Foreword:
Common Law and Feudal Society in Scholarship
since 1993

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INTRODUCTION

In 1995, Alan Harding described Hector MacQueen's *Common Law and Feudal Society* as 'one of [the] most penetrating studies yet produced of any period of Scottish legal history'.¹ In the twenty years since then that claim has been vindicated by countless studies that have relied heavily upon MacQueen's work, and several substantial contributions to scholarship that have directly engaged with it.² While those contributions have certainly contested, developed and refined elements of his arguments in significant ways, they have left largely untouched many of his central claims. So it is no longer doubted that there emerged in medieval Scotland a complex and broadly coherent common law that furnished litigants with a sophisticated framework of actions designed to remedy a wide range of feudal disputes.³ Nor is it doubted that both the English common law and the canon law strongly influenced this Scottish legal culture.⁴ Subsequent work has also confirmed MacQueen's insightful argument that the law which emerged from that culture 'took on a life of its own which did dictate the pattern of change to a large

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degree'.⁵ Put another way, while political, social and economic factors all performed roles in causing legal changes, the nature of the changes in question were strongly informed by the existing tradition.⁶ Furthermore, it seems clear that there was broad continuity in these developments. The strong influence of the Scottish common law in shaping the nature of legal change can be traced throughout the medieval period.⁷ Only in relation to certain particular matters – such as the development of new forms of centralised justice and jurisdiction at the end of this period, and the foundation of the College of Justice in 1532 – has new research superseded MacQueen's analysis.⁸

As MacQueen himself has explained in his Preface to this edition, all of his arguments mentioned above represented challenges to orthodox views of Scottish legal history at the time.⁹ Indeed, his arguments also made a significant contribution to contemporary debates concerning Scottish history more generally. For example, Jenny Wormald and Alexander Grant had attacked the older view that Scottish politics of the fourteenth and fifteenth centuries were dominated by violent power struggles between a weak crown and an over-mighty nobility. They had sought to show that the period was more generally characterised by the pursuit of stability and peace, and the maintenance of Scottish independence. MacQueen's argument that there was indeed a functioning legal system during this period that was effective in the resolution of disputes complemented these claims.¹⁰ Furthermore, given the origins of much of the Scottish common law in English feudalism, MacQueen's work retains a broader relevance for students of English legal history. Indeed, MacQueen demonstrated this to be so by considering the emergence of the Scottish legal system in the light of debates concerning the development of the English common law.¹¹

Yet it is not the purpose of this Foreword to discuss these matters. Rather, the aim here is to explore how various scholars have engaged critically with some of the claims advanced in *Common Law and Feudal Society* since its publication. In order to do this, the elements of MacQueen's thesis that have proven contestable will be examined. Reference will first be made to recent research concerning the reconstruction and interpretation of medieval Scottish legal texts dating from the thirteenth and fourteenth centuries. Subsequently, one significant attempt to challenge MacQueen's account of the thirteenth-century Scottish common law will be examined. Finally, reference will be made to important research concerning the development of the Scottish courts and the common law during the late fifteenth and early sixteenth centuries. In the process, it will be suggested that some of the challenges to MacQueen's work are perhaps less robust than one might think.

RECONSTRUCTING AND REINTERPRETING THE SOURCES

The articles published by Alice Taylor over the past few years are among the most significant recent contributions to the study of medieval Scottish legal history.¹² Taylor has reconstructed the textual traditions emanating from a variety of legal compilations dating from the thirteenth and fourteenth centuries, such as the *Leges Scocie* and the *Statuta Regis Alexandri*. She has also underlined the point that the editions of those compilations printed in the nineteenth-century *Acts of the Parliaments of Scotland* (hereafter *APS*) are not wholly reliable.¹³ Taylor has already taken considerable steps towards remedying the problem with her critical edition of the *Leges Scocie* (*LS*).¹⁴ Her forthcoming Stair Society publication, *The Auld Lawes of Scotland: Law and Legal Culture in Medieval Scotland*, together with David Fergus's edition of the fourteenth-century text *Quoniam Attachamenta*,¹⁵ will enable historians to work confidently with the sources. In addition, Taylor is demonstrating that her research into the textual traditions underpinning the legal compilations has significant consequences for how medieval Scots law is to be understood. The full implications of this will be made clear with the publication of her forthcoming book, *The Shape of the State in Medieval Scotland*.¹⁶

From Taylor's published articles, it seems likely that she will offer some critical comments on the argument pursued in *Common Law and Feudal Society*. For example, that book used versions of texts published in *APS* that cannot now be said to be entirely reliable in the light of her research.¹⁷ It is to be hoped that she will explore the consequences of this in detail in *The Shape of the State*. For the purposes of this Foreword it seems appropriate to make reference to one way in which she has already enriched the reconstruction of the medieval Scottish common law presented in *Common Law and Feudal Society*. This relates to the statutes enacted in 1318 by Robert I (r. 1306–29) and the extent to which that legislation can shed light on the origins and purposes of one contemporary legal text.¹⁸

MacQueen's Research Concerning the 1318 Legislation

In *Common Law and Feudal Society*, MacQueen examined the acts promulgated in 1318, and several features of that legislation have been explored in more detail since by Taylor. The first is the declaration of the *brieves rule*. This provided that

no one is to be ejected from his free holding [*liberum tenementum suum*] of which he claims to be vest and saised as of fee without the king's pleadable *brieve* or some similar *brieve* nor without being

first reasonably summoned to a certain day and place for his free holding.¹⁹

(Hereafter this will be referred to as the 'brieves rule'.) MacQueen argued that a 'free holding' (*liberum tenementum*) was 'in effect any life interest in land, whether or not that interest was heritable, a common example from the fourteenth century onwards being the liferent which fathers often reserved to themselves when granting the fee of their lands to their sons in order to minimise inheritance formalities'.²⁰

Alongside the brieves rule, the 1318 legislation also reformed the brieve of novel dissasine. What was a dissasine? To explain, to have 'sasine' was 'to have been put into possession of land by the grantor, typically although not invariably the lord of whom the lands were to be held'. Consequently, 'dissasine' arose where one with sasine was ejected from his possession. The remedy that the brieve of novel dissasine promised was the restoration of the 'relationship of sasine between [the dissaised] and the land's lord'.²¹ MacQueen argued that there was thought to be a problem with this form of action during the early fourteenth century, and that this was addressed in 1318. Prior to that date the brieve of novel dissasine was frequently brought not against the actual dissaisors, but rather against those they had put into the disputed lands as their feudal tenants. That meant that an innocent third party, and not the actual wrongdoers, could be made to answer the brieve. Thus in 1318 the procedure used in disputes concerning novel dissasine was reformed to give added protection to the tenant. Thereafter the dissaised was required to name the original dissaisors – if still living – in his brieve, as well as the tenant. As MacQueen put it, '[a] crucial consequence was the spreading of the pains of losing the action'.²²

MacQueen also attempted to explain these reforms of the procedures used to protect landholdings in terms of the political situation in 1318. During the previous decades the Wars of Independence had resulted in the dispossession of many of the political enemies of Robert I (r. 1306–29). Robert I now offered the 'disinherited' the opportunity to enter his allegiance, and to recover their lands. But he knew that would result in some upheaval, particularly where his supporters had simply seized the lands of the disinherited, and perhaps then granted sasine of those lands to innocent third parties. Consequently he sought to maintain control of the situation by underlining the point that the 'disinherited' should rely upon due legal process when attempting to recover their lands. He also developed the law to deal with the possibility that some of his supporters might have committed dissasines during the war, and then put innocent tenants into the lands they had seized. The king made it clear that the dissaisors were to answer for the wrong, as well as the individual tenants.²³ Elsewhere MacQueen also suggested that Robert I had broader purposes

in enacting this legislation in the wake of the Wars of Independence. As he puts it, ‘the wide-ranging legislation enacted at the symbolically significant location of Scone in 1318 was perhaps an assertion by Robert I of the regal authority to make law which Edward I [of England] had sought to exercise in 1305’.²⁴

The 1318 Legislation and the Medieval Compilations of Scots Law in Taylor’s Work

MacQueen’s account of the 1318 legislation has now been revisited, enriched and refined by Taylor’s work concerning what would seem to be a near-contemporary treatise known as the *Capitula Assisarum et Statutorum Domini David Regis Scotie* (CD).²⁵ Having reconstructed this text, Taylor has sought to explore its origins and purposes by comparing its provisions in detail with both the 1318 legislation and also her critical editions of other texts that were in circulation during the thirteenth and early fourteenth centuries. Among those works are the compilations known as the *Leges Scocie* (LS) – the contents of which can largely be dated to the reign of William I (r. 1165–1214)²⁶ – and the *Statuta Regis Alexandri* (SA), which contains laws attributed to Alexander II (r. 1214–49).²⁷ When comparing these works, Taylor notes that SA c.7 and CD c.41 preserve different versions of the statute that is said to have introduced a remedy for novel dissasine into Scots law. CD c.41 declares that the successful claimant in a case of novel dissasine should receive “damages or arrears” (*dampnis seu arreragiis*). This provision is absent in SA c.7. Might that help scholars to date CD? Taylor states that the 1318 act that reformed the procedure of novel dissasine contains the earliest known reference to the payment of *dampnum* for the wrong. Indeed, CD c.41 and the 1318 legislation both emphasise the need for an immediate award of damages to a successful pursuer. Drawing on these and other similar arguments Taylor suggests that CD c.41 ‘fits the context of its earliest manuscript – the reign of Robert I’.²⁸ Yet Taylor’s work also draws attention back to the question of exactly which party benefited from the reforms of 1318 to the procedures designed to remedy novel dissasine. It will be recalled that MacQueen suggested that the primary beneficiary of these reforms was the sitting tenant, because as a result of the promulgation of the 1318 statute he could only be sued for dissasine alongside the original dissaisor, assuming that individual was still alive. But Taylor, noting MacQueen’s arguments in this regard, also suggests in passing that under the 1318 act and the rules outlined in CD c.41 ‘there were also significant benefits for the dissaised’.²⁹ Presumably she has in mind the points that the dissaised could definitely seek damages under the statute, and the evidence does not reveal

whether or not he could do so prior to 1318. If the act of 1318 at least confirmed his rights to damages, then this may have conferred a significant benefit upon him. Indeed, the rule that he had to sue the actual dissaisors, if still living, might have made this development more palatable. Innocent sitting tenants would not now be left to face alone both the loss of land and *also* a claim for damages for a wrong they did not perpetrate. Consequently, it may be that the legislation was not designed to change the law so as to benefit only the sitting tenant.

Furthermore, it should be noted here that Taylor's published articles, and those of others citing her unpublished work, indicate that she will attempt to revise MacQueen's account of the *brieves* rule, and in particular the extent to which it was in operation prior to 1318. Again it is clear that she will draw on her knowledge of the texts mentioned above and the surviving formularies containing the older forms of action. More will be said about this below while discussing the work of David Carpenter; he has also re-examined MacQueen's work on the *brieves* rule and challenged his conclusions.³⁰

Taylor also advances other arguments that serve to enrich MacQueen's account of the purposes underlying the enactment of the 1318 legislation, and the law-making activities of Robert I more generally. Again, her argument begins by reflecting on what can be said about the fact that *CD* and the statutes of 1318 resemble one another quite closely in various respects. Reference has already been made to the similarities between *CD* c.41 and the legislation of 1318 concerning the *brieve* of novel dissasine. Taylor also shows that the rules regarding repledging of men from one court to another changed between 1230 and 1318, and that *CD* c.38 reflects the later position. Yet, while one might conclude that *CD* c.38 must have been enacted after 1318, Taylor goes to some lengths to point out that this is not so. This is because the rules enacted in 1318 may have reflected the existing common law, at least to some extent. But what her research does prove is that *CD* – which is first attested in a manuscript of 1318 × 1329 known as the Ayr Manuscript – fits the legal context of the early fourteenth century better than that of the first half of the thirteenth century. Taylor then goes on to point out that there is further evidence that may serve to date the original compilation of *CD* to the years immediately following 1318.³¹

Having made these points, Taylor then poses the question of how one is to explain this extensive interest in the law and in law-making during the reign of Robert I. In so doing, she develops MacQueen's arguments.³² It will be recalled that in *Common Law and Feudal Society* he explained the 1318 legislation in terms of the need to accommodate the returning disinherited. In a later article he also hinted that this might have served to underline very publicly Robert I's own assertion of regal authority over

his realm. Taylor develops these themes by drawing attention to just how insecure Robert I's kingship still was in 1318, both within the Scottish polity and outside it. She notes Robert I's own attempts to establish the legitimacy of his rule, and makes reference to Harding's arguments concerning the possibility that the king used the composition of the text *Regiam Majestatem* to demonstrate his role as the preserver and enforcer of the old laws of the Scots around which the whole nation could unite.³³ *CD* may have served a similar purpose. It placed legislation of Robert I alongside that attributed to his ancestor, David I (r. 1124–53), who was remembered as a great and just law-giver. It attributed the whole work to King David, presenting Robert I's own contribution as a seamless extension of the tradition of law-making initiated by his predecessors.³⁴

Thus Taylor's work on *CD* serves to shed further light on the 1318 legislation and also law-making more generally in Robert I's reign. As shown by the examples given here, it promises to enrich – and also to some extent challenge – the understanding of medieval Scots law presented in *Common Law and Feudal Society*. It is hoped that the debate that will undoubtedly result will be studied very carefully by all other scholars in the fields of Scottish legal history and Scottish medieval history more generally.

HOW COMMON WAS THE COMMON LAW IN THE THIRTEENTH CENTURY? PROFESSOR CARPENTER'S ARGUMENTS

Taylor is not the only scholar to have engaged critically with the account of the medieval Scottish common law that is presented in *Common Law and Feudal Society*. Recently David Carpenter has published an important article-length study of Scottish royal government in the thirteenth century. In so doing, he has directly challenged several elements of MacQueen's thesis, and so it is appropriate to say something about his arguments here.

Carpenter's approach is comparative. He considers Scottish royal government in the thirteenth century from an English perspective. Consequently he begins with the observation that 'English identity in the thirteenth century was shaped by both the burdens and the benefits of royal government'. Obvious examples of the 'burdens' were the various devices used to raise royal revenue. By contrast, among the 'benefits' in England was the 'common law'. It has long been thought that the burdens of royal government in Scotland were lighter, as Carpenter notes; but he also notes that '[w]hen . . . it comes to the benefits of royal government in the shape of the common law, the contrast between England and Scotland, according to the usual view, is far less marked'. He continues by stating that 'the belief that, in the thirteenth century, a common law

on the English model developed in Scotland has become almost axiomatic amongst historians'. In the introduction to his essay Carpenter promises to mount 'a direct attack on this view'.³⁵ He suggests that, if the burdens of Scottish royal government were light, the benefits of the common law in particular were quite limited. He suggests that the nobility in Scotland may have resisted any change to this situation. It is obvious that burdensome government was not in their interests; and furthermore a strong common law would have weakened their own jurisdictional powers – as it had in England. In fact, Carpenter suggests this may help to explain why the Scottish nobility were so prepared to defend the autonomy of their realm during the Wars of Independence. Government along English lines would have served to weaken their power. As Scottish noblemen generally held lands in both kingdoms, they would have been well aware of their privileged position in the north.³⁶

Critical engagement with this broad line of argument is beyond the scope of this Foreword, but it merits serious attention. What is relevant here is that Carpenter directly challenges elements of MacQueen's thesis in *Common Law and Feudal Society* when suggesting that the benefits of royal government were significantly more limited in thirteenth-century Scotland than they were in contemporary England. His starting point is that 'no one doubts that, in the thirteenth century, equivalents emerged [in Scotland] of two of the most popular of the English common law actions'. These were the *briefes* of *novel disseisin*, and *mortancestor*, which were modelled on the English writs of *novel disseisin* and *mort d'ancestor*.³⁷ In passing it may be noted that the *briefe* of *mortancestor* enabled a litigant to make a 'claim to succeed to an immediate ancestor who had died vest and saised in lands which were now being unjustly withheld by some unentitled person'.³⁸ Carpenter disputes not the existence of these procedures but rather 'the extent of their use'.³⁹ His argument in this regard is grounded in the work of Alexander Grant concerning the geographical range of the activities of those royal judges and officials who presumably administered the common law – the sheriffs and the justiciars.⁴⁰ Drawing on Grant's work, Carpenter suggests that the sheriffs and the justiciars were largely inactive in the central highlands and in much of north-west Scotland, regions dominated by 'great provincial earldoms and lordships' that 'covered 425 (46%) of [the country's] 925 parishes'.⁴¹ He argues that within those earldoms and lordships much of the administration of justice, and its associated profits, was simply left to the great lords.⁴² Those lords who held their lands in regality could even hear pleas normally reserved for the king and his justiciar, such as the crown pleas of murder, robbery, rape and arson.⁴³ Having argued these points, Carpenter then turns his attention to what all this may reveal about the administration of the *briefes*. The argument

runs that the brieves were administered by the justiciars and the sheriffs; but there were large tracts of Scotland where the justiciars and the sheriffs were inactive; therefore the brieves were not in use commonly across the whole realm. As Carpenter puts it, '[i]n terms of its geographical range . . . the Scottish common law was not common at all'.⁴⁴

The Geographical Limits of the Scottish Common Law

Of course MacQueen considered this matter in *Common Law and Feudal Society*, as Carpenter acknowledges.⁴⁵ MacQueen recognised that much of the administration of justice occurred in the courts of the great earls and lords, but nonetheless maintained that '[r]oyal justice was nevertheless always ready to interfere with lords' autonomy, although this could only be made a reality where the instruments of royal authority – justices, sheriffs and others – were in place'.⁴⁶ This would seem to be no response, *prima facie*, to Carpenter's argument about what happened in the regions where those officers were inactive. However MacQueen goes on to show that, under the terms of several grants of jurisdiction to lords from the twelfth century onwards, the grants were subject to a rule that a royal officer should – or at least *could* – be present to ensure that justice was done.⁴⁷ It should also be noted here that the sheriffs and the justiciars were not the only royal officers with apparent authority to monitor the justice dispensed by the lords. Royal sergeants and the king's *judices* in different provinces also seem to have had such roles, at least in some cases.⁴⁸ Consequently, while a royal officer might have had no authority to interfere in the exercise of jurisdiction within a lordship *qua* royal officer, he may have been able to do so by virtue of the original grant that created the lordship in question. That point does not seem to be factored into Carpenter's assessment of the geographical extent of the activities of royal officers. Yet it might be objected in response to this criticism that no evidence has been led here to show that the sheriffs, sergeants or *judices* actually *did* interfere in the administration of justice in the lordships or the earldoms.⁴⁹ Furthermore, even if these royal officers were actively monitoring the ways in which the lords adjudicated in disputes, it is not clear what powers or legal machinery they had at their disposal to 'correct' judicial errors. Admittedly *LS* c.15,⁵⁰ promulgated during the reign of William I, indicates that from 1197 lords who failed to do justice could lose their courts 'in perpetuity', but the act does not link this with any role of the sheriffs, their sergeants and the royal *judices* to monitor the administration of justice. Nonetheless, the theoretical possibility that such officers *could* interfere in the exercise of power within the earldoms and lordships is surely significant. This is because, on the evidence of *LS* c.15, one cannot assume that thirteenth-

century royal officers were powerless to ensure the observance of common legal standards outwith the sheriffdoms and the routes followed by the justice ayres.

Regardless, even if these arguments were to find support through the further study of contemporary records, they would not fully address Carpenter's real point. This is that there is no evidence to suggest that the *brieves* were used commonly across the realm in the administration of justice during the thirteenth century. In this regard, Carpenter notes that the 'forms of the novel dissasine and mortancestry brieves in the early fourteenth-century Ayr Register, the best guide to contemporary practice, are quite specifically for land within the sheriffdoms'. Furthermore, Carpenter points out that the surviving evidence for the operation of the brieves of novel dissasine and mortancestry during the thirteenth century comes exclusively from the sheriffdoms.⁵¹ The point is that it is difficult to show those brieves in operation in the great earldoms and lordships that lay outwith the sheriffdoms. Note, in passing, that the question under consideration here is not concerned with whether or not the king was generally able to use the brieves to interfere in the feudal relationship between a lord and his tenants. *SA* c.7 makes it clear that the brieve of novel dissasine was in principle available where a man's lord dissaised him.⁵² The problems relate to whether or not the brieves could be used to regulate such legal issues *within* the great earldoms and provincial lordships.

When considering this question, there are various points one should note. MacQueen did cite some evidence to the effect that the brieves could be used to enforce rights in courts other than those of the sheriffs and the justiciars. This was drawn from a series of mid-thirteenth-century cases where innominate brieves of the king were pled in the courts of the prior of Coldingham, and a further case of 1270 where another such royal brieve was pled in the court of the earl of Lennox. In the latter case the dispute did not raise questions of dissasine or mortancestry, but it was nonetheless concerned with rights in land.⁵³ On this basis MacQueen suggested that the brieve in question may have been something like the later brieve of right, which came to be available in disputes over title that did not fall within the ambit of the brieves of novel dissasine or mortancestry.⁵⁴ The case of 1270 is potentially important because it does suggest that royal brieves *could* find their way into the courts of the earls. Carpenter notes this, commenting that 'MacQueen argues, on the basis of several cases, that in the thirteenth century there was also a form [of the brieve of right] addressed to the lord'. But he then immediately states that if there was a form of the brieve of right 'addressed to the lord . . . it made no lasting impact for there is no sign of it in the Ayr Register'.⁵⁵ Regardless of whether or not the form of the brieve had any 'lasting impact', its existence does indicate that there is more to be said about the

ability of the royal briefes to interfere with the administration of justice in the greater lords' courts by the second half of the thirteenth century. MacQueen also pointed out that the evidence concerning the use of briefes in the court of the prior of Coldingham is intriguing because on two occasions the sheriff of Berwick was present. As MacQueen put it, 'was he there to do right had the prior refused to do so?'⁵⁶ This brings to mind the point mentioned above concerning the authority of royal officers to exercise supervisory roles in the courts of at least some of the great lords, and indeed MacQueen suggested that this role may have extended to the supervision of disputes over land.⁵⁷ This point will be considered again in more detail shortly.

While the use of a royal briefe in the court of the earl of Lennox in 1270 is intriguing, Carpenter is undoubtedly correct to express puzzlement as to why there is no evidence of a form of briefe of right addressed to a lord in the Ayr Manuscript (which, it will be recalled, can be dated approximately to 1318 × 1329). The puzzle cannot be resolved by suggesting that the Ayr Manuscript simply focused on practice in the courts of the sheriffs and the justiciars; it also contains, to name an example, a form of the briefe of right addressed to the provost and bailies of a burgh.⁵⁸ One possible explanation might be that, by the time the Ayr Manuscript was produced, questions concerning the enforcement of the common law in the regalities and the great lordships had become less relevant owing to developments in practice. MacQueen pointed out that Robert I's grant of land in regality to Thomas Randolph came 'with the four complaints belonging to our royal crown and with all pleas and complaints both in common indictments and in pleadable briefes'. MacQueen then commented: 'It seems highly probable that this meant that the lord of regality was empowered to issue pleadable briefes within his regality wherever the king would have done so elsewhere.' He cites fifteenth-century evidence to show that lords of regality did indeed issue their own briefes by that period. The briefes used in the regality chancery of St Andrews during the sixteenth century ran 'in the name of the archbishop but [were] otherwise exactly similar to those issued by the king'.⁵⁹

Given that this is so, a tentative solution might be suggested to the problem Carpenter perceptively raises concerning the use of royal briefes in the courts of the great earldoms and lordships. Perhaps if it was *possible* to use such briefes in those courts, it may also have been becoming possible to purchase briefes from 'chanceries'⁶⁰ or chapels maintained by local lords of regality. Interestingly, the surviving evidence of a later period suggests that such briefes offered procedures and remedies that closely resembled those that were outlined in the royal briefes. Indeed, it would hardly be surprising to discover that the courts of the great earls

and lords sought to mirror royal mechanisms for the administration of justice, at least to some extent. One of Taylor's recent articles has pointed to the seemingly curious fact that, while several of the acts that can probably be attributed to William I in *LS* outlined how crimes such as theft were to be dealt with procedurally, they did not define the crimes themselves. Taylor suggests that the determination of what did and what did not constitute the wrong itself was left to 'local communities'. William I seems to have been less interested in establishing a unitary definition of theft across his realm than he was in 'claiming a monopoly over best practice to inform others dealing with a crime'. Indeed, Taylor's conclusion is that he was more interested in this than in establishing 'a monopoly of jurisdiction and punishment over theft'⁶¹ – even though it would seem that William I's son, Alexander II, was keen to present the right to exercise jurisdiction in such cases as proceeding from royal grants.⁶² While obviously much more research needs to be carried out on the point before any firm conclusions can be drawn, it is conceivable that statutes like *SA* c.7, which established a procedure to remedy novel dissasine, were conceptualised in the same way. Perhaps what did and did not constitute a dissasine would have been approached slightly differently in different communities. But what *SA* c.7 did was to lay down the procedural framework to be used by the justiciars when called upon to address the problems. It may also have served to provide a template for how the earls and the great lords were to deal – or came to deal – with dissasines within their own jurisdictions too. In a later period they certainly followed that template, and the templates of the other procedures outlined in the *briefes*, and the evidence MacQueen cites suggests that they may conceivably have done so from the early fourteenth century onwards. One element of the *briefes* rule may in fact serve to support this – a man could not be put out of his *liberum tenementum* of which he claimed to be vest and saised as of fee 'without the king's pleadable *briefe* or such a kind of *briefe* as is similar

[emphasis added]'. What was meant by 'such a kind of *briefe* as is similar'?⁶³ Was this a direct reference to a royal policy that gave the great lords freedom to administer their own justice, so long as they adhered to royal procedural standards in so doing? Furthermore – to continue in this admittedly rather speculative vein – one might consider the possibility that all this reveals something about the supervisory role of the royal officers who were apparently entitled to oversee the administration of justice in the provincial courts of the lords and the earls. Perhaps their purpose was to ensure – or to try to ensure – that the basic royal procedural standards for handling problems like novel dissasine were observed when reaching judgement.⁶⁴

Thus arguably there could have been a degree of 'commonality' in the

administration of the legal standards expressed in the *brieves* across the thirteenth-century Scottish kingdom, even though much of the realm lay outwith the sheriffdoms. The geographical limits of the sheriffdoms are significant, but they do not take into account the apparent right of royal officers to exercise supervisory jurisdiction in several of the great lordships. Furthermore, there is some evidence to suggest that *brieves* purchased from the king's chapel could have been pled in the courts of the great earldoms and lordships. In addition, the fact that this evidence is limited might conceivably be explicable. Perhaps the great earls and lords who were active during the thirteenth century were beginning to issue commands to do justice to their *baillies* that were modelled on the royal *brieves*. It is possible that the lords of regality were actually doing just that in the early 1300s, as they undoubtedly were during the fifteenth century. Those lords' *brieves* ran in their own names, but the evidence – such as it is – suggests that the procedures they adopted imitated those outlined in the royal *brieves*. Such an approach would have shown due deference to a Scottish royal policy of creating a monopoly over 'best practice'⁶⁵ in dealing with various legal disputes. Furthermore, it would have at least helped to ensure that broadly common procedural standards were observed in dispute resolution across the kingdom. In a later period similar common legal standards could sometimes be enforced in the regalities by royal officers – at least in theory.⁶⁶

That last point is obviously relevant to Carpenter's argument that '[i]n terms of its geographical range . . . the [thirteenth-century] Scottish common law was not common at all'. The evidence cited here suggests that Carpenter's powerful critique does not necessarily disturb MacQueen's analysis as much as might be thought, but it does require careful consideration and further debate.

Was the Law Common in its Use within the Ayres and the Sheriffdoms?

Carpenter's argument continues by asking whether or not the Scottish common law 'was common in its use even within the compass of the ayres and sheriffdoms'.⁶⁷ In this context he turns his attention to the legislation of 1318 that was discussed above. He examines in particular MacQueen's conclusion that the *brieves* rule compelled the use of the *brieves* of novel *dissasine* and *mortancestry* in certain circumstances. It will be recalled that the *brieves* rule was that a man could not be put out of his *liberum tenementum* of which he claimed to be *vest* and *saised* as of fee without the king's *pleadable brieve* or a similar *brieve*. MacQueen argued that the *brieves* rule existed in Scots law prior to 1318, and cited various pieces of evidence to support his claim. First he cited a provision in the text known as the *Leges Burgorum* – which is attested in a

manuscript of c. 1270 – which provided that ‘[i]f anyone is challenged for his lands or tenement in a burgh, he need not answer his adversary without the lord king’s letters unless he freely wishes it’. Alongside this MacQueen referred to a case decided in the burgh court of Aberdeen in 1317, in which William Duncan sued Philip Gaydon, ‘alleging *wrang et unlaw* in Philip’s retention of a house against parties to whom William had leased it’. With justification Philip argued that ‘his possession was based on a heritable title derived from the tenure of his parents, and that accordingly he did not have to answer William’s complaint unless it was made by a letter of the king’s chapel’. The burgh court admitted this defence and dismissed the case.⁶⁸ Commenting on the version of the *brieves* rule observed in the burgh courts prior to 1318, Carpenter places some reliance on the point that no one had to answer for his lands without a *brieve unless he wished it*. Carpenter argues that the fact ‘[t]hat the king advertised the possibility of litigating without his *brieve*, hardly suggests he was very confident in spreading its use, let alone seeking to compel it’.⁶⁹ However, the evidence can be interpreted in a different way. Admittedly the rule in question was clearly not concerned with compelling a litigant to use a particular royal protection from which he might have benefited when the litigant in question definitely did not wish to do so. But the evidence also indicates that, as soon as the litigant *did* want the protection of the *brieves* rule, then it was absolute, and the king stood ready to compel its observance. Furthermore, the fact that the litigant was left with the choice may tell us little – or possibly nothing – about whether or not the king ‘was very confident in spreading [the] use’ of the *brieves*. Even today litigants might wish to be able to waive rights afforded to them in law during the course of civil litigation for a variety of practical reasons, such as ensuring a speedy outcome to the dispute, or securing other rights.⁷⁰

Carpenter also argues that ‘outside the burghs, there is virtually no evidence for the [*brieves*] rule’.⁷¹ MacQueen pointed out that in 1296 Alexander MacDonald of Islay claimed ‘many people say that according to the laws of England and Scotland no-one ought to lose his heritage unless he has been impleaded by *brieve* and named in the *brieve* by his own name’.⁷² Carpenter’s response to this evidence is that it is ‘a remarkably tentative statement if the rule had long been compulsory’ – and this is of course worth emphasising. MacQueen tried to explain this doubt by admitting that there was probably no enactment declaring the existence of a *brieves* rule outwith the burghs prior to 1318. And yet, as MacQueen argued, one does still have to explain why ‘many people’ believed a *brieves* rule did apply across the realm. MacQueen’s explanation of this does still seem at the very least plausible. He suggested that it was widely known that the Scottish *brieves* originated in the

English writs. He then pointed out that there was an English rule that provided that ‘no man could be made to answer for his freeholding without a royal writ’. On this basis ‘many people’ may have concluded that the Scottish brieves were to be interpreted as conferring the same basic protection.⁷³

Carpenter’s next argument seeks to challenge the idea that there was any direct association between the act of 1318 that declared the brieves rule and the act that reformed procedures in cases of novel dissasine. He points out that ‘[t]he 1318 rule applied quite specifically to land held “in fee”’, and he suggests that ‘in fee’ here probably meant ‘with some degree of hereditary right’. He then notes that the text of *SA* c.7 ‘refers simply to dissasine unjustly and without judgement without specifying the subject of the dissasine at all’. He also states that the brieves rule as formulated in 1318 ‘does not match up with the developed brieve of novel dissasine found in the Ayr Register which refers to a tenement of which the plaintiff had been “*vestitus et saisitus*” not just “*ut de feudo*” but also “*de dote vel firma ad terminum qui [non] dum preteriiit*”’.⁷⁴ Note that the last phrase means ‘as of terce (*dote*) or by a rent (*firma*) whose term has not yet expired’⁷⁵ (terce being a ‘widow’s liferent of part of her estate’⁷⁶). Put another way, novel dissasine as presented in the Ayr Register could be used not only where one was ‘*vestitus et saisitus*’ ‘as of fee’, but also where one held lands on the basis of a liferent or fixed-term tenure. So it does not ‘match up’ well with the brieves rule of 1318, which was simply concerned with lands held ‘in fee’. Carpenter’s argument does also raise a point that should be borne in mind when assessing the impact of the brieves rule. This is that after 1318 litigants might only have been compelled to use a brieve – whether a brieve of novel dissasine, mortancestry or right – where the defender alleged he held his lands ‘as of fee’. Perhaps a defender who did not advance that argument – such as one who held his lands simply ‘*in liberum tenementum*’ but not ‘as of fee’ – could not invoke the protection of the brieves rule. If Carpenter’s interpretation of the extent of the protection offered by the pleadable brieves rule is correct, then it would seem to imply a common law concerned primarily with protection of heritable rights, leaving a greater ambit to other jurisdictions and remedies than MacQueen’s account allowed.

One further argument advanced by Carpenter against MacQueen’s general thesis will be considered here. Having argued that there is ‘some evidence suggesting a low level for the purchase of the common law brieves’,⁷⁷ he then turns his attention to another piece of evidence ‘arguing against the widespread use of the common law’. He suggests that it ‘might seem to have devastating consequences for hypotheses of that kind’.⁷⁸ Broadly the argument is that the costs of using the brieve of novel

dissasine were potentially so prohibitive as to prevent all but the richest in society from making any use of them. This claim rests upon an interpretation of *SA* c.7. This provided that, once convicted, a dissaisor was to be ‘at the mercy of the lord king for £10’. But *SA* c.7 went on to provide that if it was ‘understood that the complainer said an untruth, he shall give the forfeiture over the matter’.⁷⁹ Commenting on this, Carpenter argues that ‘[t]he text of the assize does not specify the nature of the forfeiture but almost certainly like the penalty faced by the disseisor, it was £10’. He continues by noting that the phrase “Upon pain of the king’s full forfeiture of £10” appears twenty-one times in the PoMS material’ – a reference to the People of Medieval Scotland database, which is ‘a database of all known people of Scotland between 1093 and 1314’.⁸⁰ The suggestion that the forfeiture for failing to sustain an allegation of novel dissasine was £10 is also attested in *CD* c.41.⁸¹ Given that in ‘thirteenth-century Scotland a knight’s fee could be thought to yield £20 a year’, it seems to follow that ‘[a]nyone seeking to bring a novel dissasine action . . . faced a very heavy penalty in the event of failure’.⁸² Carpenter then goes on to show that there is evidence to demonstrate that at least one litigant – John Scot of Reston – who failed to sustain his allegation of novel dissasine did indeed forfeit £10 as a result in 1261.⁸³

This is a very serious challenge to any argument that defends the ‘widespread use of the common law’ in thirteenth-century Scotland. Nonetheless, it may be possible to qualify the force of the challenge, at least to some extent. First it should be noted that the actual act that introduced novel dissasine did not, it would seem, specify the nature of the forfeiture that would result from failure to sustain a claim of novel dissasine. Nothing was said in *SA* c.7 about whether a full forfeiture was automatic or not. *CD* c.41 does, admittedly, make reference to a forfeiture of £10. Yet arguably all that *CD* c.41 and the case of John Scot of Reston unquestionably demonstrate is that full forfeiture *could* result from failure to demonstrate that a novel dissasine had occurred. Admittedly *CD* c.41 indicates that full forfeiture was also a *necessary* consequence of such failure by the early fourteenth century. But it is worth noting that *CD* c.41 was not, it would seem, representative of the work of a law-making body in the way that *SA* c.7 was. Rather, *CD* ‘reflects fourteenth-century conceptions of legal practice and procedure to the point of updating earlier laws enacted by past kings of Scots’.⁸⁴ Consequently, while *CD* c.41 constitutes extremely strong evidence concerning what actually happened in practice in cases of novel dissasine, it may be worth pausing to consider whether or not the text in itself demonstrates that full forfeiture was always a *necessary* consequence of failure to sustain a claim.

This is not merely pedantic. I have argued elsewhere that other acts promulgated in 1230 may have privileged the position of certain classes

of litigants. Arguably *SA* c.6 reveals that most people who made allegations of theft or robbery risked falling into the mercy of the king if they failed to sustain their accusations. *SA* c.5, by contrast, did not compel widows, clergymen and those who were unable to fight more generally to take this risk when seeking redress for theft.⁸⁵ While the context of this development is complex, part of the reason for the special protection offered may lie in what MacQueen described as the duty of the king and his council 'to protect the specially vulnerable and needy' and in particular clergymen, widows, orphans and foreigners.⁸⁶ Is it possible, then, that the vague 'forfeiture' referred to in *SA* c.7 could have varied depending upon the identity of the litigant?

No firm evidence has been found to answer that question in the affirmative. Consequently the assumption must remain that one forfeiture applied to all litigants. Furthermore, the best evidence that historians currently possess indicates that the forfeiture in question was the full forfeiture of £10. But it is suggested that the claim that failure to vindicate a claim of novel dissasine *necessarily* resulted in full forfeiture does rest primarily on the evidence of *CD* c.41. Those who believe that the rest of the surviving evidence of the period indicates that the common law *was* widely used in the thirteenth century may wish to explore that observation further. In particular, they may wish to examine in detail what is known about forfeiture, and the question of whether or not different levels of forfeiture were applied in practice. In this regard it is worth mentioning that Carpenter does note three other examples of the uses of *brieves* in practice, and concludes that the claimants involved 'were all women of some substance'. The implication, presumably, is that they could afford to take the risk of losing their cases. Yet Carpenter admits that one of the women in question, Emma of Smeaton, was 'self-confessedly "poor"' but he suggests that '[t]his poverty . . . was evidently relative since she was able to achieve a settlement which brought her 20 marks a year for life'. Yet Emma of Smeaton was not just poor; she was a widow, and this may be of some significance.⁸⁷ Likewise the two other litigants mentioned by Carpenter were also widows who used the *brieve* of novel dissasine.⁸⁸ So one possible conclusion is that these women were all 'of some substance', and could afford to risk losing an action begun by *brieve* – even though one might reasonably doubt that in the case of Emma of Smeaton. The other possibility – which, it must be strongly emphasised, is nothing more than a possibility – is that these litigants took no risk, or a very small risk, when they brought actions by *brieve*, because, as widows, they were protected litigants. On my reading of *SA* c.5–6, widows did not risk falling into the king's mercy when they initiated proceedings in cases of theft. Perhaps the same was true when they sought to initiate actions through the *brieves*. However, even if this were to be proven, it might be

objected that, if the king ‘needed to waive the rules’ of forfeiture for certain litigants, ‘then the brieves were . . . more brieves of grace than brieves of course’.⁸⁹ In response to that argument it could be noted that it depends on the view that ‘full forfeiture’ was the normal rule in such cases, which rests on the evidence of *CD* c.41.

How widely, then, was the Scottish common law used in practice? The arguments advanced above do not conclusively answer that question one way or the other. Nor do they prove that MacQueen’s reading of the evidence on the subject is to be preferred to that of Carpenter. What they do perhaps show is that there may be more to be said concerning the validity of many of Carpenter’s objections to MacQueen’s broad thesis. It is also hoped that the outline of the debate between the two scholars offered here may help to stimulate further research into the topics discussed.

THE ‘FEE AND HERITAGE’ RULE AND THE ORIGINS OF THE COLLEGE OF JUSTICE: PROFESSOR GODFREY’S ANALYSIS

In the case of *Weems v. Forbes* (1542), the supreme Scottish court in civil matters declared that ‘the breif of rycht is nor hes nocht yit bene mony yeiris usit in this realme’.⁹⁰ Similarly MacQueen concluded that the brieves of mortancestry and novel dissasine had fallen out of use by the early sixteenth century, and indeed perhaps earlier than that in the case of the latter form of action.⁹¹ Given the significance of the brieves in the thirteenth and fourteenth centuries as discussed above, and, given their continuing importance during much of the fifteenth century,⁹² this calls for some explanation, and in *Common Law and Feudal Society* MacQueen attempted to tackle the problem. In so doing he developed a sophisticated thesis that linked the decline of the brieves system, on the one hand, with reforms in the administration of justice and the Scottish courts more generally, on the other.⁹³ On the basis of rigorous and scholarly engagement with that thesis, supported by original and extensive archival research, Mark Godfrey has since produced a new study of the decline of the brieves system and the development of the Session, the court that he has argued came to enjoy *de facto* supreme jurisdiction in Scottish civil matters at some point prior to 1532.⁹⁴ This does demonstrate that elements of MacQueen’s argument are no longer tenable in relation to the acquisition of jurisdiction over fee and heritage by the Session, and are no longer convincing in relation to the significance of the foundation of the College of Justice. Nonetheless, Godfrey’s conclusions sit well with much else of MacQueen’s research concerning the decline of the brieves and the work of the Session, especially for scholars exploring doctrinal legal developments in the fifteenth century.⁹⁵

Here the aims will simply be to explain MacQueen's original thesis, and to explore the ways in which Godfrey has engaged critically with it.

MacQueen's Thesis

MacQueen introduced his thesis by examining the extent to which the *brieves* rule originally limited the jurisdiction of certain courts to hear disputes over title to land. Given that no one could be ejected from his free tenement of which he claimed to be vest and saised as of fee without the king's pleadable *brieve*, it followed that only those courts to which the *brieves* were addressed could deal with such matters. While *brieves* might be addressed to the courts of the sheriff, the justiciar and also to the burgh courts, they were never addressed to Parliament or to the King's Council. It should be noted that the the King's Council was 'a smaller, less formal and more flexible body' than Parliament, which 'had always exercised a residual jurisdiction outside the normal course of the common law'.⁹⁶ The reasons why the *brieves* were never addressed to Parliament or the King's Council were simple. As Godfrey puts it, '[b]eing in the King's name and requiring local process in a particular area of the country, no "coursable" *brieve* (i.e. those in standard form relating to established forms of remedy) could be addressed to King and Council directly, in Parliament or otherwise'. He continues by explaining that '[t]he very structure of the procedure presupposed the direction of a *brieve* to a local (albeit royal) judge who could carry out the royal instructions on the ground'. Of course, the resulting judgment or 'doom' might be falsed by a higher court, and ultimately by Parliament.⁹⁷

Consequently, when sitting in its judicial capacity, the King's Council could not hear actions concerning matters protected by the *brieves* rule. MacQueen also argued that there was a further limitation on the jurisdiction of the King's Council; it could not hear disputes concerning matters that touched 'fee and heritage'. Given what has been said above concerning the significance of the requirement that one had to hold lands '*ut de feudo*' in order to claim the protection of the *brieves* rule, it might be thought that Carpenter's research implies a fundamental similarity between the two rules. And yet, regardless, MacQueen's work continues to demonstrate that the two rules were distinct. This can be seen from the case of *Forbes v. Wemyss* (1479). There the claimants sought a remedy for *spuilzie* of oxen and corns out of lands before the King's Council. A '[s]puilzie was in essence an action to recover possession of goods'.⁹⁸ During the 1540s a *spuilzie* was said to arise where a man had been in possession of a thing and had then been violently dispossessed of it, and the remedy was restitution.⁹⁹ While the King's Council did have jurisdiction over *spuilzies* under an Act of Parliament of 1458,¹⁰⁰

MacQueen noted that sometimes ‘the defender’s justification for seizing the goods was his assertion of some right in land’.¹⁰¹ In the action of spuilzie brought in *Forbes v. Wemyss* (1479), the King’s Council declined to exercise jurisdiction ‘because the landis that the said gudis was takin of is clamyt fee and heretage be baith the said parties and the questioun of the richt dependis apoun heretage’. Importantly this ‘fee and heritage’ rule was not simply the brieves rule in operation, because the defenders ‘could show no ex facie valid title to justify any possession of Rires [the disputed lands] they may have had’ and so ‘they could not have claimed the protection of the 1318 act’.¹⁰² On this basis MacQueen argued that the ‘fee and heritage’ rule operated *alongside* the brieves rule to exclude the jurisdiction of the King’s Council in disputes over questions of right in land. He argued that the ‘true origin’ of the fee and heritage rule lay ‘in the exclusion of the jurisdiction of parliament and council where there was an ordinary common-law remedy’.¹⁰³ In the process, he put many fifteenth-century statutes into their proper context, facilitating their interpretation. A very good example is the act of 1450 ‘concerning defenders contumaciously not compearing in answer to summonses before council’.¹⁰⁴ MacQueen’s work therefore remains essential reading for anyone wishing to engage in detailed research concerning Scottish doctrinal legal history.

In *Common Law and Feudal Society*, MacQueen also observed that the King’s Council, through its judicial ‘Sessions’, eventually acquired jurisdiction over matters touching fee and heritage, in spite of the older rules that limited its authority in relation to such disputes.¹⁰⁵ In the past scholars have suggested that this might have had something to do with the fact that the Session was placed on a new institutional footing as a College of Justice in 1532.¹⁰⁶ This will be discussed in more detail shortly. In an article published in 1984 MacQueen argued there was no direct, causative link between this institutional change and the acquisition of jurisdiction over fee and heritage.¹⁰⁷ He examined several cases decided in the Session after 1532, and argued that ‘[t]he jurisdiction in heritage of the lords of council and session seems . . . to have been developed over a period of years, rather than in any one particular case’.¹⁰⁸ Nonetheless, he also argued that the acts of the Scottish parliament that reconstituted the Session as a College of Justice ‘could be used to give legal authority to what clearly appears as an expansionist attitude of the court to its jurisdiction in the 1530s and 1540s’.¹⁰⁹ He outlined essentially the same position in 1993, in *Common Law and Feudal Society*.¹¹⁰ MacQueen also offered several explanations for the success of the Session in asserting jurisdiction over matters of fee and heritage. He noted that procedure on brieve had become fraught with delay by the beginning of the fifteenth century. This was particularly true of the form of process known as

‘falsing the doom’, whereby the decision reached by procedure on brieve could be challenged. Furthermore, the local judges, and in particular the sheriffs, who administered the common law, often lacked the legal training required to make sense of the complex legal disputes that came before them. For such reasons, litigants put pressure on the King’s Council to accept jurisdiction in an increasing number of cases, in the hope of finding speedier justice administered by more professional judges.¹¹¹

Godfrey’s Qualifications of MacQueen’s Thesis

Godfrey’s work qualifies various elements of this thesis and rejects substantial parts of it.¹¹² In so doing, he draws on his own groundbreaking archival research into the Acts of the Lords of Council surviving from the late fifteenth century and the early sixteenth century. In fact, Godfrey is the first scholar to attempt to reconstruct the practice of litigation in the Session on the basis of systematic scrutiny of the extensive archive of original manuscript records of the court, and it is this methodology that has allowed him to build on, develop and in some places depart from the earlier analysis put forward by MacQueen.

Godfrey considers the cases cited by MacQueen as evidence for the proposition that the judges or Lords in the Session were consciously expanding their jurisdiction during the 1530s and 1540s so that they could deal with matters of fee and heritage. He argues that the cases do not, in fact, reveal that the Lords were attempting to assert a new authority to adjudicate in relation to such disputes.¹¹³ Rather, they are simply examples of a jurisdiction that the Lords had been asserting throughout the 1530s and indeed before the reconstitution of the Session as a College of Justice in 1532.¹¹⁴

How, then, are historians to explain the development of the jurisdiction of the Lords of Session, and the consequences this had for both the brieves rule and the fee and heritage rule? Godfrey explores these matters through a detailed examination of the relevant evidence. He concludes that the fee and heritage rule only ever limited the jurisdiction of the Session where there was ‘more than one competing claim to a disputed title, backed up by showing lawful interest in the title’; and even then the authority of the Lords was only limited if ‘the decision would involve a final determination of right’.¹¹⁵ Godfrey then shows that from 1513 onwards the Lords ceased declining jurisdiction on the basis of the operation of the fee and heritage rule. However, rather than directly confronting either the fee and heritage rule or the related brieves rule, he argues that they did something subtler. While they did not have jurisdiction to determine the outcome of disputes where there was ‘more than one competing claim to a disputed title’, it would seem that they

always had enjoyed authority to 'examine the intrinsic validity of title and reduce such titles when some cause of invalidity was shown such as fault in transfer or incidental legal process'.¹¹⁶ Godfrey thus reconceptualises the fee and heritage rule and interprets its scope more narrowly than MacQueen. On this basis, Godfrey argues that the Lords were able to adjudicate in disputes that involved *some* element of fee and heritage. During the late 1400s and the early 1500s this seems to have enabled them to exercise jurisdiction in an increasing number of cases that previously would have fallen foul of the fee and heritage rule (or indeed the *briefes* rule). A good example is the case of *Spittal v. Spittal* (1531). In that case there was an underlying dispute over title to lands between two parties – Archibald Spittal and Finlay Spittal. But that was not how the matter was approached in court. Archibald Spittal argued that Finlay Spittal acquired sasine of his lands 'by sinister information circumnevand the kinges grace', even though Archibald himself had been 'heretably infeft' in the lands. Consequently Archibald sought reduction of Finlay's title. This remedy was granted, and Finlay was left in the lands, but without any lawful basis to remain there. Archibald then raised a subsequent action of removing in February 1532 against Finlay to recover possession of his property.¹¹⁷

Godfrey suggests that, through exercising its jurisdiction to reduce infeftments in this way, the Session had already acquired *de facto* supreme jurisdiction in civil matters prior to its reconstitution as a College of Justice in 1532. This is actually just one example of how the court developed a whole framework of actions and remedies that operated *alongside* that provided by the *briefes*. It was within the latter framework of the *briefes* that the administration of justice locally according to the common law – and so the fee and heritage rule – made sense. Godfrey argues that there was no single moment in which the framework of remedies offered by the Session replaced that which operated through the *briefes*. Rather, as he puts it, '[i]t seems that both the remedial frameworks applicable to heritage disputes were simultaneously valid over an extensive transitional period which was thereby marked by legal ambiguity'. But '[b]y 1532 . . . the undoubted competence of the Session to approach heritage disputes in terms of reduction seems to have left the older framework with no useful application'.¹¹⁸ It was for this reason, too, that by 1542 the Lords in *Weems v. Forbes* could hold that 'the breif of rycht is nor hes nocht yit bene mony yeiris usit in this realme' without making any departure from their past practice.

There is one final way in which Godfrey rejects an element of MacQueen's argument. This concerns the significance or otherwise of the creation of the College of Justice at the time of its foundation in 1532. The older established view of Richard Hannay and Archibald Duncan

was that this was no more than an excuse to tax the church with papal blessing, and that it made little difference to the operation of the Session in practice.¹¹⁹ In the light of this, MacQueen took the view that ‘the erection of the College [of Justice] effected no change in the structure, personnel or record-keeping of the court’.¹²⁰ Godfrey challenges this claim during the course of a broader argument concerning the reconstitution of the Session in 1532.¹²¹ In very brief terms, Godfrey argues that the developing jurisdiction of the Session arose in part as a result of pressure from litigants who wanted the Lords to hear an increasing range of disputes. They were dissatisfied with the quality of justice offered by untrained judges in the localities. Gradually the jurisdiction of the Lords developed in response. Ultimately it seems to have been recognised during the 1520s that one of the great advantages of the justice administered in the Session was that many of its judges were experienced adjudicators who were learned in the law, and specifically in the learned laws, the legal traditions structured around the texts of Roman law and canon law. At the same time, the personal rule of James V from 1528 seems to have given impetus to attempts to remodel the Session, enhance its effectiveness as a law court, and liberate it from the influence of the noblemen who were in attendance at the King’s Council. To explain, while the Session remained nothing more than a sitting of Council in its judicial capacity, any member of the King’s Council could participate in reaching its judgments, and many members of the King’s Council were not legally trained. Drawing also on the work of John Cairns on the intentions behind the idea of establishing such a College,¹²² Godfrey argues that the reconstitution of the Session as a College of Justice was intended to remedy this problem, and that it represented a coherent final step in a process of institutional reform that had been in train since the 1520s. Now that the Session existed on a separate institutional footing from Council, it would be possible to control more easily who could and could not sit in a court that was, after all, exercising supreme civil jurisdiction.¹²³ Thus, departing from MacQueen’s analysis, Godfrey argues that the formal institutional changes were highly significant in establishing the Session as a supreme court in 1532. Furthermore, the supreme character of the court is reinforced if he is correct in arguing that it was already exercising an unrestricted civil jurisdiction before this time as a result of longer-term development of its remedies and jurisdiction.¹²⁴

CONCLUSION

Harding’s assessment of *Common Law and Feudal Society* as ‘one of [the] most penetrating studies yet produced of any period of Scottish legal

history'¹²⁵ is vindicated by the ways in which scholars have engaged with the work since its publication in 1993. Time and again MacQueen's detailed reconstruction of the framework of the medieval Scottish common law has inspired and enabled researchers to explore its development further. Where historians have departed from his views, they have often done so in such a way as to show that this would not have been possible without the foundation laid by MacQueen's scholarship. Even in areas of his argument that have been undermined or superseded – such as that advanced in the eighth chapter of his book concerning the fee and heritage rule – readers who are aware of how the discipline has developed since 1993 can still hope to learn a great deal through studying his work. The book undoubtedly merits the status of being a 'classic' text among works on Scottish legal history.

The arguments advanced above also show that historians interested in the study of medieval Scots law have a great deal to look forward to as regards the development of research into the field. It should be noted that, while the focus of this introduction has been on *Common Law and Feudal Society*, MacQueen's more recent contributions to the discipline have shed considerable light on a variety of other areas of medieval Scots law, and continue to explore intriguing lines of enquiry.¹²⁶ Furthermore, based on the work she has already produced, Taylor's book *The Shape of the State* promises to be perhaps the most significant contribution to the study of medieval Scots law since *Common Law and Feudal Society* was published in 1993. Carpenter's article has done much to challenge orthodox views of the Scottish legal past, and his debate with MacQueen's work will undoubtedly prove fruitful. Godfrey's work has convincingly shown how the use of the brieves in the administration of justice gradually gave way to the framework of remedies administered by the College of Justice. This makes it possible now to examine how – and why – the medieval heritage of the Scottish common law came to embrace so extensively the learning of Roman law and canon law during the medieval period.¹²⁷ It may also facilitate the study of the important jurisdictional shifts that took place during the mid-sixteenth century.¹²⁸

What is very clear is that all these contributions to the discipline of Scottish legal history will derive much of their force from the rigorous research contained in *Common Law and Feudal Society*. That is surely a very great tribute to the book, and also to its author.

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NOTES

1. A. Harding, 'Review of Hector L. MacQueen, *Common Law and Feudal Society in Medieval Scotland*', *Scottish Historical Review*, 74 (1995), 115–17 at 115.
2. To name a few important examples, see J. W. Cairns, 'Historical introduction', in K. C. G. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland, Volume 1: Introduction and Property* (Oxford, 2000), 14–183, in particular at 27–50; A. M. Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (Leiden, 2009); C. Neville, *Land, Law and People in Medieval Scotland* (Edinburgh, 2010), at 13 and 42; A. Taylor, 'The assizes of David I, king of Scots, 1124–53', *Scottish Historical Review*, 91 (2012), 197–238, in particular at 216–21; D. Carpenter, 'Scottish royal government in the thirteenth century from an English perspective', in M. Hammond (ed.), *New Perspectives on Medieval Scotland 1093–1286* (Woodbridge, 2013), 117–59; A. Taylor, *The Shape of the State in Medieval Scotland* (Oxford, forthcoming).
3. See H. L. MacQueen, *Common Law and Feudal Society* (Edinburgh, 1993), 105–214. Admittedly Carpenter, 'Scottish royal government', 138–54, challenges the extent to which this law was truly 'common' during the thirteenth century; more will be said about this below.
4. As regards the significant role performed by both legal systems in the development of a Scottish legal culture, see MacQueen, *Common Law and Feudal Society*, and also H. L. MacQueen, 'Canon law, custom and legislation: Law in the reign of Alexander II', in R. Oram (ed.), *The Reign of Alexander II, 1214–49* (Leiden and Boston, 2005), 221–51 at 242–3.
5. MacQueen, *Common Law and Feudal Society*, 266; see also A. R. C. Simpson, 'Procedures for dealing with robbery in Scotland before 1400', in A. R. C. Simpson, S. C. Styles, E. West and A. L. M. Wilson (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (Aberdeen, 2016). A similar, but not identical, idea can be traced in Barrow's statement that the office of the Scottish justiciar 'began as an exotic innovation yet within a few generations took on the protective colouring of a thoroughly native species'. See G. W. S. Barrow, *The Kingdom of the Scots* (Edinburgh, 2003), 98. I am grateful to Mark Godfrey for drawing this to my attention.
6. MacQueen, *Common Law and Feudal Society*, 264–7; the point was also argued convincingly in W. D. H. Sellar, 'The resilience of the Scottish common law', in David L. Carey Miller and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997), 149–64 at 164.
7. The theme of continuity in the development of the common law was first developed by Sellar, and can be traced in a number of his articles, perhaps most obviously in W. D. H. Sellar, 'Scots law: Mixed from the very beginning? A tale of two receptions',

- Edinburgh Law Review*, 4 (2000), 3–18. For a more recent study defending this view, see Simpson, ‘Procedures for dealing with robbery’.
8. See, e.g., Godfrey, *Civil Justice*, 94–160; this point is discussed in more detail below.
 9. See above at xiii–xxi.
 10. See above at xx–xxi; see also, e.g., J. Wormald, ‘Scotland: 1406–1513’, in C. Allmand (ed.), *The New Cambridge Medieval History, Volume VII: c.1415–c.1500* (Cambridge, 1998), 514–31; A. Grant, *Independence and Nationhood: Scotland 1306–1469* (Edinburgh, 1984; reprinted 1991).
 11. See, e.g., MacQueen, *Common Law and Feudal Society*, 1–26, 35–50, 115–22, 247–54.
 12. To name a few important examples, see A. Taylor, ‘*Leges Scocie* and the lawcodes of David I, William the Lion and Alexander II’, *Scottish Historical Review*, 88 (2009), 207–88; A Taylor, ‘The assizes of David I, king of Scots, 1124–53’, *Scottish Historical Review*, 91 (2012), 197–238; A Taylor, ‘Crime without punishment: Medieval Scotland in comparative perspective’, in D. Bates (ed.), *Anglo-Norman Studies: Proceedings of the Battle Conference 2012*, 35 (Woodbridge, 2013), 287–304; A Taylor, ‘*Homo ligius* and unfreedom in medieval Scotland’, in M. Hammond (ed.), *New Perspectives on Medieval Scotland, 1093–1286* (Woodbridge, 2013), 85–116.
 13. This is explained in Taylor, ‘Assizes of David I’, 199–200.
 14. Taylor, ‘*Leges Scocie*’, 250–88.
 15. T. D. Fergus, *Quoniam Attachamenta* (Stair Society, vol. 44; Edinburgh, 1996).
 16. I should mention here that in May 2014 Alice Taylor very kindly let me read a draft of chapter 5 of *The Shape of the State* concerning the thirteenth-century law. I have not made reference to this draft when preparing this Foreword, nor have I made any conscious use of the arguments presented there, because it seems best to wait until Taylor’s work is in print before comparing it with that of MacQueen in detail. Nonetheless, it is worth emphasising that elements of the arguments presented here may have to be refined or qualified in the light of *The Shape of the State*. Note that in a recent article Dauvit Broun has made reference to a draft of Taylor’s book as a whole. He states that a ‘key feature’ of her work ‘is that, time and again, her innovative understanding of statehood hinges on an overlooked word or phrase, or on seeing sense in the untidy arrangement of a text or in an apparent contradiction’. While sociological accounts of statehood can, of course, be illuminating, Broun points out that, in Taylor’s analysis of what it might mean to speak of medieval Scottish ‘statehood’, ‘[t]he starting point is a textual puzzle, not an explanatory construct’. See D. Broun, ‘Statehood and lordship in “Scotland” before the mid-twelfth century’, *Innes Review*, 66 (2015), 1–71 at 8–11; the passages quoted are to be found at pp. 8 and 9. I am grateful to Hector MacQueen for drawing the significance of this article to my attention. Taylor

employs this approach to great effect – as indeed does Broun. It is worth noting that MacQueen also treated the rigorous exploration of textual puzzles generated by the brieves as the ‘starting point’ in his research, and it was on that basis that he engaged critically with the ‘explanatory construct’ of the ‘legal transplant’ that was developed by Alan Watson. See MacQueen, *Common Law and Feudal Society*, 5, 264–7. For Watson’s account of legal transplants, see A. Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, Athens, GA, and London, 1993). Watson’s own explanatory construct was derived from rigorous historical textual scholarship; see, e.g., Watson, *Legal Transplants*, 1–9, 21–30.

17. Taylor, ‘Assizes of David I’, 216–18.
18. Taylor, ‘Assizes of David I’. The statues themselves can be found in A. A. M. Duncan, *The Acts of Robert I, King of Scots, Regesta Regum Scottorum*, vol. 5 (Edinburgh, 1988), no. 139, and 414–15; see also *The Records of the Parliaments of Scotland to 1707*, ed. K. M. Brown et al. (St Andrews, 2007–15) (hereafter *RPS*) 1318/ 1–29, available at <<http://rps.ac.uk/>> (accessed 26 May 2015).
19. MacQueen, *Common Law and Feudal Society*, 106 (the rule is discussed in detail at pp. 105–22); see also Taylor, ‘Assizes of David I’, 228, and *RPS* 1318/27. The extent to which this rule simply confirmed existing common law rules in 1318 is controversial; see Carpenter, ‘Scottish royal government’, 143–5.
20. MacQueen, *Common Law and Feudal Society*, 157, summarising the more detailed argument outlined at pp. 113–14. Note that MacQueen’s account of the operation of the 1318 act is challenged in Carpenter, ‘Scottish royal government’, 144–5. More will be said about this below. Note that the rule that one could not be ejected from a free holding of which one claimed to be vested and saised as of fee without the king’s pleadable brieve or some similar brieve was not without qualification. MacQueen discusses in some detail the point that lords could exercise disciplinary jurisdiction over their tenants through a procedure known as ‘recognition’. They could do this without a brieve, and this could result in the temporary loss of the tenant’s lands. Disciplinary jurisdiction was available where the tenant failed to render services owed to the lord, and on the basis of the following particular causes of action: the tenant’s unlicensed alienation of his lands to a third party (possibly rendering the tenant unable to perform services due to the lord), purpresture or purprision (‘defined as encroachment by a tenant upon the demesne of his lord’) and showing the holding. ‘Showing the holding’ was ‘an action by which, in its developed form, a lord compelled his tenant to display the charters on which he held his lands . . . the aim of the process was not so much to challenge tenants’ titles as to enable a lord to take stock of his tenants and the services which they owed him . . . If the services had not been provided, the lord could recognosce, and the brieves rule was inapplicable to cases of this type.’ For this sort of disciplinary jurisdiction, which could be exercised regardless of the brieves

- rule, see MacQueen, *Common Law and Feudal Society*, 115–22; the passages quoted are at pp. 118, 120 and 121.
21. MacQueen, *Common Law and Feudal Society*, 140.
 22. For these points, see MacQueen, *Common Law and Feudal Society*, 146–53; the passage quoted is at p. 151; see also RPS 1318/15.
 23. MacQueen, *Common Law and Feudal Society*, 106–7, 152–3.
 24. H. L. MacQueen, ‘*Regiam Majestatem*, Scots Law and National Identity’, *Scottish Historical Review*, 74 (1995), 1–25 at 5.
 25. Taylor, ‘Assizes of David I’.
 26. Taylor, ‘*Leges Scocie*’; Taylor’s nuanced conclusion that ‘LS must be seen to contain legislative information primarily relating to the twelfth and early thirteenth centuries’ is at p. 243.
 27. This is discussed in Taylor, ‘Assizes of David I’, 197–201, 214–21, 226–8.
 28. See Taylor, ‘Assizes of David I’, 220–1.
 29. Taylor, ‘Assizes of David I’, 220.
 30. See Taylor, ‘Assizes of David I’, 221–3; Carpenter, ‘Scottish royal government’, 143–4. For MacQueen’s views concerning the origins, development and roles of the brief of right, see MacQueen, *Common Law and Feudal Society*, 188–214.
 31. Taylor, ‘Assizes of David I’, 226–31. The date of the Ayr Manuscript is given at pp. 201–2; a digitised copy of the manuscript itself is also available online at <http://stairsociety.org/resources/manuscript/the_ayr_manuscript> (accessed 26 May 2015). The act of 1318 to which she refers here can be found at RPS 1318/12.
 32. Taylor, ‘Assizes of David I’, 231–5.
 33. A. Harding, ‘*Regiam Majestatem* amongst medieval law books’, *Juridical Review*, NS 29 (1984), 97–111.
 34. Taylor, ‘Assizes of David I’, 235.
 35. See Carpenter, ‘Scottish royal government’, 117–18.
 36. Carpenter, ‘Scottish royal government’, 117–18, 154–5.
 37. Carpenter, ‘Scottish royal government’, 140.
 38. MacQueen, *Common Law and Feudal Society*, 167.
 39. In so doing Carpenter expressly engages in an existing debate among Scottish historians; as he notes in ‘Scottish royal government’ at p. 140, Lord Cooper in particular thought that ‘the common law procedures had very limited currency in the thirteenth century’ and that ‘most civil disputes were settled by agreement, arbitration, and litigation in ecclesiastical courts’. Carpenter cites, for example, T. M. Cooper, *Select Scottish Cases of the Thirteenth Century* (Edinburgh, 1944), pp. xxi–lxviii. Of course, Cooper’s view was subjected to criticism in *Common Law and Feudal Society*, as is explained in MacQueen’s Preface to this edition.
 40. See A. Grant, ‘Franchises north of the border’, in M. Prestwich (ed.), *Liberties and Identities in the Medieval British Isles* (Woodbridge, 2008), 155–99. For the work of the sheriff, see W. Croft Dickinson, *Sheriff Court Book of Fife* (Scottish History Society, Third Series, vol. 12; Edinburgh, 1928), particularly at pp. xi–cv and 309–88. On the justiciar, see G. W. S. Barrow, *The*

- Kingdom of the Scots: Government, Church and Society from the Eleventh to the Fourteenth Century* (2nd edn., Edinburgh, 2003), 68–111; see also MacQueen, *Common Law and Feudal Society*, 58–65, and H. L. MacQueen, ‘Tame magnates? The justiciars of later medieval Scotland’, in S. Boardman and J. Goodare (eds), *Kings, Lords and Men in Scotland and Britain, 1300–1625: Essays in Honour of Jenny Wormald* (Edinburgh, 2014), 93–120.
41. Carpenter, ‘Scottish royal government’, 118–19, 129. Carpenter acknowledges (at p. 119) that the evidence for this pattern is drawn from the late fourteenth and early fifteenth centuries, but follows Grant in suggesting (at n. 8) that ‘most of the earldoms and provincial lordships dated back much earlier’.
 42. Carpenter, ‘Scottish royal government’, 118–38.
 43. Carpenter, ‘Scottish royal government’, 132, citing Grant, ‘Franchises’, 167, 172.
 44. Carpenter, ‘Scottish royal government’, 141–3.
 45. See, e.g., MacQueen, *Common Law and Feudal Society*, 33–54.
 46. MacQueen, *Common Law and Feudal Society*, 42.
 47. See MacQueen, *Common Law and Feudal Society*, 42–7; note also the provisions of *LS* c.7, in Taylor, ‘*Leges Scocie*’, 282–3, and G. W. S. Barrow (ed.), *The Charters of King David I: The Written Acts of David I King of Scots, 1124–53 and of his Son Henry Earl of Northumberland, 1139–52* (Woodbridge, 1999), 147 (no. 190). Grant, ‘Franchises’, 191, suggests that the final clause of *LS* c.7 was a ‘dead letter’, but the only contemporary evidence he cites to show this is the precise wording of the ‘restatement’ of this rule found in *Regiam Majestatem*, and the textual authority of the printed version of *Regiam* is questionable.
 48. Again, see *LS* c.7 and Barrow, *Charters of David I*, 147 (no. 190). See also (possibly) the role of the sergeands in *LS* c.1, in Taylor, ‘*Leges Scocie*’, 280–1. For the *judices*, see Barrow, *Kingdom*, 57–67, and also now D. Broun, ‘The king’s “brithem” (Gaelic for “judge”) and the recording of dispute-resolutions’, *Feature of the Month*: No. 11, April 2010, available at <<http://paradox.poms.ac.uk/feature/april10.html>> (accessed 27 May 2015). For the sergeands, see, e.g., W. Croft Dickinson, ‘Surdit de sergeant’, *Scottish Historical Review*, 39 (1960), 170–5; H. L. MacQueen, ‘The laws of Galloway: A preliminary survey’, in R. D. Oram and G. P. Stell (eds), *Galloway: Land and Lordship* (Edinburgh, 1991), 131–43.
 49. I am grateful to Greg Gordon of Aberdeen University for discussing this point with me.
 50. See Taylor, ‘*Leges Scocie*’, 285.
 51. Carpenter, ‘Scottish royal government’, 142.
 52. See Taylor, ‘Assizes of David I’, 218, for the text of *SA* c.7; see also MacQueen, *Common Law and Feudal Society*, 140, and more generally the argument advanced at pp. 136–44.
 53. MacQueen, *Common Law and Feudal Society*, 193–4.
 54. MacQueen, *Common Law and Feudal Society*, 204–7 (discussing evidence drawn primarily from periods later than the thirteenth century).

55. Carpenter, 'Scottish royal government', 142.
56. MacQueen, *Common Law and Feudal Society*, 193.
57. MacQueen, *Common Law and Feudal Society*, 194–6.
58. T. M. Cooper (ed.), *The Register of Brieves as Contained in the Ayr MS, the Bute MS and Quoniam Attachiamenta* (Stair Society, vol. 10; Edinburgh, 1946), 40; A. A. M. Duncan (ed.), *Scottish Formularies* (Stair Society, vol. 58; Edinburgh, 2011), 17 (item A19).
59. MacQueen, *Common Law and Feudal Society*, 112–13. For the use of brieves similar to royal brieves in the regality courts, see also W. Croft Dickinson, *The Court Book of the Barony of Carnwath 1523–1542* (Scottish History Society, Third Series, vol. 29; Edinburgh, 1937), pp. xl–xlii; J. M. Webster and A. A. M. Duncan (eds), *Regality of Dunfermline Court Book 1531–1538* (Alva, 1953), 8–9, 30–1. I am grateful to Mark Godfrey for referring me to these works.
60. The word 'chancery' does not seem to have been used in thirteenth-century Scottish sources; brieves were issued by the king's 'chapel'. See Carpenter, 'Scottish royal government', 121, citing A. L. Murray, 'The Scottish Chancery in the fourteenth and fifteenth centuries', in K. Fianu and D. J. Guth (eds), *Écrit et pouvoir dans les chancelleries médiévales: Espace français, espace anglais* (Louvain-la-Neuve, 1997), 143–9.
61. Taylor, 'Crime without punishment', 293–4.
62. Taylor, 'Crime without punishment', 300.
63. *RPS* 1318/27.
64. Obviously this argument owes a great deal to that advanced in Taylor, 'Crime without punishment'.
65. Taylor, 'Crime without punishment', 294.
66. By the fifteenth century such lords were frequently ordered to administer essentially the legal standards that were observed in the rest of the kingdom within their own regalities. Failing this, they could theoretically face direct interference in their jurisdiction by the sheriff, who was empowered to see that right was done in the case in question. See, e.g., *RPS* 1372/3/6, 1404/9, 1425/3/25, 1434/5; A1438/12/1, 1450/1/9/–10.
67. Carpenter, 'Scottish royal government', 143.
68. MacQueen, *Common Law and Feudal Society*, 105–6.
69. Carpenter, 'Scottish royal government', 143–4.
70. An obvious example in the modern law can be found in the rules of legitim, which entitle a child to inherit a portion of moveable goods from a deceased parent. Claiming legitim bars a child from inheriting under the parent's will. The child is thus left with a choice. Obviously in this case the fact that the law does not compel a child to claim legitim does not imply any lack of commitment to the enforcement of the right if it is invoked. For legitim, see, e.g., Lord Eassie and H. L. MacQueen (eds), *The Law of Scotland by The Late W. M. Gloag, KC, LL.D. and The Late R. Candlish Henderson, QC, LL.D.* (13th edn, Edinburgh, 2012), paras 38.08–38.15.
71. Carpenter, 'Scottish royal government', 144.

72. MacQueen, *Common Law and Feudal Society*, 105.
73. MacQueen, *Common Law and Feudal Society*, 105–9.
74. Carpenter, ‘Scottish royal government’, 144–5.
75. MacQueen, *Common Law and Feudal Society*, 156; see also Duncan, *Scottish Formularies*, 18–19 (item A21).
76. MacQueen, *Common Law and Feudal Society*, 157.
77. Carpenter, ‘Scottish royal government’, 145–8.
78. Carpenter, ‘Scottish royal government’, 148.
79. Taylor, ‘Assizes of David I’, 218.
80. See the PoMS website at <<http://www.poms.ac.uk/>> (accessed 28 May 2015).
81. Taylor, ‘Assizes of David I’, 219.
82. Carpenter, ‘Scottish royal government’, 148.
83. Carpenter, ‘Scottish royal government’, 148–50.
84. Taylor, ‘Assizes of David I’, 230.
85. See Simpson, ‘Procedures for dealing with robbery’. I am very grateful to Alice Taylor for sharing with me a draft of her critical edition of *SA* c.5–6. I am not certain that she agrees with the interpretation I place upon those acts as outlined here, and of course any errors in this regard remain entirely my own.
86. MacQueen, *Common Law and Feudal Society*, 220 (I am grateful to Hector MacQueen for initially drawing this point to my attention). The point is discussed at more length in Simpson, ‘Procedures for dealing with robbery’.
87. See PoMS, H1/8/20, available at <<http://db.poms.ac.uk/record/source/979/#>> (accessed 28 May 2015).
88. Carpenter, ‘Scottish royal government’, 152–3.
89. Carpenter, ‘Scottish royal government’, 152.
90. The case is discussed in MacQueen, *Common Law and Feudal Society*, 239–42; the contemporary note of the decision itself can be found in A. L. Murray and G. Dolezalek (eds), *Sinclair’s Practicks*, available at <<http://home.uni-leipzig.de/jurorom/scotland/dat/sinclair.htm>> (accessed 28 May 2015), case-note 308.
91. MacQueen, *Common Law and Feudal Society*, 161–2, 183.
92. See MacQueen, *Common Law and Feudal Society*, 153–61, 177–83, 200–9.
93. MacQueen, *Common Law and Feudal Society*, 215–42.
94. Godfrey, *Civil Justice*.
95. That work is largely contained in chapter 8 of MacQueen, *Common Law and Feudal Society* (at pp. 215–42).
96. Godfrey, *Civil Justice*, 11. Of course the ‘sessions’ later became the Session, the predecessor of the modern Court of Session (of which more will be said below).
97. Godfrey, *Civil Justice*, 21.
98. MacQueen, *Common Law and Feudal Society*, 224.
99. Dolezalek and Murray (eds), *Sinclair’s Practicks*, case-note 389, *Laird of Lochinvar v. Earl of Cassillis* (1546). MacQueen’s work on fifteenth-century spuilzie remains the most authoritative, in part because it is rooted in the important context of disputes over rights in land. See MacQueen,

Common Law and Feudal Society, 224–8, which is now admirably complemented by Godfrey’s work on spuilzie in the late fifteenth and early sixteenth centuries; see Godfrey, *Civil Justice*, 239–47. Note Godfrey’s point that violence did not always have to be libelled in an action for spuilzie. For a masterly discussion of the later history of spuilzie, with a view to sketching the structure of the modern action, see D. L. Carey Miller, ‘Spuilzie: Dead, dormant or manna from heaven?: Issues concerning protection of possessory interests in Scots law’, in M. de Waal and H. Mostert (eds), *Essays in Honour of C. G. van der Merwe* (Cape Town, 2011), 129–50.

100. *RPS* 1458/3/3.
101. MacQueen, *Common Law and Feudal Society*, 224–5.
102. MacQueen, *Common Law and Feudal Society*, 227.
103. MacQueen, *Common Law and Feudal Society*, 228–8; the passage quoted is at p. 228.
104. MacQueen, *Common Law and Feudal Society*, 234; see *RPS* 1450/1/30.
105. On the link between the King’s Council and its Sessions, see Godfrey, *Civil Justice*, 11–12, 40–93.
106. For the most authoritative modern treatment of the foundation of the College of Justice, see Godfrey, *Civil Justice*, 94–160.
107. H. L. MacQueen, ‘Jurisdiction in heritage and the Lords of Council and Session after 1532’, in D. Sellar (ed.), *Stair Society Miscellany Two* (Stair Society, vol. 35; Edinburgh, 1984), 61–85 at 84–5.
108. MacQueen, ‘Jurisdiction in heritage’, 82.
109. MacQueen, ‘Jurisdiction in heritage’, 85.
110. MacQueen, *Common Law and Feudal Society*, 239–42.
111. MacQueen, *Common Law and Feudal Society*, 240–1, 257–9.
112. See Godfrey, *Civil Justice*, particularly at 150, 155–6, 315–28, 450.
113. See A. M. Godfrey, ‘Jurisdiction in heritage and the foundation of the College of Justice in 1532’, in H. L. MacQueen (ed.), *Stair Society Miscellany Four* (Stair Society, vol. 49; Edinburgh, 2002), 9–36. Note that Godfrey demonstrates that *Cunningham v. Glengarnock* (1535), cited in MacQueen, *Common Law and Feudal Society*, 241 at n. 137, does not show – as MacQueen thought – that the Lords were prepared to hold that they ‘could not reduce “old” infeftments’ as late as 1535. See Godfrey, ‘Jurisdiction in heritage’, 21–3.
114. Godfrey, ‘Jurisdiction in heritage’; Godfrey, *Civil Justice*, 268–354, particularly at 310–12.
115. Godfrey, *Civil Justice*, 310.
116. Godfrey, *Civil Justice*, 310.
117. Godfrey, *Civil Justice*, 338–40.
118. Godfrey, *Civil Justice*, 452.
119. See MacQueen, ‘Jurisdiction in heritage’, 61–2, citing R. K. Hannay, *The College of Justice* (Edinburgh and Glasgow, 1933), 37, and A. A. M. Duncan, ‘The Central Courts before 1532’, in *An Introduction to Scottish Legal History* (Stair Society, vol. 20;

- Edinburgh, 1958), 321–40 at 336. Note that Hannay's work was reprinted by the Stair Society in *The College of Justice: Essays by R. K. Hannay. Introduction by Hector L. MacQueen* (Stair Society, Supplementary Series, vol. 1; Edinburgh, 1990).
120. MacQueen, *Common Law and Feudal Society*, 242; see also MacQueen, 'Jurisdiction in heritage', 61–2.
 121. Godfrey, *Civil Justice*, 150.
 122. J. W. Cairns, 'Revisiting the foundation of the College of Justice', in H. L. MacQueen (ed.), *Stair Society Miscellany Five* (Stair Society, vol. 52; Edinburgh, 2006), 27–50.
 123. Godfrey, *Civil Justice*, 94–160.
 124. A. M. Godfrey, 'Royal councils, law courts and governance: The role of litigation in early modern Scotland', in N. Jansen and P. Oestmann (eds), *Rechtsgeschichte Heute. Religion und Politik in der Geschichte des Rechts Schlaglichter einer Ringvorlesung* (Tübingen, 2014), 77–94. I am grateful to Mark Godfrey for this last reference.
 125. Harding, 'Review of *Common Law and Feudal Society*', 115.
 126. See, to name two examples, H. L. MacQueen, 'Some notes on wrang and unlaw', in H. L. MacQueen (ed.), *Stair Society Miscellany Five* (Stair Society, vol. 52; Edinburgh, 2006), 13–26; H. L. MacQueen, 'Legal afterword', in Duncan, *Scottish Formularies*, 361–76.
 127. See my article 'Legislation and authority in early modern Scotland', in A. M. Godfrey (ed.), *Law and Authority in British Legal History, 1200–1900* (Cambridge, forthcoming).
 128. For highly significant work being carried out concerning jurisdictional shifts in Scotland during the mid-sixteenth century, see T. M. Green, *The Consistorial Decisions of the Commissaries of Edinburgh* (Stair Society, vol. 61; Edinburgh, 2014).