O'Donnell Lecture 1985

Celtic Law and Scots Law: Survival and Integration

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I should like first to thank the University of Edinburgh for the honour it has done me in inviting me to give the O'Donnell Lecture for 1985. I have attended many Edinburgh O'Donnells over the years but little imagined that one day I would find myself in the solo role.

As most present will know, the O'Donnell Lecture in Edinburgh and the corresponding lectures in Oxford, Dublin and Wales arise from the terms of the will, dated 1934, of the late Charles James O'Donnell who left bequests designed to demonstrate that the extent of Celtic survival in these islands in the face of Anglo-Saxon invasion and cultural influence was much greater than was commonly supposed. O'Donnell was born in the middle of last century. Like his better known brother Frank Hugh he was a prominent Irish Home Ruler. He joined the Indian civil service and in India, as in Ireland, he espoused the cause of home rule. Indeed his agitation and pamphleteering for land reform in India led in 1881 to his demotion and eventual departure from the service (Evans 1982; Brasted 1974). I have not attempted to discover what interest, if any, O'Donnell took in the contemporary land agitation in Scotland which was to lead in 1886 to the first Crofters Act, modelled partly on earlier Irish legislation; but I have a suspicion that he might have considered the mere fact that a man named Sellar was to deliver an O'Donnell Lecture to be as much a confirmation of his views on Celtic survival as anything I may actually say. However, I believe I may fairly claim that my theme today—Celtic Law and Scots Law: Survival and Integration—would have commended itself to O'Donnell.

It is a theme I speak on with considerable hesitation as I am only too well aware that the difficult and scattered nature of the surviving evidence, legal, historical and linguistic, calls for a greater combination of talents than I possess. I am also very conscious of how much I owe to other scholars, some of them my recent predecessors as O'Donnell Lecturer here, without whose work today's lecture would hardly have been possible. My debt to Professor Geoffrey Barrow in particular will be clear to all familiar with his writing. Many of my comments and conclusions will, inevitably, be tentative, even speculative.

At first blush the survival of Celtic law may seem a distinctly unpromising theme. We do not need to turn to the writings of mischievous English historians—I name no names[1]—for indications that Scots law has no history, or at least no history worth the

telling, and that little has survived from a remote past, least of all from the Celtic past. 'Before James V instituted the Court of Session in 1532,' wrote that fine lawyer and historian, Aeneas Mackay, in 1882, 'there was no system of jurisprudence to which the name of Scots law could properly be applied' (Mackay 1882:113). In 1896 Professor Dove Wilson of Aberdeen noted that 'The Celtic Scots were the ancestors in the male line of our kings', and that there had been in Scotland a great mixture of Celtic and Germanic blood, but then continued, 'These things make it almot inexplicable that distinct traces of Celtic law are not to be found. Yet so it is . . . Celtic law seems, indeed, to have disappeared as thoroughly as if it had never existed' (Wilson 1896:221). More recently the Regius Professor of Law at Glasgow, David Walker, has sung much the same tune: 'Very little is known of legal institutions in Scotland prior to the year AD 1000 and nothing from any earlier period can be shown to have exercised any material or permanent influence on the development of the modern law' (Walker 1981:86). More surprisingly, Lord Cooper lent his great authority to the notion that Scots law has no history. 'There is a sense,' he wrote, 'in which it is true to say that Scots law has no history; for the continuity of its growth has been repeatedly interrupted, and its story is a record of false starts and rejected experiments' (Cooper 1944:lxi). In *Celtic Law* John Cameron wrote, 'It is true to state that, in the history of the law of Scotland, we have little real continuity' (1937:154). Most depressing of all, the great Daniel Binchy once wrote, in the course of a mercilessly critical review of Cameron's book, that 'Henceforward the student of Celtic institutions will at least know that, apart from some unimportant technical terms, nothing is to be learned from Scottish legal sources . . . ' (Binchy 1938:684).

Now if I were not convinced that all these learned gentlemen were quite mistaken I would not be standing here. So far from the history of Scots law being, in Lord Cooper's words, 'a record of false starts and rejected experiments', I believe that the single most striking feature about the history of our legal system is its continuity, a continuity unbroken from a very remote past. The influence of Anglo-Norman law, the Canon law and the Civil law on the later development of Scots law is well known, but Celtic law too is part of the continuing inheritance. It is true, certainly, that the older the influence the more difficult it is to uncover its traces—sometimes one feels more of a legal archaeologist than a legal historian—but I am fortified in my views by an alternative line of authority which has sought to emphasise continuity with the past. This line includes, among lawyers, Sir John Skene in the sixteenth century, Lord Kames in the eighteenth, and George Neilson at the beginning of this century. In the unjustly neglected introduction to the second volume of *Acta Dominorum Concilii* Neilson wrote, 'Scotland was a land of Customary Law, its customs reflecting more or less faithfully the racial movements which had made its history . . . Anglican [*sic*] and Norman cords intertwined in thirteenth century law with the weakening threads of Celticism' (*ADC* II.lviii). This statement finds an exact counterpart in Professor Barrow's recent comment that in Scotland after 1214, 'thenceforward, although feudal tenure and custom were

irreversibly entrenched within the law of Scotland they would be interwoven with traditional rules and practice to form a distinctively Scottish common law' (Barrow 1981a:59). Historians have probably always been more conscious of continuity than lawyers, and recent historical scholarship, coupled with that of W. F. Skene and Croft Dickinson in the past, should make it hardly necessary to labour the point.[2] On the legal front, too, there have been recent reminders of the antiquity of our system, as in the case of *M'Kendrick v Sinclair* (1972SC(HL)25) in which a bemused House of Lords found itself having to pronounce on assythment, or in the faintly ludicrous attempt earlier this year to revive trial by combat (*The Scotsman* 19,23 Apr; *The Glasgow Herald* 27 Apr; *The Times* 19 Apr)[3].

One survival which has now been well charted (Dickinson 1928:lxvi; Barrow 1973: 69–82) is that of the judge or lawman of pre-feudal times—the *breitheamh* (early Gaelic *brithem*) or brieve, latinised *iudex*. In a sense the history of this office typifies the story of the survival and integration of Celtic law. We can distinguish between a mainstream dimension in which the traces of Celtic law become ever more faint until they are barely recognisable, and a Highlands and Islands dimension in which Celtic law survives longer in a more pristine form, and perhaps even undergoes a revival in the medieval MacDonald Lordship of the Isles. As regards the mainstream we find that the *breitheamh* still retains considerable importance after the introduction of feudalism: he is mentioned in royal ordinances, he appears in the witness list of charters, he assists in perambulations. Barrow has described his continuing presence as 'nothing less than the tenacious survival of an ancient judicial caste' (1973:70). Eventually he disappears from witness lists and declines further in status, becoming in the end not *iudex* but *iudicator*, the doomster or dempster of court, responsible for pronouncing sentence of doom; yet still one of the essential 'keys of the court' (*claves curiae*) without whose presence the court was not complete (Balfour 1962:273 c.viii; Skene 1597: *sv* Curia). In the High Court of Justiciary the doomster fell further still, for his office was conjoined with that of executioner, and the unfortunate prisoner at the bar had to suffer the spectacle of his executioner entering the court to pronounce sentence of doom. Gradually the doomster disappeared from Scottish courts, although in the case of the High Court not until 1773, late enough for Sir Walter Scott to immortalise the double office of doomster and executioner in *The Heart of Midlothian*. Even after the office of doomster was abolished, some trace of his function remained, for the final words spoken in the High Court after the death sentence was pronounced remained (until the abolition of capital punishment in 1965) 'which is pronounced for doom', the judge of the High Court thus being, although I am sure he was unaware of it, in some sense the descendant and representative of the *breitheamh* of Celtic law.

In the Lordship of the Isles, by contrast, the *breitheamh* continued to exercise his original function until the close of the Middle Ages (Thomson 1968:58–60; Bannerman 1977:227; Matheson 1979). 'There was a judge in every Isle for the discussion of all controversies,' writes 'Hugh Macdonald', 'who had lands from Macdonald for their

trouble, and likewise the eleventh part of every action decided' (Macphail 1914:24–5). These judges still bore the title *breitheamh*. Sometimes they witness Lordship charters and documents: '*Donaldus Judex*' in 1447, '*Donald Brehiff*' in 1456—presumably the same man—and, most significantly, '*Donaldus M'Gillemor iudex insularum*' in 1457 (Munro 1987)[4]; also '*Hullialmus archiudex*' in 1485. From these judges appeal lay to the council of the Isles with its base at *Eilean na Comhairle* (the Council Isle) on Loch Finlaggan in Islay. These *breitheamhan* ceased to function with the end of the lordship, but some are remembered to this day in Gaelic oral tradition. Even now the Gaelic title for those who adjudicate at the annual national Mod is *breitheamh*.

The long survival of the office of *breitheamh* is not exceptional, and I shall be referring to some comparable cases later. However, the most obvious example of continuity in office—so obvious that it is often passed over in silence—is the monarchy. The Queen's title to rule in Scotland, despite the occasional displacement of a senior line, stems ultimately from her descent from Malcolm Canmore, Kenneth mac Alpin and Fergus Mor mac Erc. The kings of Scots until the time of David II were inaugurated, rather than crowned and anointed, in a ceremony of pre-Christian antiquity which has exact parallels in Ireland and the Isle of Man.[5] In his account of the coronation of Alexander III in 1249 Fordun narrates that *quidam Scotus montanus* recited the royal genealogy (*Chron. Fordun* 1871–2:1.294). We need not doubt that this was the official historian or *seanchaidh*, without whose presence no inauguration was complete. The Lords of the Isles continued to be inaugurated in the old manner until the fifteenth century, their *seanchaidh* MacMhuirich reciting the catalogue of their ancestors. The late Sir Thomas Innes, Lord Lyon King of Arms, was wont to claim that the origins of his office antedated both heraldry and feudalism, and that he was the *seanchaidh* of the king of Scots as well as an heraldic King of Arms (Innes 1936:381–2). That he was correct in this claim is, I believe, conclusively shown by a recent study (Lyall 1977) of the Scottish coronation service, in which the Scottish, English and French coronation services are compared. In the English service a key role is played by the archbishop of Canterbury, in the French service by the archbishop of Rheims; the corresponding role in the Scottish service is played, not by a bishop or an archbishop, but by the Lyon King of Arms. One of Lyon's functions at the coronation was to recite the royal pedigree through several generations, as his predecessor had done in the time of Alexander III: 'The forme of the coronatioun of the Kings of Scotland' prepared for the Scots Privy Council in 1628 refers to Lyon commanding the king to be crowned, and 'repeating sax generatiouns of his descent' (*RPC* 2nd series II.393–5).

It used to be fashionable, following the researches of Professor Binchy and others into the early Irish law tracts, to emphasise the archaic features of Dark Age Celtic kingship and Gaelic society. The society portrayed in the law tracts was represented as a remarkable fossil survival, little changed since a remote Indo-European past, and the king as a sacral figure, expected to fight and die in battle certainly, but devoid of real authority, his actions circumscribed by the dead weight of tradition, and lacking in

legislative and judicial power. This approach emphasised the differences between Celtic society and society elsewhere in early Medieval Europe. At its most extreme, as Patrick Wormald noted in his Edinburgh O'Donnell lecture two years ago, it has led to the portrayal of Dark Age Ireland as a kind of 'Tolkienian "Westernesse"' (Wormald, P. 1986:172). More recently, however, this approach has been strongly challenged by scholars such as Professors Ó Corráin and Byrne, and by Wormald himself (Ó Corráin, 1978; Wormald, P. 1986).[6] They place a greater emphasis on similarities between Ireland and mainstream European tradition. They have demonstrated that the Dark Age Irish king was far from powerless or devoid of legislative and judicial authority. Ó Corráin (1978:33) has suggested that the transformation from wider kin-group to narrow lineage, noted on the Continent by Leyser, Duby and others, can be paralleled in Ireland also. He has shown how powerful overkings were able to mediatise lesser dynasties, or competing segments of their own dynasty, and convert their representatives into royal officers and leading churchmen. Such royal officers appear with increasing frequency in the Annals from the tenth century on: the royal governor or viceroy (*airrí*), the steward (*rechtaire*), the head of household (*toísech lochta tighe*), and the commander of cavalry (*toísech marcshlúaighe*) (Ó Corráin 1978:26–9). Of particular interest is the judge or chief judge, the *ollamh* or *ard-ollamh breitheamhnais* (Ó Corráin 1978:14–15). It is now recognised that by the end of the first millenium the leading Irish kings not only had judicial powers, but were also able to appoint judicial officers. The European parallels for all this are obvious, and it is clear too that Irish rulers aspired to the European model. The O'Brien kings of Munster, for instance, are complimented in the *Cogadh Gaedhel re Gallaibh* by the description 'Frainc na Fotla . . . Meic . . . Israeil na hErend' (the Franks of Ireland . . . the sons of Israel of Ireland) (Ó Corráin 1978:34). This admiration of the Franks as the chosen people recalls the oft-quoted comment on Malcolm IV and his brother William, kings of Scots, 'The modern kings of Scotland count themselves as Frenchmen in race, manners, language and culture' (Anderson 1908:330n): Malcolm and William, indeed, had good reason to be proud of their Frankish connections, being inheritors through their mother's mother, Isabelle of Vermandois, of the blood of Charlemagne. On one point both Ó Corráin and Binchy are agreed: by the twelfth century Irish society was already ripe for feudalism. 'The type of society that was emerging in Ireland in the eleventh and twelfth centuries,' writes Ó Corráin, 'was one which was moving rapidly in the direction of feudalism' (1978:32); and Binchy has described the institution of *cēlsine* (clientship) found in the Irish law tracts as 'a forerunner of feudal commendation' (Binchy 1973:92)[7]. Thus, although it is hardly possible to speak of 'Irish feudalism' as some have written of 'Anglo-Saxon feudalism', the seeds were there.

All this has considerable relevance for Scotland. It helps to explain how the institutions of Anglo-Norman feudalism spread so readily in a Scotland still governed by its native Celtic dynasty and its native Celtic earls. The Scottish inheritance was, of course, more varied than the Irish, and Professor Duncan has warned us that we must

not 'fill out the exiguous evidence for the dark ages . . . by a wholesale importation of Irish institutions' (1975:106). Pictish, British, Anglo-Saxon and Scandinavian influences are all in evidence, yet there can be little doubt that the prevailing ethos of the kingdom of Alba from the time of Kenneth mac Alpin to that of Malcolm Canmore was Gaelic. There is some evidence to suggest that the earliest borrowings from Anglo-Saxon law were consolidated in this predominantly Gaelic context. The result may have been a further predisposition, greater in Scotland than in Ireland, towards feudalism. Professor Barrow has argued that the Anglo-Saxon terms *scir* (shire, Gaelic *sgìre*) and *thegn* (thane)—sometimes equated with the native Gaelic term *tòiseach*—became deeply embedded in legal administration and the Gaelic language at an early date (Barrow 1973:7–68). Another Anglo-Saxon term which I would be inclined to regard as a significant early borrowing is (*ge*)*mót* or moot. 'Moot' or 'mute' is well known in Scots, of course, as are moot-hills, but *mót* was also borrowed early into Scots Gaelic as *mòd*, meaning a court or assembly.[8] In Gaelic poetry there is regular reference to the holding of a *mòd* by a chief, while today the Mod *par excellence* (at which, as we have seen, the adjudicators go by the title of *breitheamh*) is held every year. The word seems unknown in Irish Gaelic. I would argue, then, for the early borrowing of a number of key Anglo-Saxon terms. Their ready incorporation surely reflects a strengthening of royal authority. Be that as it may, Scottish society in the eleventh century, like contemporary Irish society, was moving in the direction of feudalism. We need not accept Fordun's account, as it stands, of Malcolm II (1005–34) apportioning the kingdom to his vassals from the moot-hill of Scone (*Chron. Fordun* 1871–2:I.186), but we may note that even so cautious a historian as Croft Dickinson was prepared to entertain the notion of pre-Norman feudalism in Scotland (1928:376), while Professor Barrow, in his concluding Rhind lecture this year, used the term 'proto-feudalism'[9].

So far as the history of Scots law is concerned we may accept that the introduction of Anglo-Norman feudalism gave rise to a legal Reception, a Reception in every way as significant as the later Reception of the Civil law, but a Reception which did not mark a complete break with the past. Without doubt there were new departures, but as is often the way with legal Receptions, existing institutions might be modified, re-named and adapted without doing too much violence to the native tradition. Sometimes the old institution would continue to exist under a new guise. Sometimes the old name would remain although the institution itself had changed. More often, perhaps, there would be harmonisation leading to further development on a dual foundation. We should expect to find parallel traditions and dual origins. Some sheriffdoms, as Dingwall, Auchterarder, Cromarty, Kinross and Clackmannan, may have taken the place of earlier thanedoms (Dickinson 1928:378; Duncan 1975:161–3, 596–7); and many thanes became feudal barons and knights (Skene 1886–90:III.246–83; Dickinson 1928:377; Barrow 1980:140,157). King David I had a *rannaire* or food-divider (*RRS* I.32–3) and (almost certainly) a *seanchaidh*, as well as a seneschal and a chancellor. There is the tantalising record (Lawrie 1905:66–7) of a provincial court of Fife and Fothrif held in

1128 to settle a dispute between the Culdees of Loch Leven and that 'furnace and fire of all iniquity' (*fornax et incendium totius iniquitatis*) Sir Robert the Burgundian. The account is written by a monastic chronicler whose intoxication with language resembles on one hand the *hisperica famina* of earlier Irish writing and on the other the prose of Anthony Burgess. We read of satraps and satellites and the army of Fife (*cum satrapys et satellitibus et exercitu de Fyf*) and of leaders, commanders and luminaries of the Bishop's host (*primicerios et duces et lumnarcas exercitus Episcopi*) and would dearly like to know what native words, if any, lie behind these terms.[10] But we read also of three *iudices*, clearly *breitheamhan*, one of whom, Constantine, earl of Fife, is described as *magnus iudex in Scotia*. Is this the *ard-ollamh breitheamhnais* of the king of Scots, the representative of a discarded segment of the ruling dynasty?[11] And given that Duncan, earl of Fife, later in the century, is the earliest recorded Justiciar of Scotia (Barrow 1973:105) and the institutional ancestor, therefore, of today's Lord Justice General, should we not trace that office back in part to Celtic roots?

Feudalism was very adaptable. The forms of feudalism could be used to clothe and camouflage and, on occasion, legitimate older practice. The earldom of Fife itself was feudalised under its Celtic earls as early as 1136, and held thereafter in chief of the crown (Barrow 1980:84–90). Ancient burdens on land such as cain and conveth, and obligations to common army service as *fecht* and *slúagad* could readily be incorporated into feudal charters (see below p. 17). Feudal forms too could regulate the position of the learned orders of Gaelic society—doctors, historians, musicians, poets and others—who held their land in return for professional services rendered (Thomson 1968; Bannerman 1977:232–9; and 1986). As late as 1609 Fergus MacBeth or Beaton was confirmed for life in his hereditary office of principal physician of the Isles, and granted the family lands of Ballinaby and others in Islay. The granter was no MacDonald, but James VI himself, acting for his son, Frederick Henry, Prince and Steward of Scotland and Lord of the Isles (*RMS* VII no. 109). Even the position of head of a kindred could be granted in standard form: *Formulary E* contains a style used by the royal chancery about the time of Robert Bruce 'Ad constituendum capitaneos super leges Galwidie', which begins, 'Sciatis quod constituimus concessimus tali ut sit capitaneus de tota parentela sua vel de parentela tali quatinus de iure et secundum leges et consuetudines Galwydie hactenus usitatas in capitaneis esse debet' (Duncan 1976:no.83).[12] As has been seen, the institution of *cēlsine* paved the way for feudalism. Might it not also, and with greater force, since it deals with commendation and not with tenure, be viewed as a precursor of that typically Scottish arrangement, the bond of manrent?[13]

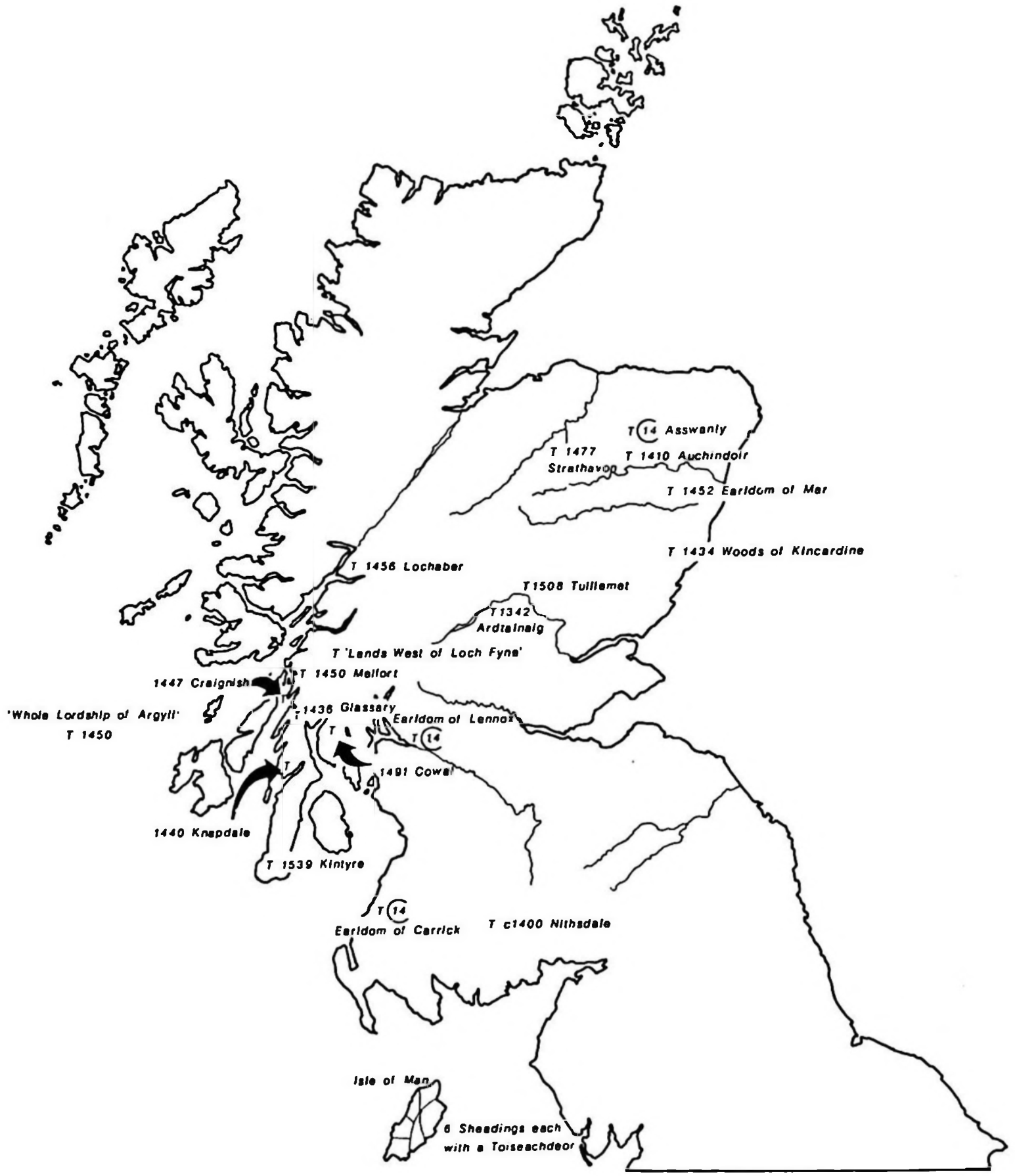
I should like to consider now, in rapid succession, various areas of law, public and private, substantive and procedural, seeking out further examples of survival and integration. As already noted, the long survival of the office of *breitheamh* was not exceptional. Parallels can readily be drawn in the case of other offices such as those of *mormaor*, *maor*, *tòiseach*, toiseachdeor and *deòradh* (dewar). Time prevents me from

lingering on these. The transition from mormaor to earl is well known. In one case at least, that of the earldom of Mar, the present holder of the dignity appears to be the representative and inheritor of a Celtic mormaor, for the countess of Mar descends, like all her predecessors in title, from Morgund, earl of Mar, immediate successor to Ruari, mormaor of Mar in king David I's reign (*Complete Peerage*:*sv* Mar).[14] The title 'mormaor', indeed, in the modern form of '*morair*' is still in use in Gaelic, signifying a lord: thus the countess of Sutherland is *bana-mhorair Chait*, Lord MacDonald is *morair Shléibhte* (of Sleat) and Lord Stockton is *morair Stockton*. Croft Dickinson traced the later history of the *maor* ('mair' in Scots)) as an officer of the sheriffdom, often hereditary—that is 'of fee' (Dickinson 1928:lxii–vi; and see Barrow 1973:67–8). This office was readily equated with that of serjeant. Again, the word is still in use in modern Gaelic, meaning a sheriff-officer or a ground officer. It also figures in one of the less comprehensible titles still borne by the hereditary keeper of Dunstaffnage, that of 'marnichty' to the duke of Argyll: this, it seems, stands for the hereditary *maor(s)neachd* or mairship. The term *tòiseach*, too, long survived, both in the original sense of head of a kindred, and also under the guise of 'thane' (Skene 1886–90:III.246–83; Jackson 1972:110–14; Barrow 1973:7–68). In the meaning of head of a kindred the *tòiseach clainne* has his counterpart in the *ceann cinéil* of Carrick (see Duncan 1975:108–10). The grant by Niall, earl of Carrick, 1250 × 56, of the office of *caput progeniei* or *kenkynolle* (that is *cenn cineóil, later ceann cinéil*) to his nephew, Roland of Carrick, is well known, and was the subject of royal confirmation to the Kennedies in later centuries (*RMS* I nos. 508 and 509; II nos. 379,414).[15] As already noted, the royal chancery had a set style for appointing the head of a kindred in Galloway, and a number of such confirmations are known. One northern thane yet remains, the thane of Cawdor, holding his lands *in unum et integrum thanagium*, rather than simply *in liberam baroniam*, as many of his fellows came to do (*RMS* II no. 1241).[16] The Cawdor lands in the Black Isle became known as *an Tòiseachd*, the thaneage, or as Ferintosh, 'land of the tòiseach' (Watson 1904:114), and gave their name to Ferintosh whisky.

The dewar (*deòradh*) likewise, in charge of his sacred relics, is a notable survivor throughout the medieval period and down to the present day. The two best known dewars are the keeper of the *bachull mór* (the *baculus* or pastoral staff) of Saint Moluag, and the keeper of the *coigreach* of Saint Fillan. The first has regained custody of his relic in the island of Lismore, although not without some intervening adventures. The second finally relinquished his relic and all rights and duties attaching to its possession to the Society of Antiquaries of Scotland in 1877, although the title of Dewar of the Coigreach remains, and the holder recently matriculated arms with the Lord Lyon.[17] It is instructive to note that these rights and duties were established by the characteristic Scoto-Norman procedure of the inquest. On 22 April 1428, at the Bridgend of Killin, before John Spens, bailie of the crown lands of Glendochart, an inquest of fifteen found Finlay Dewart to be the keeper of the *coigreach* ('lator ipsius reliquiae de Coygerach, qui

Jore vulgariter dicitur'). They noted *inter alia* that if any goods or cattle were stolen from an inhabitant of Glendochart who did not care to pursue the thief, he could send for the dewar of the *coigreach* along with four pennies or a pair of shoes and food for one night, and the dewar was bound to pursue the goods wherever they might be found in the kingdom of Scotland. The privileges of the dewar were confirmed by James III in 1487, this confirmation being recorded in the Books of Council and Session as late as 1734 by the then holder of the office.

Another officer whose exact function may still be in doubt but whose late survival is not is the toiseachdeor (Skene 1886-90:III.278-91, 300-2; Dickinson 1941). The etymology of the word remains obscure, but I take toiseachdeor to be the name of the officer and toiseachdeorachd the name of the office. In Croft Dickinson's interesting but ultimately rather despairing article (1941) about this office, he gives many instances of its occurrence both in charter and in statute. I have been able to add some further examples to Dickinson and have little doubt that others could be found. The results are shown on the map (p. 10).[18] In each case the earliest date at which a particular toiseachdeor is mentioned is noted. The geographical spread is impressively wide. One of the additions to Dickinson's list supplies the most northerly instance—at Asswanly in Strathbogie—of a toiseachdeor. The source for this is Sir Robert Gordon's *Genealogical History of the Earldom of Sutherland*: 'Sir Adam Gordon, slain at Homildoun, had tuo bastard sones, by Elizabeth Crushshanks (daughter of the laird of Assuanly, called Toshdiragh)' (1813:61). A more significant addition is that of a toiseachdeor for the earldom of Carrick. The source here is Sir John Skene, who noted in his Latin edition of *Regiam Majestatem* that David II 'dedit et concessit Ioanni Wallace suo Armigero, et fideli, officium Serjandiae Comitatus de Carrik, quod officium, Toschadorech dicitur, vulgo ane mair of fee' (Skene 1609:13).[19] Croft Dickinson noted a toiseachdeor in Nithsdale, but later seemed to cast doubt on this when he wrote that there were no examples of the office to be found in the Lothians and the south west (1941:86,103, 108). The Carrick example supports that in Nithsdale, and both are nicely *en route* for the Isle of Man. In view of the absence of the toiseachdeor in Ireland, his presence in the Isle of Man (Manx, *toshiagh jiorrey*), one for each of the six sheadings of the island (Megaw: 1976:24), raises some interesting questions, both for Man and for Scotland. The Carrick example brings to three—Carrick, Mar and Lennox—the ancient earldoms with which a toiseachdeor is known to have been associated. It is worth reflecting that, despite the obscurity of the office, there are many more examples on the record of the occurrence of the toiseachdeor under his Gaelic title than there are of the *breitheamh*. In Scotland and the Isle of Man the office of toiseachdeor was regularly equated with that of coroner (Dickinson 1941; Megaw 1976: 24). In most Scottish examples the native term changes to 'coroner' soon after it first appears, and we may take it as certain that behind the 'coroner' who appears on the record in some other instances there would have been originally a 'toiseachdeor': we may suspect this of the hereditary coroners of Bute and of Arran (*OPS* II.i.229,248); and perhaps also of the foresters and coroners of



Map showing the distribution of the Toiseachdeor ('T'), and giving the earliest date at which a particular toiseachdeor is mentioned.

Pattern of equivalent names for officers in late Medieval Argyll

Bailie: Seneschal: Steward Toiseachdeor: Coroner

Maor: Officer: Serjeant

the Garioch in Aberdeenshire (*RMS* II.2755), and of the earldom of Strathearn (*RMS* II.1160), for the offices of forester and toiseachdeor are also sometimes combined. Noted below the map is a pattern of equivalent names for officers, including the toiseachdeor and the mair, which seems to emerge in late Medieval Argyll. How old these equivalents are and how far they represent regular practice throughout Scotland I cannot say, but the subject is worth further investigation.

Turning now to the criminal law, the outstanding example of survival is, of course, the action of assythment, or compensation for wounding or slaughter, revived recently in the case of *M'Kendrick v Sinclair* (1972 SC(HL)25), and formally abolished by the Damages (Scotland) Act 1976 as a result. The legal background to the case has been discussed by Robert Black (1975) and Christopher Gane (1980), while the wider context of the blood-feud in early modern Scotland has been explored in a seminal article by Jenny Wormald (1980), so little more need be said here.[20] The payment of compensation to pacify the rancour of the kin was not peculiar to Celtic society, and in M'Kendrick's case there is mention of Anglo-Saxon *wer* and *wite* as well as Gaelic *crò*. However, one feature which clearly betrays the Gaelic origins of the later Scottish action of assythment is the letter of slains, so essential for remission, granted by the kin of the dead man; for it has recently been shown (Wormald, J. 1980:62) that, so far from 'slains' being a form derived from the English verb 'to slay', as one might imagine, it derives from *slāinte*, a technical term of Celtic law. 'The basic idea of this Irish word [*slāinte*],' writes Kenneth Nicholls, 'is that of "guarantee" or "indemnification".' (1973:187). Indemnification from the further rancour of the kin was the precise function of a letter of slains. The term *cró* for compensation is also of considerable interest. It occurs in the *Leges inter Brettos et Scotos* (*APS* I.663–5) and in *Regiam Majestatem* (*APS* I.637), and is repeated in the form 'croy' in Scots in the legislation of James I in 1432 (*APS* II.21). The late David Greene studied the various meanings of *cró* in Irish and Scots Gaelic and concluded, 'Strange to say, it was in Scotland that it was absorbed into the legal system, maintaining its meaning of "the compensation or satisfaction made for slaughter of any man according to his rank" . . . It is attested [in this meaning] only from Scots; there are no examples of Sc G *crò* in this meaning' (Greene 1983:8). 'Croy' then represents a fossil survival in Scots of Celtic law. Stranger still, the word 'croo' appears like a *leit-motif* in a recent historical novel, *The Camerons*, set in a West Fife mining community last century before the passing of the Workmen's Compensation Acts. The author, Robert Crichton, is American but claims to draw much of his inspiration from his grandmother who came from just such a mining community. In the novel the term 'croo' is used of the compensation paid at the discretion of the mine-owner for death or injury in the mines. On the face of it, this argues for the survival of the Gaelic legal term *cró* in the Scots speech of mining communities in Fife until last century, and, if authentic, is truly remarkable.[21]

More generally, one feature which sharply distinguishes the criminal law of Scotland from that of England is the late recognition in Scotland of the public right to prosecute

crimes such as theft and homicide regardless. Only at the end of the sixteenth century, and not always even then, can it be said that the Crown's interest in prosecuting for homicide (or 'slaughter') took precedence over the wishes of the kin of the victim (Black 1975; Wormald, J. 1980). Viewed from a wider European standpoint Scotland is by no means unique in this respect, yet the Celtic heritage must be seen as a major factor in the Scottish equation.

In the law of persons one notable survival which I have attempted to chart elsewhere (Sellar 1981) is Celtic secular marriage, which allowed for polygamy, concubinage and easy divorce, and is described in the early Irish law tracts. Nicholls has written, 'In no field of life was Ireland's apartness from the mainstream of Christian European society so marked as in that of marriage. Throughout the medieval period, and down to the end of the old order in 1603, what could be called Celtic secular marriage remained the norm in Ireland and Christian matrimony was no more than the rare exception grafted on to this system' (1972:73). Celtic secular marriage had a long history in Scotland as in Ireland, and did not finally disappear in the Highlands and Islands until the seventeenth century, although its traces are not so easily uncovered in mainstream development.[22] Two late practitioners of such marriage alliances, Ranald MacDonald of Benbecula and Ruari MacNeill of Barra, are still remembered in oral tradition (Sellar 1981:487). We have noted that feudal forms were very flexible and could incorporate and express older landholding arrangements without appearing to alter their essentials. The marriage law of the medieval church, too, could camouflage Celtic survival: although Canon law prohibited divorce in the modern sense, there were so many possibilities for the dissolution of marriage on the grounds of consanguinity and affinity that it must often have been easy for practitioners of Celtic secular marriage to present their divorces as dissolutions under the Canon law, the more so as the marriage of near relatives was a commonplace.

Fosterage is an institution given considerable space in the early law tracts, and there is abundant evidence for the continuing existence of fosterage of this type until a very late period in Scotland. Many contracts of fosterage in Scots, and one (dated 1614) in Gaelic, survive.[23] Robert Bruce, it would seem, was fostered (Nicholson 1974:73). The chiefs of the Campbells continued to be fostered until the seventeenth century (Innes 1861:368), and the chiefs of many other clans until the eighteenth. The obligations arising from the tie of fosterage are a frequent theme in Gaelic tradition, both prose and verse. The institution survived long enough to be remarked on by Boswell and Johnson on their famous tour; and I am informed by Mr William Matheson that there died only in the last few years a Mr Olaus Martin whose grandfather, a native of Skye, had been fostered in the ancient manner, and who still kept kindness with his grandfather's foster family. Given the strength of the institution, it is surprising that no trace of it was incorporated into the regular Scots law of persons, although no doubt a claim based on a contract of fosterage would have been legally recognised.

On the borders of marriage law and succession there is another example of dual

inheritance in the equation of the Gaelic *tochradh* (Scots 'tocher') with the *maritagium* of feudal law. Some notion of tocher, indeed, still survives: many Scots today would recognise the phrase 'a tocherless lass wi' a lang pedigree', although few, I think, could define *maritagium*. One of my favourite examples (Lamont 1914: no. 42) in this field is the contract of marriage entered into in 1462 between Ewen MacLachlan and Gilchrist Lamont in respect of Gilchrist's sister Marjory. In the event of Ewen refusing to marry Marjory he obliges himself and others as cautioners to pay the following in name of tocher: Celestin Lauchlan [Gillespic MacLachlan], forty cows; Donald the poet, twenty cows; Ewen M'Gillecattan, ten cows; Ewen the clerk, twenty cows; and Duncan Finlae, twenty cows.

In the law of succession proper the institution of tanistry provides examples of integration and survival. Loosely defined, tanistry is the name given to the system whereby succession to office, typically the office of king or chieftain, is open to various members, or to different segments, of a ruling kindred, rather than descending by primogeniture down the one line, as under feudal law.[24] More strictly, the term 'tanist' (*tánaiste*, *tànaistear*, tanister)—'he who comes second, the awaited or expected one'—describes a successor-designate formally recognised in advance. Such recognition became a common although not invariable practice, and there are accounts from both Ireland and the Isle of Man of the inauguration of a tanist at the same time as the king (Megaw 1976:24). Tanistry in Ireland left its mark on the English Common law, for *Le Case de Tanistry* of 1608 (Dav 28), concerning the O'Callaghan succession, is still a leading case on custom as a source of law. In Scotland the system of tanistry operated among the descendants of Kenneth mac Alpin until the death of Malcolm II in 1034, although there is no indisputable evidence for the formal appointment of a *tánaiste*. Later, after the death of his only son Henry in 1152, David I had his eldest grandson Malcolm solemnly paraded around Scotland by the earl of Fife, the hereditary inaugurator of the king of Scots, and recognised as his heir. To some no doubt, perhaps to David himself, Malcolm would be *rex designatus* with clear echoes of the contemporary Capetian monarchy—Malcolm's father Henry had been described as *rex designatus* in a number of charters (Lawrie 1905: 124, 126, 128)—but to others among his Celtic subjects, Malcolm would be the nominated *tánaiste*.[25] In the reigns of William I and Alexander II, the MacWilliam claimants, descending from Duncan II, the eldest son of Malcolm Canmore, surely favoured tanistry. The MacWilliams apart, there was a dearth of males in the royal house for over two centuries, until the accession of Robert II in 1371, which rather precluded the question of tanistry from arising. The only king between 1094 and 1390 who died survived by both a brother and a son was William I, and he took good care that his younger brother David should formally recognise his son Alexander as heir to the throne (Stringer 1985:42–3). There is an echo of tanistry in the arguments for the crown put forward by Bruce the Competitor in the Great Cause in 1291–2, when he pointed to the alternating succession after Kenneth mac Alpin, and when he claimed that he had been at one stage Alexander II's nominated successor (Stones and Simpson

1978:II. 175, 178, 201; II. 144–5, 170, 185; Barrow 1976:57). The mysterious 'Appeal of the Seven Earls' which backed Bruce's claim is as likely to refer to the Celtic past as to the imperial German electors, as Barrow (1976:60–2) points out, although whether it should be viewed as 'an example of that semi-antiquarian revival of things Celtic which was not uncommon in thirteenth century Scotland' (Barrow 1976:62) is another matter.

In Highland Scotland tanistry had a longer life. Dr John Bannerman has detected tanistry in operation among the MacNeill chieftains of Gigha in the fifteenth and sixteenth centuries, and among the Beaton physicians of Pennycross in Mull a century later (Bannerman 1977:148; 1986:25–40). The epithet 'tanist' or 'tanister' was in use in the Highlands from the fourteenth to the eighteenth centuries. The immediate younger brother of Donald of Isla, Lord of the Isles, John Mor, was remembered as 'the Tanist'—*Eoin Mór Tánaiste* (*Clanranald* 1894:158, 212). In his case I take the designation to signify, not that John was Donald's nominated successor, but that John, rather than his elder half brothers Ranald and Godfrey, the sons of Amie MacRuari, would have succeeded to the Lordship, failing Donald and his issue. Later examples seem to equate the *tánaiste* of Celtic law with the *tutor* of Feudal and Roman law, the tutor being the nearest male agnate—again a dual inheritance.

Far from the influence of the Lordship of the Isles, the term 'tanistry lands' is used to describe an *appanage*—to use a good feudal term—granted to a younger son. Buchanan of Auchmar, writing in 1723 about his own family, states that 'The Interest of *Auchmar* was for sometime Tanistrie or Appenage-Lands, being always given off to a Second Son of the Family of *Buchanan* for Patrimony, or rather Aliment during Life, and at his Death returning to the Family of *Buchanan*. These Lands were in some Time after disponed irreversibly to the Ancestor of the present Family of *Auchmar*, and his Heirs' (1723:42). The 'irreversible disposition' took place in 1548. Far to the east, in Aberdeenshire, the same arrangement obtained and the same term was apparently in use in the family of Skene. Six small farms in Midmar belonging to the laird of Skene 'formed what were called Tanistry lands', and were used in the sixteenth and seventeenth centuries 'to make a provision for the younger sons of the family, who occupied them during their lives as kindlie tenants' (Skene 1887:23, 24, 37, 49, 90). One of the possessors of these lands was James Skene, the second son of Alexander Skene of Skene, and the father of Sir John Skene of Curriehill (*c.* 1543–1617), Lord Clerk Register and legal historian. A similar custom is referred to by John MacPherson writing in 1768: 'In the Highlands and Western Isles the Tierna's [*Tighearna* or chief] next brother claimed a third (Trian Tiernis) part of the estate during life, by virtue of a right founded on an immemorial custom. It is not above two hundred years back since the Tanistry regulation, and the disputes consequent upon it, prevailed in the Highlands. There have been some instances of it much later' (1768:184).[26] Tanistry, then, was a long lasting legal concept, capable of being harmonised with others from a quite different background, such as *rex designatus*, tutor, *appanage* and even 'kindlie tenants'.

There are other aspects of succession which would repay investigation, such as des-

tinations-over in favour of members of a particular patrilineal kindred, as *heredibus suis et suis assignatis cognomen de Cambel* in 1358 (*RRS* VI no. 166), or to 'Donald MacGilliephadrick, his airs-mail and assignees, of the clan of Clan Chattan allenarly [only]' in 1632 (*MacGillivray v Souter* (1862)24D759); or the use of the regular forms of feudal conveyancing to legitimise the succession of an heir male rather than a female heir general, as in the case of Mary MacLeod of Dunvegan in the sixteenth century (Grant 1981:117–26,273); but I should like to move on now to consider courts and their procedure. An outstanding feature of the Scottish legal landscape until the middle of the eighteenth century were the all-pervasive franchise courts—courts of barony and courts of regality—whose jurisdiction covered as large an area of the kingdom as the regular royal courts themselves. One of the most jealously guarded privileges of these courts was the right to repledge to their own jurisdiction inhabitants of the barony or regality accused before other courts, including the sheriff court and the justice court (Dickinson 1928:344). When repledging took place a cautioner had to be found to ensure that justice would be done. The word used for such a cautioner—and this remained true until the end of repledging itself—was 'culrath' or 'culrach'. The term occurs in both *Regiam Majestatem* (*APS* I.636) and *Quoniam Attachiamenta* (*APS* I.648), and also ('culrehath') in the *Fragmenta Collecta* (*APS* I.735). Sir John Skene states in his *De Verborum Significatione* that 'Culrach sumtimes is called a furth comandborgh, bot mair properly it may be called an backborgh, or cationer . . .' (1597:*sv* Culrach). There are many examples of the term to be found in court records. Thus in 1518/9 Thomas Forrester 'baillie & commissar to the lard of balgony' appeared in the Fife sheriff court to repledge an action there to the laird's baron court: 'And the said Thomas Forestar pleige & culrach to the schiref to do Justice in the said actione . . .' (Dickinson 1928:131). In 1539, the abbot of Coupar Angus granted the office of bailliary to James, Lord Ogilvie, with power to repledge 'et Reducendo Cautionem et colerache pro Justicia' (Easson 1947:II.152). In 1564 the powers of the bishop of Caithness included 'cautionem lie colerath pro administratione iustitie diebus et locis oportunis prout moris est auferendi et reddendi' (*OPS* II.ii.614n). A late example occurs in 1700, when in a process against 'Egiptianis' at Banff there was an unsuccessful attempt to repledge some of the accused to the regality of Grant and to lodge caution of 'culriach' (Stuart 1846:175–191). One of the accused was James MacPherson (although repledging was not attempted in his case), and the end of that story is well known:

> The reprieve was coming frae the brig o' Banff
> Tae set MacPherson free
> But they pit the clock a quarter afore
> And they hanged him frae the tree.

Although different spellings of the word are legion, there can be no doubt that culrath represents a technical term of Celtic law (cúlráith) being composed of the elements *cúl* meaning 'back', and *ráth* a 'pledge' or 'surety', the etymology of the term providing a

good explanation of its function in law. *Rath* is a key term in early Irish law, and occurs in many situations (Binchy 1941:102–4; 1972). It is found in Scotland in at least one other compound word: *fulráith*, used as an equivalent for bloodwite, the element *fuil* meaning 'blood': 'bludwytys que Scotice dicitur fuilrath' (*Lenn. Cart.* 1833: 45). Here, as with 'slains' and 'croy' in assythment, we find a technical term of Celtic law deeply embedded in a cardinal process of later Scots law. In his short discussion of repledging Croft Dickinson noted that 'this extensive right has been traced by Lord Kames back to the time when each tribe or clan claimed to be under the jurisdiction only of its own judges . . . It is more likely, however,' he continues, 'that it was the outcome of pure feudalism under which justice was bound up with the holding of land' (Dickinson 1928:34). With all respect to Croft Dickinson, I would suggest that Lord Kames was at least half right, and that here again we have a dual inheritance. Another pointer towards the Celtic past is the fact that repledging could on occasion apply to an entire kindred, membership of which was the essential prerequisite. Thus, 'homines de progenie et consanguinitate makcaroun vulgariter nuncupatur Kynmaccaroun' could be repledged to the regality of the Dunfermline, this privilege being restored by James II in 1459 (Webster and Duncan 1953:11–12; *Dunf.Reg.* 1842:351–2). The 'Law of Clan MacDuff', itself an interesting survival, provides a better known example: this Law granted the privilege of repledging in cases of homicide to those within the ninth degree of kin to the earls of Fife (Skene 1597: *sv* Clan- Makduf). The privilege was claimed as late as 1548 in the case of *Kininmonth v Spens*, mentioned by both Balfour and Skene (Balfour 1962–3:511; Skene 1597).

If there was continuity in procedure, it seems likely that there must have been some continuity in the court structure as well, both franchise and royal. The case of Sir Robert the Burgundian in 1128, already mentioned, in the court of Fife and Fothrif, gives some clues as to the functioning of pre-feudal courts. On this topic Professor Barrow has recently suggested that behind place-names such as 'cuthill', 'cuthal' and the like there lies a *comhdháil* or pre-feudal Celtic assembly, a record of which survives in a Mearns charter of *c.* 1317 and an agreement of 1329 under the name of 'couthal' or 'conthal' (Barrow 1981b and 1983). Another tack which might be followed here is the investigation of the various Saints' Fairs which were such a feature of community life in all parts of Scotland until recently. No doubt some of these fairs have their origin in feudal grants of trading privileges, but others seems older. Most of the Saints' names are Celtic, some of them very obscure; and I am reminded that the day of the Tynwald court in the Isle of Man was known in Gaelic as 'Latha Féill Eoin' (the day of Saint John's Fair) and in English still as 'the Fair Day' (Megaw 1976:24).

Moving now to land law, we have already met the litany 'cain and conveth, *fecht* and *slúagad*' incorporated into many feudal charters. The long survival of the render of cain as 'cane fowl', 'reek hen' and the like, and of conveth is well known. A nice late example is recorded by Sir William Fraser. He was informed, near Luss, in August 1862, by a man of 88 that lady Helen, the wife of Sir James Colquhoun, had kept a ring to gauge eggs

rendered as 'kain fowl' by the tenants: any eggs small enough to pass through were rejected (Donaldson 1985:26). The survival of *fecht* and *slúagad*—the obligation to expedition and hosting—is less well known, despite the researches of Professors Barrow and Duncan. This pre-feudal obligation to army service was readily incorporated into feudal charters, usually under the name of *servitium Scoticanum* or common army service (Macphail 1916:227-45; Barrow 1973:161-6; 1980:161-2; Duncan 1975:378-83). Occasionally it appears with the Gaelic terms unaltered, as in the charter granted in 1240 by Ewen MacDougall, lord of Argyll, to the bishop of Argyll of land in Lismore, free of all dues, including 'cain, conveth, *feact*, *slagad* and *ich*' (Duncan and Brown 1956-7:219).[27] In the twelfth and early thirteenth centuries the formula *exercitus et expeditio* is found (for example *RRS* II no. 228; *Arbroath Liber* no. 50). *Circa* 1295 a grant of land in Cowal speaks of the provision of two men *in congregationibus Ergadie*—presumably the *slúagad* or hosting—for the two pennylands conveyed (Lamont 1914:no. 10). Professor Barrow has demonstrated how the older 'Scottish service' or 'common army service' continued to co-exist after the advent of feudalism beside new-style feudal military service. In a notable passage in his *Anglo-Norman Era* he has suggested how this undoubted survival in Scotland may throw light on one of the more vexed controversies of English medieval history, the question of the survival of the Anglo-Saxon *fyrd* after 1066 (1980:161-8). The obligation to render common army service long outlasted the Scoto-Norman era. It raised men for Flodden as it had raised them for Bannockburn, and was an important factor, so Sandy Grant has argued, in Scotland's successful struggle against English dominion (Grant 1984:33-4, 154-6).

Both the obligation to render common army service and the consequences of trying to escape it are recorded over very many centuries. In 1220 an ordinance of Alexander II dealt with the penalties to be imposed on those absent from the host, particularly in Fife (*APS* I.398). Nearly 500 years later *Fountainhall's Decisions* (1.87-90) carries the report of a prosecution, in 1680, of thirty five Fife gentlemen for absence from the king's host. There were Defence of the Realm Acts in 1318, 1456, and 1481 (*APS* I.467,473; *APS* II.45, 132). The Act of 1456 ordained that 'all maner of man' between the ages of sixteen and sixty 'that has landis and gudis be ready horsit and geryt efter the faculty of his landis and gudis for the defence of the Realm'. An Act of 1484 laid down that rolls be kept of all 'defensible personis' for the defence of the realm and the resisting of the king's enemies (*APS* II.164); this seems to be the origin of the term 'the fencible men'. In 1596 the army was called out to the Highlands and Islands, including all freeholders between sixteen and sixty (*APS* IV.98a, 172b). In 1685 James VII called the whole nation between sixteen and sixty to be in readiness for the king's service, according to their abilities (*APS* VIII.460a). In 1689 the Estates enacted that heritors and fencible men absent from the host should be prosecuted (*APS* IX.105). In 1704 the Act for the Security of the Kingdom again refers to the obligations of the heritors and fencible men (*APS* IX.137b). It is curious to reflect that the Acts of 1456, 1481, 1484 and 1689 were

only finally repealed *ob maiorem cautelam* in 1906 (Statute Law Revision (S) Act) just ten years before the re-introduction of conscription.

Just as we can follow the obligations of *fecht* and *slúagad* forward from Scoto-Norman times, so too can we trace them back to the limit of the historical horizon. John Bannerman has drawn attention to their presence in the *Senchus Fer nAlban* compiled in Dalriada about 700 AD (1974:146–8); and was it not precisely *fecht* and *slúagad* that was at issue at the Convention of Druim Cett in Ireland in 575 AD when Saint Columba mediated between Aidan, king of Dalriada, and the Ui Neill overking?

> The decision of the meeting is recorded in the Preface to the *Amra Choluim Chille* as follows: "And this is the judgement which he gave; their expedition and their hosting [*a fecht ocus a sloged*] to the men of Ireland always, for the hosting belongs to the territories always, their tax and their tribute [*a cain ocus a cobach*] belong to the men of Scotland. Or their fleet alone belongs to the men of Scotland; all else however belongs to the men of Ireland." (Bannerman 1974:155, 157–70).[28]

The obligation to hosting and expedition was not, of course, unique to Celtic society, nor was *fecht* and *slúagad* the only element behind later Scottish army service, but when the history of the army in Scotland comes to be written it will surely take note of this astounding example of continuity and survival from the sixth century to early modern times. It may also point a connection between the naval obligations recorded in the *Senchus* (Bannerman 1974:148–54) and the galley service of so many later West Highland charters.

Another field where there may be continuity, although this is more speculative, lies in the higher reaches of constitutional law. Two leading cases this century, *MacCormick v Lord Advocate* (1953SC396) and *Glasgow Corporation v Central Land Board* (1956SC(HL)1) have recognised that there may still be differences between Scots and English constitutional law. That there were once very considerable differences in the matter of the royal prerogative has been pointed out by a number of commentators.[29] There were, for example, different rules on the position of the crown as litigant and on crown exemption from statute and tax. The English rules consistently favour the crown. The Scottish rules are more in keeping with the maxim *rex utitur iure communi*.[30] In the interpretation of statute the crown was particularly favoured in England, and this from an early time: *ea interpretacio sequenda sit que pro rege fecit* (Ives 1983:193). The precise reason for these differences has never been convincingly explained, but it is tempting to associate the less favourable position of the crown in Scotland with the Scottish libertarian tradition discerned and described by Ronald Cant (1976 and 1983; and see Barrow 1979): that tendency towards libertarianism and against despotism which has surfaced at regular intervals in Scottish history—in the Declaration of Arbroath, in Barbour's *Bruce*, in John Major's *History*, in George Buchanan's *History* and *De Jure Regni*, in the Scottish constitution of 1640, and in the stark declaration in the *Claim of Right* of 1689 that James VII had forfeited his throne, contrasting with the more polite English fiction that he had merely abdicated:

> Therefor the Estates of the kingdom of Scotland Find and Declare That King James the Seventh . . . hath . . . Invaded the fundamentall Constitution of the Kingdome and altered it from a legall limited monarchy To ane arbitrary despotick power and hath Exercised the same to the subversione of the protestant religion and the violation of the lawes and liberties of the Kingdome inverting all the Ends of Government whereby he hath forfaulted the right to the Croune and the throne is become vacant (*APS* IX.38–9).

It is true that behind the Declaration of Arbroath lies the writing of John of Salisbury (see Simpson 1977), and behind Major and Buchanan the Council of Constance (see Oakley 1962), but is it not also legitimate to speculate, as Cant does, that there may also have been an indigenous native inheritance? The very conservatism of Scottish society, indeed, may have helped to preserve an older, less despotic order of things. In his *De Jure Regni*, as also in his *History of Scotland*, George Buchanan claimed that among the ancient Scots the monarchy had been elective within the ruling kindred, and that unsuitable rulers had been deposed or worse (see *inter alios* Trevor Roper 1966; Mason 1982). There is some evidence to support this view in the vestigial evidence surviving for early Scottish kingship; rather more in the arrangements of Gaelic society in Ireland. Buchanan also asserted that this position still obtained among the Highland clans in his own day (see Bannerman 1977:221,226) and this appears to have been true, the succession to the chiefship of the MacDonalds of Keppoch and of Clan Ranald being cases in point (Gregory 1837:108–9, 157–8). It is certainly interesting, and perhaps significant that Buchanan, himself a Gaelic speaker from the Lennox, drew upon the Celtic past and present. Buchanan, in turn, supplied a justification for the events of 1689.

I should like to conclude on a more personal note by mentioning some further survivals that have come my own way. When I was an apprentice some years ago in a large Edinburgh office I saw the annual account for an estate in Kinross-shire. Many of the incomings were feu duties, and beside the column in which these were entered, a few pounds at a time, there was another column in which sums of one penny, two pennies, three old pennies, were still being religiously entered up every year—they may be still. This column was headed 'cane' (I cannot now vouch for the exact spelling) but when I asked, no-one could tell me what cain was, or what it was doing there: a remarkable example of legal conservatism.[31] Moving from the written to the oral, I have heard traditions of *breitheamhan* in Lewis, Skye and Islay. The traditions of the Morrison brieves of Lewis are mostly now in print (see in particular Matheson 1979), but those about Tadhg MacQueen, the Skye brieve, are not, and I hope they may be collected.[32] In Barra I was given the *sloinneadh* or pedigree of a lady whose maiden name was MacNeil.[33] This included an eighteenth-century ancestor whom she named as *Eachann Óg an Tànaistear* (young Hector the tanister), although she was unable to explain this designation. On checking my books I found that this ancestor corresponded with Hector Og MacNeil of Ersary—the designation 'tanister' was not mentioned—who took charge of the estate of Barra in 1776 in the absence of his chief

(MacNeil 1923:93). I also checked the oral pedigree with a lady then in her nineties who confirmed that she had heard of this ancestor.[34] 'That is a strange nickname,' I said innocently, 'What does it mean?' 'That is not a nickname,' I was reproached, 'It is a title.' This seems, in fact, to be the latest known example in Scotland or in Ireland of the use of the title of tanist.

Nor is the scope of oral tradition confined to the West Highlands and Islands. Croft Dickinson (1941:96n) noted that a record of the offices of serjeant and mair is preserved in placenames such as 'mairsland', 'mairstoun', 'le Serjand aker' and 'le serjand croft'. In the fifteenth century a family named Comrie are recorded as mairs to the earls of Strathearn (*RMS* II nos 1248 and 2296; Porteous 1912: 46–8) and were granted a croft referred to as 'le Mariscroft', later as 'the Serjeant's croft', to the west of the castleton of Fowlis, as part of the perquisites of office. The mairship passed to another family, but the Comries remained, and, remarkably, remain to this day, as tenants in the neighbourhood of Fowlis Wester. I was informed recently by Miss Jean Comrie, who was brought up on the farm of Drummy, by Fowlis Wester, that a field on that farm still goes by the name of 'the sergeant'. Such continuity in central Perthshire was quite unlooked for.[35]

I fear I have tried your patience with this catalogue. Long though it has been, it could readily have been extended. I have said nothing, for example, about the church, or rights of sanctuary, or land measurement, about calp or colpindach. I have left unexplored the possibility that behind the very frequent resort to arbitration in Scottish legal history, or the device of the wadset, there may lie elements of procedures under Celtic law. I have not even mentioned the famous Gaelic charter of 1408 or the recently discovered Gaelic lease of *c.*1600 (Black 1984). I have concentrated almost entirely on the Gael north of Forth and Clyde, to the exclusion of Picts and Britons, and the Gael of the south west. I hope, however, that I have said enough to demonstrate that the story of Celtic law in Scotland did not come to an abrupt end with the advent of feudalism. On the contrary, many institutions of Celtic law survived for centuries, to an extent perhaps not previously realised, and traces are to be found to the present day. Such survivals are to be seen not as isolated curiosities, of antiquarian interest only, but as part of the very fabric of a legal system one of the outstanding features of which has been continuity with the past.

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NOTES

1 Save those of Hugh Trevor-Roper, now Lord Dacre, and Sir Geoffrey Elton.

2 I have particularly in mind the work of Professors Barrow and Duncan, of Dr John Bannerman, of Jenny and Patrick Wormald, and of Professor Derick Thomson.

3 For a comment on this episode see MacQueen 1986.

4 The significance of the 1457 reference, recently discovered, will be discussed in Jean and R. W. Munro's forthcoming *Acts of the Lords of the Isles* (1987). I am most grateful to them for alerting me to this reference.

5 Among many references to the ceremony of inauguration the following may be noted: for Ireland, Binchy 1970: 11-12; Nicholls 1972: 28-30; Ó Corráin 1972a: 35-7; Byrne 1973: 15-22; for Scotland, Duncan 1975: 115-16, 552-6; Bannerman 1977: 224-5; for the Isle of Man, Megaw 1976: 24. I am most grateful to Mr Basil Megaw for lending me the typescript of a lecture, 'Three Royal Inauguration Rites: Scone, Tullaghoge and Tynwald Hill', delivered by him to the British Association for the Advancement of Science in 1968.

A constantly recurring feature in descriptions of inaugurations in Scotland and Ireland is the mention of the white rod of kingship handed to the new ruler in token of his authority. This makes the more interesting the reference to a white rod in Fordun's account of the deposition of John Balliol in 1296: 'regiis exutus ornamentis et virgam albam in manu tenens' (*Chron. Fordun* 1871-2: 1.327). Simpson (1968) overlooks the significance of this reference in a Celtic context.

6 I rely here partly on Patrick Wormald's 1983 Edinburgh O'Donnell Lecture 'Celtic and Anglo-Saxon Kingship: Some Further Thoughts' (Wormald, P. 1986), and on lectures given by Professor Byrne in Glasgow in February 1984 on 'The Nature of Irish Kingship from the Seventh to the Twelfth Century', and by Professor Ó Corráin in Glasgow at The Barbarians Conference in January 1985 on 'Early Historic Ireland'.

7 Although Professor Binchy has more than once declared his intention to write more fully on *cēlsine*, he does not yet appear to have done so.

8 Scandinavian *mót* may also have been an influence, but not, I believe, to the exclusion of Anglo-Saxon *(ge)mót*.

9 Professor Barrow's Rhind Lectures for 1985 were entitled *Patterns of Settlement in Medieval Scotland*.

10 Barrow (1973: 70, 105), Duncan (1975: 167-8) and Cowan (1981: 16-18) all refer to this case. There are examples of *satrapas* being used in a Scottish context for mormaor, of *satelles* in a Welsh for serjeant of the peace (*cais*), and of *dux* in an Irish for *toíseach*.

11 Although the exact origins of the earls of Fife are not certain, it seems clear from their arms, privileges and forenames that they represented a branch of the dynasty of Kenneth mac Alpin.

12 The rubric to text no. 83 is prefaced to no. 82.

13 Or, if not *cēlsine*, then its later medieval successor *slāinte* in the sense of buying the protection of a great man (Nicholls 1972: 41). On this tack Dr John Bannerman suggests to me that there may be a connection between the compact or treaty of *cairde*, literally 'friendship', (Binchy 1941: 80; Bannerman 1974: 165-7) and the later Scottish bonds of alliance. Dr Jenny Wormald (1985) does not really explore these possibilities, although she notes (p. 33) that 'manrent raises questions about the nature of lordship and vassalage, and therefore of Scottish "feudalism", too insistent to be ignored'. 'Manrent' is itself, of course, a word of Anglo-Saxon origin. See also Skene (1886-90: III. 319-21).

14 The exact relationship between Morgund and his predecessor is not known.

15 I am indebted to Professor William Gillies for the older form *cenn cineōil*.

16 The title is now merged in that of Earl Cawdor.

17 For these dewars see *inter alia* Stuart (1846: xxi-xxiv), *HMC* (4th Rep. 514a), Innes (1861: 390-3), Carmichael (1909), Campbell (1910), Gillies (1938: 64-73), Dickinson (1941: 91 and 100-9), Carmichael (1948: 63-6, 171-81) and Moncreiffe (1982: 117-19, 177).

18 The additions are (a) Asswanly in Strathbogie and (b) the earldom of Carrick, both discussed in the text; (c) MacLachlan's land of Glassary (Steer and Bannerman 1977: 143); (d) 'the *Tosheadorach* of the lands lying west of Lochfyne', apparently including Glenorchy, the two Lochawes, Glenaray, Glenshira, Ardscotnish, Melfort and Barbreck (Skene 1886-90: iii.301); and (e) Knapdale for which see 'A

MacNeill Inventory' in *The Genealogist* (NS) XXXVI (1920). I am indebted to Mr R. W. Munro for this last reference. Dickinson's 'Strathdoune' or 'Strathoune' is Strathavon in Banffshire, 'Davachindore' and 'Fidelmonth' correspond to Auchindoir and Wheedlemont near Rhynie, while 'Kerctollony' or 'Artholony' appears to be Ardtalnaig on the south side of Loch Tay.

19 This grant does not appear in the *Regesta*, although a charter by David II to John Wallace is known (*RRS* VI p. 499 and *RMS* I no. 363 and app 2, no. 1650); David II petitioned for a marriage dispensation for Wallace (*RRS* VI p. 47)

20 And see now Keith Brown, *The Blood Feud in Scotland, 1573–1625* (Edinburgh 1986).

21 I have to thank Dr Athol Murray, Keeper of the Records, for drawing my attention to *The Camerons*. Dr Murray suggests that 'Pitmungo' can be loosely equated with Fordel, 'Brumbie Hall' with Fordel Castle, 'St Andrews' with St David's Harbour, and 'Lord Leitch' with the earl of Buckinghamshire.

22 In his lecture 'The lost Gaidhealtachd of medieval Scotland' delivered on the centenary of the chair of Celtic in Edinburgh, and shortly to be published, Professor Barrow explores the survival of Celtic secular marriage in 'the lost Gaidhealtachd' of eastern Scotland. I am most grateful to Professor Barrow for lending me a typescript of this paper.

23 For the 1614 contract see Cameron (1938: 220–5, 247)—Mr William Matheson assures me that the surname of the foster family in this case was Campbell, rather than MacKenzie. See also Innes (1861: 366–72), Skene (1886–90: III. 321–3), Mac Niocaill (1972: 58–9), Nicholls (1972: 79), and Barrow (1973: 107 and 1980: 158).

24 There is a wide literature on tanistry, of which the following may be noted: Mac Niocaill 1968, Binchy 1970: 24–30, Nicholls 1972: 25–9, Ó Corráin 1972a: 37–42 and 1972b, and Duncan 1975: 112–14.

25 On this I reluctantly dissent from Professor Barrow (1985: 7–9) who is unwilling to see the notion of tanistry as part of the background in this instance. See also Duncan 1975: 172–3.

26 I am grateful to Dr John Bannerman for bringing this passage in MacPherson to my attention.

27 Professor William Gillies suggests to me that *ich* must represent *O.Ir.* ic(c) 'payment, requital, atonement'. Dr Alexis Easson has directed me to a Great Seal confirmation in 1581 of a charter granted the previous year by Neil Campbell, rector of Craignish, to James Campbell of lands in Craignish and Ardscotnish, which contains the following: 'cum clausula warrantizationis a solutione de *lie kane, conveiff, garraze, eicht* [the same as *ich*?], *sornyng* . . . et ab omni *lie oisting, watching, fecht, flwarize et downaze*' (*RMS* V no. 131).

28 Apart from Bannerman (1974) there are accounts of the Convention of Druim Cett in Byrne (1973: 110–11) and Anderson (1980: 146–8).

29 See Philip (1928), Fraser (1948: 146–76), Mitchell (1957) and Cameron (1962).

30 Thus Baron Sir John Clerk and Mr Baron Scrope, writing in 1726 on the powers of the post-Union Court of Exchequer, note that, as the law concerning private rights in Scotland had to be followed, the lands of Crown debtors in Scotland 'cannot be subjected to extents, inquisitions and seizures but must be effected in the same manner as the real estates of debitors are by the laws of Scotland, that is by adjudications, inhibitions, decreets of sale and other diligences; because by the laws of Scotland, *rex utitur jure communi*, and because by the articles of Union the laws of Scotland in relation to private rights are continued' (Clerk and Scrope 1820: 138). I owe this reference to Maclean (1983).

31 Sad to relate, payments in respect of cain, although still within office memory, have ceased to be entered up. I am grateful to Mr Ivor Guild of Shepherd and Wedderburn, WS, for this information.

32 I have heard traditions of Tadhg MacQueen and his descendants from Dr Sorley Maclean, Mr William Matheson and Dr John MacInnes.

33 The late Mrs Marion Somerville (née MacNeil).

34 The late Miss Rachael MacLeod, formerly schoolteacher in Barra, who lived to see her century.

35 I am indebted to Miss Comrie for her assistance.

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