Preface

This book began life in 1978 in research towards a Ph.D. in the Faculty of Law at the University of Edinburgh.¹ Two years before, David Sellar’s Honours course on the History of Scots Law, and the sense that a whole field of study lay out there awaiting further research, had begun to inspire my interest in the subject. David highlighted the medieval more than the early-modern aspects of Scottish legal history, while also emphasising a theme of continuity in the development of the law and legal system down to the present.² He presented a direct challenge to the orthodoxy established in the mid-twentieth century by the scholar-judge Lord Cooper of Culross (1892–1955).³ Cooper’s line had been that the story of Scots law was one of ‘false starts and rejected experiments’,⁴ ending only with the 1681 publication of the seminal Institutions of James Dalrymple, Viscount Stair. The book came in the nick of time to rescue at least Scots private law from the fate of absorption into English law after the Anglo-Scottish Union of 1707. Borrowing from England had been the false start and the rejected experiment of the ‘Scoto-Norman’ period before 1300; there had then followed a ‘Dark Age’ for the system.⁵ From this it began to be rescued by the development of a central court in the sixteenth century, the emergence of a legal profession around that court, and (resulting in part from the education of many members of that profession in the law schools of continental Europe) a reception of the learned Roman and Canon laws. The end result, systematised by Stair, was something quite distinct from English law, and it was expressly preserved by the Treaty and Acts of Union along with the separate legal system within the newly united kingdom of Great Britain.

My initial thesis topic was the action or remedy of spuilzie. This seemed an excellent candidate with which to test the argument about rejected experiments and continuity in the development of Scots law. Spuilzie had undoubtedly formed part of Scots law since at the latest the early fifteenth century, but had survived down to the twentieth, the latest reported case when I began my research having been decided only seven
years before. The action was thought to be one for the recovery of possession of goods by a person who had been dispossessed of them. The claim was one that the ex-possessor could make even against the owner of the goods. In earlier times, however, and under the name ejection, it seemed to have allowed recovery of possession of land as well as of goods. In continental European jurisdictions, the *actio spolii* had been received into their developing systems, displacing the Roman possessory interdict *unde vi*. But it was also suggested in Scotland that, at least in relation to the possession of land, the spuizie action had taken over from the earlier brieve of novel dissasine, itself a thirteenth-century borrowing from English law’s assize of novel disseisin.

It was this last point that would ultimately take my focus away from spuizie, although I did not abandon the subject altogether. In a major challenge to Cooper’s ‘Scoto-Norman’ analysis of the twelfth and thirteenth centuries, Geoffrey Barrow (who became the second supervisor of my thesis in 1981) had shown (among many other things about the secular legal system of the period) clear evidence for the use of the brieve of novel dissasine in the justiciar’s court in the 1260s. My own realisation that this same brieve was certainly still in use in the 1430s, referred to in a practical treatise of the mid-1450s, and probably still known at the beginning of the sixteenth century made it difficult to see spuizie as a lineal descendant or replacement of that particular form of action, especially when there was reference to the wrong of ‘spoliation’ in the fourteenth century as well.

This survival of novel dissasine well into the fifteenth century matched other evidence that Sheriff Hector McKechnie had set out in a lecture at Glasgow University in 1956. The brieve of right, another form of action for the recovery of land for which there was also pre-1300 evidence of borrowing from England, had continued in use until at least the beginning of the sixteenth century. My own researches confirmed this observation and provided further evidence to support it. McKechnie’s lecture, viewed as a whole, further demonstrated that the procedural system of briefs in general had not only lasted long after 1300, indeed down to the twentieth century, but had also been developed and innovated upon until at least 1500. However courteously expressed, the lecture delivered what was very much a knockout blow to Cooper’s overall thesis of discontinuous legal development after 1300.

McKechnie did not draw attention to the fifteenth-century evidence for novel dissasine already mentioned, but he did point out a confusion about the brieve of mortancestor or mortancestry into which writers on
Scots law had fallen from the late sixteenth century onwards. That was to give the name ‘mortancestor’ to the process for service of heirs to land instituted by the brieve known in pre-1500 sources as the brieve of inquest. The brieve of mortancenest itself, a process by which an heir could recover land being wrongfully occupied by some third party, was also introduced into Scotland before 1300 on the model of the English assize of mort d’ancestor, and continued to enjoy its own separate existence beyond 1500 (although perhaps not very long beyond).

What we therefore seemed to have in Scotland up to 1500 was a scheme of actions for the recovery of land: (1) the possessory novel dissasine; (2) the protection of close heirs against intruders under mortancestry; and (3) the brieve of right for all other claims based upon heritable entitlements to land. Moreover, the evidence for the brieves in action showed clear consistency across time with the accounts and styles provided by the treatises and formularies of medieval Scots law. The brieve of right pertained to the jurisdiction of the sheriff and burgh courts, and the other two brieves to the justiciary court; the actions were decided by juries or assizes held in these courts. The brieves were ‘pleadable’ in that the issue to be determined by the jury was defined by the parties exchanging allegations of fact along with admissions and denials, and the decision of the jury on that issue, once defined, was put into immediate effect. This contrasted with the ‘retourable’ brieves exemplified by the brieve of inquest, where the jury had to answer questions set out in the brieve and return (‘retour’) their answers to the royal office that had issued the brieve so that it could order the further action then required: for example, to give the identified heir sasine of the lands in question.

A final point about brieves with which McKechnie had dealt only in passing was the existence in Scots law before 1300 and after 1400 of a jurisdictional rule that said that no person could be made to answer for his freeholding except by the king’s pleadable brieve – that is, as it now seemed in the light of my other researches, one or other of novel dissasine, mortancestry and right. Once again there was a parallel rule in England. Much more evidence for the existence of this rule in Scotland was in print than had been the case when McKechnie wrote, while in 1966 Alan Harding had published a fundamentally important study of the king’s peace and protection in Scotland in which he identified what I now called ‘the brieves rule’ as an aspect of his subject. Put in simple terms, the king offered protection to stability of tenure by insisting on the use of certain procedures if the sitting tenant was to be removed. At the same time, these procedures enabled external parties to make claims based upon either their prior possession or their rights of inheritance. Although
Harding took no particular notice of novel dissasine or mortancestry in this regard, he suggested that originally the brieve of right had been simply the king exercising his powers of protection by ordering that right be done, implying later elaboration from this base.\textsuperscript{24} Taking all together, then, these pleadeable brieves and the brieves rule did indeed amount to a system for the protection of rights to land, which had endured from at the latest 1250 until, at the earliest, 1500. The idea that the development of Scots law in this area on English lines had been rejected after 1300 was clearly no longer tenable; continuity of development appeared, in this regard at least, to characterise the whole medieval period.

There was, nonetheless, an apparent discontinuity in the story that needed further investigation. The whole edifice of pleadeable brieves in relation to land disputes seemed to disappear after 1500. The most obvious possible explanation for this, as McKechnie had hinted,\textsuperscript{25} was the rise within the king’s council in that period of a central court based mainly in Edinburgh – the court that became known as the Court of Session, and succeeded in establishing its superiority in non-criminal matters over the local sheriff, burgh and justiciary courts. In 1532 the court was reconstituted as a College of Justice with jurisdiction in all civil actions.\textsuperscript{26} While this development too had its elements of continuity stretching back well before 1500, as Archie Duncan had shown in another major contribution published in 1958,\textsuperscript{27} a key fact, as it seemed to me, was that the court’s medieval forerunners had no jurisdiction in cases dealing with disputes about ‘fee and heritage’ – that is, about heritable entitlements to land. But by 1543 at the latest the position had been reversed: the court claimed, not just jurisdiction in heritage cases, but an exclusive jurisdiction.\textsuperscript{28}

That the earlier restriction on council related in some way to, or was even to be explained by, the ‘brieves rule’ seemed to gain support from a mid-fifteenth-century document in which William, Richard and Henry Graham invoked both it and the exclusion of the king’s council from cases of fee and heritage in defending an action brought against them in the latter body in respect of the lands of Hutton in Dumfriesshire.\textsuperscript{29} But the document shows that there were two separate jurisdictional rules by its date, each having its distinct effect, and I argued that any link between these rules must be indirect, rather than immediate or causal. My proposal was that council and, indeed, the Scottish parliament originally enjoyed a jurisdiction that supplemented ordinary legal processes as necessary: for example, in the regulation of possession of land prior to any dispute about the actual entitlements of the parties.\textsuperscript{30} I carefully avoided any suggestion that there was here a latent jurisdictional division between law and equity, bearing in mind that the formal English division of labour between the courts of common law and the courts of equity was a
relatively late development in that system. But it may be that Scotland did not go down that route only because from the supplementary processes in the king’s council there emerged a court that eventually assumed authority over all other courts (including the ecclesiastical tribunals), thereby establishing and maintaining a unity of judicial administration in which law and equity could be treated together rather than separately from each other. The Scottish legal system changed significantly in the sixteenth century, therefore; but the change was not brought about by any sense that the preceding three centuries had led into an unlit blind alley from which contemporaries recognised a need to make escape. Rather, the process was much more organic or evolutionary, in which part of the established system took on new functions, while the need for some of the other parts gradually reduced to zero. In S. F. C. Milsom’s striking phrases about legal development in England:

lawyers have always been preoccupied with today’s details, and have worked with their eyes down. The historian, if he is lucky, can see why a rule came into existence, what change left it working injustice, how it came to be evaded, how the evasion produced a new rule, and sometimes how that new rule in its turn came to be overtaken by change. But he misunderstands it all if he endows the lawyers who took part with vision on any comparable scale, or attributes to them any intention beyond getting today’s client out of his difficulty.31

No doubt in this process there was at least implicit criticism of the parts of the law not used, for no longer serving the purposes of users of the system as well as did the now developing parts. But change came about within the system rather than being a reaction to a perception of its having already fallen apart more or less completely.

The significance of the relationship between medieval Scots and English law underpinned at least three other points that I tried to make in my thesis and elaborated on much more in the book that followed some eight years after completion of the former.

First, the development of the writ of right, the assizes of novel disseisin and mort d’ancestor, and the rule requiring writs in cases about freeholdings had long been seen as crucial in the development of a Common Law in England in the twelfth century, in the sense that royal justice alone could create a law and legal system that was indeed common to the whole kingdom. The same could be said of Scotland, albeit at a somewhat later time. But what triggered these developments? Milsom had transformed thinking on the subject in England by suggesting that the royal aim in the twelfth century had been, not to create a common law superseding non-royal forms of secular justice, but rather to make what he called ‘the legal framework of English feudalism’ work according to its
own norms; that is, to compel the lords of whom land was held by tenants
to do justice to them in accordance with the customary forms of tenure,
or else the king would.32 When I was writing my thesis, Milsom’s views
had only just begun to receive critical analysis from others, notably
Robert C Palmer;33 but, by the time I came to convert the thesis into a
book, many more had waded in, and I therefore sought to make a Scottish
contribution to the debate.34 This linked the subject much more firmly to
another, even wider, discussion launched by an article published in 1974
by Elizabeth A. R. Brown.35 In it she challenged the notion of feudalism
as a distortion of the realities of medieval Europe as a whole. In Scotland
the major contributors had been Geoffrey Barrow (who had articulated
most effectively the concept of a feudal Scotland, albeit principally as a
system of government) and Archie Duncan (who had memorably
doubted whether the ‘tired structure’ of land tenure in the thirteenth
century had any significance beyond legal formality).36 In the book I was
accordingly led into a much fuller account of, in particular, lordship
courts and their role in regulating land tenure, and the relationship that
had to royal justice.37 The view that I took, and continued to elaborate in
subsequent publications, was that tenurial relationships remained
significant in Scotland from the twelfth to the end of the fifteenth
centuries.38 Even if we accept, with Duncan, that tenurial relationships
were by no means invariably indicators of significant social relationships
in the Middle Ages, legal form was always critical to the ownership,
transfer and inheritance of land; while the landed society of the period
can scarcely be understood at all without an appreciation of the forms in
which their relationships and transactions were put into effect. Lordship
courts played an ongoing role of some importance in their administration
throughout, and a key theme still to be fully worked out is the interplay
between royal and other jurisdictions, such as those of barony and regality
and also burghs, throughout the medieval period.39 I have continued to
find the distinguished work of Keith Stringer and Alexander Grant of
particular help in this regard.40

The second point is that medieval Scots law was by no means a carbon
copy of its English counterpart.41 The judicial system in existence in
Scotland by 1250 was much simpler, much more localised and much less
professionally based than royal justice in England. It grew alongside the
reach and control of the kings themselves, as I attempted to show in a
series of maps published in the *Atlas of Scottish History to 1707* in 1996,42
and even in the fourteenth and fifteenth centuries that was challenged by
English occupation along the border from Berwick to Lochmaben.43 But
otherwise it changed very little before 1500 apart from the growth of
judicial business in parliament and the king’s council.

The brieve system too remained relatively simple. Novel dissasine may
have spawned a brieve *de aqueductu* in the fifteenth century to deal with
dispossession of watercourses,⁴⁴ but the brieve of right in the mature form
it had probably achieved before 1300 looks like a consolidation of the writ
of right and the writ *precipe* in England, and needed no development like
the multiplication of the writs of entry that occurred south of the border
after Magna Carta in 1215.⁴⁵ Mortanecstry was adjusted by statute in
1318, as was novel dissasine, with the legislation in both cases implicitly
bringing Scots law into line with developments that had taken place in
England after the first introduction of the brieve in Scotland;⁴⁶ but there
is no other evidence thereafter to suggest further Scottish developments
to take account of anything happening in England.

All this tends to suggest that the legal borrowing, or transplanting,
from English into Scots law in the medieval period was not uncritical or
simply a by-product of the fact that before the Wars of Independence a
substantial number of Scotland’s leading landholders also held land in
England and therefore looked to have the same legal regime applying in
each country. It may well be that the different political and social
conditions applying in the two kingdoms, especially after the wars, led to
the establishment and then the preservation of a simpler system in
Scotland; it was certainly important that there was no parallel to the
emergence of the professional lay judiciary or the organised secular legal
practitioners pleading in the royal courts in England well before the end
of the thirteenth century.⁴⁷ Notaries public, on the other hand, began to
proliferate in the fourteenth century in Scotland, clearly playing an
increasingly important role in legal practice in and out of court;⁴⁸ while,
as shown in some detail in the book and other articles published since it
came out, laymen who were skilled and knowledgeable in matters of law
also become more and more visible after 1300, with some at least in the
fifteenth century being also graduates.⁴⁹ These were perhaps the
forerunners of the class of men who in later centuries would become
members of the Faculty of Advocates in Edinburgh.

My final point on the relevance of English to Scottish legal history is
that I never intended to suggest that the rising Common law was the only
influence on the making of Scots law in the medieval period up to 1500.
Lord Cooper was surely correct to discern the importance of the Canon
law and the church courts as at least equal and even greater than that of
the common law.⁵⁰ This book confirms that insight at least incidentally,⁵¹
and I have sought elsewhere to demonstrate the point in greater detail,
highlighting the way in which the secular and the ecclesiastical interacted
in the administration and development of the law, including on the
criminal as well as on the civil side.⁵² Peter Stein and the late Bill Gordon
have demonstrated in as much depth and detail as the sources may allow
the role played by Roman law (mainly via the Canon law) from the twelfth
My own work has also sought to show the importance of what may for convenience be called customary law: not just Celtic or Gaelic custom, as perhaps exemplified in particular by the laws of Galloway, but also the possibly Anglo-Saxon *wrang* and *unlaw*, *bloodwite*, *twertnay*, and *burthensak* as jurisdictional and procedural terms that continued to feature in Scots law into the fifteenth century in at least some cases. *Regiam Majestatem*, the key Scottish legal text of the later Middle Ages and beyond, may have been largely based upon the late-twelfth-century English text *Glanvill*; but it was not a slavish copy, and it also contained significant material drawn from Canon and Roman law as well as the more native and customary sources. In other words, many elements went into the mix of law in medieval Scotland, and the Common law was but one of them.

In conclusion, it has been surprisingly pleasant to return to research done many years ago and to find that, despite much additional and important corrective work by others in the same or adjacent fields since it was published, its basic arguments as just outlined seem still to hold water. Perhaps a last observation can be made, building on the earlier discussion of the concept of feudalism and the connection between legal and social relationships. One of the most important articles to be published during the time of my Ph.D. research was Jenny Wormald’s justly celebrated piece on the bloodfeud in medieval and early modern Scotland, with its emphasis on ‘informal’ justice and dispute resolution over the more ‘formal’ processes of the law. Mark Godfrey has produced a perceptive discussion of this seeming contrast in the Festschrift for Dr Wormald published in 2014. In the context of my own project as described in this Preface, the ‘justice of the feud’ at first looked like a refreshingly different take on the period Lord Cooper had characterised as the ‘Dark Age of Scottish legal history’, albeit one that underplayed the strength of the legal system in the fourteenth and fifteenth centuries. The arguments of Dr Wormald (and also Alexander Grant) that the period was not one of constant violent conflict between crown and an over-mighty nobility, or between members of the nobility themselves, but rather one where there was at base a common agenda in the pursuit of peace, stability and the preservation of the kingdom’s independence, chimed well (as it seemed to me) with my own perception of an operative law and legal system in the period. Indeed, the law was a crucial dimension of the kingdom’s sense of its own identity among other kingdoms. If parties more often negotiated than litigated the way to the solution of their disputes, it could be said that they did so ‘in the shadow of the law’, which not only set out the parties’ respective legal entitlements but also often actually provided the means (arbitration procedures, formally written binding agreements of various kinds, royal orders upholding
agreed arrangements) by which settlement was achieved and enforced. More recent scholarship has, however, tended to emphasise politics, patronage and relative power (including the power to wreak violence against other people and property without any apparent concern about redress) as the keys to understanding the nature of society and events in our period. The significance of law, legal rights and legal processes is downplayed in this perspective if not actually altogether bypassed. My response would still be that at least sometimes, and probably much more often than that, these are always factors in understanding the activities, events and institutions we are researching. Law was (and is) a crucial part of the fabric of society, determining personal status, entitlements to property and inheritance, and (where needed) disputes about things that had gone wrong. So elemental is it to social and indeed to political relationships, in fact, that, if we do not at least attempt to comprehend it, we may actually miss it altogether.

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NOTES

1. The finished version is Hector L. MacQueen, ‘Pleadable brieves and jurisdiction in heritage in later medieval Scotland’, Edinburgh University Ph.D., 1985 (accessible online at <https://www.era.lib.ed.ac.uk/handle/1842/6861>). It is cited below as ‘MacQueen, “Pleadable brieves”’. This book is cited below as ‘MacQueen, CLFS’.


5. This ‘Dark Age’ theory was strangely accepted by Cooper’s distinguished medievalist contemporary, William Croft Dickinson, despite the latter’s invaluable work on the medieval and early modern sheriff, barony and burgh courts: see his ‘The administration of justice in medieval Scotland’, Aberdeen University Review, 34 (1951–2), 338–51.


8. On the actio spolii, see still Francesco Ruffini, L’actio spolii: Studio storico-giuridico (Turin, 1889).


13. See MacQueen, ‘Pleadable briefes’, 180–200; MacQueen, CLFS, ch. 5.

14. MacQueen, ‘Pleadable briefes’, 90, 142; MacQueen, CLFS, 111, 129, 243 n. 47.
17. See, e.g., McKechnie, *Brieves*, 16 (‘Naturally, I tread softly in such footsteps’).
26. See Godfrey, *Civil Justice in Renaissance Scotland*, especially ch. 3.
29. HMC, *Various Collections*, v. 77. The original can now be found at National Records of Scotland GD1/1430/1. See MacQueen, ‘Pleadable brieves’, 14–16, 150–1, 310; MacQueen, *CLFS*, 112, 215; and further R. C. Reid, ‘The border Grahams, their origin and distribution’, *Transactions of the Dumfriesshire and Galloway Natural History Society*, 38 (1959–60), 85–113 at 89–91, dating the document to 1460.
30. See MacQueen, ‘Pleadable brieves’, 249–64; MacQueen, *CLFS*, ch. 8.
MacQueen, *CLFS*, ch. 1. For my earlier thoughts, see MacQueen, ‘Pleadable briefs’, 234–48.


41. Possibly in the twenty-first century one should say ‘copy and paste’ rather than ‘carbon copy’.

43. See MacQueen, 'Pleadable briefes', 70–1, 88–9; also Alan Borthwick and Hector MacQueen, ‘Law, lordship and tenure: A fifteenth-century case study’, in Stephen Boardman and David Ditchburn (eds), *Studies in Honour of Alexander Grant*, forthcoming.
44. See MacQueen, ‘Pleadable briefes’, 197–8; MacQueen, *CLFS*, 158–61.
45. See MacQueen, ‘Pleadable briefes’, 243–8; MacQueen, *CLFS*, 207–9.


57. Discussed by Dr Andrew Simpson in the Foreword to this edition.


60. See Alexander Grant, *Independence and Nationhood: Scotland 1306–

61. See MacQueen, ‘Regiam Majestatem, Scots law, and national identity’.


63. For royal orders, see MacQueen, ‘Legal afterword’, 369–70.
