of the Reformed kirk of Scotland', *Scotia*, 6 (1982), 1-13.

2. Melville, *Diary*, 328.

the 'nobilmen, baronis and utheris' in the assembly.' The assembly met before the convention, for it adopted a set of demands which were then registered by the convention. In the preparations for the parliament of December 1567, which was expected to legislate thorough-going Protestantism for the first time, there was complex and deep co-operation between the ministers and the government.<sup>2</sup> As yet there was no pressure for ministerial separatism - either lobbying still worked, or disillusion had not yet set in.

But the potential for confrontation was later institutionalized when the opposition was able to win broad acceptance of the two-kingdoms doctrine in the general assembly - and not, unsurprisingly, in parliament. This demanded that the church maintain a distance from the civil magistrate, and reserved judgement on the latter's political legitimacy in a newly-ideological way. Radicals sometimes argued that the church was outside parliamentary jurisdiction because outside the feudal property structure - the ministers, as well as the bishops, had come a long way since the Reformation.<sup>3</sup> But the two-kingdoms theory never gained government acceptance, although presbyterianism did; the relevant Black Acts continued in use. During the revolution of 1638, the National Covenant would rely overwhelmingly on statute.<sup>4</sup> The two-kingdoms doctrine, as the ideology of the radical party in the church, survived to underpin the 1648 'second revolution' of the general

1. *RPC*, i, 534-37; *BLK*, i, 100-110.

2. MacQueen, 'General assembly', 137-41.

3. A.H. Williamson, *Scottish national consciousness in the age of James VI* (Edinburgh, 1979), 87.

4. W. Makey, *The church of the Covenant, 1637-1651* (Edinburgh, 1979), 29.

assembly against parliament.

Those, broadly, were the three medieval estates. With the expansion of government activity, they were no longer enough: a wider range of social groups was brought into direct contact with government, and they were enabled - or driven - to make their own decisions on the government's legitimacy instead of following the lead of their superiors. A wider range of town-dwellers was taxed. Lawyers grew in numbers and status as the statute-based civil law expanded.<sup>1</sup> Lairds, if feudal freeholders, actually entered parliament in 1587. Kirk sessions, many of whose members were not from the feudal classes, were expected to implement some statutes. Traditions of deference and hierarchy laid heavily on them, but in time they would come to demand a say in the government commensurate with their social position.

The two key social sectors which had to be drawn into a closer relationship with the government were the lawyers and the lairds. Lawyers were not exactly an estate - but they would have been in medieval times. They were in many ways the heirs of medieval church administrators, and some of them were used in similar roles by the government.<sup>2</sup> The profession of civil law looked to the government to enhance its role, and it is no accident that the lawyers overwhelmingly

1. For the growth of statute law, see chapter 2.

2. Cf. G. Donaldson, 'The legal profession in Scottish society in the sixteenth and seventeenth centuries', *JR*, new ser. 21 (1976), 7; J. Wormald, 'James VI: new men for old?', *Scotia*, 2 (1978), 73-74.





supported the winning side in the 1570-73 civil war.' Their focus was the court of session. In 1593 and 1594 the members of the college of justice - who included advocates and writers to the signet as well as lords of session - obtained acts ratifying their institutional privileges, just as if they had been an estate.<sup>2</sup> And while on the subject of lawyers and lairds, it is worth pointing out that the overwhelming majority of lords of session were from lairds' families.<sup>3</sup>

The court of session, perhaps more than any other body, was entitled to pass subordinate legislation. Its acts of sederunt, though they were subordinate to statute, were increasingly recognized as having the force of law in areas where the law was unclear.<sup>4</sup> There is an example of the senators suspending an act, restoring the earl of Bothwell to all his predecessors' lands in 1587, which by 'oversight' overstepped property law by including lands held of other superiors than the crown. They removed the act from the parliamentary register, and presented it to the next parliament for permanent cancellation.<sup>5</sup> By act of sederunt in November 1599, the court ratified an act of convention passed in the previous July on setting up a register of sasines.<sup>6</sup> No doubt the court of session had itself inspired this act, but it is

1. Lynch, *Edinburgh*, 133-34.

2. *APS*, iv, 22, c.24; 67, c.21; *Introduction to Scottish legal history*, 29.

3. Donaldson, 'Legal profession', 9.

4. *Acts of sederunt of the lords of council and session* (Edinburgh, 1790).

5. *APS*, iii, 595-96, c.103.

6. *Acts of sederunt*, 29-31; *APS*, iv, 184-85.

striking that an act of sederunt might add authority to an act of convention. It was more usual for acts of sederunt to become statutes later: Mackenzie listed a number of instances.<sup>1</sup> In 1598, a convention asked the court not to take too literally the act of a previous convention which had granted the Lewis colonists a disturbingly wide immunity from prosecution.<sup>2</sup> Balfour's 'Practicks' claimed that cases where the law was unclear had to be remitted to parliament, but this was no longer normal practice.<sup>3</sup>

However, there were many general issues on which the court sought the support of parliament. As well as improvements to the substantive civil law (and here the lords of session probably lobbied for many or most of the statutes) there were statutes to enhance the authority of the session itself, and to bring the local courts under central control: matters like the sasines register.<sup>4</sup> Thus in 1563 the court secured from parliament control over the admission of notaries.<sup>5</sup> In 1569 it was to be consulted over the setting up of commissary courts nationally.<sup>6</sup> Sheriff courts and hornings gave the lords of session endless trouble, and in 1579 an earlier act of sederunt requiring registration of hornings by sheriffs was backed by a statute.<sup>7</sup> In

1. Mackenzie, *Observations*, 293-94.

2. *APS*, iv, 175-76.

3. Balfour, *Practicks*, i, 1-2.

4. Chapter 3.

5. *APS*, ii, 542, c.17.

6. *RFC*, ii, 6-7.

7. *APS*, iii, 142-43, c.13.

1597 the session gained from a convention the power to register hornings directly if the sheriff refused to act.' On the whole the court sought to take over sheriff court business, but through a statute in 1587 it resisted being a court of first instance for molestation in property, as cases of this kind were holding back 'wechtie causes of heretage'.<sup>2</sup> In 1593, parliament ordered the session to back up the authority of presbyteries, an act which may well have been useful to the latter but which created a two-way relationship.<sup>3</sup>

Parliament and session usually co-operated. The court had been set up partly to take over judicial business from parliament, a process largely completed in the 1540s;<sup>4</sup> cases arising in parliament and conventions continued to be referred to it.<sup>5</sup> This worked the other way too. Where law was inadequate the court might make an act of sederunt, but where laws were confused it occasionally referred cases to parliament. In 1593 the lords of session threw up their hands in despair at the tortuous finances of Jedburgh abbey, caused by the 'multitude of the actis of parliament maid anent the saidis monkis portionis, superplus of benefices and annexatioun of temporall landis to the crown'; parliament cut the Gordian knot in this case, but left the law as it was.<sup>6</sup> No doubt the lords of the articles would have argued

1. *APS*, iv, 116.

2. *APS*, iii, 445-47, c.23.

3. *APS*, iv, 16-17, c.7.

4. Hamilton-Grierson, 'Judicial committees of the Scottish parliament', 12.

5. E.g. *RFC*, iv, 101.

6. *APS*, iv, 35-36, c.50.

that any changes would have to be made with the advice of those who really understood the workings of property law - the session judges.

The session witnessed a number of internal struggles, and parliament was often called in as supreme arbitrator. These were largely conflicts over the right to appoint senators to the college of justice: this was formally an issue between the crown and the existing senators, but Hannay argues that the underlying struggle was between crown and nobility.<sup>1</sup> Parliament invariably took the side of the latter - another instance of parliamentary opposition in action. Thus in 1579 the senators came to parliament complaining that some of the king's recently-appointed senators were neither old enough, experienced enough nor rich enough. The conflation of these three complaints obscures the issue: the first two might be the objections of professionals, but the third is clearly inspired by the landlords who wanted a voice in the appointment of the people who judged their lands. The upshot was that existing senators were allowed a veto on appointments - a defeat for the crown.<sup>2</sup> In 1592 the senators returned to the attack, this time apparently obtaining the king's surrender before parliament met.<sup>3</sup> The resulting statute conceded that all new lords of session should be over 25, with a yearly income of 1,000 merks or 20 chalders victual; recent appointees not meeting this standard were to be dismissed.<sup>4</sup> The power of the senators even in adversity was demonstrated at a June

1. R.K. Hannay, *The college of justice* (Edinburgh & Glasgow, 1933), 117.

2. *APS*, iii, 153, c.38.

3. 'Clark register's opinion anent acts passed in June 1592', SRD, PA7/1/42.

4. *APS*, iii, 569, c.50.

1590 convention where, amid mutual accusations of 'bryberie and kneavrie' between two of their number, 'the lordis of sessioun wer intendit to be altered.' (Perhaps the complaints of corruption related to senators and advocates buying land currently subject to court cases, a practice banned in 1594.<sup>2</sup>) Their spokesman John Lindsay deflected a bid to remove the senatorial veto by suggesting a commission of 12 from the nobility, barons, burghs and church to make appointments.<sup>3</sup>

The excellent lobbying ability which the court of session demonstrated must have depended partly on its most influential members - the 'extraordinary', non-professional lords who were often nobles or privy councillors. Extraordinary lords seem on the surface like an abuse perpetrated by the crown, but they were not; the magnates wanted them.<sup>4</sup> On one occasion the lords of session were to assist a parliamentary commission considering a number of articles which parliament itself had been unable to deal with.<sup>5</sup> During a parliamentary session, when inferior courts did not sit, the senators could even be drafted in to assist the lords of the articles - the lobbyist's dream.<sup>6</sup>

1. Moysie, *Memoirs*, 84.

2. *APS*, iv, 68, c.26.

3. Earl of Worcester to Burghley, 15 June 1590, *CSP Scot.*, x, 325.

4. R.K. Hannay, 'On the foundation of the college of justice', *SHR* 15 (1918), 45.

5. *APS*, iii, 214-15, c.9.

6. *RFC*, iv, 194-95.

It was not just over the appointments question that parliament flexed its muscles against the crown. Together with the statute of October 1579 on appointments came another (mentioned earlier) discharging crown and privy council interference with the court; the context in which it appeared adds weight to the idea that it was a miniature Magna Carta.' It had been preceded, in February, by the privy council's grudging promise - clearly not kept - that 'the kingis majestie sould not writ to the lordis of his hienes counsaile and sessioun in furtherance or hinderance of ony particular personis actionis and causis'.<sup>2</sup> The court of session as an institution never came into the open as a focus for a wider political opposition, as its cousin the parlement of Paris often did.<sup>3</sup> But there was regular friction with the government, particularly over the order of business.<sup>4</sup> In 1583 the privy council ordered that the backlog of poor people's cases should be cleared.<sup>5</sup> On the same issue in 1564, Mary had sat in the court herself to stop the cases of the rich taking priority.<sup>6</sup> The clerk register's interference in 1585, setting up a system which called cases by region and lot rather than influence, called forth some bitter

1. *APS*, iii, 152-53, c.37.

2. *RFC*, iii, 98.

3. Shennan, *Parlement of Paris*, chs.6, 7.

4. McNeill argues that the privy council could not interfere with the court of session because the two were parallel, supreme judicatories; this is clearly correct in law, but does not consider the evidence presented here; P.G.B. McNeill, 'Interference with the court of session by the privy council', *JR*, new ser. 6 (1961), 253-55.

5. *RFC*, iii, 610-11.

6. Thomas Randolph to William Cecil, 8 March 1564, *CSP Scot.*, ii, 51.

memoranda.<sup>1</sup> In November 1590 the king and privy council wanted major reforms in the system of central courts, mainly to expand the jurisdiction of the exchequer. Among the proposals was one that would have allowed the exchequer to take over all criminal cases on the grounds that they concerned crown revenue. The court of session apparently joined the chamber faction (who were unhappy that the scheme would restrict access to the king) to defeat the plan.<sup>2</sup>

The admission of the shire commissioners to parliament was an event of seismic significance. Parliament had derived its authority from ancient tradition; as late as 1584, a forceful government had beaten down resistance to its initiatives with 'the auctoritie of [the] supreme court of parliament continewit past all memorie of man unto thir dayis'.<sup>3</sup> But now, despite the claim to be reviving a stillborn and long-forgotten act of 1428, the representation in parliament would be based on a manifest innovation. Tampering with parliament's immemorial three estates to add a fourth could hardly fail to shake conservative beliefs about the well-springs of parliamentary authority, helping people to think of government as looking to the future as well as to the past.

They clearly needed some help, as they tacitly admitted by their overwhelming failure to refer to the 'four estates' after 1587. The

1. EL, Add. MS 33,531, fos.195r.-206v.

2. Bowes to Burghley, 7 November 1590, *CSP Scot.*, x, 416.

3. *APS*, iii, 293, c.3.

silence on this is deafening: people were deeply reluctant to abandon the traditional, mystically-significant number for the sake of mere arithmetical accuracy. The idea of three estates derived from the three medieval orders of society: those who worked, fought and prayed.' In England too, the phrase was always 'three estates' - even though in a bicameral parliament it was unclear what these might be.<sup>2</sup> The Scottish system of representation, however, made it obvious that there were now four estates, and people tried hard to avoid admitting it. An 'original act' (the copy used in its passage through parliament<sup>3</sup>) survives from 1592, the first parliament in which shire commissioners sat: comparison with the parliamentary record shows that the clerk who compiled the latter silently altered the traditional phrase 'thrie estaites' to the uneasily non-committal 'estaitis'.<sup>4</sup> The lairds' very presence in parliament was a continual, insistent reminder that times were a-changing.

The shire commissioners' institutional story has been well told.<sup>5</sup> However, the continuity of the lairds' attendance in parliaments and conventions between 1560 and 1587 needs to be stressed. It is well known that 101 lairds attended the Reformation parliament, but though this was significant it was not unique. Over 58 lairds attended a

1. J. Batany, 'Des "trois fonctions" aux "trois états"?', *Annales ESC*, 10 (1963), 933-38.
2. Pollard, *Evolution of parliament*, 61.
3. Cf. G.R. Elton, *The parliament of England, 1559-1581* (Cambridge, 1986), 6.
4. SRD, PA7/1/43; APS, iii, 559, c.32.
5. Rait, *Parliaments*, 199-210; C.S. Terry, *The Scottish parliament: its constitution and procedure, 1603-1707* (Glasgow, 1905), ch.5.



convention in February 1570, 34 attended another in July, and over 81 came to a third in November 1572.<sup>1</sup> At least 11 conventions between 1560 and 1587 included lairds. Even in parliament, though 1560 could not establish a precedent, lairds were sometimes present. The Regent Moray set up a commission of lairds, burgesses and ministers to receive articles and frame legislation for the parliament of December 1567.<sup>2</sup> One of their proposals (which was not passed) was for baronial representation in parliament.<sup>3</sup> Some lairds attended the August 1571 parliament, recorded in a separate list headed 'Astiterunt'.<sup>4</sup>

Both 1560 and 1570-72 were controversial and decisive periods for the nation's political and religious orientation; the lairds sought and achieved an independent voice in these questions. They consolidated their position in national politics through the general assembly, which from the outset accepted lairds' participation. The proposal for parliamentary representation in December 1567 led to an attempted formalization of the assembly's own shire commissioners.<sup>5</sup> It has been argued that presbyteries also tried to influence parliament's shire commissioners after 1587.<sup>6</sup>

After the civil war, the lairds continued to press for parliamentary

1. Appendix A, nos. 19, 22, 30.

2. *APS*, iii, 35.

3. *APS*, iii, 40. Rait, in a rare slip, describes this proposal as a statute; Rait, *Parliaments*, 203.

4. Appendix A, no. 30.

5. I. B. Cowan, *The Scottish Reformation* (London, 1982), 126.

6. MacQueen, 'General assembly', 124.

representation, petitioning for it in 1579; the privy council conceded their demand in principle, but was unwilling to make a major constitutional change during a royal minority.' It has been shown that the lairds, not the crown, took the initiative in the 1585-87 period when their demands bore fruit.<sup>2</sup>

The lairds' representation was closely linked with the growth of regular taxation.<sup>3</sup> However, the small barons had always been liable for taxation on the same basis as nobles: if they would no longer tolerate taxation without representation, this suggests growth in their social status and independence from the magnates. There were strong reasons to limit representation to the forty-shilling freeholders - this allowed an appeal to precedent in the act of 1428, and the English practice on which that had been based; but the experience of taxation thereafter suggests that this marked no significant social divide, even though the elite may have hoped that it might become one. For all freeholders, however small, were liable for taxation. Even the non-freeholder lairds - the feuars of church land who were growing in wealth and numbers - began to find themselves having to pay taxes; and the regular demands and petitions of the barons in parliament, when they were not battling against heavier taxes for all, concentrated on attempts to limit the tax assessment of feuars of church land. True, the election of shire commissioners was planned by the 1587 act to

1. Bowes to Burghley, 22 October 1579, *CSP Scot.*, v, 358. Although the king had formally accepted responsibility for the government in March 1578, he had still not reached 14, the normal legal age of majority.

2. I.E. O'Brien, 'The Scottish parliament in the 15th and 16th centuries' (Glasgow PhD, 1980), 78.

3. For what follows on taxation, see chapter 5.

take place at a special meeting of the forty-shilling freeholders, rather than at the head court of the sheriffdom at which all freeholders might be present.' This might have divided the freeholders, but it would also have undermined the feudal structure of the sheriffdom. Similarly, the forty-shilling freeholders had to be taxed regularly for their commissioners' expenses to parliament; if this divided them from those below, it also marked them off from the magnates above. The larger barons dropped anchor in parliament after a lengthy voyage which they could only have completed because they were buoyed up by those below them.

Once safely ensconced in the estates, the barons could lobby successfully for the cancellation of a proposed parliament in March 1595.<sup>2</sup> This, and the regular lobbying on taxation, could hardly have been done without some kind of organized national or regional network. It was not formal enough to be an institution like the convention of royal burghs, but that was not for want of trying. In November 1599, a petition from the barons to the other estates made a number of demands, mainly for reduced taxes, but also for the right to hold their own twice-yearly convention like the royal burghs.<sup>3</sup> It is significant that the barons' political leaders thought in these terms, especially that they identified with the burghs with whom they were taking concerted action against taxation. But perhaps it is equally significant that such a convention was never set up. The destiny of

1. *APS*, iii, 509-10, c.120.

2. Colville to Carey, 18 March 1595, *CSP Scot.*, xi, 553.

3. *SRD*, PA7/1/48.

the lairds was not to create another medieval institution, but to undermine existing ones by blurring distinctions of status like those between baron, feuar and burgess.

So parliament stood at the centre of a complex matrix of organizations, linking government to a range of social sectors and linking these sectors one with another; without them, government could not have been carried on. The time was not yet ripe for society to become an association of sovereign individuals, equal under the law; everyone who was anyone was part of a lobbying network with channels which might, if necessary, lead to parliament. Many of these institutions were certainly powerful; but it is time to look beyond the idea that parliament was weak because it had vigorous rivals. The historian of General Motors might well mention Ford only as a competitor; but a history of the US motor industry (probably a much more illuminating project) would have to consider the two firms as parallel, even complementary, businesses which shared a network of suppliers, which could both grow successfully, and between which competition played at best an incidental part. If parliament was weak because it had to share its fiscal privileges with conventions of estates, then by this argument conventions were strong, challenging parliament for supremacy.' But there is no evidence that they were mutually antagonistic even to the level of Ford and GM - which is hardly surprising, since the same people came to both. If the governing elite wanted a formal, legislative assembly, they held a parliament; if

1. For an example of this argument, see O'Brien, 'Scottish parliament', ch.5.

they wanted to pursue political intrigues, a convention of the nobility was more convenient. Similarly with the other estates' forums: when the general assembly was seen to be better at regulating religious matters than parliament would have been, parliament let them get on with it. Of course, the political elite sometimes had their differences over religious policy, differences which have been the staple fare of ecclesiastical historians; but even then it was less a matter of parliament versus general assembly than of government versus opposition in both parliament and assembly. The tendency of the opposition to be more successful in the assembly is very interesting, but should not allow the social and political realities to be obscured by an institutional superstructure.

## Chapter 2

## PARLIAMENT AND THE LAW

Now maisters ye sail hair incontinent,  
 At great leysour in your presence proclaimit  
 The nobill Acts of our Parliament,  
 Of quhilks we neid nocht for to be aschamit,<sup>1</sup>

More government: so more statutes. How did statutes operate? To answer this we first have to know the place of statute in Scots law. Having considered this question, this chapter goes on to discuss what statutes had the power to do, and then to consider some ways in which they can be categorized. Implementation of the laws could not be taken for granted, and often the most fundamental question that historians can ask about an act is: was it implemented, and if so how? Different statutes were designed to be operated in different ways. Finally, some acts benefited particular individuals: were any of these 'private acts', and if so what did this mean?

The late sixteenth century was a crucial period for reorientation of the law, and of attitudes to the law. The transition from locally-administered customary law to centrally-administered professional law had begun in the fifteenth century;<sup>2</sup> it was now accelerating.

1. Lindsay, 'Thrie estaitis', 347.

2. J.J. Robertson, 'The development of the law', *Scottish society in the fifteenth century*, ed. J.M. Brown (London, 1977), 137.

However, while contemporaries knew that law was in flux, they were uncertain about what type of law would or should emerge. The chief point of agreement was that Scotland was well supplied with ancient texts and collections of laws, most of which were, however, obscure and little understood. The conventional wisdom hoped for an updated and codified version of these, probably relying on the best-known text, *Regiam majestatem*.<sup>1</sup> In default of such a code, those who tried to define the basis of Scots law typically offered a combination of the 'old laws' (*Regiam* and associated texts) and the statutes. Before the Reformation, a churchman might add the canon law.<sup>2</sup>

How exactly the old laws and statutes fitted together was never conceptualized. The authority of the old laws stemmed from their virtually immemorial antiquity, usually having a legendary attribution to some famous ancient lawgiver like David I. This was based on the medieval view of society as fundamentally static; the best law was the oldest, and anything new was likely to be an innovation of doubtful authority. But where did this leave statute? - the best statute was surely the most recent. Could a statute contradict the old laws? If so, it was but a short step to the vertiginous suggestion that the old laws, because they were the oldest, were the least authoritative because least relevant to changing current conditions. The most logical way back from the brink of this conceptual abyss would have been to argue that statute could merely declare pre-existing law; but neither this nor any other theory seems to have been elaborated. There was no

1. *Regiam*, 1-2.

2. E.g. Leslie, *Historia*, i, 119.

need - not yet; for legislation had not expanded to test the boundaries of what statute might do, and there are no recorded debates about the competence of statute like those which the English Reformation prompted.<sup>1</sup>

This left statute potentially omniscient, and it is perhaps significant that nobody argued that the old laws were superior to statute. In practice, the old laws could be over-ridden even by lesser authorities like the convention of royal burghs, which in 1581 told Inverness that it had no right to levy an 'excise boll' on burgesses, 'nochtwithstanding the Lawes of the Majesty [i.e. *Regiam majestatem*]'.<sup>2</sup> Those who thought about the potential contradiction between statute and old laws perhaps recognized the limitations of the old laws in their current obscure form, using them when they could in specific cases, and hoping that the question would be made irrelevant by a code based on the old laws and approved by parliament.

Demand for law codification was growing in the 1560s, perhaps spurred by Scotland's French connections (especially strong during the regency of Mary of Guise and the personal reign of Mary): 1561-67 was a key period for French law reform.<sup>3</sup> A Scottish law reform commission of May 1566, the first of a long series, included three lawyers known to have studied in France among its key members: John Leslie, bishop of

1. Elton (ed.), *Tudor constitution*, 239.

2. *ACRB*, i, 123.

3. J.H.M. Salmon, *Society in crisis: France in the sixteenth century* (London, 1975), 151-62; J. Durkan, 'The royal lectureships under Mary of Lorraine', *SHR* 62 (1983), 74.



Ross (who initiated and chaired the commission), Edward Henryson, editor of the printed statutes that resulted, and David Chalmers, recently appointed a lord of session.<sup>1</sup> Also important was James Balfour, recently appointed clerk register.

According to Henryson, the commission planned to start with the post-1424 statutes, and then go on to codifying Scotland's old laws.<sup>2</sup> The edition of the statutes was a highly significant piece of work, to which we will return. But, lawyers would have asked, what about the old laws? One member of the commission did produce a work using the *Regiam* and many other old laws - Chalmers' 'Dictionary of Scots law'.<sup>3</sup> This was a digest collection of old laws, statutes, and decisions of the court of session. Presented to the queen (according to the preface) in July 1566, the 'Dictionary' may have been a preliminary report on this second stage of the commission's work. However, it was far from restricting itself to the old laws; perhaps it was an independent piece of work, on the strength of which Chalmers had been put on the commission. It could have been useful in its clear presentation - a chronological summary of significant laws arranged under alphabetical subject headings. But the 'Dictionary' was not a codified law, still less a codified version of the old laws. How could it have been, when the material Chalmers worked with was unsystematic? The old laws

1. *Actis and constitutionis of the realme of Scotland...* (Edinburgh, 1566), introduction; J. Durkan, 'The French connection in the sixteenth and early seventeenth centuries', *Scotland and Europe, 1200-1850*, ed. T.C. Smout (Edinburgh, 1986), 25; G. Brunton & D. Haig, *An historical account of the senators of the college of justice* (Edinburgh, 1832), 123.
2. *Actis and constitutionis of the realme of Scotland...*, introduction.
3. David Chalmers, 'Dictionary of Scots law', DL, Add. MS 27,472.

needed more than diligent compilation. And Chalmers, like a medieval chronicler, was more diligent than critical - he included, indeed gave pride of place to, a large number of pseudo-laws taken from Boece's *History*.

All this activity in her reign hardly justified Chalmers' later congratulations to Mary for 'reducing to order' the laws.' But something had been done, and the work continued in the 1570s. In March 1575, an act 'anent the sichtig collection and reformation of the lawis of this realme' lamented 'the harme quhilk this commoun weil sustenis throw want of a perfyte writtin law', and appointed a commission to draft 'ane certain writtin law'.<sup>2</sup> The expected transition from 'lawis' to 'ane law' shows that codification was still intended. The central commissioners were James Balfour and John Skene;<sup>3</sup> what eventually emerged was Balfour's 'Practicks'. Balfour and Skene probably took the opportunity to obtain the commission because they were working on the project anyway. Official backing meant material support, like a house in Edinburgh and a pension for Skene.<sup>4</sup>

The 'Practicks' was compiled very much on the plan laid down by the act - from the 'bukis of the law' (principally *Regiam majestatem*), the 'actis of parliament', and 'decisionis befoir the sessioun'. Balfour's

1. David Chalmers, *La recherche des singularitez plus remarquables concernant l'estat d'Ecosse* (Paris, 1579), introduction.

2. *APS*, iii, 89.

3. Calderwood, *History*, iii, 575-76.

4. *Edin. Recs.*, iv, 38; *RSS*, vii, no. 1552.

work, like Chalmers', was not a code but a magpie-like collection of all the law he could find, the older the better; though it was somewhat less jumbled, and much larger. Balfour probably began with a digest of the old laws, divided it roughly into subject headings, and like Chalmers added statutes and session decisions chronologically under each heading.<sup>1</sup> The arrangement of his headings within larger themes seems more sophisticated to modern eyes, but it was not always appreciated at the time - some contemporary copyists of the 'Practicks' rearranged it alphabetically.<sup>2</sup>

Nor was Balfour much more critical than Chalmers in his handling of the old laws. For instance, his prescription on usury ('ocker'), following the *Regiam*, specified that 'na persoun may be accusit for ocker induring his lifetime: bot gif ony man deceis, beand suspect thairof, the king may tak inquisition be ane assise... gif the said persoun usit the crime of ocker immediatlie befoir the time of his deceis' and escheat his lands and goods if found guilty. Why could the accusation be made only after death? Because the usurer was not primarily a criminal, but a sinner: 'gif he, befoir his deceis, has desistit and ceissit to use the samin, and has done repentance thairfoir', he could not be accused.<sup>3</sup> None of this bore any relation to the law when Balfour wrote.<sup>4</sup>

1. Balfour, *Practicks*, i, p.lviii.

2. Balfour, *Practicks*, i, pp.xxxv-xxxviii.

3. Balfour, *Practicks*, ii, 532; cf. *Regiam*, 163-64.

4. For the law on usury, see chapter 6.

Balfour did make some advances over Chalmers. Though his collection was still founded on the old laws, he tilted its balance towards recent times: its vast size arose from the inclusion of many more decisions of the court of session. He also relegated the luxuriant fantasies of Boece to an appendix where they could be safely ignored, instead of putting them proudly at the head of each chapter. He may have intended to incorporate them in the body of the text (he died in 1583 with it unfinished), but even if so, he clearly had his doubts about his Boece.

The first writers to apply critical standards to the old laws were Balfour's protégé Skene, and Thomas Craig; and they reached different conclusions. Craig's *Jus feudale*, written about 1600 towards the end of a long career as a <sup>justice depute</sup>~~session judge~~, was professedly a 'commentary on feudal customs... a scientific formulation of our Scots law'. Its ingredients were not merely current practice in Scots law, but included history from classical times and much of the west European legal tradition. He erected feudal law into a system to answer a wide variety of legal questions, from the rights of third parties in debt cases to the succession to kingdoms.

Craig, like Balfour, based his work on old laws, in his case the <sup>Lombardic</sup>~~Carolingian~~ 'Books of the feus'. But despite his own devotion to antiquity - or perhaps because of it - he repudiated the *Regiam* without hesitation as 'a blot on the jurisprudence of our country... useless as

1. Craig, *Jus feudale*, i, p. xii.

an aid to judicial decision'.<sup>1</sup> A rational humanist, he felt that his own feudal laws were important not because ages of use had given them authority (they were not, after all, any more Scottish than the English-derived *Regiam*), but because when looked at objectively they had something to offer the times in which he lived. Unhampered by Scotland's own mildewing medieval laws, he was free to serve up a fresh synthesis of law, derived from the most useful laws medieval Europe had to offer, for a seventeenth-century audience. This, however, distanced him from his Scottish contemporaries, and it is hard to assess his standing - is it more significant that the privy council praised the *Jus feudale* and recommended its printing, or that the recommendation was ignored?<sup>2</sup> Craig eventually achieved a European reputation, but his chief impact on Scots law at the time was probably a negative one: to undermine the idea that a code of law based on *Regiam majestatem* would be essential or even desirable. By contrast, Balfour and his colleagues were consciously concerned to adapt the law to the needs of a changing society, but they had not as yet developed the intellectual and critical tools to achieve this.

In the later work of John Skene, some of these tools can be seen in the process of development. His *De verborum significatione* (1597) was not intended to be a synthesis of the old laws, merely a collection of pathways which he had discovered through some of their more overgrown and tangled thickets.<sup>3</sup> But it would have been an essential

1. Craig, *Jus feudale*, I.8.11.

2. Privy council to James VI, 14 April 1608, *Melros papers*, I, 43-44.

3. Skene, *DVS*.

precondition for revival of the old laws - indeed, together with his edition of the *Regiam* itself (1609), it was perhaps the most single-minded effort yet made.<sup>1</sup> Skene showed particular interest in Highland laws, apparently with the idea that they might be integrated into any future system.<sup>2</sup> It is ironic that he was one of the Octavians, who in their government treated the Highlanders merely as savages inhabiting a land ripe for colonization.<sup>3</sup>

Skene devoted himself to resisting the encroachment of Roman law into Scotland.<sup>4</sup> The Reformation favoured Roman law; rather than continue the work of the 1566 commission on the old laws, the godly Moray regime proposed a new start, with a new commission to codify the law according to the 'fassoune of the law Romane'.<sup>5</sup> There is no evidence that such a commission was set up, but it perhaps became more common to see the principles of Roman law being used to decide cases where the law was unclear.<sup>6</sup> Almost all Scottish advocates admitted in this period had qualified in civil and canon law in France, where a new emphasis was being given to Roman law.<sup>7</sup> William Welwood's *Sea law of Scotland* (1590), which after the statutes was the first Scottish legal

1. Cf. *Regiam*, 18, 20.

2. For contemporary thinking on this subject, see Williamson, *Scottish national consciousness*, ch.6.

3. Chapter 4.

4. *Introduction to Scottish legal history*, 31.

5. *APS*, iii, 40.

6. P. Stein, 'The influence of Roman law on the law of Scotland', *JR*, new ser. 8 (1963), 215-16.

7. Durkan, 'French connection', 26; Durkan, 'Royal lectureships', 74.

work to be printed, was based on Roman law.' This kind of thing was a useful adjunct to the collections of session decisions - 'gif ony cummirsum or trubilsum cause fal out, as oft chances, quhilke can nocht be agriet be our cuntrey lawis, incontinent quhatevir is thocht necessar to pacifie this controversie is citet out of the Romane lawis'.<sup>2</sup>

None of these legal texts could compete in prestige with the printed statutes. The simple fact of printing must have given them unparalleled circulation and impressiveness, and they were directly associated with current affairs - each parliament was followed by another printed pamphlet with more statutes. The latest parliamentary enactments were just as much news then as now, and we shall see that good care was taken to maintain interest in them. Alexander Guthrie, burgh clerk of Edinburgh, was even moved to versification in the flyleaf of his copy:

Juges be war, pretend na ignorance;  
 Excuse is nane, the lawis ar to yow knawin,  
 The mighty Lord, quha gevis governance,  
 His law, his word, into your eir is blawin;  
 The princis lawis befoir yow heir is schawin,  
 Gif ye do wrang do nocht your self abuse;  
 Heir is your reule, ye can have na excuse.<sup>3</sup>

Even as successive law commissions wrestled with the intractable old laws in vain, Scots law was being refined, updated and extended. No

1. Welwood, 'Sea law'.

2. Leslie, *Historie*, i, 120.

3. *Actis and constitutionis of the realme of Scotland...*, copy in NLS, H.33,c.24.

single code of 'perpetuall lawes' was produced, but every parliament passed statutes to solve the problems of some branch of law and extend the competence of statute over other branches which had previously relied on old laws or custom.' By the seventeenth century, most criminal prosecutions were based on statute.<sup>2</sup> The true law reformers were the drafters of the statutes - who no doubt counted Balfour, Skene and Craig among their numbers.

The last chance for the old laws' survival was perhaps the 1609 printing of Skene's bilingual *Regiam majestatem*, including a number of the subsidiary law texts also. Here at last was a scholarly (for its time) edition of the old laws: what jurists had been demanding for two generations. But was it? - it was still not a code. The old laws proved little more usable in published form than they had done before, and there were two further law reform commissions in the early seventeenth century. Neither produced the *Code Napoléon* which by then was the only alternative to statute, and in 1681 Stair drove the last nail into the coffin of the codifiers.<sup>3</sup> Skene had done his best with the *Regiam*; but the statutes he had helped to print (he brought out the second collected edition in 1597) made it irrelevant, and it came half a century too late.

The process of superseding other laws with statute was not universally welcomed, nor did it go unopposed by those who distrusted central

1. Cf. *Introductory survey of the sources and literature of Scots law*, ed. H. McKechnie (Stair Society, 1936), 3.

2. *Introduction to Scottish legal history*, 41.

3. *Regiam*, 3-4.



government and preferred to leave things as they were. There is mention of opposition to the 1575 project to codify the law.' The burghs were happy enough with the old burgh laws, which provided an untidy but reasonably complete set of rules enabling them to govern their own affairs.<sup>2</sup> The extension of statute at the expense of local burgh privileges led to the quest for confirmations of the latter.<sup>3</sup> Edinburgh compiled a book of the old burgh laws for the convention of royal burghs in 1580-82.<sup>4</sup> This was less a special predilection for old laws than a distrust of parliament; any other law which preserved burghs' independence would do. The burghs probably used Welwood's sea laws, and they also drew up their own regulations in 1602: these were designed to supplement rather than to replace Welwood, concentrating on details rather than principles - for instance the rule that 'na mariner sall dispyse, conteme, or lichte the schipis wittuallis'.<sup>5</sup>

Though statute law now shone brightly while the lamp of the old laws burned dim, some other branches of native law were thriving. One forum for this growth was the commissary courts. Pre-Reformation family law had been canon law; this was partly superseded by the Reformers' statutes, and may also have suffered from an act against

1. Williamson, *Scottish national consciousness*, 135.
2. As well as the old laws on commercial matters, burgh courts of course administered the law of the realm; H.L. MacQueen & W.J. Windram, 'Laws and courts in the burghs', *The Scottish medieval town*, eds. M. Lynch, M. Spearman & G. Stell (Edinburgh, 1988), 214.
3. Lynch, 'The crown and the burghs', 67-68.
4. *RCRB*, i, 103-04, 112, 128-29.
5. *RCRB*, ii, 132-45.

'canon, civile or municipale' laws contrary to Protestantism.' Reformed practice in the commissary courts still used canon law, but a new body of decisions of the general assembly grew up on marriage and divorce.<sup>2</sup> These were mainly in the 1560s and 1570s; later decisions on marriage tended to shift away from the law towards the conduct of the ceremony. Whether this was because the law was now defined and the commissary courts' expertise in it accepted, or because the commissaries resisted the assembly's interference, is not clear.

The quiet, steady flow of statutes appeared more remote from the codification projects because Scottish statute drafters tended not to go in for vast, omnibus statutes like the Elizabethan statute of artificers.<sup>3</sup> Such acts, beloved of English legislators, would repeal a battery of earlier statutes to replace them with what was supposed to be an all-embracing code on the subject. Scottish acts tended to be brief (or relatively so) and to cover one or two simple points; few repealed previous legislation at all. The concept of desuetude was not yet fully developed, however, and we shall see that laws could lie dormant and then revive. In the regency of Morton, there were one or two direct borrowings from the English statute book: the statute of 1573 requiring holders of benefices to accept the Reformed confession of faith copied an English act of 1570, and an English act of 1572 was

1. Cf. W.D.H. Sellar, 'Leviticus XVIII, the forbidden degrees and the law of incest in Scotland', *Jewish Law Annual*, 1 (1978), 229-32; *APS*, iii, 548-49, c.2.

2. *BUR*, i-iii, *passim*.

3. 5 Eliz. I, c.4.

borrowed for the 1575 poor law.<sup>1</sup>

Balfour performed a most useful service to the professionalization of law in putting so many session decisions into circulation. It has been argued that what lawyers and the law really needed was evolution through constant use in a professional supreme court.<sup>2</sup> Neither Balfour nor anyone else formulated the idea at the time; Balfour even claimed that the session could not make law. But what was his authority for this? - a decision of the lords of session.<sup>3</sup> Some of the manuscript versions of Balfour included only the session decisions, so important were they.<sup>4</sup> The proliferating manuscript collections of such decisions are eloquent testimony to the growth of judge-made law. And as we have seen, the court of session never challenged parliament. Its decisions accepted the primacy of statute, and its first instinct when confronted with a problem for which there was no clear answer was always to seek a new law from parliament.

The eclipse of the old laws left statute supreme. Devotees of the old laws (or of the idea of reviving them in a usable form) would probably have argued that they were as authoritative as statute, if not more. In practice this proved an impossible position to sustain: Scots needed new laws, not a new version of the old ones. And that is what

1. For the 1573 statute, see Donaldson, *Scottish Reformation*, 177, and appendix III where the two acts are printed in parallel. For the poor law, see chapter 8. There had been a previous such borrowing with a sasines act of 1555; Sellar, 'The common law of Scotland and the common law of England', 92.

2. T.M. Cooper, *The dark age of Scottish legal history* (Glasgow, 1952), 24.

3. Balfour, *Practicks*, i, 1-2.

4. Balfour, *Practicks*, i, p. xxxvi.

they got. No longer would the oldest law be the most authoritative; now it would be the newest statute. There was plenty of room for other laws - precedents, for instance - so long as they did not conflict with the new and fundamental rule that the law needed to evolve and that parliamentary statutes were the driving force. Scots law was becoming a three-tier system. First came the statutes; subordinate to them, filling in gaps, came precedents from the court of session; further subordinate, the principles of Roman law could be used to set further precedents in the remaining gaps.

This brief survey of legal developments presents some striking contradictions. The medievalist Balfour was widely honoured; the modernizing Craig ignored. The diligent compilations of session decisions were made by lawyers who insisted that these could not be sources of law. Above all, the jurists yearned for a universal code of law, expressed in regular commissions which built castles in Spain while the real code of law - the statute book - was being written all the time.' If Scots law stood at a crossroads, it was so mistaken about the direction it was to take as to suggest that the ideas on which it drew were out of touch with emerging social realities. At the end of the barren labours of all the law commissions, it was more than ever possible to agree with Craig: 'it has to be frankly admitted that the Scots acts are practically the only written source of genuine native law we have'.<sup>2</sup> Buchanan had put it more bluntly: the

1. Cf. *Introduction to Scottish legal history*, 30-31.

2. Craig, *Jus feudale*, I.8.12.

Scots 'have no laws but their acts of parliament'.<sup>1</sup>

Did parliamentary statutes have any limitations in their scope? In England, the crown attempted (with diminishing success) to demarcate areas which parliament was to keep out of. This was an important component of the royal prerogative: the crown's right to do things independently of parliament.<sup>2</sup>

Parliament's powers were essentially unlimited, as in England, thought an English observer.<sup>3</sup> This report also believed that the crown had a veto, but there is no evidence of one being formally exercised in this period, and James VI later told his English parliament that in Scotland his negative voice came at the beginning, not the end, of the parliamentary process.<sup>4</sup> There was however an innovation in 1584, when the acts were touched by the sceptre - a ceremony either new, or given new prominence by Arran.<sup>5</sup>

The Scottish parliament legislated on a wider range of issues than the English, and a formal royal prerogative in the English sense scarcely existed. Even the word was used differently. When James VI in 1597

1. Buchanan, *History*, ii, 447.

2. N. Wilding & P. Laundy, *An encyclopaedia of parliament* (London, 1958), s.v. royal prerogative.

3. 'Relation of the manner of iudicatores of Scotland', n.d. (1587-1603), BL, Cotton MSS, Caligula, B.V., fo.272r.

4. Rait, *Parliaments*, 509.

5. Rait, *Parliaments*, 435.

referred in a statute to his own 'liberteis and prerogativis be the lawis of this realme and privelege of his crown and diademe', he meant in practice that the estates' sectional privileges (in this case the 'allegit bipast immunitie' of the merchants from paying customs on imports) could not stand up against parliament.' The first statute of the 1606 parliament, after James had succeeded to the English throne, was an 'act anent the kingis majesteis prerogative' in which the exuberance of the sycophantic verbiage was only matched by its meaninglessness.<sup>2</sup> Turning from words to deeds, parliament regularly ratified the appointment of the privy council, sometimes adding regulations for its conduct.<sup>3</sup> Practical rather than constitutional questions were to the fore. An act of 1563 on church repairs delegated parliamentary powers to the privy council, allowing that any action the council took was to be 'of als greit strenth and effect as and the samin had bene expreslie contenit in this present act'.<sup>4</sup>

No royal official was immune from parliamentary intervention. Thus, parliamentary commissions for overseeing the expenditure of tax revenue were appointed in 1588 and 1597.<sup>5</sup> In theory, only parliament could alienate crown property.<sup>6</sup> On one occasion the officers of state were

1. *APS*, iv, 136, c.22.

2. *APS*, iv, 281, c.1.

3. *APS*, iii, 69, c.24; 96-98, c.4; 118-19; 150-51, c.32; 228-29, c.38; 378, c.10; 444, c.19; 562-63, c.41; iv, 34, c.45; 53; 177-78.

4. *APS*, ii, 539-40, c.12.

5. *APS*, iii, 523; iv, 145-46, c.48.

6. *APS*, iii, 89-90.

not to be dismissed without parliamentary approval.' These powers fell well short of direct parliamentary control over the executive, of course. There was no procedure for the Scottish parliament to initiate independent investigations or punish crimes committed by crown officers. Such powers were relatively rare among European parliaments, being possessed only by the Aragonese cortes, the Polish *sejm* and the English parliament.<sup>2</sup>

Queen Elizabeth, having had the Reformation settlement made by parliament, did her best to keep her house of commons away from religious matters thereafter.<sup>3</sup> The Scottish Reformation, similarly, was legislated by parliament, but the crown had less incentive to curb parliamentary powers on this since these could usually be used on the crown's side against the general assembly, as with the Black Acts of 1584.<sup>4</sup>

Parliament had discussed war, peace and foreign policy in medieval times.<sup>5</sup> The making of war and peace were recognized as matters for parliament and conventions of estates, though probably not to the exclusion of independent crown action.<sup>6</sup> An embassy to Denmark on the

1. *APS*, iii, 300-01, c.16.

2. *Myers, Parliaments and estates*, 33.

3. *Neale, Elizabeth I and her parliaments*, i-ii, *passim*.

4. Chapter 1.

5. *Lovat-Fraser, 'Constitutional position of the Scottish monarch'*, 254.

6. *APS*, ii, 543, c.20.

Sound tolls was authorized by statute in 1563.<sup>1</sup> Similarly, Archbishop James Beaton was restored in 1598 in order to act as ambassador in France (but not appointed - that must have been done by the crown).<sup>2</sup> The 1585 league with England was ratified by parliament.<sup>3</sup> If parliament did not have complete control over foreign policy, neither did the government: if it was illegitimate for the Catholic earls to negotiate with Philip II, it was quite in order for the royal burghs to send their own embassy to France.<sup>4</sup> Related to foreign policy are military matters.<sup>5</sup> Commanders were not answerable to parliament, but there were numerous statutes on the army. The summons of the common army (and thus, increasingly, a form of taxation) was a prerogative of the crown.<sup>6</sup>

There were few more inflammable topics under Elizabeth than the succession to the throne and the sovereign's marriage. The succession was not discussed by the Scottish parliament in this period; however, when the duke of Lennox wanted a ratification of his right to the succession in 1581, this was too controversial for the politicians but parliament's right to make such a ratification was unquestioned.<sup>7</sup> Royal marriages could be discussed by parliament if they raised

1. *APS*, ii, 544-45, c.27.

2. *APS*, iv, 169-70.

3. *APS*, iii, 380-81, c.18; 423-24.

4. *APS*, iv, 46-48; *RCRB*, i, 127-28.

5. Chapter 7.

6. Chapter 5.

7. Occurrents in Scotland, 24 November 1581, *CSP Scot.*, vi, 92-93.



constitutional issues, as did that of Mary to Francis.'

The constitutional powers of parliament (or rather of conventions) over regencies were extensive but undefined, depending like so much else on power politics carried on elsewhere. The legal basis of the regency during James VI's minority was Mary's act of abdication, naming a council of seven governors plus Moray to whom the regency was offered.<sup>2</sup> On Moray's death the procedure was unclear, and made more so by the limited recognition of Mary's abdication. A convention of the nobility discussed three alternative methods of electing a regent - by those in Mary's council, by all those who had attended the king's coronation, or by parliament; no agreement could be reached.<sup>3</sup> Scotland was without a regent for six months until the English intervened to get Lennox elected.<sup>4</sup> Thereupon two successive conventions elected regents in the same way, from among those in Mary's council, until by 1573 few of these were left: whereupon parliament enacted that any Protestant noble could be elected.<sup>5</sup> There was no official suggestion that the heir presumptive (Lennox or Châtelherault, depending which view was taken of the royal genealogy) had the right to the regency without asking the estates.<sup>6</sup>

1. *APS*, ii, 504-20.

2. *RFC*, i, 538-41.

3. *Herries, Memoirs*, 123-24.

4. *Diurnal*, 180.

5. *APS*, iii, 74, c.6.

6. For a typology of regencies, see P.G.D. McNeill, 'The Scottish regency', *JR*, new ser. 12 (1967), 127-48.

Only a convention, not parliament, could elect a regent. When Lennox was killed in 1571, parliament was actually in session; but a separate convention, with no doubt the same membership, had to be held to elect a new regent, Mar.<sup>1</sup> The same parliament then reconvened, and by its first act confirmed Mar's election.<sup>2</sup> It is clear that parliament could not lawfully be held until a regent had been constituted to hold it.<sup>3</sup>

These wide powers were all very well in theory, but parliament's right to make laws was of little value unless they could be implemented. Herein lay, according to most older histories, the real weakness of the Scottish parliament: the fact that parliamentary statutes were often regularly repeated proves that they were not being observed. Or does it? Might not repetition of statutes prove rather that someone continued to think they were worthwhile, and in fact they were being implemented?<sup>4</sup> Much of the evidence for either argument can be slotted neatly into the preconceptions on which the argument is based. For instance, in June 1595, Mark Acheson of Acheson's Haven in East Lothian was summoned for exporting grain, contrary to the 'actis of parliament and proclamatiounis for the retening of victuall within the cuntrie'. He had already been warned twice in 1594. But in 1597, he was summoned again - this time for deforcing a searcher for forbidden

1. *APS*, iii, 65-66.

2. *APS*, iii, 58, c.1.

3. McNeill, 'Scottish regency', 131-32. Rait claims that a convention elected the regent because it was a 'more popular assembly', which was true neither for this convention nor for conventions in general, as his own work makes clear; Rait, *Parliaments*, 161.

4. Rait is more willing than most to consider both views; Rait, *Parliaments*, 47.

goods.' Many historians might treat this as evidence that the laws are being entirely disregarded. Here is someone exporting grain with impunity, even repeating his offence - how many more must be getting away scot free! But others might argue that this case shows how difficult it is to export grain. Thus, it has to be done from a minor port, because the royal burghs are too well policed; and even here, a customs official manages to interfere, if not too successfully.

Acheson's case does at least offer some kind of evidence for compliance or non-compliance with the law, even if it is hard to interpret. All too often, historians have failed to look beyond the statutes at all, and have tried to measure the success of laws by their own comments on the problem in hand. For instance, efforts to improve the process of putting criminals to the horn were common. One such law, in 1579, lamented that 'the disobedience of the proces of horning is sa greit and commoun that the personis denunceit rebellis takkis na feir thairof'.<sup>2</sup> This is familiar enough. But if we accept it at face value, what are we to make of the law of 1573 which said that people had 'greit feir and terrour... to incur the said proces of horning'?<sup>3</sup> The answer is that this act was tightening up on the penalties for benefice-holders at the horn, and needed to imply in its wording that this was worth doing: they would have the same 'feir and terrour' as laymen. This kind of excited remark was always included by the promoters of a law, to convince parliament (and themselves) that the

1. TA, 1593-96, SRD, E21/70, fos.163v., 97v., 127r.; TA, 1596-97, SRD, E21/71, fo.132v.

2. APS, iii, 142-43, c.13.

3. APS, iii, 74-75, c.8.

the law was worth having. Sixteenth-century statutes exaggerated the seriousness of the disease; they claimed that all previous laws had totally failed to cure it; and they prescribed an infallible remedy: this was no more than common form. More can be learned from the substance of the statutes than from their hypochondriac preambles; and in the case of horning, there is the law of 1598 which enjoined privy councillors to set a 'guid example of obedience' by not actually appearing at the council table while at the horn.'

Even the substance of the statutes can be of limited value. How many laws were passed with resounding claims to universal, complete and permanent implementation! Of course, this was unrealistic; but what other formula could have been used? Past histories have brimmed with sympathy for parliaments in their well-intentioned uphill struggle, or have rebuked them sternly for relying on futile scraps of paper. Both attitudes miss the point. Sixteenth-century legislators, despite the formulas in their statutes, did not think in terms of full, permanent implementation.

The statutes can thus be divided up according to what kind of implementation was expected of them. These categories are not concrete or mutually exclusive; quite a number of laws fall into two or more groups. Rather, they are tendencies which can be found in the laws.

The first two categories need not be discussed in any depth. In 1563,

1. *APS*, iv, 178.

a law required an embassy to be sent to Denmark.' The ambassador went, came back (empty-handed, as it happens), and that was the end of it. Continual effort for implementation was not required. Secondly, many laws, though permanent, were not of the kind which required government to be continually vigilant over their enforcement. Much civil law merely established ground rules for disputes between individuals. If the laws were in tune with generally-accepted values, they could be left to take their course; and discordant laws could be harmlessly forgotten. Thus, laws allowing divorce on grounds of adultery (1563) or desertion (1573) were not going to be followed by campaigns to require all partners of adulterers, say, to seek divorce.<sup>2</sup> Having passed the law, the government let the commissary court get on with it.

Thirdly, we have what we expect from modern laws: full, country-wide, permanent implementation. Even modern governments face many constraints on their ability to implement their laws. Were there, in fact, any laws which a sixteenth-century government could enforce fully and permanently? Not many, certainly. The customs, perhaps, are an example. They at least were being collected all the time somewhere, and at the rates laid down from time to time. There was certainly large-scale evasion of the customs, but when have there ever been taxes without tax evasion? The government was able to maintain its hold on the machinery of collection.

1. *AFS*, ii, 544-45, c.27.

2. *AFS*, ii, 539, c.10; iii, 81-82, c.1.

The fourth approach to law-making, however, was very common. It may be called permissive legislation. Parliament passed these laws with sweeping claims, certainly. But nobody thought that they would be implemented permanently; nobody thought that they would be observed all over the country; and nobody thought that they would be applied to everyone, even in a locality which was paying attention to them. They were *enabling* laws. The government, worried about some social problem, passed a law inviting local administrators to consider what, if anything, they would do about it. Thus, the poor law was first enacted in 1575 to deal with the social threat of growing poverty and vagrancy.<sup>1</sup> It required parishes to assess the level of poverty, and to impose local taxation to pay regular poor relief to all those in need. Probably not a single parish did so - at least, not immediately or regularly. Certainly the government made no attempt to compel them. But arguably, the act did encourage thinking about how to tackle vagrancy at a local level, and it gave parishes a mechanism of which they could take advantage to cope with a temporary crisis. This, perhaps, was as much as administrators could expect.

There were many laws and even more proclamations against shooting wild game.<sup>2</sup> But this was not principled conservationism; it was about preserving the royal sport. The laws were usually proclaimed (and only enforced) at a time and place when the king was actually

1. Chapter 8.

2. E.g. *APS*, ii, 541, c.15.

hunting.' Thus the law might sound permanent, but the problem was often intermittent. Mark Acheson, exporting grain contrary to statute, would have been much less likely to get into trouble if the mid-1590s had not been years of dearth. The law limiting the followers which a noble could bring to the law courts was only important when there was a serious attempt at intimidation. This law is a good example of the type of law which fades out and then comes back. Having been passed as a statute in 1584, not for the first time, it was re-issued by the privy council in 1590 - but the council saw no harm in tinkering with the statute's permitted limits.<sup>2</sup>

The temporary (not to say evanescent) nature of such laws was not the same as desuetude, which was not mentioned by Balfour (1580s) or Hope (1630s) and took its modern form only with Stair's *Institutions* of 1681.<sup>3</sup> By Stair's time, full implementation of laws was expected as normal, so the concept emerged to weed out the minority of laws which were not continuing to bear fruit. Craig, before his time in this as in much else, mentioned that laws could go out of use, though he did not elaborate on the principles which could allow this to happen.<sup>4</sup> In 1611, the Edinburgh council protested against a revival of the anti-usury 'poenall laws which have heirtofoir beine left in... deswetude'; what this meant was that only a small number of laws might be attended to at any one time, yet dormant ones might easily take on renewed

1. E.g. TA, 1601-04, SRD, E21/76, fo.78r.; RFC, vi, 353, 542.

2. APS, iii, 301, c.17 (reissuing APS, ii, 51, c.29; 495, c.15); RFC, iv, 508.

3. Balfour, *Practicks*; Sir Thomas Hope, *Major practicks, 1606-1633*, 2 vols., ed. J.A. Clyde (Stair Society, 1937-38); Stair, *Institutions*, 87-88.

4. Craig, *Jus feudale*, I.8.9.

life.' This happened in England too, where there was no desuetude; the Scots were surprised in 1602 when a campaign against their cloth exports was launched under a statute of Edward IV.<sup>2</sup> The interest in old statutes means that it is normal to find that the contemporary editions of the statutes have been heavily annotated: legislation back to the reign of James I continued to attract attention.<sup>3</sup>

In extreme cases of permissive legislation, no enforcement was envisaged at all. Local authorities were not being invited to enforce the law; the subjects were being invited to comply with it. In 1579, a law was passed requiring all members of the propertied classes to possess bibles and psalm books.<sup>4</sup> Possibly some law-abiding citizens went out and bought them as a result; but nobody can have expected punishment if they did not. True, a 'sercheour' was appointed in 1580 with power to enforce the law in Edinburgh;<sup>5</sup> but if this was ever widely known it was soon forgotten. In 1584, the exiled presbyterian minister James Melville was in Newcastle attending to the spiritual welfare of a group of nobles who had been forced to flee, he felt, for their loyalty to presbyterian principles. He told them of the need for bibles and psalm books, but he did not mention the legal obligation to possess them. Indeed, he limited his advice to saying

1. Quoted in S.G.E. Lythe, *The economy of Scotland in its European setting, 1550-1625* (Edinburgh, 1960), 106.

2. Nicolson to the English privy council, 22 May 1602, *CSP Scot.*, xlii, 987.

3. E.g. *Actis and constitutionis of the realme of Scotland...*, copies in NLS, Ry.iii,c.20(1-2), H.33,c.21(1-7), H.33,c.24.

4. *APS*, iii, 139, c.10.

5. *RSS*, vii, no.2395.



that 'everie an that can reid' should have them.'

Much effort went into fine-tuning the penalties, even for the most unenforceable laws. For the bibles and psalm books law, for instance, the penalty was £10, scrupulously divided up: one third to the king's commissioner and two thirds to the poor of the parish.<sup>2</sup> No doubt the scale of the penalty reflected parliament's view of the seriousness of the offence; there were also pious efforts to provide incentives for action. In 1579, the law against carrying firearms was re-enacted with the penalty reduced from loss of the right hand to a £10 fine, 'be ressons of the pane of deith or demembering quhilk the ordiner juges hes bene laith to execute'.<sup>3</sup>

Mention of financial penalties leads us to the fifth tendency within the laws: fiscalism. One eager hope of many laws was to make money. In fact almost all laws had an eye to the fiscal possibilities. Fines were lucrative; so was the sale of exemption licences. Mark Acheson's real crime was not to export grain, but to do so without paying for a licence. It is worth pondering that modern governments disapprove of tobacco so much that they... ban it? No, they tax it. This administrative problem was the same in the reign of the author of the *Counterblaste to tobacco*: an import ban had soon to be replaced by a monopoly of tobacco imports.<sup>4</sup> Monopolies had clear fiscal

1. Melville, *Diary*, 183.

2. *APS*, iii, 139, c.10.

3. *APS*, iii, 29-30, c.23; 146, c.25.

4. Lythe, *Economy of Scotland*, 86-87.

potential; if they were not paid for in cash, they were distributed as rewards. One interesting case is the 1599 scheme to import weapons, run by Michael Balfour of Burleigh: a law was passed requiring the propertied classes to possess weapons, and he was given a monopoly of importing them. He used the courts assiduously to drag in unwilling customers, but he failed to make money - partly because the crown granted many suspensions of obligation to buy. Or did it sell these suspensions? The potential ramifications of fiscalism are endless.'

The fiscal use of laws did not even have to be legal. New customs rates were issued on privy council authority in 1611: they included £10 per chalders on export of great coal.<sup>2</sup> This was curious, since the export of great coal was illegal under statutes of 1563 and 1579, which had been repeatedly reissued, most recently in 1609.<sup>3</sup> Possibly the ban was still in force to countries other than England - the king's main motive in obtaining the 1609 reissue was to ensure a good supply of Scottish coal for London - but the point remains.<sup>4</sup> If many laws were partly fiscal in their aims, some were almost entirely so. In 1575 a new law on salt production lifted a two-year old export ban; but in return it required exporters to purchase signet licences, and ordered all salt masters to provide six bolls a week to the crown at fixed prices for domestic resale.<sup>5</sup>

1. For the armour import scheme, see chapter 7.

2. *RFC*, ix, pp.lxv-lxvi.

3. *APS*, ii, 543, c.22; iii, 147, c.28; *RFC*, viii, 232; J.U. Nef, *The rise of the British coal industry*, ii (London, 1932), 226.

4. *RFC*, viii, 547. For more on export policy, see chapter 6.

5. *APS*, iii, 82, c.3; 93-94.

The sixth type of law is the large group for which implementation was negotiable. No doubt the salt export law was preceded by discussions with the salt masters; but many laws were followed by negotiation. This is the reality behind Good Counsel's advice (standard in medieval times) that a king's duty

Is for to do everilk man justice,  
And for to mix his justice with mercie,  
But rigour, favour or parcialitie.'

The admixture of mercy to justice is most noticeable in the field of criminal law. The law might prescribe a specific punishment for a specific offence; but the privy councillors, to whom usually fell the thankless task of coping with feuds, were desperately willing to overlook offences if this would reduce future trouble from powerful families.<sup>2</sup> Any means, coercive or conciliatory, would be adopted on a pragmatic basis.<sup>3</sup> In 1579, John Boswell of Auchinleck complained that he feared 'bodilie harm' from John Crawford of the Shaw and other Crawfords. Although there had already been 'divers bluidsheddis betuix thame', the privy council passed over these crimes and merely ordered the Crawfords to give lawburrows that they would not harm him further.<sup>4</sup> The council was relatively uninterested in the letter of the law: in enforcing law and order, the stress was very much on achieving order. If mercy to either side was exercised without this legitimate

1. Lindsay, 'Thrie estaitis', 187.

2. Brown, *Bloodfeud*, ch.9.

3. B. Lenman & G. Parker, 'Crime and control in Scotland, 1500-1800', *History Today*, 30, no.1 (January 1980), 15.

4. *RFC*, iii, 148-49.

aim it might degenerate into illegitimate 'rigour, favour or parcialitie'. This was, perhaps, class-based law: the peasant murderer could expect no mercy, whereas the noble could obtain a remission at a price. On the other hand, when such a small fraction of crimes came before the courts, perhaps a higher proportion of nobles' crimes did so.

If remissions were available at a price, how was that price negotiated? First of all, for a case of slaughter, it had to be preceded by assythement - compensation to relatives of the victim. That required one set of negotiations. At justice ayres, further negotiations would follow with 'lords componitors' on the price of a remission.' Remissions were only available from the crown, but one of the administrative problems of the period was the ease of obtaining one at court by pulling the right strings - sometimes (and this was the key point) without satisfying victims. Regular acts ordered that no remissions would be given for a year, three years, five years - these orders probably came at times when the privy council was asserting its influence.<sup>2</sup> The problem was not new: parliament had demanded a moratorium on remissions in 1473.<sup>3</sup> In practice it was hard to overturn even a dubious remission.<sup>4</sup>

1. J. Wormald, 'Bloodfeud, kindred and government in early modern Scotland', *Past and Present*, 87 (May 1980), 82.
2. E.g. *TA*, xii, 14; *APS*, iii, 67; 298, c.12; 426; 457, c.54, para 4; 575, c.67; iv, 18-19, c.16.
3. Macdougall, *James III*, 99.
4. E.g. Pitcairn, *Trials*, ii, 1, 97.

Remissions have a large fiscal component: James V prosecuted some nobles merely in order to sell remissions to them.' The fiscal connection is even clearer with 'unlaws' and 'wills' in the court of justiciary - the rather rudimentary central criminal court. 'Unlaws' were the occasional, but sometimes substantial, compositions for fines; 'wills' were the penalties imposed on those who 'came in the will' of the monarch, submitting without a trial in the hope of more lenient treatment.<sup>2</sup> Edward Johnstone, burgeess of Edinburgh, came in the king's will for treasonable behaviour during the 1596 tolbooth riot. The king's will was that since he himself owed huge sums to the goldsmith Thomas Foulis; and since Foulis owed 8,000 merks to Johnstone; Johnstone should not pursue Foulis for the 8,000 merks (or for any interest payments) until the king had paid Foulis. Johnstone probably never saw his money again. Nor was that all, for his escheat was granted to a courtier, George Home of Spott, who mulcted him of another 3,500 merks.<sup>3</sup> These complex transactions, involving four different parties, must have involved careful negotiation.

By law, of course, Johnstone could have been executed for treason. But some laws were not implemented fully because they were too general. They were reserve weapons; and this is the seventh and final category. Treason, for instance, was what the king said it was: as James VI advised his son, 'I remitte to your owne choise to punish or pardone

1. Donaldson, *James V - James VII*, 53.

2. *TA*, xii, p.xxviii.

3. Pitcairn, *Trials*, ii, 1, 33-34. For the significance of Foulis' debts at this time, see chapter 4.

therein." The supreme penalty was hardly ever paid. Censorship laws were similar: there was frequent criticism of James, but he let many hostile comments pass without invoking the statutes.<sup>2</sup> In an effort to suppress presbyteries, the Black Acts of 1584 banned all assemblies, prompting Calderwood's complaint that 'there is no particular specification of the judgments and assembleis heere called in questioun... commoun lawes should be cleere, to assure the subjects certanelie what could be done or left undone'.<sup>3</sup> Arran knew it was in his interests to leave things vague.

This discussion of the implementation of acts has focused on the acts the government wanted implemented. Chapter 3 takes this further by looking at the available executive institutions. Meanwhile, there is another way of approaching the acts:

All maner of men I wairne that be opprest,  
 Cum and complaine and thay salbe redrest,  
 For quhy, it is the nobill princes will,  
 That ilk compleiner sall gif in his bill.<sup>4</sup>

Not all acts were government ones; many were inspired by the various sectional and individual interests that swarmed round parliament, bombarding it with petitions. When parliament was held in Stirling castle, 'it wes allegeit that thair wes na frie acces nor libertie to

1. James VI, *Basilicon doron*, I, 64-65.

2. For censorship policy, see chapter 7.

3. *APS*, iii, 293, c.4; Calderwood, *History*, iv, 64.

4. Lindsay, 'Thrie estaitis', 233.

the saidis liegeis to frelie repair and resort to our said soverane lord, his thrie estatis and lordis of articulis'.<sup>1</sup> Were these lieges seeking private acts, and if so how did they differ from public ones? The question may appear simple - but in fact the answer is that private acts were public, and that public acts were private.

To explain this, perhaps it is best to begin by asking who drafted the acts. We rarely know, but it is usually assumed that government measures were framed by the privy council or the lords of the articles, and other measures by interested parties;<sup>2</sup> such an assumption can take us a long way, though we shall see that it fails us in the end. Drafting could be a lot of work: Chancellor Maitland and the king were at work on the legislation of July 1587 by April 1586.<sup>3</sup> We have seen that the court of session also played an important role in inspiring civil law statutes. Parliament does not seem to have had its own institutional draftsmen like the Lords' and Commons' clerks in England, though the clerk register, as the official in charge of the parliamentary paperwork, was involved in receiving petitions.<sup>4</sup> Unless the measure was a government one from the start, its drafting may have been left to the lobbyists: the convention of royal burghs in 1592 paid 10 crowns to William Scott, the writer who had drafted recent statutes for it, as well as £100 to the clerk register for seeing them

1. *APS*, III, 94, c.1.

2. N. Gow, 'The character of Scots acts', *JR*, new ser. 7 (1962), 41.

3. Lee, *Maitland of Thirlestane*, 92.

4. Neale, *Elizabethan house of commons*, 322; A.L. Murray, 'The lord clerk register', *SHR* 53 (1974), 135.

through parliament.' Many private acts embodied petitions, converted into acts with a few standard phrases: 'Anent the supplicatioun gevin in and presentit to our soverane lord and thrie estaitis... makand mentioun that... as at mair lenth is contenit in the said supplicatioun; quhilk being hard and considerit be oure said soverane lord...' - and parliament's decision would be tacked on to the end.<sup>2</sup>

Many statutes thus provided work for lawyers like William Scott even before they were passed: lawyers were often hired by lobbyists, like the Edinburgh craft deacons when they sought better representation on the burgh council.<sup>3</sup> Others relied on their own talents, like the Edinburgh council itself which appointed a committee of six leading burgesses to prepare legislation 'for the weill of the toun' in 1593.<sup>4</sup> These may not have been commercial matters: town government was, after all, government, and when the council decided in 1595 that seduction was too common in the burgh they drew up an article against it for parliament.<sup>5</sup> An Edinburgh skinner was admitted to the guild 'fre for 40s deburst of befoir for ratificatioun of the act of parliament', probably the act of 1594 which ratified an earlier act against exports of calf and kid skins, hutherons and shorlings.<sup>6</sup>

1. *RCRB*, i, 382-83.

2. *APS*, iii, 498, c.108.

3. Lynch, *Edinburgh*, 61.

4. *Edin. Recs.*, v, 90.

5. *Edin. Recs.*, v, 141.

6. V. Angus (ed.), 'The incorporated trade of the skimmers of Edinburgh, with extracts from their minutes, 1549-1603', *SOEC* 6 (1913), 74-75; *APS*, iv, 75-76, c.47.



Lobbying had its sorrows as well as its joys: the skinnners spent over £43 on 'fortificatioun of the act anent the puresis' in May 1599, but no such act emerged from the convention of that date.' Probably the number of petitions was growing - after all, the number of statutes was; if so, this may help explain the parliamentary committee (four members from each estate) set up in 1594 to weed out unwanted petitions 20 days before parliament met.<sup>2</sup>

As well as these statutes which benefited a particular interest group - and in the last analysis, what statute does not benefit an interest group? - there were acts in favour of (or against) private individuals. Acts naming specific people fell into a number of categories. By far the largest was the de-luxe charter. These were ratifications of possession of property; the beneficiaries would return home clutching extracts from the parliamentary roll which looked very much like the charters they already had. Secondly, there were the former rebels who took advantage of a period of national reconciliation to obtain a remission or restoration, often in the form of admission to the 1573 pacification of Perth. Almost all these were between 1578 and 1585, with a foretaste in the parliament of April 1567 when the Gordons' restoration was ratified. These acts had often been preceded by a third type: parliamentary forfeiture. Finally, a fourth type was the parliamentary adjudication - least common, but sometimes most revealing. Sometimes one party or the other would bring the case back

1. Angus (ed.), 'Skinners of Edinburgh', 99.

2. AFS, iv, 69, c.28.

time and again to parliament - the record perhaps being the dispute over the escheat of William Maitland of Lethington, pursued between his father Richard and David Home of Fishwick over four acts between 1578 and 1584.<sup>1</sup>

All the cases in which an individual benefits can be divided into just two categories by asking: at whose expense? If people were prepared to go to the trouble and cost of obtaining an act of parliament, they clearly expected to gain by it. The ostensibly uncontroversial ratification of A's possession may well be a weapon in a struggle against B. Similarly the restoration of a former rebel may mean that someone else had to disgorge their grant of that rebel's escheat. These acts are really little different from those which explicitly decide between the disputed rights of A and B.

The case is different, however, if A benefits at the expense of the crown. This would be so for some restorations of former rebels, if their lands were still in crown hands. The act making an exception from a general revocation of crown lands also in effect ratifies a grant received (perhaps indirectly) from the crown. Similarly the confirmation of a great seal charter may simply be a promise that the crown will not attempt to reclaim a recent grant:

Thou sail have yeirly for thy hyre  
The teind mussellis of the ferrie myre,  
Confirmit in Parliament,<sup>2</sup>

1. *APS*, iii, 111, c.31; 162-63, cc.45-46; 354-55, c.17; cf. Rait, *Parliaments*, 471-72.

2. Lindsay, 'Thrie estaitis', 181.

Elton argues persuasively that many general acts in England were the product of private initiative. His claim that there were no private acts in Scotland is less than persuasive, but by now it is worth asking whether and where a line can be drawn.' It is even clearer in Scotland that general acts could be privately sponsored, when so much legislation was obviously inspired by a particular estate.<sup>2</sup> James VI, who was in a position to know, wrote that parliament could be 'the injustest judgement-seate that may bee, being abused to mens particulars: irrevocable decreits against particulare parties being given therein under colour of generall laws'.<sup>3</sup> Such a 'generall law' might be the act of 1584 against ministers holding legal office - tacitly directed against Robert Pont, a dissident Melvillian minister who was also a session judge.<sup>4</sup>

So general laws were not necessarily public. How far were the acts applying to individuals really private? Forfeitures, remissions, ratifications: it was the government that was forfeiting people, de-forfeiting them, or exempting them from revocations, and while some of these acts may have been concessions to the just claims of an isolated individual, there is no reason to suppose that they all were. All acts affected individual people, and acts in which individuals were named were no less the product of an overall government policy.

1. G.R. Elton, 'Tudor government: the points of contact: 1: parliament', *TRHS*, 5th ser., 24 (1974), 191-92.

2. Chapter 1.

3. James VI, *Basilicon doron*, 1, 60-61.

4. *APS*, iii, 294, c.6; Brunton & Haig, *Senators of the college of justice*, 152.

This is particularly clear for royal revocations, by which the crown attempted to reclaim crown lands granted out during royal minorities. These acts were in theory general, but many revocation statutes incorporated individual exceptions obtained in advance by the best-connected courtiers, and were followed by other parliamentary exceptions as more people sought secure guarantees for possession of former crown lands.<sup>1</sup> Whether they were general acts, or acts concerning particular individuals, is an inextricably tangled question; but whatever the answer, revocations were undoubtedly a component of a general policy attempting to revive the crown's ancient landholdings.<sup>2</sup>

Parliamentary ratifications, as guarantees for private property, were essentially political rather than legal.<sup>3</sup> There was a technical justification for parliamentary exceptions from a royal revocation: they amounted to an alienation of crown lands, and the accepted law was that only parliament could do this. But other parliamentary ratifications had limited legal force. The key question was always: what about the rights of others? This is where the adjudications between the disputed claims of A and B do differ from the simple ratifications to A: if the dispute was admitted, both parties could hope to get a fair hearing and the resulting act, though still legislative in form, might well have a judicial character.<sup>4</sup> Otherwise,

1. E.g. *APS*, iii, 307-10, c.26.

2. Chapter 4.

3. *Sources and literature of Scots law*, 14.

4. W.B. Gray, 'The judicial proceedings of the parliaments of Scotland, 1660-1668', *JR* 36 (1924), 142-43.

parliament could not be expected to look at the small print of A's infestment, and ratifying it might well do injustice to B. The court of session complained in 1567 about the difficulty of overturning unjustly-obtained parliamentary ratifications, and obtained an act declaring it to be 'competent to the reduction of all sic infestmentis'.<sup>1</sup> In 1592 parliament declared that the ratifications it had just passed would not 'hurt nor dirogat the particular richtis of uther partiis', and another act made ratifications invalid without the treasurer's signature.<sup>2</sup> In the seventeenth century, parliaments regularly declared that ratifications should be *salvo jure cujuslibet*. Mackenzie was sure about this rule for most ratifications, but not about whether it applied to lands subject to revocation.<sup>3</sup> In other cases, judges were ordered to try cases on the situation obtaining before the ratification.<sup>4</sup> But if this had always happened, it would have made the parliamentary ratification pointless - clearly it continued to have an effect, if only as a blunt instrument.

In 1585, Adam Hepburn of Bonhard secured the cancellation of a statute of the previous year, as it had been 'purchest upoun sinister informatioun'.<sup>5</sup> What was sinister, however, was the information rather than the purchase. In England, the best definition of private acts

1. AFS, III, 29, c.22.

2. AFS, III, 561, c.38; 563, c.42.

3. Mackenzie, *Observations*, 281.

4. Gray, 'Judicial proceedings of the parliaments of Scotland', 143.

5. AFS, III, 420, c.66.

was simply that fees were paid for them.' We can catch a glimpse of what such acts cost in Scotland: some of those who obtained ratifications in 1592 paid their fees direct to the treasurer.<sup>2</sup> Among them were Patrick Vaus of Barnbarroch, who paid £13 6s 8d for approval of his proceedings as an ambassador to Denmark;<sup>3</sup> William Keith of Delny, who paid £33 6s 8d for a ratification of his property - an act, incidentally, omitted from the *Acts of the parliaments of Scotland*;<sup>4</sup> and the young earl of Moray, who paid £40 for two acts, one suspending his creditors' actions against him during his minority, and another ratifying his lordship of Doune.<sup>5</sup> These were payments to the crown, as crown rights were involved in these cases; officials also expected a reward for their services, and we have seen the clerk register in 1592 collecting £100 from the convention of royal burghs for favouring some recent statutes.<sup>6</sup>

Finally, it may be that these burgh statutes included some of the least controversial private acts. It is perhaps because it was so unastonishing that not much can be said here about the parliamentary ratification of Dalkeith's bridge tolls, needed to pay for repairs to

1. Neale, *Elizabethan house of commons*, 323.
2. TA (Leven & Melville duplicate), 1590-92, SRQ, E22/8, fos.92r.-92v.
3. APS, III, 568-69, c.49. Peter Young, the other ambassador favoured by this act, seems not to have had to pay.
4. Extract act of parliament, SRQ, PA7/1/45. The act ratifies a great seal charter: RNS, v, no.1625.
5. APS, III, 628, c.166; 629-36, c.168.
6. ACCS, I, 382-83.

two bridges.' It might be regretted by those who had to pay, but they knew that bridge repair benefited everyone. The Tay bridge at Perth, indeed, was considered important enough for nationwide taxation to be imposed to repair it.<sup>2</sup> But many such acts were surely among those that Lindsay of Pitscottie had in mind as he concluded his account of the legislation of a convention of estates: 'mony uther actis var maid quhilk var tedious to rehers'.<sup>3</sup>

1. *APS*, iv, 85, c.73.

2. *APS*, iii, 108, c.24.

3. Pitscottie, *Historie*, ii, 320.

## Chapter 3

## PARLIAMENT AND THE EXECUTIVE

In 1585, it was felt necessary to pass a law saying simply that the law should be enforced.' It saw the problem as 'misknowledge of his hienes lawes and actis of parliament' and the 'negligent execution of the panis thairof'. But surely, especially now that the statutes were printed, the 'jugels officiaris and ministeris of the lawes' did know the law - or at least could find it out if it was important? And surely they were not negligent when it came to their own interests?

We have seen that many statutes were implemented only partially, if at all. But historians have passed beyond the stage of deploring this as 'lawlessness'. Clearly, if laws were passed and then ignored, this was because one social group or institution wanted them - but they threatened other groups or institutions which were in a position to block their operation. So when we consider the implementation of any act, we have to ask: who welcomes it, and who is hostile? What follows is a discussion of the administrative machinery available to sixteenth-century legislators: partly to see how able it was in general to make people dance to its tune, but mainly to show that the administration itself was not all playing the same tune.

The main administrative conflict was between centre and localities. Some administrators had deep local roots; others were more dependent

1. APS, III, 375, c.2.



on the centre. Of course, even privy councillors had local interests, and a rigid line can never be drawn; but there is value in the distinction. This was a period of state-building in Europe: government was increasingly carried on by a professional bureaucracy, dependent on the crown rather than on the nobility. The nobility themselves relied more on the state, drawing income from state subsidies. While they retained control over their estates, their local political power was whittled away to be replaced by a share in deciding the direction of government policy as a whole.' In Scotland, Lee has argued that the late sixteenth century saw the construction of a 'Stewart despotism'.<sup>2</sup> These administrative questions have a direct bearing on the question of absolutism, raised in chapter 1.

A.L. Brown has pointed out that in the late fifteenth century, 'an earl at court might achieve more in five minutes' than the clerk register 'at umpteen meetings of the council'.<sup>3</sup> That was still true a century later; but it only applied to policy-making, for even an earl could not implement the policy in five minutes, and with the expansion of government, the administrators became increasingly important. Nobles never ceased to make and remake government policy, in the interests of themselves, their kin groups, their factions and their class; but by the sixteenth century they were reluctantly beginning to rely on a centralized government machine to implement rather more of their policies.

1. Kiernan, *State and society*, 6.

2. Lee, *Maitland of Thirlestane*.

3. A.L. Brown, 'The Scottish "establishment" in the later 15th century', *JR*, new ser. 23 (1978), 105.

The key to centralization was information-gathering, an effort to persuade local authorities to report on their activities; in later ages it would be statistics. Many reports had an additional importance as financial accounts. The sheriffs and other semi-independent local authorities were hounded to demonstrate that they were doing their job properly - that is, doing it in the way the privy council, exchequer and other central bodies expected.

The traditional local authorities often had other ideas about how to do their jobs properly - ideas which commanded much local support, otherwise they would have been swept away. Once we stop looking only through the eyes of central government, and adopting its attitude to the localities, we find that Scotland's centuries-old local institutions made sense. They had not been set up primarily to implement a wide range of statutes, for at that time there had been few statutes and central government had made few demands on them. But the concepts of permissive legislation and negotiated implementation, developed in the previous chapter, should remind us that statutes could be implemented quite successfully by traditional authorities, sensitive to local conditions and to the needs of local elites.

Executive authorities can be divided into three types. First, there were traditional local courts, which had established their authority in the days before statute came to dominate the law; they were often reluctant to adapt to an environment of flux, driven by the constant evolution of government policy. Then there were the locally-based administrators whose authority derived more directly from the crown or

some other national source, who might be agents of centralization - but who might also be drawn by their local connections into co-operating with the traditional regime. Finally there were the expanding central courts and councils in Edinburgh. How did each fare, and how successful were the local administrators in maintaining control over how, when and whether they would implement statutes?

The main rural administrators, of course, were the sheriffs. They had long escaped from crown control: all were hereditary in the sixteenth century except Orkney and Shetland, where the crown had little influence.' James VI saw 'no present remedie' for heritable jurisdictions, which were 'the greatest hinder to the execution of our law'.<sup>2</sup> But in what way? Were they amateur? But at least their justice was comprehensible to non-literate people, in contrast to the arcane jargon of Edinburgh professionals. Were they partisan? But in a feuding and locally-oriented age this was easy to understand, and it was even possible to develop mechanisms to counteract it. The idea that justice could be abstract was a hard one to grasp.

The sheriffs' popularity was declining, and some of them lacked the 'strang hand' necessary to do the job.<sup>3</sup> More people were going to Edinburgh to seek law. This is a trend that pre-dates government interest in administrative centralization: there had been a demand for central justice throughout the fifteenth century, and often the council

1. James Macgill & John Bellenden, *Discours particulier d'Escosse*, ed. T. Thomson (Bannatyne Club, 1824), 12.

2. James VI, *Sesilicon daron*, i, 88-89.

3. *APS*, iv, 145, c.48.

had not been at all pleased at litigants coming to bother them. By the mid-sixteenth century, this had changed: a professional court of session was actively seeking to extend its influence over the localities, for instance by advocating cases from the sheriffs' courts.'

Attempts were also made to integrate sheriffs themselves into a central system. There was no intrinsic reason why they should not abandon their local roots to become components of an absolutist administrative system, for such systems were usually marked by bureaucracies in which the offices were a species of personal property - often heritable property.<sup>2</sup> Sheriffs were regularly prodded to keep registers of hornings, and to produce them centrally: most sheriffs (sometimes sheriff clerks) were asked for them seven times between 1585 and 1602.<sup>3</sup> Once, despairing of the sheriffs, the order went out that those obtaining letters of horning should themselves give the names in to the treasurer.<sup>4</sup> The heaviest pressure was applied at the end of the century, as in 1598, when all sheriffs were summoned personally to explain why they were not enforcing hornings - there is no record that any came.<sup>5</sup> The story of the establishment of the register of sasines, which would allow easier determination of land disputes centrally, is a

1. Balfour, *Practicks*, ii, 340-42.

2. Anderson, *Absolutist state*, 33.

3. TA, 1585-86, SRD, E21/64, fo.93r.; TA, 1586-87, SRD, E21/65, fos.72v., 78v., 79v.; TA, 1588-90, SRD, E21/67, fo.211v.; TA, 1593-96, SRD, E21/70, fos.141v., 181v.; TA, 1598-99, SRD, E21/72, fos.91v.-92r.; TA, 1601-04, SRD, E21/76, fos. 91v., 104r.

4. TA, 1593-96, SRD, E21/70, fo.184r.

5. *RPC*, v, 440; cf. TA, 1599-1600, SRD, E21/73, fos.79v., 100v.; TA, 1600-01, SRD, E21/74, fos.44r., 55v.; T.I. Rae, *The administration of the Scottish frontier, 1513-1603* (Edinburgh, 1966), 14.

parallel one: the sheriffs and the localities fought it successfully all through the sixteenth century. A proposed statute in 1592 was not enacted.<sup>1</sup> A notaries' boycott even forced the abolition of the first register (1599-1609), but the localities had to concede defeat in 1617.<sup>2</sup>

Sheriffs' executive officers, the mairs or officers of arms, came in for much central attention. Skene had some home truths about hereditary mairs 'quha knawis nocht their office, bot ar idle persones, and onely dois diligence in taking up of their fees'.<sup>3</sup> Attempts were made to check officers' corruption in summoning assizes - even if not actually partisan, they could be bribed to leave names out. A cut in officers' numbers was ordered by a statute of 1587, which stressed that they should be men of substantial property.<sup>4</sup> But attempts to implement this met with local resistance at justice ayres the following year: the assizes, who were usually alleged to suffer from officers' extortion, were willing to get rid of a corrupt individual but refused to give names for a general purge.<sup>5</sup>

Below the sheriff was the private jurisdiction of the baron court. Central government rarely asked for its involvement in implementing

1. Draft act for registration of sasines, probably 1592, SRD, PA7/1/39-40.
2. *APS*, iv, 184-85; 237-38, c.36; L. Ockrent, *Land rights: an enquiry into the history of registration for publication in Scotland* (London, 1942), 69-70; *Introduction to Scottish legal history*, 33.
3. Skene, *DVS*, s.v. mairis.
4. *APS*, iii, 449-50, c.30; I.D. Willock, *The origins and development of the jury in Scotland* (Stair Society, 1966), 150-51; cf. *APS*, iii, 143-44, c.14; 554-55, c.29.
5. Questions at a justice court, 17 April 1588, BL, Add. MS 33,531, fos.217-18.

statutes. This was a period of some decline for the baron court, as feuing weakened traditional rural ties, before it was revived as an engine of seigneurial control in a modernizing agrarian regime.<sup>1</sup> Like sheriffs, baron courts were suffering incursions by the court of session into their jurisdiction, which increasingly used advocacy to remove complex or serious cases from them.<sup>2</sup>

A bigger problem for the centralizers was the type of baronial jurisdiction known as a regality. Regalities covered about half the country - about the same as in Spain.<sup>3</sup> They usually excluded the crown's brieves and justice ayres, except in cases of treason and witchcraft; they might also exclude the judicial authority of the sheriff, equally local but technically public. Sheriffs could enter regalities to collect taxes, however:<sup>4</sup> as they probably could on other non-judicial matters like the implementation of the poor law. Such administrative matters, rather than the provision of justice, were becoming relatively more important to central government. But regalities were still alive and well in this period. In 1587, the act of annexation of church temporalities returned ecclesiastical regalities to the crown, though many had to be re-granted.<sup>5</sup> Revocations may

1. M.H.B. Sanderson, *Scottish rural society in the sixteenth century* (Edinburgh, 1982), 18; I.D. Whyte, *Agriculture and society in seventeenth-century Scotland* (Edinburgh, 1979), 44-45; Mitchison, *Lordship to patronage*, 81.

2. *Court book of the barony of Carnwath, 1523-1542*, ed. W.C. Dickinson (SHS, 1937), p.xlvi.

3. Lenman & Parker, 'Crime and control', 13; Kiernan, *State and society*, 26-27.

4. Chapter 5.

5. *APS*, III, 431-37, c.8.

also have regained some for the royalty.' The crown exploited its established right to take treason cases out of regalities' hands, creating a new series of 'statutory treasons' in parliament: theft or reiving by landowners; murder under trust; saying mass; fire-raising in coal workings; resetting of Jesuits or seminary priests; brawls in law courts; and refusing a new alloy coinage.<sup>2</sup> This may have circumvented a few of the regalities' privileges, but a well-established regality could always defend itself against frontal attack: when the king's lieutenant, Lennox, took over Spynie regality in 1594, he was obliged to preside over a spate of acquittals.<sup>3</sup> In 1649 feuars were allowed to buy themselves out of regalities.<sup>4</sup>

Scotland's rural courts had deep roots; but how numerous were they? Counting both sheriffs and sheriff deutes, assuming that sheriffdoms had between one and three sheriff deutes along the lines of a statute which classified the sheriffdoms in 1587, and adding a few stewards and bailies, there may have been about 75.<sup>5</sup> England in 1580 had 1,738 justices of the peace.<sup>6</sup> Assuming (very roughly) a population of four million, and not counting English sheriffs and lord lieutenants, that makes one local administrator for every 2,300 people. If Scotland's

1. *APS*, iii, 441, c.14.

2. *APS*, iii, 451, c.34; 545, c.14; 575, c.68; iv, 17, c.11; 22, c.22; 48-49; cf. Stair, *Institutions*, 640-41.

3. 'Extracts from the register of the regality court of Spynie, 1592-1601', ed. J. Stuart, *Spalding Club Miscellany*, ii (1842), 122-26.

4. Makey, *Church of the Covenant*, 80.

5. *APS*, iii, 458-61, c.57.

6. A.G.R. Smith, *The government of Elizabethan England* (London, 1967), 90.

parallel administrators were divided among a population of one million, that would give one for every 13,000 people, only a fifth of England's administrative potency. France had one crown official per 4,500 people as early as 1515 - and these were more subject to central direction than either Scotland's or England's.' The Scottish record would seem more impressive if the concentration of administrative resources in the Lowlands was taken into account; but this would still leave even Lowland Scotland with less than half England's local administrators, while the Highlands, as we shall see, had virtually none. Nor did the number of administrators rise in this period, though a fifty per cent rise would have been needed just to keep pace with population. (In England, the JPs' numbers were growing faster than the population.) As we shall see, there was growth in Scottish administration; but the traditional rural local government was stagnating.

Urban local government was similar in some ways. The royal burghs represented localism at its most entrenched.<sup>2</sup> They had gained very considerable independence. They taxed themselves and collected their own burgh fermes, accounting to the government merely for a fixed sum. Their officers were all (in theory and usually in practice) locally elected, and the only significant crown official in a burgh was the customar.

The government rarely had the problem of compelling burgh courts to

1. Salmon, *Society in crisis*, 79.

2. Cf. Lynch, 'The crown and the burghs'.



implement its statutes. Many of the burghs' concerns - over local trading privileges, over regulation of burgees-ship, over apprentices and the like - were not concerns of the government.' If any laws were passed on these subjects, they were initiated and supervised by the convention of royal burghs, as when the convention ordered its members in 1580 to enforce eight statutes passed in the previous year's parliament.<sup>2</sup> Government was only drawn in, as a mediator, when the burghs failed to resolve some internal dispute. So long as burgh self-management remained stable, central government left well alone.

In the drama of the creation of a national political community, the burghs found themselves drawn towards centre stage. Government interference in burghs was growing. Elections were rigged, constitutions rewritten, burgesses of rival factions flitted through corridors of power and occasionally found themselves in prison or worse. This was party politics rather than administration: the issue was which party would enjoy the fruits of power. True, many administrative problems were largely urban: vagrancy, for instance.<sup>3</sup> But here was where permissive legislation was at its most successful, because burgh magistrates could, when they chose, govern quite intensively. Parliament was happy to furnish the tools, and let them decide whether, when and how to get on with the job. The Dundee magistrates were worrying about incest in 1583, and about regulation of their maltmen in 1588: they had no difficulty in obtaining commissions

1. For policy on these matters, see chapter 6.

2. *ACRB*, i, 102-03.

3. Chapter 8.

of justiciary to enforce the relevant laws.<sup>1</sup> But if they ignored these laws in other years, nobody was bothered by it.

If the burghs were drawn only reluctantly on to the national stage, the kirk sessions were never out of place there, and the presbyteries were born with ambitions for a starring role. They are included here as local administrators, but in some ways they were not under local control at all: they were agents of an active, centralizing general assembly, which fashioned them as working parts in a completely new, more integrated matrix of national authority. In 1583, for instance, Stirling presbytery acknowledged that its acts had to be in line with the policy of the general assembly.<sup>2</sup> But at this early period, presbyteries were still largely independent of central government.

Church-state conflict initially inhibited the government from trusting presbyteries as local administrators. But once the Golden Act had recognized them in 1592, presbyteries' co-operation was increasingly sought. The court of session was ordered to back up their decisions in 1593, and they were authorized to deal with recusants in 1594.<sup>3</sup> In 1594 and 1599 they were asked to report names of adulterous and incestuous persons to the treasurer: this would have been a significant first step towards integration of church and state social control, since such cases formed the largest single element in

1. Miscellaneous burgh papers, Dundee District Archive & Record Centre, nos.66, 70.

2. *Stirling presbytery records*, 113.

3. *APS*, iv, 16-17, c.7; 62-63, c.4.

presbyteries' business.' So long as mutual concord was maintained, the relationship between presbyteries and central government was potentially fruitful.

Kirk sessions were less of a threat, but the government was slow to learn how to use them. They insisted on setting their own course, leaving the legislators struggling in their wake: the reverse of the traditional view of laws as the beacons of progress which hidebound local authorities followed only reluctantly.<sup>2</sup> They had potentially a wide area of competence: even the grain exporter Mark Acheson, mentioned in the last chapter, may have felt the impact of the Edinburgh kirk session when in 1594 it was asking the presbytery of Haddington to stop grain exports from East Lothian.<sup>3</sup> Kirk sessions were effective in compelling obedience to their jurisdiction - strikingly more so than any other courts, including presbyteries.<sup>4</sup> The sessions' main interest, of course, was sex: there was a statute passed against fornication as early as 1567, but it was not followed up centrally, and the sessions themselves seem largely to have ignored it.<sup>5</sup> St Andrews kirk session had been punishing fornicators on its own authority for more than a generation when, in 1593, it finally decided to make its penalties 'aggreabill with the act of parliament'.<sup>6</sup>

1. TA, 1593-96, SRD, E21/70, fos.118v., 119v., 123r.; TA, 1599-1600, SRD, E21/73, fos.74v., 87v.; *Stirling presbytery records*, passim.

2. Cf. Lenman & Parker, 'Crime and control', 15-17.

3. MacQueen, 'General assembly', 186.

4. Foster, *Church before the Covenants*, 80.

5. APS, III, 25-26, c.14.

6. *St Andrews kirk session register*, II, ed. D.H. Fleming (SHS, 1890), 767.

In Aberdeen, fornicators were still being fined £5 into the seventeenth century, though the statute had specified £40.<sup>1</sup> In many parishes, the fine would be related to the offender's resources.<sup>2</sup> Kirk sessions were the only bodies to take rural poor relief at all seriously, but their activities on this were invariably quite different from what statute required.<sup>3</sup> With their own momentum and their own well-springs of authority, they had little need of statutes. The successful centralization led by the general assembly remained largely outside the government's control. Scottish absolutism had its limits.

Despite these often unsympathetic local institutions choking its route, the government still had a number of paths to the localities either actually or nominally in its control, and it showed increasing skill and determination in navigating them. If some of these paths were indirect or proved to be dead ends, the Scottish government was not alone with this problem. When Philip II wanted to stop the export of horses from Spain, he had to turn to the Spanish Inquisition to organize border patrols.<sup>4</sup>

To be a credible force in the localities, the government had to show itself able to do justice. Despite the growth of court of session, it was still important to bring the courts to the litigants. Many must

1. Kirk session accounts, 1617-18, Aberdeen City Archives.

2. Foster, *Church before the Covenants*, 79.

3. Chapter 8.

4. Kiernan, *State and society*, 30.

have thought of the central courts the way we think of the European Court - important, but would we ever take a case there? For serious criminal justice, there were periodic travelling courts: the justice ayres. The conventional wisdom is that they were eclipsed after the death of James IV and the appointment of the earl of Argyll as hereditary justice-general in 1524: in their place emerged a rudimentary central criminal court. Justice ayres were then revived after an act of 1587.<sup>1</sup> But nobody has investigated this view in detail.

It is relatively well known that reports of the death of justice ayres were exaggerated. James V, Mary of Guise, and Queen Mary all held them personally when they could.<sup>2</sup> The Regent Moray made them a priority.<sup>3</sup> The *coup d'état* of the Ruthven Raiders was made easier in 1582 because 'many of the consaill' were away 'to hald justice aires in dyvers schyres of the contre', according to Sir James Melville whose job it was to hold the West Lothian court.<sup>4</sup> The best source for justice ayres is the treasurer's accounts, which record fines collected from major ones.<sup>5</sup> We also have numerous references in Pitcairn's *Trials* to cases which were continued to justice ayres. It is clear that justice ayres continued to be an established component of central

1. *Introduction to Scottish legal history*, 39; Willock, *Jury in Scotland*, 44; *APS*, iii, 458-61, c.57.

2. Donaldson, *James V - James VII*, 52, 123; R.K. Marshall, *Mary of Guise* (London, 1977), 207-09.

3. Melville, *Memoirs*, 198.

4. Melville, *Memoirs*, 276-77; cf. Henry Widdrington to Walsingham, 19 July 1582, *CSP Scot.*, vi, 143.

5. Appendix B.

justice - until, that is, they fizzled out almost completely in the 1590s. The question is not whether the 1587 act was successful in reviving justice ayres or not, but why they declined.

Justice ayres, even at their best, hardly offered regular criminal justice for ordinary people. Even if, as seems likely, only the major ayres were recorded in the treasurer's accounts, there would still have been several years between courts in any one sheriffdom. They were held in order to maintain political control by the central government, and to raise money:

For the pure peopill cryis with cairis,  
The misusing of justice airis,  
Exercit mair for covetice,  
Then for the punischning of vyce.'

It was the civil war and its aftermath that saw the most political dissent - and the most judicial activity. The Regent Moray in 1569 extracted £32,085 from the sheriffdoms of Banff and Aberdeen, and in a series of courts in the west in 1574 the earl of Argyll hanged eight score people, 'although hempe and towe were scant'.<sup>2</sup> Between 1573 and 1576 the Regent Morton held a series of justice ayres in the south-east, in which hundreds were fined for a range of socio-economic crimes (like salmon fishing out of season, or cutting green wood) which just happened to have been combined with support for the queen's party.<sup>3</sup>

1. Lindsay, 'Thrie estaitis', 253.

2. *TA*, xii, 190; Henry Killigrew to [ ], July 1574, BL, Cotton MSS, Caligula, C.IV., fols.271v.-272r.

3. *TA*, xiii, appendix 2.

Lindsay of Pitscottie had supported the king, but his distaste overflowed in his chronicle: 'thair was no thing at that tyme bot haulding of justice airis from schyre to schyre and the puir men war hereit and Goddis plaigue rang at this tyme quhat of derth and quhat of evill weathir and falsit invy and malice and na credit all rang at this tyme in Scotland.'

An easier and growing alternative to the justice ayre was the issue of a commission of justiciary to some private individual, to deal with a specified local crime.<sup>2</sup> Similar were commissions as sheriffs *in hac parte*: these gave authority to act as sheriff to try a specified case in which the regular sheriff was held to have a personal interest. These commissions were hardly accountable centrally, and were if anything a surrender to local pressure. When this type of commission was used in England, it was found to be less effective and more partisan than the earlier general eyre.<sup>3</sup> It is true that there are no recorded protests such as those quoted above against justice ayres. But there were clear signs in the 1580s and 1590s that commissions of justiciary were getting out of hand, apparently because the king could not say no to anyone who asked for one through the medium of the privy chamber. His councillors tried repeatedly to rein him in. Orders were issued discharging all current commissions in 1587; again in

1. Pitscottie, *Historie*, II, 312.

2. Willock, *Jury in Scotland*, 44-45, 155.

3. J. Bellamy, *Crime and public order in England in the later middle ages* (London, 1973), 2-3.

1592; and in 1594 and 1598.<sup>1</sup> The council clashed with the chamber, who were 'causing his majeste subscriye sindre hurtfull signatours and commissions' in 1590; and again in 1596.<sup>2</sup>

By the seventeenth century the council had succeeded in staunching the flow of commissions of justiciary, perhaps aided by the departure of the court, though commissions continued to give local commissioners more control over justice than trials in the court of justiciary.<sup>3</sup> They had only been abused for want of anything better at a time when the demand for justice was heavy. When they threatened to get out of control in 1590s, the government failed to steer them in the direction it wanted - but it was eventually able to apply the brakes.

While the central government's distrust of the church remained too great for it to promote the powers of the church's existing local organization, it was seeking for ways to insert its own representatives into the parishes. The Reformation brought a new emphasis on the parish as a unit for the management of local society under the direction of the ministry, and the civil parish was a creation of this period in England.<sup>4</sup> The absence of crown-controlled officials at this level in Scotland can be pointed up by the exception to the rule. In Orkney and Shetland, the bailie was a public, parish official, appointed

1. TA, 1587-88, SRD, E21/66, fo.93v.; AFS, iii, 556, c.30; TA, 1593-96, SRD, E21/70, fos.94r.-94v.; TA, 1598-99, SRD, E21/72, fo.47r.

2. Melville, *Memoirs*, 375; APC, v, 268-69. For more on the struggle to control the royal signature, see chapter 4.

3. C. Lerner, *Enemies of God: the witch-hunt in Scotland* (London, 1961), 63.

4. Elton, *Parliament of England*, 268.



by crown or bishop, who held courts, collected rents and headed local military musters.' Clearly a similar network of bureaucrats, answerable to Edinburgh, could be of inestimable value in bypassing the more remote sheriffs and bringing central government into direct contact with the people.

Before 1560 there had been locally-elected parish clerks.<sup>2</sup> They lost their authority along with the ecclesiastical structure of which they had been a part, but there may have been a plan to continue them under central direction; in an isolated but interesting 1566 case, a parish clerk was appointed under the privy seal.<sup>3</sup> A local tax of 1563 for repair of parish churches illustrates the flux and experimentation in the aftermath of the Reformation.<sup>4</sup> The privy council, charged with the implementation of the act, sought to construct a hybrid institutional structure involving four different sources of authority: a secular, centrally-appointed sheriff *in hac parte* (probably covering a group of parishes) was to organize the election of assessors by the parishioners who were to pay two thirds of the tax. The rest was to be paid by the pre-Reformation benefice-holder, and the receiver of the tax was to be the minister.<sup>5</sup> However, this never established itself

1. F.J. Shaw, *The northern and western islands of Scotland: their economy and society in the seventeenth century* (Edinburgh, 1980), 61.

2. D. McKay, 'The election of parish clerks in medieval Scotland', *JR* 18 (1967), 25-35.

3. *RSS*, v, no.3004.

4. *APS*, II, 539-40, c.12.

5. *RFC*, I, 247-48.

on a regular basis.'

A more straightforward scheme, to establish crown commissioners based in each parish, was launched in 1579. Commissioners were to be appointed to implement laws on poor relief, sabbath enforcement and bible possession.<sup>2</sup> It was perhaps linked with an earlier scheme of the general assembly, which in 1574 had asked the regent for commissions to 'gentlemen' to enforce the recently-passed statutes on incest, adultery and witchcraft.<sup>3</sup> No doubt the 1579 commissioners (when and if they were appointed) were intended to work with kirk sessions, but they were to derive their authority from the state - or from the bishops, which amounted to the same thing by 1585 when Archbishop Adamson was wanting to appoint parish 'censors of manners'.<sup>4</sup> It is hardly likely that many commissions were issued, though there was one in Edinburgh in 1585, and a poor relief act of 1588 kept a place for them.<sup>5</sup> Some kirk sessions might have welcomed them - the church was aware of the limits of what it could or should be involved in, as when the kirk session of Alva was censured by the presbytery for meddling in 'civill thingis'.<sup>6</sup> By 1592 the idea was being merged with the presbyterian church structure: blank signet commissions to enforce laws on witchcraft, poor relief and the deprivation of unworthy

1. *APS*, III, 764-77, c.15.

2. *APS*, III, 138, c.8; 139, c.10; 139-42, c.12.

3. *BVK*, I, 305.

4. Calderwood, *History*, IV, 267.

5. *Edin. Recs.*, IV, 421; *APC*, IV, 302-03.

6. *Stirling presbytery records*, 133.

ministers were handed out to the commissioners to the general assembly.<sup>1</sup> Presbyteries were offered their own commissioners in 1594, and ministers were invited to nominate commissioners in 1595.<sup>2</sup> While the church was not hostile to these offers, its indifference suggests that local elders saw little value in them. Little is heard of the idea thereafter, though in 1608 a revival was suggested at a time of attempted poor law reorganization.<sup>3</sup> Kirk sessions were happy to go it alone.

The introduction of justices of the peace in 1609-10 increased the density of the matrix of authority in the localities. JPs were not overly accountable to the centre, but at least they were not actually heritable. The conventional wisdom that they were the fruit of the king's experience in England has been challenged by Wormald, who draws attention to a series of precedents going back to the parliament of 1581.<sup>4</sup> Arguably the story begins in 1575, when a national network of 54 local commissioners was appointed to hold regular wapinshawings.<sup>5</sup> Their reports were to be 'rollit in bukis' and sent to the regent. The law of 1587 to reorganize justice ayres envisaged over 300 local commissioners to arrest criminals.<sup>6</sup> The resounding tinkle produced by this scheme is better attested than usual, and next year another idea

1. *APC*, iv, 753-54.

2. *APS*, iv, 63, c.8; *APC*, v, 200.

3. M. Lee, *Government by pen: Scotland under James VI and I* (London, 1980), 72.

4. Wormald, *Court, kirk and community*, 162.

5. *APS*, iii, 91-92.

6. *APS*, iii, 458-61, c.57; cf. *Historical atlas of Scotland*, eds. P.G.B. McNeill & R. Nicholson (Conference of Scottish Medievalists, 1975), text 60, map 113.

was tried: the issue of high-powered commissions to 58 individuals to implement a number of laws in rural areas.<sup>1</sup> Included in their remit was the enforcement of hornings, normally the sheriffs' job. They also had to implement the poor law (through parish commissioners), banish Jesuits, mediate in local feuds, and hold wapinshawings - most of these were tasks on which statutes had recently been passed. No more is heard of these commissions either, but they would not be likely to have left much trace except in family papers. Quite possibly they had some impact: they were, after all, similar to the justiciary commissions which were undoubtedly popular with local elites; on the other hand, they did not offer the unique combination of power and irresponsibility that was the hallmark of the commission of justiciary.

Another 1575 law regulated salt production, allowing the crown to purchase set quantities at set prices;<sup>2</sup> as a result there were 'collectouris maid in evirie towne quhair salt was maid'.<sup>3</sup> How long these collectors lasted is not clear. In 1587 John Boyd was given a privy seal commission as inspector of fish barrels, a commission which he was forced to surrender in 1595 after pressure from the convention of royal burghs.<sup>4</sup> These examples illustrate the heterogeneity of administrative devices that the government might employ, with a varying combination of administrative, judicial and fiscal powers. They might be given responsibility for one of the government's

1. *RFC*, iv, 300-02.

2. *APS*, iii, 93-94.

3. *Pitcottie, Historie*, ii, 319.

4. *RCRB*, i, 467; for more on such economic regulations, see chapter 6.

newly-created policy areas, like the salt collectors, or for a branch of the existing administration of justice. No Scottish statute offered rewards to private informers, in contrast with the English statute of artificers: more than half of prosecutions under the latter arose from semi-professional informers.'

The customs administration was a branch of centrally-controlled administration to be found in all royal burghs. It is strange that, when the burghs extended their powers over their fermes and taxation, they left the collection of the great customs (duties on overseas exports, and from 1597 on imports) untouched in crown hands. Local influence over who held the customar's office did manifest itself in some burghs, such as Kirkcudbright where the sixteenth century saw a veritable dynasty of Maclellans of Bombie as customars. When in 1602 the current incumbent arrested a ship to collect unpaid customs, no customs had been paid into the exchequer for twenty years.<sup>2</sup> Yet this pattern was not repeated, it seems, in the most important burghs - and over 80 per cent of customs revenue came from just four burghs.<sup>3</sup> Nor were the burghs able to determine the customs rates. They were reduced to lobbying to influence customs policy: one angel noble was paid to the advocate John Sharp to draft Edinburgh's successful protest against an act on the customs in 1582.<sup>4</sup> Shortly after, the crown set

1. M.G. Davies, *The enforcement of English apprenticeship, 1563-1642* (Cambridge, Mass., 1956), 18-19, chs.1-3.
2. A.L. Murray, 'The customs accounts of Dumfries and Kirkcudbright, 1560-1660', *Dumfriesshire Trans.*, 3rd ser. 42 (1965), 121-22.
3. I. Guy, 'The Scottish export trade, 1460-1599', *Scotland and Europe*, ed. Smout, 62.
4. *Edin. Recs.*, iv, 232.

the customs in tack to the burghs; but the very fact that it was able to do so (and later to terminate the contract) shows that it was maintaining central control over the customs bureaucracy.'

The real local influence was perhaps indirect, through the graft which pervaded the customs collection.<sup>2</sup> Some aspects of this were welcomed by the merchants, who could bribe the customar or searcher to understate the value of their goods. But the convention of royal burghs was petitioning parliament in 1579 against corrupt customs searchers; the issue of centre versus localities was not straightforward in this area.<sup>3</sup> In 1586 the burghs had had a chance to see things the government's way, for they had taken on a tack of the customs, and they now felt that the problems were 'generall sersouris undescreitlie sersing forbodin gudes, and omitting the upgeving of ane compte thairof'.<sup>4</sup> Perhaps the customs administration was autonomous, with neither central government nor local merchants able to influence it quite as they wished.

The customs tack to the burghs was a prime example of administrative privatization. Others are not far to seek. Piecemeal tacks of local customs were quite common, presumably in response to local initiative;<sup>5</sup>

1. Chapter 6.

2. A.L. Murray, 'Sir John Skene and the exchequer, 1594-1612', *Stair Society Miscellany*, i (1971), 145.

3. *RCRB*, i, 76.

4. *RCRB*, i, 212.

5. E.g. A.L. Murray, 'The customs accounts of Kirkcudbright, Wigtown, and Dumfries, 1434-1560', *Dumfriesshire Trans.*, 3rd ser. 40 (1963), 137-38.

though the national tack was a failure. The mint, too, was often leased out, without apparent ill effects. These were permanent government departments which functioned at least equally well in the public domain, but the government was unable to manage others: the lead mines were normally leased to entrepreneurs.<sup>1</sup> From there it is only a short step to other monopolies or privileges connected with the implementation of economic policy, such as salt-manufacturing monopolies or licences to export forbidden goods.<sup>2</sup> By and large the government maintained control over the granting of such privileges, though daily accountability must have been small. There may be a connection here with the endemic struggle between privy council and privy chamber: through which were economic privileges normally granted? As a rule grants through the privy council were more likely to harmonize with an overall policy and to carry some obligations.

Conveyancing was a local matter, and dear to the hearts of the landed class, but who controlled the notaries who carried it out? Being free-lance, rural notaries in a sense depended on the market for their services; but this market was unable to eliminate fraud and incompetence.<sup>3</sup> So notaries were increasingly subject to central regulation. The initiative was taken by the court of session, which had to sort out the problems caused by inadequate or corrupt notaries. In 1579, an act was passed requiring two notaries to act in many

1. Chapter 4.

2. Chapter 6.

3. For conveyancing fraud, cf. I.D. Grant (ed.), 'Not improven; advocate and Leslie v. Brown and Johnston, 1582', *Stair Society Miscellany*, i.

cases.<sup>1</sup> This proved to be hard to operate, and in 1584 the rule was abandoned for sasines.<sup>2</sup> Even after then, the law had to be 'construed with the utmost freedom' by the court of session.<sup>3</sup> Local authorities co-operated in the battle against fraud, sometimes enthusiastically, as when corrupt notaries had their hands 'stricken of' in Edinburgh in 1563.<sup>4</sup> But only the central government was interested in another aspect of regulation: requiring notaries to hand in their protocol books, perhaps with the hope that these would come to form some kind of sasines register. Earlier attempts to prevent notaries giving sasine were abandoned in 1563.<sup>5</sup> Thereafter the government made a virtue of necessity by enforcing earlier requirements for notaries' protocol books to be checked by the privy council: statutes on this in 1552 and 1555 'tuik not than dew executioun', having to be suspended and re-enacted, for the last time in 1563 which may suggest that it was being observed.<sup>6</sup> There was a proposal in 1567 for all protocol books of dead notaries to be handed in to sheriffs and burgh magistrates.<sup>7</sup> This was not adopted, and the register of sasines in its final 1617 form was an alternative to this scheme.<sup>8</sup> However, the many surviving urban protocol books, and the occasional

1. *APS*, iii, 145, c.18.

2. *APS*, iii, 353, c.11.

3. Craig, *Jus feudale*, I.8.9.

4. *Edin. Recs.*, iii, 165-66.

5. *APS*, ii, 493, c.7; 542, c.18.

6. *APS*, ii, 487, c.17; 496, c.18; 541-42, c.16.

7. *APS*, iii, 44.

8. Ockrent, *Land rights*, 65.



sixteenth-century burgh register of local sasines, show that burgh magistrates were interested in the recording of land transactions; and of course the burghs were left out of the 1617 register. In Dundee the town clerk was given a monopoly, to exclude 'unkent notaris'.<sup>2</sup> These local developments, however, would have done nothing directly to increase the powers of central government.

The court of session was more fortunate in its efforts to control the admission of new notaries: following a statute, a register of notaries was begun in November 1563.<sup>3</sup> Many existing notaries derived their authority from the pope, and this may have been another example of the crown stepping into the pope's shoes.<sup>4</sup> A 1587 law to tighten up on the proliferation of notaries was probably unsuccessful: it ordered a five-year moratorium on new admissions and a seven-year apprenticeship as a condition of admission, while requiring existing notaries to bring their cautioners up to date and to hand in their books for checking.<sup>5</sup> All this pressure on notaries contrasts with the lack of attention paid to those more traditional local officers, the coroners: there was only one coroner per sheriffdom, and when a noble was appointed coroner of Perth, the post had probably become a sinecure.<sup>6</sup> There is no evidence of central regulation earlier than 1600, when five coroners and their

1. E.g. Prestwick: D. Murray, *Early burgh organization in Scotland*, ii (Glasgow, 1932), 89.
2. Dundee council minutes, i, Dundee District Archive & Record Centre, p.122.
3. *APS*, ii, 542, c.17; register of admissions of notaries, 1563-67, SRD, NP2/1.
4. Donaldson, *Queen's men*, 55.
5. *APS*, iii, 448-49, c.29.
6. *RSS*, vii, no.1566.

officers were summoned for 'extortioun'.<sup>1</sup>

Before passing from local to central executive institutions, a visit must be made to those regions where the local implementation of statutes took on a distinctive character: the Borders and Highlands. A reading of older histories can suggest that the problem ('lawlessness') was the same in both regions: not so. The Borders were close to an alien, sometimes hostile, administration and recurrent war; long experience showed that English intrigues could exact a high price for administrative failure or neglect, and attention to Border government never ceased. The Highlands, distant and culturally distinctive, were quite different. Government in the late sixteenth century inherited a long tradition of leaving Highlanders to their own devices. This is reflected in 'national' Scottish politics, in which the actors were almost all Lowlanders, half of Scotland neither seeking nor being offered a role in the Scottish political system. This is too big a subject for full treatment here; instead of ignoring it, however, its implications for the executive institutions of government must at least be tackled. If the Highlands' long self-sufficiency was to be broken down by central government, the impetus would come not (as with the Borders) from outside, with a shift in international relations, but from the inside, with the developing administrative dynamism of the Scottish state.

The impression that Borders and Highlands posed identical problems to central government, though erroneous, is strengthened by the adoption

1. TA, 1599-1600, SRQ, E21/73, fo.142r.; cf. Skene, *DVS*, s.v. coroner, iter.

of the same remedies. Parliament typically lumped the two together as areas infested with criminals 'delyting in all mischeiffis, and maist unnaturallie and cruellie waistand, slayand, heryand and distroyand thair awin nyctbouris and native cuntrie people', in the words of a 1587 statute.<sup>1</sup> But here we are concerned with executive government institutions in the localities, and a glance will show that these were quite different in the Borders and Highlands. The Borders were over-governed, with the wardenries as a unique extra layer of local government. The Highlands, without even the normal executive institutions, were under-governed; there were baron courts, but one of the few things that is known about them is that they were quite beyond central control.<sup>2</sup> Statutes on Border issues had long been regular.<sup>3</sup> Only in the 1580s did parliament begin to pay attention to the Highlands as well.<sup>4</sup>

Why, then, did the statutes treat both areas the same? Essentially it was because the government had difficulty in obtaining access to those who failed to observe the statutes. The special characteristic of laws passed to deal with the Highlands and Borders was the lack of expectation that law-breakers would come into direct contact with the executive machinery. In 1587, for instance, Border and Highland landlords (apart from non-residents) were to be held responsible for

1. *APS*, iii, 461, c.59, para 1.

2. Lenman & Parker, 'Crime and control', 13; W.D.H. Sellar, 'Barony jurisdiction in the Highlands', *Notes and Queries of the Society of West Highland and Island Historical Research*, 16 (September 1981), 23-24.

3. E.g. *APS*, iii, 31-32, c.27.

4. *APS*, iii, 218-19, c.16.

the delinquencies of the tenants and inhabitants of their lands, and were ordered to find caution, binding on their heirs, that they would observe this. Victims of crime could demand redress from a clan chief, and if not satisfied within 15 days could pursue that chief as if they held a commission of justiciary. Landlords were to be summoned every six months to answer for their dependants' observance of the laws.<sup>1</sup> Little or none of this happened, but the point remains: such laws attempted to deal with law-breakers indirectly, by legitimizing attacks on their chiefs or landlords. This was nothing new, and the three estates of Lindsay's 'Satyre' had passed a similar 'act'.<sup>2</sup> There is irony in the 1587 law's exception for non-resident landlords; these actually made social control more difficult.<sup>3</sup> The legislators' aim, however, was not to maintain social control as such - that had been done successfully for centuries by local, traditional means - but to subordinate local elites to central government.

The elaborate detail of such laws could be pursued further, but there were few important variations. The main distinction to be drawn is between the laws that attempted to hold only feudal lords responsible and those that conceded a measure of legitimacy to the despised clan system.<sup>4</sup> The most that was normally hoped for in the Highlands, where the laws were reserve weapons for only occasional use, was to bring crimes home to heads of clans - or, what amounted to the same

1. *APS*, iii, 461, c.59.

2. Lindsay, 'Thrie estaitis', 349.

3. Rae, *Administration of the Scottish frontier*, 17-18.

4. A. Cunningham, *The loyal clans* (Cambridge, 1932), ch.5.

thing, to use crimes as a weapon to make life difficult for chiefs who did not collaborate with the government. Such manipulation of local elites has always been the means for colonial regimes to get a foot in the door, before their own executive institutions can be established.'

The distinctive executive machinery of the Borders had been developed over the centuries to cope with the proximity of the 'auld inemeyis of Ingland'. The wardens were additional to the sheriffs, and on the whole above rather than below them: they found it no easier to make contact with individual law-breakers. In the more temperate diplomatic climate of the late sixteenth century, however, Border wardens ceased to be front-line war officers, and were turned to this kind of police work.<sup>2</sup> This did not increase their central accountability; if anything it reduced it, for the government was obliged to appoint gamekeepers who were also poachers. But though its choice of wardens was restricted, the government never surrendered the right of choice: a warden who strayed too far from his duty could always be sacked in the end, even if his derelictions in the meantime were often severe indeed. Central government was maintaining an administrative foothold in the marches, but no more: its considerable aspirations were not matched by its achievements before the union of crowns.

There was, perhaps, a special executive institution for the Highlands: the lieutenancy. But this was a pale shadow of the elaborate Border

1. Hair, *Primitive government*, 256-59.

2. Rae, *Administration of the Scottish frontier*, ch.3.

system. Highland lieutenants were never permanent like Border wardens, being appointed only in times of political upheaval; they had no distinctive duties other than the general maintenance of order (as the concept was understood in Edinburgh), and there was no administrative machinery other than the lieutenants' own armed followings. Lieutenancy powers were simply devolved justiciary powers, typically to punish the four pleas of the crown (murder, rape, robbery and fire-raising) and to grant remissions. There was even less choice of lieutenant than in the marches, the earls of Argyll (in the west) and Huntly (in the north) being almost the only contenders, and if the government did not see eye to eye with them there would be no lieutenants. Greater Lowland centralization left the Highlands behind - and thus increasingly vulnerable.

For centuries, the Highlands had been sheltered behind a language barrier. There is no evidence that the Lowland ruling class knew or used Gaelic (with the exception, perhaps, of scholars like Skene); at the interface between two language groups, business is normally conducted in the language of the dominant group.<sup>1</sup> The MacGregor clan, at the edge of the Highlands, provide some evidence of this: when one family of MacGregors became burgesses of Perth, they had to adopt the name Johnstone.<sup>2</sup> As government extended its demands over more social groups, this would have meant more Highlanders under pressure to learn Scots - or, more likely, suffering for failure to do so. The government's increasing dependence on paperwork compounded the

1. P. Trudgill, *Sociolinguistics* (Harmondsworth, 1974), 133.

2. Perth guildry book, Perth Museum & Art Gallery, p.339.

problem; a few more Highlanders might learn to speak Scots, but where would they learn to read it?' Traditional Highland administrators were no use in this new climate. So remote had the government become from them that Skene in 1597 puzzled over the jurisdiction of the toiseachdeor ~~toiseach~~ of Kintyre: was he a species of bailie, a coroner, or what?<sup>2</sup>

The Highlands saw little or nothing of the government's executive institutions, central or local, traditional or modern. Sheriffs' seats were almost entirely in the Lowlands, the only exceptions being Argyll and Tarbert in the west. The sheriff of Inverness seems normally to have ignored the vast Highland area over which he had jurisdiction. When Huntly was appointed sheriff in 1509, it was thought a daring move to send sheriff deputies to remote places like Kingussie, Inverlochy, Tain, Dingwall and Wick.<sup>3</sup> The only active royal burgh in the Highlands at this time was the tiny Rothesay.<sup>4</sup> Since government was so much carried on from towns, this was a major handicap: no market crosses meant no government proclamations, for instance. There was a very fair sprinkling of ministers and readers appointed to Highland parishes, but there must be doubts about their effectiveness as agents of social control, especially since there seems to be no

1. J. Bannerman, 'Literacy in the Highlands', *The Renaissance and Reformation in Scotland*, eds. I. B. Cowan & D. Shaw (Edinburgh, 1963), 215.
2. Skene, *DVS*, s.v. tocheoderache.
3. D. Gregory, *History of the western Highlands and Isles of Scotland* (2nd edn., London, 1881), 105.
4. *Historical atlas of Scotland*, eds. McNeill & Nicholson, map 74. Tarbert was active as a sheriff's seat only, and the sheriff (the earl of Argyll) was able to obtain tax exemption on the grounds that the inhabitants would not obey him; Pryde, *Burghs of Scotland*, no. 42; Tax decreets, 1594, SR0, E62/1, fo. 81r. There were other burghs on the fringes, like Inverness.

evidence of kirk sessions.' There were local commissaries in the Highlands - in Skye and Iona, at least.<sup>2</sup> Notaries are mentioned, though none are found in the register of admissions.<sup>3</sup> But this is only a matter for comment because Lowland-style local government was so sparse. Most of the Highlands saw no proclamations; no wapinshawings; no members of parliament, general assembly or convention of royal burghs; no privy councillors; no sheriff courts; no justice ayres; no royal visits except occasionally for conquest; no commissions of justiciary; no presbyteries or kirk sessions; no customars. It is hard to think of any normal activity of central government that regularly crossed the Highland Line.

This was often a problem for Lowland authorities. But did they actually want local chiefs implementing the law? Angus MacDonald of Glengarry was issued with a commission of justiciary in 1574 to punish those of his tenants who had killed a Kinghorn fisherman: but it is clear that he neither requested nor welcomed it, for the assize was to be drawn from 'the marchandis and marynaris that first sall happin to arrive at Lochstrone or Lochcarroun at the nixt fischeing'.<sup>4</sup> They would trust MacDonald himself only with the job of hangman.

The Glengarry episode suggests that Lowland efforts to exploit Highland

1. J. Kirk, 'The kirk and the Highlands at the Reformation', *Northern Scotland*, 7 (1986), 1-22.
2. *Collectanea de rebus Albanicis* (Iona Club, 1847), 7.
3. Bannerman, 'Literacy in the Highlands', 219-20; *Protocol book of John Foular, 1528-1534*, ed. J. Durkan (SRS, 1985), pp.ix-x.
4. *Collectanea de rebus Albanicis*, 100-01.



natural resources were seen as illegitimate. Leslie wrote that the 'rude pepill' of the Highlands 'admitt na man thair with thame to the fisheing willinglie excepte thair awne nyctbouris and cuntrey men'.<sup>1</sup> Exploitation of the western fishings was growing, but as yet the Highland economy was more or less independent, and there were only occasional signs of the future trend towards specialization in a few primary products for export to the Lowlands.

If the institutional vacuum in the Highlands had some advantages for the government, it also had advantages for the Highlanders; so long as they could maintain it, they could also maintain their traditional way of life. We assume that they owed allegiance to the government in Edinburgh, but did this really mean to them as much as the government was beginning to think it should? The commissioners of the lordship of the Isles distinguished carefully between the loyalty which they acknowledged to the Scottish crown and the hostility which they assumed between themselves and the Scottish realm.<sup>2</sup> Casual references by Lowlanders show similar assumptions - as when the fugitive earl of Arran was said to have left the country and gone to Kintyre, or when grain exports were banned and an exception was made for the Isles.<sup>3</sup> To be subject to the Scottish crown meant something quite different, and far more limited, in the Highlands. The legitimacy of the crown itself was recognized - what harm had the crown ever done, remote as it was? It was the crown's lieutenants or commissions of justiciary

1. Leslie, *Historia*, i, 38.

2. J. Bannerman, 'The lordship of the Isles', *Scottish society in the fifteenth century*, ed. Brown, 215.

3. Calderwood, *History*, iv, 547; *APS*, ii, 495, c.14.

that were resisted. Government expansion implied an abstract legal system, written land titles based on charters granted in Edinburgh, an extension of literacy in Scots, a professional urban bureaucracy, burdensome taxes. Administrative growth and centralization were often unwelcome in the Lowlands; how much less did they have to offer in the Highlands!'

We have now completed our tour of the localities, visiting local administrators old and new, popular and unpopular. Returning to Edinburgh, we can now ask: what of the central administration itself? What role did it play in the implementation of statutes?

At the helm of the central administration, supposedly, was the privy council. If anyone was in charge of the executive implementation of statutes, the privy council was. Indeed, any questions about how Scotland was governed must lead back to the privy council. What made Huntly's rebellion of 1570-73 so much more serious than the average magnate rising was his erection of a formal governmental system in the queen's name - headed by a privy council.<sup>2</sup> Below the crown, the council was the supreme executive authority, with a general political competence that allowed it to intervene in almost any area of government. Nor was this always the unwarranted meddling discussed in chapter 1: the lords of session were not going to complain if the

1. For a useful model of the processes at work here, see M. Hechter, *Internal colonialism: the Celtic fringe in British national development, 1536-1966* (London, 1975), 9-10 and passim.

2. A.L. Murray, 'Huntly's rebellion and the administration of justice in north-east Scotland, 1570-1573', *Northern Scotland*, 4 (1981), 1.

privy council (nominally an equal, parallel body) ordered the court to rise when plague threatened Edinburgh.<sup>1</sup> The privy council, as much as the crown, was the government, and neither Mary nor James VI ever disagreed strongly or for long with their privy councils before the union of crowns. James found it difficult at times to hold the balance between privy council and privy chamber, but this could be a problem in England too.<sup>2</sup>

The council's legal powers were not precisely defined - for instance, administrative and judicial business (*acta and decreta*) were not separated in its records until 1610, when it had the example of star chamber to follow.<sup>3</sup> (1610 was also the year that an English-style court of high commission was created.<sup>4</sup>) Like parliament itself, the business the council dealt with was both public and private; in 1578 there was a rule that public affairs should be dealt with in the morning, and private suits in the afternoon.<sup>5</sup> This law came at a time of attempts to formalize and recast the central courts' jurisdictions. The 1579 parliament, as we have seen, slapped down the council's interference in the administration of justice by the court of session;<sup>6</sup> this may have been part of a wider attempt to untangle the two conciliar jurisdictions.

1. *NPC*, vi, 345.

2. D. Starkey, 'Privy secrets: Henry VIII and the lords of the council', *History Today*, 37, no.8 (August 1987), 24.

3. *NPC*, ix, p.v.

4. Foster, *Church before the Covenants*, 47.

5. *APS*, iii, 97, c.4.

6. Chapter 1.

The council was, however, constrained by its lack of reliable servants. A single illustration from 1623 may suffice. A Dunkirk pirate ship was brought in to Leith. Local people began to plunder it, and guards were set to protect it; but they deserted. The councillors themselves had to ride down to Leith docks to mount guard in a rota. Eventually they were forced to give up, exhausted, and plunder began again.'

In practice the council still relied on the private power and standing of the councillors - particularly the nobles. In 1593, in exasperation at the way recently-appointed noble councillors 'attendit nocht thairupoun in maner as wes appointit', a new council was appointed with only three nobles among its large membership. Other nobles, it was ordained, 'salbe of his hienes privie counsaill quhen thair happin to be present or beis send for be his majestie'.<sup>2</sup> It did not work; six months later, a new council was appointed with ten nobles and nine others.<sup>3</sup> In 1598 the king wanted 14 nobles and only seven 'learned' councillors.<sup>4</sup> But in the early seventeenth century, the only nobles to be found as working councillors were recently-created lords of erection.<sup>5</sup>

Compared with the privy council, the exchequer has had much less attention paid to it, especially in the context of implementation of

1. W. Taylor, 'The Scottish privy council, 1603-1625: its composition and its work' (Edinburgh PhD, 1950), 61-62.

2. *APS*, iv, 34, c.45.

3. *APS*, iv, 53.

4. Nicolson to Cecil, 1 July 1598, *CSP Scot.*, xiii, 228.

5. Taylor, 'Scottish privy council', 13.

government policy. For most of the sixteenth century, there was scarcely any fiscal policy worthy of the name, for there was no body which could have co-ordinated one; the exchequer was an irregular, passive body, convoked *ad hoc* to receive and audit financial accounts.' However, the exchequer was becoming more institutionalized. Its reputation for efficiency is not enhanced by the king's much-quoted outburst of 1591: 'I have been Fryday, Saterdag, and this day waithing upon the directioun of my affairs, and nevir man cumand. Thame of the chekker that wes ordainit to tak the compts, nevir one.'<sup>2</sup> It is, of course, quite possible that the king himself had got the day wrong.

One thing is clear: the exchequer was growing in status. The financial system, little changed since James I, was forced to adapt to changing crown revenues, as when the crown took over from the papal curia in confirming feus of church lands. A 1584 statute marked a new departure, the beginning of a permanent exchequer commission which would supervise and co-ordinate the individual financial officers.<sup>3</sup> The transition to a permanent exchequer was gradual: meetings were at first concentrated in a few months of the year as before, and they were largely confined to adjudicating on the complaints that an increasingly intrusive fiscal policy was generating.<sup>4</sup> These complaints chiefly related to church revenues in government hands, the main new source of

1. A.L. Murray, 'The procedure of the Scottish exchequer in the early sixteenth century', *SHR* 40 (1961), 89-117.

2. Quoted in Sir William Purves, *Revenue of the Scottish crown, 1661*, ed. D.M. Rose (Edinburgh, 1897), p.xxxvii.

3. *APS*, iii, 309, c.26; Murray, 'Sir John Skene and the exchequer', 126.

4. Exchequer auditors' act book, 1584-86, SRD, EA/1.

landed revenue at this period.

However, the exchequer soon began to take the initiative in administration. In 1584, for instance, it put the sheriff depute of Dumfries to the horn for non-payment of mails.<sup>1</sup> In the 1587 parliament, it was asked to take action on the customs, fishing, piracy, royal castles, and other such matters.<sup>2</sup> Although another 1587 statute confined its meetings once more to July and August, this had clearly been abandoned by 1590 when it was said to have been the 'only consell' for a while, and even a move to have 'na prevy consaill bot the chekker' was considered.<sup>3</sup> The continuing link with the council is illustrated by an order of 1594 that the 'lordis of... secreit counsaile and chekker' should meet twice weekly for council business and twice weekly for exchequer business.<sup>4</sup>

In 1596, the eight exchequer auditors known as the Octavians made the exchequer into a power-house, stepping up the pace of change with initiatives on customs, crown lands, and other matters.<sup>5</sup> It was to the exchequer, not the privy council, that the general assembly went in 1596 with its proposals for teind reform.<sup>6</sup> The Octavians cracked the whip over the existing financial officers so much that all resigned,

1. *RSS*, viii, no.2018.

2. *APS*, iii, 455, c.51.

3. *APS*, iii, 455, c.49; Melville, *Memoirs*, 373, 391.

4. *APC*, v, 118.

5. Murray, 'Sir John Skene and the exchequer', 127-31.

6. Calderwood, *History*, v, 421-33.

and the posts were shared out among members of the group - possibly a lucrative move, on which Melville blamed their unpopularity.' Although the Octavians resigned in January 1597, they were reappointed to a similar, enlarged exchequer commission, and more initiatives continued to be taken until a reaction took place in June 1598. The old system of separate financial officers was restored, and there were to be no more permanent exchequer commissions.<sup>2</sup> This was no doubt a manoeuvre by courtiers, angry at the Octavians' squeeze on patronage.

However, the clock could not be turned back completely. The exchequer was still able to take initiatives in 1600, when it advocated a case to itself, brought by Edinburgh against centrally-licensed exporters of wool.<sup>3</sup> Since the Octavians, it had been discovered that financial offices could be held jointly. Central control was soon returning, though it took other forms from the Octavian formula of supreme auditors of exchequer. In 1603 a new body known as the commissioners of rents appeared, exercising some of the financial control that the Octavians had had. In 1610 a weighty new financial department was created by combining all four financial officers (treasurer, comptroller, collector general and treasurer of new augmentations) in one person, the earl of Dunbar.<sup>4</sup> The treasurer depute, who did the work, was assisted by assessors; and in 1611, after Dunbar's death,

1. Melville, *Memoirs*, 390. For evidence casting doubt on the profitability of the financial offices in the 1590s, see chapter 4.
2. *APS*, iv, 165; Murray, 'Sir John Skene and the exchequer', 131.
3. *ACAS*, II, 75.
4. A.L. Murray, 'The pre-Union records of the Scottish exchequer', *Journal of the Society of Archivists*, 2 (1960-64), 99; *HMC Mar & Kellie*, I, 65-66.

this arrangement was formalized when the treasury was put in commission under eight assessors who were known as the 'new Octavians'.<sup>1</sup>

The exchequer (which in the seventeenth century we must speak of as the treasury) gives an impression of increasing red tape. New officers of state like collector general and treasurer of new augmentations seem to be more subject to it. There are new civil servants like the clerk of the temporality. The new officers may have been granted lands or benefices for their work, limiting their dependence on the centre; but a growing use of pensions, which in theory were easier to control, is more likely. At any rate, this fledgling bureaucracy, like all bureaucracies, had to become self-supporting in some way. Information on its exactions from the public is hard to come by: fees were not standardized until 1606.<sup>2</sup> In 1598 it cost the burgh of Aberdeen £4 2s to present its accounts, and in 1600 it cost £5 16s 8d, including clerks' fees, drink silver, and wine, cheese and bread to porters and ushers.<sup>3</sup> And that was the cost of paying money in.

The exchequer was at the forefront of the central government's information-gathering campaign. In 1592 the treasurer was required by parliament to keep registers of licences for export of forbidden goods, of monks' portions, of first fruits of benefices, and of licences of

1. Murray, 'Sir John Skene and the exchequer', 132.

2. Donaldson, *James V - James VII*, 234.

3. *Aberdeen council letters*, i, ed. L.B. Taylor (London, 1942), 76, 84.



exemptions from military service.<sup>1</sup> Military service was often commuted for cash, becoming almost a form of extra-parliamentary taxation, about this time.<sup>2</sup> Also in 1592, the treasurer and justice clerk were ordered to compile a list of all remissions granted since the king's majority in 1578.<sup>3</sup> In 1597, more statutes demanded yet more red tape. Rentals of church temporalities were to be given in by ministers provided to any benefice.<sup>4</sup> Feuars of church lands were to give in copies of their titles.<sup>5</sup> All feuars were ordered to hand in copies of their titles to the clerk of the temporality in 1599.<sup>6</sup>

It would be easy to exaggerate this proliferation of pen-pushers. But most historians have done the opposite, creating a pervasive scepticism about government effectiveness. Was Scotland really under-governed if it could maintain (in 1594) not one but two registers of exemptions from military service? - one for permanent absence, kept by the keeper of the register of casualties (associated with the privy seal), the other for temporary absence, kept by the keeper of the register of the signet.<sup>7</sup> The chance survival of other registers, such as that for the admission of notaries, is surely evidence that government paperwork was originally much more extensive. Many centralizing initiatives, such as

1. *APS*, iii, 556, c.30.

2. Chapter 5.

3. *APS*, iii, 575, c.67.

4. *APS*, iv, 133, c.15.

5. *APS*, iv, 133, c.16.

6. *TA*, 1599-1600, SRD, E21/73, fo.42r.

7. *APC*, v, 177-78.

the Octavians' tightening-up on the collection of feudal dues, were not the kind to leave a permanent trace in the archives; and the main exchequer minute book of their decisions is missing.' The Octavians themselves, highly visible because of the stir they created at court, were the tip of the iceberg: after all, these same eight administrators, and many more, all had long and active careers.

Many parliamentary statutes set up commissions to continue their work. Some commissions were for clearly 'parliamentary' business, such as making decisions on a list of articles presented to parliament. They tended to be large and to contain a balance of the three estates. They were not really executive commissions - rather they were an extension of parliament's legislative and judicial power. This was particularly clear in the 1563 commission to administer the act of oblivion - the law burying the crimes committed during the religious revolution.<sup>2</sup> Its surviving minute book shows that it acted like a miniature court of session, meeting at intervals for some years.<sup>3</sup> But there were also commissions to implement a particular decision. A balance of estates was less important in these, and they tended to contain a higher proportion of working members - officers of state and others active in the administration. More commissions were like this by the 1590s.<sup>4</sup>

1. Murray, 'Sir John Skene and the exchequer', 128.

2. *AFS*, II, 536-37, c.2.

3. Acts of the lords interpreters of the act of oblivion, SRQ, PA9/1.

4. Appendix C.

But by then commissions were in relative decline; they failed to match the enormous expansion of parliamentary statutes. Probably the government had developed more effective administrative machinery. Not that we know much about the achievements of parliamentary commissions: most have left no trace of their successes or their failures. Occasionally we are told that 'na thing is yit performit' by a commission.' Commissions' *ad hoc* nature, which has preserved few written records, probably hampered them. Although one commission was invited to 'creat clarkis' and no doubt others did, they lacked the continuous momentum which only a permanent bureaucracy could provide.<sup>2</sup>

Similar problems may have affected the central justiciary court, which remained a shadowy body in the sixteenth century. Its administrative continuity may have been weakened by the periodic justice ayres, and it seems to have failed to attract the resources invested in the court of session - though Scotland was not alone in seeing most growth in the civil rather than criminal law.<sup>3</sup> A potentially far-reaching development was the law encouraging public prosecutions: this might have allowed the justiciary court to emerge as a major branch of government, but few initiatives seem to have been taken by the court before the seventeenth century.<sup>4</sup> The most that can be said is that it

1. *APC*, iii, 199.

2. *APS*, iii, 220, c.17.

3. B. Lenman & G. Parker, 'The state, the community and the criminal law in early modern Europe', *Crime and the law: the social history of crime in western Europe since 1500*, eds. V.A.C. Gatrell, B. Lenman & G. Parker (London, 1980), 16.

4. Brown, *Bloodfaced*, 257.

remained under unquestioned central control.'

Growth of central control is also a feature of the commissary court. This emerged in 1564 from the pre-Reformation courts of the bishops' officials. The historian of the latter has stressed the elements of continuity in the transition, but points out that the new court was state-controlled.<sup>2</sup> The officials' courts had been answerable to nobody in practice, but the commissaries depended on the court of session which issued letters of poinding to collect their unpaid fines.<sup>3</sup> Local commissaries were answerable to the Edinburgh court. In 1587, they were decreed to hold office only during the crown's pleasure, and were ordered to hand in their registers annually.<sup>4</sup> Crucially, although they administered family law, they were free of church control; when in 1595 the general assembly was wanting to restrict the remarriage of adulterers, it had to 'travell with the commissars'.<sup>5</sup>

The admiral's court was a creation of the fifteenth century.<sup>6</sup> While the admiral's powers derived basically from military responsibilities, his court was also competent to decide all maritime cases 'tuiching the

1. *Sources and literature of Scots law*, 408; Willock, *Jury in Scotland*, 44-45.
2. Ollivant, *Court of the official*, 164.
3. *Acts of sederunt*, 6.
4. *Acts of sederunt*, 16-17.
5. Calderwood, *History*, v, 370-71.
6. A.R.G. McMillan, 'The admiral of Scotland', *SHR* 20 (1923), 11-12; *Acts of the admiral's court of Scotland (Acta curiae admirallatus Scotiae), 1557-1562*, ed. T.C. Wade (Stair Society, 1937), p.xiii.

carrying, lousing, and away taking of merchandice be sea'.<sup>1</sup> This was potentially a powerful weapon for centralization, as many cases in local burgh and dean of guild courts might have been claimed for it. A session case of 1533 held that debt cases between a Scottish and a foreign merchant fell under the jurisdiction of the burgh court, not the admiral.<sup>2</sup> Could this area of jurisdiction be claimed for the centre? The post of admiral passed from the fourth earl of Bothwell to the Regent Morton, and in 1581, following the latter's execution, an article was submitted to parliament on the 'ordoure betuix the merchandis and marrinaris for pilleit guidis'.<sup>3</sup> This suggests that the burghs wanted a redefinition of the jurisdiction in maritime causes; but when they got one, in 1587, it was quite the opposite of their hopes. Francis Stewart, fifth earl of Bothwell, was restored to his uncle's lands and to the admiral's office: his infetment allowed him to hold

civil and criminal courts... in all actions committed at sea, between native and foreign merchants or between foreign and foreign, concerning merchandise, fishings, materials of war, piracies, contracts, pledges and agreements... and on violators of the laws of the realm concerning exporters and regraters of victual, flesh, corn and other prohibited and uncustomed goods, as freely as any admiral of the realms of France, Spain, England, Denmark or other foreign nations.<sup>4</sup>

Here was a brand new central jurisdiction, professedly based on foreign example.

1. Balfour, *Practicks*, ii, 630.

2. Balfour, *Practicks*, ii, 635.

3. *APS*, iii, 214, c.9.

4. *RMS*, v, no.1316.

There was also pressure to extend the admiral's jurisdiction geographically. In practice the admiral's court was probably confined to Edinburgh, and similar cases in other burghs went to local courts. It took time for the new-style admiral's court to emerge, as in 1590 Welwood referred to reforms in the pipeline - 'the place ordinair for this jurisdiction is not as yit constitute' - and argued for setting up a similar court in the head burgh of each maritime sheriffdom.<sup>1</sup> Some things were already changing, for in 1590 the convention of royal burghs was stung into protest at the admiral's 'new exactiounis'.<sup>2</sup> The project might have succeeded if the unrelated antics of the hereditary admiral had not brought ruin on his court. In 1591, on Bothwell's forfeiture, the commission by his successor Lennox to the new vice admiral gave him only a vague jurisdiction over all cases 'pertening and concerning the jurisdiction of the said admiraltie conforme to the lawis thairof'.<sup>3</sup> Next year the burghs were able to strike a decisive blow against the court, securing a statute limiting the admiral's jurisdiction to what it had been under James V.<sup>4</sup> In 1593, a statute on the subject reaffirmed the principles of standardization and foreign example, but ceded control to the burghs. Cases between merchant and merchant were now to be tried by the local dean of guild court, 'as it is now usit in the toun of Edinburgh... according to the lovable forme of jugement usit in all the guid townis of France and Flanderis... and speciallie in Paris, Rowen, Burdeaulx [and]

1. Welwood, 'Sea law', 77-79.

2. *RCRB*, i, 339-40.

3. Commission to James Wemyss of Bogie, 5 August 1591, quoted in B. Saton, 'The vice admiral, and the quest of the "golden pennie"', *SHR* 20 (1923), 123.

4. *APS*, iii, 580, c.79.

Rochell'.<sup>1</sup> Central government could be resisted in some ways, but the clock could not be turned back completely.

At this point, this accumulating evidence of central government expansion might give rise to enthusiastic conclusions about a 'Stewart revolution in government'. But no. The word revolution is better kept for real revolutions, and this was a trend. Nor was it as benign and harmonious a trend as Elton once identified in early Tudor England.<sup>2</sup> There was continual friction between centrally-controlled and locally-controlled administrators - as indeed there was in England too.<sup>3</sup> But while there has been little acceptance for Elton's proposition that the transformation of government was a conscious, deliberate process concentrated in the 1530s, his critics have been chiefly concerned to show that the restructuring was a slow, piecemeal process dependent on short-term political contingencies.<sup>4</sup> That the restructuring took place there is no doubt. Nor can it be doubted that, in the Scotland of the 1580s and 1590s, there was a similar expansion of bureaucracy and professional government. Within a social system that was still largely feudal, this was absolutism.

The scale of the shift to the centre could easily be exaggerated:

1. *AFS*, iv, 30, c.38.
2. G.R. Elton, *The Tudor revolution in government* (Cambridge, 1953).
3. R. Ashton, *The English civil war: conservatism and revolution, 1603-1649* (London, 1978), ch.3.
4. D. Starkey, 'After the "revolution"', *Revolution reassessed: revisions in the history of Tudor government and administration*, eds. C. Coleman & D. Starkey (Oxford, 1986), 199.

perhaps the most significant point, indeed, is the successful resistance and continued vitality of Scotland's traditional local courts. Frontal assaults by the government, such as summonses to sheriffs, were forlorn hopes; the main centralizing trend was towards the creation of new channels of government to bypass the entrenched strongholds of local power. For despite continuing localism, the trend was clearly towards the centre: no new regalities or heritable jurisdictions were being created.' (An exception is the tiny regality court of the wardenry of the mint, created in 1584.<sup>2</sup>) A central executive was being refashioned to meet the demand for implementation of a wider range of more complex statutes. This chapter has shown both absolutism under construction, and the resistance that it generated. At the end of this period, it was by no means certain whether the will of the centre would prevail over the localities. The issue was a complex one, but at its root was the question: if central government was to prosper, who would pay for it?

1. *Regality of Dunfermline court book, 1531-1538*, eds. J.M. Webster & A.A.M. Duncan (Dunfermline, 1953), 11.

2. *RSS*, viii, no.2024.



## Chapter 4

### FISCAL POLICY

The Scottish state in search of cash was nothing if not enterprising. In the autumn of 1565, an army was being raised to crush Moray's rebellion: the queen summoned Edinburgh's leading burghesses to hear an 'orisoun' on her need for loans to pay for it. When this failed to inspire them to open their purses, six of them were imprisoned 'to thole the lawis for certane crymes' (probably they were to be accused of leading to the rebels), and released only when they 'appoyntit with our soveranis' with a loan of 10,000 merks from the burgh.<sup>1</sup> Knox claimed that there were 'soldiers set over them, having their muskets ready charged, and their match lighted', and even the most sober accounts of the episode leave the crudity of this fiscal expedient in no doubt.<sup>2</sup>

A generation later came an attempt to borrow that was not so much crude as extraordinary. The 1590s parallel to Moray's rebellion was the armed resistance of the north-eastern Catholic earls, and in July 1594 their relations with the government were deteriorating rapidly.<sup>3</sup> At this point the king approached the defiant earls through an intermediary, Lord Home: would they lend him 10,000 crowns? The

1. *Diurnal*, 84.

2. Knox, *History*, ii, 169-70; cf. Captain Cockburn to Cecil, 2 October 1565, *CSP Scot.*, ii, 217. Threats were followed by bribery, with the burgh being offered the superiority of Leith; for more on all this, see Lynch, *Edinburgh*, 110-11.

3. Brown, *Bloodfeud*, 166.

request was politely refused.'

These two episodes took place against very different backgrounds. Mary in 1565 needed to borrow for a specific and rare occasion - warfare. She was basically solvent, as the Scottish state had normally been since medieval times.<sup>2</sup> This is the more remarkable in that her personal reign followed a period of civil disruption and international war, and it was war (rather than court luxury) that was the principal drain on the resources of European states of the time.<sup>3</sup> But by 1594, there had been almost a generation of internal and external peace which had made no such demands on the crown's finances, and there was no need to borrow to raise an army - 10,000 crowns from the Catholic earls would certainly not have been spent on fighting them. King James needed the money because, unlike his mother, he could not make ends meet.

Intensified fiscal demands were both a cause and an effect of state-building in Renaissance monarchies, as new sectors of society were brought face to face with the state and its proliferating revenue collectors. More people were taxed, more often, and on a wider range of activities. In France, government revenues doubled in real terms in the early sixteenth century;<sup>4</sup> the story was similar in

1. News from Scotland, 21 July 1594, *CSP Scot.*, xi, 378.

2. Grant, *Independence and nationhood*, 166.

3. G. Parker, 'The emergence of modern finance in Europe, 1500-1750', *The Fontana economic history of Europe*, II, ed. C.M. Cipolla (London, 1974), 562.

4. H. Volle, *The fiscal system of Renaissance France* (New Haven, 1972), 99-100.

Spain.' Another way in which 1594 differed from 1565 was that this process was well under way. Not only was the Scottish fiscal administration growing in sophistication (that would not have obviated the need for loans, after all: the new absolutist monarchies made greater use of loans than before), but a recognizable financial sector, able to provide the crown with a range of banking services, had developed. And yet the crown still had to resort to outlandish contrivances.

Although deficit finance was becoming increasingly normal, loans had, eventually, to be repaid out of revenue. Moreover, each loan was still taken out as a response to a specific, urgent requirement; there was no Scottish parallel to the growth of long-term, funded debts like the French *rentes*.<sup>2</sup> So before discussing borrowing and other forms of crisis management, it is necessary to look at the ordinary revenue that was supposed to suffice for ordinary expenditure. One thing was certain: by the 1580s, at least, it no longer did. It was no use waiting, Micawber-like, for something to turn up; action would have to be taken, in the words of a 1592 finance commission, 'befoir it cum to ower instant necessitie'.<sup>3</sup> In the years after 1594, there was an intensified struggle over what form this action should take, a struggle which highlights the problems the crown had run into over the past generation. The need - and the opportunity - to make real choices in the direction that fiscal policy should take became clear during that

1. Parker, 'Emergence of modern finance', 561.

2. Wolfe, *Fiscal system of Renaissance France*, 92-93.

3. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.127r.

week in January 1596 when the king was persuaded to supersede his financial officers in favour of the eight exchequer auditors who became known as the Octavians. Although the Octavians were in sole control of the exchequer for only a year, resigning in January 1597, it has been convincingly argued that their reign was the high point of a regime of fiscal restructuring lasting from early 1595 until mid-1598.<sup>1</sup>

In France, the high-powered *conseil des finances* was superseded in 1597, only to be replaced by Sully as supreme *surintendant des finances*. It was not the end of financial restructuring, only of one administrative approach to it.<sup>2</sup> Could this have been so in Scotland too? Why, in fact, were the Octavians eclipsed in 1598, and what fiscal direction did the government take thereafter? Answers to these questions must begin by looking more closely at the opposition to the Octavians. The Octavians' own public image was that of dedicated professionalism, an image that was widely accepted at the time.<sup>3</sup> But were there not other influential, even forceful, figures who opposed or remained aloof from them? George Home of Spott, for instance, tried to persuade the treasurer depute, Robert Melville of Murdocairny, not to resign in January 1596.<sup>4</sup> He himself later became earl of Dunbar, and as treasurer wielded at least as much power as the Octavians had done.<sup>5</sup> Edward Bruce, commissary of Edinburgh and future Lord Kinloss, served

1. Murray, 'Sir John Skens and the exchequer', 127-31.

2. R. Doucet, *Les institutions de la France au XVI<sup>e</sup> siècle*, I (Paris, 1948), 150.

3. E.g. James Hudson to Cecil, 14 July 1596, *CSP Scot.*, xii, 278.

4. Nicolson to Bowes, 7 January 1596, *CSP Scot.*, xii, 112-13.

5. *HMC Mar & Kellie*, I, 65-66.

on many parliamentary and privy council commissions in the 1590s, on the coinage, ministerial stipends, customs, taxation, cloth manufacture and other matters.' He collected the English subsidy in 1598, and argued in favour of the disastrous taxation scheme of 1600.<sup>2</sup> Then there was the earl of Mar, another future treasurer, who co-operated with some Octavian policies but was never wholeheartedly on their side.<sup>3</sup> To dismiss these people, as has often been done, as courtiers who blocked 'reform' for short-sighted, selfish reasons, is to see the events of the late 1590s through the eyes of one party only. There was a coherent alternative to the Octavian approach, which deserves to be taken seriously. It was never promoted by an identifiable party: the 'cubiculars' or 'chamber' faction who appear in the reports of disapproving English ambassadors are an amorphous and faceless group. But they did exist, and they promoted real policies rather than simply wallowing unheeding in the luxury of a bankrupt court.

Still, the chamber faction scarcely believed in primitive simplicity; it was the Octavians who combated the famine of 1596 by reissuing the sumptuary legislation of 1581 which looked back austere to a virtuous past.<sup>4</sup> The Octavians' identification with the exchequer is significant, for to contemporaries, exchequer reform already meant

1. *APS*, iii, 553-54, c.27; iv, 27, c.31; 33-34, c.45; 113; 113-14; 145, c.48; *RFC*, v, 483; vi, 69, 98.

2. List of gratuities to James VI, c.November 1600, *CSP Scot.*, xiii, 742-43; Nicolson to Cecil, 29 June 1600, *CSP Scot.*, xiii, 661-64; for more on the taxation scheme, see chapter 5.

3. M. Lee, 'King James's popish chancellor', *Renaissance and Reformation in Scotland*, eds. Cowan & Shaw, 174-75.

4. Chapter 6.

above all the backward-looking policy of recovering crown lands, and this in turn was counterposed to the chief alternative: direct taxes.' The Octavian party was thus seen as the party of low taxation. This should in itself be a warning not to take the Octavians at face value, for the largest direct tax of the century, 200,000 merks in 1597, was imposed under their auspices - not to mention the largest single increase in indirect taxation.<sup>2</sup> But most of the Octavian party's efforts went into the recovery of revenue from crown lands and traditional feudal dues. This policy necessitated the restriction of patronage and access to the king, since it was royal giving that eroded the revenues, and it was this restriction, rather than heavy taxation, that led to their downfall.

By contrast, the chamber faction favoured unrestricted spending - particularly on handouts to the nobility, which continued to grow until the 1630s. This may have been short-sighted and selfish, but it led to a definite approach to revenue-raising. The chamber approach was never hostile to taxation, and they pressed more urgently for higher taxes after 1598: if they failed to find the pot of gold at the end of the rainbow, there were nevertheless some solid successes in establishing regular parliamentary taxes.<sup>3</sup> Coinage debasement was a source of easy cash; the mint was idle during the Octavian regime, but resumed its work with a vengeance thereafter. While the chamber was willing to impose direct taxes on all property-owners, there was a

1. E.g. Aston to Bowes, 14 February 1595, *CSP Scot.*, xi, 535.

2. *APS*, iv, 142-46, c.48; 118.

3. Chapter 5.

tendency to favour indirect taxes which fell largely on the mercantile classes: numerous such taxes were tried or proposed after 1598.

One thing that was not possible in the long term, though the Octavians tried it, was to plan ahead. The pressure to spend was so great as to engulf anything that could be raised and more; any limitation of expenditure was largely unplanned and entirely short-term, arising simply through insolvency. The system was income-driven - what was raised was spent. The accounting system did not allow advance budgeting; the function of the traditional exchequer, a largely passive body which met annually to receive accounts, was to prevent fraud.' Under the charge and discharge accounting system, items were recorded at the point when liability was incurred rather than when the transaction actually took place; this meant the inclusion in the accounts of income that had not been collected and expenditure that had not been paid out.<sup>2</sup> If this gave each account something of the character of a budget, it was not one that could be used to plan ahead. John Skene's 'Proposals' of the early seventeenth century included the suggestion that the exchequer should not allow expenditure items *periculo computantis*, which would have removed this problem on the discharge side, but the proposal was not implemented.<sup>3</sup>

A second planning disadvantage of the accounting system arose from the Chinese walls that separated the financial officers. The

1. Murray, 'Procedure of the Scottish exchequer',

2. *JA*, xii, p.xviii; A.L. Murray, 'The exchequer and crown revenue of Scotland, 1437-1542' (Edinburgh PhD, 1961), 7-9.

3. Murray, 'Sir John Skene and the exchequer', 149.

establishment of a permanent exchequer in 1584 was a step towards more active fiscal planning.' However, it was still hard to distribute pressure evenly through the system: in the early 1590s, when the treasury was staggering ever deeper into deficit, the comptroller's accounts on occasion showed a small surplus.<sup>2</sup> In 1597-98, when Walter Stewart held both offices, it must have been easier to transfer funds between the accounts - though by this time it was the comptroller's account that needed aid.<sup>3</sup>

If long-term fiscal policy thus ignored expenditure, there was nevertheless a tendency to realign expenditure towards more generally-acceptable ends. It is impossible to consider expenditure in detail here, but trends on spending were sensitive to the changing needs of the nobility who made or approved policy. What the nobles needed was an increase in cash handouts, particularly pensions.<sup>4</sup> This redistributive use of crown revenues might be popular with the politically powerful, but would lead to long-term problems with the non-feudal classes who had to bear an increasing proportion of the burden. Nevertheless, actual cuts were unlikely in this branch of expenditure - or in any other branch. The cost of the royal household, the focus of the privy council's fiscal concerns, had an underlying tendency to grow in the 1590s because of the king's marriage and growing family. There were occasional cuts, as when the privy

1. Chapter 3.

2. *ER*, xxii, 317, 408.

3. *ER*, xxiii, 191.

4. K.M. Brown, 'Aristocratic finances and the origins of the Scottish revolution', *EHR* 104 (1989), 71.



council achieved a reduction in household staff to 'farre less number then had been used' in May 1590.<sup>1</sup> In 1620-21 there was an attempted freeze on pensions, which by then had eaten away at the revenues to an alarming extent.<sup>2</sup> But such measures, essentially responses to crisis, were rare and probably not significant. Sir James Melville was aware of the possibility of cuts in the household - one of his brothers was master of the household, while another was treasurer depute; but his advice to restrict the number of household officers to two per post was probably, like most good advice, easier to give than to act on.<sup>3</sup> It was politically necessary to have a lavish court.

If there was little prospect of cutting expenditure, there was, in theory at least, a good deal of scope for increasing income. Most of the traditional sources of revenue were given over to inertia; they had sustained the crown for centuries, but a new age was dawning in which they faced unprecedented challenges. The policy favoured by the Octavians was the recovery of crown lands. These lands, after all, had been the mainstay of the crown for a century and a half, reaching their greatest extent around 1542.<sup>4</sup> What was needed, to combat inflation, was vigilant and effective administration, which is what the Octavians could offer. The line of attack was clear: exploit to the full the crown's right to revoke lands granted out during minorities, by using the archives to identify unpaid dues and former crown lands

1. Bowes to Burghley, 31 May 1590, *CSP Scot.*, x, 306.

2. *HMC Har & Kellie*, i, 90-95, 99-101.

3. Melville, *Memoirs*, 380.

4. Murray, 'Exchequer and crown revenue', 172.

that were being concealed from the comptroller.

But while the theory was obvious, the practice was much less clear. Rents were stagnant; inflation on an unheard-of scale had eroded them. But of course many people had a vested interest in fixed rents - some of them influential, as we shall see. Moreover, while most alienation of crown lands had in the past been by means of freehold grants to tenants in chief, the preferred tendency in the sixteenth century was to retain the crown's superiority but to set the lands in feu. Feuars made cash payments, sometimes large, in return for becoming proprietors with only the obligation to pay a feu duty fixed in perpetuity. In the early sixteenth century this had done the crown little harm: feu duties might be as much as the old rent if not more, and inflation was not high enough to make much difference.

Feuing of crown lands had been encouraged by policy-makers on non-fiscal grounds: it was felt that feuars, with a secure title to their property, were likely to invest in improvements.<sup>1</sup> In practice what feuing meant was probably not so much investment as increased rents.<sup>2</sup> In an inflationary age, freedom to raise rents was vital to the very survival of the landlord class. Rent rises may have been particularly likely when feus were granted at the full rate (rather than being, say, concessions to relatives at nominal feu duties): the feuars would have had to recoup their outlay from the peasants.<sup>3</sup> In the burgh lands of

1. Macgill & Bellenden, *Discours*, 5.

2. Murray, 'Exchequer and crown revenue', 201-02.

3. Sanderson, *Scottish rural society*, 159.

Ayr, the rents had been unchanged for so long that they were actually equal to the old extent valuation: feuing in the 1590s was followed by vast rent increases.<sup>1</sup> Feuing was, in fact, the jolt to the static, customary landlord-tenant relationship that an institutional landlord needed to break free of the old rents.

The full contours of the disposal of crown lands have yet to be charted, but in the late sixteenth century, their feuing was clearly proceeding by leaps and bounds. Statutes encouraging it - or rather, permitting it, since feuing was in principle frowned on - were passed in 1584 and 1587.<sup>2</sup> In 1588 there was an attempt to link feuing with agricultural improvement: those taking feus of the crown lands in Fife and Strathearn were to be required to plant trees and orchards and to build houses and doocots.<sup>3</sup> But it does seem that most feuing was simply a source of short-term cash. This trend, which was eventually to prove irresistible, was incompatible with the recovery of crown revenues from land. Lands granted out could be reclaimed, but once feued they were gone for good.<sup>4</sup>

The government, however, was reluctant to accept the verdict of inflation. The seriousness of the determination to rejuvenate landed revenues is captured in a warning of a finance commission of 1592 that

1. *Ayr accounts*, p. xxxvii.

2. *APS*, iii, 349, c.5; 439, c.13.

3. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.121r.

4. Murray, 'Exchequer and crown revenue', 202-03.

this should be 'na utherwiss bot according to law'.<sup>1</sup> A series of statutes of 1597, originating not in the regime of the Octavians but in acts of sederunt of the court of session in 1595 (though the exchequer had some input into these), attempted to provide a framework for recovery of the crown lands - or rather, for limiting their continued dispersal.<sup>2</sup> The acts helplessly accepted that more feuing was inevitable, but feu duties were at least to be set 'with augmentation of the rentell' so that the crown would lose out only once inflation overtook the existing rents.<sup>3</sup> To ensure payment of the feu duties, the lands could be forfeited for two years' non-payment.<sup>4</sup> Feu duties themselves were not to be alienated.<sup>5</sup> An exception was made even for this, allowing the alienation of feu duties of church lands annexed to the crown.<sup>6</sup> No disposition of crown lands other than by feuing was allowed.<sup>7</sup>

Parliament was useful to lend authority to this programme. For one thing, the assembled notables in parliament were as fully persuaded as the king and the exchequer of its desirability: from parliament's point of view, the alternative was taxation. One statute required parliamentary confirmation of feus, which, if observed, might have

1. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34,2,17, fo.127r.
2. Murray, 'Sir John Skene and the exchequer', 127-28; Mackenzie, *Observations*, 282.
3. *APS*, iv, 131, c.4.
4. *APS*, iv, 133, c.17.
5. *APS*, iv, 132, c.10.
6. *APS*, iv, 132, c.14.
7. *APS*, iv, 131, c.5.

helped to limit their number or at least to discourage the granting of over-generous terms.<sup>1</sup> But parliament was even more necessary because the programme was linked with revocations of crown lands. With these, the crown took advantage of its position at the apex of the feudal pyramid to act as private individuals did in reclaiming lands by revoking deeds done in their minority.<sup>2</sup> The monarch did not have to wait till the age of 21 as others did - the first of many revocations of James VI's reign was made in March 1575 when he was nine, recalling all crown lands granted out since the death of James IV on the grounds that only parliament could alienate crown lands.<sup>3</sup> This tended to undermine the trend towards absolute landownership, and to create a fruitful field for intrigue and patronage. Those nominally affected would have to wait until the comptroller's officials identified the crown's rights, and normally negotiations on a compromise settlement would follow. The outcome of those negotiations is invisible from the statutes themselves - only a systematic investigation of individual cases could establish the result of the political trial of strength between crown and other landlords; occasional comments like that of 1585 that the lands reclaimed by previous revocations had been 'newlie impetrat and purchast of his majestie be inoportun and unreasonabie suittis' perhaps signal a lack of confidence in the bargain the crown was obtaining.<sup>4</sup>

1. *APS*, iv, 131, c.4.

2. For examples, see *Records of the sheriff court of Aberdeenshire*, I, ed. D. Littlejohn (New Spalding Club, 1904), 219, 290; cf. Ollivant, *Court of the official*, 75.

3. *APS*, III, 89-90.

4. *APS*, III, 382, c.20.

The 1585 revocation statute was the most significant from the vantage point of 1598, when its enforcement was still hoped for.<sup>1</sup> It was more far-reaching than those of 1584 and 1587, including fewer individual exceptions.<sup>2</sup> It also contained the king's pledge not to regrant any reclaimed lands until his 'awin necessiteis' were provided for. Similarly there were parliamentary annexations of lands to the crown; but these too, if they were to have any effect, would clog up the flow of patronage.<sup>3</sup> The annexation of 1594 was limited in its scope: a companion act explicitly dissolved the annexation of crown lands for the purpose of setting them in feu to their existing tenants.<sup>4</sup> It was predicted in 1595 that exchequer reforms, if they led to greater efforts to recover crown land, would 'crab' many important people.<sup>5</sup>

None of the revocations could touch feuars, whose titles were rock-solid so long as they paid their ever-diminishing duties. But there were efforts to increase revenue from existing feuars. There was an order, probably in January 1598, to investigate feuars in Galloway and Lochmaben.<sup>6</sup> More seriously, the feuars of the Fife crown lands were ordered in 1599 to pay increased feu duties, based on a rental of 1487 that Skene had discovered. The feuars successfully resisted; one of

1. Copies of documents relating to the revenues of Scotland, BL, Add, MS 24,275, fo.16r.
2. *APS*, iii, 307-10, c.26; 439-42, c.14.
3. *APS*, iii, 307, c.25; 347-48, c.4; iv, 64-65, c.13.
4. *APS*, iv, 65, c.14.
5. Aston to Bowes, 14 February 1595, *CSP Scot.*, xi, 535.
6. Copies of documents relating to the revenues of Scotland, BL, Add, MS 24,275, fos.16r-16v.

them, threatened with eviction, won a case in the court of session, arguing that the 1487 duties had been reduced again in 1499 and in any case had never been paid. This decision was ratified by parliament in 1600. The list of the feuars affected, including many eminent personages, shows that feuing to kindly tenants did not necessarily mean peasants.<sup>1</sup> If the duties had been increased before feuing, their legal defence would have been much poorer; the Octavians came too late. Perhaps that was one reason why the Octavians were so interested in the crown lands in the Highlands - an issue to which we will return.

As well as feuing, wadsetting of crown lands seems to have been escalating. Wadsets were temporary alienations in return for loans, probably betokening greater desperation than feuing: crown lands to the value of £1,000 were to be wadset in July 1587 when the comptroller's revenue could not maintain the royal household until his rents could be collected at Martinmas.<sup>2</sup> The act banning disposition of crown lands other than by feuing was perhaps aimed at preventing wadsetting.<sup>3</sup> If so it was unsuccessful, since £8,000 worth of crown lands were being wadset in 1599.<sup>4</sup> Official concern about wadset crown lands is clearly identifiable in the early seventeenth century. Skene recommended that priority should be given to redeeming them in

1. *APS*, iv, 251-56, c.56.

2. *APS*, iii, 456, c.53.

3. *APS*, iv, 131, c.5.

4. *APC*, v, 550-51.

his 'Proposals' of c.1605-10.<sup>1</sup> In 1610 it was proposed to use a cash windfall from an escheat to redeem some wadsets.<sup>2</sup>

The question of crown lands was linked with the statute that squeezed the last drop of revenue from the medieval church. On the whole the beneficiaries from the dispersal of church property had been, not the crown, but the landed classes - the exception being the thirds of benefices in 1561 - and with the act of annexation of 1587 the crown took over the empty shell of a once-rich ecclesiastical structure. The act annexed to the crown the superiorities of monastic and episcopal lands as these were no longer 'necessar nor proffitable'.<sup>3</sup> The annexation was not 'proffitable' to the crown either; the finance commission of 1592 told the king flatly that 'your hienes rent is nevir the better'.<sup>4</sup> Very little could be gleaned from the church after this final, meagre harvest, as shown by a 1592 order to mulct Coldingham and Kelso, two monasteries exempted from the annexation, to pay the royal guard - considerably less than 6,000 merks was expected from this source.<sup>5</sup> Thereafter revenues moved if anything back towards the church. John Lindsay of Balcarres, one of the Octavians, responded to the pressure for more funding for the parish ministry with a report proposing that most teinds should be allocated to the church to

1. Murray, 'Sir John Skene and the exchequer', 150.

2. Copies of documents relating to the revenues of Scotland, BL, Add. MS 24,275, fo.9v.

3. *APS*, iii, 431-37, c.8.

4. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.127r.

5. *RFC*, iv, 755.



compensate for its lost lands.' The king later decided to restore what could still be found of the bishops' ancient revenues. There was an abortive move to do this in the 1600 parliament, and it was successful in 1606.<sup>2</sup>

Though the king eventually came to regard the act of annexation as 'vile', parliament in the early 1590s continued to legislate to make it effective.<sup>3</sup> A census of church lands and thirds of benefices was ordered in 1592.<sup>4</sup> Since the comptroller in 1599 was wanting a rental of annexed church lands to be compiled, this may not have happened.<sup>5</sup> Registers of rentals and feus of church lands were to be compiled by two 1597 statutes, perhaps following on from the inventory of crown land that Skene had compiled in 1595.<sup>6</sup> The main problem was that revenues from these lands slipped through the crown's fingers, ending up, as usual, in the hands of secular lords. In 1592 and 1594 there were statutes limiting pensions granted from benefices, and ordering that no more church lands should be erected as secular lordships.<sup>7</sup> However, none of these acts could be passed without conceding a host of exceptions.<sup>8</sup>

1. Calderwood, *History*, v, 421-33.

2. Hudson to Cecil, 19 October 1600, *CSP Scot.*, xiii, 713; *APS*, iv, 281-84, c.2.

3. James VI, *Basilicon doron*, i, 78-79.

4. *APS*, iii, 564, c.44.

5. *APC*, v, 552-53.

6. *APS*, iv, 132-33, c.15; 133, c.16; Murray, 'Pre-Union records of the Scottish exchequer', 95.

7. *APS*, iii, 544, c.13; 571, c.55; iv, 63, c.5; 66, c.17.

8. E.g. *APS*, iii, 587-88, c.90; iv, 38-39, c.55; 94, c.97; 94, c.99.

Another fiscal question which was administratively related to landed revenue was that of feudal casualties. The Octavians favoured driving a hard bargain over these. One of the points on which they insisted at their appointment was that wards, nonentries, marriages, bastardies, liferents and recognitions should be held for 40 days before being granted out, and escheats of moveables for eight days; they were not to be sold or disposed before then, and even after that only to the highest bidder.<sup>1</sup> This would have cut off much of the flow of patronage that lubricated the court. Because the issue was so much an administrative one, there seems to have been very little legislative effort specifically directed at increasing income from feudal casualties - no statutes were passed on wardship after 1491, for instance.<sup>2</sup> The administrative framework was well established; indeed, probably the last significant change had been the administrative supersession of the sheriffs by the treasurer in 1471.<sup>3</sup> In 1581 there was a brief revocation, of unknown but perhaps small effectiveness, of all casualties granted since the beginning of James VI's reign.<sup>4</sup> In 1587 parliament enacted that casualties 'sall not be gevin away in gryte, as of the casualities of ane hail cuntrie togidder'.<sup>5</sup> The practice was probably towards the granting of casualties on increasingly generous terms.

1. *RFC*, v, 760.

2. *APS*, ii, 224-25, cc.6-7.

3. C. Madden, 'Royal treatment of feudal casualties in late medieval Scotland', *SHS* 55 (1976), 173.

4. *APS*, iii, 243-44, c.69.

5. *APS*, iii, 456, c.54, para 2.

There were, however, some prominent struggles over fiscal feudalism, concentrating on two issues which may have been seen as test cases for a more thorough-going revival of feudal rights. Economically speaking, collecting burgh mails in sterling and converting blench fermes to cash were not going to solve the crown's money problems. A statute of 1592 ordered that the requirement of most burgh charters to pay mails in 'striviling money' should be enforced literally - meaning English currency, then ten times the value of Scottish.' The act was initially ignored; Aberdeen won a case against it in the court of session in 1595-96, but the most serious attempt to enforce it came in 1600.<sup>2</sup> Burgh mails were worth £740 in 1593, so a tenfold increase would have been welcome to the crown, but it was hardly worth the storm that it provoked - the burghs paid only £265 in 1597, for instance, probably as a deliberate protest.<sup>3</sup> In the end a compromise was reached, in which some burghs conceded smaller increases.<sup>4</sup> The attack on blench fermes came with an exchequer order of 1596.<sup>5</sup> It was reversed in 1606 when a statute observed that holders by blench ferme were being 'yeirlie without ony just cause burdenit, urgeit and compellit to mak payment in his hienes chekker', and ordered the payment of blench fermes on demand only, effectively abandoning them. The act's harsh words on the exchequer, and the protest entered against the act by the lord advocate, show that it was an opposition

1. *APS*, iii, 561, c.36.

2. *Aberdeen council letters*, i, 63-66.

3. *ER*, xxii, 291-92; xxiii, 192-93.

4. *RCRB*, ii, 69-71; *Ayr accounts*, p.xviii.

5. *ER*, xxiii, pp.liv-lvi, 506-07.

measure.<sup>1</sup>

A central aspect of the management both of crown land and of fiscal feudalism was the struggle for the royal signature. Casualties arose constantly, and lands still came into crown hands through revocations, through the act of annexation, and through forfeitures. Would they be granted out again, and if so on what terms? A running battle over this question was waged between the court and council: between politicians concerned to distribute patronage (and forever seeking for new ways of giving to bolster their position), and administrators with some concern for collecting the revenue. James VI's tutor, George Buchanan, sided with the latter. Tired of upbraiding the young king for lack of restraint in signing petitions and grants, he administered a practical lesson: one day, James discovered that he had signed a deed making his tutor king for a fortnight.<sup>2</sup> James may have been both careless and generous, but it is unhelpful to focus on his personal qualities: the struggle was endemic in the patronage system. Nor was it always a problem. In a sense the system maintained a creative tension between the courtiers and the administrators: the preponderance of historiographical sympathy for the latter's point of view is misplaced, for the crown clearly needed both to raise revenue and to distribute rewards.

This discussion must rely on administrative sources, but because administrators were partisans in the struggle, care is needed in

1. *APS*, iv, 287-88, c.13.

2. I.D. Macfarlane, *Buchanan* (London, 1981), 448-49.

evaluating their complaints. Even Queen Elizabeth was castigated as 'too liberal' by her lord treasurer.' In Scotland the issue was not new; unregulated royal giving had been claimed as a problem under James V and before.<sup>2</sup> Melville thought that Mary was 'naturally liberall, more than sche had moyen'.<sup>3</sup> The court of session ordered a chancery writer not to pass irregular royal signatures in 1566.<sup>4</sup> In March 1567 there was a freeze on gratis dispositions of gifts, pensions and tacks.<sup>5</sup> But neither Mary nor her father had the serious money problems that James VI faced. If James VI was too liberal, it was not because he distributed rewards without obtaining political advantage, but because the demand for patronage exceeded the supply.

The chief weapon available to the privy council was to use parliament to make rules requiring either that the council itself should approve signatures, or that only officers of state should present signatures to the king, or sometimes both. The most intense period for such activity was between 1578 and 1593. In 1578, a statute appointing a new privy council laid down detailed rules on grants of casualties and infeftments in lands: essentially, new or altered infeftments had to be considered by the council. Only renewals in which there was 'na thing changit bot the persoun quha salbe infeft' could go direct from suitor to king to treasurer, while the comptroller was authorized to set tacks

1. F.C. Dietz, *English public finance, 1558-1641* (2nd edn., London, 1964), 32.

2. Hannay, 'Foundation of the college of justice', 32.

3. Melville, *Memoirs*, III.

4. *Acts of sederunt*, 9.

5. BL, Royal MSS, 18 B vi, fo.231r.

only for up to five years and to renew kindly tenancies. The keepers of the seals were not to pass any grants not following this procedure. Financial officers were not to answer the king's precepts for cash payments without the council's approval.' In 1579, a similar but simpler statute ordered that none but the financial officers should present signatures to the king;<sup>2</sup> there were three attempts to enforce this in the next two years.<sup>3</sup> This position was temporarily abandoned during the spending spree of the Lennox regime, a statute of 1581 on 'importune and untymous suitters' accepting that suitors could present signatures to the king so long as they did not demand an immediate answer.<sup>4</sup> The 1579 position was restored in 1585.<sup>5</sup>

The growth of a permanent exchequer aided the administrators, though perhaps the end result was only to prolong the hard-fought retreat. The privy council handed over much of the responsibility for considering signatures - and, presumably, for continuing the struggle to be allowed to consider them - to the exchequer in 1590.<sup>6</sup> This arrangement was ratified, broadly, by several statutes of 1592 and 1593.<sup>7</sup> In 1587 there were to be no parliamentary ratifications until the appropriate composition had been paid to the treasurer, but nothing

1. *APS*, iii, 97-98, c.4.

2. *APS*, iii, 151, c.32.

3. *RFC*, iii, 284-85, 326, 349.

4. *APS*, iii, 229, c.39.

5. *APS*, iii, 380, c.16.

6. *RFC*, iv, 551-52.

7. *APS*, iii, 560, c.34; 562-63, c.41; iv, 19, c.18.

was said about how this was to be enforced.' This can be compared with a 1592 statute despairingly enacting that the parliamentary ratifications, of which there were a record number in this parliament, would not be valid without the treasurer's signature.<sup>2</sup> A more practical measure, perhaps, was to order the establishment of a register of signatures, recording their progress through the bureaucracy, in an attempt to eliminate antedated grants.<sup>3</sup>

There were no elaborate regulations on signatures for the next five years. The Octavians simply made the king promise not to sign anything without their approval; uniquely, while it lasted, their regime had the political muscle to enforce this.<sup>4</sup> Their successors, however, did not. In early 1599 there were orders that signatures should be passed through the seals and that the comptroller and treasurer of new augmentations should authorize all dispositions of annexed and erected church lands.<sup>5</sup> Casualties were not to be granted out by the king but to be componed for in the treasurer's office.<sup>6</sup> In June 1599 there was even an order that all who had obtained infetments, remissions, legitimations or other signatures were to pass them through the great seal by 1 August.<sup>7</sup> Since there were fewer

1. *APS*, iii, 457, c.54, para 14.

2. *APS*, iii, 563, c.42.

3. *APS*, iii, 569, c.51.

4. *RFC*, v, 757.

5. *RFC*, v, 542, 552-53.

6. *APS*, iv, 180.

7. *TA*, 1599-1600, SRD, E21/73, fo.55r.

great seal charters registered in June and July 1599 than in the corresponding period in 1598, this can have had little effect.' The same might be said of any of these measures, but it is hard to believe that all that effort was wasted. More detailed study would be needed to establish when, if ever, the administrators were able to establish control over royal giving; the impression given by the administrative measures is that patronage was relatively unchecked in the early 1580s, in the late 1590s, and possibly in the early 1590s too; before then, the crown's relatively secure finances had made the problem less urgent.

All these failures, caused as much as anything by conflict between supporters of the Octavian and chamber approaches, must have been frustrating. So it must have been good to find an issue that all sections of the governing class could unite on: the customs. Skene thought that 'thair is na rent of his hienes propirtie quhairin his hienes is sa far prejigit as in the abuis of his hienes gret custumes'.<sup>2</sup> Perhaps, but this probably tells us more about the attitudes of the ruling class - who were landlords, not merchants - than about actual trading practices, for the most detailed investigation of the latter has uncovered evidence only of moderate customs evasion.<sup>3</sup> Probably the landed classes looked with a more censorious eye on customs fraud than on, say, those who concealed a wardship or evaded a revocation of crown

1. *RMS*, vi, nos. 721-61, 919-48.

2. Quoted in Murray, 'Sir John Skene and the exchequer', 145.

3. Brown, 'Edinburgh merchant elite', 165-68.



lands.

Medieval customs were traditionally levied only on exports, at more or less permanently fixed rates. This, however, was coming to an end: in England, for instance, the customs had been freed from inertia in 1558.<sup>1</sup> In Scotland, in December 1582 the convention of royal burghs had been forced to deny a 'senister report' that customs were being evaded, and to offer under pressure to take the customs in tack.<sup>2</sup> A four-year tack of the customs was agreed in March 1583, with the burghs paying £4,000 and 30 tuns of wine per year.<sup>3</sup> This was a defensive measure by the burghs: when the tack was renewed in 1586, it was done only because the alternative was higher customs rates. Despite efforts to improve collection procedures, the burghs' collectors could not raise enough to break even on the contract, and more than once the convention of royal burghs had to tax its members for 'inlaik of the customes'.<sup>4</sup> Effectively, then, the crown had increased its income from the customs by a roundabout method: the burghs had chosen to provide this extra money through taxation on themselves rather than through increased customs duties. Artisans and small merchants were subsidising the large overseas traders.

This arrangement was too unusual to last, and the customs returned to

1. Dietz, *English public finance*, 7.

2. *ACRB*, i, 147-48.

3. *ACRB*, i, 152-54, 159-61; *EA*, xxi, pp. iviii-ixii, 561-64.

4. *ACRB*, i, 207, 235.

direct management in September 1589.<sup>1</sup> This might have been the time to raise the customs duties, something the 1587 parliament had asked the exchequer to consider.<sup>2</sup> But by now the government was concentrating on another, related objective: taxing wine imports. This measure had already been taken in England in 1558 and in Ireland in 1569 - in Ireland's case it was almost the only fiscal change of this period.<sup>3</sup> Scotland's tax, introduced by a convention in July 1590, imposed a duty of three crowns per tun of wine imported, less 10 per cent for 'the lekkage'.<sup>4</sup> Within months the tax was being demanded on re-exports as well, and 'the boroughs withstood the order set downe', with Dundee even being put to the horn before the government relented.<sup>5</sup> In the final agreement, negotiated in March 1591, the government agreed not to levy the tax on re-exports, and to change the duty to £8 per tun. As part of the deal, it was recorded that the king 'promittis the saidis burrowis that the payment of thair customes sail not be alterit nor changeit fra the forme that hes beine usit thir fourtie yeiris bygone sa long as the said impost is liftit'.<sup>6</sup>

Not surprisingly, this promise was being cited by the burghs in 1597, when the traditional customs rates were finally raised, as evidence of

1. *RFC*, iv, 416.

2. *APS*, iii, 455, c.51.

3. Dietz, *English public finance*, 306-07; S.G. Ellis, *Tudor Ireland: crown, community and the conflict of cultures, 1470-1603* (London, 1985), 174-75.

4. *RFC*, iv, 514.

5. Boves to Burghley, 3 April 1591, *CSP Scot.*, x, 494; *Edin. Recs.*, v, 34.

6. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.2v.

official duplicity.<sup>1</sup> Export duties went up dramatically, and new customs were imposed on imports.<sup>2</sup> This was a striking success. The burghs' protests were brushed aside.<sup>3</sup> The measure was first passed by a convention, and when parliament came to ratify it, what purported to be a transcript even added a new clause highlighting its class nature: landlords were allowed to import or export goods for their own use duty-free.<sup>4</sup> In January 1601 the wine import tax went up from £7 16s (this figure presumably represents the £8 of 1591 minus a leakage allowance) to £27 16s per tun; resistance to this duty led to its reduction to £21 the following October, and again an element of class privilege was introduced with the duty on wine for nobles' and lairds' households being only £7.<sup>5</sup>

The expanding fiscal power of the state was mainly used to exploit the merchants, not the landed classes. The state completely failed to lift the incubus of tradition from the land tax. Direct parliamentary taxation was such a significant question for the government, and for taxpayers of all propertied classes, that it is dealt with in more detail in the next chapter. Here it is only necessary to say that the government did achieve some success in imposing taxes which in the early 1580s were more frequent than before, and from 1588 were far heavier. However, there were many structural problems with the

1. *RCRB*, II, 19-21.

2. *APS*, IV, 118.

3. *Edin. Recs.*, V, 161.

4. *APS*, IV, 135-36, c.22.

5. *RFC*, VI, 200-01, 291.

antiquated assessment and collection system for direct parliamentary taxes on land, at first concealed but eventually only too obvious. The government suffered some embarrassing defeats which crippled its hopes of using parliamentary taxes on a scale for which they had never been designed. The only alternative was to continue along the lines begun in 1590s with even heavier exactions from commerce and finance - in particular the 1621 taxation of annual rents.<sup>1</sup>

Although this is not the place to discuss the tax on annual rents, it is worth pointing out that the search for some such tax had a long history. The success with the customs pointed the way for the policy-makers, and from 1597 onwards they were casting around for new indirect taxes. A convention in December 1599 was called mainly to revise parliamentary tax assessments.<sup>2</sup> However, it also considered a novel proposal for an excise on sales of grain (16d per boll), cattle (2s each) and sheep (12d each), reportedly to meet the king's need for £500,000.<sup>3</sup> This was surely an exaggerated sum to expect from any tax, even though crown debts and pressing expenditure may well have reached such a figure.<sup>4</sup> It may have been presented as a tax or penalty on forestalling (sales outside official markets), as Moysie described it when recording that it had been dropped after being 'mourmoured against'.<sup>5</sup> It is hard, however, to imagine how a tax on forestalling

1. D. Stevenson, 'The king's Scottish revenues and the Covenanters, 1625-1651', *Historical Journal*, 17 (1974), 19.

2. Chapter 5.

3. Aston to Cecil, 16 December 1599, *CSP Scot.*, xiii, 584.

4. Cf. Nicolson to Cecil, 6 February 1600, *CSP Scot.*, xiii, 622-23.

5. Moysie, *Memoirs*, 165.

could have been collected. The English ambassador was told the next February that the idea was not dead, but that if ever imposed it would be sure to be resisted by force, so unpopular had it been; a week later the idea was officially buried, with a proclamation denying that it had ever been planned.<sup>2</sup>

In May 1601, Thomas Foulis was told that he, Thomas Acheson and Robert Jowsie would get the money the crown owed them (of which more below) if he could devise a tax worth £180,000 over 11 years - but it would have to be 'nawyse grevous to his majesteis loyall subjectis'.<sup>3</sup> To square this circle he may have proposed a tax on cloth manufacture, since this was an idea that the burghs were lobbying against, successfully, in July.<sup>4</sup>

The only tax on domestic trade that was actually imposed in this period - and then only briefly - was a tax on wine sales. A levy of 12d in the pint was ordered in January 1601, at the same time that wine import duties were quadrupled, and a minimum price of 6s per pint was set.<sup>5</sup> A sales tax was something quite new, and it could have been highly significant if it had succeeded in putting a new tax-collection machinery in place. It was the machinery that probably failed - nothing could stop the vintners continuing to sell wine at 5s per pint,

1. Nicolson to Cecil, 6 February 1600, *CSP Scot.*, xiii, 621.

2. *APC*, vi, 205-06.

3. *APC*, vi, 245-47.

4. *APC*, vi, 269.

5. *APC*, vi, 200-01.

presumably without paying the tax.' The privy council attempted to enforce the tax in March 1601, but by October it had been abandoned.<sup>2</sup>

As well as these taxes on commerce, the state might go into business on its own account. Would this lead to direct public investment in the hope of a return? Parliament gave a good deal of attention to the mining of gold, silver and lead, but this was largely a question of granting leases of mining rights and leaving the lessees to raise the capital.<sup>3</sup> The inventor and entrepreneur Eustace Roche, for instance, had a tack of the mines from 1583.<sup>4</sup> However, a consignment of his lead ore was arrested at Leith in 1590, apparently for failure to pay his tack duties.<sup>5</sup> In 1592 there was a brief attempt at direct management, under John Lindsay of Balcarres as master of the metals and Thomas Foulis as master refiner; however, it seems that their preferred management option was to feu the mines to landlords.<sup>6</sup> There was little or no direct crown investment.

A different business project, less glamorous than the quest for El Dorado but striking in its own way, was unveiled in 1599, when the crown's debts were crying to be paid. Eustace Roche had developed a new type of salt pan which he would build with crown finance. An act

1. Birrell, 'Diary', 53-54.

2. *RFC*, vi, 230, 513-14.

3. Lythe, *Economy of Scotland*, 51-57.

4. *APS*, iii, 368-71, c.32; *RFC*, iv, 269-70.

5. TA, 1588-90, SRD, E21/67, fo.226v.

6. *APS*, iii, 556-59, c.31.

of convention authorized the borrowing of £20,000 at more than the legal 10 per cent interest in order to build two salt pans.<sup>1</sup> At that price they must have been remarkable pieces of technology, since an ordinary pan could be built for £2,500 or less in the 1620s.<sup>2</sup> They were expected to be so profitable as to pay for themselves, and then to fund the building of further, similar pans as well as rewarding Roche and paying the crown's £25,000 debt to William Stewart, commendator of Pittenweem, who was appointed comptroller of the salt pans for this purpose. There is no evidence that any such salt pans were built.

The crown lands offered possibilities for official enterprise. James V had gone into business as a sheep farmer.<sup>3</sup> Stocking the royal parks with sheep was one of the ideas that Melville offered the king in the 1590s, and the Octavians favoured it too.<sup>4</sup> However, their preferred area of official spending in the hope of a long-term return was not strictly a business project at all. What they wanted was to attack the Highlands, partly on general policy grounds but also to gain control of the lands that had once belonged to the lordship of the Isles and to which the crown now had a nominal title.

This was a project that required a large outlay on warfare. The finance commission of 1592 advised that an Isles expedition be called

1. *APS*, iv, 182-84.

2. C.A. Whatley, *The Scottish salt industry, 1570-1650* (Aberdeen, 1987), 78.

3. P. Symms, 'Some aspects of the sheep farming activities of James V', *Scottish Economic and Social History*, 7 (1987), 66-69; Murray, 'Exchequer and crown revenue', 175-76.

4. Melville, *Memoirs*, 382; *RFC*, v, 759.

off, as it would not be 'effectuall' in paying for itself.' There were such expeditions, but eventually the government decided to adopt the same approach as to the mines - grant out the rights to the Highlands, and let the expense of colonization be borne by private capital. Thus was born the Lewis adventure, in which a group of 'adventurers' from Fife sought to take advantage of strife among Lewis's ruling MacLeod family to conquer the island. The adventurers financed the first expedition themselves, and were promised legal possession of the island in return for a large feu duty.<sup>2</sup> The Lewis people's resistance defeated them, however, and in 1605 the crown had to pay for an expedition on their behalf.<sup>3</sup> By now this was done on grounds of general policy; the idea of an economic return from investment in colonization had receded. Ironically, the ultimate beneficiaries from the Lewis fiasco, the MacKenzies of Kintail, may have been successful in agricultural reorganization, if a 1615 report that the island was 'dispeopled' betokens a deliberate policy on their part.<sup>4</sup>

If the western Isles failed to yield up any revenue, there were more solid prospects from foreign countries. The significance of Mary's dowry as dowager queen of France is only just beginning to be appreciated: 60,000 livres tournois (£30,000 Scots) annually was a fabulous sum, funding more than half of all the queen's household

1. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.127v.

2. *APS*, iv, 160-64.

3. D. Macdonald, *Lewis: a history of the island* (Edinburgh, 1978), 28-31.

4. Shaw, *Northern and western islands*, 69.



officers.' James VI was keenly aware of the possibility of Continental subsidies; he probably hoped in 1594 that the Catholic earls might prove a conduit for Spanish gold. Much diplomatic effort was expended in vain on the search for such funds.<sup>2</sup> But the main chance was closer at hand. The English were prepared to spend money to establish or bolster a sympathetic regime in Scotland; when official Scottish policy was not pro-English enough, the money went to nobles who were believed to be 'well affected'.<sup>3</sup> There had been intermittent payments from England to the Scottish government since at least the regency of Moray.<sup>4</sup> A regular subsidy began at £4,000 sterling per year, in 1586.<sup>5</sup> In real terms this was not much more than half what Mary had received from France, and by the late 1580s only £3,000 sterling was being paid; but even that was received by the impoverished Scottish government as a 'legion of angels'.<sup>6</sup>

There was, however, no guarantee that 'angels' would descend to help the Scottish crown out of crisis. James VI learned early about the precarious state of his finances: one crisis struck just as he was beginning to take a role in government. Having made the first formal

1. M. Greengrass, 'Mary, dowager queen of France', *Mary Stewart*, ed. Lynch, 172-75.
2. R.S. Brydon, 'The finances of James VI, 1567-1603' (Edinburgh PhD, 1925), ch.4.
3. K.M. Brown, 'The price of friendship: the "well affected" and English economic clientage in Scotland before 1603', *Scotland and England, 1286-1815*, ed. R.A. Mason (Edinburgh, 1987).
4. Malville, *Memoirs*, 214; Dietz, *English public finance*, 41-43.
5. Walsingham to Randolph, 19 March 1586, *CSP Scot.*, viii, 254; money paid to the king of Scots, 1586-1594, BL, Stowe MSS, 158, fo.33r.
6. William Asheby to Walsingham, 12 September 1588, *CSP Scot.*, ix, 614.

entry into his capital, he had to go on progress through Fife and Angus in the summer of 1580; 'this progresse was devised becaus the Lord Ruthven, treasurer, alledged the treasurie was exhausted'.<sup>1</sup> It is surprising that these progresses did not become the regular money-saving events that they were in England for Elizabeth.<sup>2</sup> However, there were certain recognizable policies which were regularly adopted to stave off insolvency.

Most of the crown's income was inflexible; the most conventional sources of revenue, like crown lands, doubly so. But naturally expenditure fluctuated - and when it also had a tendency to run ahead of income, each crisis seemed more serious than the last. Suddenly, the crown badly needed a source of loans to tide itself over. Medieval Europe had had only a few sources of large loans, and larger states had tended to raise their loans on the international money market. In the last three decades of the sixteenth century, England, which had hitherto sought loans in places like Antwerp, witnessed a decisive break with the past: the Elizabethan regime sought instead a relationship with the domestic financial sector.<sup>3</sup> Scotland seems never to have needed the Continental bankers, but on a smaller scale the Scottish government, too, now sought to tap domestic capital.

Traditionally, apart from the occasional forced loan like that raised from Edinburgh in 1565, most borrowing had taken place within the

1. Calderwood, *History*, iii, 462.

2. L. Stone, *The crisis of the aristocracy, 1550-1641* (Oxford, 1965), 453.

3. R. Ashton, *The crown and the money market, 1603-1640* (Oxford, 1960), 1.

crown's accounting system. The financial officers, principally the treasurer and comptroller, were personally liable for the debts they incurred on the crown's behalf (the crown having also, of course, a liability to reimburse them): as a result they might have to bear deficits out of their own resources. They were rewarded, of course - in fact, this was the principal service for which they were rewarded; and as late as 1561 the treasurership was reckoned a 'proffitable' office.<sup>1</sup> Robert Richardson, treasurer at that time, had risen from the lowly post of treasurer clerk, but he left his sons as lairds.<sup>2</sup> This would have seemed bitterly ironic to the earl of Gowrie, treasurer in 1582, when a list of debts incurred in the crown's service was sent to the English government: Gowrie himself was overspent by £33,000, the treasurer depute by £6,000, the comptroller by £5,000 and the collector general by £4,000. Together with £3,000 owed to the captain of Dumbarton castle, the crown's debts according to this report amounted to £51,000.<sup>3</sup> Though it excoriated the duke of Lennox, whom it blamed for the shambles, the report seems actually to have underestimated the deficit: in March 1582 the treasurer's superexpenses alone were £45,377.<sup>4</sup> By May 1583, the treasurer's accounts recorded debts to the treasurer depute of £14,342, to the master of the mint of £5,082, and to Gowrie of £67,488.<sup>5</sup> To add further irony, one of Gowrie's creditors

1. Randolph to Cecil, 17 October 1561, *CSP Scot.*, i, 560.

2. G. Crawford, *The lives and characters of the officers of the crown and of the state in Scotland* (Edinburgh, 1726), 383.

3. Advice for James VI, 1582, *CSP Scot.*, vi, 240.

4. TA, 1581-82, SRD, E21/62, fo.180v.

5. TA, 1582-83, SRD, E21/63, fo.137r.

was a son of his predecessor, Robert Richardson.<sup>1</sup> Gowrie had to wadset his own lands to bear the burden of his office, claiming the interest payments in his accounts.<sup>2</sup> The system was getting out of hand.

The response, partly a sign of greater administrative sophistication, but partly betokening desperation in the face of crisis, was a growing distinction between administrators and financial entrepreneurs. Earlier financial officers, like Gowrie, had fulfilled the function both of administrator and of provider of reluctant credit. This continued; the treasurers in particular ran up enormous deficits from the late 1570s on, with the comptrollers' deficits remaining relatively under control at least until the later 1590s. But these deficits were no longer the sole source of credit: a new breed of financier arose, which was to prove a source of loans on an unprecedented scale. Meanwhile, the making of policy tended to devolve upon officers who did not provide credit themselves.

The emergence of these new administrators can be traced back to the early 1580s, a seminal time for financial administration as in so many other fields. The first permanent exchequer was set up in 1584, eventually becoming an active administrative department with auditors who did not bear the personal liability of treasurer and comptroller.<sup>3</sup> Their responsibilities can be illustrated by an exchequer report, in

1. *APS*, III, 400, c.32.

2. *TA*, 1581-82, SRD, E21/62, fo.67r.

3. Chapter 3.

August 1585, on the work they had done in finding some rents to shore up the unstable finances of the royal household for the rest of the year. They took the opportunity to observe that the treasurer's latest superexpenses were 'greit and difficill to be spedellie relevit, gif it sall not be your hienes guid plesour to foirbeire for a tyme the subscribing of signatures gratis'.<sup>1</sup> In July 1587, Maitland of Thirlestane wrote to the exchequer outlining the desperate financial state of the royal household, and appointing a special commission of 11 to overcome the crisis and to discover a 'likelie and possible meanes' of paying the crown's debts before 'confirmation of confusioun' was reached.<sup>2</sup> One was David Carnegie of Colluthie, a future Octavian. Some of these commissioners did lend to the crown themselves - the advocate John Sharp of Houston, for instance.<sup>3</sup> But the sums were modest, and their money was far less important than their administrative talent.

A similar commission reported in 1592, stressing that drastic action was needed. To underline this, it suggested sacking all the financial officers, and came down, as the Octavians were to do, in favour of recovering crown lands rather than imposing taxation. This would have been popular in parliament, and the commission advised involving parliament in the work of the treasurer by having a committee of three, one from each traditional estate, to authorize all grants of feudal casualties along with the treasurer: this would prevent them being

1. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.174v.

2. Maitland to the exchequer, 18 July 1587, ERD, PA7/1/3.

3. M.H.B. Sanderson, *Mary Stewart's people* (Edinburgh, 1987), 25-26.

granted 'ower guid chaip' since parliament knew that the alternative was taxation.' An exchequer commission of January 1595 foreshadowed the Octavians in another way, by proposing to replace the financial officers with 'mene' men.<sup>2</sup> This commission may not itself have been effective;<sup>3</sup> however, the proposal for 'mene' financial officers shows that the government had moved away from the assumption that the officers should be the major source of royal credit. While the Octavians in 1596 opted to take over some of the financial offices themselves, they did install one 'mene' officer, the obscure Henry Wardlaw, chamberlain of Dunfermline, in the new post of receiver general, responsible for the entire income not only of the former comptroller, but also of the treasurer of new augmentations (the receiver of duties from church lands annexed in 1587) and of the mint.<sup>4</sup>

If Wardlaw was appointed for his administrative abilities rather than his wealth, this underlines the fact that the crown was increasingly looking elsewhere for loans. An entirely new type of financial entrepreneur would supplement and eventually overtake the established financial officers of the crown as a source of credit, and sometimes take over many of the latter's accounting functions too. The Reformation period had marked an end to the occasional presence in Edinburgh of Italian bankers; thereafter Scots took their place.<sup>5</sup>

1. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.127v.

2. Aston to Bowes, 18 January 1595, *CSP Scot.*, xi, 515.

3. Lee, *Maitland of Thirlestane*, 284.

4. *ER*, xxiii, 134.

5. S.G. Checkland, *Scottish banking: a history, 1695-1973* (Glasgow & London, 1975), 726-27.

Probably the real credit explosion is to be dated in the early seventeenth century, but it clearly had its precursors.' Janet Fockart, for instance, was a merchant and moneylender who lent to the crown among others in the 1570s.<sup>2</sup> Unlike the new-style administrator, who made policy but did not bear personal liability, the importance of the new-style entrepreneur was simply that he or she could put large cash sums on the line. Such people are less visible in the official sources, for they made policy only indirectly - by deciding either to lend or not; but ultimately this would come to be the decisive voice in fiscal policy.

The explosion of borrowing was not confined to the state, nor to isolated individuals staggering from crisis to disaster. Burghs were running up debts: in Ayr, the merchant John Lockhart was effectively a banker to the burgh for the entire decade 1576-86.<sup>3</sup> Nobles too were running up semi-permanent deficits.<sup>4</sup> Were these borrowers taking advantage of newly-sophisticated banking opportunities, or were they treading a primrose path to ruin? Examples of both could be found; not all debtors were insolvent, certainly. But the accumulating wreckage of private and public bankruptcy clearly denotes a new and significant extension of the tentacles of credit throughout the economy.

Some financial entrepreneurs no doubt provided only occasional loans to

1. Brown, 'Edinburgh merchant elite', 239-42.
2. Sanderson, *Mary Stewart's people*, 99.
3. *Ayr accounts*, 151-52.
4. Brown, 'Aristocratic finances', 50-53.

the crown, trusting to receive repayment in the long term and royal favour in the meantime. Such loans occasionally appear in the treasurer's accounts in the 1590s. A complicated transaction took place in 1593: John Arnott, merchant of Edinburgh, was owed a large sum by the crown, and in May received payment of £10,000 from the queen's tocher (of which more below) deposited with the burgh of Edinburgh.<sup>1</sup> The opportunity was too good to miss, and by the next month £1,800 of the money was in the treasurer's hands 'by the king's command'.<sup>2</sup> Most such loans went through the king's hands directly, never being recorded in the accounts. In some ways this was primitive and haphazard - it certainly must have made budgeting difficult. But in some ways it was actually more sophisticated, because the chief credit agents made their own accounts. Thomas Foulis and his partner Robert Jowsie, merchant of Edinburgh, through whose hands part of the English subsidy passed in 1593, were making their own accounts separate from those of the treasurer.<sup>3</sup> Accounts of this kind could provide the crown with limited credit. Jowsie was making regular accounts of this kind, from 1590 at least, of apparel provided to the royal household.<sup>4</sup>

To provide full banking services to the state, including large-scale overdraft facilities, financial entrepreneurs like Foulis and Jowsie had to get their hands on some regular revenue. Traditional revenue was

1. *Edin. Accs.*, v, 88-89.

2. TA, 1592-93, SRD, E21/69, fo.180v.

3. TA, 1592-93, SRD, E21/69, fo.225r.

4. Apparel accounts, 1590-1600, SRD, E35/13.



in the hands of the traditional officers, which left four main possibilities: the mines, the English subsidy, the customs, and the coinage. Foulis, in his heyday a giant among financiers, tried all four, and one of his surviving accounts is of critical importance in illustrating how he handled three of them.<sup>1</sup> His career may serve as an epitome of the new and sometimes tense relationship between capital and government.

One of Foulis' early interests was in the mines, no doubt through his trade as a goldsmith and his post as sinker of the irons in the mint.<sup>2</sup> As we have seen, he became master refiner of the metals in 1592, a post in which he was confirmed in 1594 for good service.<sup>3</sup> However, in 1594 he also obtained a tack of the mines, retaining all the revenues in return for an annual duty of £666 13s 4d - which was one of the items, though only the smallest, on the charge side of his account.<sup>4</sup> As late as 1619 he was prospecting for gold at Leadhills with a royal licence, but considering the heights he had reached during the late 1590s this does seem something of a come-down.<sup>5</sup>

Foulis' sheet-anchor in difficult times was his growing control over the English subsidy. This was instant, easy cash, attractive to an impecunious king, and often it went the same way as much ready money:

1. Accounts of Thomas Foulis, king's goldsmith, 1594-95, SRD, E30/14.

2. *RSS*, viii, no.1722.

3. *APS*, iii, 559, c.31; iv, 84-85, c.71.

4. Foulis' accounts, 1594-95, SRD, E30/14, fo.1v.

5. J.K. Cameron, 'Some Continental visitors to Scotland', *Scotland and Europe*, ed. Smout, 51.

it was spent. The king in 1593 appropriated much of it as pocket money.<sup>1</sup> But there were pressures to use it more strategically. The fact that it was usually paid in London encouraged the growth of banking services: Foulis, or his brother David who acted as his London agent, received the subsidy in at least five of the years between 1592 and 1598. £2,000 sterling in 1593 never left London, but was allocated with English co-operation to pay debts there.<sup>2</sup> Even more was in fact spent in England: Foulis received £7,680 sterling in subsidy in 1594-95, and the discharge of his account shows many sterling items, ranging from the £21 (£210 Scots) that he paid for 'ane greit allabast stane' for the chapel royal in Stirling and 'certane leid' for Linlithgow palace, to the £1,828 (£18,280 Scots) paid to Jowsie to settle some of the latter's English debts.<sup>3</sup> The fact that Foulis could establish such a strong claim to this tempting source of income is an indicator of his indispensability.

By 1594 Foulis had moved into the coinage. In January he persuaded a convention of estates to pass an act for a new gold and silver currency, with the silver to be raised to 50s per ounce of 11d fine silver.<sup>4</sup> With the mint paying 42s for the 40s silver pieces (each piece one ounce, 11d fine) issued in the early 1580s, a gross profit of over 20 per cent was in prospect. Initially Foulis was himself to have taken on a tack of the mint, and the burgh of Edinburgh agreed to

1. TA, 1592-93, SRD, E21/69, fo.225r.

2. Gratuities to James VI, c. November 1600, *CSP Scot.*, xiii, 742-43.

3. Foulis' accounts, 1594-95, SRD, E30/14, fos.3r.-3v.; for the alabaster and lead, cf. *MHA*, i, 314.

4. *APS*, iv, 49-50.

be his surety for this.' However, the tack eventually went to the burgh itself, paying 1,000 merks per week to the crown, with Foulis as the burgh's agent; possibly his own capital was over-committed elsewhere.<sup>2</sup> The operation continued until April 1596.<sup>3</sup> It was linked to Foulis' loans to the crown. In September 1594 the king pledged two gold cups with him, empowering him to coin them if not redeemed by November;<sup>4</sup> in October, Foulis received a £7,004 subvention from the mint, clearly in repayment of this loan.<sup>5</sup>

Foulis became a member of a commission on the customs in March 1597.<sup>6</sup> Did he play the key part in May's decision to increase the customs? At any rate, shortly after the decision, he and Jowsie were appointed chief customs collectors.<sup>7</sup> At this point they were just administrators, and a statute in November enacted that the customs should not be set in tack without parliamentary confirmation - perhaps because the government was still intoxicated with its success.<sup>8</sup> But by March 1598, Foulis and Jowsie had obtained a tack of the customs from a convention.<sup>9</sup> This tack was probably the fruit of Foulis'

1. *Edin. Recs.*, v, 107-08.

2. *APS*, iv, 85-86, c.74; I.H. Stewart, *The Scottish coinage* (London, 1955), 96-97.

3. Coinage register, 1594-98, BL, Add. MS 33,517.

4. *RFC*, v, 167.

5. Foulis' accounts, 1594-95, ERD, E30/14, fo.1r.

6. *APS*, iv, 113-14.

7. *RFC*, v, 388.

8. *APS*, iv, 131, c.7.

9. *APS*, iv, 165; *ER*, xxiii, 237-46.

association with George Home of Wedderburn, the comptroller.' But though it was to have run for a year, by December 1598 it had been cancelled; Home had transferred his favour to a syndicate headed by Bernard Lindsay, which in its turn was dismissed the following April, apparently after Lindsay had tried to reduce the payments.<sup>2</sup>

Foulis had done well to obtain the customs tack, even though he failed to hold on to it, for his sun was already declining from its meridian. His furthest penetration of the crown finances had come in December 1597, when he became the sole executive officer of a new exchequer commission.<sup>3</sup> Effectively he was in full charge of the revenues, 'and that becaus the king was in his debt'.<sup>4</sup> This remarkable arrangement needs further investigation; one reason it has not received the attention accorded to the Octavians is because Foulis' reign was so brief, collapsing after less than a month when he apparently failed to meet obligations to the creditors from whom he had borrowed in order to lend to the king - who had defaulted.<sup>5</sup> However, his own debts were officially suspended.<sup>6</sup> These debts were still causing concern long afterwards.<sup>7</sup> Foulis himself was still capable of bouncing back; as

1. Birrel, 'Diary', 45.

2. *RFC*, v, 508, 525-26; *ER*, xxiii, 334-35.

3. Commission to exchequer commissioners, 29 December 1597, *CSP Scot.*, xiii, 144-45; cf. a provisional agreement between Foulis and Walter Stewart, treasurer, October 1597, *CSP Scot.*, xiii, 118-20.

4. Calderwood, *History*, v, 668.

5. Aston to Hudson, 20 January 1598, *CSP Scot.*, xiii, 155.

6. Calderwood, *History*, v, 673.

7. 'The desyr of the barronis... anent the stenting of the present taxation that the samyn may be devlie uptakin but abuss', 1606, SR0, PA7/23/1.

well as the customs tack, he and Jowsie received another tack of the mint at the end of 1598.<sup>1</sup> The coinage was duly 'cryed down, to the great hurt of the leidges'.<sup>2</sup> Foulis was still valuable enough to the crown to obtain a pension of £1,000 per year in 1601, and the tacksmen of the mint in 1602 were making payments to his assignees.<sup>3</sup>

The debts of financial officers, and other agents like Foulis, were a burning issue. A list of the creditors of Foulis and Jowsie was drawn up for the perusal of a convention in June 1598.<sup>4</sup> The total came to a staggering £160,522. Entries like the £1,333 owed to 'Thomas Annanis bairnis' suggest that some of the debts were of long standing. Were they paid interest? The case of Edward Johnstone, who was owed 8,000 merks and who had been discharged in the previous January from proceeding against Foulis for this sum or for any interest, suggests that some of them <sup>were</sup> ~~did~~.<sup>5</sup> Most of the debts are similar - large sums with round figures which suggest formal loans. However, some of them may have been simply unpaid bills - the convention's act on the debts remarked that Foulis and Jowsie had incurred them through furnishing the king with jewels and clothing on credit as well as by lending money to the crown.<sup>6</sup> Unpaid bills may well have provided a larger component of the superexpenses of the regular financial officers than

1. *APS*, iv, 166.

2. *Moysie, Memoirs*, 138.

3. *RFC*, vi, 245-47; *TA*, 1601-04, SRD, E21/76, fo.152r.

4. *APS*, iv, 168.

5. *Pitcairn, Trials*, ii, I, 33-34; for more on this case, see chapter 2.

6. *APS*, iv, 166.

of entrepreneurs like Foulis and Jowsie; if so, the latter's interest-bearing commitments to their creditors made them particularly vulnerable, and their achievement in penetrating the crown's finances all the more striking.

Interest payments were rarely recorded formally in bonds or other transactions of the period.<sup>1</sup> The likelihood that many creditors of the crown's agents received no interest on their loans is reinforced by the tale of the queen's tocher. When James married Anne of Denmark she brought a tocher of £150,000, of which £100,000 was distributed as a loan to a number of burghs, who were obliged to pay 10 per cent interest until the crown redeemed its money.<sup>2</sup> Yet the king could have paid his debts with the money. The burghs were none too happy about this 'reverse' forced loan, and it does seem that the crown would only have benefited from the arrangement if it was not obliged (or could evade the obligation) to pay interest on its own debts. There may be exceptions: for instance, Aberdeen's £8,000 share of the tocher loan was repaid in 1594 to Thomas Acheson, master of the mint, and Robert Jowsie.<sup>3</sup> The debt to Jowsie dated only from the recent baptism of the princess, but Acheson was a long-standing creditor of the crown - and continued to be, as late as 1601.<sup>4</sup>

Acheson and his like had no legal remedy against the crown, of course.

1. Brown, 'Edinburgh merchant elite', 236.
2. A. Montgomerie, 'King James VI's tocher gude and a local authorities loan of 1590', *SHR* 40 (1961), 11-16.
3. *Aberdeen council letters*, i, 57-59.
4. TA, 1582-83, SRD, E21/63, fo.137r.; *RFC*, vi, 245-47.

When the treasurer's accounts recorded in 1592 that Thomas Foulis 'takis his hienes self debtour' for £18,787 owed for jewels and goldsmith work supplied, thus reducing the treasurer's liability, this must have been a reluctant concession by Foulis.' With financiers, and similarly with the forced loans sometimes exacted from burghs, obtaining reimbursement from the crown was a matter of being economically or politically indispensable.<sup>2</sup> As well as receiving cash payments, they might negotiate more favourable terms for their involvement with future revenue. In 1601-02 the crown's £41,000 debt to Alexander, master of Elphinstone, who had recently left office as treasurer, was cleared by assigning the mint temporarily to his son, taking it temporarily out of the hands of the current tacksmen, and issuing a quantity of heavily debased coin.<sup>3</sup>

But Acheson, Elphinstone, and other officers and financiers who became entangled with the royal funds, were all intermediaries. The really important debts were those that they owed to their ultimate creditors, the suppliers of goods and services to the crown. These suppliers' remedy to recover their money, normally, was to sue the financial officer with whom they had contracted. But all too often the officers would receive protection from their creditors; examples can be found of supersederes of such debts being granted by the privy council, the exchequer, the court of session, and of course parliament.<sup>4</sup>

1. TA (Leven & Melville), 1590-92, SR0, E22/8, fo.184r.

2. E.g. a 1590 loan by the burghs: ACAS, i, 331, 349.

3. AYC, vi, 287-88.

4. E.g. AYC, iii, 340; ER, xxii, 162; Acts of sederunt, 33; APS, iv, 147, c.50.

The royal household deserves a special mention in discussion of fiscal crisis management.' From the point of view of the king, a crisis was essentially a time when the household threatened to run short of wine or other supplies. There were two basic ways to avoid such an unfortunate eventuality. The first was to prise some revenues away from any of the regular officers, usually the comptroller who had primary responsibility for household finance, and assign them directly to the master of the household. This was being done, for instance, as early as 1570-71.<sup>2</sup> The long-term result, of course, would be to cause worse problems for an already hard-pressed comptroller. A variant of this was to divert other officers' expenditure towards the household, as when Adam Erskine, commendator of Cambuskenneth, collector general, was charged to supply it in 1583, presumably at the expense of ministers' stipends.<sup>3</sup>

The second approach was to force the comptroller or other officers to undertake to supply the household for a specified period. John Seton of Barns, comptroller, and Robert Douglas, collector general, made such an undertaking in 1588, as did David Seton of Parbroath, comptroller in 1592.<sup>4</sup> But there were limits to what this could achieve. George Home of Vedderburn, comptroller in June 1598, was forced to undertake to furnish the household from his revenues, giving this priority over

1. Cf. A.L. Murray, 'Financing the royal household: James V and his comptrollers, 1513-43', *Renaissance and Reformation*, eds. Cowan & Shaw.

2. *APC*, xiv, 80-82, 105-07.

3. *TA*, 1582-83, SRD, E21/63, fo.126r.

4. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fos.116v.-118r., 12v.-13r.



payment of creditors.' In February 1599 this came badly unstuck: under pressure to meet impossible obligations, Home absconded.<sup>2</sup>

A 1591 report on the household recommended that all existing debts should be divided into old and new, so that those who were currently 'prime furnessouris' could be paid - longer-standing creditors would have to wait. 'Furnessouris' seem to have made allowance for the crown's well-known habits by charging higher prices: the report remarked on the need to avoid having to buy supplies 'at darrer prices nor the commoun mercatt for want of reddy silver'.<sup>3</sup>

The nature of 'reddy silver' was itself in flux: the best-known fact about Scottish coinage of this period is its dizzying plummet in value, as a result of debasement undertaken largely in response to fiscal crisis.<sup>4</sup> It is true that inflation was a European phenomenon, and that some was caused by other changes such as population growth. Some Scottish inflation may have been imported: the government occasionally tried to argue that finer coins were leaking abroad, which may not have been entirely false in the late 1570s when debasement had just hit the French coinage.<sup>5</sup> But at a time when the Scottish currency eventually lost two-thirds of its value against the English,

1. *AFS*, iv, 166.

2. *APC*, v, 525-26, 530-31, 550-51.

3. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fo.138r.

4. C.E. Challis, 'Debasement: the Scottish experience in the fifteenth and sixteenth centuries', *Coinage in medieval Scotland, 1100-1600*, ed. D.M. Metcalf (British Archaeological Reports, no.45, 1977), 171 and *passim*.

5. Salmon, *Society in crisis*, 224-25.

most inflation clearly had its roots in the government's desire to rake off quick profits from the mint.

This is not to blame the policy-makers. In those days, governments could not finance their military spending by running up a budget deficit and manipulating interest rates. When, in 1572, towards the end of the civil war, the king's party were faced with troops to pay, debts of £30,000, and 'na money to be had... except only be the cunyehouse', what could they do? Various rates of alloy were suggested, and the 'bassest' was inevitably adopted.<sup>1</sup> That was war, but even in peacetime the government could never escape, from about 1573 on, from the need to debase the coinage.<sup>2</sup> From then on, the master of the mint became effectively another of the crown's financial officers, with the mint accounts recording their own independent (very miscellaneous) discharge - and, inevitably, their own superexpenses.<sup>3</sup> The story of the mint, indeed, epitomizes the way in which short-term expedients increasingly became a semi-permanent way of life for a semi-bankrupt state. The king's own view, in *Basilicon doron* (1599), is instructive: a fine coinage is desirable, he writes, because one day you might want to debase it.<sup>4</sup>

Life was commonly difficult and dangerous for state financial officers.

1. John Acheson, 'Anent cunye, and ample discourse' (c.1581), BL, Add. MS 33,531, fos.251r.-258v. For the relevant statute, see appendix A, no.28.
2. Challis, 'Debasement', 190.
3. Brydon, 'Finances of James VI', 89-99.
4. James VI, *Basilicon doron*, i, 90-93.

In France they might easily end up on the scaffold, no doubt *pour encourager les autres.*<sup>1</sup> This was not a Scottish habit, though there was a shadowy plot early in 1580 to charge William Murray of Tullibardine, comptroller, and Adam Erskine, collector general, with 'sudden reckonings' that might have led to their execution.<sup>2</sup> The main threat to Scottish officers was to their purses. In 1587, the treasurer was ordered not to pay out more than £20,000 a year, or no *supersedere* would be granted.<sup>3</sup> The discharge for 1587-88 turned out to be a worrying £27,071.<sup>4</sup> In 1601, the former treasurer Walter Stewart, commendator of Blantyre, had to accept an arrangement for repayment of his superexpenses, incurred between 1596 and 1599, that would have left him still out of pocket in 1606.<sup>5</sup> Such examples were by no means exceptional; George Home of Wedderburn could testify that much worse could happen.

If serving an insolvent and unreliable crown was full of such tribulations, why did financial officers not resign? Robert Melville of Murdocairny wanted to continue as treasurer depute in 1596 even when superexpended by £35,686.<sup>6</sup> The reason is that though there seemed no end to his mounting debts, he had a wolf by the ears and

1. Doucet, *Institutions de France*, i, 175; Salmon, *Society in crisis*, 75.

2. Boves to Burghley & Walsingham, 10 May 1580, *CSP Scot.*, v, 418.

3. *APS*, iii, 456, c.54, para 1.

4. TA, 1587-88, SRD, E21/66, fo.115r. The accumulated deficit at this point was £52,996.

5. *APC*, vi, 542-43.

6. TA, 1593-96, SRD, E21/70, fo.82v.; Nicolson to Boves, 7 January 1596, *CSP Scot.*, xii, 112-13.

feared to let go. While he was in post, the king had to protect him more or less; but if he relinquished control of his sources of revenue, manifestly inadequate though these were to cover his current expenditure, he ran the risk of being flung to his creditors to be devoured. After he was forced out by the Octavians, he did receive some reduction in his debt: the king promised to pay him a somewhat derisory 2,000 merks, and his successor, Walter Stewart, paid him £3,333.<sup>1</sup> More importantly, some of his debts to Robert Jowsie were transferred to the king himself, which cannot have been good news for Jowsie, and Melville ended up owing a mere £23,447.<sup>2</sup> He also obtained an act of parliament the next year protecting him from his creditors, so it was they rather than he who suffered in the short run.<sup>3</sup> He was a loser again in 1601, however, when the exchequer unilaterally cut £3,333 6s 8d from the current treasurer's liabilities, and numerous creditors had portions of their debts repudiated. Melville lost £700, the biggest single sum from this dubious operation.<sup>4</sup>

Melville could be thankful that he was not ruined. The story of John Acheson, master of the mint, is a sad one that has been well told. He took on some of Gowrie's treasury debts in the late 1570s when the mint was making large profits, only to find himself still responsible for these obligations after he had been removed from office and the

1. TA, 1592-93, SRD, E21/69, fo.227r.; TA, 1593-96, SRD, E21/70, fo.82v.

2. TA, 1593-96, SRD, E21/70, fo.198v.

3. APS, iv, 147, c.50.

4. TA, 1600-01, SRD, E21/74, fos.138r.-139r.

income that went with it: he was warded for debt in 1581.<sup>1</sup> He was promised action to recover the debts in 1587, but his heirs in 1594 were still unable to sue Gowrie's heirs: the actions of Gowrie's creditors were still suspended, so parliament suspended the actions of Acheson's creditors too.<sup>2</sup> Another financial entrepreneur who ended up in jail was Robert Jowsie: while in London in 1599 he fell a victim to the king's English creditors. Foulis was blamed for failing to rescue him, but he himself was as much a victim of the fiscal system as his unfortunate partner.<sup>3</sup>

Foulis and Jowsie were capitalists whose aim, in providing financial services to the crown, was to make profits. But the main reason why most financial officers continued willing to serve an insolvent crown was that the reward, traditionally, was not monetary profit but political power. Without the treasurer or comptroller 'myght noe man gete no goodenes of the king', complained Lindsay's Poor Man.<sup>4</sup> And political power meant, above all, favourable opportunities to acquire property for themselves, their kin and friends. The gifts and hospitality which the burgh of Ayr, for instance, regularly had to offer to the officers of state, testify to their influence.<sup>5</sup> Whether they would be protected after leaving office was essentially a political question: it depended how much they were still worth to those in

1. *TA*, xiii, pp. xxx-xxxI.

2. *APS*, iii, 495, c.102; iv, 83, c.67.

3. James Elphinstone to Cecil, 28 February 1599, *CSP Scot.*, xiii, 410-11; Cecil to Elphinstone, 13 April 1599, *CSP Scot.*, xiii, 445-46.

4. Lindsay, 'Thrie estaitis', 5.

5. *Ayr accounts*, 141, 152 and *passim*.

power. One financial officer who has been studied in detail is Robert Barton, treasurer and comptroller in the 1520s. He left office in 1530-31 superexpended by £6,780; probably less than half of this was paid by the crown, and he narrowly escaped imprisonment at one point, but his office had helped him to acquire a landed estate, and he received favoured treatment over a revocation of crown lands.<sup>1</sup> Melville of Murdocairny received various grants and favours both during and after his period of office, ending with a peerage.<sup>2</sup> These political rewards were rare for the newer financial entrepreneurs: although they moved in the inmost circles of government, it is hard to see Foulis and Jowsie as politicians, which is why perhaps their paths and those of the Octavians hardly seemed to cross.

In fact, perhaps what is most remarkable is that, despite the rewards of office, some financial officers *did* resign. The earl of Cassillis is a case in point. He agreed to replace Walter Stewart as treasurer in April 1599, but resigned almost immediately on hearing that his appointment had been engineered to mulct him of his wealth - or rather, that of his wife, Jean Fleming, Lady Thirlestane.<sup>3</sup> Unfortunately he had already entered into bonds for payment of some of Stewart's obligations, and though he rushed to the court of session it seems that his abortive appointment left him considerably worse off.<sup>4</sup> His

1. W.S. Reid, *Skipper from Leith: the history of Robert Barton of Over Barnton* (Philadelphia, 1962), ch.13; Murray, 'Exchequer and crown revenue', 261-63; Murray, 'Financing the royal household', 52.

2. *Scots peerage*, vi, 98.

3. *APC*, v, 548-50; Nicolson to Cecil, 10 April 1599, *CSP Scot.*, xiii, 444.

4. *Advices from Scotland*, 8 June 1599, *CSP Scot.*, xiii, 496; *Scots peerage*, ii, 476.

successor, the master of Elphinstone, learned from the experience, refusing to take on any past debts with the office.' The clumsiness of Cassillis' treatment left the king with no choice but to accept this.

To some extent, from the crown's point of view, all financial officers and entrepreneurs were decoy ducks. They were given impressive-looking powers and sources of income in order to make them convincing conduits through which the money, goods and services of others could be channelled to the crown without the latter being burdened with payment at once, if at all. The Cassillis episode was just a more squalid version of this approach. Equally squalid, perhaps, was the forfeiture of the third earl of Gowrie in 1600. The king owed Gowrie a vast sum dating back to his father's treasurership - the figure of £48,063 was mentioned in 1594.<sup>2</sup> Forfeiture might have been considered to wipe this out. But Gowrie also owed the same sum to his own creditors; would the crown, in escheating his property, also take on his debts? The legal position is uncertain; the first earl had been forfeited in 1584, and his debts had clearly still been extant on the restoration of his heirs. But the 1600 parliament favoured only two of Gowrie's creditors, and not from the first earl's treasurership.<sup>3</sup> It does look as though, having sheltered ingloriously behind Gowrie for two decades, the crown was finally able to disown these ancient debts.

Which brings us, perhaps, back to where we began. In 1565, crude

1. *Advices from Scotland*, 8 June 1599, *CSP Scot.*, xiii, 496.

2. *Acts of sederunt*, 21.

3. *APS*, iv, 245, c.47.

extortion was an occasional expedient when the crown needed to spend heavily, for there were no sophisticated credit mechanisms to draw on, but it could meet ordinary needs without getting out of its depth. By 1600 the situation had in some ways been reversed: an elaborate financial sector had emerged, while the crown's increasing insolvency had forced it to adapt its own fiscal machinery to finance its ordinary expenditure through slow, regular extortion. James's chronic failure to pay his bills was less glaringly dramatic than Mary's jailing of her leading merchants, but essentially it was no less crude.



## Chapter 5

## PARLIAMENTARY TAXATION

The Scottish nobles, reported an English envoy in 1556, had rejected a new tax assessment, 'affirming that they meant not to putt their goodes in inventory, as if they were to make their last willes and testamentes'.<sup>1</sup> Other accounts, more circumstantial, show the lairds taking the lead: 'the nobilitie gave way to this proposition, either through fear or expectations of favor; but the gentry repynd and took it grevouslie, and convened in Edinburgh in no les number then three hundred'.<sup>2</sup> But there is agreement on the central point: 'this tax was grevous, but the valuation was taken worse by all men generallie'.<sup>3</sup>

As parliamentary taxation began its long journey from being an occasional handy supplement to the crown's income to become the central pillar of the state, the question of land valuation was vitally important. To succeed, a system of direct taxation had to be able to adapt itself to the overall distribution of property. In the century which followed the confrontation of 1556, parliamentary taxation became a more and more regular event; but the government never managed to unlock the nation's full taxable capacity. There was a large increase in first the frequency and then the level of taxation, beginning in the 1580s, which was important in establishing the principles that the

1. Report on taxation, 1556, *CSP Scot.*, i, 196-97.

2. Harries, *Memoirs*, 29-30; cf. Buchanan, *History*, i, 330.

3. Harries, *Memoirs*, 29-30.

government was entitled to tax and that taxation was granted by parliament or convention. But the practical achievement was vitiated by retention of outdated traditions of assessment.

There were several attempts after 1556 to revise the tax assessment machinery, and analysis of the traditional system's workings shows only too clearly why there was pressure for reform. Most of the evidence for the old system comes from the 1590s, when most taxation archives begin: tax rolls showing what should have been paid, accounts showing (in theory) what actually was paid, and the invaluable records of the commissions of 1594 and 1597 which adjudicated on disputed cases.<sup>1</sup> However, there is enough evidence to gain a good idea of how the system had progressed (or not) from at least 1560.

There were three separate types of assessment: for lay land, for church benefices, and for royal burghs. (Though the classic theory of taxation was that it was a tax on persons, a form of feudal service.<sup>2</sup>) Central to the assessment of secular land was that elusive phenomenon known as old extent.<sup>3</sup> This began life during the wars of independence as the value which lands had had 'in time of peace', and a tax of 1326 superimposed a rebate system for war damage on earlier assessments, unintentionally fixing them in amber and making the 'extent' of lands a

1. For a list of all the direct taxes in this period, including details of the surviving archives, see appendix D.
2. Craig, *Jus feudale*, I, 16.20.
3. T. Thomson, *Memorial on old extent*, ed. J.D. Mackie (Stair Society, 1946).

matter of public law. The phrase found its way into briefs of succession, which for centuries thereafter asked what the lands 'valent nunc... per annum, et quantum valuerunt tempore pacis' every time they were transferred to an heir, so that the assize had to come up with a figure to put in the retour to chancery.' Old extent was so much associated with retours that the fixing of old extent valuations was sometimes accompanied by 'inquisitiones valorum' which produced a kind of general retour for a whole sheriffdom or lordship.<sup>2</sup> The valuation process was usually referred to as to 'retour' the lands in question. Taxation of the lands was always set at so much in the pound of old extent.

From 1366 onwards, old extent stalked down the centuries in the uneasy company of new extent, which replaced old extent as the current land value in the aftermath of the Black Death. Thus new extent was originally lower.<sup>3</sup> However, inflation allowed new extent to catch up with old extent, and then overtake it, during the fifteenth century. Long before the sixteenth century, old extent had simply become a traditional, customary assessment: it gained its authority not from being based on the latest data but from having been fixed in the past, preferably the remote past. This was normal for land assessments of the period: in England, the medieval tenth and fifteenth became a stereotyped assessment, as did the Tudor subsidy.<sup>4</sup> There was no

1. Balfour, *Practicks*, ii, 644; *Retours*, i, introduction.

2. *Retours*, ii, inquisitiones valorum.

3. Nicholson, *Later middle ages*, 165, 175.

4. S. Dowell, *A history of taxation and taxes in England*, i, ed. A.R. Hiersic (3rd edn., London, 1965), 86-87, 154-55.

mechanism for revising the assessment as land values changed, for there was no intellectual framework for accepting changing valuations as part of a normal economic process. This made good sense when change was indeed slow and rare. The trouble was that the movement of land values, even at a snail's pace, could distort old extent over the centuries - as we shall see.

In theory, new extent should have varied with the rent, while old extent was permanently fixed; but in practice things were not so simple, if only because old extent valuations, being largely unrelated to daily use, tended to be forgotten. Moreover, at some point during the fifteenth century, new extent had become a stereotyped assessment in its turn. The recreation of forgotten valuations when a retour had to be made thus became linked with the question of the proper relationship between old and new extents - if only one was remembered, the other could be fixed from it. In the years before 1541, Thomson argued, a rule was introduced by legal precedent that old extent should be one quarter of new extent.<sup>1</sup> Old extents created after that date should in theory (if the new extent was known) have followed this 4:1 ratio. However, a glance at the *Retours* (before the mid-seventeenth century when old extent lost almost all meaning) shows only scattered examples of this ratio.<sup>2</sup> The move to a 4:1 ratio may have had some impact; but what about the decision of 1500 that the ratio should be 3:2?<sup>3</sup> Hannay collected retours from the fifteenth and early sixteenth

1. Thomson, *Memorial*, 92-93, 237.

2. *Retours*, i-ii, *passim*.

3. Balfour, *Practicks*, ii, 430.

centuries in which 2:1 and 1:1 ratios were quite common; he also found several eccentrics, 20:1 being retoured in one 1502 example.' There, the 'tempore pacis' (old extent) figure was the same as the blench ferme, the assize not having understood that head of the brieve. This case, like the many 1:1 ratios, shows that old extent could become rusty and ill-understood if taxation was rare - as it usually was before the 1580s. Similarly, even if the many 1:1 ratios date from the fifteenth century when old and new extents were actually quite close, they could only have been identical if one or other of the extents had been cut adrift from its origins. In England, 'time of peace' seems always to have meant a theoretical maximum value for lands; if this concept remained current in Scotland it is not surprising that even Balfour, in reporting one case on the subject (the decision was that new extent had to be higher), was muddled enough to describe new extent as 'time of peace' and old extent as 'time of war'.<sup>2</sup>

If retours often produced random variations in old extent, the reliance on custom and the absence of any check on retours meant that variations were likely to be perpetuated. More studies of these assessments are needed; but it is clear that the evolution of old extent was not connected with the evolution of current land values. Thus the power of old extent to reflect sixteenth-century land value was minimal. If the old extent was (as it should have been) an immemorial survival, we can be fairly sure that the pattern of agriculture and settlement (and thus the land value) would have shifted,

1. Papers of Prof. R.K. Hannay, SRD, 60214/39.

2. Thomson, *Memorial*, 215-17; Balfour, *Practicks*, ii, 430.

for instance by altering the arable-pasture or infield-outfield ratios. On the other hand, if it was relatively recent, it stood a good chance of having been thought up at random by a confused assize.'

The church's property was taxed by a separate, equally traditional, assessment known as Bagimond's Roll, the original of which had been a 1274-75 valuation of benefices for papal taxation.<sup>2</sup> The theory was similar to old extent: the relative values of each benefice were fixed, whatever the absolute level of each tax. The relative values in our tax rolls are often, but not always, those in the contemporary 'Bagimond's Roll' (so-called) recorded by Bisset.<sup>3</sup> They bear no relation to the original Bagimond's Roll, perhaps only because Bagimond recorded sums collected, rather than sums assessed, but it has been argued that the place-name evidence shows the two rolls to be unconnected.<sup>4</sup> The origin of Bisset's roll remains a puzzle - was it connected with a 1291 papal tax assessment, or could it be no earlier than the early sixteenth century? And how does it relate, both in its many similarities and in its tantalizing differences, to the tax rolls which are our direct concern? Without answers to these questions, it

1. The pitfalls of this subject are illustrated by the recent suggestion that the move from old to new extent represented an attempt to change from an 8-acre to a 13-acre 'merkland', which cannot be right if only for the reason that new extent began as less than old extent, but ended up as more: R.A. Dodgshon, *Land and society in early Scotland* (Oxford, 1981), 87-89.
2. 'Bagimond's Roll', ed. A.I. Dunlop, *SHS Miscellany*, vi (1939), 44-47.
3. Habbakuk Bisset, *Rollment of courtis*, ii, ed. P.J. Hamilton-Grierson (STS, 1922), 38-39, which may be compared with a tax roll in Purves, *Revenue of the Scottish crown*, 188-89.
4. V.F.H. Nicolaisen, 'Bagimond's Roll as a toponymic text', *So many people longages and tonges*, eds. M. Benskin & M.L. Samuels (Edinburgh, 1981).

is impossible to determine the long-term evolution of the tax assessment of benefices which we must continue to call Bagimond. Only one thing is certain: it was with Bagimond as it was with old extent, in that tradition and inertia pervaded all. The government even possessed an up-to-date valuation of the benefices, made from 1561 onwards for the purpose of collecting the thirds; yet for parliamentary taxation they were still obliged to rely on a valuation which was probably almost fiction.

Taxation of royal burghs is relatively well understood.<sup>1</sup> Payment of taxation was one of the traditional obligations of burgesse-ship; the old burgh laws said little explicitly about this, however, which is why perhaps as taxation became more regular Perth began to find it prudent, around 1575, to require burgesses on admission to find caution to pay tax.<sup>2</sup> Stent rolls, showing burgesses' worth and tax due, were compiled anew for every tax; each burgh had its own habits on this, but they were supervised by the convention of royal burghs. Thus, in 1596, burghs were ordered not to deplete their common good to pay taxes.<sup>3</sup> The convention was an intermediary with the government, collecting two out of the century's three largest royal taxes.<sup>4</sup>

There was little government interference in assessment of burgh

1. Lynch (ed.), *Early modern town*, esp. chs.1, 3.

2. *Ancient laws and customs of the burghs of Scotland*, i, ed. C. Innes (SERS, 1868); Perth guildry book, Perth Museum & Art Gallery, p.366.

3. *RCRS*, i, 475.

4. *RCRS*, i, 309, 498.

taxation. The convention of royal burghs assigned each burgh a share of the total - a process which required high-pressure negotiation every three years or so.<sup>1</sup> The resulting tax rolls can be compared with the distribution of customs payments; though the latter do not measure the whole range of burghs' wealth, the divergent distribution of customs and direct taxation suggests that Edinburgh in particular was relatively under-taxed.<sup>2</sup> The burghs seem to have been torn between the desire to cut their tax bill and the need to create an opulent public image to attract trade; the tax roll was the burghs' public expression of their pecking order. This might explain the problem of Edinburgh - it was too far ahead of the pack to worry about precedence. If the burghs were thus driven towards conspicuous taxation as a species of conspicuous consumption, it was an ultimately harmless pursuit; the burghs' overall tax level remained one sixth of the total.

The convention of royal burghs could impose taxes for the burghs' own purposes, these being identical to royal taxes from the burgesses' point of view. Though frequent, they were small, like the two payments of £200 each which the burghs raised to enforce their overseas trade monopoly in 1592 and 1595.<sup>3</sup> The total identifiable taxation imposed by the convention in this period (not counting taxation imposed by individual burghs) comes to £25,651 - and over £20,000 of this was ultimately destined for the crown's coffers, for instance as part of

1. E.g. *ACRB*, ii, 10.

2. Lynch (ed.), *Early modern town*, 6.

3. *ACRB*, i, 371-72, 462-63.



complicated arrangements over customs tacks.' By contrast the burghs' one-sixth share of the total direct taxation would come to over £100,000.<sup>2</sup>

The liability of burgh lands was confused. All tenements within the burgh were straightforwardly taxed by the burgh, even when held by a bishop.<sup>3</sup> But what about lands held by the burgh itself? Dingwall escaped tax on the lands of the earldom of Ross which it held from the crown - the magistrates successfully argued that they should only be taxed by the estate of burghs, and as a 'puir burgh' the convention of royal burghs did not tax them.<sup>4</sup> Lands held by Inverkeithing of a lay freeholder did have to pay in his relief.<sup>5</sup> In a similar case concerning Inverurie's lands, the magistrates advanced the curious argument that they should not have to pay more than the burgh mail (7 merks); in fact they escaped paying altogether, and the commissioners followed a similar rule for freehold lands held by Lanark.<sup>6</sup>

Though it was from the peasants that all landed wealth ultimately came, taxation was not laid upon them directly. (The exception is the

1. *RCAB*, i-ii, *passim*.

2. Appendix D.

3. Tax decreets, 1594, SRQ, E62/1, fo.7v.

4. Tax decreets, 1594, SRQ, E62/1, fo.114v.

5. Tax decreets, 1597, SRQ, E62/2, fo.5r.

6. Tax decreets, 1597, SRQ, E62/2, fos.33v., 90v.

traditional Shetland skat.<sup>1</sup>) No doubt the landlords' own methods of acquiring the peasants' surplus were thought to be effective enough, and government intervention by an administrative system of doubtful efficiency might have hindered as much as helped. It was common, as in 1597, to ban taxpaying lords from 'causing thair pure fermoreris and laboraris of thair grund' to 'releiff thame of the hail burdene of the said taxatioun'.<sup>2</sup> However, this act's concern was that some lords were doing just that, 'impoverishing ane greit nomber of the saidis fermoreris and bringing of thame to utter vreak and ruin', a claim which cannot be proved or disproved in the present state of our knowledge of the peasantry. The advocate John Russell alleged that 'the barrownis... nevir payis ane penny out of thair awin pursis' but instead would 'extent thair tennentis at thair plesour'; he thought there should be 'ane provisoun... in favouris of the lauboraris of the ground' but did not say what.<sup>3</sup> Government concern for the peasants was no doubt humanitarian; but it should be remembered that since effective taxation has to tax wealth or income, a fiscal system relying on poor peasants to the exclusion of rich lords (which is what these oppressive lords sought in effect) would in the long run have been crippled.

Thus parliament's three estates - secular freeholders, benefice-holders

1. T.M.Y. Manson, 'Shetland in the sixteenth century', *Renaissance and Reformation*, eds. Cowan & Shaw, 205; B. Smith, 'What is a scattald? Rural communities in Shetland, 1400-1900', *Essays in Shetland history*, ed. B.E. Crawford (Lerwick, 1984).

2. *APS*, iv, 144, c.48.

3. John Russell, 'Ffor ansuer to my lord clerk registeris breif', 9 July 1597, SRD, PA7/1/36.

and royal burghs - were all taxed by their own separate assessments. Each tax was imposed in the form of a specified total sum, so how was this shared out among the estates? The answer is, once again, by a traditional assessment. By this period it was usual for the clergy to pay half, the barons and freeholders one third, and the burghs one sixth.<sup>1</sup> In former days the proportions had usually been 2:2:1 rather than 3:2:1; the clergy's increased share represents their declining political status rather than any economic trend.<sup>2</sup> After 1561, though benefice-holders' income was cut by a third, they only received allowance for this during the early 1580s (and in 1578, the same effect was achieved by adjusting the overall ratio).<sup>3</sup> Before then (and afterwards) they were 'taxed to meikill and mair nor quhen thay war haill possessouris of thair benefice'.<sup>4</sup>

This way of apportioning taxation matched the conception of society as separate estates, but it ignored one important species of property: the crown lands. In medieval times these had rarely been taxed, crown tenants being tenants like those of any other lord.<sup>5</sup> Their traditional exemption survived as late as 1566. But from the early sixteenth century crown land had increasingly been set in feu;<sup>6</sup> and by the 1570s it was beginning to be recognized that feuars of crown land,

1. Appendix D.

2. Donaldson, *James V - James VII*, 132.

3. Appendix D.

4. Pitscottie, *Historie*, ii, 322.

5. Murray, 'Exchequer and crown revenue', 327.

6. E.g. C.A. Madden, 'The feuing of Ettrick Forest', *JR* 27 (1976), 70-71.

being proprietors if not freeholders, should pay tax at the same rate as the barons and freeholders.' This meant giving these lands old extent valuations; some crown lands may always have had such valuations, if they had been freehold in the past, for instance. By 1587, Russell could describe the crown lands (with some exaggeration) as 'all extentit'; though he was not sure whether their taxation should be 'according to the new or auld extentis'.<sup>2</sup> There was an order to retour crown lands in 1597.<sup>3</sup>

At this point we can pause to gain an international perspective. The Scottish fiscal system as a whole evidently had much in common with England.<sup>4</sup> Tax revenue came from the same combination of periodic direct taxes - effectively land taxes on fixed assessments - with permanent indirect taxes - customs - on international trade. Neither in Scotland nor England did the government tax the peasantry directly, as it did in France. Nor do we find in Scotland anything resembling the distinction between the *taille réelle* and *taille personnelle*.<sup>5</sup> The notorious Castilian *alcabala*, or domestic sales tax, was regarded in Scotland as the spark that had ignited the revolt of the Netherlands.<sup>6</sup>

1. *RFC*, iii, 46; see also appendix D.

2. John Russell, 'Ffor ansuer to my lord clerk registeris breif', 9 July 1587, SRD, PA7/1/36.

3. *APS*, iv, 143, c.48.

4. Dowell, *Taxation and taxes in England*, i.

5. Wolfe, *Fiscal system of Renaissance France*, app.6.

6. J.H. Elliott, *Imperial Spain, 1469-1716* (Pelican edn., Harmondsworth, 1970), 285-86; Craig, *Jus feudale*, i.16.16.

Both Spain and France had deeply-entrenched regional variations with no Scottish counterpart: the Highlands may have paid little tax, but this was through administrative weakness rather than administrative distinctiveness.

Scotland, unlike England, had no separate assessment system for the nobility: land had a fixed and known valuation which did not change just because a noble acquired it. In England the nobles faced taxation with relative equanimity.<sup>1</sup> Since in both countries the assessment system was based more on political influence than economic facts, Scottish nobles too probably had scope for under-assessment, but not on the lavish English scale which allowed Lord Burghley, say, to declare his income regularly at a laughable 200 marks sterling, or his son to pay tax of £63 on an income of £25,000 sterling.<sup>2</sup>

Scotland also differed from England in the way it distinguished between church and lay lands. Since the Scottish clergy's tax assessment had been forced up to a higher rate than that of the barons and freeholders, if former church land had been transferred (as in England) to a secular assessment, this would have threatened to cut tax revenue and capsize the traditional ratio between the two estates on which the whole system rested. Up to the end of the old regime, the government could never bring itself to upset this balance; lands which had once been church lands continued, whoever held them, to be treated as

1. H. Miller, 'Subsidy assessments of the peerage in the sixteenth century', *Bulletin of the Institute of Historical Research*, 28 (1955), 15-34.

2. Miller, 'Subsidy assessments', 22-23; L. Stone, *Family and fortune: studies in aristocratic finance in the sixteenth and seventeenth centuries* (Oxford, 1973), 30.

benefices for tax purposes.<sup>1</sup> Old extent and Bagimond may have been clearer assessment methods than their English counterparts - but this, far from being a virtue, led to inflexibility.

The late sixteenth century was a particularly bad time to be clinging to inflexible ideas about landed property. As the balance between church and lay lands was shifted from above, by the passing of the monasteries' superiorities into the hands of secular commendators and their successors the lords of erection, it was being simultaneously undermined from below. The problem was feuing. The feuing of church lands (and also of crown lands, already mentioned) was creating a new type of property which fitted uneasily into the feudal scheme of things.<sup>2</sup> Nothing was clearer than that feuars had never been liable for tax, for they were not tenants in chief and rendered no services beyond their fixed feu duties.<sup>3</sup> And yet it was feuars who were now coming to hold the property of most benefices, leaving the titular benefice-holders with increasingly empty superiorities which could not possibly bear the full weight of taxation.

The problem was solved, more or less; but it was solved in a piecemeal and superficial fashion which caused endless trouble. Were superiors unable to meet their tax liabilities? Then let them have the power to charge their vassals - for feuars, powerful though they might be, were

1. *APS*, iv, 143, c.48; Thomson, *Memorial*, 180.

2. Sanderson, *Scottish rural society*, ch.6. For some of the wider implications of feuing, see chapter 9.

3. Craig, *Jus feudale*, I.16.20.

still vassals - to relieve them of a just proportion of the tax. This would convert the feudal hierarchy itself into a tax-gathering machine, and was first done by statute in 1581.<sup>1</sup> Mackie, in editing Thomson's *Memorial*, was unable to reach any conclusions about whether this began a new procedure or legitimized an existing one;<sup>2</sup> in fact there is evidence of a commendator obtaining relief from his feuars in 1578, and it would be surprising if this was the earliest case.<sup>3</sup> The problem also existed, on a smaller scale, for secular freeholders who had feued their lands: such a freeholder can be found pursuing his feuars for his share of a tax as early as 1558.<sup>4</sup> Nevertheless, this was never achieved without friction.

Once it was established that a superior could recoup some of his tax from his feuars, an equally important question was raised: at what rate? A memorandum which the clerk register commissioned from the advocate John Russell in 1587 pointed out the need 'to defyne quhat the fewar pro rata sall pay';<sup>5</sup> but to say, as parliament began to do in 1594, simply that feuars should pay 'pro rata' merely begged the question.<sup>6</sup> From 1597 onwards statutes required the superior to convene his vassals and reach an agreement with them, but this still

1. *APS*, iii, 190.

2. Thomson, *Memorial*, 178n.

3. *Liber cartarum Sancte Crucis*, ed. C. Innes (Bannatyne Club, 1840), p.cxvi.

4. *Records of the sheriff court of Aberdeenshire*, i, 181-82.

5. John Russell, 'Ffor ansuer to my lord clerk registeris breif', 9 July 1587, SRD, PA7/1/36. It is perhaps its location in the parliamentary papers that has led this document to be taken for a 'memorandum presented to the estates': Wormald, *Court, kirk and community*, 161.

6. *APS*, iv, 75, c.45.

did not explain how.' Feuars' lands were going to have to be valued somehow. This posed an insidious threat to their superiors - for superiors, as we have seen, still paid by Bagimond's Roll. The weakness in Bagimond was its lack of any method of land assessment, for the valuation was only a single figure attached to both lands and teinds of a benefice. Once feuars had had to accept the principle of liability, it seemed to them only reasonable that this should be assessed by the only method they knew of valuing lands: old extent.

Church lands had long been given occasional old extent valuations, for reasons which have yet to be investigated.<sup>2</sup> A valuation might survive from a time when the lands had been in lay hands. In some estates, the valuation in poundlands or merklands might be used as a method of assessment by the landlord.<sup>3</sup> But if a feuar paid his tax on this basis, his burden would be far lighter: he could hardly be refused the right to pay at the same rate as the lay freeholders, which was lower than the church rate. The feuars of Scone abbey were allowed to pay by old extent in 1594: this meant paying under £80 instead of the £204 which the commendator, the earl of Gowrie, had demanded. Gowrie still had to pay 'as gif the samyn lands had nevir bene

1. *APS*, iv, 142-43, c.48.

2. There is a 1507 example in W.D. Lamont, 'Old land denominations and "old extent" in Islay', *Scottish Studies*, 2 (1958), 91.

3. R.A. Dodgshon, 'Medieval rural Scotland', *An historical geography of Scotland*, eds. G. Whittington & I.D. Whyte (London, 1983), 49. However, Dodgshon's theory of 'assessed land' fails to distinguish between a public land valuation like a merkland - which was not a 'fixed amount of land' - and a private land denomination like a ploughgate or husbandland. If old extent assessments were used by landlords, this could contribute to their survival over centuries: see A. Gibson, 'Territorial organization and settlement in medieval and early-modern Breadalbane', *Settlement and society in Scotland* (papers for Association of Scottish Historical Studies conference, Glasgow, 1988), 112-14, 120.



retourit'.<sup>1</sup> The feuars of Broughton (a barony held by Holyrood abbey), on the same basis, paid £90 instead of £408.<sup>2</sup>

Mackie cited the similar case of Dunfermline abbey in the belief that it was highly exceptional.<sup>3</sup> The tax decreets show that it was not. Other major benefices where the feuars in 1594 made successful demands to be taxed by old extent include Arbroath abbey,<sup>4</sup> St Andrews archbishopric ('it is nawyss reasonable that the said complenar should be burdynit with pament of mair for every pund land... nor is cravit of the haill remanent pund lands within this realme'),<sup>5</sup> Kelso abbey,<sup>6</sup> Melrose abbey<sup>7</sup> and Newbattle abbey.<sup>8</sup> A later St Andrews archbishopric case refers to a 1588 exchequer decret in favour of old extent for that benefice.<sup>9</sup> The Balmerino abbey lands were retoured in 1597, explicitly to allow its feuars to pay tax 'according to the raith of uther pund landis of auld extent within this realme', and similarly the Culross abbey lands in 1598.<sup>10</sup> This list alone includes three of the top four benefices; bearing in mind that there is no evidence

1. Tax decreets, 1594, SRD, E62/1, fo.5r.
2. Tax decreets, 1594, SRD, E62/1, fo.25v.
3. *AFC*, iv, 542-44; Thomson, *Memorial*, 85.
4. Tax decreets, 1594, SRD, E62/1, fo.52r.
5. Tax decreets, 1594, SRD, E62/1, fo.34r.
6. Tax decreets, 1594, SRD, E62/1, fo.38r.
7. Tax decreets, 1594, SRD, E62/1, fo.77r.
8. Tax decreets, 1594, SRD, E62/1, fo.40v.
9. Tax decreets, 1597, SRD, E62/2, fo.41r.
10. *Retours*, ii, inquisitiones valorum, nos.3, 4.

either way for many other benefices, it is clear that old extent was sweeping in like the tide to engulf benefice-holders.

There is a little evidence that the tide was turned back. In 1597 the Broughton feuars, finding themselves charged once more to pay at a rate set by the commendator, brought the same case before the commissioners - and lost: a decision which more than doubled their tax bill.<sup>1</sup> There are other such cases;<sup>2</sup> but they are less numerous than those favouring old extent, which can still be found in 1601 and 1602.<sup>3</sup>

The confusion into which taxation of benefices had fallen is shown by the cases in which feuars' liability was assessed by some quite different method. Feuing was known to be an innovation, and it was natural to seek for principles in the old days. People reasoned thus: before the feuar got his feu he was a tenant, and his rent payments discharged all his obligations to his lord; the lord could not seek to pass on his tax burden to him, but had to pay the tax out of the rents he received. Now that the tenant had become a feuar, the only reason for this to change would be if the feu duty was less than the old rent. In 1594, a number of feuars successfully claimed exemption on the grounds that their feu charter had not diminished their lord's rental.<sup>4</sup> The system could not cope with the inflation that had been eating away

1. Tax decreets, 1597, SRD, E62/2, fo.20r.

2. E.g. Tax decreets, 1597, SRD, E62/2, fo.66r.

3. *RFC*, vi, 239-40, 392.

4. Tax decreets, 1594, SRD, E62/1, fos.41v., 48v., 90v., 119v.

at the feu duties' real value, often for generations.

Thomson pointed out that feuars had, in their feu duties, liabilities not owed by freeholders, and repeatedly argued that they must have been assessed on their current net income after deducting the feu duty.<sup>1</sup> The 1597 taxation statute (the first to go into any kind of detail) did require each church vassal to be taxed 'according to the greit or small quantitie of his frie rent that he hes athair of his landis teindis or pensioun', and ordered the retouring of crown lands to be done with 'ane speciall regaird to the frie rent that the feuaris and rentellaris hes of the same landis besyid thair few fermes and dewteis payit be thame'.<sup>2</sup> But did Thomson interpret the legislators' use of the phrase 'frie rent' correctly? They may have had the idea of using net income for benefices, but in the case of the crown lands they were asking the *ballivi ad extra* to go easy in applying permanent old extent valuations, not laying down a flexible rule based on current rentals. It is a mistake to expect too much precision or consistency when legislators are trying to adapt a traditional system piecemeal. And even if the statute had laid down a consistent principle, the fact is that it was ignored. There is not a single case showing assessment on net income. The most that can be said is that the 1597 tax decreets have no more cases comparing the feu duty to the previous rental.

Besides assessing feuars on the nominal value of their lands (old

1. Thomson, *Memorial*, 159.

2. *APS*, iv, 143, c.48.

extent), or by the difference between that and their feu duties ('frie rent', i.e. net income), superiors could also use the feu duty alone. Relief equal to the feu duty was collected by St Andrews priory (probably the country's richest benefice) in 1594, and a similar principle was used to decide two 1597 cases.<sup>1</sup>

So far we have been looking at a fairly straightforward land tax. But one of the most important types of landed property was teinds, which by one estimate amounted to a quarter of the income of the landed class.<sup>2</sup> Teinds were effectively a form of rent, usually by now set in tack, and the right to them had passed from the pre-Reformation parson, concerned only to 'ressave his teinds and spend them syne',<sup>3</sup> to members of the local landed class with an entirely similar determination.

Traditionally, teinds were exempt from tax. This was implicitly confirmed as late as January 1594, and explicitly by a privy council ruling of March 1594.<sup>4</sup> But it was soon after then that the government realized for the first time that a quarter of the country's income was escaping free of tax; a statute of June 1594 included tacksmen of teinds among those who were ordered to relieve their

1. Tax decreets, 1594, SRD, E62/1, fo.100r.; Tax decreets, 1597, SRD, E62/2, fos.74v., 77v.

2. A. Birnie, *A short history of the Scottish teinds* (London, 1928), 27.

3. Lindsay, 'Thrie estaitis', 261.

4. *APS*, iv, 53-54; *RPC*, v, 136-37. Mackie (Thomson, *Memorial*, 179n.) erroneously regarded the January act as making teind-holders liable; its purpose was to allow benefice-holders who held only teinds to collect relief from the pensioners holding the temporality.

superiors (the benefice-holders).<sup>1</sup> However, this act was not always enforced; the 1594 tax commissioners, who heard all but one of their 117 cases after it was passed, never referred to it, and at least twice they let teind tacksmen off altogether on the basis of the March act of council.<sup>2</sup> More commonly, they lent a sympathetic ear to teind-holders whose tacks had been set before 1558 at a tack duty which did not diminish the old rental (the same principle which we have seen in use for many feuars). The date of 1558 is not mentioned in the acts, but it no doubt implied that tacks set after that date were taxable - the religious revolution was legally held to have begun then, and people were supposed to have learned better than to set teinds in tack. In a typical case of July 1594, the commission decided in favour of a tacksmen (the brother of one commissioner) for teinds set before 1558, but against him for teinds set at an unspecified but probably later date.<sup>3</sup>

Yet other principles were at work in deciding teinds' liability for tax. In 1594 and 1597, the commissioners upheld clauses in tacks exempting the tacksmen from paying tax in relief.<sup>4</sup> Sub-tacksmen had automatic exemption.<sup>5</sup> Benefice-holders themselves possibly preferred to seek relief from feuars rather than teind tacksmen, as an angry feuar of

1. *APS*, iv, 75, c.45.

2. Tax decreets, 1594, SRD, E62/1, fos.5r., 62r.

3. Tax decreets, 1594, SRD, E62/1, fo.32r.

4. Tax decreets, 1594, SRD, E62/1, fos.14v., 45r, 58r.; Tax decreets, 1597, SRD, E62/2, fo.38r.

5. Tax decreets, 1594, SRD, E62/1, fo.79v.; Tax decreets, 1597, SRD, E62/2, fos.48r., 73r.

Arbroath abbey claimed;<sup>1</sup> the reason here may be that Arbroath, in common with other monastic superiorities, had lost control of presentation to its annexed churches, and so perhaps had less influence over their holders.<sup>2</sup>

As well as complete exemption for an unknown but clearly large proportion of teinds, there was wide variation in the rate paid by the remainder, and in the principle on which the rate was calculated. In 1597, a number of cases had relief being demanded or paid at so much per boll of teinds in kind: 10s (reduced to 5s by the commissioners), 6s 8d, 8s, and so on.<sup>3</sup> Dunfermline abbey, however, demanded relief in 1594 equal to a year's tack duty - in other words, it was assessing tacksmen on liabilities rather than income.<sup>4</sup> As with feu duties, there are no cases showing the use of 'frie rent', i.e. net income.

As well as the feuars and teind tacksmen, benefice-holders had yet more types of vassals from whom they could collect relief. The most significant were the holders of pensions. As with tacksmen, if the contract to pay the pension had a tax exemption clause this would be upheld by the commissioners.<sup>5</sup> One pensioner successfully argued, in the face of crystal-clear statute evidence, that pensions were tax-free on the grounds that feuars paid relief on the lands from which the

1. Tax decreets, 1594, SRD, E62/1, fo.52r.

2. J. Kirk, 'The exercise of ecclesiastical patronage by the crown, 1560-1572', *Renaissance and Reformation*, eds, Cowan & Shaw, 107.

3. Tax decreets, 1597, SRD, E62/2, fos.57v., 75v., 102v.

4. Tax decreets, 1594, SRD, E62/1, fos.44r., 56r.

5. Tax decreets, 1594, SRD, E62/1, fo.16v.

pension was paid.<sup>1</sup> Apart from this aberration, the commissioners were mainly concerned to set rates of relief. With cash pensions, they upheld a demand for 19 per cent of a St Andrews priory pension in 1594: the pensioner's claim that past taxes had seen relief at five per cent (probably referring to the 1588 tax, which had been at the same rate as that of 1594) was brushed aside.<sup>2</sup> Another St Andrews priory pensioner, also offering five per cent, had his tax bill reduced from 28 to 16 per cent.<sup>3</sup> Some pensions were paid in kind: in 1594 one commendator's demand was cut from 16s 8d to 11s 8d per boll of pension, and another's in 1597 from a swingeing 40s to 6s 8d.<sup>4</sup> 6s 8d per boll was the rate that the 1597 commissioners seem to have favoured for teind tacks - more evidence that gross rather than net income determined tax rates, for pensioners unlike tacksmen had to pay no tack duties from their income. Clearly rates of tax on pensions were almost random. The perpetrator of that huge 1597 demand, incidentally, was the *oeconomus* of Kelso abbey, Lord Newbattle - who was also collector in charge of the taxation! If he was concerned to maximize the revenue, we shall see that he had good reason.

The final problem with taxation of benefice-holders' vassals was how to collect from them. Benefice-holders varied in wealth and power from the commendators of the great abbeys to holders of remote vicarages; all had to collect their relief from feuars, tacksmen and other

1. Tax decreets, 1594, SRD, E62/1, fo.57v.

2. Tax decreets, 1594, SRD, E62/1, fo.100r.

3. Tax decreets, 1594, SRD, E62/1, fo.105r.

4. Tax decreets, 1594, SRD, E62/1, fo.87r.; Tax decreets, 1597, SRD, E62/2, fo.62v.

vassals. If the benefice-holder was small and the feuar powerful this could be difficult, as William Hamilton, parson of Cumnock, lamented to the commissioners in 1594: times were hard, his benefice was in tack, parsons no longer got pre-Reformation parish dues, the tax rolls were out of date and inequitable. The commissioners agreed that he was unable to collect from his tacksman, and ordered the collector of taxation to do so directly.<sup>1</sup> The general assembly had similar complaints: ministers who held benefices, it said in 1598, should not have the job of collecting from their vassals as it was bad for their public relations.<sup>2</sup> Larger benefices had other difficulties: unless they had the sympathy of the tax commissioners, they might be overwhelmed by a flood of suspensions purchased by small vassals, as the earl of Atholl claimed to have been by the vassals of Coupar abbey.<sup>3</sup> This is probably what happened to Gowrie in the Scone abbey case, already cited.<sup>4</sup> And even the large benefices were not immune from the problem of the over-mighty vassal, as Lord Altrie found in 1591 when he found himself charged to pay relief to the Earl Marischal for the abbey of Deer. Altrie indignantly protested that he was himself the superior of the abbey, now a temporal lordship, and should not have to relieve Marischal who was its feuar; in fact, Marischal should have to pay him!<sup>5</sup>

1. Tax decreets, 1594, SRD, E62/1, fo.93v.

2. Calderwood, *History*, v, 685.

3. Tax decreets, 1597, SRD, E62/2, fo.100r.

4. Tax decreets, 1594, SRD, E62/1, fo.5r.

5. *RFC*, iv, 628-29.



So much for problems specific to church taxation. The heart of the land tax was old extent, and the time to look more closely at its workings on both church and lay lands can no longer be postponed. The history of old extent made unequal taxation highly likely; is there evidence showing how far the old extent valuations of people's lands reflected their ability to pay?

There has been little study of this subject since the pioneering suggestion of Innes that 104 acres, eight oxgates or one ploughgate were equivalent to 40s land of old extent.<sup>1</sup> He assumed that old extent reflected the land's actual value. (The same assumption, for the present purpose, is made here about denominations like oxgate, husbandland and ploughgate, though it is true that they had a customary element.) Innes' evidence was a 1586 test case heard in the exchequer between the feuars of Broughton and their superior, the commendator of Holyrood, where 13 acres were equated with an oxgate and four oxgates with £1 land of old extent.<sup>2</sup> The exchequer allowed the feuars to relieve the commendator by old extent, and set this interim formula for giving these and other church lands an old extent valuation, while recommending that parliament should legislate on the subject (which it never did). The Broughton rate should in theory have reflected existing valuations of lay land, and have influenced new valuations of church land thereafter. Did it do either?

1. C. Innes, *Lectures on Scotch legal antiquities* (Edinburgh, 1872), 281-83. Mackie usefully discusses some further evidence; Thomson, *Memorial*, 310-12.
2. Thomson, *Memorial*, appendix. Mackie's notes on this decret call for comment. Firstly, it relates not to the tax of 1583 but to that of 1585 (RFC, iii, 741-42). Secondly, he puzzles over the reference to a case eight years earlier, but there was such a case in 1578 (*Liber cartarum Sancte Crucis*, p.cxvi).

The second question is easily dealt with. The 1594 tax commissioners upheld the 1586 Broughton rate when the ever-litigious Broughton feuars themselves appeared before them.<sup>1</sup> Dunfermline abbey had been valued at the same rate in 1590, expressed there as four oxgates to two husbandlands, and two husbandlands to £1 land of old extent.<sup>2</sup> However, the 1594 commissioners also upheld another order (by which court was not specified) that for the St Andrews archbishopric lands, one ploughgate should be £1 land of old extent - half the Broughton rate.<sup>3</sup> The retouring of Arbroath abbey, apparently not long before 1594, gave one of its feuars a valuation of only £5 of old extent for his eight ploughgates.<sup>4</sup> In 1597, the Scone abbey feuars claimed that their lands were retoured to 10s of old extent per ploughgate, which was accepted though their right to pay tax at this rate was not.<sup>5</sup> The first-time retour of Balmerino had 60 acres equal to £1 land of old extent in 1597 (somewhat under the Broughton rate), and the similar retour of Culross in November 1598 had an example of 1 acre equal to 1s land of old extent (somewhat over it).<sup>6</sup> Not long before, in January 1598, the privy council had ordered that 'quhair the kirklandis is not retourit' their tax on that occasion should be at a rate equivalent to £1 of old extent per husbandland - which would come to

1. Tax decreets, 1594, SRD, E62/1, fo.25v.

2. *RFC*, iv, 542-44.

3. Tax decreets, 1594, SRD, E62/1, fo.119v.

4. Tax decreets, 1594, SRD, E62/1, fo.52r.

5. Tax decreets, 1597, SRD, E62/2, fo.66r.

6. *Retours*, ii, inquisitiones valorum, nos.3, 4.

£4 of old extent per ploughgate.' Clearly Innes' rule was far less universal than he believed: even new assessments departed from it by a factor of two in one direction, and a factor of four in the other.

In the absence of detailed studies of rentals it is harder to determine what old extent meant in terms of lay land values, but what evidence there is points the same way. Innes' rule was observed in 1507 in Islay, where a horsegang (equal to an oxgate) was valued at 5s land of old extent;<sup>2</sup> but not in 1552 by the sheriff of Linlithgow, who equated 16 oxgates with 40s land of old extent.<sup>3</sup> Probably the traditional lay land assessments diverged from one another at least as much as the newer assessments of church land, and the tax decreets provide one conclusive case of this.<sup>4</sup> The earldom of Errol consisted of two chief baronies, those of Slains and Errol. In a dispute over the share of tax payable from both baronies by the widowed countess, the following figures can be ascertained:

	Old extent	Rent (chalders)	Tax per chalder
Slains	£100	280	£0.7
Errol	£80	64	£2.6

Neither party questioned these figures, although they showed that one barony was liable for four times the other's tax.

1. *RFC*, v, 434-35.

2. Lamont, 'Old land denominations', 90.

3. Thomson, *Memorial*, 316.

4. Tax decreets, 1597, SR0, E62/2, fo.7v.

An analogy can be made with Shetland's merklands. These were not old extent (Shetland not having been part of the Scottish assessment system in its formative years), but they were also customary land assessments; and they were employed to set the rent. Rents typically varied between 4 and 12 'pennies in the merk'. Orkney saw the same divergence in the value of its customary pennylands.<sup>1</sup>

A sheriffdom had its own old extent valuation, supposedly the total of all its lay lands, and these valuations may well have diverged regionally. The western sheriffdoms contended that 'their retoures are higher than in other shires' in the seventeenth century, and demanded to be taxed by valued rent instead.<sup>2</sup> The reality behind the shire valuations may indeed have been tenuous. Perth was valued at £1,581 15s of old extent, and in 1597, when the tax was 40s in the £, the sheriff was charged to pay £3,163 10s.<sup>3</sup> But for the 1596 tax in lieu of military service, the lay lands of each sheriffdom had to pay at a specified rate (15s in the £ of old extent for Perth), but no target figure was set and the resulting figures may be more realistic.<sup>4</sup> Perth actually accounted for a payment of only £578 17s, less than half what would be expected from its retoured value.<sup>5</sup> Of the other sheriffdoms where comparison is possible, Kincardine and Linlithgow also paid less than their valuation would suggest - but Fife and

1. Shaw, *Northern and western islands*, 25.

2. Mackenzie, *Observations*, 305.

3. Tax roll, 1597, SRD, E59/2.

4. *RFC*, v, 313.

5. Tax accounts, 1596, SRD, E65/3.

Edinburgh actually paid more. The lower figures were not caused by collection failure, for we know that the accounts ignored this: they showed Forfar paying £787 10s, but the sheriff actually paid only £551 10s, being let off the rest after submitting a list of non-payers.<sup>1</sup> All but one of these sheriffs, incidentally, had to be put to the horn before they would pay at all.<sup>2</sup>

Potentially the most fruitful method of analyzing old extent would be to compare it with the system of valued rent that replaced it as a tax assessment. To do this comprehensively would be a huge task requiring detailed studies of the valuation rolls; here is just one example, the 1657 valuation of Kincardineshire which can be compared with a 1669 tax roll and list of retours, both showing old extent.<sup>3</sup> The 13 lay lands which appear in the same form in both lists show a mean of £192 of valued rent for each pound of old extent, but the standard deviation from this mean is £174 (that is, one third of the values lie outside the range 192 plus or minus 174). The extreme cases are the lands of Allardice and Pittarrow, where the former would by old extent have been liable for over ten times the latter's tax. These figures would need to be confirmed by a local study, but they point in the same direction as all the other evidence.

Within many of the burghs, incidence of taxation was shifting. Three effects of heavier taxation can be seen in 1580s<sup>1</sup> Edinburgh. The stent <sup>2</sup>

1. *NFC*, v, 435.

2. *NFC*, v, 420-21.

3. 'Papers relating to the valuation of Kincardineshire', *Papers from the collection of Sir William Fraser*, ed. J.R.N. MacPhail (SHS, 1924).

rolls extended outwards to embrace more and poorer burghesses; merchants' sons had to pay (an innovation previously introduced temporarily in the 1550s); and the key decret-arbitral of 1583 taxed the crafts individually, thus doubling and trebling the tax payable by the richer artisans.<sup>1</sup> The scope for widening the tax net can be illustrated by the unconventional tax of 1565 imposed in Edinburgh, including a large number who were wealthy but not normally liable.<sup>2</sup> These developments, especially the decret-arbitral (which was one of a series in other burghs), could be seen as modernizing concessions to the principle of ability to pay - remarkable in comparison with the stagnation of the land tax. Parliament in 1592 ordered that 'all maner of personis inhabitantis of burrowis exerceand ony maner of traffique merchandice or having change within the same' were to pay tax, and to watch and ward, 'quhether thay be admittit frie burges thairin or no'.<sup>3</sup> If the burghs welcomed this statutory backing for the trend towards taxing a wider spectrum of urban society, they must have borne in mind that it would ultimately be at the expense of the privileges conferred by burghship.

A final conspectus of the hit-and-miss nature of tax incidence can be gleaned from the tax decreets. There are 26 cases where the complainers admitted some liability and the commissioners were presented with a choice between a high and a low figure for assessment, and where the decision could have gone either way (in other similar

1. Lynch, 'The crown and the burghs', 72-73.

2. Lynch, *Edinburgh*, appendix XI.

3. *APS*, iii, 578-79, c.75.

cases, it did go the other way).<sup>1</sup> On average the low figure was 36 per cent of the high figure. Taking all the evidence together, we can conclude that it was quite normal for some taxpayers to be paying at least three or four times as much as others, and for some discrepancies to be even larger.

If parliament was unable to remedy these glaring differences in tax rates, neither was it able to do much about the wealth which avoided tax altogether. Imposition of a tax was a welcome event for a few fortunate exemption-holders. One was Robert Melville of Murdocairny, treasurer depute. Melville's exemption, stated to be as an officer of state, did not stop him from charging his Dunfermline abbey vassals to relieve him of their share of the tax - and then pocketing the proceeds.<sup>2</sup>

If some benefice-holders had their ability to collect relief from feuars undermined by old extent, others exercised their rights untrammelled. In theory they should have paid some of the tax from the feu and tack duties which made up their own income, but a barons' petition to parliament in 1606 complained that they 'in uplifting of thair taxationis fra thair vassellis and takismen of teyndis hes stentit them of befoir to the... mair nor thair aught and suld haif peyd therfoir'.<sup>3</sup> The pot may have been calling the kettle black, for we have seen the

1. Tax decreets, 1594, SRD, E62/1, fos.5r., 25v., 38r., 40v., 41v., 42v., 48r., 52r., 53r., 87r., 105r., 119v.; Tax decreets, 1597, SRD, E62/2, fos.20r., 36v., 41r., 57v., 62v., 66r. (2 cases), 71r., 74v., 77v., 79r., 81v., 85r., 104r.

2. *RFC*, iv, 542-44.

3. 'The desyr of the barronis... anent the stenting of this present taxation that the samyn may be devlie uptakin but abuss', 1606, SRD, PA7/23/1.

statutes' comments, and in 1584 it was said flatly that 'lords, lards and prelates exacts twyse sa mikle from thair pure tenents' as they were liable for.' Cases of benefice-holders avoiding any tax on their own income can indeed be found in the 1612 taxation papers, which include the earliest 'particular tax rolls' showing the relief payable by vassals of individual benefices. To take one example, £24 16s tax was due from the chantory of Aberdeen, but its holder charged his tacksmen of teinds to pay relief totalling £26.<sup>2</sup>

Based as it was on the medieval conceptions of estates and tenants in chief, the tax system was unable to take account of the income of new social groups. Would the Protestant ministers pay tax? The question was never even raised at first. The tax of 1581 laid tax liability on the thirds of benefices, including ministers whose stipends came from these thirds;<sup>3</sup> but ministers obtained special exemption in the remaining three taxes which required payment from thirds, making the requirement largely redundant and probably contributing to its demise.<sup>4</sup> By the 1590s and probably before, ministers with benefices did have to pay, much to their resentment,<sup>5</sup> but those who received stipends were not liable.<sup>6</sup> Ministers were more likely to hold the smaller benefices, and the general assembly demanded tax exemption for these in 1591 and

1. Malville, *Diary*, 193.

2. Particular tax rolls, 1612, SRD, E60/1/1.

3. AFS, iii, 189-90.

4. AFS, iii, 328-30; APC, iii, 741-42; AFS, iii, 424-26.

5. Tax decreets, 1594, SRD, E62/1, fo.17v.

6. Tax decreets, 1597, SRD, E62/2, fo.43r.



1598, on the latter occasion asking for a cut-off point of 300 merks; all benefices below this value had gone to ministers since 1566.<sup>1</sup> Comparison of the 1594 tax roll with the 1595 valuation of benefices in the diocese of Moray by the collector general of thirds suggests that the tax rolls included benefices down to a value of roughly £40.<sup>2</sup>

Another major new sixteenth-century profession was law. Lawyers were urban, and it was up to the burghs, especially Edinburgh, to draw them into the net. They failed in all attempts to tax lawyers' wealth until the 1630s, when the increasing pressure of taxation was to be a factor in the collapse of the whole system.<sup>3</sup> Members of the college of justice (which could include leading ministers of state, camouflaged as extraordinary lords of session) were exempt from tax on their lands as well - even after their deaths.<sup>4</sup> This exemption extended to embrace commissaries and advocates.<sup>5</sup>

There were various entrenched exemptions, such as that of the lyon king of arms.<sup>6</sup> Craig recorded one curious and uncorroborated exemption: all people who had had 12 children living.<sup>7</sup> Parliament in 1490 had banned new exemption grants, but the well-connected could still get

1. Calderwood, *History*, v, 134-35, 685.

2. Tax roll, 1594, SRD, E59/1; Collector general's accounts, 1595, SRD, E45/24.

3. Lynch (ed.), *Early modern town*, 17.

4. *RFC*, i, 55-56; Tax accounts, 1594, SRD, E65/2, fo.4v.

5. Tax decreets, 1597, SRD, E62/2, fols.15r., 45v.

6. *RFC*, vi, 520.

7. Craig, *Jus feudale*, i.16.20.

round this.<sup>1</sup> The feuars of crown lands in Fife talked themselves out of payment in 1589 on the grounds that they did the king special service at Falkland.<sup>2</sup> The earl of Argyll was ordered to pay up for his sheriffdom of Tarbert in 1582, despite protesting that he could never collect from those disobedient Highlanders; but John Carswell, bishop of the Isles, used an identical argument with success.<sup>3</sup> Argyll's successor, probably because he was a useful political counterweight to the Catholic earls, was let off payment of £1,200 for the sheriffdoms of Tarbert and Argyll in January 1596.<sup>4</sup> The vagaries of political influence would also decide the fate of creditors of the crown: a promise of future exemption seems to have been a common inducement to lenders, but would such a promise be honoured despite the 1490 statute and similar provisions in most taxation acts? The burgh of Ayr had its exemption upheld in 1594 and 1597, on one occasion having to spend £40 on sending an envoy to Edinburgh;<sup>5</sup> but in 1597 the unfortunate Adam Erskine, with £10,000 due to him from his period as collector of thirds, had £1,148 in tax extracted from him although he held a life exemption under the privy seal.<sup>6</sup>

Some exemptions may have made sense in social policy terms, such as

1. *APS*, ii, 218, c.4.
2. *RFC*, iv, 416-17.
3. *RFC*, iii, 451-52, 517-18.
4. Tax decreets, 1594, SRD, E62/1, fo.81r.
5. Tax decreets, 1594, SRD, E62/1, fo.12r.; Tax decreets, 1597, SRD, E62/2, fo.9v; *Ayr accounts*, 180. The promise is in *RFC*, iv, 222, 309-10.
6. Tax decreets, 1597, SRD, E62/2, fo.68v.

those for feuars of salt pans,<sup>1</sup> for the burgh of Dundee while building a parish church,<sup>2</sup> for Perth while building a new Tay bridge,<sup>3</sup> or for Flemish cloth workers brought in to improve the Scottish textile industry.<sup>4</sup> Higher education and charitable foundations were a major exemption category, including benefices annexed to hospitals and universities, and chaplainries and other benefices allocated as bursaries for students.<sup>5</sup> None of the friaries, in theory earmarked for such purposes, appeared in the tax rolls. The city of Edinburgh did have to pay tax for Haddington priory in 1597, although claiming that it held it for college students; perhaps this was merely a temporary assignation of the fruits of the benefice.<sup>6</sup> And chaplainries were usually too small to attract the tax-collectors' notice anyway - those of the diocese of Moray averaged under £12 in 1595.<sup>7</sup> These exemptions were all very well, but they went hand in hand with others, such as for monks' portions, that had no obvious rationale.<sup>8</sup> The preceptory of Torphichen had a long-standing exemption - it did not pay thirds of benefices

1. Tax decreets, 1594, SRD, E62/1, fo.35v.

2. *RFC*, iii, 520-21.

3. *RFC*, v, 531. The burgh was protesting two years later at being charged to pay despite this; Perth council minutes, i, Sandeman Library, Perth, fo.10v.

4. *APS*, iii, 508, c.119, para 5.

5. Tax decreets, 1597, SRD, E62/2, fos.27r., 29v.

6. Tax decreets, 1597, SRD, E62/2, fo.29v. Maitland of Thirlestane possessed the benefice in 1594; G. Donaldson, 'The Cistercian nunnery of St Mary, Haddington', *East Lothian Trans.*, 5 (1952), 23.

7. Collector general's accounts, 1595, SRD, E45/24.

8. Tax decreets, 1594, SRD, E62/1, fo.101r.

either.<sup>1</sup> On one occasion an exceptional tax payment of £500 was gouged out from its holder, but this was less than the £689 to which it was assessed in the tax rolls and may have been a semi-voluntary contribution.<sup>2</sup> This case shows how far tax liability was a fluid and negotiable matter. Far too many exemptions were merely surrenders to vested interests, pointing up the underlying weakness of the state's tax machine.

A final type of exemption dwarfs all others on occasion: entire estates were exempt from some taxes. Taxes were periodically imposed as payments in lieu of military service, the advantage being that the crown could do this without consulting parliament; technically it was not taxation at all, for the lieges could not deny their military obligations and it was made clear that they could still serve in person. But when they saw nationwide tax machinery being set in motion, assessments by old extent, appointment of collectors and so forth, they can hardly have appreciated the difference from parliamentary taxation - except that church lands were not taxed. The church's medieval exemption from knight service thus continued relevant as late as 1596 (and the crown lands escaped this tax too).<sup>3</sup> There was a tax in 1598 for a military expedition to Dumfries where church lands were included;<sup>4</sup> this may represent a rethink by the government (more antiquarian-minded since the Octavians?) and a decision to rely

1. Tax decreets, 1594, SRD, E62/1, fo.64v.; *RFC*, III, 671-72.

2. Tax accounts, 1597, SRD, E65/4; Tax roll, 1597, SRD, E59/2.

3. *RFC*, v, 306-08; Tax accounts, 1596, SRD, E65/3.

4. *RFC*, v, 434-35.

on common army service from which the church had no exemption.' This does not seem to have established a precedent, probably because of growing resistance to all unorthodox tax demands.

The burghs too were exempted from the 1598 tax; but they might also find themselves bearing the sole burden of taxation. Mostly this belongs to the story of indirect taxes, or of the general way in which the government's most reliable instinct when short of cash was to turn to the burghs, which cannot be told here; but there may have been formally-assessed taxes which the royal burghs found themselves having to pay at crown behest. One fairly clear case is in 1593, when £1,000 had to be found by a tax on all the burghs to reimburse Edinburgh for providing the king with troops.<sup>2</sup>

So far we have been examining taxation as it fell due. How was it collected, and with what success? Each tax being a one-off event, a special collector had to be appointed to take overall responsibility; he was a separate financial officer accounting independently to the exchequer. He and his deputies issued individual payment demands to 414 church benefice-holders and to each sheriff for lay lands. He received payment from the burghs, sometimes individually, but at other times via the convention of royal burghs which kept a vigilant eye on burgh taxation.<sup>3</sup> There was a different collector almost every time,

1. G.W.S. Barrow, *Kingship and unity: Scotland, 1000-1306* (London, 1981), 46.

2. *RCRB*, i, 392-93, 407.

3. *RCRB*, i, 309, 498.

but administrative continuity was provided by Archibald Primrose, writer to the signet. He never took on the task of collector, which carried personal financial liability, but he ran the tax bureaucracy from the early 1580s. The collectors of the small barons' tax in 1588 were the master of Glamis and Robert Melville of Murdocairny, respectively treasurer and treasurer depute;<sup>1</sup> but the money was actually paid to Melville (as treasurer depute, not as collector) by Primrose.<sup>2</sup> In 1590 there was a vacancy for a collector: Richard Cockburn of Clarkington applied to take on the job, 'as I may easelye, having Archie Prymrose and the rest of the officeris'.<sup>3</sup> Primrose was always in the background of the tax commissions of 1594 and 1597: those disputing their liability had typically to consign the disputed sum to him. In 1586 a dispute between him and the then collector, John Arnott, paralyzed the collection process.<sup>4</sup>

The workings of Primrose's empire can be glimpsed in the 1594 tax decreets. He seems to have parcelled out responsibility for the benefice-holders on a regional basis, for instance to a deputy collector for south of the Forth, Thomas Lindsay, Snowdon herald, whose deputy in turn was David Lindsay of the Mount, lyon king of arms.<sup>5</sup> The heralds are often mentioned, and reference to action by David Lindsay and his 'brother heraldis' suggests that they were a kind of collection

1. *RFC*, iv, 245-46, 361-62.

2. *TA*, 1588-90, E21/67, fo.92r.

3. Cockburn to Maitland of Thirlestane, 11 August 1590, *CSP Scot.*, x, 377.

4. *RFC*, iv, 119-20.

5. Tax decreets, 1594, *SRD*, E62/1, fo.64v.

agency.<sup>1</sup> But other individuals were also involved in this, such as Walter Stewart, commendator of Blantyre.<sup>2</sup> As well as the tax roll in the official archives, another surviving 1594 tax roll also includes rough notes on the grouping of benefices.<sup>3</sup> Once partial collection had been achieved in an area, there might be a separate assignment of the arrears collection to someone else; one benefice-holder in 1596 was charged to pay his unpaid 1594 tax to Andrew Melville of Garvock, master of the household, and his 1588 tax to Primrose himself.<sup>4</sup>

It would have been too much to expect this system to be trouble-free. There were embarrassing moments when benefice-holders were charged to pay by one sub-collector, having already paid to another.<sup>5</sup> Things should have been simpler for lay lands, for everyone knew the boundaries of sheriffdoms. Or did they? Not the sheriffs of Roxburgh and Selkirk, to take one example, who both tried to collect the 1597 tax from Walter Scott of Buccleuch.<sup>6</sup> Selkirk lost but was allowed to reduce his sheriffdom's tax roll by £100 of old extent (it was only £147 to start with). The crown lands paid separately, but crown lands which had long been held by feuare were not easily distinguished from lay freehold lands: the estates of the earldom of March, for instance, were almost inextricably tangled with the lay

1. Tax decreets, 1594, SRD, E62/1, fo.106r.
2. Tax decreets, 1594, SRD, E62/1, fo.59v.
3. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fos.60v.-61r.
4. Tax decreets, 1594, SRD, E62/1, fo.93v.
5. Tax decreets, 1594, SRD, E62/1, fos.67r., 68v., 69v.
6. Tax decreets, 1597, SRD, E62/2, fo.92r.

lands of the sheriffdom of Berwick.<sup>1</sup> And there were plenty of other things to go wrong, as some taxpayers in 1594 found to their cost. James Durham of Duntarvie not only had to pay at an exorbitant rate, but was then put to the horn for non-payment as the result of a feud; feuds must have played havoc with tax collection.<sup>2</sup> Robert Haig of Bemersyde paid to Timothy Frank, agent of the bailie of Lauderdale, but when charged to pay a second time failed to prove that Frank had been an accredited agent.<sup>3</sup> Robert Douglas of Easthogill paid direct to Thomas Kirkpatrick of Closeburn, sheriff depute of Dumfries, not realizing that only freeholders were supposed to do so, and had to pay again to his feudal superior, James Douglas of Drumlanrig.<sup>4</sup> Perhaps this kind of thing was why part of the Dumfries sheriffdom's taxation was transferred to Patrick Leslie, commendator of Lindores; but this did not stop Kirkpatrick (who had also caused trouble in 1591<sup>5</sup>) from trying to collect it.<sup>6</sup>

The first stage in collecting a tax was to compile a tax roll. This was a temple of tradition, highly stereotyped and full of somewhat bogus precision. The officials were so reluctant to tamper with them that even a benefice known to be exempt, like Torphichen, was still

1. Copies of papers of a parliamentary commission for revising tax rolls, 1613, NLS, Adv. MS 22.2.16, pp.132-37.
2. Tax decreets, 1594, SRD, E62/1, fo.24v.
3. Tax decreets, 1594, SRD, E62/1, fo.110v.
4. Tax decreets, 1594, SRD, E62/1, fo.111r.
5. *AFC*, iv, 583.
6. Tax decreets, 1594, SRD, E62/1, fos.95r., 120v.



included time and again.' But even the few surviving tax rolls show traces of flux in liability. The crown lands were omitted from the 1594 tax roll, and also from the accounts of the tax;<sup>2</sup> the privy council's order to tax crown lands (the statute had 'negligentlie left his majesteis awne propir landis untaxt') was not carried out.<sup>3</sup> This failure was not repeated in 1597, the tax roll listing them in detail.<sup>4</sup> One interesting feature of the list is the assessment of the lordship of the Isles, where the tax officials, seemingly not without doubts, held that a pennyland was to be treated as a merkland of old extent. Where they can be compared, the old extent valuations of the Isles diverged from the 'merklands' listed in a contemporary report (written probably for English eyes), but not so much as to make it certain that this was not old extent.<sup>5</sup> Startlingly, that report included Rathlin (30 merks), which the English were well aware was one of theirs;<sup>6</sup> it would be interesting to know if it ever paid tax to Scotland.

This growing interest in the Isles can be paralleled in the Borders: taxation was a key instrument of the extension of the government machine into all parts of the country. The stewardry of Annandale and lordships of Liddesdale, Eskdale and Wauchopedale appeared in the tax

1. Tax decreets, 1594, SRD, E62/1, fo.64v.; Tax roll, 1597, SRD, E59/2; Tax roll, 1601, SRD, E59/3.
2. Tax roll, 1594, SRD, E59/1; Tax accounts, 1594, E65/2.
3. *RFC*, v, 131-32.
4. Tax roll, 1597, SRD, E59/2; Tax accounts, 1597, E65/4.
5. W.F. Skene, *Celtic Scotland*, iii (2nd edn., Edinburgh, 1890), appendix 3. There is a similar report in *CSP Scot.*, xi, 253.
6. W.C. Mackenzie, *The Highlands and Isles of Scotland* (Edinburgh, 1937), 167-68.

rolls for the first time in 1597.<sup>1</sup> The independent taxation of these lordships did not diminish the liability of the Border sheriffs; in fact, while the old extent of a sheriffdom might normally have been graven on tablets of stone, Roxburgh saw its assessment hoisted from £1,243 in 1594 to £2,596 11s 8d in 1597.<sup>2</sup> This was the sequel to a case in which the sheriff, James Douglas of Cavers, was forced in 1596 to pay tax arrears back to 1588; his contention that the sheriffdom should be only £1,000 and not £1,243 of old extent was dismissed.<sup>3</sup> Not surprisingly he is next found at the horn in 1599 for non-payment of the 1597 tax at the greatly increased rate, though the privy council claimed that he had actually collected the £5,193 3s 4d that he owed.<sup>4</sup> Meanwhile Liddesdale had to be let off payment of its £1,000 on the tame grounds that it had never paid before.<sup>5</sup> These ructions could only be explained by a local study, but it may be that the tax-collectors were trying to break down traditional exemptions in lieu of military service on the Borders. No Border sheriffdom was called upon to pay the 1596 tax in lieu of service for the Kintyre expedition, for instance.<sup>6</sup> The English Borders were exempt from lay subsidies until 1603 for the same reason.<sup>7</sup>

1. Tax roll, 1597, SRQ, E59/2.

2. Tax roll, 1594, SRQ, E59/1; Tax roll, 1597, SRQ, E59/2.

3. Tax decreets, 1594, SRQ, E62/1, fo.86r.

4. *RFC*, vi, 23.

5. Tax accounts, 1597, SRQ, E65/4, fo.14r.

6. *RFC*, v, 306-08; Tax accounts, 1596, SRQ, E65/3.

7. A.B. Appleby, *Famine in Tudor and Stuart England* (Liverpool, 1978), 67-68.

Taxation gave additional powers (or rather, additional duties) to sheriffs, but otherwise it was a centralizing force. Regalities appear to have had no role in tax collection; no lord of regality is ever mentioned in the tax decreets as a collector. Parliament at one point complained that lords of regality were reluctant to put people to the horn for non-payment, which is what we would expect if sheriffs and central agents were elbowing their way in.<sup>1</sup> One tax may have undermined the sheriffs too: that of 1588-89 on the small barons for their place in parliament, where they were to elect their own collectors for each sheriffdom.<sup>2</sup> Some of the successful candidates were sheriffs (and one was a noble, the earl of Norton who dominated Kinross);<sup>3</sup> but others were local activists of various kinds, some of whom were also wapinshawings commissioners in 1575 or 'national commissioners' in 1588.<sup>4</sup> The mere fact of electing officers to run local tax machinery must have jolted the hereditary sheriffs, and the effect was permanent since small barons were thereafter taxed regularly for their commissioners' parliamentary expenses.<sup>5</sup>

The commissions to hear tax disputes were an important feature of the collection system. It might have been impossible to collect the really big taxes with which the century closed without such bodies to reassure sceptical taxpayers. They were independent of the collector's

1. *APS*, iv, 146, c.48.

2. *RFC*, iv, 245-46.

3. *RFC*, iv, 361-62.

4. *APS*, iii, 91-92; *RFC*, iv, 300-02. For more on these and other commissions, see chapter 3.

5. E.g. *RFC*, vi, 668, 686.

bureaucracy, the vagaries of which they frequently curbed, as we have seen; though there is one ominous case where the king's advocates 'for thair entres' associated themselves with the defender, the commendator of Melrose, to defeat the abbey feuars' attempt to be assessed by old extent.<sup>1</sup> The commissions of 1594 and 1597 operated for periods of over two years each. A case would be initiated by the purchase of letters of suspension of the collection, in one case from the court of session.<sup>2</sup> One statute banned session and privy council from issuing suspensions, and although this was probably not observed it implies that the commissions (and perhaps the exchequer) may have been able to issue their own letters.<sup>3</sup> Commissions were judicial bodies, capable of establishing their own 'ordour and custume' as a basis for future decisions.<sup>4</sup>

Commissions' records only survive from 1594, but there was a commission for the 1588 marriage tax.<sup>5</sup> There may have been others before: although the privy council took responsibility for complaints about the 1581 tax,<sup>6</sup> it referred one complainer to a commission, probably that which parliament had just appointed to consider a number of issues including taxation.<sup>7</sup> Many tax cases must lie buried in the

1. Tax decreets, 1594, SRD, E62/1, fo.42v.

2. Tax decreets, 1597, SRD, E62/2, fo.12r.

3. APS, iv, 52.

4. Tax decreets, 1594, SRD, E62/1, fo.79r.

5. RPC, iv, 269.

6. E.g. RPC, iii, 409-10, 422, 444.

7. RPC, iii, 448; APS, iii, 214-15, c.9.

acts and decreets of the court of session; one is mentioned in July 1597, when no commission was in being, and there were at least two more in 1594-97.<sup>1</sup> The Broughton feuars, whose untiring efforts have contributed so much to our understanding of tax assessments, sought redress from an unknown body in 1578,<sup>2</sup> from the privy council in 1581,<sup>3</sup> from the exchequer in 1586,<sup>4</sup> and from the commissions in 1594 and 1597.<sup>5</sup> In the seventeenth century, all tax cases went before the court of session.<sup>6</sup>

All taxation was assessed in monetary terms. This is remarkable in an economy which was far from fully monetized: many rents were still in kind, as were other large transactions. How did the taxpayers - the earl of Errol, for instance, whose income was expressed entirely in kind - obtain the cash? This is a question on which the official records are silent, and any information would have to be gleaned from family archives. Probably the conversion was done locally; if so, taxation may have helped to stimulate the growth in local market centres which began at this time.<sup>7</sup> The sheriff or his agents would then have had to transport the cash to Edinburgh: in England, this

1. Tax decreets, 1597, SRD, E62/2, fo.20r.; Tax accounts, 1594, SRD, E65/2, fo.8v.
2. *Liber cartarum Sancte Crucis*, pp.cxvi-cxviii.
3. *RFC*, iii, 406-09.
4. Thomson, *Memorial*, appendix.
5. Tax decreets, 1594, SRD, E62/1, fo.25v.; Tax decreets, 1597, SRD, E62/2, fo.20r.
6. E.g. *AFS*, iv, 480, c.13.
7. I.D. Whyte, 'The growth of periodic market centres in Scotland, 1600-1707', *SGM* 95 (1979), 13-26.

could be an expensive business.'

Such expenses may account for some of the identifiable costs of collection, though no distinction was made between expenses and fees. The accounts for the 1597 tax show costs of £14,120, including a £5,000 fee to the collector, Lord Newbattle, and £1,000 to Archibald Primrose.<sup>2</sup> £7,820 went to sub-collectors (stated to be 12d in the £ of what they had collected), £200 to the clerk register and £100 to the exchequer clerks. As this tax raised £157,603 (a somewhat nominal figure as we shall see), the costs on this occasion amounted to just under ten per cent of gross revenue. The much smaller tax of 1586 was similar: gross revenue £16,361, collection costs £1,450.<sup>3</sup> This is impressive compared with France, where collection costs could amount to a third;<sup>4</sup> but we would expect Scotland, relying so heavily on its unpaid feudal hierarchy, to have a cheaper service than France with its armies of bureaucrats.

Of course, this is not the full story. Financial accounts of this kind have to be treated with extreme caution. The previous collector, Thomas Erskine of Gogar, got his accounts to balance nicely in 1594 without mention of collection costs.<sup>5</sup> Yet the 1597 statute complained

1. Stone, *Crisis of the aristocracy*, 512-13.
2. Tax accounts, 1597, SRD, E65/4, fo.16r.
3. 'Concernyng the chekker and the kingis rentis', NLS, Adv. MS 34.2.17, fos.34v., 39r.
4. Salmon, *Society in crisis*, 76.
5. Tax accounts, 1594, SRD, E65/2.

that the 1594 collection officers 'hes bene in use of allowing to thame selfis of greit and extraordiner feis for thair service, quhilk was ane greit imparing of the formar taxatioun, thair being ane greit pairt thairof bestouit upoun the chairges in ingetting of the samyn'.<sup>1</sup> Presumably the expenditure was concealed in the accounts or taken from some other source: as it could equally have been in 1597, though perhaps Newbattle had to be more careful about how he did it. Furthermore, local collectors demanded fees from taxpayers despite a statutory ban on this. The sheriff depute of Haddington, in collecting £60 from one complainer, also exacted a collection fee of 35s. This was queried neither by the complainer (who merely wanted to avoid paying his tax a second time to the bailie of Lauderdale) nor by the commission.<sup>2</sup>

One of the penalties of using the feudal hierarchy for collection was that it was slow and painful. The 1594 taxation accounts were submitted in 1600, the 1597 accounts in 1601 (they had been demanded unsuccessfully in 1599), and the 1596 accounts not until 1607.<sup>3</sup> But perhaps most of the money was paid in the early stages? Half the 1594 tax, voted in January, was supposed to be paid before Easter, the rest before midsummer.<sup>4</sup> Aberdeen paid both instalments, totalling £1,338, on 11 April, stating that this was because the burgh had been put to the horn - it is puzzling that this could be done so

1. *APS*, iv, 146, c.48.

2. Tax decreets, 1597, SRD, E62/2, fo.64r.

3. Tax accounts, 1594, 1596, 1597, SRD, E65/2-4; *APS*, iv, 180.

4. *APS*, iv, 51.

early.<sup>1</sup> But £2,373 was due from the sheriffdom of Perth,<sup>2</sup> and the dates when the sheriff depute paid up are also recorded.<sup>3</sup> In the first half of 1594 he paid a total of £750, in the second £538; in the first half of 1595 £8, in the second £55; then nothing until July 1596 when he paid £81; two undated further payments of £89 and £45 were perhaps made after the sheriff and sheriff clerk were put to the horn in November 1596.<sup>4</sup> After some chivvying by Peter Young to whom the arrears collection had been assigned, he seems to have come up with a final £519 in January 1603. At this point the privy council gave up, tacitly abandoning some £286 - a 12 per cent shortfall after nine years.

And yet the 1594 tax was not distinguished for its difficulty in collection. Far worse seems to have been endured by John Colville of Strarudy, collector in 1588, whose tale of woe was poured out in 1591.<sup>5</sup> The burghs had paid - they were the 'suirest payment', as the Aberdeen example above also suggests - but direct to the king, not to him. 'As to the rest of the said taxatioun, quhilk is to be payit be the clergie and baronis, albeit all maner of diligence his bene usit, yit the said Mr Johnne can gett na payment of the same.' Myriads of suspensions of payment had been purchased to torment him, of which many had been upheld by the commission; the 'new erectionis' were notable offenders

1. *Aberdeen council letters*, i, 57.

2. Tax roll, 1594, SRD, E59/1.

3. *RFC*, iv, 516.

4. TA, 1596-97, SRD, E21/71, fo.90r.

5. *RFC*, iv, 584-85.



here, no doubt through conflict over the rate payable by feuars. He had been lavish in denouncing non-payers, and there was a 'catalogue of thair names affixt upoun the tolbuith wallis', to no avail. The privy council cancelled some of the decisions against him, but otherwise could do little to help him - certainly not reduce his own liability.

The 1588 collection failure was probably caused by the country's economic problems and by the unfamiliarity of heavy taxation. This was, after all, the first of the really large taxes (£100,000), with the small barons in the same year having to find a further £40,000. And it came at the end of several years of widespread famine and plague.' Things were not always this bad; Alexander Clark, collector of the 1583 and 1585 taxes, finished the job satisfactorily by October 1586.<sup>2</sup> But in 1575 the 1566 tax was still unpaid by three sheriffs, a steward and two bailies, who must have been greatly surprised when the government remembered them.<sup>3</sup> And when Lord Ruthven, provost of Perth, was collector of the 1578 tax for repairing the Tay bridge, the burgh later noted sadly in its guildry book 'for our memoriall to reman' that he had been 'noway ernist and cairfull for obtening thairof'.<sup>4</sup>

The country suffered renewed economic disasters in the late 1590s, with

1. M. Flinn (ed.), *Scottish population history* (Cambridge, 1977), 109.

2. *APC*, iv, 109, 112.

3. *APC*, ii, 436; *TA*, xiii, p.xvi.

4. Perth guildry book, Perth Museum & Art Gallery, p.449.

repercussions on collection of the taxation of 200,000 merks of November 1597. There was 'grit slaknes' in April 1598; non-payers were being put to the horn but then (complained the council) allowed to purchase their own escheats.<sup>1</sup> English envoys reported 'great grudging' in March, and in June claimed extravagantly that practically no money had yet come in.<sup>2</sup> These assertions, unlike those of 1588, can be checked against the accounts; there was £441 'dependand be suspensiounis' and £21,927 owed by non-payers at the horn.<sup>3</sup> There were also many exemptions (some traditional, some granted by the crown, and some adverse commissioners' decisions) totalling £11,692.<sup>4</sup> This is a shortfall of over 14 per cent, or 22 per cent with exemptions included. Suspensions and hornings in the 1594 accounts were only £773.<sup>5</sup> But the smallness of this figure is also a reminder of every tax account's limitations, for it clearly ignores payment made at the leisurely pace of Perth's sheriff depute. The 1596 accounts, as we have seen, recorded a payment from the sheriff of Forfar which included a number of people from whom collection had not actually been made. All accounts implied payment on the nail unless enforcement action was being taken (and sometimes, it seems, even if it was). Probably the true level of non-payment was far higher than the accounts suggest.

1. *RFC*, v, 451-52.

2. Nicolson to Burghley, 15 March 1598, *CSP Scot.*, xiii, 174; Aston to Cecil, 12 June 1598, *CSP Scot.*, xiii, 217.

3. Tax accounts, 1597, SRD, E65/4, fos.17r., 23r.

4. Tax accounts, 1597, SRD, E65/4, fos.10r.-15v.

5. Tax accounts, 1594, SRD, E65/2, fos.12v., 13r.

So the tax system was inequitable and inefficient; it was nevertheless widely cherished. Let us return to where we began, with the government's 1556 reform scheme scuppered by strong, well-organized opposition. The rebels of 1559-60 publicly denounced 'unaccustomed and exorbitant' taxation as they swept to power.<sup>1</sup> An obscure medieval alternative to parliamentary taxation, the military 'tax of spears', had probably been discredited by its use in 1552 and 1555, and was never mentioned again.<sup>2</sup> All this ushered in two decades of cheap government in which taxation faded from public concern. A tax of £6,000 was proposed in the 1560 parliament, but apparently dropped.<sup>3</sup> Queen Mary and her advisers were in no hurry to court the unpopularity that her mother had suffered; besides, she had her French dowry. Her personal rule saw only one tax, with no assessment innovations.

This was the time, however, when there was one practical success in imposing a new kind of tax. The religious revolution and the urgent need to find some cash for the new church meant that rules had to be broken; at the same time, the political influence of the benefice-holders was at its nadir. The upshot was logical - 'thirds of benefices' became a new tax, based on actual rentals, and so related to ability to pay.<sup>4</sup> The crown as well as the ministers reaped the benefit. Then a 1563 statute on church repairs led to a privy council

1. Knox, *History*, i, 221.

2. Murray, 'Exchequer and crown revenue', 324-26; *Sheriff court book of Fife*, 293-94. Cf. the English 'tax for archers': Dowell, *History of taxation*, i, 121-29.

3. Randolph to Cecil, 19 August 1560, *CSP Scot.*, i, 467; Randolph to Cecil, 25 August 1560, *CSP Scot.*, i, 470.

4. *Thirds*, pp. x-xi and *passim*.

order for a parish-based tax, with sheriffs *in hac parte* supervising locally-elected assessors; nothing had been done on this by 1573, when the scheme was ratified, and it disappears from sight thereafter.'

There was thus still a chance in the 1560s that parliamentary taxation might be superseded. It may not be possible to calculate the odds on its survival, but at any rate it did survive. After all, it had the sanction of tradition. But it also had the limitations of tradition, and saw no revolutionary changes in its assessment. Cheap government continued into the 1570s. The explanation of how the civil war was financed will have to await a full study of the period, since at present evidence is available only for Edinburgh.<sup>2</sup> But there were few parliamentary taxes, and the traditional assessment was fully adequate to cope with the small sums involved.

In the 1580s and onwards, government was more expensive - for the first time in peacetime. This raises a constitutional question familiar in English history: for what non-military purposes could the government legitimately levy taxes? This was the principal question on which in 1587 the clerk register sought legal advice from John Russell. Russell was disturbed by his own conclusions: 'I find na resolute conclusioun nor suretie quhilk may bind the prince... nochtwithstanding quhatsumevir statute can be maid, the prince will appoint taxationes sa oft as he pleissis upoun cullorit caussis'. The only remedy was an 'ordinance to be maid that na taxatione salbe input

1. *APS*, ii, 539-40; *RFC*, i, 247-48; cf. *APS*, iii, 764-77, c.15.

2. Lynch, *Edinburgh*, 204-05.

upon the lieges without the speciale advise of the thrie estaitis athir convenit in parliament or in publict conventioun, ffor ane maist necessar and publict caus tryit and knawin to the saidis estaitis.'

The paucity of constitutional precedent, which Russell as a man of his time interpreted as an absence of constraints on the crown, is clear.

Though theory was vague, in practice an explicit reason of some kind had to be given for a tax. A convention of April 1583 granted a tax of £20,000 for the stated purposes of paying off worrying crown debts, preparing for the king's marriage, and for 'utheris his maist neidfull and wechtie effairis'.<sup>2</sup> As even the royal nuptials were in the indefinite future, this collection of vague justifications was a slender thread from which to hang a demand for 6s 8d in the £ of old extent. But the original request had been for as much as £100,000; this had to be scaled down, after protests led by Lord Newbattle, with the argument that 'the chargis requisite heiranent cravis the presence of a greittar nowmer of the estaittis', and that taxation for crown debts was a dangerous precedent.<sup>3</sup> No doubt this was why the royal marriage was made to serve as an excuse - not for the last time. A parliament was summoned for later in the year to discuss the rest of the £100,000, but it never met.<sup>4</sup>

1. John Russell, 'Ffor ansuer to my lord clerk registeris breif', 9 July 1587, SR0, PA7/1/36.

2. *APS*, iii, 328-30.

3. Aston to Leicester, 19 April 1583, *CSP Scot.*, vi, 400; Bowes to Walsingham, 23 April 1583, *CSP Scot.*, vi, 404.

4. Bowes to Walsingham, 28 September 1583, *CSP Scot.*, vi, 623.

The customary view that a tax was a one-off, extraordinary expedient never disappeared.<sup>1</sup> But theory, as in England, diverged from practice.<sup>2</sup> The right of the Estates to sanction taxes grew because they continued to be asked; but why would this continue to be necessary if it were once admitted that the government needed taxation constantly for its ordinary expenses? Far better not to let go of the reins, even if they had to be loosened enough to allow the levying of vast sums intended nominally for the baptism of royal infants, for expeditions to the Isles that might never take place, and other such 'cullorit caussis'. Even if the reasons were as specious as the promise to pay on a modern banknote, the effect would prove to be the opposite of Russell's fears: the Estates retained control. And the opposition found the theory of more direct use on occasion, as in 1597 when tax money was being lavished on the entertainment of a drunken Danish duke.<sup>3</sup>

Most taxes were granted by conventions rather than parliaments.<sup>4</sup> While this is not of major significance, it does suggest a reluctance to expose the government's financial necessities to a possibly unsympathetic assembly. Conventions' membership was smaller and probably contained a higher proportion of government supporters.

1. James VI, *Basilicon doron*, i, 158-59.

2. G.L. Harriss, 'Theory and practice in royal taxation: some observations', *EHR* 97 (1982), 811-19. This article is part of a debate in which I have no wish to become embroiled, but it offers the best parallel to developments in Scotland. Cf. J.D. Alsop, 'The theory and practice of Tudor taxation', *EHR* 97 (1982), 1-30, for a useful survey of the debate.

3. Nicolson to Cecil, 9 June 1598, *CSP Scot.*, xiii, 215.

4. Appendix D.

Still, the largest tax of the whole period (200,000 merks in 1597) was granted in a parliament.

Was there ever taxation outside parliament or convention? This is not the place to discuss the government's other financial shifts, though their occasional importance can be illustrated by comparing the 500 merks which Edinburgh paid for the duly-assessed tax of 1566 with the previous year's exactions, not recorded as normal taxation: £1,000 composition for absence from the queen's army, and a loan of 10,000 merks for the superiority of Leith.<sup>1</sup> But there were moments when the link between normal taxation and the estates might have become tangential. In 1578, a tax was imposed by a self-styled convention, little more than an enlarged privy council: protests followed, and a promise had to be made that it would not be a precedent.<sup>2</sup> Even as early as this, the Estates were jealous of their rights over taxation. The tax of 1585, imposed by the privy council, may have been agreed in principle in a convention two years earlier, though the Maxwell rebellion which the tax was to suppress had only just happened.<sup>3</sup> Overall, extra-parliamentary taxation never got far.

This allowed parliamentary opposition to taxation to take root and flourish. Parliament was not the only forum for discussion of political affairs, as we saw in Chapter 1: even indirect taxation might be decided by negotiation between the government and the convention of

1. *Edin. Recs.*, iii, 202-03; for more on this, see chapter 4.

2. *RFC*, iii, 46; *Edin. Recs.*, iv, 91-93, 96-98; *RFC*, iii, 56-57.

3. *RFC*, iii, 741-42; *APS*, iii, 328-30; Brown, 'Making of a *politique*', 157.

royal burghs; but no other bodies rivalled the Estates for settling questions of direct taxation, and there are frequent if often unspecific references to the opposition. What do they mean? In some cases, no doubt, the parliament house was merely the scene for desultory exchanges between an indecisive government and an unwilling but passive assembly: if no decision to tax resulted, this was in some senses an opposition victory, but it does not betoken a self-confident or organized opposition. Again, some proposed taxes died on cancellation of the parliament which was to have debated them, showing that some of the most successful opposition was still exercised by personal contact at court. But when we begin to see organized resistance with named leaders, or evidence of systematic lobbying by the burghs, we know that we are dealing with something much more concrete. Much opposition was always that of a passive majority; but when that majority allowed itself to be swayed by the arguments of outspoken critics of taxation, in the face of strong government pressure, then clearly that opposition was central to the political process in parliament.

When taxation came under strong pressure to grow, this must surely have highlighted the inequalities in traditional assessment levels, providing a focus for the opposition? - after all, for every person who was under-taxed, someone else was increasingly aware of being over-taxed. But no. It was for that very reason that the critics of taxation articulated the desire of the propertied classes to retain the outdated assessments; the very unfairness of the old system provided an automatic limit on tax revenue. As the tax burden grew, some would



very soon be squeezed until the pips squeaked; and so long as the political system worked properly, that would be the limit. It was necessary that a few should be over-taxed for the general good rather than that all should be over-taxed, for that was the alternative. It was the government that wanted to reform taxation, and its reform efforts came at a time when revision of tax assessments was clearly seen to imply, for most people, upward revision.

The first organized opposition to a tax since the 1550s is identifiable in 1578, when the unrepresentative way it was imposed (already mentioned) led not just to criticism within the convention itself but to systematic lobbying from the burghs, led by Edinburgh.<sup>1</sup> A non-payment campaign was proposed, and though this was ruled out, it was complained that the tax was 'contrair the act of parliament', no doubt that of 1563 which had guaranteed burghs a voice in conventions voting taxation.<sup>2</sup> In 1583 we have seen that constitutional doubts were used successfully to cut a tax from £100,000 to £20,000. The burghs' chorus of criticism continued through the 1580s, and their right to be taxed separately (at one sixth of the total) was ratified by parliament in 1587.<sup>3</sup> Yet they had to pay £20,000, or one fifth, of the marriage tax imposed the very next year; nor do they seem to have received a promised allowance for an advance payment of £6,000.<sup>4</sup>

1. *Edin. Recs.*, iv, 91-93, 96-98.

2. *APS*, ii, 543, c.20.

3. *RCRB*, i, 167, 214, 305; *APS*, iii, 498-99, c.109.

4. Appendix D.

Official doubts about Bagimond in the early 1580s are suggested by some papers of Richard Maitland of Lethington on the benefices' contributions to the senators of the college of justice, hitherto assessed using the tax rolls.<sup>1</sup> Interpretation of these is difficult, as it is not clear which, if any, represents the actual situation and which is a reform proposal, but it seems that Bagimond survived. Then, in 1587, parliament appointed a commission explicitly to reform taxation - particularly to deal with the endless problems over the benefice-holders, their vassals and the illegal taxation of the 'puir laubouraris of the ground', which John Russell had highlighted; the commission, indeed, may have been prompted by his memorandum.<sup>2</sup> Nothing more was heard of it as a reform body, though it was given a role in administering the following year's marriage tax, and reform hopes from it were not abandoned.<sup>3</sup>

The paradoxical phenomenon of voluntary taxation first arose from a 1586 convention which met to counter the threat of Mary's execution. The government tried to harness the general outcry, arguing that it could not save her without money. The 'fewnes of thair nowmer' (echoes of 1578 and 1583) made a formal tax impossible, the convention stated, but all those present would give 'freelie', earls £300, lords £200, bishops £40 or more, and others were enjoined to follow their

1. 'The somme of the contributioune grantit be the haili prelatie within this realme... to the fyftene ordinar lordis of sessioun yairlie', Richard Maitland of Lethington, 2 April 1586, *Bannatyne Miscellany*, ii, eds. T. Thomson & D. Laing (1836), 51-64.

2. *APS*, iii, 517, c.124.

3. *APS*, iii, 523; 524.

example.<sup>1</sup> The burghs were not there, so the statement that they too would think about giving something lacks conviction. The advantage for the government was the prospect of escaping from the traditional assessment. There was some support for the idea in Lothian at least, where the 'hail barronis, frehaldaris and fewaris' promised 10,000 merks.<sup>2</sup> The tax survived Mary's execution, as attempts were being made to collect it in May and June 1587, 'payment being maid be sum, and the maist parte refusing, at the leist delaying'.<sup>3</sup> Disappointing; but the potential gains of the policy were great, and there were further semi-voluntary taxes. One was imposed in 1590 for entertaining some Danish ambassadors, for which James Wood of Lambeletham was charged to pay £200. He got it reduced to £100, grumbling that 'this contributioun is na wayis voluntarie'. When people were being put to the horn for non-payment, he had a point.<sup>4</sup> The final semi-voluntary tax was for the royal guard in 1593; it used presbyteries as collectors, knowing that they were committed to tough military action against the Catholic earls. It does not seem to have been a success.<sup>5</sup>

In the 1590s, taxation soared to new heights. While this is remarkable, so is the consistent success of the opposition in reducing or preventing many proposed taxes. In 1589, the burghs allegedly

1. *RFC*, iv, 129.

2. *RFC*, iv, 135-37.

3. *RFC*, iv, 174-75.

4. *RFC*, iv, 634-35.

5. *RFC*, v, 55-56; MacQueen, 'General assembly', 121-22.

stymied a tax by pointed absence from a convention.<sup>1</sup> The January 1594 baptism tax of £100,000 was originally, in December 1593, to have been accompanied by a further £50,000 for the queen's needs.<sup>2</sup> Yet another tax, planned for November 1594, was also abandoned.<sup>3</sup> The semi-voluntary taxes had also failed for the time being, but another approach was to revamp crown feudal rights, as with the taxes of 1596 and 1598 in lieu of military service, bypassing the Estates. Meanwhile the king wooed the burgess estate - an embassy to France was needed on customs rates, and would the burghs raise a tax for it? The burghs, sensing that the king wanted the embassy for quite other reasons, declined.<sup>4</sup>

In June 1594, parliament ordered all annexed church lands to be retoured.<sup>5</sup> This seems to signal a government plan to rid themselves of Bagimond by taking advantage of the trend which we have seen developing towards using old extent for the feuars of church land. Once old extent was in place on all the church lands, they could have equalized the church and lay assessments by revising or abandoning the rule that church lands paid half of all taxes. However, there had been a change of plan by April 1598 when the Broughton feuars were deprived of the right to pay by old extent (or rather of the right to pay at the same old extent rate as the barons and freeholders), thus

1. Asheby to Burghley, 16 August 1589, *CSP Scot.*, x, 139; Asheby to Walsingham, 26 August 1589, *CSP Scot.*, x, 148.

2. Ewes to Burghley, 22 December 1593, *CSP Scot.*, xi, 246.

3. Aston to Ewes, 29 November 1594, *CSP Scot.*, xi, 483.

4. Ewes to Burghley, 2 June 1596, *CSP Scot.*, xii, 237.

5. *APS*, iv, 75, c.46.

reinforcing the commitment to taxing church lands more heavily.'

This key decision might simply have implied an intention to stick to tradition, but the sequel suggests that it in fact heralded something more radical. The 1594 plan would have killed off Bagimond, but at the price of entrenching old extent - scarcely ideal. In 1598, it looks as though the government was already planning to escape from both strait-jackets at once. The story unfolds in four remarkable conventions of July and December 1599, April and June 1600. The last major parliamentary tax had been in 1597, another was surely on the way, and the government had determined that it should not use the old assessments.

They proceeded at first with the utmost caution, hoping to obtain agreement by little and little. The convention of July 1599 passed a velvet-gloved measure agreeing that the desperate state of crown finance had caused poor government and a breakdown in law and order, but admitting what critics had long charged, that past taxation had been 'grevous' to the lieges and 'litill proffitable ather to the supplie of the foirsaidis defectis or ony uther his majesties necessar services'. So - what joy! - the king would make all future taxes voluntary: 'never to impone ony taxatioun heirefter upoun his pepill, bot rather to expect at thair handis sum favourable releiff of thair benevolence without ony grudge'. Sceptics must have recalled previous semi-voluntary taxes, and the heart of the proposal was clearly the assessment system rather than the voluntary principle, but the act

i. Tax decreets, 1597, SRD, E62/2, fo.20r.

could hardly be refused since it committed the convention to nothing: the numbers present, stated the act, were insufficient (another sweetener, remembering past concerns about representation), and an actual tax on these lines would only be imposed at the next, better-attended, convention.<sup>1</sup>

The next convention, in December, seems not to have been so well frequented as to prevent the opposition from playing the representation card again. The question was deferred, though in the meantime there was another novel proposal for an excise on grain, cattle and sheep.<sup>2</sup> This failed, and the government persevered with its original plan, reminding the next convention, in Perth in April 1600, that its two predecessors had accepted the 'voluntary' taxation scheme in principle. This time the king was able to force things a stage further, and an act was passed outlining some of the features of the new system.<sup>3</sup> The whole country was to be divided as it were into 1,000 persons - seemingly 1,000 areas, each to bear an equal burden. Within each area each man's substance would be assessed by the sheriff and four assessors, and a report would be made to a central commission. The burghs would be taxed as before, but old extent and Bagimond were clearly to be buried. The act discreetly omitted any mention of the sum to be imposed or details of the collection mechanism, leaving these questions to the next convention. Even so, the barons and burghs fought the measure doggedly. The mood of the Lothian barons, so

1. *AFS*, iv, 185-86.

2. Chapter 4.

3. *CSP Scot.*, xiii, 633-34.

generous in 1587, had altered; an 'infamous pasquell' circulated on 'our new impoist' when they met in March to elect their commissioners.' Resistance at the convention was organized by John Wemyss of Wester Wemyss and John Robertson, merchant of Edinburgh. They were only defeated by gerrymandering the convention's voting procedure: the king had them vote by estates and got the officers of state counted as an estate, thus carrying the measure by three estates to two.<sup>2</sup>

It was a fragile success, and all now turned on the June convention. Here at last it emerged that the king was bent on a vast tax of 100,000 crowns (£333,333 Scots at 1598 exchange rates<sup>3</sup>) to be prepared to fight for his English inheritance.<sup>4</sup> In the debate, the opposition focused on the futility of Scotland trying to conquer England by force of arms, government supporters countering that the king's place in the English succession would make war inevitable if some other claimant were to succeed Elizabeth. But after three days of battling such arguments back and forth, all saw that the question turned less on their logical merits than on the plain fact that the barons and burghs were grimly unwilling to pay more tax. They offered a paltry £40,000 for their share - and only on the impossible condition that they should receive exemption for the rest of the reign. The king protested that he had been promised this tax and new assessment in April, and demanded that all present should declare on oath whether this was so.

1. *APC*, vi, 855-56.

2. Nicolson to Cecil, 20 April 1600, *CSP Scot.*, xiii, 633-34.

3. Coinage proclamation, 18 December 1598, *CSP Scot.*, xiii, 356-57.

4. Nicolson to Cecil, 29 June 1600, *CSP Scot.*, xiii, 661-64.

He was rebuked by John Learmonth of Balcomie, who declared that the convention was free and could not be forced to answer. Soon it was all over; barons and burghs had killed the scheme, and an angry king was threatening reprisals. When he fumed about revoking the barons' place in parliament, however, Wemyss rejoined that they had bought their place and could not be deprived of it. Out of pique James ordered an expedition to Kintyre, which would have required another tax, but nobody took it seriously. He sent the nobles away with kind words.

Since most nobles supported the government or at least failed to align themselves with the opposition, the motives of the few noble dissenters are worth examining.<sup>1</sup> Alexander Seton, lord president, former Octavian and future earl of Dunfermline, had had enough of being a whipping-boy for unpopular measures.<sup>2</sup> His brother, Lord Seton, had been a member of the 1594 tax commission which had been notably lenient to taxpayers.<sup>3</sup> The earl of Cassillis had been expensively swindled by the king over his appointment as treasurer in 1599.<sup>4</sup> Finally, the enigmatic earl of Gowrie was owed vast sums by the king, which makes his opposition to improving crown finances seem Quixotic - interestingly, one of his own creditors was John Robertson, activist in April;<sup>5</sup> but he probably felt that he would see little of the money, and

1. Dennis Campbell, dean of Limerick, to Nicolson, July 1600, *CSP Scot.*, xiii, 670.

2. Lee, 'King James's popish chancellor', 175.

3. *APS*, iv, 51.

4. Chapter 4.

5. *APS*, iv, 245, c.47.



we have seen his past tax troubles as commendator of Scone.

So the opposition had won in the end. The fact that a tax of 100,000 merks was voted in February 1601 underlines their victory; for this was a tax on the traditional assessment system, for ambassadors, a traditionally-acceptable purpose.<sup>1</sup> The collectors of this tax are interesting:<sup>2</sup> one was the earl of Mar, a supporter of the June 1600 tax, but the other, the duke of Lennox, had been the largest single tax defaulter in 1597!<sup>3</sup> An epilogue to the story comes in 1613, when a parliamentary commission took up the only form of tax revision left to the government: searching for lands omitted from the sheriffs' tax rolls. They spent endless wearisome hours sifting through retours and other evidents, but while they made some discoveries - the marquis of Huntly had been evading tax on his lordship of Strathbogie, for instance - the impact on tax revenue was minimal. Some sheriffdoms even got their assessments reduced.<sup>4</sup> Old extent and Bagimond were to remain unchallenged for another forty years of heavy but unequal taxation.<sup>5</sup>

1. Nicolson to Cecil, 14 February 1601, *CSP Scot.*, xiii, 773; Tax roll, 1601, SRD, E59/3.
2. *APC*, vi, 359.
3. Tax accounts, 1597, SRD, EE65/4, fos.17v.-23r.
4. Copies of papers of a parliamentary commission for revising tax rolls, 1613, NLS, Adv. MS 22.2.16. For a similar local effort in 1621, see *APS*, iv, 630, c.35.
5. E.g. Lee, *Government by pen*, 65; Stevenson, 'King's Scottish revenues', 19.

The clearest conclusion to be drawn must be that Scotland's taxation before the revolution was unequivocally feudal. It was based on a feudal hierarchy, starting with the tenants in chief - freeholders, benefice-holders and royal burghs. Indeed, in the way that all freeholders and benefice-holders were treated alike, the tax system conformed better to feudal theory than did parliamentary representation, which singled out nobles and prelates for special treatment. When parliamentary taxation was as rare and low-key as it had been for the centuries before the 1580s, it was more important to apportion it in harmony with parliament's overall view of the social status hierarchy than to ask awkward questions about the distribution of national resources and individual ability to pay.

Not only was it feudal; it was also customary, based on a collection of centuries-old assessment systems, which produced hopelessly unequal levels of taxation. There were inequalities within old extent itself, the basis of taxation for lay lands. Similar inequalities doubtless existed within Bagimond's Roll, though the complicated distribution of income between feuars, tacksmen and superiors makes this hard to prove. Old extent and Bagimond themselves represented taxation at different levels, and the apportionment of taxes between the estates varied (as when some estates escaped paying). Within church lands, some feuars were taxed by old extent, while others suffered from a variety of heavier assessment principles. Some teind-holders avoided payment, others again had to pay at different rates. There was differential collection failure, with the more powerful finding it easier to avoid paying. And there were many exemptions for reasons good, bad and

indifferent. Only within the burghs was there institutional flexibility enough to allow revision of the assessments. Otherwise, the random nature of so much multiple variation in tax incidence suggests that all the different variables would overlap and reinforce each other to produce a yet wider spectrum within which tax rates would fall.

It was on this crazily-patched structure, inherited from a low-pressure fiscal tradition which had concealed its defects, that regular parliamentary taxation was imposed in the 1580s and 1590s. This success in establishing high-pressure taxation is important, but underlying it is the fact that social changes had made it necessary. Government needed increased income for increased activities, and traditional revenues from sources like crown lands were stagnant or declining. Moreover its new-found income from taxation was never enough, thanks to successful resistance, to pay for new-style government.

As well as boosting the overall level of taxation, there were some changes in the way it was distributed: in particular the taxation for the first time of feuars and teind tacksmen. But this innovation becomes less impressive when we remember that this was the age which had created feuars and teind tacksmen. Parliament was not leading, but trailing behind, social change. The end result was to create a hybrid system in which the incidence of taxation was still as uneven as ever - indeed, perhaps more so - for both the new and the old social groups.

Another aspect of government failure is familiar from English history: the failure to detach control of taxation from the Estates. Parliament and conventions remained at the centre of the system, and the opposition was able to use them successfully to defeat the government's aspirations - for heavier taxation, and for assessment reforms which would allow taxation to become heavier still.

Newly-erected in the 1580s, but relying wholly on medieval foundations laid down with no such structure in mind, such a fiscal system was inevitably short-lived. The durability of old extent, stretching over five centuries and more, makes it easy to forget how multi-faceted its history was, and in particular that it was only in use for regular taxation for a tenth of that time. The reason is plain: it was unable in the long run to fulfil the fiscal function for which it had long ceased to be fitted.

The fiscal structure was at the heart of the early modern state.<sup>1</sup> Thus, a 'stent and retour' of the middle march and Liddesdale was ordered in 1581, not for tax purposes but to establish lords' responsibility for criminals.<sup>2</sup> But when the Scottish tax system was so inequitable and unpopular, the resultant stresses may have impeded the process of state-building. There was no professional bureaucracy with direct access to taxpayers, already found at this time in France; instead, feudal superiors were forced to become tax-collectors. The

1. G. Ardant, 'Financial policy and economic infrastructure of modern states and nations', *Formation of national states*, ed. Tilly, 165 and passim.

2. *RFC*, iii, 346.

endless disputes between superiors and vassals can scarcely have strengthened feudal ties, and the sheer irrelevance of many of these feudal relationships is underlined by episodes like the absurd squabble between Altrie and Marischal about which was the other's feudal superior. After half a century of regular taxation based on assessments essentially unrelated to people's ability to pay, and institutional structures increasingly unrelated to contemporary society, the time would come when people would opt for a more modern fiscal system - even if it meant paying more tax.

As, indeed, it did. For it was revolution and civil war which finally overturned the rickety old structure. As in the 1550s, the need for troops was paramount. But unlike Mary of Guise, the Covenanters were successful in bursting through the built-in limitations of the medieval assessments, and imposing by force a system based on valued rent. Of course, at the Restoration there were calls for the revival of the old system, and a lengthy encomium on it by Mackenzie unintentionally highlighted its defects:

As to the pretence of inequality in the old way, it is to be considered, that though an arithmetical proportion and exactness is not to be expected in any way; yet there is more reason to presume for the justice and equity of a legal way, venerable for antiquity, warranted by express laws and immemorial custom... than for a way contriv'd and hatch'd in the heat and fury of trouble and distempers.'

Suffice to say that the first tax for a generation by the 'venerable' old system, in 1665, was also the last.<sup>2</sup>

1. Mackenzie, *Observations*, 304-09.

2. Rait, *Parliaments*, 499-500.